

No. \_\_\_\_\_

---

In the  
**Supreme Court of the United States**

---

RADLAX GATEWAY HOTEL, LLC  
and RADLAX GATEWAY DECK, LLC,  
*Petitioners,*

v.

AMALGAMATED BANK,  
*Respondent.*

---

*On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Seventh Circuit*

---

**PETITION FOR A WRIT OF CERTIORARI**

---

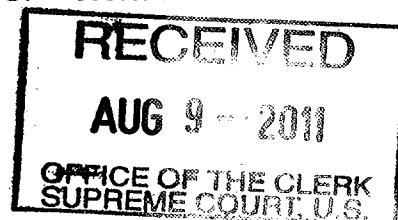
DAVID M. NEFF  
*Counsel of Record*  
BRIAN A. AUDETTE  
ERIC E. WALKER  
PERKINS COIE LLP  
131 S. Dearborn Street  
Suite 1700  
Chicago, IL 60603-5559  
(312) 324-8400  
DNeff@perkinscoie.com

August 5, 2011

*Counsel for Petitioners*

---

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001



(i)

### QUESTION PRESENTED

Section 1129(b)(2)(A) of the Bankruptcy Code sets forth three alternative standards for determining if a chapter 11 plan is “fair and equitable” with respect to an objecting class of secured creditors. Petitioners, the Debtors, proposed a chapter 11 plan involving the sale of assets free of liens that satisfies one of these standards by providing their secured lender with the “indubitable equivalent” of its claim pursuant to Section 1129(b)(2)(A)(iii). In an appeal certified directly from the bankruptcy court, the Seventh Circuit held that the Debtors could only satisfy the statute by allowing their secured creditor to bid its claim in lieu of cash (i.e., credit bid) at the sale pursuant to Section 1129(b)(2)(A)(ii). This holding directly conflicts with the Third Circuit’s decision in *In re Philadelphia Newspapers*, 599 F.3d 298 (3d Cir. 2010), and the Fifth Circuit’s decision in *Scotia Pacific Co., LLC v. Official Unsecured Creditors’ Comm. (In re Pacific Lumber Co.)*, 584 F.3d 229 (5th Cir. 2009). The question presented is:

Whether a debtor may pursue a chapter 11 plan that proposes to sell assets free of liens without allowing the secured creditor to credit bid, but instead providing it with the indubitable equivalent of its claim under Section 1129(b)(2)(A)(iii) of the Bankruptcy Code.

(ii)

**RULE 29.6 STATEMENT**

Petitioners RadLAX Gateway Hotel, LLC and RadLAX Gateway Deck, LLC (the "Debtors") are each owned 99% by RadLAX Gateway Holdings, LLC and 1% by RadLAX Gateway Project Management, LLC.

TABLE OF CONTENTS

Question Presented .....	i
Rule 29.6 Statement .....	ii
Table of Authorities .....	vi
Petition for a Writ of Certiorari .....	1
Opinions Below .....	1
Jurisdiction .....	1
Statutory Provisions Involved .....	1
Statement of the Case .....	3
A. Factual Background .....	4
B. The Bankruptcy Court Opinion .....	6
C. The Seventh Circuit Opinion .....	6
Reasons for Granting Certiorari .....	7
A. The Seventh Circuit's Decision Creates an Untenable Conflict with the Third and Fifth Circuits .....	7
1. The Third Circuit's Decision in <i>Philadelphia Newspapers</i> .....	8
2. The Fifth Circuit's Decision in <i>Pacific             Lumber</i> .....	12
B. This Case Presents an Ideal Vehicle to Resolve the Circuit Split .....	13

C. The Question Presented Regarding Secured Creditor Protections is Central to Nearly Every Chapter 11 Bankruptcy Involving the Sale of Collateral ..... 15

D. The Seventh Circuit’s Decision is Wrongly Decided..... 17

Conclusion..... 19

**APPENDIX**

United States Court of Appeals for the Seventh Circuit, Opinion (June 28, 2011) ..... 1a

Excerpt from Transcript of Oral Argument before the Seventh Circuit (April 7, 2011) ..... 27a

United States Bankruptcy Court for the Northern District of Illinois, Certification for Direct Appeal to Court of Appeals for the Seventh Circuit (In re: RADLAX Gateway Hotel, et al.) (November 4, 2010) ..... 30a

United States Bankruptcy Court for the Northern District of Illinois, Certification for Direct Appeal to Court of Appeals for the Seventh Circuit (In re: River Road Hotel Partners, et al.) (November 4, 2010)..... 33a

United States Bankruptcy Court for the Northern District of Illinois, Order Denying Debtors’ Bid Procedures Motion (In re: RADLAX Gateway Hotel, et al.) (October 5, 2010)..... 38a

(v)

United States Bankruptcy Court for the  
Northern District of Illinois, Order Denying  
Debtors' Bid Procedures Motion (In re: River  
Road Hotel Partners, et al.) (October 5, 2010) .....40a

## TABLE OF AUTHORITIES

## Cases

<i>Conn. Nat'l Bank v. Germain</i> , 503 U.S. 249 (1992) .....	17
<i>In re Murel Holding Corp.</i> , 75 F.2d 941 (2d Cir. 1935) .....	9
<i>In re Phila. Newspapers</i> , 599 F.3d 298 (3d Cir. 2010) .....	<i>passim</i>
<i>Scotia Pac. Co., LLC v. Official Unsecured Creditors' Comm.</i> , 584 F.3d 229 (5th Cir. 2009) .....	<i>passim</i>
<i>Wade v. Bradford</i> , 39 F.3d 1126 (10th Cir. 1994) .....	8

## Constitution and Statutes

11 U.S.C. § 102(5) .....	9
11 U.S.C. § 363 .....	9
(k) .....	2, 9, 16
11 U.S.C. § 1123 .....	9
(a) .....	9
(a)(5) .....	16
(a)(5)(D) .....	16
(b) .....	9
11 U.S.C. § 1129 .....	3
(a)(8) .....	3
(b) .....	3
(b)(1) .....	1, 17
(b)(2) .....	13
(b)(2)(A) .....	<i>passim</i>
(b)(2)(A)(i) .....	3, 6, 8, 10, 18

(b)(2)(A)(ii) .....	<i>passim</i>
(b)(2)(A)(iii) .....	<i>passim</i>
28 U.S.C. § 157(a) .....	7
28 U.S.C. § 1254(1) .....	1
28 U.S.C. § 1334(a) .....	7
<b>Rules</b>	
N.D. Ill. I.O.P. 15(a) .....	7
<b>Other Authorities</b>	
Jason S. Brookner, <i>Pacific Lumber and Philadelphia Newspapers: The Eradication of a Carefully Constructed Statutory Regime Through Misinterpretation of Section 1129(b)(2)(A) of the Bankruptcy Code</i> , 85 AM. BANKR. L.J. 127 (Spring 2011).....	13
Vincent S. J. Buccola & Ashley C. Keller, <i>Credit Bidding and the Design of Bankruptcy Auctions</i> , 18 GEO. MASON L. REV. 99 (2010).....	15
Hollace T. Cohen, <i>Is the Philadelphia Newspapers, LLC Decision the Death Knell to Credit Bidding in a Sale Under a Plan?</i> , 20 J. BANKR. L. & PRAC. 1 Art. 1 (Jan. 2011) .....	13
Kenneth Noble, <i>Seventh Circuit Upholds Right of Secured Creditors to Credit Bid Under a Chapter 11 Plan</i> , July 26, 2011, available at 2011 WLNR 14776589 .....	14
Brian Trust & Thomas S. Kiriakos, <i>Seventh Circuit Upholds Secured Lenders' Right to Credit Bid in Asset Sales Under a Chapter 11 Plan</i> , July 8, 2011, available at 2011 WLNR 13580283 .....	14



**PETITION FOR A WRIT OF CERTIORARI**

---

**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Seventh Circuit in *In re River Road Hotel Partners, LLC*, Nos. 10-3597, 10-3598, is reported at --- F.3d ---, 2011 WL 2547615 (7th Cir. 2011), and is set forth in the Appendix at 1a. The orders of the United States Bankruptcy Court for the Northern District of Illinois in *In re River Road Hotel Partners, LLC*, Case No. 09-B-30029, and *In re Radlax Gateway Hotel, LLC*, Case No. 09-B-30047, are not reported and are set forth in the Appendix at 38a and 40a.

**JURISDICTION**

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on June 28, 2011. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

**STATUTORY PROVISIONS INVOLVED**

11 U.S.C. § 1129(b)(1):

Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or

interests that is impaired under, and has not accepted, the plan.

11 U.S.C. § 1129(b)(2)(A):

For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides —

(i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

11 U.S.C. § 363(k):

At a sale under subsection (b) of this section of property that is subject to a lien that secures an

allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

### STATEMENT OF THE CASE

This case involves perhaps the most hotly-debated issue of bankruptcy law today – whether the Bankruptcy Code provides a secured creditor with the absolute right to credit bid at the sale of its collateral free of liens through a chapter 11 plan. Section 1129 of the Bankruptcy Code enumerates the requirements a debtor must meet to confirm a chapter 11 plan, including the requirement that each class of impaired creditors accepts the plan. See 11 U.S.C. § 1129(a)(8). Section 1129(b), however, allows a debtor to confirm a plan over the objection of a class of creditors—a so-called “cramdown” plan—if, among other things, the plan is “fair and equitable” to the objecting class. Section 1129(b)(2)(A) lists three ways in which a plan may be “fair and equitable” to an objecting class of secured creditors: (i) if the secured creditor retains its lien and is paid deferred cash payments totaling at least the present value of its collateral; (ii) if the secured creditor is allowed to credit bid at the sale of its collateral free of its lien; or (iii) if the secured creditor receives the indubitable equivalent of its claim.

The Seventh Circuit in this case held that any chapter 11 plan involving the sale of assets free of liens may only be made pursuant to Section 1129(b)(2)(A)(ii) of the Bankruptcy Code, which requires a debtor to allow the secured creditor to

credit bid. This decision is in direct conflict with the Third Circuit's decision in *In re Philadelphia Newspapers*, 599 F.3d 298 (3d Cir. 2010), a case in which, under nearly identical facts, the court held that a debtor may instead pursue such a sale under a chapter 11 plan by providing the secured creditor the indubitable equivalent of its claim pursuant to Section 1129(b)(2)(A)(iii). The Seventh Circuit's decision is also in conflict with the Fifth Circuit's decision in *Scotia Pacific Co., LLC v. Official Unsecured Creditors' Comm. (In re Pacific Lumber Co.)*, 584 F.3d 229 (5th Cir. 2009), which held that a sale of assets free of liens through a chapter 11 plan may occur under Section 1129(b)(2)(A)(iii). The petitioners, the Debtors, respectfully submit that the Seventh Circuit, unlike the Third and Fifth Circuits, fundamentally misconstrued the plain language of Section 1129(b)(2)(A), which permits the bankruptcy court to confirm a chapter 11 plan as "fair and equitable" with respect to an objecting class of secured creditors if any one of its three subparts is satisfied.

#### A. Factual Background

The Debtors own the Radisson Hotel at Los Angeles International Airport and an adjacent, partially-completed parking structure. In November 2007, the Debtors obtained a \$142 million construction loan from the Longview Ultra Construction Loan Investment Fund, for which Amalgamated Bank serves as trustee and administrative agent (the "Lender"), to acquire the property, renovate the hotel, and build the new parking structure. Due to the severe economic

downturn beginning in 2008 and the Lender's refusal to advance funding to complete the parking structure, the Debtors were forced to file voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Illinois on August 17, 2009.

Early in their bankruptcy cases, the Debtors embarked on a marketing campaign to sell the hotel and parking structure pursuant to a chapter 11 plan. Through these efforts, the Debtors procured a bidder that offered to purchase substantially all of the Debtors' assets for a cash purchase price of \$47.5 million, which was later increased to \$55 million.

On June 4, 2010, the Debtors filed their joint chapter 11 plan, which proposed the auction sale of substantially all of their assets with the proceeds distributed to various creditor constituencies consistent with the Bankruptcy Code's priority scheme. In support of their plan, the Debtors filed a motion to approve certain procedures for the asset sale, which specified that the sale would be conducted pursuant to Section 1129(b)(2)(A)(iii) of the Bankruptcy Code, and no secured creditor would be permitted to credit bid at the sale. The Lender objected to the proposed bid procedures on the grounds that a sale of its collateral free of liens could only occur under Section 1129(b)(2)(A)(ii), which required the Debtors to allow the Lender to credit bid.

## B. The Bankruptcy Court Opinion

Bankruptcy Judge Bruce Black denied the Debtors' bid procedures motion. He acknowledged that the majority in *Philadelphia Newspapers* endorsed the Debtors' interpretation of Section 1129(b)(2)(A)(iii), but he found the dissent in that case more persuasive and held that the Debtors could not sell their assets free of liens under a plan pursuant to Section 1129(b)(2)(A)(iii). App. at 42a. Recognizing the vital importance of this issue to a broad range of bankruptcy cases, Judge Black certified the appeal directly to the Seventh Circuit. App. at 35a-36a.

## C. The Seventh Circuit Opinion

The Seventh Circuit affirmed the bankruptcy court's decision, recognizing its clear break from the Third Circuit's decision in *Philadelphia Newspapers* and the Fifth Circuit's decision in *Pacific Lumber*. App. at 14a. The court analyzed the plain language of Section 1129(b)(2)(A) and concluded that subsection (iii) does not indicate whether it applies to every type of chapter 11 plan or only those that fall outside of subsections (i) and (ii). *Id.* at 17a. In doing so, the court rejected the majority's conclusion in *Philadelphia Newspapers* that Congress' use of the disjunctive "or" to connect the three subsections in Section 1129(b)(2)(A) meant that a debtor could proceed under any of the three subsections. *Id.* at 17a n.5.

Finding section 1129(b)(2)(A)(iii) ambiguous, the court turned to canons of statutory interpretation and reasoned that an interpretation of subsection

(iii) that permits confirmation of a chapter 11 plan involving the sale of assets free of liens without credit bidding would render subsections (i) and (ii) superfluous. *Id.* at 22a-23a. Citing extensively to Circuit Judge Thomas Ambro's dissent in *Philadelphia Newspapers*, the court agreed that secured creditor protections found in other parts of the Bankruptcy Code provide further support for interpreting subsection (iii) as not permitting asset sales free of liens without credit bidding. *Id.* at 24a-25a.

Jurisdiction in the court of first instance, the United States Bankruptcy Court for the Northern District of Illinois, is founded upon 28 U.S.C. §§ 157(a), 1334(a) and Internal Operating Procedure 15(a) for the United States District Court for the Northern District of Illinois.

#### REASONS FOR GRANTING CERTIORARI

The Court should grant certiorari because the Seventh Circuit's decision directly conflicts with the Third Circuit's decision in *Philadelphia Newspapers* and the Fifth Circuit's decision in *Pacific Lumber*, the question presented is of pressing national importance in bankruptcy law, and this case presents an ideal vehicle for deciding that question.

##### A. The Seventh Circuit's Decision Creates an Untenable Conflict with the Third and Fifth Circuits

As the Seventh Circuit recognized, the decision below squarely conflicts with the Third Circuit's

decision in *Philadelphia Newspapers* and the Fifth Circuit's decision in *Pacific Lumber*. The Third, Fifth and Tenth Circuits have all recognized that Congress' use of the word "or" to separate the three subsections of Section 1129(b)(2)(A) is unequivocal evidence that a debtor may confirm a cramdown plan through any one of these alternatives. *Philadelphia Newspapers*, 599 F.3d at 305 ("The use of the word 'or' in this provision operates to provide alternatives – a debtor may proceed under subsections (i), (ii), or (iii)"); *Pacific Lumber*, 584 F.3d at 245 ("This court has subscribed to the obvious proposition that because the three subsections of § 1129(b)(2)(A) are joined by the disjunctive 'or,' they are alternatives"); *Wade v. Bradford*, 39 F.3d 1126, 1130 (10th Cir. 1994) ("These requirements are written in the disjunctive, requiring a plan to satisfy only one before it could be confirmed over creditor's objection."). Furthermore, the Third and Fifth Circuits have each expressly approved a sale of assets free of liens through a chapter 11 plan under subsection (iii) without credit bidding, rulings directly contradicted by the Seventh Circuit's decision in this case.

**1. The Third Circuit's  
Decision in *Philadelphia  
Newspapers***

In *Philadelphia Newspapers*, the Third Circuit approved bid procedures for an auction sale of assets free of liens through a chapter 11 plan without credit bidding. The bid procedures in *Philadelphia Newspapers* were nearly identical to the procedures



the Debtors proposed in this case, and contained the same operative language:

The Plan Sale is being conducted under sections 1123(a) and (b) and 1129(b)(2)(A)(iii) of the Bankruptcy Code, and not section 363 of the Bankruptcy Code. As such, no holder of a lien on any assets of the Debtors shall be permitted to credit bid pursuant to section 363(k) of the Bankruptcy Code.

*Philadelphia Newspapers*, 599 F.3d at 302.

Unlike the Seventh Circuit in this case, the majority in *Philadelphia Newspapers* held that the structure and language of Section 1129(b)(2)(A) is unambiguous and thus the statute should be applied according to its plain meaning. First, the majority reasoned that Congress' use of the word "or" to separate the three subsections of 1129(b)(2)(A) was "not without purpose" and therefore a debtor may pursue confirmation of a cramdown plan through any one of the three alternatives. *Id.* at 309. In further support of this conclusion, the majority cited to Section 102(5) of the Bankruptcy Code, which instructs that "'or' is not exclusive." *Id.* at 305. The Seventh Circuit rejected the Third Circuit's plain text analysis, suggesting instead that there are several examples in the Bankruptcy Code where the word "or" is exclusive. App. at 17a n.5.

Second, the majority in *Philadelphia Newspapers* held that the phrase "indubitable equivalent" in subsection (iii) was not ambiguous, tracing its origins to Judge Learned Hand's opinion in *In re Murel Holding Corp.*, 75 F.2d 941, 942 (2d Cir. 1935). *Philadelphia Newspapers*, 599 F.3d at 310.

the Debtors proposed in this case, and contained the same operative language:

The Plan Sale is being conducted under sections 1123(a) and (b) and 1129(b)(2)(A)(iii) of the Bankruptcy Code, and not section 363 of the Bankruptcy Code. As such, no holder of a lien on any assets of the Debtors shall be permitted to credit bid pursuant to section 363(k) of the Bankruptcy Code.

*Philadelphia Newspapers*, 599 F.3d at 302.

Unlike the Seventh Circuit in this case, the majority in *Philadelphia Newspapers* held that the structure and language of Section 1129(b)(2)(A) is unambiguous and thus the statute should be applied according to its plain meaning. First, the majority reasoned that Congress' use of the word "or" to separate the three subsections of 1129(b)(2)(A) was "not without purpose" and therefore a debtor may pursue confirmation of a cramdown plan through any one of the three alternatives. *Id.* at 309. In further support of this conclusion, the majority cited to Section 102(5) of the Bankruptcy Code, which instructs that "'or' is not exclusive." *Id.* at 305. The Seventh Circuit rejected the Third Circuit's plain text analysis, suggesting instead that there are several examples in the Bankruptcy Code where the word "or" is exclusive. App. at 17a n.5.

Second, the majority in *Philadelphia Newspapers* held that the phrase "indubitable equivalent" in subsection (iii) was not ambiguous, tracing its origins to Judge Learned Hand's opinion in *In re Murel Holding Corp.*, 75 F.2d 941, 942 (2d Cir. 1935). *Philadelphia Newspapers*, 599 F.3d at 310.