

Supreme Court, U.S.
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No. 11-166

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*

PETITIONERS' REPLY BRIEF

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CORPORATE DISCLOSURE

The corporate disclosure statement included in the petition for writ of certiorari remains accurate.

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Reply in Support of Petition for Certiorari

ARGUMENT

Respondent attempts to manufacture a jurisdiction problem by characterizing the case as moot. This argument completely misses the mark. The petition does not ask the Court to determine whether a particular chapter 11 plan may be confirmed, but rather whether Petitioners may pursue an auction sale of assets free of liens using bid procedures that prohibit its secured creditor from credit bidding at the sale. The parties continue to actively contest that important question of law that has split the circuits. The Court's decision will therefore have a concrete impact on the legal rights of the parties going forward. There is an active controversy this Court needs to resolve.

Respondent's vigorous opposition to Petitioners' proposed bid procedures in this case demonstrates that the issue presented is much more than a mere interesting academic question. Respondent concedes that the right to credit bid at a bankruptcy sale of collateral is a vital protection for secured creditors. Whether that right must be provided in any sale under chapter 11 is therefore critically important, affecting billions of dollars in secured debt. The Seventh Circuit's decision below creates a square conflict on this issue with prior decisions by the Fifth and Third Circuits and upsets the uniform application of the Bankruptcy Code. The Court should grant the writ of certiorari and resolve this issue.

I. The Case is Not Moot.

As it did below, Respondent attempts to distract the Court from the important issue presented in this case by raising the specter of mootness. Respondent's mootness argument has been repeatedly rejected by the bankruptcy court and was readily dispatched by the Seventh Circuit. *See* Pet. App. at 7a-9a. The same result should obtain here.

A. There is a live controversy and the parties have a concrete interest in the outcome.

Simply stated, a case is moot only if the issue presented is no longer live or the parties lack a cognizable interest in the outcome. *Powell v. McCormack*, 395 U.S. 486, 496 (1969). The Court has described a legally cognizable interest as "definite and concrete, touching on the legal relations of parties having adverse legal interests . . . a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

In this case, there is no doubt that a live controversy exists. Petitioners are still pursuing an auction sale of their assets and the parties continue to vigorously contest whether section 1129(b)(2)(A) of the Bankruptcy Code requires Petitioners to permit Respondent to credit bid at the auction. In recognition of this ongoing dispute, the bankruptcy court has twice refused to lift the automatic stay imposed by 11 U.S.C. § 362(a) while this appeal has been pending—including most recently just two weeks

ago—despite Respondent’s contention, *inter alia*, that the appeal is moot. *See* Bankruptcy Dkt. No. 505.

Likewise, the parties have a legally cognizable interest in the outcome of this appeal. If the Court grants review and agrees with Petitioners’ interpretation of section 1129(b)(2)(A), Petitioners will implement bid procedures for an asset sale that preclude Respondent from credit bidding. If the judgment of the lower court is affirmed, Petitioners will be required to consider alternative strategies for exiting bankruptcy and Respondent will renew its request for relief from the automatic stay. Accordingly, this controversy “touch[es] on the legal relations of parties having adverse legal interests” and a decision from the Court will provide “specific relief through a decree of a conclusive character” in this bankruptcy case. *Rice*, 404 U.S. at 246.

Respondent attempts to conflate the issue presented to create a mootness problem that does not exist by diverting the Court’s attention from the specific bid procedure provision on appeal to the underlying asset purchase agreement and chapter 11 plan. *See, e.g.*, Opp’n at 17-18. The specific order on appeal, however, is the bankruptcy court’s denial of Petitioners’ motion to establish bid procedures for the sale of collateral because it precludes credit bidding. *See* Pet. App. at 40a-45a. Neither the adequacy of the underlying asset purchase agreement nor the confirmability of Petitioners’ chapter 11 plan was before the bankruptcy court or even addressed in the order below. Consequently, neither is at issue in this appeal. The *only* issue before the Court is whether Petitioners may establish bid procedures that preclude Respondent from credit bidding at an auction sale of

