RADLAX GATEWAY HOTEL, LLC, AND RADLAX GATEWAY DECK, LLC

v.

AMALGAMATED BANK.

UNITED STATES SUPREME COURT CASE NO. 11-166

Index of Materials

Brief Procedural Background and Timeline of

RADLAX GATEWAY HOTEL, LLC, AND RADLAX GATEWAY DECK, LLC

v.

AMALGAMATED BANK.

UNITED STATES SUPREME COURT CASE NO. 11-166

October 5, 2010:	Bankruptcy Court denied Debtors' Bid Procedures Motions.
October 14, 2010:	Debtors/Petitioners filed notices of appeal with the Bankruptcy Court, and motions for certification of their appeals directly to the United States Court of Appeals for the Seventh Circuit.
November 4, 2010:	Bankruptcy Court entered its Certification for Direct Appeal to the Seventh Circuit.
November 30, 2010:	Seventh Circuit entered order authorizing and consolidating the direct appeals.
June 28, 2011:	Seventh Circuit entered an order affirming the Bankruptcy Court's ruling.
August 5, 2011:	Petition for a writ of certiorari filed (Response would normally be due September 9, 2011).
September 1, 2011:	Order entered extending time to file response to petition to and including October 11, 2011.
October 5, 2011:	Order entered further extending time to file response to petition to and including October 18, 2011.
October 18, 2011:	Brief of Respondent Amalgamated Bank in opposition to certiorari filed.
October 28, 2011:	Reply of Petitioners RadLAX Gateway Hotel, LLC, et al. in support of certiorari filed.[1]
December 12, 2011:	Petition GRANTED.
January 26, 2012:	Joint appendix filed.

[1] Because a plan was confirmed in the River Road case during this process, the River Road Debtors are no longer parties to the appeal and RadLAX Gateway Hotel, LLC, et al. are the sole Petitioners.

January 26, 2012:	Brief on the merits of Petitioners RadLAX Gateway Hotel, LLC, et al. filed.
February 3, 2012:	Order entered setting matter for argument on Monday, April 23, 2012.
February 10, 2012:	Order entered extending time to file Respondent's brief to and including March 2, 2012.
March 2, 2012:	Brief on the merits of Respondent Amalgamated Bank filed.

** Per rules, Petitioners may file a reply brief within 30 days after Respondent's brief, or no later than one week before date of oral argument, whichever is earlier.*

No. 11-166

In the Supreme Court of the United States

RADLAX GATEWAY HOTEL, LLC, AND RADLAX GATEWAY DECK, LLC

v.

AMALGAMATED BANK.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF PETITIONERS[1]

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[1] This brief has been adapted from the Petitioners' brief that was filed with the U.S. Court of Appeals for the Seventh Circuit and is being used for strictly educational purposes. Angela Degeyter is in real life an Associate with Vinson & Elkins LLP.

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STATEMENT OF THE ISSUE PRESENTED FOR APPEAL

Whether the Bankruptcy Court erred as a matter of law when it denied the Debtors' Bid Procedures Motions and held that the Debtors must follow the requirements of 11 U.S.C. § 1129(b)(2)(A)(ii) and provide their secured creditors an opportunity to credit bid even if the Debtors intend to sell their assets pursuant to a chapter 11 plan and provide their secured creditors with the indubitable equivalent of their secured claims under 11 U.S.C. § 1129(b)(2)(A)(iii).

PARTIES BELOW

In addition to the parties listed in the caption, River Road Hotel Partners, LLC, River Road Expansion Partners, LLC, River Road Restaurant Pads, LLC, River Road Hotel Mezz, LLC, River Road Expansion Mezz, LLC, and River Road Restaurant Mezz, LLC were parties to the consolidated appeal before the Court of Appeals.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in *River Road Hotel Partners, LLC v. Amalgamated Bank (In re River Road Hotel Partners, LLC)*, Nos. 10-3597 & 10-3598, is reported at 651 F.3d 642.

JURISDICTIONAL STATEMENT

On August 17, 2009 (the "Petition Date"), River Road Hotel Partners, LLC and River Road Expansion Partners, LLC (collectively, the "River Road Debtors"), along with River Road Restaurant Pads, LLC and three related mezzanine entities, and RadLAX Gateway Hotel, LLC and RadLAX Gateway Deck, LLC (collectively the "RadLAX Debtors" and together with the River Road Debtors, the "Debtors")[2] all filed separate voluntary petitions for relief under chapter 11 of Title 11 of the United States Code, §§ 101, *et seq*. (the "Bankruptcy Code") in the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division (the "Bankruptcy Court"). The Bankruptcy Court exercised jurisdiction over the Debtors' bankruptcy cases (collectively, the "Bankruptcy Cases") pursuant to 28 U.S.C. § 157(b).

On October 5, 2010, the Bankruptcy Court entered orders in the Bankruptcy Cases denying Debtors' respective Bid Procedures Motions, holding, *inter alia*, that

[2] Recognizing that the River Road Debtors are no longer parties to this appeal, Petitioners will nonetheless use the term "Debtors" throughout this brief for ease of reference.

11 U.S.C. § 1129(b)(2)(A)(iii) does not, as a matter of law, permit the Debtors to sell their assets free of liens through a chapter 11 plan without providing secured creditors an opportunity to credit bid at such a sale. On November 4, 2010, the Bankruptcy Court entered its Certification for Direct Appeal to Court of Appeals for the Seventh Circuit in the Debtors' cases. On November 30, 2010, the Seventh Circuit entered an order authorizing the direct appeals. Accordingly, the Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 158(d)(1). On June 28, 2011, the Seventh Circuit affirmed the Bankruptcy Court's ruling. Petitioners filed a timely Petition for a Writ of Certiorari on August 5, 2011, which the Court granted on December 12, 2011. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case turns primarily on the interpretation of 11 U.S.C. § 1129(b)(2)(A), which provides:

(b)(2) 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 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.

This case also involves 11 U.S.C. §§ 102, 363(k), 1123(a)(5), and 1129(b)(1) (discussed below).

STATEMENT OF THE CASE

On June 4, 2010, the Debtors filed their respective Joint Chapter 11 Plans (as amended, the "Plans"), both of which contemplate the auction sale of substantially all of the Debtors' respective assets (the "Plan Sales") with the distribution of

proceeds to certain creditor constituencies in each case. On that same day the Debtors each filed a 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 (the "Bid Procedures Motions"), pursuant to which they sought to establish procedures for the Plan Sales, including a request to preclude the Debtors' respective secured creditors from credit bidding as a matter of law under 11 U.S.C. § 1129(b)(2)(A)(iii), or, alternatively, for cause under 11 U.S.C. § 363(k). Certain of the Debtors' creditors objected to the Bid Procedures Motions.

On October 5, 2010, the Bankruptcy Court entered an Order Denying Debtors' Bid Procedures Motion in the River Road Bankruptcy Case, holding that (a) the Debtors could not sell their assets through a chapter 11 plan under 11 U.S.C. § 1129(b)(2)(A)(iii) without providing secured creditors with an opportunity to credit bid under 11 U.S.C. § 1129(b)(2)(A)(ii) and (b) the Debtors did not demonstrate that there was cause to deny credit bidding under 11 U.S.C. § 363(k). In support of its holding, the Bankruptcy Court adopted the reasoning of the dissent in *In re Philadelphia Newspapers, LLC*, 599 F.3d 298 (3d Cir. 2010). On that same date, the Bankruptcy Court entered a substantially similar order in the RadLAX Bankruptcy Case (collectively, the "Orders").

On October 14, 2010, the Debtors filed their respective notices of appeal with the Bankruptcy Court, appealing only the Bankruptcy Court's ruling that the Debtors cannot as a matter of law sell their assets through a chapter 11 plan without providing secured creditors an opportunity to credit bid under 11 U.S.C. § 1129(b)(2)(A)(ii). On that same date, the Debtors filed their respective motions for certification of their appeals directly to the United States Court of Appeals for the Seventh Circuit (the "Seventh Circuit"). On November 4, 2010, the Bankruptcy Court entered its Certification for Direct Appeal to the Seventh Circuit. On November 30, 2010, the Seventh Circuit Court entered an order authorizing and consolidating the direct appeals.

FACTUAL BACKGROUND

I. *The River Road Debtors*

The River Road Debtors own the InterContinental Chicago O'Hare Hotel (the "InterContinental O'Hare"), a luxury hotel consisting of 556 rooms and located just minutes from O'Hare International Airport and 14 miles west of downtown Chicago. To construct the hotel, the River Road Debtors obtained a $128,611,313 construction loan (the "River Road Hotel Loan") in February, 2007 from

Amalgamated Bank, as Trustee of the Longview Ultra I Construction Loan Investment Fund, in its capacity as administrative agent for itself and San Diego National Bank (the "River Road Lender"). In October, 2008, the River Road Hotel Loan was increased by $6,625,000 to $135,236,313. As of the Petition Date, the River Road Debtors owed the River Road Hotel Lender in excess of $160,000,000 on account of the River Road Hotel Loan.

The InterContinental O'Hare opened in September, 2008 during one of the most severe economic declines in recent history. Shortly after the InterContinental O'Hare's opening, the River Road Hotel Lender refused to advance additional funding to enable the River Road Debtors to make final payments to contractors and suppliers. As a result, mechanic's lien claimants asserted approximately $9.5 million of liens against the hotel. Due to the mounting mechanic's lien lawsuits asserted against the River Road Debtors, and the River Road Lender's refusal to negotiate a consensual resolution, the River Road Debtors were forced to commence the River Road Bankruptcy Case.

II. *The RadLAX Debtors*

The RadLAX Debtors own the Radisson Hotel at Los Angeles International Airport (the "Radisson LAX"), a 580-room hotel that is the closest hotel (within walking distance) to Los Angeles International Airport.

In November, 2007, the RadLAX Debtors obtained a $142,000,000 construction loan (the "RadLAX Loan") from Amalgamated Bank, as Trustee of the Longview Ultra Construction Loan Investment Fund, in its capacity as administrative agent for itself and San Diego National Bank (the "RadLAX Lender" and together with the River Road Lender, the "Lenders") to acquire the property and renovate the Radisson LAX. As of the Petition Date, the RadLAX Debtors owed the RadLAX Lender in excess of $120,000,000 on account of the RadLAX Loan.

In March, 2009, at which time the RadLAX Debtors had completed approximately 60% of improvements to the property, the RadLAX Lender terminated all funding under the RadLAX Loan. As a result, more than $15 million of mechanic's liens were asserted against the property, which subjected the RadLAX Debtors to numerous lawsuits in various California state courts. Due to the mounting litigation and the RadLAX Lender's refusal to negotiate a consensual resolution, the RadLAX Debtors were forced to commence the RadLAX Bankruptcy Case.

III. *The Debtors' Reorganization Efforts*

Following an extensive marketing effort on the part of the Debtors and their financial advisors, in November, 2009, the River Road Debtors procured O'Hare River & Technology Hotel, LLC (the "River Road Stalking Horse") as a purchaser for substantially all of the River Road Debtors' assets for a cash purchase price of $42,000,000. The RadLAX Debtors procured LAX Century & Sepulveda Hotel, LLC (the "RadLAX Stalking Horse" and together with the River Road Stalking Horse, the "Stalking Horse Entities") as a purchaser for substantially all of the RadLAX Debtors' assets for a cash purchase price of $47,500,000. Though the Stalking Horse Entities have common ownership, the Stalking Horse Entities are not affiliates or insiders of the Debtors, as those terms are defined in Bankruptcy Code §§ 101(2) and (31).

On June 4, 2010, the Debtors filed their respective Plans and Bid Procedures Motions, which contemplated the sale of substantially all of the Debtors' assets to the Stalking Horse Entities, subject to higher and better bids after additional marketing efforts (the "Plan Sales"). The Bid Procedures Motions sought to preclude the Lenders from credit bidding at the Plan Sales, while allowing them to bid cash just like every other potential bidder. Accordingly, the Debtors proposed to confirm their Plans by providing the Lenders with the "indubitable equivalent" of their secured claims under 11 U.S.C. § 1129(b)(2)(A)(iii), instead of granting the Lenders an opportunity to credit bid at the Plan Sales under 11 U.S.C. § 1129(b)(2)(A)(ii).

On July 8, 2010, the Lenders and the FDIC filed separate objections to the Bid Procedures Motions,[3] in which they opposed the Debtors' attempts to preclude the Lenders from credit bidding at the Plan Sales. On July 20, 2010, the Debtors filed their omnibus replies to the objections.

IV. *The Bankruptcy Court's Opinion*

On October 5, 2010, the Bankruptcy Court entered the Orders denying the Bid Procedures Motions, ruling that the Debtors could not preclude the Lenders from credit bidding at the Plan Sales as a matter of law under 11 U.S.C. § 1129(b)(2)(A)(iii). The Bankruptcy Court acknowledged that the Third Circuit in *Philadelphia New spapers* had approved nearly identical bid procedures and held that a chapter 11 plan involving an auction sale of assets free of liens without credit bidding could be confirmed by providing the secured creditor with the indubitable

[3] Other parties in interest filed objections to the Bid Procedures Motions that are not applicable or relevant to these appeals.

equivalent of its secured claim under § 1129(b)(2)(A)(iii). The Bankruptcy Court found the dissenting opinion in *Philadelphia Newspapers* more persuasive, however, and held that the Debtors could not proceed with the auction unless they allowed credit bidding and pursued confirmation pursuant to § 1129(b)(2)(A)(ii). Recognizing the importance of the issue to a broad range of bankruptcy cases, the Bankruptcy Court certified an immediate appeal to the Seventh Circuit.

In the meantime, the bankruptcy cases continued and the Lenders filed a motion for relief from the automatic stay pursuant to § 362(d)(1) and § 362(d)(2) of the Code to pursue its state law foreclosure rights against its collateral. The Bankruptcy Court denied that motion. For their part, the Debtors filed an amended chapter 11 plan and an amended asset purchase agreement in the Bankruptcy Court, both of which were virtually identical to their predecessors except that (1) the purchase price for the Debtors' assets rose to $ 55 million to account for the appreciation in value of the assets during the bankruptcy cases, and (2) the deadlines for approval of the bid procedures motion and other events were extended.

V. *The Seventh Circuit Opinion*

The Seventh Circuit accepted the Debtors' direct appeal. The Court of Appeals heard argument in April 2011 and issued an opinion affirming the Bankruptcy Court's decision in June 2011.

The Seventh Circuit concluded that § 1129(b)(2)(A) did not have a plain meaning because subsection (iii) does not specify whether it applies to any type of chapter 11 plan or, instead, only to plans not covered by subsections (i) and (ii). Having established an ambiguity, the court looked beyond the plain text to canons of statutory interpretation, legislative history, and secured creditor protections found in other parts of the Bankruptcy Code to conclude that any plan involving the sale of assets free of liens could not be confirmed under subsection (iii), but only under subsection (ii).

VI. *Subsequent Events, Including the Court's Grant of Certiorari*

Shortly after the Seventh Circuit's decision, in July 2011, the Bankruptcy Court confirmed the Lenders' chapter 11 plan in the River Road Cases. The River Road Debtors therefore did not seek review of the Seventh Circuit's ruling.

The RadLAX Bankruptcy Cases have not concluded, however, and the RadLAX Debtors petitioned for a writ of certiorari. The Court granted the petition on December 12, 2011. Noting that the Court had granted certiorari, the

Bankruptcy Court denied the Lenders' renewed motion for relief from the automatic stay.

SUMMARY OF ARGUMENT

This appeal presents an important question and concerns one of the most hotly debated areas of bankruptcy law, which has resulted in a split in the Circuit Courts of Appeals: whether the Bankruptcy Code provides secured creditors with the right to credit bid, as a matter of law, whenever a debtor proposes to sell their collateral free and clear of liens under a chapter 11 plan. The plain language of Bankruptcy Code § 1129(b)(2)(A) does not provide such absolute protection. Because the language and structure of the statute are clear and unambiguous, references to alternative canons of statutory construction and legislative history, such as those relied upon by the Seventh Circuit Court of Appeals below, are unnecessary and inappropriate. Likewise, references to secured creditor protections provided in other sections of the Bankruptcy Code or under non-bankruptcy law are irrelevant and, in any event, cannot override the plain language of § 1129(b)(2)(A).

Bankruptcy Code § 1129(b)(2)(A) provides three distinct ways that a debtor may satisfy the "fair and equitable" requirement to confirm a chapter 11 plan over the dissent of a secured creditor class. Subsection (i) states that the plan may provide that the secured creditor retain its lien and be paid deferred cash payments totaling at least the present value of its collateral on the date of plan confirmation. Subsection (ii) states that the plan may provide for a sale of the secured creditor's collateral free and clear of liens, subject to the creditor's right to credit bid under Bankruptcy Code § 363(k), with such liens attaching to the sale proceeds. Finally, subsection (iii) of Bankruptcy Code § 1129(b)(2)(A) states that the plan may provide for the secured creditor to receive the indubitable equivalent of its secured claim. The statute is plainly written in the disjunctive, as shown by the use of the word "or" between its three distinct subparts. Only one of those three subparts—subsection (ii)—incorporates the credit bidding requirement of Bankruptcy Code § 363(k).

In contravention of the strictures of statutory construction, the courts below held that, because the Debtors proposed to sell collateral free of liens, they *must* pursue confirmation through subsection (ii), which provides the right to credit bid, instead of subsection (iii), which provides for the secured creditor to receive the indubitable equivalent of its secured claim. In addition to ignoring the plain language and structure of Bankruptcy Code § 1129(b)(2)(A), the lower courts' rulings conflict with two recent Courts of Appeals decisions allowing debtors to pursue chapter 11 plan sales without credit bidding under subsection (iii). *See In re*

Philadelphia Newspapers, LLC, 599 F.3d 298 (3d Cir. 2010); *In re The Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009).

The application of Bankruptcy Code § 1129(b)(2)(A) according to its plain meaning maintains the Bankruptcy Code's careful balance in protecting the interests of secured creditors in the value of their collateral while providing debtors with the flexibility to pursue confirmation of a chapter 11 plan and providing bankruptcy judges with the discretion to determine whether the "fair and equitable" requirements of the Bankruptcy Code have been satisfied. The Seventh Circuit's decision disregards the plain meaning of Bankruptcy Code § 1129(b)(2)(A) and, as a consequence, upsets this careful balance. Accordingly, this Court should reverse the Seventh Circuit and allow the Debtors to pursue the Plan Sales according to the procedures set forth in the Bid Procedures Motion.

ARGUMENT

I. *Standard of Review*

This appeal involves a review of the Court of Appeals' interpretation of Bankruptcy Code § 1129(b)(2)(A)—an issue of law. Accordingly, this Court should apply a *de novo* standard of review. *See, e.g., Pullman–Standard v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982). When *de novo* review is compelled, no form of appellate deference is acceptable. *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991).

II. *The Court of Appeals Erred In Concluding That The Debtors Must Meet The Requirements Of 11 U.S.C. § 1129(b)(2)(A)(ii) And Provide Secured Creditors The Right To Credit Bid At The Plan Sales Even Though The Debtors Propose To Provide The Indubitable Equivalent Of The Secured Creditors' Claims Under 11 U.S.C. § 1129(b)(2)(A)(iii).*

The statutory bases on which the Debtors rely in support of their Bid Procedures Motions and to confirm their Plans are Bankruptcy Code §§ 1123(a)(5)(D) and 1129(b)(2)(A). Bankruptcy Code § 1123(a)(5)(D) states that "a plan shall provide adequate means for the plan's implementation, such as [a] sale of all or any part of the property of the estate, either subject to or free of any lien." 11 U.S.C. § 1123(a)(5)(D).[4] Because the phrase "adequate means for implementation" is not defined, courts must look to Bankruptcy Code § 1129(b)'s plan confirmation requirements to see what standards must be met for plan confirmation involving an

[4]This statute does not contain any reference to a dissenting secured creditor's right to credit bid at such a sale.

asset sale.

As a general rule, a chapter 11 plan must be accepted by all "impaired" classes of creditors (creditors that will receive less than the full amount of their claims) to be confirmed. Bankruptcy Code § 1129(b)(2)(A), however, provides that a debtor may confirm a chapter 11 plan over the dissent of an impaired class of claims (known as a "cramdown") so long as 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)(1). Bankruptcy Code § 1129(b)(2)(A) provides that a plan is "fair and equitable" with respect to a class of dissenting secured creditors if the following requirements are met:

> (i) (I) that 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,[5] 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) (emphasis added).

The Debtors intended to sell substantially all of their assets through the Plans after conducting the Plan Sales as expressly authorized by Bankruptcy Code § 1123(a)(5)(D). The Plan Sales were to be governed by the procedures set forth in the Bid Procedures Motions, which did not allow the Lenders to credit bid at the Plan Sales. The Debtors intended to confirm their Plans by providing the Lenders with the "indubitable equivalent" of their secured claims under Bankruptcy Code §

[5] Bankruptcy Code § 363(k) provides a secured creditor with the right to credit bid at the sale of its collateral, unless the court for cause orders otherwise. *See* 11 U.S.C. § 363(k).

1129(b)(2)(A)(iii). Notwithstanding the foregoing, the Bankruptcy Court denied the Bid Procedures Motions, holding instead that the Debtors must comply with Bankruptcy Code § 1129(b)(2)(A)(ii) and provide the Lenders an opportunity to credit bid if they intend to sell their assets pursuant to the Plans. The Seventh Circuit affirmed. In doing so, the lower courts erred as a matter of law because they ignored the plain language and structure of the Bankruptcy Code, which allows the Debtors to satisfy the "fair and equitable" requirement for a cram-down plan through any one of the three alternatives enumerated in Bankruptcy Code § 1129(b)(2)(A).

A. This Court Should Fulfill The Cardinal Rule Of Statutory Construction And Enforce The Plain Meaning Of Bankruptcy Code § 1129(b)(2)(A)(iii).

This Court has long embraced the primary "plain meaning" rule of statutory construction, which commands that courts must give the words of the statute their ordinary and common meaning. *BedRoc, Ltd. v. United States*, 541 U.S. 176, 183 (2004); *Helvering v. New York Trust Co.*, 292 U.S. 455, 469 (1934) (citing *Old Colony R. Co. v. Commissioner*, 284 U.S. 552, 560 (1932)). "If the language be plain, there is nothing to construe." *Helvering*, 292 U.S. at 469 (citing *Hamilton v. Rathbone*, 175 U.S. 414 (1899)).

In other words, when the plain wording of the statute is clear, courts will not consider other canons of statutory interpretation. As this Court has admonished when interpreting the Bankruptcy Code:

> We have stated time and again that 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."

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (internal citations omitted).*See also United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989) ("where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'").

Applying this well-established maxim to these cases, the Court should conclude that Bankruptcy Code § 1129(b)(2)(A) unambiguously provides three separate and distinct alternatives for the Debtors to meet the fair and equitable requirement for confirming the Plans over the objections of the Lenders, one of which is to provide the Lenders with the indubitable equivalent of their secured claims, while not allowing them to credit bid at the Plan Sales.

B. Bankruptcy Code § 1129(b)(2)(A) Is Clear And Unambiguous.

The structure of Bankruptcy Code § 1129(b)(2)(A) enumerates three options for satisfying the "fair and equitable" requirement of § 1129(b) that are connected by the disjunctive **"or,"** reflecting Congress's intent to allow a debtor to choose any one of the three alternatives. Indeed, the Bankruptcy Code itself provides the specific rule of that the use of the term "or" in the statute "is not exclusive." 11 U.S.C. § 102(5).[6]

The Courts of Appeals for the Third, Fifth and Tenth Circuits have all expressly recognized that the use of the disjunctive "or" in Bankruptcy Code § 1129(b)(2)(A) allows a debtor to satisfy the "fair and equitable" requirement through any one of the three alternatives. *See 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 subsection (i), (ii), *or* (iii), and need not satisfy more than one section.") (emphasis in original); *Pacific Lumber*, 584 F.3d at 245-46 ("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" and therefore "[c]lause (iii) thus affords a distinct basis for confirming a plan if it offered the [secured creditors] the 'realization . . . of the indubitable equivalent of such claims.'"); *Wade v. Bradford*, 39 F.3d 1126, 1130 (10th Cir. 1994) ("because the debtors' plan satisfied the requirements of § 1129(b)(2)(A)(i), creditor was not entitled to the 'indubitable equivalent' of his claims as described in § 1129(b)(2)(A)(iii).").

Bankruptcy Code § 1129(b)(2)(A)'s plain language limits the opportunity to credit bid at a plan sale to subsection (ii)—just one of the alternatives enumerated in the statute. Indeed, by use of the term "including," it is arguable that Congress did not even intend for this three-prong list to be an exhaustive enumeration of what is "fair and equitable" to a dissenting secured creditor. *See* 11 U.S.C. § 102(3) ("'includes' and 'including' are not limiting.").

Had Congress intended to impose a universal right to credit bid at plan sales regardless of what subsection of § 1129(b)(2)(A) the debtor chose to satisfy, it easily could have done so. Most obviously, Congress could have drafted Bankruptcy Code § 1123(a)(5)(D) to provide that "a plan shall provide adequate means for the plan's

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[6] The statutory note to Bankruptcy Code § 102 further explains that "[paragraph (5) specifies that 'or' is not exclusive. Thus, if a party 'may do (a) or (b)', then the party may do either or both. The party is not limited to a mutually exclusive choice between the two alternatives." 11 U.S.C.A. § 102 (West 2010) (Revision Notes and Legislative Reports).

implementation, such as [a] sale of all or any part of the property of the estate, either subject to or free of any lien ***subject to section 363(k) of this title***." This simple addition would clearly have imposed a universal right to credit bid for all plan sales. Alternatively, Congress could have drafted Bankruptcy Code § 1129(b)(2)(A)(iii) as follows: "With respect to a class of secured claims, ***except as provided in subsections (i) and (ii) of this section***, the plan provides for the realization by such holders of the indubitable equivalent of such claims."[7] This phrasing would have limited the applicability of subsection (iii) to situations not already covered by subsections (i) or (ii). However, there is nothing in the plain language of Bankruptcy Code §§ 1123(a)(5)(D) or 1129(b)(2)(A), as drafted, that imposes such an absolute right to credit bid at any plan sale.

Furthermore, Congress knew how to limit the use of the "indubitable equivalent" standard. In Bankruptcy Code § 361(3)—the only other section of the Code to use the phrase—Congress limited the scope of the "indubitable equivalent" standard by specifying what it does not include. 11 U.S.C. § 361(3).[8]

Finally, the operative clause at the beginning of Bankruptcy Code § 1129(b)(2)(A)—"the plan provides"—demonstrates that it is the plan proponent (in this case, the Debtors) that determines which of the three alternatives to pursue to satisfy the "fair and equitable" requirement of Bankruptcy Code § 1129(b). It is not, as the lower courts held, the particular method of the plan's implementation that determines which alternative requirement under § 1129(b)(2)(A) must be met. For example, the statute does not dictate that a debtor must proceed under subsection (ii) if it intends to sell assets pursuant to a plan. To the contrary, § 1129(b)(2)(A) provides a debtor with an alternative means under subsection (iii) to confirm a plan even if the debtor intends to proceed with a plan sale.

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[7] Indeed, Congress used this exact same phrase to limit the applicability of numerous other sections of the Bankruptcy Code. *See, e.g.*, 11 U.S.C. §§ 348(a), 362(a), 362(c), 365(f)(1), 365(g), 366(a), 502(b), 509(a), 523(c)(1), 524(e), 541(a)(1), 542(a), 547(b), 547(e)(2)(A), 549(a), 552(a), 766(h), 945(b), 1112(e), 1122(a), 1301(a), 1307(c).

[8] 11 U.S.C. § 361, entitled "Adequate protection" provides, in pertinent part (emphasis added),

When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by—

* * *

(3) granting such other relief, *other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense*, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

Because both the language and structure of § 1129(b)(2)(A) are clear and unambiguous, the cardinal rule of statutory interpretation applies here and thus, as this Court instructs, "judicial inquiry is complete." *Germain*, 502 U.S. at 254. The Court should therefore enforce the plain meaning of Bankruptcy Code § 1129(b)(2)(A) and allow the Debtors to proceed with the Plan Sales pursuant to the terms and conditions set forth in the Bid Procedures Motions.

C. Using Legislative History to Override the Clear Language of a Statute is Inappropriate.

Because Bankruptcy Code § 1129(b)(2)(A) is clear and unambiguous, the Court should not consider extrinsic sources, such as legislative history, to reach a particular interpretation of that statute. As this Court has instructed, there is no need to examine legislative history where the words of a statute are clear:

> As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. . . Legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in "looking over a crowd and picking out your friends."

Exxon Mobile Corp. v. Allapattah Serv., Inc., 545 U.S. 546, 568 (2005) (Kennedy, J.).*See also Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("If one were to search for an interpretive technique that, *on the whole*, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history.") (emphasis in original).

III. *The Weight Of Authority Supports The Debtors' Position.*

Both the United States Court of Appeals for the Third Circuit in *Philadelphia Newspapers* and the United States Court of Appeals for the Fifth Circuit in *Pacific Lumber* recently enforced the plain language of Bankruptcy Code § 1129(b)(2)(A) to allow debtors to sell assets free and clear of liens through plans without providing their secured creditors an opportunity to credit bid because their plans proposed to provide the secured creditors with the indubitable equivalent of their secured claims under § 1129(b)(2)(A)(iii). At least one bankruptcy court has also reached the same conclusion. *See In re CRIIMI MAE, Inc.*, 251 B.R. 796, 805-06 (Bankr. D. Md. 2000). The thorough analysis presented in the *Philadelphia Newspapers* and *Pacific Lumber* decisions (as opposed to the mental gymnastics required by the Seventh

Circuit's opinion) provide persuasive authority for this Court's adherence to the plain language of the statute.

A. The Third Circuit's Decision In *Philadelphia Newspapers* Endorses The Plain Meaning Interpretation Of Bankruptcy Code § 1129(b)(2)(A)

In March, 2010, the Third Circuit in *Philadelphia Newspapers* affirmed a district court's decision permitting the debtors to sell substantially all of their assets free of liens without providing secured creditors an opportunity to credit bid under § 1129(b)(2)(A)(iii). The facts in *Philadelphia Newspapers* are similar to the facts of these cases. A few months after seeking protection under chapter 11 of the Bankruptcy Code, the debtors filed a joint chapter 11 plan, through which they proposed to sell substantially all of their assets free of liens at a public auction. *Philadelphia Newspapers*, 599 F.3d at 301. At the same time, the debtors signed an asset purchase agreement with a stalking horse bidder, controlled by the debtors' insiders, to purchase the debtors' assets for $37 million in cash. *Id*. at 302. The plan also provided that the debtors would transfer their Philadelphia headquarters, valued at $29.5 million and subject to the secured lenders' lien, to the secured lenders subject to a two-year, rent-free lease. *Id*. In furtherance of the plan, the debtors filed a motion to approve certain bid procedures that precluded their secured lenders (which were owed more than $300 million) from credit bidding.[9] *Id*. The debtors sought plan confirmation under Section 1129(b)(2)(A)(iii) by providing the secured lenders with the indubitable equivalent of their secured claims. *Id*.

The bankruptcy court denied the debtors' bid procedures motion, reasoning that while the debtors intended to proceed under § 1129(b)(2)(A)(iii), the plan contemplated a sale and, therefore, the secured lenders must be afforded the right to credit bid, as provided by § 1129(b)(2)(A)(ii). The district court reversed the bankruptcy court, holding that the plain language of § 1129(b)(2)(A) provides three distinct alternatives to meet the "fair and equitable" requirement of § 1129(b), including conducting a sale of collateral free and clear of liens *without* credit bidding and providing secured creditors with the indubitable equivalent of their claims pursuant to subsection (iii). *Id*. at 302-03. In a 2-1 ruling, the Third Circuit affirmed the district court's decision, holding that "§ 1129 unambiguously permits a court to confirm a reorganization plan so long as secured creditors are provided the 'indubitable equivalent' of their secured interest." *Id*. at 304.

The majority, in an opinion authored by Circuit Judge D. Michael Fisher, recognized that "[c]hapter 11 of the Bankruptcy Code strikes a balance between two

[9] The Debtors modeled the Bid Procedures Motions on the same type of motion filed in the *Philadelphia Newspapers* case.

principal interests: facilitating the reorganization and rehabilitation of the debtor as an economically viable entity, and protecting creditors' interests by maximizing the value of the bankruptcy estate." *Id*. at 303. The court then looked to the plain language of § 1129(b)(2)(A) and concluded that it clearly sets forth three distinct options for satisfying the "fair and equitable" requirement in the disjunctive. *Id*.

The secured lenders nonetheless argued that the canon of statutory interpretation in which a specific clause should prevail over a general clause applies to § 1129(b)(2)(A), thereby limiting a debtor's ability to sell assets free of liens to subsection (ii), which specifically requires credit bidding. *Id*. at 306. The court rejected this argument, reasoning that the application of the "specific governs the general" canon of interpretation only applies in situations "where the more specific provision clearly place[s] a limitation on the general." *Id*. at 307 (citing *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996)). The court concluded that no such limitation existed in § 1129(b) and stated that:

> Although subsection (ii) specifically refers to a "sale" and incorporates a credit bid right under § 363(k), we have no statutory basis to conclude that it is the only provision under which a debtor may propose to sell its assets free and clear of liens. . . it is apparent here that Congress' inclusion of the indubitable equivalence prong intentionally left open the potential for yet other methods of conducting asset sales, so long as those methods sufficiently protected the secured creditor's interests.

Id. at 308. The court further elaborated that "[r]eading the statute in this manner significantly curtails the ways in which a debtor can fund its reorganization—an outcome at odds with the fundamental function of the asset sale, to 'provide adequate means for the plan's implementation.'" *Id*. at 308-09 (citing 11 U.S.C. § 1123(a)(5)(D)).

Alternatively, the secured lenders argued that the term "indubitable equivalent" used in § 1129(b)(2)(A)(iii) is ambiguous and thus the court should resort to other canons of statutory interpretation. *Id*. at 310. The court also rejected this argument, finding that "[t]hough broad, the phrase 'indubitable equivalent' is not unclear." *Id*. In concluding that indubitable equivalent is not ambiguous, the court relied upon dictionary definitions of the terms "indubitable" (not open to question or doubt) and "equivalent" (equal in force or amount). *Id*. The court concluded that the term "indubitable equivalent" under § 1129(b)(2)(A) "is the unquestionable value of a lender's secured interest in the collateral." *Id*. Notably, the court explained that:

> We are asked here not to determine whether the "indubitable equivalent" would necessarily be satisfied by the sale; rather we are asked to interpret the requirements of § 1129(b)(2)(A) as a matter of law. This distinction is critical. The auction of the Debtors' assets has not yet occurred. Other public bidders may choose to submit a cash bid for the assets. . . We are simply not in a position at this stage to conclude, as a matter of law, that this auction cannot generate the indubitable equivalent of the Lenders' secured interests in the Debtors' assets.

Id. at 312-13.

The same distinction applies here. The Debtors are not seeking a ruling that their Plans *will* provide the Lenders with the indubitable equivalent of their secured claims, but only that they be given an opportunity to conduct the Plan Sales and pursue confirmation under§ 1129(b)(2)(A)(iii). The confirmability of the Plans, including whether the Lenders are receiving the indubitable equivalent of their secured claims, must be made by the Bankruptcy Court at plan confirmation. The Lenders, and all similarly situated creditors, retain all of their rights to argue the fact issue of indubitable equivalence and other confirmation issues to the bankruptcy judge, who is the best equipped to adjudicate such issues, at that time.

Finally, the secured lenders in *Philadelphia Newspapers* argued that despite its plain language, § 1129(b)(2)(A) must be interpreted together with other sections of the Bankruptcy Code—primarily §§ Sections 1111(b)[10] and 363(k)—to incorporate the absolute right to credit bid in any circumstance. *Id*. at 314. The court summarized the secured lenders' argument as follows:

> At the heart of the Lenders' argument is the notion that the combined import of § 1111(b) and § 363(k) is a special protection afforded to secured lenders to recognize some value greater than their allowed secured claim -- either by treating their unsecured claim as a secured deficiency claim under § 1111(b), or bidding their credit under § 363(k) in hopes of realizing a potential upside in the collateral.

Id. at 316. The court explained that asserting an absolute right to such preferential

[10] Bankruptcy Code § 1111(b) allows a secured creditor to elect to have the entire amount of its claim treated as fully secured, regardless of the value of the underlying collateral, except if the secured creditor has recourse against the debtor and the collateral is sold pursuant to Section 363 or through a chapter 11 plan.

treatment is plainly contrary to other provisions of the Code, noting that (1) a secured creditor's recovery is capped at the current value of the underlying collateral under subsection (i) and (2) a secured creditor can be denied the right to credit bid for "cause" under § 363(k). *Id*. at 316-17.

The extensive statutory analysis performed by the majority in *Philadelphia Newspapers* provides compelling support for this Court to resolve the split in circuits in the Debtors' favor. As in *Philadelphia Newspapers*, the Debtors' assets are currently worth significantly less than the Lenders' secured claims. As the Bankruptcy Court highlighted in the Certification, this phenomenon is becoming increasingly common in commercial real estate bankruptcy cases in the current economic climate. Accordingly, providing debtors with the flexibility to proceed with a sale of assets free and clear of liens through a chapter 11 plan while providing secured creditors with the indubitable equivalent of their claims under § 1129(b)(2)(A) not only respects the express language drafted by Congress, but also fosters the rehabilitative goals of the Bankruptcy Code. In contrast, judicially crafting a universal requirement preserving a secured creditor's right to credit bid in all circumstances upsets the careful balance between a debtor's ability to reorganize and a secured creditor's interest in the underlying collateral currently achieved by the plain language of the statute. This Court has recognized that the purpose of chapter 11 of the Bankruptcy Code is to permit the successful rehabilitation of debtors. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984). Chapter 11 is not intended, as the Respondent suggests, to benefit secured creditors.

B. The Fifth Circuit's Decision In *Pacific Lumber* Endorses The Plain Meaning Interpretation of Bankruptcy Code § 1129(b)(2)(A).

In September, 2009, six months before the Third Circuit issued its decision in *Philadelphia Newspapers*, the Fifth Circuit in *Pacific Lumber* also addressed the ability of a debtor to conduct a sale of collateral free and clear of liens without providing the right to credit bid under § 1129(b)(2)(A)(ii) but providing secured creditors with the indubitable equivalent of their secured claims under § 1129(b)(2)(A)(iii). A unanimous court, in an opinion written by Chief Judge Edith Jones, concluded that such a plan was authorized by the plain language of Section 1129(b)(2)(A).

The debtors in *Pacific Lumber* owned and operated a sawmill and power plant, as well as a vast stretch of prime redwood timberland in Northern California. *Pacific Lumber*, 584 F.3d at 236. Prior to filing for bankruptcy, one of the debtors, Pacific Lumber Company ("Palco"), transferred the timberland assets to a newly

formed subsidiary, Scotia Pacific LLC ("Scopac"), to secure more than $800 million in additional financing. *Id.* In 2007, the debtors sought protection under chapter 11. *Id.* A year into the case, one of the debtors' secured creditors, Marathon Structured Finance ("Marathon"), together with one of the debtors' competitors, Mendocino Redwood Company ("MRC"), proposed a chapter 11 plan. *Id.* at 237. That plan sought to dissolve all of the debtors and establish two new entities, Townco (owned entirely by Marathon) and Newco (owned by both Marathon and MRC). *Id.* The plan further proposed, among other things, the transfer of the sawmill and timberland to Newco in exchange for $580 million funded by Marathon and MRC. *Id.* The bankruptcy court confirmed the plan over the objection of certain of the debtors' other secured creditors pursuant to § 1129(b)(2)(A)(iii), concluding that the plan provided the dissenting creditors with a current cash distribution equal to the value of the underlying collateral, which the bankruptcy court determined was $510 million. *Id.* at 238.

The secured creditors moved for a direct appeal to the Fifth Circuit, arguing, among other things, that the plan did not meet the "fair and equitable" requirement of § 1129(b) because it failed to provide secured creditors with the opportunity to credit bid for the collateral sold to Newco pursuant to § 1129(b)(2)(A)(ii). *Id.* at 244-45. The Fifth Circuit reasoned that § 1129(b)(2)(A)(ii), providing for the sale of collateral free and clear of liens with credit bidding, *could* have applied. *Id.* The court further explained that "[t]he Noteholders, however, must do more than show that Clause (ii) theoretically applied to this transaction. They have to demonstrate its exclusive applicability." *Id.* As in *Philadelphia Newspapers*, the secured creditors argued that subsection (ii) must apply to all sales of collateral through a plan. The court disagreed, finding that:

> For several reasons, the Noteholders' arguments cannot be accepted. 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. . . Clause (iii) does not render Clause (ii) superfluous facially or as applied to the MRC/Marathon plan. Although a credit bid option might render Clause (ii) imperative in some cases, it is unnecessary here because the plan offered a cash payment to the Noteholders. Clause (iii) thus affords a distinct basis for confirming a plan if it offered the Noteholders the "realization . . . of the indubitable equivalent of such claims."

Id. at 245-46 (citing *In re Briscoe Enterp. Ltd., II*, 994 F.2d 1160, 1168 (5th Cir.

1993)).[11] Accordingly, the Fifth Circuit unanimously affirmed the bankruptcy court's confirmation of the plan, finding that even though the transfer of assets through the plan constituted a sale without credit bidding, it nonetheless satisfied the "fair and equitable" requirement of § 1129(b) by providing the secured creditors with the indubitable equivalent of their secured claims.

As in *Philadelphia Newspapers*, the conclusion reached by the Fifth Circuit in *Pacific Lumber* reinforces the plain meaning of § 1129(b)(2)(A). That same application is even more compelling in this case, necessitating this Court's reversal of the Seventh Circuit below. Unlike the judicial valuation of the collateral in *Pacific Lumber*, the Debtors in this case propose to sell their assets through an open auction, thereby allowing the market to determine the value. Furthermore, the Debtors intend to provide the Lenders with the indubitable equivalent of their secured claims by paying them cash proceeds from the Plan Sales. Like the secured creditors in *Pacific Lumber*, the Lenders in this case are not entitled to the upside potential of their collateral, but rather only the amount of their secured claims on the plan confirmation date, which will be determined through the Plan Sales. If the Lenders desire to speculate on any upside potential they believe is not already factored into the market price, then they may submit a cash bid for the Debtors' assets, just like any other potential bidder. In short, the Debtors' Plans and Bid Procedures Motions are designed to achieve the maximum return for the Lenders while providing the Debtors with a viable exit strategy.

C. This Court Should Reverse the Seventh Circuit's Ruling Because it Disregards the Plain Language of the Bankruptcy Code and Hinders Its Policies

The Seventh Circuit, in its ruling below, rejected the well-reasoned opinions advanced by the majority in *Philadelphia Newspapers* and *Pacific Lumber* and, instead, adopted the reasoning of Judge Thomas Ambro in his *Philadelphia Newspapers* dissent. The Seventh Circuit began its analysis by finding that, despite its plain language and structure, § 1129(b)(2)(A) has more than one plausible meaning. *River Road Hotel Partners, LLC v. Amalgamated Bank*, 651 F.3d 642, 649

[11] The court went on to explain how the indubitable equivalent requirement was in fact satisfied in that case. First, the value of the secured creditors' claim is set at the value of the underlying collateral pursuant to Section 506(a), which the bankruptcy court concluded was $510 million. *Id.* at 246. Second, the immediate cash payment to the secured creditors through the plan equal to the value of their claims ($510 million) constitutes the realization of the indubitable equivalent of their claims. *Id.* As the court emphatically stated, "[p]aying off secured creditors in cash can hardly be improper if the plan accurately reflected the value of the Noteholders' collateral." *Id.* at 247.

(7th Cir. 2011). In support of this conclusion, the court stated that 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 dispose of assets in ways other than those covered in subsections (i) and (ii). *Id.*

Having found that § 1129(b)(2)(A) has more than one plausible meaning, the Seventh Circuit went on to apply rules of statutory construction to determine which interpretation is correct. The court turned to the so-called "anti-superfluousness canon" which provides that, when interpreting an ambiguous statute, that statute "ought to be construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. *Id.* at 651-52 (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). The court then found that allowing the sale of assets free and clear of liens without requiring credit bidding under subsection (iii) would render subsection (ii) a practical nullity. Thus, according to the Seventh Circuit, plans can only qualify as "fair and equitable" under subsection (iii) if they propose disposing of assets in ways that are not described in subsections (i) and (ii). *Id.* at 652. The Seventh Circuit's holding, however, fails to consider circumstances where a debtor may prefer to pursue a sale through subsection (ii) instead of subsection (iii). For example, when certain property is not necessary for reorganization (usually where the debtor owns more than one piece of property), a debtor may prefer to propose a sale of that property with credit bidding under subsection (ii) instead of satisfying the indubitable equivalence requirement under subsection (iii). Similarly, when the value of the collateral is close to the amount of the secured creditor's claim, a debtor may prefer a sale with credit bidding under subsection (ii). Indeed, in any situation where the debtor reasonably expects that the secured creditor will use its right to credit bid in a way that maximizes the return to the bankruptcy estate, instead of as a block against the debtor's reorganization efforts (as is the case here), it may prefer to pursue confirmation through subsection (ii) as opposed to subsection (iii).

In short, this Court should find that subsections (ii) and (iii) simply provide different requirements for plan confirmation; one is not necessarily more specific or more general than the other, but rather one option may be more preferable to a debtor under certain circumstances. Indeed, all debtors in chapter 11 are faced with unique circumstances and case dynamics. The Debtors submit that this is precisely why Congress enumerated the three options in § 1129(b)(2)(A) using the disjunctive "or." Upholding the plain and unambiguous language of § 1129(b)(2)(A) does not render subsection (ii) superfluous.

After employing various canons of statutory construction, the Seventh Circuit next found that § 1129(b)(2)(A) should be interpreted as part of the Bankruptcy Code as a whole, stating that the interpretation submitted by the Debtors here and

by the *Philadelphia Newspapers* court "sharply conflicts" with the way secured creditors' interests are treated elsewhere in the Code, specifically in §§ 363(k) and 1111(b). *Id.* at 652-53. The Seventh Circuit, thus, found that, because § 363(k) provides the secured creditor with the right to credit bid when the debtor attempts to sell its collateral free and clear under that statute, and because § 1111(b) provides secured creditors with the option to treat the entire amount of their claim as secured, regardless of the value of the underlying collateral, the Debtors' position would not provide secured creditors with the types of protections they are generally afforded elsewhere in the Code. However, the Third Circuit in *Philadelphia Newspapers* rejected this analysis of secured creditor protections under the Bankruptcy Code, noting various circumstances in which neither of these protections apply (*e.g.*, capping the recovery under § 1129(b)(2)(A)(i) at the value of the collateral and precluding credit bidding for cause under § 363(k)).

The lengths to which the Seventh Circuit goes in an attempt to override the clear language of § 1129(b)(2)(A) underscore the limitations of its holding. As Circuit Judge D. Brooks Smith noted in his concurrence in *Philadelphia Newspapers*:

> I sympathize with the dissent's desire to honor what it believes was Congress's intent in codifying § 1129(b)(2)(A). But the near-gymnastics required to reach its conclusion reveal the tenuous nature of this approach. As sensible as the dissent's approach to credit bidding may be, I simply cannot look past the statutory text, which plainly supports the conclusion that § 1129(b)(2)(A) does not require credit bidding in plan sales of collateral free of liens.

599 F.3d at 318-19 (Smith, J., concurring).[12]

[12] Judge Ambro's dissent is perhaps better understood in light of certain facts, highlighted at the beginning of his dissent, that call into question the propriety of the debtors' plan in *Philadelphia Newspapers*. For example, certain of the debtors' insiders held a controlling stake in the stalking horse and conducted an extensive "Keep It Local" marketing campaign apparently aimed at discouraging outside bidders so that the stalking horse could purchase the debtors' assets "on the cheap." *Id.* at 319-320 (Ambro, J., dissenting). Additionally, the debtors' plan ostensibly provided for the surrender of the building that housed the debtors' headquarters (and was itself subject to the lenders' lien) back to the secured lenders, but subject to a two-year, rent-free lease in favor of the stalking horse, which Judge Ambro derided as "chutzpah to the core." *Id.* at 319-320, 336 (Ambro, J., dissenting). Neither of these questionable circumstances is present in these cases. Accordingly, the Seventh Circuit's reliance on Judge Ambro's dissent in *Philadelphia Newspapers* as broad license to ignore the plain language of § 1129(b)(2)(A) is misplaced.

In its opinion, the Seventh Circuit incorrectly interpreted the Debtors' position herein that, simply because the property is sold at an auction, it, therefore, as a matter of law, will bring the indubitable equivalent of a secured creditor's claim. However, the concern over whether a secured creditor is actually receiving the indubitable equivalent of its claim is a factual analysis best left for the individual bankruptcy judges confronted with these plans. The Debtors are merely seeking this Court's ruling today that they are not precluded from proceeding under subsection (iii) of § 1129(b)(2)(A) and barring the right to credit bid simply because they are proposing a sale of assets free and clear of liens. Whether, in any given circumstance, such sale actually provides a secured creditor with the "indubitable equivalent" of its claim is a separate inquiry not relevant at this time. Thus, the Seventh Circuit's footnote 6, which, citing law review articles, speaks of the inherent risks to a secured creditor in a bankruptcy auction, is a red herring. 651 F.3d at 651. n.6. If, as the Seventh Circuit cautions, for example, a debtor's management engages in self dealing that would result in an undervaluing of the asset being sold, the bankruptcy court could easily find in such a situation that the proposed plan is not in fact "fair and equitable" in accordance with § 1129(b)(2)(A).

In his dissent in *Philadelphia Newspapers*, which was adopted by the Seventh Circuit below, Judge Ambro warned that applying the plain language of § 1129(b)(2)(A) allows a stalking horse bidder "to acquire the debtor's assets as cheaply as possible" and will "upset[] three decades of secured creditors' expectations, thus increasing the cost of credit." *Id*. at 337-38. Judge Ambro's concerns, however, proved to be unfounded based on the facts of that very case. After *Philadelphia Newspapers* was decided, the auction sale of the debtors' assets went forward and produced spirited cash bidding with the secured lenders producing the winning cash bid totaling $138.9 million. *See* Weintraub, et al., *Third Circuit Bids Credit Bidding Adieu*, 19 J. Bankr. L. &Prac.3 Art. 4 (May 2010). Accordingly, the majority's application of the plain language of § 1129(b)(2)(A) produced an optimal result in that case, maximizing the value of the debtors' assets. The debtors' decision to preclude credit bidding fostered an open and competitive auction for the debtors' assets that produced a winning bid ($139 million) nearly quadruple the amount of the stalking horse bid ($37 million). Furthermore, the secured lenders were still able to protect any perceived upside interest in the collateral by submitting their own winning cash bid, which cash was returned to them through the plan. Thus, the *Philadelphia Newspapers* decision highlights how the faithful application of the plain language of § 1129(b)(2)(A) enacted by Congress maintains the careful balance of competing interests

established by the Bankruptcy Code.

CONCLUSION

In sum, § 1129(b)(2)(A) provides a debtor with three distinct options for confirming a chapter 11 plan over the dissent of a class of secured creditors. The plain language and structure of the statute is clear and thus the application of alternative canons of statutory interpretation or reference to legislative history is unnecessary and improper. Similarly, references to secured creditor protections provided in other sections of the Bankruptcy Code are insufficient to override the clear language of § 1129(b)(2)(A). Instead, the Court should resolve the current split in circuits and reverse the Seventh Circuit's decision below by applying the plain language of the statute. For the foregoing reasons, the Court should allow the Debtors to proceed with the Plan Sales pursuant to the procedures outlined in the Bid Procedures Motions and, ultimately, seek confirmation of the Plans through § 1129(b)(2)(A)(iii).

No. 11-166

In the Supreme Court of the United States

RADLAX GATEWAY HOTEL, LLC, AND RADLAX GATEWAY DECK, LLC

v.

AMALGAMATED BANK.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT[1]

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[1] This brief has been adapted from the Respondent's brief that was filed with the U.S. Court of Appeals for the Seventh Circuit and is being used for strictly educational purposes. Rebecca Petereit is in real life an Associate with Vinson & Elkins LLP.

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COUNTER-STATEMENT OF THE ISSUE PRESENTED FOR APPEAL

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PARTIES BELOW

In addition to the parties listed in the caption, River Road Hotel Partners, LLC, River Road Expansion Partners, LLC, River Road Restaurant Pads, LLC, River Road Hotel Mezz, LLC, River Road Expansion Mezz, LLC, and River Road Restaurant Mezz, LLC were parties to the consolidated appeal before the Court of Appeals.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in *River Road Hotel Partners, LLC v. Amalgamated Bank* (*In re River Road Hotel Partners, LLC*), Nos. 10-3597 & 10-3598, is reported at 651 F.3d 642.

JURISDICTIONAL STATEMENT

Amalgamated Bank, as Trustee of Longview Ultra Construction Loan Investment Fund, f/k/a Longview Ultra I Construction Loan Investment Fund ("Amalgamated" or the "Respondent"), in its capacity as administrative agent for itself and co-lender U.S. Bank National Association, successor-in-interest to the Federal Deposit Insurance Corporation (the "FDIC"), as Receiver for San Diego National Bank, San Diego, California, (collectively, the "Lenders"), believes that the statement of jurisdiction contained in the Brief for Petitioners is complete and correct.

STATUTORY PROVISIONS INVOLVED

This case turns primarily on the interpretation of 11 U.S.C. § 1129(b)(2)(A), which provides:

(b)(2) 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 the liens se-curing 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.

STATEMENT OF THE CASE

On August 17, 2009 (the "Petition Date"), River Road Hotel Partners, LLC ("Hotel Partners") and River Road Expansion Partners, LLC ("Expansion Partners" and together with Hotel Partners, the "River Road Debtors"), along with River Road Restaurant Pads, LLC ("Restaurant Pads") and three related mezzanine entities, and RadLAX Gateway Hotel, LLC and RadLAX Gateway Deck, LLC (collectively, the "RadLAX Debtors" and together with the River Road Debtors, the "Debtors")[2] each filed separate voluntary petitions for relief under chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq*. (the "Bankruptcy Code") in the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division (the "Bankruptcy Court").

On August 20, 2009, the Bankruptcy Court entered orders directing joint administration of the River Road Debtors' bankruptcy cases under Case No. 09-30029 (the "River Road Bankruptcy Case") and the joint administration of the RadLAX Debtors' bankruptcy cases under Case No. 09-30047 (the "RadLAX Bankruptcy Case").

On June 4, 2010, the River Road Debtors and the RadLAX Debtors filed their respective Joint Chapter 11 Plans (as amended, collectively, the "Plans" and each, a "Plan"). The foundation for each Plan was the sale of substantially all of each

[2] Recognizing that the River Road Debtors are no longer parties to this appeal, Respondent will nonetheless use the term "Debtors" throughout this brief for ease of reference.

Debtor's respective assets (the "Plan Sales") to a stalking horse bidder (each, a "Stalking Horse"), whom the Debtors purportedly selected in advance of filing the Plans, subject to higher or better bids to be determined at an auction. On that same day, the River Road Debtors and the RadLAX Debtors each filed a 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 (collectively, the "Bid Procedures Motions"). The Debtors expressly linked the Bid Procedures Motions to the Plans as being a necessary predicate to proceeding with Plan confirmation.

Pursuant to the Bid Procedures Motions, the Debtors requested that, in advance of any confirmation hearings on the Plans, the Bankruptcy Court approve procedures for the Plan Sales (the "Bid Procedures"). Specifically, the Debtors requested that, in connection with the Bid Procedures, the Bankruptcy Court expressly preclude the Debtors' secured creditors from credit bidding their claims in the auctions contemplated by the Bid Procedures Motions as a matter of law under 11 U.S.C. § 1129(b)(2)(A)(iii), or, alternatively, for cause under 11 U.S.C. § 363(k).

The Lenders, among others, filed objections to the Bid Procedures Motions in each Chapter 11 case on July 8, 2010.

On July 22, 2010, the Bankruptcy Court orally ruled that it would not allow the Debtors to preclude secured creditors from credit bidding at the auctions proposed to be conducted pursuant to the Bid Procedures as a matter of law under 11 U.S.C. § 1129(b)(2)(A)(iii), agreeing with the dissent in *In re Philadelphia Newspapers, LLC*, 599 F.3d 298 (3d Cir. 2010) ("*Philadelphia Newspapers*"). The Bankruptcy Court scheduled a trial on the issue of whether the Debtors could preclude the Lenders from credit bidding for cause under 11 U.S.C. § 363(k), which trial occurred on August 23 and 24, 2010. On August 30, 2010, the Bankruptcy Court orally ruled that "cause" did not exist to deny the Lenders the right to credit bid under 11 U.S.C. § 363(k) and indicated that it would enter orders denying the Bid Procedures Motions.

On October 5, 2010, the Bankruptcy Court entered an Order Denying Debtors' Bid Procedures Motion in the River Road Bankruptcy Case (the "River Road Order"), holding that: (a) in the context of a Chapter 11 plan, 11 U.S.C. § 1129(b)(2)(A)(ii) is the exclusive means to sell the Debtors' assets free and clear of liens under 11 U.S.C. § 1129(b)(2)(A) and, as such, the Debtors could only deny secured lenders the right to credit bid for "cause"; and (b) the Debtors had not demon-

strated at trial that there was "cause" to deny credit bidding under 11 U.S.C. § 363(k). On that same date, the Bankruptcy Court entered an order in the RadLAX Bankruptcy Case (the "RadLAX Order"), and together with the River Road Order, the "Orders") incorporating the terms of the River Road Order.[3]

On October 14, 2010, the Debtors filed their respective notices of appeal with the Bankruptcy Court, appealing only the Bankruptcy Court's ruling that the Debtors cannot as a matter of law sell their assets through a chapter 11 plan without providing secured creditors an opportunity to credit bid under 11 U.S.C. § 1129(b)(2)(A)(ii). On that same date, the Debtors filed their respective motions for certification of their appeals directly to the United States Court of Appeals for the Seventh Circuit (the "Seventh Circuit"). On November 4, 2010, the Bankruptcy Court entered its Certification for Direct Appeal to the Seventh Circuit. On November 30, 2010, the Seventh Circuit Court entered an order authorizing and consolidating the direct appeals. On June 28, 2011, the Seventh Circuit affirmed the Bankruptcy Court's ruling.

STATEMENT OF FACTS

A. The River Road Debtors

The River Road Debtors, together with four affiliated entities, are the owners and operators of the Intercontinental Chicago O'Hare Hotel (the "Intercontinental O'Hare") and related assets located near O'Hare Airport in the Chicago area. The related assets include an expansion space owned by Expansion Partners and two pads owned by Restaurant Pads, which are leased to two restaurants. To construct the hotel, Hotel Partners obtained a $128,611,313 construction loan (the "River Road Hotel Loan") in February 2007 from the Lenders. In connection with the River Road Hotel Loan, Hotel Partners executed a Promissory Note A in the amount of $53,611,313 payable to SDNB, and a Promissory Note B in the amount of $75,000,000 payable to Amalgamated. In October 2008, the amount of the River Road Hotel Loan was increased by $6,625,000 to $135,236,313.

Expansion Partners owns a parcel of real estate adjacent to the Intercontinental O'Hare, upon which it constructed an addition to the Intercontinental O'Hare (the "River Road Expansion"). To construct the River Road Expansion, Expansion Partners obtained a $20,265,000 construction loan (the "River Road Expan-

[3] The Orders do not address several other bases upon which the Lenders objected to the Bid Procedures Motions.

sion Loan") in December 2007 from Amalgamated. As of the Petition Date, Expansion Partners owed Amalgamated in excess of $10,000,000 on account of the River Road Expansion Loan.

Several months after the Intercontinental O'Hare's opening, Hotel Partners exhausted the available funds under the River Road Hotel Loan necessary to make final payments in satisfaction of the claims of the contractors and suppliers for the work performed at, and the materials supplied to, the Intercontinental O'Hare. Numerous defaults subsequently occurred under the River Road Hotel Loan documents, including Hotel Partners' failure to pay interest on the River Road Hotel Loan for the period from December 2008 through June 2009. Although the Lenders and River Road Debtors engaged in discussions during this extended period of time, they were unable to arrive at mutually acceptable terms that would allow for amendment of the various River Road Hotel Loan documents and related cures or waivers of the River Road Debtors' defaults.

Following the Lenders' issuance of notices of default on the River Road Hotel Loan, the River Road Expansion Loan, and the loan related to the restaurant pads, the River Road Debtors and their debtor affiliates filed petitions commencing the River Road Bankruptcy Case.

The Lenders hold essentially a blanket lien on all of the River Road Debtors' assets. As of the commencement of the River Road Bankruptcy Case, the Lenders' claims against the River Road Debtors and Restaurant Pads totaled at least $161,000,000, with interest accruing at approximately $1.25 million per month.

B. The RadLAX Debtors

The RadLAX Debtors are the owners and operators of the Radisson Hotel (the "Radisson LAX") and related assets, including an incomplete parking deck, located near the Los Angeles International Airport.

In November 2007, the RadLAX Debtors obtained a $142,000,000 construction loan (the "RadLAX Loan") from the Lenders to acquire the Radisson LAX property, renovate the Radisson LAX, and build a new parking structure on an adjacent parcel of real estate owned by RadLAX Gateway Deck, LLC.

During the course of construction of the parking deck, the RadLAX Debtors incurred construction cost overruns of approximately $7 million in connection with a redesign of the parking deck that involved adding an additional level to the origi-

nal design. The RadLAX Debtors were unable to obtain outside financing for the additional parking level and requested a loan increase from the Lenders. At the same time however, revenue and operations at the Radisson LAX began to suffer as the economy deteriorated.

Around March 2009, the RadLAX Debtors exhausted the available funds under the RadLAX Loan necessary to complete construction of the parking deck. Numerous defaults subsequently occurred under the RadLAX Loan documents, including the RadLAX Debtors' failure to pay interest on the RadLAX Loan for the period from April 2009 through June 2009. Although the Lenders and the RadLAX Debtors engaged in discussions regarding a potential restructuring of the RadLAX Loan during this period, they were unable to arrive at mutually acceptable terms that would allow for amendment of the various RadLAX Loan documents and related cures or waivers of the RadLAX Debtors' defaults.

Following the Lenders' issuance of a notice of default on the RadLAX Loan, the RadLAX Debtors filed petitions commencing the RadLAX Bankruptcy Case.

The Lenders hold essentially a blanket lien on all of the RadLAX Debtors' assets. As of the commencement of the RadLAX Bankruptcy Case, the Lenders' claims against the RadLAX Debtors totaled at least $130,000,000, with interest accruing at approximately $1.5 million per month.

C. The Debtors' Chapter 11 Plans

On June 4, 2010, the River Road Debtors filed a joint Chapter 11 plan (as amended on August 20, 2010, the "River Road Plan") and the related Bid Procedures Motion. On June 22, 2010, the River Road Hotel Debtors filed a proposed asset purchase agreement between the Hotel Debtors and O'Hare River & Technology Hotel, LLC as Stalking Horse, which was amended on August 20, 2010 (as amended, the "River Road APA").

On June 4, 2010, the RadLAX Debtors filed a joint Chapter 11 plan (as amended on August 20, 2010, the "RadLAX Plan") and the related Bid Procedures Motion. On June 22, 2010, the RadLAX Debtors filed a proposed asset purchase agreement between the RadLAX Debtors and LAX Century & Sepulveda Hotel, LLC as Stalking Horse, which was amended on August 20, 2010 (as amended, the "RadLAX APA" and together with the River Road APA, the "APAs").

Only unsigned copies of the APAs were filed. In addition, none of the sched-

ules or exhibits to the APAs were ever filed.

The foundation of the Plans were the proposed Plan Sales of substantially all of the Debtors' assets to the Stalking Horses free and clear of the Lenders' liens, subject to higher and better bids. The Stalking Horse entities each have common ownership: Och-Ziff Real Estate Acquisitions LP, a New York based investment firm, or its designee, was to be the 95% owner of each Stalking Horse, and the Harp Group, Inc., an entity owned and controlled by one of the Debtors' principals, Peter G. Dumon, was to hold the other 5% interest.

The purchase price to be paid under the River Road APA, $42 million, represented approximately 26% of the value of the Lenders' pre-petition claims against the River Road Debtors. The purchase price to be paid under the RadLAX APA, $47.5 million, represented approximately 37% of the value of the Lenders' pre-petition claims against the RadLAX Debtors. Under the Plans, the Debtors proposed to fund, through the proceeds of the Plan Sales and cash on hand (all of which is encumbered by the Lenders' liens), their administrative and priority claims, a class of miscellaneous secured claims, secured tax claims, and senior mechanic's lien claims. Each amended Plan further purported to provide for a cash distribution to be paid to holders of general unsecured claims and the Lenders on account of their unsecured deficiency claims. These contributions were merely a disguised component of the purchase price under the APAs, however.

The existing management company for each of the hotels--Portfolio LAX, LLC with respect to the Radisson LAX, and Portfolio Hotels Rosemont, LLC, with respect to the Intercontinental O'Hare--was to continue to manage its respective hotel if the Stalking Horse prevailed as the winning bidder under the Plan Sales. Each of these management companies is affiliated with Portfolio Hotels & Resorts, LLC, which, in turn, is affiliated with the Harp Group, Inc., the entity owned and controlled by one of the Debtors' principals, Peter G. Dumon.

The APAs contained an unqualified due diligence contingency, which permitted the Stalking Horses to terminate their obligations under the APAs in their sole discretion and without penalty, within 30 days of the Bankruptcy Court's approval of the applicable Bid Procedures Motion. The APAs provided the Stalking Horses with several other "outs" by imposing drop-dead dates. For example, the Bid Procedures Motions were required to be approved by final orders by August 31, 2010, and the applicable disclosure statements for the Plans were required to be approved by final orders by October 11, 2010. The failure to meet any of these deadlines entitled the Stalking Horse to terminate the applicable APA.

Under the APAs, each proposed Plan Sale was at a price that the Debtors later acknowledged was well below market.[4] Further, the Stalking Horse bid amount reflected that, by some tens of millions of dollars, there is no equity in the Debtors' assets in excess of the value of the Lenders' liens, without even taking into account any of the alleged mechanics liens that have been asserted against the properties. Indeed, for that reason, the Debtors' Plans could only have benefitted the Stalking Horses (or prevailing bidders). The only other possible beneficiaries were insiders, who, if the Stalking Horses were the winning bidders, negotiated equity and management roles in the new enterprises under the Debtors' Plans.

The Bid Procedures Motions, which the Debtors themselves portrayed as essential elements of the Debtors' Plans because they addressed the sale process that the Plans would employ, also sought to preclude the Lenders from credit bidding at the Plan Sales. Anticipating the objections of the Lenders to the treatment of their claims under the Plans, the Debtors sought to obtain confirmation of the Plans using the "cramdown" provisions of section 1129(b)(2)(A) of the Bankruptcy Code.

On July 8, 2010, the Lenders and the FDIC each filed separate objections to the Bid Procedures Motions, in which they opposed, *inter alia*, the Debtors' attempts to preclude the Lenders from credit bidding at the Plan Sales. On July 20, 2010, the Debtors filed their omnibus replies to the objections. On July 22, 2010, the Bankruptcy Court orally ruled that the Debtors could not preclude the Lenders from credit bidding at the Plan Sales as a matter of law. On October 5, 2010, the Bankruptcy Court entered the Orders denying the Bid Procedures Motions. The Bankruptcy Court certified an immediate appeal to the Seventh Circuit.

Upon the motions of the Lenders, the Debtors' exclusive periods within which to file and solicit acceptances of a plan under Bankruptcy Code section 1121 in each of the respective Chapter 11 cases were terminated pursuant to orders dated August 30, 2010. Since that time the Debtors filed an amended chapter 11 plan and an amended asset purchase agreement in the Bankruptcy Court, both of which were virtually identical to their predecessors except that (1) the purchase price for the

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[4] In his December 2, 2010 deposition in connection with a prospective trial on whether the Lenders were adequately protected, Peter G. Dumon, the Debtors' manager and ultimate decision-maker, acknowledged that the Lenders' collateral was worth many millions of dollars more than the bids of the Stalking Horses and testified that, accordingly, the Debtors would not try to confirm the current Debtors' Plans, but would instead require higher stalking horse bids. (*See* Peter Dumon Deposition at 6:7-13 (acknowledging his authority to make decisions on behalf of the Debtors); 37:12-38:24 (stating that the Stalking Horse bids were under market and he would not re-propose the same Plans).

Debtors' assets rose to $ 55 million to account for the appreciation in value of the assets during the bankruptcy cases, and (2) the deadlines for approval of the bid procedures motion and other events were extended.

D. The Seventh Circuit Opinion and Subsequent Events

The Seventh Circuit accepted the Debtors' direct appeal. The Court of Appeals heard argument in April 2011 and issued an opinion affirming the Bankruptcy Court's decision in June 2011.

Shortly after the Seventh Circuit's decision, in July 2011, the Bankruptcy Court confirmed the Lenders' chapter 11 plan in the River Road Cases. The River Road Debtors therefore did not seek review of the Seventh Circuit's ruling. The RadLAX Bankruptcy Cases have not concluded, however, and the RadLAX Debtors petitioned for a writ of certiorari. The Court granted the petition on December 12, 2011.

SUMMARY OF ARGUMENT

The issue before the Court is whether a debtor may deny its secured creditors the right to credit bid when it proposes to sell their collateral free and clear of liens under a Chapter 11 plan. The Debtors' arguments that they can in fact do so fail for several reasons. Section 1129(b)(2)(A) is just one component of the Bankruptcy Code. Reading that subsection divorced from all context allows for the statute to be misconstrued and the derivation of meanings never intended by the Bankruptcy Code's drafters. But section 1129(b)(2)(A) was not drafted in a vacuum. It was intended to, and does, work in concert with the rest of the Bankruptcy Code to recognize the rights of secured creditors. Section 1129(b)(2)(A)(i)-(iii) does not list the three alternative routes to cramdown confirmation that are universally applicable to any plan. Instead, it sets forth three distinct routes for cramdown that apply depending on the proposed treatment of secured creditors' claims under a plan. Clause (i) applies where the secured creditor retains the lien securing its claim, whether the collateral is to be transferred or retained by the debtor, and entitles the creditor to receive deferred cash payments up to the allowed amount of its secured claim. Clause (ii) applies to a situation where the plan provides for the sale of collateral and the secured creditor will not retain its lien. Under this scenario, the secured creditor receives a lien on the proceeds from the sale and is given the opportunity to credit bid up to the amount of its secured claim. Clause (iii) requires a secured creditor to receive the "indubitable equivalent" of its claim and is best understood as a "catchall" provision that applies to those circumstances that fall outside of clauses

(i) or (ii), including, for example, the abandonment of property or the provision of substitute collateral. Finding otherwise would permit a plan proponent to choose the requirement that it wishes to satisfy and bypass a requirement that specifically addresses the treatment that the plan proposes. This would undo the Bankruptcy Code's careful matching of plan treatments with requirements that serve to protect the interests of secured creditors. Simply put, clause (iii) cannot be used to displace clause (ii) when the exact means by which the Debtors' Plans intended to cramdown the Lenders is a free and clear plan sale such as is provided for in detail under clause (ii).

The Debtors promote an application of the statute that would permit debtors to avoid those protections, in this case for the sole benefit of insiders and strangers. The Debtors urge this Court to disregard the well-reasoned approach of the Seventh Circuit and follow the recent decisions of the Third and Fifth Circuit Courts of Appeals, which employ an overly-mechanical reading of the provision to arrive at a conclusion that strips secured creditors of their bargained-for rights, leaving them with the cold comfort that the bankruptcy court may yet find at plan confirmation that their treatment under the plan was not fair and equitable. Those decisions are of questionable persuasiveness in light of clear legislative intent and more than 30 years of established bankruptcy practice to the contrary.

Section 1129(b)(2)(A) can and should be applied in a way that does not do violence to the plain language of the statute but also upholds the principles and protections embodied in the Bankruptcy Code. Specifically, section 1129(b)(2)(A)(ii) should be understood to be the sole mechanism for cramming down secured creditors available to a debtor seeking to sell those creditors' collateral free and clear of liens under a chapter 11 plan. This was the position taken by the Seventh Circuit, as well as by the dissent in *Philadelphia Newspapers*. This Court should affirm the Seventh Circuit's decision and preclude confirmation under the "indubitable equivalent" prong of section 1129(b)(2)(A) of the Bankruptcy Code in the context of a plan sale free and clear of liens.

ARGUMENT

A. The Lower Courts' Application of the Bankruptcy Code Was Correct.

Relying on the Third Circuit's majority decision in *Philadelphia Newspapers* (and, to a lesser extent, the Fifth Circuit's decision in *Bank of N.Y. Trust Co. v. Official Unsecured Creditors' Committee (In re The Pacific Lumber Co.)*, 584 F.3d 229 (5th Cir. 2009) ("*Pacific Lumber*")), the Debtors seek to deny the Lenders the right

to credit bid, depriving them of their property interests and the valuable rights and protections afforded to them under the Bankruptcy Code. The Bankruptcy Court and subsequently the Seventh Circuit declined to follow the Third Circuit's mechanical reading of section 1129(b)(2)(A) , recognizing correctly that the provision's context informs its meaning and requires that the Lenders' right to credit bid be preserved.

1. The Relevant Statutory Language Is Subject to Differing Reasonable Interpretations.

The Seventh Circuit adopted Judge Ambro's reasoning as set forth in his dissent in *Philadelphia Newspapers*, beginning with the position that a plain reading of section 1129(b)(2)(A) of the Bankruptcy Code reflects the ambiguity in the statute. Though section 1129(b)(2)(A)(i)-(iii) is phrased in the disjunctive, section 1129(b)(2)(A)(ii) specifically addresses plan sales and requires that sales free and clear of liens be subject to credit bidding as prescribed by section 363(k) of the Bankruptcy Code. 11 U.S.C. § 1129(b)(2)(A)(ii).

The specificity of section 1129(b)(2)(A)(ii) suggests a much more practical and purposeful interpretation of section 1129(b)(2)(A) then the one postulated by the courts in *Philadelphia Newspapers* and *Pacific Lumber and* advocated by the Debtors. "Congress did not list the three alternative routes to cramdown confirmation that were universally applicable to any plan, but instead as distinct routes that apply to specific requirements." *Philadelphia Newspapers*, 599 F.3d at 325. Judge Ambro's observations on this point are particularly instructive:

> To use clause (iii) to accomplish a sale free of liens, but without following the specific procedures prescribed by clause (ii), undoubtedly places the two clauses in conflict. It seems Pickwickian to believe that Congress would expend the ink and energy detailing procedures in clause (ii) that specifically deal with plan sales of property free of liens, only to leave general language in clause (iii) that could sidestep entirely those very procedures. Unlike the majority, I do not read the language to signal such a result; I read the text to show congressional intent to limit clause (iii) to those situations not already addressed in prior, specifically worded clauses.

Philadelphia Newspapers, 599 F.3d at 329, J. Ambro, *dissenting*. *See also John Hancock Mut. Life Ins. Co. v. Cal. Hancock, Inc. (In re Cal. Hancock, Inc.)* 88 B.R. 226, 230-31 (B.A.P. 9th Cir. 1988) (noting that legislative history indicates an inten-

tion to allow credit bidding when property is being sold pursuant to a reorganization plan); *Nat'l Cable & Telecomms. Ass'n Inc. v. Gulf Power Co.*, 534 U.S. 327, 335 (2002) ("It is true that specific statutory language should control more general language when there is a conflict between the two."); *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228-29 (1957) ("However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment.") (citations and quotations omitted); *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (citations and quotations omitted).

2. Under Application of Canons of Statutory Construction, Section 1129(b)(2)(A)(ii)) Is the Exclusive Means to Cramdown Secured Creditors Under a Free and Clear Plan Sale.

As the situation before this Court illustrates, it is hard to envision how adopting the position urged by the Debtors does not render the second clause of 1129(b)(2)(A) superfluous, except in the rare instance when a debtor advocates credit bidding. *Philadelphia Newspapers*, 599 F.3d at 330-31, J. Ambro, *dissenting*.

The dissent in *Philadelphia Newspapers* is correct in arguing that the three prongs of section 1129(b)(2)(A) are distinct channels for providing a secured lender with fair and equitable treatment of its lien. First, clause (i) defines fair and equitable treatment of secured claims under circumstances where the secured claimant will retain its liens and receive future cash payments on account of its secured claim. Next, clause (ii) provides for the sale of the property that is "subject to the liens securing such claims, free and clear of such liens," with such sale to expressly be subject to credit bidding by the creditor under section 363(k). Finally, clause (iii) provides the alternative of providing the creditor with "the indubitable equivalent" of its secured claims. This third prong acts only as "a 'catch-all' not designed to supplant clauses (i) and (ii) where they plainly apply." *Philadelphia Newspapers*, 599 F.3d at 325-26. As Judge Ambro further argues in his dissent, "[i]f plan sales free of liens were permitted outside of clause (ii), the secured creditor would not only lose the undervaluation protection afforded in non-plan-sale situations [*i.e.*, by the protections afforded to secured creditors to make the election set forth in section 1111(b)(2) of the Bankruptcy Code], but it would also lose the only undervaluation protection Congress provided and considered in the sale-free-of-liens scenario." *Id.* at 334. Thus, Judge Ambro concludes that "Congress intended to channel all plan sales free of liens through § 1129(b)(2)(A)(ii)." *Id*. To conclude otherwise would render the credit bidding protections afforded under clause (ii) superfluous. As the

Seventh Circuit similarly concluded, "[w]e 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." *River Road Hotel Partners, LLC v. Amalgamated Bank*, 651 F.3d 642, 652 (7th Cir. 2011). The "infinitely more 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.'" *Id.* (citing *Bloate v. United States*, —U.S.—, 130 S.Ct. 1345, 1355, 176 L.Ed.2d 54 (2010)).

In response to this well reasoned and practical application of the statute, the Debtors postulate certain limited hypothetical scenarios where a debtor may in its sole discretion elect to utilize section 1129(b)(2)(A)(ii), including, for example, where the value of the collateral approaches the amount of the secured creditors' claims. In effect, the Debtors view this provision as a sword to be used by a debtor; but nothing in the statute nor legislative history suggests that section 1129(b)(2)(A)(ii) is intended to be applied in a limited manner at the whim of the debtor. Moreover, by attempting to so limit the applicability of section 1129(b)(2)(A)(ii), the Debtors validate Judge Ambro's conclusion.

3. The Unfettered Denial of a Secured Creditor's Customary Right to Credit Bid Its Claim Cannot Provide the Secured Creditor with the "Indubitable Equivalent" of Its Secured Claim.

Clause (ii) of the permitted cramdown methods expressly preserves the presumptive right of the secured creditor to credit bid its claim in order to protect itself from the undervaluation of that claim in the context of a sale free and clear of liens. In effect, clause (ii) protects the customary right of a secured creditor to credit bid its debt that is available to it in a foreclosure sale outside of bankruptcy. Taking away this presumptive right by allowing a debtor to sell collateral free and clear of liens without providing additional equivalent value such as a replacement lien would be by definition a failure to provide the creditor with the "indubitable equivalent" of its claim. "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)." *River Road*, 651 F.3d at 651. Accordingly, the denial of credit bidding under such circumstances can never satisfy clause (iii).

This position is supported by Professor Brubaker's cogent argument that clause (i) and (ii) contain specific "indubitable equivalent" standards for certain kinds of plans, whereas clause (iii) contains a generalized third basket of other "in-

dubitable equivalent" plan treatment:

> The disjunctive specification of the minimum fair-and-equitable requirement in subdivisions (i), (ii), and (iii), therefore, seems to be structured as two specific applications (in (i) and (ii)) of the more general, over-arching "indubitable equivalent" standard contained in (iii). To provide a secured creditor less than that which is specified in either (i) or (ii) would, therefore, essentially by definition fail to provide the secured creditor the indubitable equivalent of its secured claim.

Brubaker, R., *Cramdown of an Undersecured Creditor Through Sale of the Creditor's Collateral: Herein of Indubitable Equivalence, §1111(b)(2) Election, Sub Rosa Sales, Credit Bidding, and Disposition of Sale Proceeds*, Vol. 29 No. 12, Bankruptcy Law Letter 1, p. 10 (Dec. 2009). Professor Brubaker concludes: "Indubitable equivalence cannot require less protection than is afforded by the preceding clauses in §1129(b)(2)(A) ." *Id*. at 10-11. But that is exactly what the Debtors propose to do, arguing that the presumptive right to credit bid included in the form of indubitable equivalence set forth in clause (ii) may be ignored by simply proposing to effect a similar plan sale without any right of credit bidding under clause (iii). The Debtors' proposed application of clause (iii) would allow the Debtors' Plans that provide the Lenders with no equivalent substitute for their presumptive right to credit bid, precisely because "there is no indubitable equivalent substitute for the secured creditor's right to credit bid at the sale." *Id*. at 12.

4. The Most Obvious Construction of Clause (ii) Is That it Governs the Treatment of a Secured Claim in the Context of Any "Sale ... Free and Clear of Such Liens."

The Debtors construe clause (ii) of the cramdown provisions of Section 1129(b)(2)(A) as though its subject matter were the treatment of a secured creditor in the context of a "sale subject to § 363(k)" of the Bankruptcy Code. Having limited the domain of clause (ii) to sales subject to § 363(k) that preserve the right to credit bid, the Debtors then are free to argue that the more general indubitable equivalence standard set forth in clause (iii) may be fairly construed to include sales free and clear of liens that do not incorporate the protections set forth in § 363(k) with respect to credit bidding. That construction, however, ignores the comma in clause (ii) immediately after the word "sale," and just before the invocation of the right to credit bid. As the dissent in *Philadelphia Newspapers* argued, "without the commas here, the object of the sentence is no longer a 'sale,' but is instead a 'sale subject to § 363(k).'" *Philadelphia Newspapers*, 599 F.3d at 329.

When the punctuation is honored, however, the most natural reading of clause (ii) is that its domain is plans that provide for "the sale ... of any property that is subject to the liens securing such claims, free and clear of such liens." 11 U.S.C. § 1129(b)(2)(A)(ii). Under this reading, the reference in clause (ii) to the right to credit bid under section 363(k) does not create a separate sub-category of plan sales, but instead requires that all plan sales free and clear of liens must be subject to the presumptive right to credit bid in order to treat the secured creditor fairly and equitably. Accordingly, clause (ii) requires that a plan include a presumptive right to credit bid in any plan sale that is free and clear of liens.

5. The Debtors Have Analyzed Bankruptcy Code Section 1129 in Isolation and, in the Process, Ignored the Interplay with Other Relevant Sections of the Bankruptcy Code, Including Sections 363(k) and 1111(b)(2).

"[S]tatutory construction is a holistic endeavor" and courts "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law and to its object and policy." *Official Coram, of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 559 (3d Cir. 2003) (*en banc*) (citing *United Savs. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988)). *See also Timbers*, 484 U.S. at 371 ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law . . . .").

The position advocated by the Debtors deprives the Lenders of the rights granted to them as secured creditors under the Bankruptcy Code. *See* 11 U.S.C. § 363(k) (providing that "[a]t 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."). 11 U.S.C. § 363(k). Specifically, section 363(k) of the Bankruptcy Code permits a secured lender to credit bid the full amount of its claim where the debtor proposes to sell collateral free and clear of the secured creditor's liens. 124 *Cong. Rec.* H32396 (Sept. 28, 1978) (statement of Rep. Edwards) ("[A] secured creditor may bid in the full amount of the creditor's allowed claim, including the secured portion and any unsecured portion thereof."). *See also Cohen v. KB Mezzanine Fund II, LP (In re SubMicron Sys. Corp.)*, 432 F.3d 448, 461 (3d Cir. 2006) (observing it is well settled that creditors can bid the full face value of their claims under § 363(k)); *In re Suncruz Casinos, LLC*, 298 B.R. 833, 839 (Bankr. S.D. Fla. 2003) ("The plain language of [section 363(k)] makes clear that the secured

creditor may credit bid its *entire claim*, including any unsecured deficiency portion thereof." (emphasis in original)); *In re Midway Invs., Ltd.*, 187 B.R. 382, 391 n.12 (Bankr. S.D. Fla. 1995) ("[A] secured creditor may bid in the full amount of the creditor's allowed claim, including the secured portion and any unsecured portion thereof." (citing legislative history) (alteration in original) (internal quotation marks omitted)); *In re Realty Invs., Ltd. V*, 72 B.R. 143, 146 (Bankr. CD. Cal. 1987) (same).

The right to credit bid under section 363(k) serves as a check against the undervaluation of collateral. *See, e.g.*, 7 Collier on Bankruptcy, P. 1111.03 [4] (16th ed. 2010). *See also In re SubMicron Sys. Corp.*, 432 F.3d at 461 (the right to credit bid preserves the secured creditor's status by ensuring that its debt is either paid in full or that the collateral remains in place to secure the debt); *In re Realty Invs., Ltd. V*, 72 B.R. 143, 146 (Bankr. CD. Cal. 1987) (observing that section 363(k) provides "rights that will protect [creditors] from a questionable sale at a very low price.").

Among the other secured creditor protections contained in the Bankruptcy Code, is the secured creditor's right to make an election under section 1111(b). 11 U.S.C. § 1111(b). The section 1111(b) election right applies to both recourse and non-recourse creditors. Under section 1111(b)(2), subject to certain limitations, secured creditors have the right to treat their claims as fully secured, notwithstanding the value of the collateral, and to forego any unsecured deficiency claim they would otherwise be entitled to. Section 1111(b)(2) provides in relevant part, that "if such election is made, then notwithstanding section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed." *See* 11 U.S.C. § 1111(b)(2). The practical implications of making the 1111(b)(2) election is to allow an undersecured creditor to realize any future appreciation in the value of its collateral following the debtor's emergence from bankruptcy. *See, e.g.*, 7 Collier on Bankruptcy, P. 1111.03[4] (16th ed. 2010). If a secured creditor makes an election under section 1111(b)(2), the debtor may retain the creditor's collateral only by paying the creditor the full amount of its claim. *Id*. Thus, by design and in practice, the section 1111(b)(2) election acts as a check against undervaluation and preserves the secured creditor's state law rights and the benefit of its bargain. *See In re 183 Lorraine St. Assocs.*, 198 B.R. 16, 27 (E.D.N.Y. 1996) ("The purpose of the section 1111(b)(2) election is to protect secured creditors from depreciations in the market value of property securing claims.").

Indeed, the very purpose for the enactment of section 1111(b) was to preclude lien stripping. *See, e.g., Tampa Bay Assocs. v. DRW Worthington, Ltd. (In re Tampa Bay Assocs.)*, 864 F.2d 47, 49-50 (5th Cir. 1989) (noting that section 1111(b) "was enacted by Congress to cure the harsh result of *In re Pine Gate Assocs.*, 2 Bankr. Ct.

Dec. 1478 (Bankr. N.D. Ga. 1976)," under which "a debtor could file bankruptcy proceedings during a period when real property values were depressed, propose to repay secured [nonrecourse] lenders only to the extent of the then-appraised value of the property, and 'cram down' the secured lender class, preserving any future appreciation of the property for the debtor.").

However, the section 1111(b)(2) election is not available to secured creditors with recourse if the "property is sold under section 363 of this title or is to be sold under the plan." 11 U.S.C. § 1111(b)(1)(B)(ii). Even then, all is not lost for the secured creditor because it has the right to credit bid under section 363(k) in both sales under section 363 and under any plan, subject only to the denial of that right for "cause."

The Congressional record explains the reason for the exclusion of the section 1111(b)(2) election in the context of assets sales: a "[s]ale of property under section 363 or under the plan is excluded from treatment under section 1111(b) because of the secured party's right to bid in the full amount of its allowed claim at any sale of collateral under section 363(k) of the House amendment." 124 *Cong. Rec.* at H32407 (statement of Rep. Edwards). *See also In re Kent Terminal Corp.*, 166 B.R. 555, 565-66 (Bankr. S.D.N.Y. 1994) ("Arguably, Congress intended an absolute right to credit bid in all liquidating plans when it formulated the relationship among §§ 363(k), 1111(b), and 1129(b) ."); 7 Collier on Bankruptcy, P. 1111.03[3][b] (16th ed. 2010).

Thus, sections 1111(b) and 363(k) work in tandem, as intended by Congress, to protect the secured creditor against the kind of undervaluation the Debtors attempted to achieve through their now abandoned Plans and Bid Procedures Motions. The Debtors, however, advocate an interpretation entirely at odds with the Bankruptcy Code's well-constructed mechanism of secured creditor protection in order to advance the interests of the Stalking Horse and their insiders.

6. Legislative History Supports the Seventh Circuit's Interpretation of Section 1129.

When there is no consensus about what a law means based on the statutory language itself, a review of the legislative history is appropriate. *See Blum v. Stenson*, 465 U.S. 886, 896 (1984) ("Where, as here, resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear."). Here, the legislative history of section 1129(b)(2)(A) makes clear that it is to be read not in isolation, but in conjunction with, and as a complement to, section

1111(b). *See* 124 *Cong. Rec.* at H32406 (statement of Rep. Edwards) ("Together with section 1111(b) . . ., this section [1129(b)] provides when a plan may be confirmed notwithstanding the failure of an impaired class to accept the plan under section 1129(a)(8). Before discussing section 1129(b)[,] an understanding of section 1111(b) is necessary."). As Judge Ambro observed, section 1111(b) was drafted with section 1129(b)'s operation in mind and explicitly contemplates credit bidding for sales under a plan: "Sale of property *under section 363 or under the plan* is excluded from treatment under section 1111(b) *because* of the secured party's right to bid in the full amount of his allowed claim at any sale of the collateral under section 363(k) . . . ." *Philadelphia Newspapers*, 599 F.3d at 335 (citing 124 *Cong. Rec.* at H32407 (emphases added)).

7. The Debtors' Interpretation of Section 1129(b)(2)(A) Serves No Bankruptcy Policy, Necessarily Benefiting Only Strangers (and an Insider in These Cases).

A sale that prohibits credit bidding permits bidders to ignore the real market value of the asset regardless of whether that value exceeds the secured creditor's claim. The only constraint on the bidder is whether another bidder, including the secured creditor, has enough cash on hand and wants to use it to bid up the price. Thus, the Debtors' self-serving and collusive effort to avoid a real market test of the value of the collateral by substituting an artificial, potentially market-depressing auction process for one that truly tests the market by allowing credit bidding is a perfect illustration of the type of conduct Judge Ambro in his dissenting opinion concluded would flow from a holding that secured creditors may be precluded from credit bidding in a plan sale of their collateral:

> Instead of allowing the lenders their presumptive right to credit bid, debtors wish to confirm a plan that sells the collateral without the procedural safeguard against undervaluation contemplated by the [Bankruptcy] Code's drafters . . . The only party that stands to benefit from any undervaluation is the purchaser of the assets, ostensibly the Stalking Horse Bidder with substantial insider and equity ties.

Philadelphia Newspapers, 599 F.3d at 336, J. Ambro, *dissenting*. Certainly, no other creditors will benefit from this scheme until and unless the bid exceeds the secured creditor's claim, because until then, all the cash bid will go right back to the secured creditor.

It is easy to see why Judge Ambro's analysis is correct. Under the Plans, all

cash would have gone to the secured creditors until their total claims were paid. If the Stalking Horses' bids were below market (as the facts ultimately demonstrated they were) and the secured creditors could not have raised the cash to overbid, then the Stalking Horses could easily have obtained the assets at below market values without producing a penny for creditors junior to the secured creditors since all the cash would have gone right into the secured creditors' pockets. *Only the stalking horse bidder, commonly a total stranger to the proceedings (as is the case here), benefits by that outcome*. It is hard to conceive that bankruptcy law is designed to confer such a windfall on a stalking horse bidder without producing any benefit for the parties with whom bankruptcy is most concerned: the creditors. It is even harder to see the point when the debtor's insiders are positioned to benefit from the undervalued bid, as was the case with the Debtors' Plans.

B. The Seventh Circuit's Decision is Consistent with the Better Reasoned Decisions on This Issue.

Although numerous courts have reached a different conclusion,[5] in *Philadelphia Newspapers*, the Third Circuit held that, notwithstanding the express provisions of section 1129(b)(2)(A)(ii) of the Bankruptcy Code, the secured creditors did not have a statutory right to credit bid their claims in the context of a plan providing for the sale of their collateral free and clear of their liens because the debtor had the potential to cramdown the plan under the "indubitable equivalent" prong of 1129(b)(2)(A)(iii). *Philadelphia Newspapers*, 599 F.3d at 313. *See also Pacific Lumber*, 584 F.3d at 245-46 (stating that secured creditors must show that section 1129(b)(2)(A)(ii) is exclusively applicable to a proposed sale in order to be entitled to credit bid).

The decision goes to great lengths to address both the appellant's arguments and Judge Ambro's emphatic and well-reasoned dissent. However, the holding is premised on a formulaic and rigid approach to statutory construction that relies primarily on the fact that the three prongs of section 1129(b)(2)(A) , under which a secured creditor may be subject to cramdown, are phrased in the disjunctive. *Phila-*

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[5] *See, e.g., In re California Hancock*, 88 B.R. 226, 230 (B.A.P. 9th Cir. 1988) (requiring credit bidding where, although confirmation was sought under subsection (i), the debtor proposed to sell its assets under the plan); *In re River Village Assocs.*, 181 B.R. 795, 805 (E.D. Pa. 1995) (permitting credit bidding in a § 363(b) pre-confirmation sale, but confirming the reorganization under subsection (i)); *In re 222 Liberty Assocs.*, 108 B.R. 971, 980 (Bankr. E.D. Pa. 1990) (stating that the purpose of § 1111(b)(1)(A) is not satisfied by a sale at which the lienholder may not credit bid); *In re Kent Terminal Corp.*, 166 B.R. 555, 565-66 (Bankr. S.D.N.Y. 1994) (same, and agreeing with holding of *California Hancock*).

delphia Newspapers, 599 F.3d at 304-10. In so doing, the decision overrides critical secured creditor and estate protection designed expressly to guard against the undervaluation of secured creditor collateral and Congressional intent, and undervaluation that, worse yet, benefits no one but the selected bidder.

Judge Ambro cautioned that the majority's ruling would promote the undervaluation of assets, and allow the stalking horse to acquire the assets on the cheap. "If the debtors here prevail, a direct consequence is that debtors generally would pursue confirmation under [1129(b)(2)(A)(ii)] only if they somehow concluded that providing a right to credit bid as required by that clause would be more advantageous to them than denying that right. This is illogical when one considers that credit bidding is a form of protection for the secured creditor, not the debtor." *Philadelphia Newspapers*, 599 F.3d at 336, J. Ambro, *dissenting*.

The Debtors also point to two other decisions, *Pacific Lumber* and *In re CRIIMI MAE, Inc.*, 251 B.R. 796, 805-06 (Bankr. D. Md. 2000), for the proposition that the weight of authority supports their position. To the extent an argument regarding the alleged weight of authority is persuasive regarding a question of statutory interpretation, it is nonetheless inapplicable here because these are the only other decisions supporting the Debtors' position, hardly an indication of a settled view. Indeed, the affirmance by the Seventh Circuit all but eviscerated any weight of authority on this issue. In any event, the cases are easily distinguishable and neither case should be applied here.

In *In re CRIIMI MAE*, the Maryland bankruptcy court dealt with one of the few situations where courts have regularly held that a debtor can provide the indubitable equivalent of a secured lender's claim--by providing alternative collateral of equal value. In fact, the *CRIIMI MAE* court emphasized this point in distinguishing the cases that require credit bidding. *Id*. at 807. Thus, the *CRIIMI MAE* case falls outside of the plan treatment that section 1129(b)(2)(A)(ii) was intended to address. Furthermore, the secured lender in *CRIMII MAE* was fully secured and was to be paid in full under the proposed plan.

The Petitioners rely more heavily on the Fifth Circuit's recent decision in *Pacific Lumber*. Several aspects of that case warrant careful attention, however. Most importantly, *Pacific Lumber* did not involve an auction; rather, the value of the collateral at issue in that case had already been determined judicially and the contested plan proposed to pay the objecting secured noteholders cash equal to that collateral value. The secured noteholders voluntarily participated in the valuation process and only raised the issue of credit bidding after they were disappointed by

the result of the evidentiary hearing.

The Lenders also submit that *Pacific Lumber* was an instance in which bad facts made for bad law. The credit bidding issue arose at the confirmation stage of the bankruptcy cases. At that point, the court was faced with two competing plans, one a self-interested plan sponsored by a group of secured creditors that was clearly neither confirmable nor supported by any other constituents, and the other a plan that was widely supported and provided for substantial distributions to all creditors. The bankruptcy court made questionable rulings in an effort to confirm the latter plan, which was ultimately appealed to the Fifth Circuit. The Fifth Circuit observed that the bankruptcy court's other rulings on matters under the plan including unfair discrimination and releases from third-party claims were wrong and the offending plan provisions were either struck or would have been reversed if they had not been equitably moot. *Id*. at 250-52.

It is worth noting that even if one takes the position that the right result, *i.e.*, allowing the contested but only viable plan to proceed to confirmation, was reached in *Pacific Lumber* because such plan represented the proper balance of protecting the rights of secured creditors against achieving the reorganization of the debtors, a finding by the Fifth Circuit that the transfers under the plan should have been exclusively subject to section 1129(b)(2)(A)(ii) would not necessarily have foreclosed confirmation. Under the circumstances present in that case, including the existence of a judicially determined collateral value and a cash payment to secured creditors equal to that value, a court might well have found cause to deny the lenders the right to credit bid under section 363(k) on the basis that the protection afforded to secured creditors by credit bidding was unnecessary and would impede an effective reorganization.

The Lenders respectfully submit that the better reasoned and harmonious application of the relevant provisions of the Bankruptcy Code would preclude confirmation under the "indubitable equivalent" prong of section 1129(b)(2)(A) of the Bankruptcy Code in the context of a plan sale free and clear of liens.

CONCLUSION

For the foregoing reasons, this Court should resolve the current split in circuits and affirm the Seventh Circuit's Order affirming the Bankruptcy Court's denial of the Bid Procedures Motions, precluding confirmation under the "indubitable equivalent" prong of section 1129(b)(2)(A) of the Bankruptcy Code in the context of a plan sale free and clear of liens.

Supreme Court Practice – Certiorari Checklist

The following provides a brief summary of the United States Supreme Court certiorari process most relevant to bankruptcy practice.

1. Entry of judgment, or denial of rehearing, by federal court of appeals.

↓

90 days (Extendable up to 60 days by the Court)

↓

2. Petitioner dockets the case in the Supreme Court by (a) filing with the clerk (or mailing) 40 copies of the petition for certiorari (Rule 29.2), (b) paying $300 docket fee (Rule 38(a)), and (c) filing proof of service on all parties required to be served (Rule 29.5).

↓

30 days after receipt of petition (may be extended by Clerk) (Rule 30.4)

↓

3. Respondent may file 40 copies of brief in opposition to petition (Rule 15.1). If no opposition is filed, Court may order one.

↓

3A. *Amicus curiae* brief in support may be filed if consent of party or leave of court granted (no extension) (Rule 37.2).

30 days after receipt petition if a cross-petition is being filed (no extension permitted) (Rule 12.5)

↓

3B. Respondent may file 40 copies of a cross-petition for certiorari (cannot be combined with brief in opposition) (Rule 12.5).

↓

30 days after receipt of cross-petition

↓

3C. Petitioner, as cross-respondent, may file 40 copies of brief in opposition to cross-petition. If no opposition is filed, court may order one.

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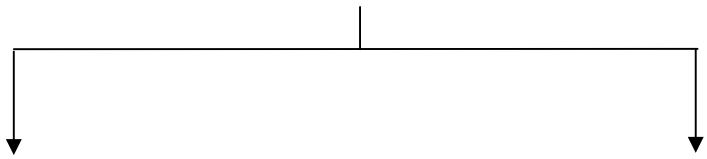
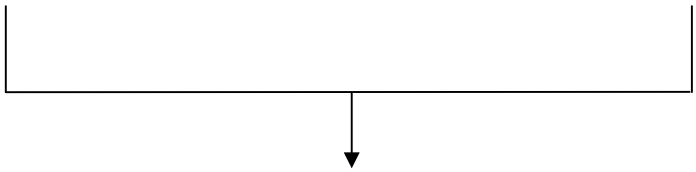
Unspecified time for Petitioner to file a reply brief (40 copies) after receipt of brief in opposition to petition or cross-petition (but should be filed within 10 days as explained below.).



Where a brief in opposition has been filed, the Clerk will distribute the petition, opposition, and any reply brief to the Court no less than 10 days after the brief in opposition is filed (Rule 15.5).

If the Respondent has waived the right to file an opposition brief, the petition for certiorari will be distributed to the court upon expiration of the 30-day period for filing an opposition brief (Rule 15.5).



5. At any time case is pending before Court, any party may file a supplemental brief calling attention to new cases, new legislation, or other intervening matters since the party's last filing (Rule 15.8).

Unspecified time (usually at least two weeks after filing brief in opposition)

6. Court enters order granting or denying petition (or cross-petition) for certiorari (Rules 16.2, 16.3).

Within 25 days of date of order denying certiorari

7. Petitioner (or cross-petitioner) may file 40 copies of petition for rehearing of the order of denial on certain limited grounds, along with a $200 filing fee (Rule 44.2).

Within the time specified by the Court in an order requesting response to the petition for rehearing

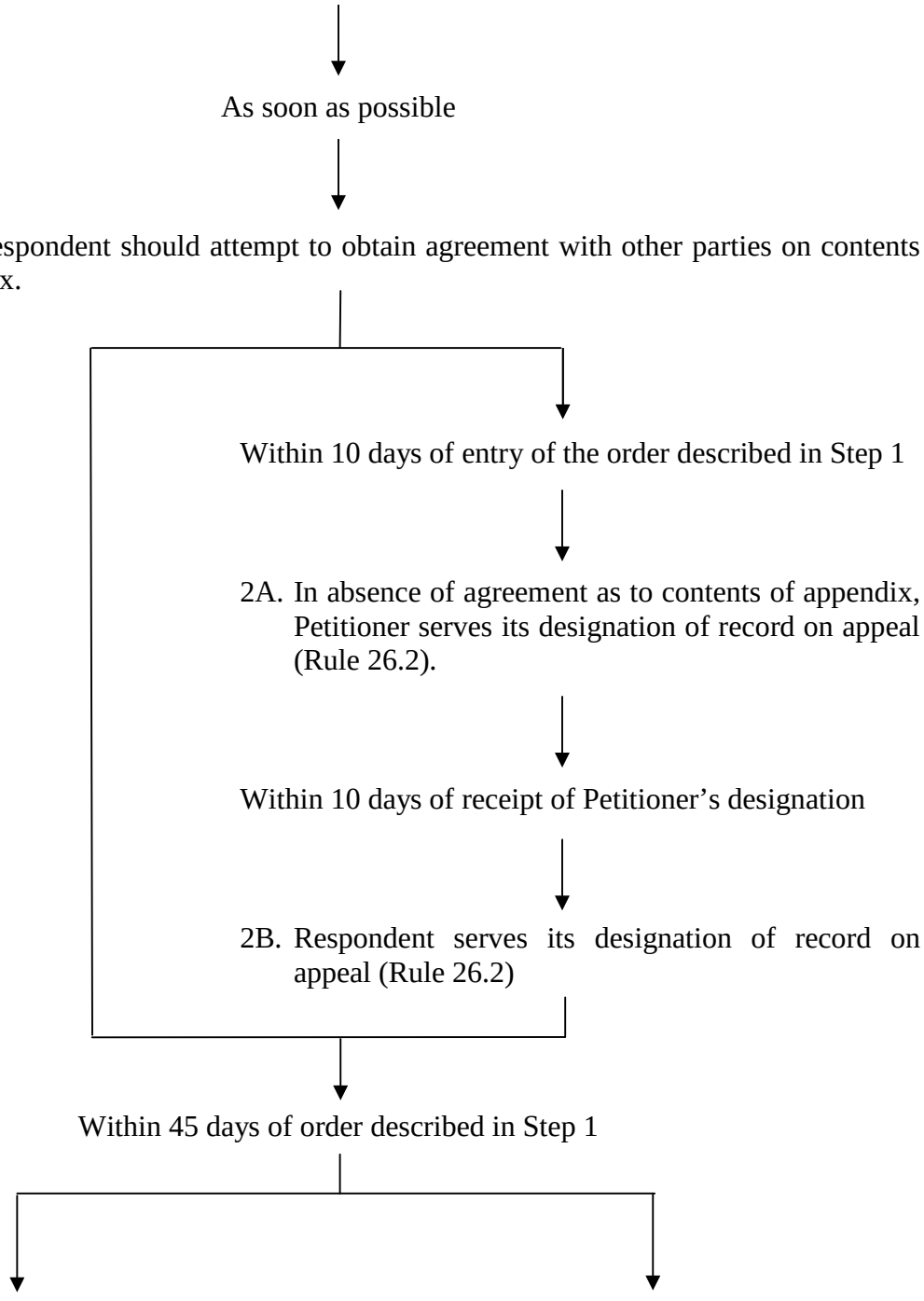
8. When, and only when, requested by the Court, respondent files 40 copies of a response to the petition for rehearing (Rule 44.3).

Unspecified time

9. Court enters order denying or granting petition for rehearing.

Supreme Court Practice – Checklist for Cases Accepted for Argument

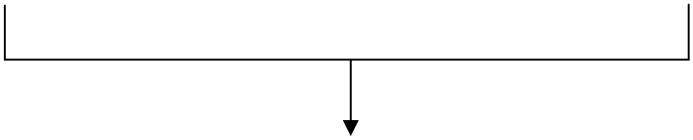
1. Order of Court granting certiorari
   (a) Clerk shall request transmittal of record below (Rule 16.7)
   (b) Clerk sends all counsel of record memoranda setting forth due dates of briefs on the merits, the probable month in which oral argument will be held, and instructions for preparation and filing of a joint appendix.



2. Petitioner or Respondent should attempt to obtain agreement with other parties on contents of joint appendix.

3A. Petitioner files 40 copies of brief on the merits (Rule 25).

3B. Petitioner files (40 copies) and serves printed copies of joint appendix.



Within 30 days after receipt of Petitioner's brief on the merits

4. Respondent files 40 copies of opposing brief on the merits (Rule 25.2).

Within 30 days after Respondent's brief, or no later than one week before date of oral argument, whichever is earlier (Rule 25.3)

5. Petitioner may file 40 copies of a reply brief (Rule 25.3).

At any time up to call of case for argument

6. Any party may file 40 copies of supplemental brief, restricted to presentation of late authorities, newly-enacted legislation, or other intervening matters not available to be included in brief in chief (Rule 25.2).

Usually not less than two weeks after Respondent brief is due

7. Oral argument before Supreme Court (Rule 28).

Within time specified by Court

8. By leave of Court only, any party may file additional memoranda after oral argument (Rule 25.6).

Unspecified time

9. Supreme Court announces opinion and judgment in case.

25 days

10. Losing party may file 40 copies of petition for rehearing with $200 filing fee (Rule 44.1). Unless otherwise ordered, such filing will stay judgment.

Within time specified by Court

11. Only when requested by Court, prevailing party files 40 copies of reply to petition for rehearing. But, no rehearing will be granted without an opportunity to reply (Rule 44.3).