No. 19-1456

IN THE
Supreme Court of the United States

KK-PB FINANCIAL, LLC,
Petitioner,

v.

160 ROYAL PALM, LLC.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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Dated: September 1, 2020

QUESTIONS PRESENTED

1. Should certiorari be granted where Petitioner does not does contend that the decision below creates a circuit split, conflicts with precedent from this Court, or involves an important question of federal law, but instead only argues that the Court should exercise its supervisory power to decide whether the Bankruptcy Court abused its discretion in (i) determining that, following a robust and extensive marketing effort, the Debtor properly exercised its business judgment in pursuing a private sale with a bona fide, arms-length, third-party purchaser; (ii) approving the sale of the relevant property to such a purchaser; and (iii) refusing to re-open the bidding procedures when Petitioner on behalf of another entity attempted to interject an untimely, equivocal, undetailed, and unsubstantiated oral offer to purchase the relevant property during the hearing on approval of the sale?

2. Should certiorari be granted where (i) the sale of the relevant property has closed, and the question presented is therefore moot under 11 U.S.C. § 363(m); (ii) the Court cannot grant Petitioner the relief it seeks, and therefore there is no case or controversy under Article III; and (iii) Petitioner is not a "person aggrieved" by the decisions below, and therefore lacks appellate standing?

CORPORATE DISCLOSURE STATEMENT

Respondent, 160 Royal Palm, LLC, is not a publicly traded corporation; no publicly traded corporation owns its stock; prior to confirmation of its chapter 11 bankruptcy plan (under which all equity interests were cancelled), 100% of the stock of 160 Royal Palm, LLC was owned by Palm House, LLC, a privately-owned corporation.

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PRELIMINARY STATEMENT

This matter arises out of the bankruptcy case of Respondent, 160 Royal Palm, LLC ("Respondent" or the "Debtor"). The Debtor filed for bankruptcy in August of 2018. Until recently, the Debtor owned a partially completed hotel project (the "Property"), which has now been sold to a third-party purchaser, LR Palm House LLC, a subsidiary of LR U.S. Hotels Holdings, LLC (collectively, "LR").

Glenn Straub ("Straub") is the former owner of the Debtor. Petitioner KK-PB, LLC ("Petitioner") is a private company also owned by Straub. Petitioner seeks this Court's review in order to unravel the sale of the Property to LR so that one of Petitioner's affiliates might have the opportunity to bid on the Property, even though the affiliate had every opportunity to bid below and declined to do so in a timely or otherwise appropriate manner. In addition, the affiliate who wishes to bid is not a party to this matter, did not appeal from the Bankruptcy Court's order approving the sale, and did not otherwise participate in the proceedings below.

The Petition has no merit. Petitioner does not argue that the decision below created a circuit split, conflicts with prior precedent of this Court, or involves an important question of federal law. Nor does Petitioner contend that the Eleventh Circuit misapprehended the relevant legal standard. Rather, Petitioner asks the Court to exercise its "supervisory

power" to correct what it perceives is the wrong outcome. Pet. at 13. But as this Court's Rules acknowledge, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. For the reasons below, this is not such a "rare[]" case. Indeed, there is every reason to deny further review.

Absent from the Petition is the real story of how Petitioner fraudulently caused the Debtor to incur much of its debt in the first place. The former owner of the Property, Robert Matthews ("Matthews"), used the Property in a scheme to defraud foreign investors—promising green cards that never materialized in exchange for hefty investments. After Matthews defaulted on his mortgage debt, Straub caused the Debtor to purchase the Property. Just a few years later, Straub caused the transfer of the Property back to an entity controlled by Matthews. The transaction, however, was a fraudulent one: Straub transferred his equity interest in the Debtor to an entity controlled by Matthews, but Matthews paid nothing in exchange. Instead, the Debtor paid Straub approximately $6 million in cash, and Petitioner received an approximately $27 million note secured by a mortgage lien on the Property. The Debtor thus went from owning the Property free and clear to owning the Property encumbered by Petitioner's $27 million secured claim, with nothing to show for having incurred the new debt. Conversely, Straub—whose equity interest in the Debtor was worthless at the

time of the transaction owing to the Debtor's insolvency—sold his worthless interest for $6 million in cash, plus a nearly $27 million note issued by the Debtor to Petitioner, a company owned by Straub.

In its continued quest to bilk the Debtor and its legitimate creditors, Petitioner now complains that its belated oral offer to have an affiliate purchase the Property, which was made for the first time at the hearing to approve the sale to LR, was higher and better than LR's offer. It was not. In fact, it was not even a firm offer; it was simply a proposal to hold an auction at a later date where some entity other than Petitioner (specifically, an affiliate known as "Kids2, LLC") would supposedly submit a bid. As the Court of Appeals acknowledged, there were numerous reasons the Debtor determined that Petitioner's "offer" was neither highest nor best, and the Bankruptcy Court did not abuse its discretion in concluding that the Debtor, in its reasonable business judgment, properly pursued LR's good-faith written offer. Accordingly, there is no compelling reason for this Court to exercise its supervisory powers and review the Bankruptcy Court's exercise of discretion in this case. On the contrary, there is every reason to deny further review.

The Petition should also be denied for the independent reason that the appeal is moot and Petitioner lacks standing. After the District Court affirmed the Bankruptcy Court's order approving the sale to LR, the Debtor closed the deal, transferring

both title and possession to LR in exchange for LR's payment of the purchase price. As a result, this appeal is now statutorily moot under 11 U.S.C. § 363(m), which prohibits appellate courts from undoing or modifying a sale unless the party challenging the sale obtained a stay (which Petitioner did not). Nor is there an Article III case or controversy because, owing to the same statutory provision, this Court is barred from undoing the sale. Finally, because this is a bankruptcy appeal, Petitioner must demonstrate that it is a "person aggrieved" in order to have appellate standing to challenge the decisions below. Under this standard, an appellant must be impacted pecuniarily or otherwise suffer a deprivation of its rights or an increase in its burdens. Disappointed purchasers and holders of fraudulently obtained notes do not qualify under this standard, especially when the erstwhile purchaser did not even participate in the appellate process. The Petition should be denied.

BACKGROUND

A. Ownership of the Property and the Scheme to Defraud Creditors.

The Property has a tortured history. Pet. App. B ("Aff. Order") at 4. Ownership had transferred more than once, and no prior owner had been able to develop the Hotel into a functioning facility. *Id.* Matthews acquired the Property through a limited liability company, but lost it in 2009 after the

company defaulted on a mortgage debt owed to a third-party lender. Bk. Ct. Doc. 574, (Jan. 8, 2019 (am) Hr'g Tr.) 28:4-29:17 (Feb. 14, 2019). At the ensuing foreclosure sale, Straub caused the Debtor to acquire the Property for $10.2 million. *Id*. Straub owned and controlled the Debtor through August of 2013. Bk. Ct. Doc. 603 ("Est. Order") at 5 (Feb. 26, 2019). During this period, Straub both owned the equity interest in the Debtor and controlled its operations. *Id*.

Dozens of foreign investors have alleged that Matthews and others used the Property to solicit investments as part of a fraudulent EB-5 visa scheme, garnering more than $500,000 each from various individuals in exchange for the promise of green cards that never materialized. Over seventy-six of these investors ultimately filed proofs of claim in the Debtor's bankruptcy case (the "EB-5 Investors"). *See* Est. Order 2, n.1.

In August of 2013, Straub agreed to sell his equity interest in the Debtor to Palm House, LLC ("Palm House"), a company controlled by Matthews. Est. Order 5; Bk. Ct. Doc. 574, (Jan. 8, 2019 (am) Hr'g Tr.) 59:10-60:6 (Feb. 14, 2019). Critically, Palm House did not pay Straub for this acquisition. Instead, the Debtor paid Straub $6,211,000 in cash and issued a promissory note to Petitioner in the principal amount of $27,468,750 secured by a mortgage lien on the Property. Bk. Ct. Doc. 577, (Jan. 11, 2019 (pm) Hr'g Tr.) 230:10-21 (Feb. 14, 2019); Est. Order 5. Of the

$6,211,000 cash payment provided to Straub, approximately $2.6 million is traceable to funds provided by the defrauded EB-5 Investors. *See* Bk. Ct. Docs. 584, (Feb. 15, 2019 (am) Hr'g Tr.) 15:22-21:19 (Feb. 18, 2019); Est. Order 5. In other words, the Debtor issued a $27 million note and mortgage to facilitate Matthew's acquisition of the Debtor, at the expense of the very victims of his fraud. After this transaction, the Debtor remained the title owner of the Property, *see* Bk. Ct. Docs. 584, (Feb. 15, 2019 (am) Hr'g Tr.) 40:5-15 (Feb. 18, 2019), and a mortgage in favor of Petitioner was recorded on March 28, 2014, Est. Order 6; Bk. Ct. Doc. 577, (Jan. 11, 2019 (pm) Hr'g Tr.) 242:11-13 (Feb. 14, 2019).

Significantly, the Debtor received no value in exchange for its issuance of the note and mortgage to Petitioner. Rather, the Debtor simply went from owning the Property free and clear to owning the Property encumbered by Petitioner's $27 million secured claim, with nothing to show for having incurred the new debt—all at the expense of its legitimate unsecured creditors. Meanwhile, Straub pocketed over $6 million in cash; Petitioner acquired the note and mortgage; and Palm House acquired Straub's equity interest in the Debtor, which was then worthless because the Debtor's assets had a value of no more than $20 million at the time, whereas the Debtor owed tens of millions to its other creditors. Accordingly, when Petitioner requested that the Bankruptcy Court estimate its claim represented by the note and mortgage so that it could use its claim to

acquire the Property through the bankruptcy credit bidding process, the Bankruptcy Court fixed the claim at $0 because it is based on a fraudulent transfer scheme under Florida law. *See* Est. Order 11-15.

On November 14, 2016, certain of the EB-5 Investors commenced an action in federal court against a number of parties involved in the alleged scheme, including the Debtor and Petitioner. *See* Est. Order 2, 9. The Debtor also owed significant obligations to others, including the Town of Palm Beach and the Town of Palm Beach Code Enforcement Board, which asserted a $4,141,000 secured claim comprised of damages and code violation fines that were accruing at the rate of $2,250 per day since Straub owned the Debtor (the "Town Claim"). *See* Bk. Ct. Docs. 97, 780, 930, & 1469, § 4.2. The Securities and Exchange Commission also asserted claims based on the approximately $2.6 million traceable to funds provided by the EB-5 Investors. *See* Est. Order 10; Bk. Ct. Doc. 1416 (November 19, 2019).

Additionally, Petitioner purports to have purchased a secured claim of approximately $3.4 million from New Haven Contracting South, Inc. ("New Haven"), which Petitioner acquired for roughly $20,000. *See* Bk. Ct. Doc. 673 ("Sale Hr'g. Tr.") at 40:17-40:21 (March 14, 2019). However, New Haven's principal testified at the hearing on the approval of the sale to LR that he is a felon guilty of conspiracy to commit wire fraud and engaging in other improper monetary transactions. *Id*. 46:1-46:21. After that

hearing, an involuntary bankruptcy petition was filed against New Haven, and litigation between the Debtor and New Haven ensued. Bk. Ct. Dkt. 1646. The Debtor and New Haven then settled the matter, and the court entered a final consent judgment against New Haven and in favor of Debtor in the amount of $14 million. Bk. Ct. Dkt. 1697. As part of that settlement, New Haven also assigned to the Debtor its claims of fraudulent transfer that it held against Petitioner and Straub. Bk. Ct. Dkt. 1646. Ultimately, Petitioner's $3.4 million claim was disallowed. Bk. Ct. Dkt. 1731 (Apr. 28, 2020).

B. The Debtor Files for Bankruptcy and Seeks to Sell the Property for the Benefit of Its Legitimate Creditors.

The Debtor commenced its Chapter 11 case on August 2, 2018 (the "Petition Date"). *See* Bk. Ct. Dkt. 1 (Aug. 2, 2018). By operation of law, when a debtor files for bankruptcy, a bankruptcy estate is created, consisting of all of the debtor's property. *See* 11 U.S.C. § 541. As of the Petition Date, the Property was the principal asset of the Debtor's estate. Cary Glickstein ("Glickstein"), in his capacity as court-appointed manager of the Debtor, thereafter engaged in an extensive effort to sell the Property as authorized by section 363 of the Bankruptcy Code. *See* 11 U.S.C. § 363(b). As the Bankruptcy Court noted, the "goal of this case is to preserve [the value of the Property] for

the Debtor's other creditors including, in particular, the EB-5 Investors." Est. Order 2.

On October 1, 2018, the Debtor filed a motion to approve certain sale procedures centering on a $32 million "stalking horse" contract with RREF II Palm House LLC ("RREF"). Bk. Ct. Doc. 92 (Oct. 1, 2018). RREF, as the "stalking horse" bidder, was willing to make a firm offer for the Property, subject to higher and better bids. *Id.* On October 16, 2018, the Bankruptcy Court entered a procedural order setting a bid deadline and scheduling an auction and sale hearing. *See* Bk. Ct. Doc. 154 ("Pro. Order") (Oct. 16, 2018). The stalking horse contract demanded a tight timeline, requiring that the auction and sale hearing be accomplished in short order. *See* Bk. Ct. Doc. 92, Ex. 2, ¶¶ 9.1, 9.2 (Oct. 1, 2018). The auction, however, was not guaranteed to occur. Rather, an auction would occur only if another qualified bidder submitted a timely bid for at least $32.5 million, *see* Bk. Ct. Doc. 273, ¶¶ 6(i), 6(iii) (Nov. 9, 2018), and prior to any auction, the Debtor had no duty to disclose bidders, *id.* at ¶ 6(i).

C. The Debtor Settles with The Town of Palm Beach.

A critical impediment to the Property's sale were the various fines imposed by the Town of Palm Beach—exceeding $4 million—which were imposed as a result of the Property's neglected condition, including while managed by Straub. Aff. Order. In

order to overcome this impediment and proceed with a sale, the Debtor negotiated the Town Settlement. Pursuant to the Town Settlement, if the Property were sold to a "qualified buyer," the fines would be reduced to $250,000, which amount the qualified buyer of the Property had to pay by February 28, 2019. *See* Bk. Ct. Docs. 97 (Oct. 3, 2018), 204 (Nov. 6, 2018), 536 (Feb. 5, 2019), & 543 (Feb. 6, 2019). In addition, the conditional settlement extended various regulatory approvals necessary to develop the Property through April 30, 2019, provided a qualified buyer purchased the Property and completed certain actions by that date. *Id.* Notably, Petitioner, its affiliates, and Straub were not "qualified buyers," thereby scuttling the Town Settlement if they were to purchase the Property. *See* Sale Hr'g. Tr. 35:18-36:2; Bk. Ct. Doc. 675 ("Pro. Hr'g Tr.") at 31:11-31:22 (March 14, 2019).

D. The Debtor Seeks Approval for a Private Sale to Petitioner.

With the Town's claim conditionally settled, the Debtor was in a better position to sell the Property. But the sale process was interrupted by litigation between Petitioner, the Debtor, and other creditors. Pet. App. C, Ex. A. at 4. To resolve this litigation, the Debtor and Petitioner negotiated a settlement that included a private sale of the Property to Petitioner (the "Petitioner Settlement"), pursuant to which Petitioner would pay $5.125 million for the Property. Bk. Ct. Doc. 523 (Jan. 25, 2019). While these

settlement negotiations were ongoing, the Debtor sought extensions of the various upcoming deadlines, with the Bankruptcy Court ultimately rescheduling the bid deadline to March 4, 2019, and the auction/sale hearing to March 8, 2019. *See* Bk. Ct. Doc. 537 (Feb. 5, 2019). The Debtor served notice of these rescheduled dates on all interested parties on February 6, 2018, thirty days prior to the sale hearing on March 8, 2019. *See* Bk. Ct. Doc. 540 (Feb. 6, 2019).

During a February 8, 2019 hearing on the Petitioner Settlement, the EB-5 Investors, the Securities and Exchange Commission, and the United States Trustee all objected to the settlement, and the Bankruptcy Court denied approval. *See* Bk. Ct. Docs. 534 (Feb. 4, 2019), 535 (Feb. 4, 2019), 542 (Feb. 6, 2019), 544 (Feb. 6, 2019), 545 (Feb. 6, 2019), 555 (Feb. 6, 2019), & 560 (Feb. 11, 2019). Notably, as of the February 8 hearing, Petitioner had also failed to deliver the $5,125,000 payment required under the Petitioner Settlement, and was thus was in default. *See* Sale Hr'g Tr. 85:5-85:18, 87:18-88:6, 93:17-93:19.

E. After a Robust Marketing Process, the Debtor Seeks Approval of a Private Sale to LR or RREF.

Throughout the course of the bankruptcy proceedings, the Debtor diligently sought to market and sell the Property. To facilitate the sales process, the Debtor hired Cushman & Wakefield U.S., Inc. (the "Broker") as its real estate broker in September of

2018. *See* Bk. Ct. Doc. 66 (Sept. 10, 2018). Glickstein, the Debtor's court-appointed manager, testified that: (i) the Property offering was distributed to approximately 29,000 investors in the Broker's national and international databases; (ii) approximately 4,800 investors viewed the offering; (iii) approximately 335 investors executed confidentiality agreements; (iv) approximately 40 individual tours were conducted, most of which Glickstein attended to gauge the potential purchaser's interest and qualifications; and (v) the foregoing efforts resulted in just two qualified buyers who expressed serious and sustained interest in the Property—RREF and LR. *See* Sale Hr'g Tr. 98:17-99:3. During this period, the Debtor also negotiated extensions of the Town Settlement deadlines to permit potential bidders to take advantage of its terms, and obtained extensions of the RREF stalking horse bid. *See* Bk. Ct. Doc. 536 (Feb. 5, 2019).

After the Petitioner Settlement fell through, the Debtor signed a sales contract with LR (the "LR Contract"), under which LR offered $39.6 million to purchase the Property, which was $7 million more than RREF's stalking horse bid. *See* Bk. Ct. Doc. 604 (Feb. 26, 2019). LR also agreed to reimburse the Debtor $250,000—the amount the Debtor paid the Town under the Town Settlement. *Id*. The LR Contract, however, did not guarantee a sale to LR because RREF was permitted to submit an overbid, provided the bid was at least $40.6 million; and if

RREF opted to submit a higher bid, then LR had the ability to submit its best and final offer. *Id*.

On February 26, 2019, the Debtor filed a motion seeking approval of a private sale to LR or RREF (the "Sale Motion"), which outlined the private sale procedures agreed upon in the LR Contract (the "Private Sale Procedures"). *See* Bk. Ct. Doc. 604 (Feb. 26, 2019). The Debtor also filed a Motion to Shorten Sale Notice on February 27, 2019, to which Petitioner never objected. Bk. Ct. Doc. 608 (Feb. 27, 2017). After conducting a hearing on February 28, 2019, the Bankruptcy Court granted the Debtor's motion to approve the Private Sales Procedures (the "Procedures Order"), and it scheduled a deadline for objections of March 5, 2019, and a sale hearing for March 8, 2019 (the "Sale Hearing"). *See* Bk. Ct. Docs. 619 ("Pro. Order") (March 1, 2019) & 627 (March 4, 2019). The Procedures Order also deemed LR a "[q]ualified [b]uyer" under the Town Settlement. Pro. Order ¶4.

Ultimately, RREF did not submit an overbid, so the Debtor pursued a sale of the Property to LR. None of the parties who objected to the Petitioner Settlement objected to a private sale to LR. Instead, Petitioner was the only party who timely filed any written objection (the "Objection"), but its Objection was filed solely on behalf of Petitioner (not any affiliate) and only references its claim based on the note and mortgage that, by that time, had been disallowed as a fraudulent conveyance. *See* Bk. Ct.

Doc. 629 (March 5, 2019). Notably, Petitioner did not submit a bid for the Property in its Objection, or even indicate that it wished to bid on the Property.

On March 8, 2019, the Bankruptcy Court held the Sale Hearing. As the hearing began, Petitioner interrupted the presentation and advised that Petitioner's affiliate, Kids2, LLC, should be permitted to present an offer to purchase the Property. *See* Sale Hr'g Tr. 7:12-9:2. Up until that time, Petitioner had not discussed any such proposed offer with the Debtor. Further, no proposed sale contract of any kind was provided at the Sale Hearing, and even during the Sale Hearing, the terms of the oral offer remained equivocal. Addressing this uncertainty, the Bankruptcy Court stated in its ruling:

> Today, more than two days after the objection deadline, with no prior notice to the Debtor or the Court, literally during the sale hearing, [Petitioner] attempts to present its own offer to purchase the [Property]. [Petitioner] proposes a cash purchase price of $40.6 million, plus the assumed liabilities identified in the contract attached to the Debtor's sale motion, plus an additional $5 million dollars to cover the [Town] claim . . . but only to the extent that claim is allowed after an opportunity for objections. The reason for the extra $5 million is that

> [Petitioner] is not a qualified buyer under the settlement with the [Town], so that settlement would fail and the estate would not have the benefit of the significant settlement of those claims. Note that the [Town] today suggests that if the settlement is not consummated, the Town likely will have other claims against the estate and those may include administrative expense claims that would come ahead of unsecured creditors. Thus, even assuming the basic terms of [Petitioner's] last minute proposal, it may not in fact represent the $1 million increase in value to the estate that it presents on its face. But let us assume for a moment that the [Petitioner] proposal represents a $1 million potential benefit to the estate. [Petitioner's] proposal includes as a required component that there be an auction procedure, set out about 30 days from now, at which other parties would also be permitted to bid. So the [Petitioner's] proposal made today includes an initial topping offer, but would require a delay of at least a month for an additional auction procedure.

> . . . [T]he proposal of [Petitioner] was made orally during the hearing and was somewhat in flux as counsel for [Petitioner] presented the proposal. There was no written proposal offered. It is impossible to overstate how unusual this last minute proposal is in the context of a sale of this particular asset. Does it sometimes happen that bidders show up at a bankruptcy sale hearing to present a last minute bid? Yes, it does. Does it happen in cases such as this where the asset is of significant value and the due diligence required to present a reasoned bid typically requires extensive review of data and discussion with the debtor? In my 28 years[’] experience with bankruptcy sales, it does not.

Pet. App. C, Ex. A at 5.

Additional facts supported the Debtor’s determination that Petitioner’s proposal did not represent a higher and better offer than the LR Contract. Among other things, Glickstein testified that: (i) Petitioner’s alleged $1 million price increase was not worth the risk that Straub would later take actions that would increase the costs to the estate, thereby reducing creditor recovery, Sale Hr’g Tr. 88:11-88:22; (ii) the potential increase in recovery was far outweighed by the risk of litigation, including

Straub's self-professed status as a professional litigator who enjoys litigating, has the time to do it, and takes pleasure in it, and also Petitioner's failure to deliver the $5 million payment required under the Petitioner Settlement, *id.* at 88:2-88:22, 93:5-93:19; (iii) LR was a strong and preferable Property purchaser, *id.* at 88:16-88:20, 92:8-92:21, 94:18-95:5; (iv) a sale delay would jeopardize both the Town Settlement and the LR Contract, *id.* at 84:14-85:11, 86:1-86:14; (v) the Debtor had nearly run out of funds and further delay might require debtor-in-possession financing, which could be difficult to obtain, due to extensive problems with the Property, *id.* at 88:25-89:4; (vi) the EB-5 Investors—who hold an overwhelming majority of the unsecured claims—opposed Petitioner's proposed offer and supported the LR Contract, *see id.* at 34:22-35:8; (vii) Petitioner's proposal on behalf of Kids2, LLC did not take into account that if the Debtor did not sell to a qualified buyer, the Town would have additional administrative claims for the daily fines that accrued post-petition and likely other claims against the estate for failure to move forward with the development, *id.* at 73:6-76:11, 78:18-79:23; (viii) no evidence was presented to show Kids2, LLC could close on the sale, and although Petitioner presented a photocopy of a $50 million cashier's check payable to Straub, at no time did Straub agree on the record that he would make the cash available to Kids2, LLC or Petitioner; and (ix) no evidence was presented to support the suggestion that there would be any new bidders at an auction.

Accordingly, after weighing the testimony and other evidence introduced at the Sale Hearing, on March 8, 2019, the Bankruptcy Court approved the sale to LR and overruled the objections raised by Petitioner. *See* Sale Hr'g Tr. 116:1-146:3. On March 12, 2019, the Bankruptcy Court entered an order granting the Sale Motion, and included its detailed findings and conclusions as an exhibit thereto. Pet. App. C ("Sale Order").

Petitioner moved the Bankruptcy Court to stay the sale pending appeal, but the Bankruptcy Court denied the motion. *See* Bk. Ct. Doc. 668 (March 14, 2019). Petitioner then sought appellate review of the stay denial, but both the District Court and the Eleventh Circuit denied Petitioner's requests for a stay. D. Ct. Doc. 13 (March 14, 2019) ("Dist. Ct. Stay Order"); Eleventh Cir. Case No. 19-10962, Order Dated March 18, 2019.

F. The District Court and Eleventh Circuit Affirm the Bankruptcy Court's Orders.

On April 10, 2019, the District Court entered an order affirming the Bankruptcy Court's Procedures Order and the Sale Order, finding "nothing in the record to overcome the deference that is owed to the Debtor's business judgment and the Bankruptcy Court's findings of fact." Aff. Order 10.

The District Court explained that the Debtor exercised its reasonable business judgment in

selecting LR's firm offer and rejecting Petitioner's equivocal oral offer:

> [T]he Debtor's choice was between taking advantage of the LR APA, which offered finality, certainty, and a price $7.6 million above the stalking horse bid, and the uncertainty of delaying the sale yet again, for the promise of a bid just 2.5% higher than the LR bid. . . . [T]he Debtor here has been clear that it is pursuing a "bird in the hand" approach and sought the finality and certainty of the LR offer. . . . The use of a private sale, to take advantage of the offer made by LR, was within the Debtor's business judgment, and the Court sees no reason to supplant its judgment for the business judgment determination of the Debtor.

Id. at 12 (internal citations omitted).

The District Court also noted that LR's offer allowed the Debtor to take advantage of the valuable Town Settlement. *Id.* at 14. The court further held that the Debtor reasonably believed that LR's offer would maximize the value to creditors, and neither it nor Petitioner could substitute its own judgment for the Debtor's. *Id.* at 14-15 ("[T]o force the Debtor to forego the LR offer and subject itself to a public auction would require this Court to inappropriately

use its own business judgment in place of the Debtor's, which this Court will not do.").

On November 25, 2019, the Eleventh Circuit affirmed the Bankruptcy Court's orders in a per curiam decision, ruling (i) the appeal was not moot "for the reasons the Court expressed during oral argument," and (ii) assuming without deciding that Petitioner had standing on appeal, the "bankruptcy court did not abuse its discretion when it approved the sale to LR" for "the well-reasoned determinations of the bankruptcy court as set forth in its rulings." Pet. App. A, 3.

G. The Sale to LR Closed and the Escrowed Funds Were Distributed to Creditors.

On May 15, 2019, the Debtor's sale of the Property to LR closed, and LR recorded an unconditional Debtor-in-Possession Deed on May 16, 2019. Bk. Ct. Doc. 794 (May 16, 2019). The Property has thus transferred to, and is now owned by, LR.

Under a Post-Closing Agreement, the Debtor agreed to hold certain funds from the sale to LR in escrow until either (i) the Eleventh Circuit or this Court issued a final, non-appealable order, or (ii) the Debtor and LR issued a joint written instruction to disburse the escrowed funds. Pet. App. G (Post-Closing Agreement). The Post-Closing Agreement also provided that a reversal of the Sale Order on appeal would trigger the delivery of a reverse deed,

but no court has reversed the Sale Order, and thus no reverse deed has ever been recorded.

On February 11, 2020, the Bankruptcy Court entered an order confirming the Third Amended Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code ("Plan"). Bk. Ct. Doc. 1564 (Feb. 11, 2020). After confirmation, all funds from the sale were released from escrow per the joint instructions of the Debtor and LR, all reversal-deed documents held in escrow were destroyed; and the Debtor's bankruptcy estate has distributed over $39,000,000 to creditors. Bk. Ct. Docs. 1557 (Feb. 9. 2020), 1586 (Feb. 10, 2020), 1594 (Feb. 13, 2020), 1629 (Feb. 20, 2020), 1665 (March 3, 2020), 1776 (June 24, 2020), & 1795 (July 17, 2020).

REASONS FOR DENYING THE PETITION

I. PETITIONER DOES NOT IDENTIFY A COMPELLING REASON TO GRANT THE PETITION.

A petition for writ of certiorari is to be granted only for a "compelling reason." Sup. Ct. R. 10. No such reason exists in this matter. Examples of compelling reasons include where a lower court's opinion creates a circuit split, it conflicts with existing Supreme Court precedent, or presents "an important question of federal law that has not been, but should be, settled by this Court." *Id*. None of these circumstances are present here.

Instead, Petitioner asks this Court to exercise its "supervisory power." Pet. at 13. Specifically, although bankruptcy courts indisputably have discretion to tailor bidding and sale procedures to the particular circumstances of the cases before them, Petitioner argues that the Bankruptcy Court abused its discretion in this particular case. As this Court's Rules acknowledge, however, a writ of certiorari is "rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. As the Court of Appeals properly determined, the Bankruptcy Court did not abuse its discretion in this case, and Petitioner has failed to demonstrate that it did—let alone in a manner sufficient to justify an extraordinary grant of further review in this Court.

As a "debtor in possession" in a Chapter 11 case, the Debtor was entitled to exercise its business judgment in managing the sale of its assets, as warranted under the circumstances. *See In re Phillips*, No. 2:12–CV–585–FtM–29, 2013 WL 1899611, at *10 (M.D. Fla. May 7, 2013) (bidding and sale procedures "are 'ultimately a matter of discretion that depends upon the dynamics of the particular situation'"); *In re Frantz*, 534 B.R. 378, 387 (Bankr. D. Idaho 2015) (the debtor in possession must use its business judgment in "selection of bidding and sale procedures"); *In re Innkeepers USA Trust*, 448 B.R. 131, 146 (Bankr. S.D.N.Y. 2011) (debtors properly "exercised their business judgment" in proposing bidding procedures). Likewise, in situations in which

the debtor entertains multiple offers, it exercises its business judgment in determining which is "the best and highest," and this discretion includes the ability to accept "a lower monetary bid." *In re Phillips*, 2013 WL 1899611, at *10 (internal quotations omitted). In general, the Debtor's business judgment "is entitled to great judicial deference," and the bankruptcy court is not permitted to substitute "its own judgment . . . ." *Id*. Instead, "[a] debtor's business decision should be approved by the court unless it is shown to be so manifestly unreasonable that it could not be based upon sound business judgment, but only on bad faith, or whim or caprice." *In re SW Boston Hotel Venture, LLC*, No. 10-14535-JNF, 2010 WL 3396863, at *3 (Bankr. D. Mass. Aug. 27, 2010). Here, Petitioner has failed to show that the Debtor's exercise of its business judgment runs afoul of these standards.

As outlined above, the Debtor undertook extensive marketing efforts over a period of many months in order to sell the Property, with the help of its seasoned and reputable Broker. *Supra* 12. Only two *bona fide* potential purchasers emerged, LR and RREF, both of whom were invited to participate in the private sale. *Supra* 12. Their inclusion in the sale process was eminently reasonable, as RREF had previously agreed to make a stalking horse bid of $32 million, and LR later offered substantially more: $39.6 million. *Supra* 9, 12-13. Although Petitioner contends that the Bankruptcy Court abused its discretion by approving procedures that "foreclosed all competitive bids," Pet. at 3, this argument ignores reality: there were only

two legitimate bidders and both were included in the process.

Petitioner's real complaint is that it was not permitted to sabotage the Debtor's sale efforts, which it has repeatedly attempted to thwart. If Petitioner had wanted to put a *bona fide* offer on the table, it had every opportunity to do so. As noted, the Debtor had attempted to negotiate a private sale to Petitioner, to no avail. *Supra* 10-11. Even after that, Petitioner could have offered to pay more than the other bidders by presenting a timely, written, *bona fide* proposal. Petitioner, however, did not. Instead, it waited in ambush for a strategic moment to attempt to upend whatever sale the Debtor negotiated.

Nor was Petitioner's belated oral offer highest and best. As noted by the District Court, the Bankruptcy Court's Sale Order "goes to great lengths to document why the proposed sale [to LR] represents the 'best possible recovery' for the bankruptcy estate," given the "lengthy history of delayed public sales, substantial negotiations with the Town of Palm Beach (a significant creditor in the bankruptcy action), consultation with the majority of creditors in the case, and a finding that the sale negotiations have been pursued in good faith." Dist. Ct. Stay Order 4. Moreover, LR's offer exceeded the stalking horse bid by $7.6 million, was "stable and certain," and allowed "the Debtor to take advantage of a valuable settlement offer with the Town." Aff. Order 14.

Other factors also supported the Debtor's determination that Petitioner's offer was neither highest nor best: (i) if the Town Settlement failed, the Town could assert additional claims against the Property, and thus Petitioner's offer "may not in fact represent the $1 million increase in value to the estate that it presents on its face," Sale Order Ex. A at 5; (ii) Petitioner did not present any evidence that Kids2, LLC could actually close a sale; (iii) Glickstein testified that—taking into account the outstanding $250,000 checks to the Town—the Debtor was nearly out of funds and the further delay that Petitioner requested was undesirable; (iv) Straub, the principal of Petitioner, is a self-professed serial litigant who takes joy in filing and pursuing lawsuits, casting further doubt on the success of a sale to Petitioner; (v) Petitioner previously defaulted on its private purchase of the Property by failing to submit the required deposit, even though it was required to pay only $5.125 million; (vi) when the Debtor previously sought court approval of a private sale to Petitioner, multiple creditors objected to the sale; and (vii) Petitioner previously saddled the Debtor with millions of dollars in debt through an illicit fraudulent transfer scheme in an attempt to elevate Straub's worthless equity stake into a secured claim at the expense of the Debtor's legitimate creditors. *See supra* 16-17

Even assuming *arguendo* that Petitioner's proposal provided potentially higher value, it is hornbook law that it was well within the Debtor's business judgment to decline such an offer. *See In re*

Diplomat Const., Inc., 481 B.R. 215, 219-20 (Bankr. N.D. Ga. 2012) ("Trustee articulated his business justification for declining the higher offer"); *In re Bakalis*, 220 B.R. 525, 532 (Bankr. E.D.N.Y. 1998) (approving trustee's decision to pursue the bid "most advantageous to the estate" rather than "mechanistically recommending the facially higher bid" due to "greater risk of . . . a failed closing and the associated chance of being left with a devalued asset"). As aptly noted by the District Court, the "'inclusion of "best" in that conjunction is not mere surplusage.'" Aff. Order 14 (quoting *In re Bakalis*, 220 B.R. at 532).

The Debtor thus unquestionably exercised "sound and reasonable business judgment" in proposing a private sale limited to LR or RREF. *See In re Phillips*, 2013 WL 1899611, at *10. Nor did the Bankruptcy Court abuse its discretion in approving the sale procedures and concluding that, "in light of the circumstances of this case, the revised [private sale procedures] in place now is an appropriate method for the Debtor to follow through on its extensive efforts to sell the hotel property for the best possible recovery and the ultimate benefit of the estate and valid creditors." Sale Order Ex. A at 5. In fact, given that the two finalists who emerged after a robust marketing effort were each given an opportunity to participate in the sale, the relevant bidding and sale procedures were, more accurately, a mere "amendment to the existing auction procedure." Pro. Hr'g Tr. at 58:19-59:3. These factual findings are entitled to great weight because, at the time of its

ruling, the Bankruptcy Court had presided over multiple hearings concerning the Debtor's sale procedures. As the District Court properly determined, "nothing in the record [] overcome[s] the deference that is owed to the Debtor's business judgment and the Bankruptcy Court's findings of fact." Aff. Order 10.

Moreover, the bankruptcy rules expressly permit private sales, and Petitioner's belated oral offer at the Sale Hearing did not compel reopening of the bidding. *See* Fed. R. Bankr. P. 6004(f)(1) (sales "may be by private sale or by public auction"). The Bankruptcy Court also properly determined that Petitioner's oral offer made at the Sale Hearing was actually an untimely objection to the sale, and was thus waived under the Procedures Order—a ruling Petitioner has never disputed and which would supply an independent ground for affirmance. Pro. Order 4 (directing that an objection not submitted by March 5, 2019 is waived); Sale Order 7 (noting independent basis to approve sale); Sale Order Ex. A at 7 (explaining waiver in further detail).

Unable to articulate a meritorious argument based on the actual facts, Petitioner resorts to hyperbolic rhetoric, contending that the private sale procedures were "anti-competitive." Pet. at 9, 13. But as noted above, LR and RREF were the only *bona fide* purchasers interested in the Property who were also "qualified buyers" under the Town Settlement. *Supra* 12. And far from chilling competition, the terms of the

sale established a procedure that produced LR's nearly $40 million bid and provided that—in exchange for offering $7 million more than RREF's stalking horse bid, and $34.5 million more than Petitioner had offered to date—LR was allowed to make a final and best offer if RREF chose to bid more than $40.6 million. Indeed, there are many ways that a sale might be structured to maximize the value of a debtor's asset, and Petitioner fails to show that the process the Debtor selected constituted an improper exercise of the Debtor's business judgment. *See In re Philips*, 2013 WL 1899611, at *10 (bidding and sale procedures "are 'ultimately a matter of discretion that depends upon the dynamics of the particular situation'").

There is thus no merit in Petitioner's repeated assertion that "such a restrictive, non-competitive sale of substantially all of the assets of a bankruptcy debtor is without precedent in the reported cases." Pet. at 3. It is not the Bankruptcy Court but rather the Petitioner that has acted unconventionally. As the Bankruptcy Court duly noted:

> [T]he proposal of [Petitioner] was made orally during the hearing and was somewhat in flux as counsel for [Petitioner] presented the proposal. There was no written proposal offered. ***It is impossible to overstate how unusual this last minute proposal is in the context of a sale of this***

> ***particular asset***. Does it sometimes happen that bidders show up at a bankruptcy sale hearing to present a last minute bid? Yes, it does. Does it happen in cases such as this where the asset is of significant value and the due diligence required to present a reasoned bid typically requires extensive review of data and discussion with the debtor? ***In my 28 years[']*** ***experience with bankruptcy sales,*** ***it does not***.

Sale Order Ex. A at 5 (emphasis added).

Accordingly, even if this appeal were not moot (which it is, as shown below), and even if Petitioner had standing to pursue this appeal (which it does not, as shown below), Petitioner has not identified a compelling reason this Court should review the Bankruptcy Court's order and the Petition should be denied.

II. THE APPEAL IS MOOT UNDER SECTION 363(m) BECAUSE THE SALE CLOSED AND PETITIONER FAILED TO OBTAIN A STAY.

Petitioner's singular goal in pursing this matter is to overturn the Sale Orders so that its affiliate, rather than LR, may have the opportunity to acquire the Property. That relief, however, is no longer available because the sale to LR has been consummated.

Section 363(m) of the Bankruptcy Code expressly provides that "[t]he reversal or modification on appeal of an authorization . . . of a sale . . . of property does not affect the validity of the sale . . . under such authorization to an entity that purchased . . . such property in good faith . . . unless such authorization and such sale . . . were stayed pending appeal." 11 U.S.C. § 363(m). The point of this provision is to protect the interests of third parties like LR who have purchased property from debtors in bankruptcy. Without this protection, buyers like LR would be less willing to purchase property for fear that an appeal might result in the undoing or modification of the terms of the sale. As a result, if a bankruptcy court approves a sale to a good faith purchaser like LR, the sale cannot be undone or modified by an appellate court unless the party challenging the sale obtained a stay, which Petitioner failed to do.

Because section 363(m) essentially bars revision of a consummated sale to a good faith purchaser, its practical effect is to render any appeal of the Sale Orders effectively moot. As the Court of Appeals for the Sixth Circuit has observed, "[a] 'majority of [the courts of appeals] construe § 363(m) as creating a *per se* rule automatically mooting appeals for failure to obtain a stay of the sale at issue.'" *In re Brown*, 851 F.3d 619, 622 (6th Cir. 2017) (quoting *In re Parker*, 499 F.3d 616, 621 (6th Cir. 2007)). The Eight Circuit has likewise held that, under the majority approach, section 363(m) "prevent[s] the overturning of a completed sale to a bona fide third party purchaser in

the absence of a stay." *In re Wintz Cos.*, 219 F.3d 807, 811 (8th Cir. 2000). The Eleventh Circuit has adopted the majority position. *In re Parker*, 499 F.3d 616, 621 (6th Cir. 2007) (citing *In re The Charter Co.*, 829 F.2d 1054, 1056 (11th Cir. 1987)); 3 Collier on Bankruptcy P. 363.11 & n.3a.

In determining whether an appeal must be dismissed as moot under section 363(m), courts apply a straightforward test: the appeal is moot if (1) the sale was approved under either section 363(b) or (c) of the Bankruptcy Code, (2) the sale has been consummated, (3) the appellant failed to obtain a stay, and (4) the purchaser acquired the property in good faith. *Id.*; *In re The Charter Co.*, 829 F.2d at 1056.

These elements are unambiguously present in this case. First, there is no question that the sale of the Property to LR was approved under section 363(b) of the Code. *See* Aff. Order 13; Sale Order 3 (approving a "sale pursuant to 11 U.S.C. § 363(b)"). Second, the sale has now been fully "consummated by the parties" because it closed on May 15, 2019, *In re The Charter Co.*, 829 F.2d at 1056, and under Florida law, a sale of real estate occurs when title of record transfers to the buyer, *see In re Caldwell*, 457 B.R. 845, 852-53 (Bankr. M.D. Fla. 2009) (execution and delivery of deed transferred ownership in real property even if deed was recorded at a later date); *see also Major Realty Corp. & Subsidiaries v. C.I.R.*, 749 F.2d 1483, 1486-87 (11th Cir. 1985) (sale complete for tax purposes when deed transferred title and incidents of ownership to

buyer); Fla. Stat. § 689.27 (defining closing as "the finalizing of the sale of property, upon which title to the property is transferred from the seller to the buyer"); *Shannis v. Bellamy (In re Shannis)*, 229 B.R. 234, 238 (Bankr. M.D. Fla. 1999) (recordation of deed transfers real property); *McCoy v. Love*, 382 So. 2d 647, 649 (Fla. 1979) (delivery of deed conveys title to real property); *Kingsland v. Godbold*, 456 So. 2d. 501, 502 (Fla. 5th DCA 1984) (deed supported by nominal consideration is valid). Third, Petitioner failed to obtain a stay as required under section 363(m). *Supra* 18. Finally, the District Court affirmed the Bankruptcy Court's findings that LR acted in good faith, and Petitioner has never challenged that finding of fact on appeal. *See supra* 16.

Although the Eleventh Circuit panel questioned during oral argument whether the post-closing agreement effectively operated as a stay because the Debtor held certain funds from the sale of the Property in escrow—an issue Petitioner never raised—that question is no longer germane because, after the Eleventh Circuit affirmed the Sale Orders, the funds were transferred out of escrow and largely dispersed to the Debtor's creditors. *Supra* 21. Nevertheless, the suggestion that escrowed funds amount to a *de facto* stay belies the very point of section 363(m), which was enacted to "encourage the sale of estate property," *Matter of VCR I, L.L.C.*, 789 F. App'x 992, 993 (5th Cir. 2019), and "to protect the interests of good faith purchasers by guaranteeing the finality of property sales." *In re Berkeley Delaware*

Court, LLC, 834 F.3d 1036, 1039 (9th Cir. 2016). Section 363(m) thus was not designed to override the ordinary recourse for undoing a sale. Instead, it was designed to render the sale order final by overriding an appellate court's ability in a bankruptcy case to overturn the sale for bankruptcy purposes. Moreover, "[a] stay pending appeal is an extraordinary remedy" and it is only proper where the party seeking it shows "(1) a substantial likelihood that they will prevail on the merits of the appeal; (2) a substantial risk of irreparable injury to the[m] unless the [stay] is granted; (3) no substantial harm to the other interested persons; and (4) no harm to the public interest." *Woide v. Fannie Mae (In re Woide)*, 730 F. App'x 731, 737 (11th Cir. 2018) (internal quotation marks omitted). Here, Petitioner failed to obtain a stay because it could not satisfy that test, and the fact that some funds were held in escrow does not change that result.

Similarly, the mootness of this appeal is not altered by the fact that certain terms in the post-closing agreement and the Plan dictated what should occur in the event that an appellate court reversed the Sale Order. To the contrary, any sale can always be undone post-closing, and the mere fact that the Debtor planned for that unlikely occurrence does not change the fact that, as a matter of law, the four-factor test under section 363(m) is satisfied here. And, contrary to Petitioner's suggestion, a "Reversal Deed" was never recorded. Pet. at 19. Instead, after the closing, LR recorded an unconditional Debtor-in-Possession

Deed, and after the Plan was confirmed, the reversal deed held in escrow under the post-closing agreement was destroyed. *Supra* 21.

Because the four-factor test under section 363(m) is satisfied in this case, the relief Petitioner seeks is moot. *See In re The Charter Co.*, 829 F.2d at 1056. As the Court of Appeals for the Fifth Circuit has concluded, section 363(m) makes "the bankruptcy court's approval [of the sale] the final word on the subject when the objector did not obtain a stay of that ruling." *Matter of Sneed Shipbuilding, Inc.*, 916 F.3d 405, 407 (5th Cir. 2019). Certiorari should be denied.

III. THERE IS NO CASE OR CONTROVERSY AND, ACCORDINGLY, THE COURT LACKS SUBJECT MATTER JURISDICTION.

"Article III of the United States Constitution limits the jurisdiction of federal courts to Cases and Controversies." *RES-GA Cobblestone, LLC v. Blake Constr. and Develop. LLC*, 718 F.3d 1308, 1314 (11th Cir. 2013) (internal quotations omitted) (quoting *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013)). Moreover, "[t]o qualify for adjudication in federal court, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *In re Di Giorgio*, 134 F.3d 971, 974 (9th Cir. 1998) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)); *see RES-GA Cobblestone, LLC*, 718 F.3d at 1313 ("Federal

courts operate under a continuing obligation to inquire into the existence of subject matter jurisdiction whenever it may be lacking."); *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466, 1468 (11th Cir. 1997). Accordingly, "[w]henever an action loses its 'character as a present live controversy' during the course of litigation, federal courts are required to dismiss the action as moot." *Di Giorgio*, 134 F.3d at 974 (quoting *Allard v. DeLorean*, 884 F.2d 464, 466 (9th Cir. 1989)). For example, "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." *Church of Scientology of Cal. v. U.S.*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)); *see Neidich v. Salas*, 783 F.3d 1215, 1216 (11th Cir. 2015) ("A case becomes moot when 'it is impossible for a court to grant any effectual relief whatever to the prevailing party.'") (quoting *Chafin v. Chafin*, 133 S.Ct. 1017, 1023 (2013)); *Fla. Ass'n of Rehab. Facilities, Inc. v. Florida*, 225 F.3d 1208, 1216-17 (11th Cir. 2000) (holding that a case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."). In this instance, the Petition does not present a live case or controversy because the relief Petitioner seeks—setting aside the Sale Orders—is not something an appellate court may do. *See supra* Section II. Accordingly, the Court lacks an opportunity to "grant[] effective relief." *In re The Charter Co.*, 829 F.2d at 1056. The Petition should be denied for lack of jurisdiction.

IV. PETITIONER LACKS STANDING BECAUSE IT IS NOT A PERSON AGGRIEVED.

In order to have standing to appeal the Bankruptcy Court's Sale Orders, Petitioner must be a "person aggrieved" by that order. *See In re Ernie Haire Ford, Inc.*, 764 F.3d 1321, 1324-25 (11th Cir. 2014). This standard limits appellate standing in bankruptcy matters to "those individuals who are directly, adversely, and pecuniarily affect[ed] by a bankruptcy court's order." *Id.* at 1325 (internal quotation marks omitted). "An order will directly, adversely, and pecuniarily affect a person if that order diminishes their property, increases their burdens, or impairs their rights." *Id.* (internal quotation marks omitted); *see In re Westwood Cmty. Two Ass'n, Inc.*, 293 F.3d 1332, 1335-36 (11th Cir. 2002).

In its capacity as an affiliate of a disappointed prospective buyer, Petitioner is not a "person aggrieved." *See In re Colony Hill Assoc.*, 111 F.3d 269, 273 (2d Cir. 1997). A prospective buyer—let alone an affiliate of one—has no right to purchase an asset from a debtor in bankruptcy. Nor does a prospective buyer acquire any kind of property interest in the asset in question simply by being a prospective buyer. Further, the sale of the Property to LR cannot be said to increase Petitioner's burdens as a prospective buyer. Although some courts have recognized an exception to the aggrieved person standard where an unsuccessful bidder challenges the good faith of the

successful purchaser under 11 U.S.C. § 363(m) or alleges collusive conduct under 11 U.S.C. § 363(n), Petitioner never raised any such arguments below, nor has it challenged the lower courts' findings that LR acted in good faith in connection with the sale. *See* Aff. Order 16.

Petitioner also lacks standing as one of the Debtor's creditors. As the Bankruptcy Court observed, there are only two possible ways Petitioner could be considered a creditor of the Debtor. Sale Order 20.[1] The first is by virtue of its mortgage claim "that the Court disallowed" as a fraudulent conveyance. *Id.* "The second possible basis . . . is that [Petitioner] has acquired a claim previously held by New Haven Contracting South, Inc." *Id.* As discussed above, however, "[Petitioner] has no right to payment in this case as a result of its mortgage claim, and so is not the holder of a claim in connection with its mortgage or note, [and] is not a creditor for those purposes." *Id.* at 20-21; Aff. Order 4. In addition, the claim that it acquired from New Haven has been disallowed. Accordingly, other than with respect to the *de minimis* claim that it purchased after initiating the appeal, Petitioner is not entitled to any recovery for reasons having nothing to do with the Sale Orders, and the Sale Orders do not "directly, adversely, and

[1] After Petitioner lodged its appeal of the Sale Orders with the Eleventh Circuit, Petitioner purchased a $10,940.85 allowed general unsecured claim against the Debtor's bankruptcy estate. Bk. Ct. Doc. 974 (Aug. 2, 2019).

pecuniarily affect" Petitioner to any meaningful extent. *See In re Ernie Haire Ford, Inc.*, 764 F.3d at 1325.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

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Dated: September 1, 2020