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

Counsel for Petitioners

August 5, 2011

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

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.

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

APPENDIX

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Rules

Other Authorities

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.

Referencing the dictionary definitions of "indubitable" and "equivalent," the majority defined the phrase indubitable equivalent in subsection (iii) as "the unquestionable value of a lender's secured interest in the collateral." *Id.* The majority explained that "a term in a statute is not ambiguous merely because it is broad in scope." *Id.* Accordingly, the majority concluded that subsection (iii) does not usurp subsections (i) and (ii), but instead all three subsections work together to protect the fair return on a secured creditor's claim. *Id.* at 310-11.

In reaching its decision, the Third Circuit was careful to highlight the critical distinction between approving the debtors' bid procedures and confirming the chapter 11 plan. *Id.* at 312-13. Just as in this case, only the threshold issue of bid procedures for the proposed sale was before the court. As the majority correctly recognized, "it is the plan of reorganization, and not the auction itself, that must generate the 'indubitable equivalent.'" *Id.* at 312. Whether the debtors would ultimately be able to confirm their plan by satisfying the indubitable equivalent standard set forth in subsection (iii) was an issue to be decided by the bankruptcy court after the sale was completed. *Id.* at 313. Accordingly, the question presented in *Philadelphia Newspapers*, as in this case, is whether a chapter 11 plan involving the sale of collateral free of liens without credit bidding may ever be confirmed under subsection (iii) as a matter of law. The majority in *Philadelphia Newspapers* held that it can.

In a lengthy and sharply-worded dissent, Circuit Judge Thomas Ambro assailed the majority's decision, claiming that it cuts against "the first 30 years of Bankruptcy Code jurisprudence." *Id.* at 319. Judge Ambro rejected the majority's conclusion that the plain language of Section 1129(b)(2)(A) is unambiguous and allows a debtor to choose to satisfy any of the three subsections when confirming a cramdown plan. Judge Ambro reasoned that "Congress did not list the three alternatives as routes to cramdown confirmation that were universally applicable to any plan, but instead as distinct routes that apply specific requirements." *Id.* at 325.

Judge Ambro then embarked on an extensive analysis of alternative canons of statutory construction, legislative history, and secured creditor protections found in other sections of the Bankruptcy Code to reach his conclusion that all chapter 11 plans involving the sale of assets free of liens over the objection of secured creditors may only be confirmed through subsection (ii), which permits credit bidding. In closing, Judge Ambro warned that the majority's decision would "force future secured creditors to adjust their pricing accordingly, potentially raising interest rates or reducing credit availability to account for the possibility of a sale without credit bidding." *Id.* at 337.

Circuit Judge D. Brooks Smith concurred entirely in Judge Fisher's majority opinion except for one section discussing legislative history, stating that "recourse to legislative history . . . [is] unnecessary as the statutory language of § 1129(b)(2)(A) is unambiguous." *Id.* at 318. Judge Smith rejected the

"near-gymnastics" required by the dissent to reach its conclusion, agreeing with Judge Fisher that statutory text compels the conclusion that Section 1129(b)(2)(A) does not require credit bidding in all plan sales free of liens. *Id.* at 319. The spirited debate among the panel in *Philadelphia Newspapers* underscores the importance of this decision and its impact across a wide range of bankruptcy cases.

2. The Fifth Circuit's Decision in *Pacific Lumber*

In *Pacific Lumber*, the Fifth Circuit held that a sale of assets through a chapter 11 plan without credit bidding can be confirmed under Section 1129(b)(2)(A)(iii) by providing the objecting secured creditor with a present cash payment equal to the present value of its collateral (i.e., the indubitable equivalent of its secured claim). This decision is in accord with the Third Circuit's decision in *Philadelphia Newspapers*, but directly at odds with the Seventh Circuit's decision in this case. Like the Third Circuit, the Fifth Circuit found that the phrase "indubitable equivalent" was not ambiguous, explaining that "Congress did not adopt indubitable equivalent as a capacious but empty semantic vessel" and that subsection (iii) presents "no less demanding a standard than its companions." *Pacific Lumber*, 584 F.3d at 246. The court recognized that while the use of subsection (ii) might be imperative in some cases, it does not exclusively apply where the plan provides a current cash payment equal to the amount of the secured claim, precisely the treatment proposed by the Debtors in this case. *Id.*

B. This Case Presents an Ideal Vehicle to Resolve the Circuit Split

The Seventh Circuit acknowledged that its decision created a clear and direct conflict with the Third and Fifth Circuits. *See* App. at 14a (citing contrary decisions in *Philadelphia Newspapers* and *Pacific Lumber*). Indeed, Circuit Judge David Hamilton explained the implications of the court's decision at oral argument in the Seventh Circuit, telling the Lender's counsel: "In essence, you're asking us to send this issue to the Supreme Court . . . to agree with you, we've got to create a circuit split." App. at 28a. Furthermore, numerous bankruptcy scholars and commentators have recognized the need for clear direction from the Court on this important issue of bankruptcy law.[1]

---

[1] *See, e.g.*, Jason S. Brookner, 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*, 85 AM. BANKR. L.J. 127, 159-60 (Spring 2011) ("Until such time, however, as the Supreme Court provides a definitive answer to the question, debtors appear to have more flexibility under § 1129(b)(2)—and secured creditors more to fear—than previously believed"); Hollace T. Cohen, *Is the* Philadelphia Newspapers, LLC *Decision the Death Knell to Credit Bidding in a Sale Under a Plan?*, 20 J. BANKR. L. & PRAC. 1 Art. 1 (Jan. 2011) ("Until such time as the U.S. Courts of Appeal in Circuits other than the Third and Fifth Circuits or the U.S. Supreme Court speaks to the issues concerning a secured creditor's right to credit bid in a sale under a plan, secured creditors (not only in cases in the Third and Fifth Circuits but other Circuits as well) will be well-advised to take all precautions to preserve the right to credit bid in connection with providing debtor-in-possession financing or consenting to the use of cash

This case is an ideal vehicle for the Court to resolve the circuit split; it presents a precise question of law with no material factual disputes. *See* App. at 10a ("this appeal presents a single, relatively straightforward question concerning the proper interpretation of Section 1129(b)(2)(A) and its subsections."). Furthermore, this case presents a rare opportunity for the Court to address this important issue. Although chapter 11 plans involving asset sales are common, decisions on them are rarely reviewed because of the inherently short time periods involved. Indeed, the Seventh Circuit expressly recognized the "economic necessity" of short deadlines for asset sales in bankruptcy and concluded that "it will rarely, if ever, be the case that an appellate court would have the opportunity to review a bankruptcy court's confirmation decision prior to the expiration of such deadlines." App. at 9a. Accordingly, there may be limited opportunities for the Court to resolve this issue despite its prevalence and importance in bankruptcy law.

---

collateral."); Kenneth Noble, *Seventh Circuit Upholds Right of Secured Creditors to Credit Bid Under a Chapter 11 Plan*, July 26, 2011, *available at* 2011 WLNR 14776589 ("Indeed, the emerging high-profile split in the circuits over this core right of secured creditors will likely require an ultimate resolution before the United States Supreme Court."); Brian Trust & Thomas S. Kiriakos, *Seventh Circuit Upholds Secured Lenders' Right to Credit Bid in Asset Sales Under a Chapter 11 Plan*, July 8, 2011, *available at* 2011 WLNR 13580283 ("Moreover, as the [*River Road*] decision has now created a split among the appellate circuits as to the interpretation of Section 1129(b)(2)(A)'s "fair and equitable" standards, such contradictory rulings may result in eventual Supreme Court review and determination of the issue.").

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

Although the traditional aim of chapter 11 of the Bankruptcy Code is to preserve and reorganize an ongoing enterprise, debtors are increasingly turning to chapter 11 to facilitate a sale of assets free of liens. *See, e.g.*, Vincent S. J. Buccola & Ashley C. Keller, *Credit Bidding and the Design of Bankruptcy Auctions*, 18 GEO. MASON L. REV. 99, 99 (2010) (noting that more than half of debtors in chapter 11 now seek to sell their assets). Judge Black acknowledged this trend in certifying the appeal directly to the Seventh Circuit:

> [T]he determination whether to permit credit bidding at auction sales in bankruptcy is a matter of public importance. Under current economic conditions a large portion of chapter 11 cases involving commercial real property progress to a sale of assets rather than to reorganization, and many of those sales involve lenders who are owed more than the property is worth. Whether such lenders can credit bid is crucial to the outcome of the sales. As a result, this issue has received significant attention among bankruptcy commentators.

App. at 35a-36a.

As Judge Black observed, the protections afforded secured creditors in the sale of collateral free of liens are critically important. Paramount among these

protections is the secured creditor's right to credit bid provided by Section 363(k) and incorporated into certain plan sales by Section 1129(b)(2)(A)(ii). For this reason, the Loan Syndications and Trading Association ("LSTA"), a leading industry group for secured lenders, participated as amicus curiae in both the Third Circuit appeal in *Philadelphia Newspapers* and the Seventh Circuit appeal in this case.

At the same time, providing a debtor with flexibility to propose a viable chapter 11 plan is one of the primary purposes of the Bankruptcy Code. To that end, Section 1123(a)(5) enumerates various methods through which a debtor may implement a plan, including the "sale of all or any part of the property of the estate, either subject to or free of any lien . . ." *See* 11 U.S.C. § 1123(a)(5)(D). The design of such plan sales under Section 1129(b)(2)(A) is vitally important to fulfilling the rehabilitative goals of the Bankruptcy Code. It is therefore crucial for the courts to apply a uniform rule regarding the ability of a debtor to pursue a sale of assets free of liens through a chapter 11 plan.

The Seventh Circuit's decision below marks a clean break from the Third and Fifth Circuits by limiting all proposed asset sales through a chapter 11 plan to Section 1129(b)(2)(A)(ii), which provides for credit bidding. This circuit split creates uncertainty regarding a central component of plan sales in bankruptcy and invites forum shopping by potential debtors. It further upsets the settled expectations of the secured lending industry, as observed by Judge Ambro. *Philadelphia Newspapers*, 599 F.3d at 337. The impact of this

inter-circuit conflict is exacerbated by the fact that many large chapter 11 bankruptcy cases are currently filed in the District of Delaware, in the Third Circuit. As plan sales have become the central feature of chapter 11, it is critical that the Court resolve the controversial issue of whether a secured creditor has the right to credit bid at any plan sale of collateral under Section 1129(b)(2)(A).

D. The Seventh Circuit's Decision is Wrongly Decided

The Seventh Circuit's decision below disregards established principles of statutory construction to reach a conclusion at odds with the plain language of Section 1129(b)(2)(A). As this Court has repeatedly instructed: "courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). The Seventh Circuit ignored this maxim by declining to apply the plain language of Section 1129(b)(2)(A), which provides three alternative ways to satisfy the "fair and equitable" requirement of Section 1129(b)(1). As highlighted by the Third Circuit in *Philadelphia Newspapers* and the Fifth Circuit in *Pacific Lumber*, the use of the word "or" to join the three subparts of Section 1129(b)(2)(A) compels the conclusion that a debtor may pursue plan confirmation by satisfying any one of these criteria. *Philadelphia Newspapers*, 599 F.3d at 305; *Pacific Lumber*, 584 F.3d at 245. In stark contrast, the Seventh Circuit dismissed the import of the

structure of the statute in a footnote, concluding that "the mere presence of the term 'or' is insufficient to resolve the case." App. at 17a n.5. Instead, the court focused only on subsection (iii), reasoning that nothing in its language indicates whether it can generally apply to all chapter 11 plans or only those not covered by subsections (i) and (ii). *Id.* at 17a.

With this supposed ambiguity, the court concluded that subsection (iii) must be limited only to plans that cannot be confirmed through subsections (i) and (ii). *Id.* at 23a-25a. Otherwise, the court reasoned, subsection (iii) would render the other subsections superfluous. *Id.* at 23a. Consequently, in the Seventh Circuit's view, despite the clear language of Section 1129(b)(2)(A), a plan involving the sale of assets free of liens may not be confirmed as fair and equitable even if it provides the secured creditor with the indubitable equivalent of its claim under subsection (iii). The court's conclusion fundamentally misreads Section 1129(b)(2)(A) and violates the bedrock principle of statutory construction that requires the application of an unambiguous statute according to its plain terms. Accordingly, this Court should issue a writ of certiorari and reverse the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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

APPENDIX

Appendix to the Petition for a Writ of Certiorari

Table of Contents

In the
United States Court of Appeals
For the Seventh Circuit

NOS. 10-3597 & 10-3598

IN THE MATTER OF:
RIVER ROAD HOTEL PARTNERS, LLC,
RIVER ROAD EXPANSION PARTNERS, LLC,
RADLAX GATEWAY HOTEL, LLC AND
RADLAX GATEWAY DECK, LLC,

Debtors-Appellants,

v.

AMALGAMATED BANK,

Appellee.

Appeals from the United States Bankruptcy Court
for the Northern District of Illinois,
Eastern Division.
Nos. 09-B-30029, 09-B-30047—**Bruce W. Black**,
Bankruptcy Judge

ARGUED APRIL 7, 2011—DECIDED JUNE 28, 2011

Before CUDAY, MANION, and HAMILTON,
Circuit Judges

CUDAHY, *CIRCUIT JUDGE*. Debtors-Appellants appeal from a bankruptcy court order denying the

bid procedures motions that they filed in connection with their Chapter 11 reorganization plans. They argue that the bankruptcy court erred in finding that their plan could not be confirmed over the objections of its secured creditors because it did not qualify for "fair and equitable" status under 11 U.S.C. § 1129(b)(2)(A). We affirm.[1]

I. Factual Background

A. The River Road Debtors

In 2007 and 2008, River Road Hotel Partners, LLC, River Road Expansion Partners, LLC, and related entities ("the River Road Debtors") built the InterContinental Chicago O'Hare Hotel and affiliated event space. In order to construct the hotel and event space, these entities obtained construction loans totaling approximately $155,500,000 from the Longview Ultra Construction Loan Investment Fund and the Longview Ultra I Construction Loan Investment Fund ("the River Road Lenders"). The loan documents designated Amalgamated Bank as the administrative agent and trustee of the River Road Lenders.

The InterContinental Chicago O'Hare Hotel and affiliated facilities opened in September 2008. Several months later, the River Road Debtors

---

[1] This opinion has been circulated among all judges of this court in regular active service pursuant to Circuit Rule 40(e). No judge asked to hear this case en banc. Judge Flaum took no part in the consideration or decision of this case.

Hotel at Los Angeles International Airport. In order to purchase the hotel, pay for renovations and build a parking structure on an adjacent parcel of real estate (which was to be owned by a related entity, RadLAX Gateway Deck, LLC), RadLAX Gateway Hotel, LLC, and its affiliates ("the RadLAX Debtors") obtained a construction loan totaling approximately $142,000,000 from the Longview Ultra Construction Loan Investment Fund ("the RadLAX Lenders"). The loan documents designated Amalgamated Bank as the administrative agent and trustee of the RadLAX Lenders.

During the course of building the parking structure the RadLAX Debtors incurred several million dollars of unanticipated costs. Around March 2009, the RadLAX Debtors ran out of funds and had to halt construction.[3] The RadLAX Lenders entered into negotiations with the RadLAX Debtors concerning the conditions under which additional funding would be provided, but the parties could not agree on mutually satisfactory terms.

On August 17, 2009, each of the RadLAX Debtors filed voluntary petitions for relief under Chapter 11 of the Code in the United States Bankruptcy Court for the Northern District of

---

[3] While the RadLAX Lenders claim that the RadLAX Debtors exhausted all of the money available under their loan, the RadLAX Debtors claim that they only came up short because the RadLAX Lenders improperly denied their construction draw requests. Which account is correct is inconsequential for the purposes of this appeal.

Illinois, Eastern Division. At the time the petition was filed, the RadLAX Debtors owed at least $120,000,000 on the loans, with over $1,000,000 in interest accruing per month. In addition, over $15,000,000 in mechanics' liens have been asserted against the RadLAX properties.

C. Proceedings Before the Bankruptcy Court

On August 20, 2009, the bankruptcy court entered orders directing the joint administration of the River Road Debtors' bankruptcy cases under Case No. 09-30029. The court also entered orders directing the joint administration of the RadLAX Debtors' bankruptcy cases under Case No. 09-30047. Each set of Debtors continues to operate their businesses as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Code.

On June 4, 2010, the River Road and RadLAX Debtors (collectively, "the Debtors") submitted their reorganization plans to the bankruptcy court for confirmation. Both plans sought to sell substantially all of the Debtors' assets, with the proceeds to be distributed among the Debtors' creditors in accordance with the Code's priority rules. The Debtors also filed motions requesting the court's approval of their proposed procedures for conducting the asset sales. Both sets of proposals sought to auction off the Debtors' assets to the highest bidder, with the initial bid in each auction being supplied by a stalking horse bidder that had been lined up in the post-petition, pre-plan period. In one of their bid

procedures motions, the River Road Debtors claimed that they had procured a stalking horse offer of $42,000,000 for their assets. On June 22, 2010, the RadLAX Debtors filed copies of a proposed asset purchase agreement that offered $47,500,000 for their assets.

On July 8, 2010, Amalgamated Bank, on behalf of the River Road and RadLAX Lenders (collectively, "the Lenders"), filed objections to the Debtors' proposed bid procedures. Because the Debtors' plans would impair the Lenders' interests and the Lenders had not accepted the plans, they could not be confirmed unless they qualified for one of the exceptions listed in Section 1129(b)(2)(A) of the Code. *See* 11 U.S.C. § 1129(a)(8), (b). Amalgamated argued that the Debtors' plans could not satisfy Section 1129(b)(2)(A)'s requirements because they sought to sell encumbered assets free and clear of liens without allowing the Lenders to bid their credit at the asset auctions, in violation of 11 U.S.C. § 1129(b)(2)(A)(ii)'s requirement that secured lenders be given credit-bidding rights. The Debtors filed omnibus replies to Amalgamated's objections, arguing that, while their plans did not comply with Section 1129(b)(2)(A)(ii)'s requirements, they were still confirmable because they satisfied Section 1129(b)(2)(A)(iii)'s requirements.

On July 22, 2010, the bankruptcy court orally ruled that the Debtors' plans could not be confirmed under Section 1129(b)(2)(A)(iii). On October 5, 2010, the court entered orders denying the Debtors' bid procedure motions. The Debtors filed notices of

appeal and motions requesting that the bankruptcy court certify their appeals directly to this court pursuant to 11 U.S.C. § 158(d)(2)(A). On November 4, 2010, the court entered certifications for direct appeal to this court for both cases. On November 30, 2010, we entered an order authorizing and consolidating the River Road and RadLAX appeals.

II. Discussion

This appeal presents two issues for this court to decide. First, we must determine whether events that occurred subsequent to the filing of the appeal have mooted the parties' dispute. Second, if we find that the appeal is not moot, we must turn to the merits of the Debtors' appeal and decide whether the bankruptcy court's interpretation of 11 U.S.C. § 1129(b)(2)(A) was correct.

A. The Issue Raised by the Debtors' Appeal Is Not Moot

The Lenders claim that it would be inappropriate for this court to review the bankruptcy court's denial of the Debtors' bid procedure motions because the Debtors' proposed plans are no longer pending before the bankruptcy court. The Lenders contend that the reorganization plans that the court originally considered are no longer viable due to the passing of several expiration dates contained in the asset purchase agreements that the Debtors filed. They alternatively argue that statements from the Debtors indicate that the Debtors have abandoned their original reorganization plans.

We reject the Lenders' mootness argument. While "it is well-settled that a federal court has no authority to give opinions upon moot questions or abstract propositions," *Porco v. Trs. of Ind. Univ.*, 453 F.3d 390, 394 (7th Cir. 2006), an issue will not be considered moot unless the parties lack a "legally cognizable interest in the outcome." *Olson v. Brown*, 594 F.3d 577, 580 (7th Cir. 2010). It does not appear that the Debtors' reorganization plans suffer from either of the defects—the passing of expiration dates or abandonment—identified by the Lenders. On February 15, 2011, the RadLAX Debtors filed an amended asset purchase agreement with the bankruptcy court that largely resembled the agreement that was submitted in connection with the original reorganization plans. On March 2, 2011, the River Road Debtors filed a similar agreement. None of the confirmation deadlines contained in the amended agreements have expired. Further, the Debtors' statements before this court and the fact that they have filed amended agreements provide convincing evidence that the Debtors have not abandoned their asset sale plans.

Even if we were to find that the Debtors' original reorganization plans were based on asset purchase agreements that had expired, the Lenders have failed to show why this appeal would not fit squarely within the exception to mootness that we have recognized for cases that, due to timing issues, would otherwise evade review. *See, e.g., Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007); *Krislov v. Rednour*, 226 F.3d 851,

858 (7th Cir. 2000). A court can disregard mootness and retain jurisdiction over an appeal when the challenged action is (1) too short in duration to be fully litigated prior to cessation or expiration and (2) there is a reasonable expectation that the same appealing party will be subject to the same action again. *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. at 462.

This appeal satisfies both of these requirements. First, essentially all bankruptcy plans that seek to liquidate the debtor's assets will be based on asset purchase agreements that contain sales provisions with confirmation deadlines. These deadlines are, by economic necessity, quite short in duration. Hence, it will rarely, if ever, be the case that an appellate court would have the opportunity to review a bankruptcy court's confirmation decision prior to the expiration of such deadlines. Second, it is reasonable to expect that, if this appeal were dismissed for mootness, the Debtors would simply re-file their reorganization plans with new asset purchase agreements and the bankruptcy court would deny confirmation on the same grounds, giving the Debtors grounds for bringing the same appeal before this court.

B. 11 U.S.C. § 1129(b)(2)(A) Does Not Authorize Debtors To Use Subsection (iii) To Confirm a Reorganization Plan that Seeks To Sell Encumbered Assets Free and Clear of Liens Without Providing Secured Creditors the Right To Credit Bid

The Debtors contends that the bankruptcy court misinterpreted Section 1129(b)(2)(A) of the Code when it held that their plans could not be confirmed because they did not "comply with the specific requirements of Section 1129(b)(2)(A)(ii)." They argue that their plans should have been confirmed because they satisfied the conditions set forth in Section 1129(b)(2)(A)(iii). Thus, this appeal presents a single, relatively straightforward question concerning the proper interpretation of Section 1129(b)(2)(A) and its subsections.

The bankruptcy court held that, when a debtor's reorganization plan has not been approved by its secured creditors and proposes the sale of encumbered assets free and clear of liens, Section 1129(b)(2)(A) provides the exclusive means by which it can be confirmed. The court did not attempt to provide its own in-depth justification for its construal of Section 1129(b)(2)(A), but stated that its holding was based upon the statutory analysis set forth in Judge Ambro's dissent in *In re Philadelphia Newspapers*, 599 F.3d 298 (3d Cir. 2010). Because we review a bankruptcy court's interpretation of the Code's provisions under the *de novo* standard, we must conduct our own, independent analysis of

Section 1129(b)(2)(A)'s meaning. *Frey v. EPA*, 403 F.3d 828, 833 (7th Cir. 2005).

(1) Overview of Section 1129(b)(2)(A) and Relevant Precedents

Before attempting to decipher Section 1129(b)(2)(A)'s proper meaning, a brief review of the statute and the way it has been construed by the courts is merited. Section 1129 of the Code sets forth the criteria that a debtor's Chapter 11 reorganization plan must satisfy to be confirmed by a bankruptcy court. While the Code generally requires that reorganization plans be accepted by each class of claimants (or, alternatively, leave the claims of non-assenting classes unimpaired), *see* 11 U.S.C. § 1129(a)(8), Subsection (b) of Section 1129 excepts certain plans from this requirement. Plans that are confirmed under Section 1129(b) are often referred to as cramdown plans because they have been "crammed down the throats of objecting creditors." *Kham & Nate's Shoes No. 2, Inc. v. First Bank*, 908 F.2d 1351, 1359 (7th Cir. 1990). Subsection (b)(1) states that, in order for a plan to be confirmed over the objection of a class of creditors, it must be "fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." Subsection (b)(2)(A) defines what constitutes "fair and equitable" treatment in the secured creditor context. It states that a plan is "fair and equitable" if it 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 the 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. § 1129(b)(2)(A).

Traditionally, the majority of cramdown plans have sought confirmation under Subsection (ii) of 1129(b)(2)(A). Given the detailed and carefully tailored language used in this subsection, it has rarely been difficult for courts to determine whether plans qualify for "fair and equitable" status. Plans that propose selling an encumbered asset free and

clear of liens could be confirmed over the objections of secured creditors so long as the debtor's asset sale complies with Section 363(k) of the Code. Sales comply with Section 363(k) if they permit parties with secured claims to "offset [their] claim against the purchase price of [the asset]" when entering bids to purchase the asset, an arrangement that is popularly referred to as credit bidding.

An increasing number of debtors, however, have begun to seek confirmation of their plans under Subsection (iii) of 1129(b)(2)(A). Because the language used in this provision is both sparse and general, determining whether a reorganization plan can qualify as "fair and equitable" under this subsection is no simple task. As written, the statute does not provide guidance concerning (1) what types of plans fall within Subsection (iii)'s scope or (2) what constitutes the "indubitable equivalent" of a secured creditor's claim. Resolving the first issue is not easy because nothing in the text of Section 1129(b)(2)(A) indicates whether subsection (iii) can be used to confirm every type of reorganization plan or only those plans that fall outside the scope of Subsections (i) and (ii). Resolving the second issue is difficult because "indubitable equivalent" is not a term that has been defined by the Code or the courts. *In re Pacific Lumber, Co.*, 584 F.3d 229, 246 (5th Cir. 2009) (noting that "[w]hat measures constitute the indubitable equivalent of the value of the [secured creditor's] collateral are rarely explained in case law").

Two of our sister circuits recently issued opinions analyzing Section 1129(b)(2)(A). *Philadelphia Newspapers*, 599 F.3d 298; *Pacific Lumber*, 584 F.3d 229. In *Pacific Lumber*, the Fifth Circuit held that a plan that proposed the sale of the debtor's encumbered assets to a specified purchaser for an amount equal to the judicially-determined value of the assets qualified as "fair and equitable" under Subsection (iii) of Section 1129(b)(2)(A). *Pacific Lumber*, 584 F.3d at 249. In *Philadelphia Newspapers*, the Third Circuit held, in a 2-1 decision with one of the members of the majority concurring in the judgment, that a plan that proposed selling the debtor's encumbered assets free and clear of liens in an auction where credit bidding would not be allowed could qualify as "fair and equitable" under Subsection (iii). *Philadelphia Newspapers*, 599 F.3d at 318. Both majority opinions held that Subsection (iii)'s scope was not limited by its neighboring subsections and that the proceeds from the sale of encumbered assets constituted the indubitable equivalent of the secured creditors' claims. Judge Ambro's dissent in *Philadelphia Newspapers* rejected both of these conclusions, arguing that the majority's reading of the statute was at odds with the text of the statute itself, various canons of statutory interpretation, the statute's legislative history, interests expressed in other parts of the Code and the settled expectations of lenders and borrowers.

(2) The Plain Language of Section 1129(b)(2)(A) Does Not Clearly Authorize Confirmation of the Debtors' Reorganization Plans

With this background information in mind, we can begin our analysis of Section 1129(b)(2)(A)'s meaning in earnest. When attempting to decipher the proper interpretation of a statute, we begin by determining "whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). When interpreting statutory language, the meaning attributed to a phrase "depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S.Ct. 1325, 1330 (2011); *see also United States v. Webber*, 536 F.3d 584, 593 (7th Cir. 2008) (stating that "we give words their ordinary meaning unless the context counsels otherwise"). If we find that the language in a statute is unambiguous, we will not conduct further inquiry into its meaning and enforce the statute in accordance with its plain meaning. *BedRoc, Ltd. v. United States*, 541 U.S. 176, 183 (2004); *Ind. Forest Alliance, Inc. v. United States Forest Serv.*, 325 F.3d 851, 857 (7th Cir. 2003). Thus, the first step we must take in resolving this appeal is determining whether the language of Section 1129(b)(2)(A) unambiguously authorizes the confirmation of

reorganization plans such as those proposed by the Debtors under Subsection (iii).

The Debtors contend that the plain language of Section 1129(b)(2)(A) orders courts to approve any cramdown plan—including those that propose selling encumbered assets free and clear of liens—that satisfies Subsection (iii)'s requirement that the plan provides secured creditors with the indubitable equivalent of their claims. They also argue that the statute's language unambiguously indicates that a plan that provides a secured creditor with the proceeds from the sale of an asset at an auction that does not permit credit bidding satisfies the indubitable equivalence requirement. In support of their positions, the Debtors cite the majority's decision in *Philadelphia Newspapers*, reiterating many of the arguments articulated in that case.[4] Unsurprisingly, the Lenders disagree with the Debtors' claims, arguing that cramdown plans that seek to sell encumbered assets free and clear of liens must satisfy Subsection (ii)'s requirements and that the Debtors' proposed sales would not provide the Lenders with the indubitable equivalent of their claims. The Lenders contend that Judge Ambro's dissent in *Philadelphia Newspapers* provides a superior analysis of Section 1129(b)(2)(A).

---

[4] Given that the Debtors' assets in this case have not gone through the judicial valuation process and the Debtors' reorganization plans involve using an auction to determine the assets' current value, it is clear that *Philadelphia Newspapers* is more relevant precedent than *Pacific Lumber*.

We reject the Debtors' contentions for two reasons. First, like the bankruptcy court, we find the statutory analysis articulated by Judge Ambro in his *Philadelphia Newspapers* dissent to be compelling. Nothing in the text of Section 1129(b)(2)(A) directly indicates whether Subsection (iii) can be used to confirm any type of plan or if it can only be used to confirm plans that propose disposing of assets in ways that can be distinguished from those covered by Subsections (i) and (ii).[5] Hence, there are two plausible interpretations of the statute: one that reads Subsection (iii) as having global applicability and one that reads it as having a much more limited scope. *See Philadelphia Newspapers*, 599 F.3d at 324-27 (Ambro, J., dissenting). Because, at this stage of our analysis, we are limited to considering the plain text of the statute and "reasonable minds can differ on the interpretation of Section 1129(b)(2)(A) as it applies to plan sales free of liens," we find that the statute does not have a single plain meaning. *Id.* at 322. Accordingly, we must look beyond the text of Section 1129(b)(2)(A) to determine which of its possible interpretations is the correct

---

[5] We disagree with the *Philadelphia Newspapers* majority's conclusion that the use of "or" in Section 1129(b)(2)(A) resolves this issue. *Philadelphia Newspapers*, 599 F.3d at 305-06. While Section 102(5) of the Code indicates that "or" should be understood in the term's non-exclusive sense, several exceptions to this rule have been recognized. *See Philadelphia Newspapers*, 599 F.3d at 324 (Ambro, J., dissenting); Lawrence P. King et al., 2 *Collier on Bankruptcy* ¶ 102.06 (16th ed. Rev. 2011). Hence, the mere presence of the term "or" is insufficient to resolve this issue.

one. Second, we find that, even if we analyze Subsection (iii) of Section 1129(b)(2)(A) in isolation, the text of the provision does not unambiguously indicate that plans such as those proposed by the Debtors qualify for "fair and equitable" status. Subsection (iii) states that a reorganization plan can be confirmed over the objections of secured creditors if it provides the creditors with the "indubitable equivalent" of their claims. What constitutes the "indubitable equivalent" of a creditor's secured claim depends on the amount of the creditor's lien and the current value of the secured asset. If a creditor's claim is oversecured, then the indubitable equivalent of the creditor's claim is its face value. For instance, where a creditor has a $100,000 lien on an asset worth $500,000, a reorganization plan will only give the creditor the indubitable equivalent of its claim if it gives it something worth $100,000 (e.g., that amount in cash or a replacement lien for that amount on another asset). If a creditor's claim is undersecured, then the indubitable equivalent of the creditor's secured claim equals the current value of the asset. For instance, where a creditor has a $100,000 lien on an asset that has depreciated in value and is now worth less than $100,000, a reorganization plan will give the creditor the indubitable equivalent of its claim if the plan gives the creditor something worth the asset's current market value.

Determining the value of an undersecured creditor's claim is problematic because it is usually difficult to discern the current market value of the

types of assets that are sold in corporate bankruptcies. The Code recognizes two basic mechanisms for solving these types of valuation problems: judicial valuation of an asset's value, 11 U.S.C. § 506(a)(1), and free market valuation of an asset's value as established in an open auction, 11 U.S.C. §§ 363(k), 1129(b)(2)(A). The Debtors argue that, because their proposed plans would sell their assets at an open auction and the Lenders would receive the proceeds from these sales, the free market will determine the assets' current values and the Lenders will receive the indubitable equivalent of their secured claims.

The Debtors' argument is flawed, however, because of the incongruity between the auctions proposed in the plans and those recognized elsewhere in the Code. In order to auction off an encumbered asset free and clear of liens under Sections 363(k) or 1129(a)(2)(B)(ii), for instance, the Code requires that parties with secured interests in the assets be permitted to credit bid. By granting secured parties this ability, the Code provides lenders with means to protect themselves from the risk that the winning auction bid will not capture the asset's actual value. If a secured lender feels that the bids that have been submitted in an auction do not accurately reflect the true value of the asset and that a sale at the highest bid price would leave them undercompensated, then they may use their credit to trump the existing bids and take possession of the asset. In essence, by granting secured creditors the right to credit bid, the Code promises

lenders that their liens will not be extinguished for less than face value without their consent. This protection is important since there are number of factors that create a substantial risk that assets sold in bankruptcy auctions will be undervalued.[6]

---

[6] Multiple factors contribute to the risk that an asset will be undervalued in such sales. First, the speed and timing of a bankruptcy auction often results in undervaluation. Lorie R. Beers, *Preparing the Distressed Company for Sale*, Am. Bankr. Inst. J. 44, 45 (Aug. 26, 2007). Second, and closely related, is the inability to provide sufficient notice to interested parties. *See id.* at 69 (explaining that because of financial constraints, the development of formal marketing materials and notice to prospective buyers is often abbreviated, resulting in a shorter list of interested parties and thereby reducing the chance that the sale will result in full realization of the asset's value). Third, there is an inherent risk of self-dealing on the part of existing management. We have recognized that existing management may have an incentive to favor "white knight" bidders favorably disposed to preserving the existing business over others who might enter higher bids. *See Dynamic Corp. of Am. v. CTS Corp.*, 805 F.2d 705, 711 (7th Cir. 1986). Fourth, while the credit markets are more recently showing signs of repair, they remain in a state of limited liquidity. Liquidity constraints are likely to keep many potential bidders on the sidelines, greatly reducing the chance that competitive bidding will occur. Finally, the fact that bidders must expend their resources when putting together a bid and are likely to take these costs into consideration when setting the value of their bids increases the chance that the asset's sale price will not reflect its actual value. *See* Vincent S. J. Buccola & Ashley C. Keller, *Credit Bidding and the Design of Bankruptcy Auctions*, 18 Geo. Mason L. Rev. 99, 121 (2010) (noting that an estate is unlikely to realize the entire value of an asset because bids will take into account the bidders' financing costs).

Because the Debtors' proposed auctions would deny secured lenders the ability to credit bid, they lack a crucial check against undervaluation. Consequently, there is an increased risk that the winning bids in these auctions would not provide the Lenders with the current market value of the encumbered assets. Nothing in the text of Section 1129(b)(2)(A) indicates that plans that *might* provide secured lenders with the indubitable equivalent of their claims can be confirmed under Subsection (iii). Hence, we find that a plain-meaning reading of Subsection (iii)'s text does not establish that it can be used to confirm plans that propose auctioning off a debtor's encumbered assets free and clear of liens without allowing credit bidding.

(3) The Better Interpretation of Section 1129(b)(2)(A)(iii) Does Not Permit Confirmation of the Debtors' Reorganization Plans Under Subsection (iii)

Because the text of Section 1129(b)(2)(A) suggests more than one plausible understanding of the statute, we must apply well-established principles of statutory interpretation to determine which of these understandings is superior. In general, canons of statutory construction urge courts to interpret statutes in ways that make every part of the statute meaningful. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Interpretations that result in provisions being superfluous are highly disfavored. *Id.* Further, when deciding between competing understandings of a statute, courts often consider

the objectives of the larger statutory scheme and select the meaning that "produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988); *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004).

The Debtors' proposed interpretation of Section 1129(b)(2)(A) violates a cardinal rule of statutory construction. One of the basic tenets that courts follow when interpreting ambiguous text states that "a statute ought . . . to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). The first two Subsections of 1129(b)(2)(A) set forth the specific conditions that reorganization plans that seek to sell encumbered assets in particular manners must meet. Subsection (i) sets forth requirements that apply to all plans where the debtor seeks to retain possession of or sell an encumbered asset with the liens attached. Subsection (ii) sets forth requirements that apply to all plans that seek to sell an encumbered asset free and clear of liens. The Debtors propose that we should read Subsection (iii) as stating that any plan that satisfies a general requirement—the indubitable equivalence standard—should be granted "fair and equitable" status. Under their interpretation, plans could qualify for treatment under Subsection (iii) even if they seek to dispose of encumbered assets in the ways discussed in Subsections (i) and (ii), but fail to meet these Subsections' requirements.

This understanding of Section 1129(b)(2)(A)(iii) is unacceptable because it would render the other subsections of the statute superfluous.[7] If, as the Debtors propose, Subsection (iii) permits a debtor to sell an asset free and clear of liens without permitting credit bidding, then it is difficult to see what, if any, significance Subsection (ii) can have. Similarly, the Debtors' interpretation would permit properly-designed reorganization plans to sell encumbered assets without satisfying the conditions set forth in Subsection (i). We cannot conceive of a reason why Congress would state that a plan must meet certain requirements if it provides for the sale of assets in particular ways and then immediately abandon these requirements in a subsequent subsection.[8] The infinitely more

---

[7] This interpretation would also violate the canon of statutory construction that states that when "there is an inescapable conflict between general and specific . . . provisions of a statute, the specific will prevail." Norman J. Singer & J.D. Shambie Singer, 2A *Sutherland Statutes & Statutory Construction* § 46:5; *see also Bloate v. United States*, 130 S.Ct. 1345, 1354 (2010) (stating that "general language of a statutory provision, although broad enough to include [a matter], will not be held to apply to a matter specifically dealt with in another part of the same enactment"). Allowing plans to use Subsection (iii) to accomplish a sale free of liens without according lenders the procedural protections prescribed by clause (ii) "places the two clauses in conflict" and would allow the general to subsume the specific. *In re Philadelphia Newspapers*, 559 F.3d at 329 (Ambro, J., dissenting).

[8] Indeed, the legislative history for Section 1129(b)(2)(A) indicates that Subsection (iii) was intended to apply to plans that propose treating the estate's encumbered assets in ways that are different from those covered by Subsection (i) and (ii).

plausible interpretation of Section 1129(b)(2)(A) would read each subsection as stating the requirements for a particular type of sale and "construing each of the [] subparagraphs . . . [as conclusively governing] the category of proceedings it addresses." *Bloate v. United States*, 130 S. Ct. 1345, 1355 (2010). Under such a reading, plans could only qualify as "fair and equitable" under Subsection (iii) if they proposed disposing of assets in ways that are not described in Subsections (i) and (ii).

Also counseling against the Debtors' interpretation of Section 1129(b)(2)(A)(iii) is the fact that it treats secured creditors' interests in a way that sharply conflicts with the way that these interests are treated in other parts of the Code. A review of the "sections of the Code related to plan sales of encumbered property free of its liens, as well as sections concerning the protection afforded to secured creditors," reveals that the Code has an expressed interest in insuring that secured creditors are properly compensated. *Philadelphia Newspapers*, 599 F.3d at 331 (Ambro, J., dissenting). For instance, Sections 363(k) and 1129(b)(2)(A)(ii) provide a secured creditor with the right to credit bid whenever a debtor attempts to sell the asset that

---

In re Philadelphia Newspapers, 559 F.3d at 335-36 (Ambro, J., dissenting) (reviewing the congressional record and noting that neither of the examples of plans that a court could confirm under clause (iii)—abandonment of the encumbered asset or providing the secured creditor with a replacement lien on similar collateral— overlap with plans that could be confirmed under Subsections (i) and (ii)).

secures its debt free and clear of its lien. *Id.* Similarly, Section 1111(b) provides secured creditors with means to protect their claims when a debtor seeks to retain possession of an encumbered asset. *See In re 680 Fifth Ave. Assocs.*, 29 F.3d 95, 97-98 (2d Cir. 1994); Lawrence P. King et al., *7 Collier on Bankruptcy* ¶ 1111.03 (16th ed. Rev. 2011). In contrast, the Code does not appear to contain any provisions that recognize an auction sale where credit bidding is unavailable as a legitimate way to dispose of encumbered assets. Because the Debtors' interpretation of Section 1129(b)(2)(A) would not provide secured creditors with the types of protections that they are generally accorded elsewhere in the Code, their interpretation is less plausible than a construction of the statute that reads Subsection (ii), which offers the standard protections to creditors, as providing the only way for plans seeking to sell encumbered assets free and clear of liens to obtain "fair and equitable" status. *Philadelphia Newspapers*, 599 F.3d at 331 (Ambro, J., dissenting).

Because the Debtors' suggested reading of Subsection (iii) would nullify its neighboring subsections and ignore the protections for secured creditors recognized in other Code provisions, we reject their interpretation of the statute. Instead, we find that the Code requires that cramdown plans that contemplate selling encumbered assets free and clear of liens at an auction satisfy the requirements set forth in Subsection (ii) of the statute.

III. Conclusion

For these reasons, the ruling of the bankruptcy court is

AFFIRMED

In the
United States Court of Appeals
for the Seventh Circuit

In the Matter of:
RIVER ROAD HOTEL PARTNER, LLC,
RIVER ROAD EXPANSION PARTNERS, LLC,
RADLAX GATEWAY HOTEL, LLC and
RADLAX GATEWAY DECK, LLC,

v.

AMALGAMATED BANK

Appeals from the United States Bankruptcy Court
for the Northern District of Illinois,
Eastern Division,
Nos 09-B-30029 & 09-B-30047

The Honorable Bruce W. Black,
Bankruptcy Judge Presiding

Oral Argument - Filed 04/07/2011

VICTORIA COURT REPORTING SERVICE, INC.
312-443-1025

* * *

gets teed up, it will get litigated whether something satisfies the standard. Uh, so I don't think so, but I don't think we have to decide that to decide whether (a)(ii) is the sole method Congress has provided for uh --

JUDGE CUDAHY: The courts that have gone against you have pretty much started with the proposition that this a plain meaning term.

MR. LEWIS: They, they have. And I, and I, and as I argued here at the outset –

JUDGE CUDAHY: If that's not right, then we've got problems.

MR. LEWIS: And that's my point. It was where I started here.

JUDGE HAMILTON: In essence, you're asking us to send this issue to the Supreme Court.

MR. LEWIS: Well that depends on --

JUDGE HAMILTON: We have, you're asking, to agree with you, we've got to create a circuit split.

MR. LEWIS: I, I, I'm not asking you to create a circuit split, I'm asking, Your Honor, to affirm below. That may be the consequence, Mr. Neff can probably tell you that more than I, it'll be in his

hands if you affirm, uh, but uh, yeah, that might well the be outcome

* * *

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Chapter 11

Case No. 09 B 30047
(Jointly Administered)

Hon. Bruce W. Black

In re:	)
	)
RADLAX GATEWAY HOTEL, LLC, *et al.*,	)
	)
Debtors.	)

CERTIFICATION FOR DIRECT APPEAL TO COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Pursuant to 28 U.S.C. § 158(d)(2)(B)(i) and Bankruptcy Rule 8001(f)(2)(A)(i), and at the request of the debtors, RADLAX GATEWAY HOTEL, LLC, *et al.*, the bankruptcy court certifies that the appeal in this matter meets the requirements of 28 U.S.C. § 158(d)(2)(A)(i), (ii), and (iii) for direct appeal to the court of appeals.

This chapter 11 case and *In re River Road Hotel Partners, LLC*, No. 09 B 30029, are nearly identical cases. The debtors have the same counsel, filed their petitions for relief on the same date, have many of the same creditors, and both cases involve distressed hotel properties. The cases have been administered concurrently with the parties involved filing virtually identical motions in each. The cases have also maintained corresponding hearing schedules. In short, these are sister cases.

On June 4, 2010, the debtors in the two cases filed substantively identical motions to approve bid procedures. The bankruptcy court entered an order denying that motion on October 5, 2010, citing the reasons stated in an order issued the same date in *River Road Hotel Partners.* The debtors in both cases have now filed motions requesting the bankruptcy court to certify the appeal directly to the court of appeals.

As these are sister cases and the reasons for certifying the appeal directly to the court of appeals are the same, the bankruptcy court certifies the appeal in this case for direct appeal to the court of appeals for the reasons stated in this courts certification issued in *In re River Road Hotel Partners, LLC*, No. 09 B 30029, entered November 4, 2010.

Dated: November 4, 2010

/s/
Hon. Bruce W. Black
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Chapter 11

Case No. 09 B 30029
(Jointly Administered)

Hon. Bruce W. Black

In re:	)
	)
RIVER ROAD HOTEL,	)
PARTNERS, LLC, *et al.*,	)
	)
Debtors.	)

CERTIFICATION FOR DIRECT APPEAL TO COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Pursuant to 28 U.S.C. § 158(d)(2)(B)(i) and Bankruptcy Rule 8001(f)(2)(A)(i), and at the request of the debtors, River Road Hotel Partners, LLC, *et al.*, the bankruptcy court certifies that the appeal in this matter meets the requirements of 28 U.S.C. § 158(d)(2)(A)(i), (ii), and (iii) for direct appeal to the court of appeals.

Background

1. This appeal arises out of a chapter 11 bankruptcy case filed on August 17, 2009.[1] On June 4, 2010, the debtors filed their chapter 11 plan, which contemplated the auction sale of substantially all of their assets, including the InterContinental Hotel Chicago O'Hare. On the same date the debtors filed a motion seeking approval of procedures to govern the sale. The motion included a request to preclude the debtors' secured creditors from credit bidding,[2] both as a matter of law under 11 U.S.C. 1129(b)(2)(iii) and for cause, a matter of fact, under 11 U.S.C. § 363(k).

2. After orally denying that portion of the motion seeking to preclude credit bidding as a matter of law, the bankruptcy court conducted an evidentiary hearing on the issue of cause and found that cause did not exist to preclude credit bidding.

3. On October 5, 2010, the bankruptcy court entered a written order denying the motion. The debtors had based their legal argument on the

---

[1] For the same reasons set forth in this certification, the bankruptcy court is also certifying the chapter 11's sister case, *In re RADLAX GATEWAY HOTEL, LLC, et al.*, No. 09 B 30047, directly to the court of appeals. A separate certification will be issued in *RADLAX GATEWAY*.

[2] Credit bidding as defined by § 363(k) is the ability of a secured lender to offset its claim against the purchase price of the property. *See* 11 U.S.C. § 363(k); 3 *Collier on Bankruptcy* ¶ 363.09 (Alan N. Resnick & Henry J. Sommers eds., 16th ed. 2010).

majority opinion in *In re Philadelphia Newspapers, LLC*, 599 F.3d 289 (3d Cir. 2010). The bankruptcy court declined to follow that opinion, finding the dissenting opinion of Judge Ambro persuasive. The debtors have appealed the decision.[3]

Discussion

4. The debtors' appeal satisfies all of the criteria in 28 U.S.C. § 158(d)(2)(A) for direct appeal to the court of appeals.

5. First, the appeal satisfies the first clause of section 158(d)(2)(A)(i) because the bankruptcy court's order denying preclusion of credit bidding under 11 U.S.C. § 1129(b)(2)(A)(iii) raises a question of law on which there is no controlling decision of the Court of Appeals for the Seventh Circuit or of the Supreme Court of the United States.

6. Second, the appeal satisfies the second clause of section 158(d)(2)(A)(i) because the determination whether to permit credit bidding at auction sales in bankruptcy court is a matter of public importance. Under current economic conditions a large portion of chapter 11 cases involving commercial real property progress to a sale of assets rather than to reorganization, and many of those sales involve lenders who are owed more than

---

[3] The debtors do not seek review of that part of the October 5, 2010, order in which the court found that the debtors had not established cause to preclude credit bidding under 11 U.S.C. § 363(k).

the property is worth. Whether such lenders can credit bid is crucial to the outcome of the sales. As a result, this issue has received significant attention among bankruptcy commentators.[4]

7. Third, the appeal satisfies section 158(d)(2)(A)(ii) because the appeal involves a question of law requiring resolution of conflicting decisions. In addition to *Philadelphia Newspapers*, two other reported decisions conflict with the bankruptcy court's order here. *See In re The Pacific Lumber Co.*, 584 F.3d 229, 246 (5th Cir. 2009); *In re CRIIMI MAE, Inc.*, 251 B.R. 796, 806-07 (Bankr. D. Md. 2000).

---

[4] *See, e.g.*, Erik W. Anderson & Joshua J. Lewis, The Impact of Philadelphia Newspapers on a Secured Creditor's Right to Credit Bid, XXIX Am. Bankr. Inst. J., 376, March 2010; Benjamin D. Feder, Plain Meaning Trumps Long Standing Commercial Lender Expectations in Third Circuit Philadelphia Newspapers Decision, BANKRUPTCY LAW INSIGHTS, March 31, 2010, http://www.bankruptcylawinsights.com/2010/03/articles/distressed-ma-1/plain-meaning-trumps-long-standing-commercial-lender-expectations-in-third-circuit-philadelphia-newspapers-decisons/; Stephen J. Lubben, The Chapter 11 Challenge to Delaware, October 5, 2010, 1:18 pm, THE NEW YORK TIMES DEALBOOK BLOG, http://dealbook.blogs.nytimes.com/2010/10/05/the-chapter-11-challenge-to-delaware/; Benjamin D. Feder, Credit Bidding After Philadelphia Newspapers: Dissent 1, Majority 0, BANKRUPTCY LAW INSIGHTS, October 29, 2010, http://www.bankruptcylawinsights.com/2010/10/articles/distressed-ma-1/credit-bidding-after-philadelphia-newspapers-dissent-1-majority0/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+BankruptcyLawInsights+%28Bankruptcy+Law+Insights%29.

8. Fourth, the appeal satisfies section 158(d)(2)(A)(iii) because an immediate appeal will materially advance the progress of this case by settling whether the debtors may proceed with their proposed chapter 11 plan, "or whether they must instead pursue reorganization through one or more alternative plans." Debtors' Motion for Certification at ¶ 10 (Oct. 14, 2010). Notwithstanding the debtors' reference to alternative resolutions, the huge difference between the value of the real estate and the amounts owed the lenders,[5] the proposed sale precluding credit bidding appears to this bankruptcy judge to be the only realistic hope the debtors have to confirm a plan in chapter 11.

For these reasons, the bankruptcy court certifies the appeal in this case for direct appeal to the court of appeals.

Dated: November 4, 2010

/s/
Hon. Bruce W. Black
U.S. Bankruptcy Judge

---

[5] The principal secured lender, Amalgamated Bank, is owed in excess of $161,000,000. Claims No. 6-1, 15-1, and 136-1. Although the debtor has not provided an estimated value of the property the proposed stalking horse bid was a mere $42,000,000. Debtors' Motion to Approve Bid Procedures ¶ 16, Dkt. 309, filed June 4, 2010.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Chapter 11

Case No. 09 B 30047
(Jointly Administered)

Hon. Bruce W. Black

In re:	)
	)
RADLAX GATEWAY HOTEL, LLC, *et al.*,	)
	)
Debtors.	)

Debtors' Motion for an Order: (A) Approving Procedures for the Sale of Substantially All of the Debtors' Assets; (B) Scheduling an Auction; (C) Approving Assumption and Assignment Procedures; (D) Approving Form of Notice; and (E) Granting Related Relief is Denied.

STATEMENT

This matter is before the court on the Debtors' Motion for an Order: (A) Approving Procedures for the Sale of Substantially All of the Debtors' Assets; (B) Scheduling an Auction; (C) Approving

Assumption and Assignment Procedures; (D) Approving Form of Notice; and (E) Granting Related Relief filed June 4, 2010. The Debtors in *In re River Road Hotel Partners, LLC, et al.*, 09 B 30029, filed a nearly identical motion on the same date. This court held a joint evidentiary hearing on the motions on August 23, 2010. For the reason stated in this Court's order entered October 5, 2010, *In re River Road Hotel Partners, LLC, et al.*, 09 B 30029, the Debtors' Motion is DENIED.

Dated: October 5, 2010

/s/
Hon. Bruce W. Black
United States Bankruptcy
Judge

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Chapter 11

Case No. 09 B 30029
(Jointly Administered)

Hon. Bruce W. Black

In re:	)
	)
RIVER ROAD HOTEL,	)
PARTNERS, LLC, *et al.*,	)
	)
Debtors.	)

Debtors' Motion for an Order: (A) Approving Procedures for the Sale of Substantially all of the Debtors' Assets; (B) Scheduling an Auction; (C) Approving Assumption and Assignment Procedures; (D) Approving Form of Notice; and (E) Granting Related Relief is Denied.

STATEMENT

Order Denying Debtors' Bid Procedures Motion

This matter is before the court on the *Debtors' Motion for an Order: (A) Approving Procedures for the Sale of Substantially all of the Debtors' Assets; (B) Scheduling an Auction; (C) Approving Assumption and Assignment Procedures; (D) Approving Form of Notice; and (E) Granting Related Relief* filed on June 4, 2010. The motion seeks, among other things, an order approving bid procedures that deny the secured creditors the ability to credit bid. The Debtors believe that they can prevent credit bidding by proceeding under section 1129(b)(2)(A)(iii) of the Bankruptcy Code[1], or in the alternative, for cause under sections 1129(b)(2)(A)(ii) and 363(k).

Amalgamated Bank[2] and the Federal Deposit Insurance Corporation[3] (referred to collectively as the "Lenders"), object to the motion. They argue that section 1129(b)(2)(A)(ii) is the exclusive means

---

[1] 11 U.S.C. § *ff*. Any reference to "section" or "the Code" is a reference to the Bankruptcy Code unless another reference is stated.

[2] Amalgamated Bank is acting as Trustee of Longview Ultra Construction Loan Investment Fund, f/k/a/ Longview Ultra I Construction Loan Investment Fund, in its capacity as the administrative agent for itself and San Diego National Bank, now part of U.S. Bank N.A. Amalgamated Bank should not be confused with the Amalgamated Bank of Chicago. The two are different entities.

[3] The FDIC is acting as receiver for San Diego Nation Bank. San Diego National Bank was closed on October 30, 2009, and the FDIC was appointed receiver. The FDIC sought to intervene by motion on July 29, 2010. An agreed order was entered on August 9, 2010, granting the FDIC's motion to intervene in connection with the current bid procedures motion.

to sell the Debtors' assets free and clear of liens under section 1129(b)(2)(A), and, as such, the Debtors can only deny the right to credit bid for cause. They believe the Debtors have not sustained this burden and therefore credit bidding must be allowed. This court agrees with the Lenders.

I. Use of section 1129(b)(2)(A)(iii) to Circumvent Credit Bidding

The Debtors, relying heavily on the Third Circuit's recent opinion in *In re Philadelphia Newspapers, LLC*, 599 F.3d 289 (3rd Cir. 2010), first seek to preclude credit bidding by proceeding under section 1129(b)(2)(A)(iii), as opposed to section 1129(b)(2)(A)(ii).[4] Section 1129(b)(2)(A)(iii) does not expressly provide the secured creditors with the right to credit bid. The majority in *Philadelphia Newspapers* approved the Debtors' proposed interpretation of section 1129(b)(2)(A)(iii). This court, however, finds Judge Ambro's well-reasoned dissent in *Philadelphia Newspapers* more persuasive. The Debtors, therefore, may not use section 1129(b)(2)(A)(iii) to sell their assets free and clear of liens. The Debtors must comply with the specific requirements of section 1129(b)(2)(A)(ii).

---

[4] The bid procedures' provision on credit bidding states: "The Plan Sale is being conducted under sections 1123(a) and (b) and 1120(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." Proposed Order, Addendum I, Docket Entry 356 (7/15/10).

II. No Cause Shown to Deny Credit Bidding

The Debtors next seek to suppress the secured creditors' right to credit bid under sections 1129(b)(2)(A)(ii) and 363(k). Pursuant to section 363(k), a secured creditor may credit bid up to the total amount of its allowed claim at a sale under 363(k) unless "the court for cause orders otherwise." 11 U.S.C. 363(k). Section 363 gives courts the discretion to decide what constitutes "cause" and the flexibility to fashion an appropriate remedy by conditioning credit bidding on a case-by-case basis. *See In re NJ Affordable Homes Corp.*, 2006 WL 2128624, 16 (Bankr.D.N.J.,2006) *citing In re 222 Liberty Assocs.*, 108 B.R. 971, 979 (Bankr. E.D. Pa. 1990); *Aetna Realty Invs., Inc. v. Monarch Beach Venture* (In re Monarch Beach Venture, Ltd.)166 B.R: 428, 433 (C.D. Cal. 1993).

On August 23, 2010, this court held an evidentiary hearing for the Debtors to establish cause to deny credit bidding. The Debtors asserted that the Lenders should be barred from credit bidding because: (1) the Lenders' actions caused the Debtors to fail; (2) allowing the Lenders to credit bid will chill the bidding process; and (3) there are still millions of dollars in mechanics' liens that are currently being litigated in state court. None of these alleged circumstances, nor any combination of them, constitute cause sufficient to justify denying the Lenders' right to credit bid at an auction.

First, the Debtors believe that the Lenders' actions caused the Debtors to fail. The Debtors,

however, did not assert, nor did the evidence show, that the Lenders breached their contracts or acted with any sort of intent to harm the Debtors. The Lenders were trying to protect their interests. Even in the event that the actions the Lenders took to protect their interests did in someway accelerate the Debtors' failures, it does not constitute cause to deny credit bidding in this court's judgment.

Second, the Debtors argue that allowing credit bidding will chill other potential bids. The potential to chill the bidding process has been recognized as a reason to deny credit bidding. *See* 3 *Collier on Bankruptcy* ¶ 363.09[1] (Alan N Resnick & Henry J. Sommers eds., 16th ed.). The Debtors, however, did not provide any specific evidence to show this assertion to be true in this case. Instead, the Debtors were content to assert that credit bidding generally chills the bidding process. Such an assertion, without any evidence showing that credit bidding will chill the process in this case, does not satisfy the Debtors' burden.

Finally, the Debtors' believe that the Lenders should not be allowed to credit bid because the amount and priority of the mechanics' liens against the property have not been resolved. Section 363, however, allows this court to alleviate this concern by placing conditions upon a secured creditor's right to credit bid without denying the right altogether. *See In re NJ Affordable Homes Corp.*, 2006 WL 2128624, 16 (Bankr.D.N.J. 2006). For example, courts have required secured creditors to put cash in escrow, pay a portion of the bid in cash, or furnish a

letter of credit when the amount and validity of an alleged senior lien is in dispute. *See In re Octagon Roofing*, 124 B.R. 522, 526 (Bankr. N.D. Ill. 1991); *In re Diebart Bancroft*, 1993 WL 21423, *5 (E.D.. La. Jan. 26, 1993). In this instance, a similar condition on credit bidding appears to be warranted to ensure that all mechanics' liens that are senior to the Lenders are protected.

III. Conclusion

The Debtors may not use section 1129(b)(2)(A)(iii) to circumvent the Lenders' right to credit bid. Additionally, the Debtors did not show sufficient cause to deny credit bidding under 1129(b)(2)(A)(ii) and 363(k). The Debtors' motion is, therefore, DENIED.

Dated: October 5, 2010

/s/
Hon. Bruce W. Black
United States Bankruptcy
Judge