CASE NO. 19-1456

SUPREME COURT OF THE UNITED STATES

KK-PB FINANCIAL, LLC,

Petitioner,

vs.

160 ROYAL PALM, LLC,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, Case No. 19-11402-B

PETITIONER'S REPLY BRIEF

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I. THE BANKRUPTCY COURT'S ERRORS WARRANT THE EXERCISE OF THIS COURT'S SUPERVISORY POWER.

As KK-PB stated in its petition for certiorari, the Bankruptcy Court's cancellation of public bid procedures; foreclosing of competitive bids; and approval of the sale of substantially all of the Debtor's assets to a private buyer despite KK-PB's higher and better, all-cash offer was "so far outside of accepted practice as to be unsupported by any published precedent." (Pet. 4.) In response, the Debtor identifies no precedent with circumstances similar to this case, instead reciting various facts that, the Debtor claims, justify the Bankruptcy Court's rulings. None of the Debtor's arguments holds water.

First, the Debtor states that KK-PB "had every opportunity to bid below and declined to do so in a timely or otherwise appropriate manner." (Opp'n at 1, 24.) But the Debtor ignores the fact that the Bankruptcy Court, at the Debtor's request, withdrew the public bid procedures before the bid deadline had passed and adopted private sale procedures prohibiting other bids. Indeed, at the hearing before the Bankruptcy Court on the private sale procedures (on just 48 hours' notice), KK-PB objected and informed the Bankruptcy Court it wished to make a cash bid to purchase the Hotel. The Bankruptcy Court dismissed KK-PB's objection and representations and approved the private sale procedures. See Bk. Ct. Doc. 651 (Mar 12, 2019).

Second, the Debtor misleadingly asserts that KK-PB's offer at the Sale Hearing was not "firm" because KK-PB proposed to reinstate the public auction. (Opp'n 3, 9, 19). But KK-PB's offer was to serve as the stalking horse bidder for the public auction, which guaranteed that the Hotel would be sold (either to KK-PB, or to another bidder that submitted an even higher and better offer). As for the Debtor's claim that the "further delay" involved in reinstating the public auction was "undesirable" because the Debtor was running out of money, the delay would have been minimal. (Opp'n 25.) KK-PB's proposal was for a quick auction process (i.e., in less than a month), and KK-PB offered to pay the marketing costs for the auction. (Bk. Ct. Doc. 673 at 10-11 (Mar. 14, 2019)). The Debtor, its estate and creditors would be fully protected under KK-PB's proposal because KK-PB's cash purchase price would be deposited with the Debtor. (Bk. Ct. Doc. 673 at 9; 67; 70; 109-10; 81 (Mar. 14, 2019)).

Third, the Debtor argues that a sale to KK-PB's designee, Kids2, LLC, might not have successfully closed because the $50 million cashier's check KK-PB presented at the Sale Hearing was made out to Mr. Straub; because KK-PB had previously defaulted on a deposit in a separate settlement; and because Mr. Straub is litigious. (Opp'n 17, 25.) Objectively, however, there was no such risk. Mr. Straub is the principal of both KK-PB and Kids2, LLC, and the only reason KK-PB presented the cashier's check was as evidence of its ability to pay for the Hotel.

Moreover, the fact that KK-PB expressly offered to deposit the *entire amount* of the purchase price for the Hotel in escrow with the Debtor pending the auction would have eliminated any risk of non-payment or uncertainty of closing.

Fourth, the Debtor states that, although KK-PB's offer on its face was worth at least $1 million more than LR's offer, the real differential might have been less because, "if the Town Settlement failed, the Town could assert additional claims against the Property." (Opp'n 25.) That is incorrect. KK-PB's proposal included KK-PB's obligation to "cover whatever amounts are owed" pursuant to the Town's claims, which means that KK-PB's offer was, *in fact*, $1 million more than LR's offer, with the possibility of an even greater recovery to the estate if another bidder offered more at the reinstated public auction. (Bk. Ct. Doc. 673 at 81; 83 (Mar. 14, 2019)).

Finally, the Debtor suggests that the private sale procedures were really just an "amendment to the existing auction procedure" because LR and RREF were both allowed to compete. (Opp'n 23-24, 26-28.) This argument defies logic. RREF's ability to submit a single overbid under the Bankruptcy Court's private sale procedures did not make the private sale procedures competitive. LR always had an absolute right of first refusal under the LR Purchase Agreement. (Bk. Ct. Doc. 604 at 34 §§ 8.4-8.5 (Feb. 26, 2019)). Thus, LR had the sole and exclusive right to respond to an RREF overbid with a higher bid (i.e., a bid that was even one

dollar more) and purchase the Hotel—which meant that RREF had no incentive to bid at all. Indeed, RREF did not bother to do so.[1]

In sum, the Debtor's Opposition does nothing to undermine the conclusion that the Debtor's purported exercise of "business judgment" in preferring the LR bid was actually driven by its animus toward Mr. Straub rather than any legitimate business concern. The Bankruptcy Court, in approving the LR sale in these circumstances, abdicated its duty to ensure the sale maximized value to the Debtor's estate, and therefore, the Debtor's creditors. This Court should grant KK-PB's petition to clarify that a bankruptcy court's discretion in approving a private sale of substantially all of a liquidating debtor's assets, though broad, has meaningful limits.

II. THIS CASE IS NOT MOOT

As KK-PB stated in As KK-PB stated in its petition, 11 U.S.C. § 363(m) does not bar review. Although the Debtor in its Opposition now states that the "Reversal Deed" in its unauthorized post-closing agreement was destroyed based on the joint instructions of the Debtor and LR (Opp'n, 21, 33-34) at some point

[1] The Debtor also is incorrect that the Bankruptcy Court's finding that KK-PB's offer was an untimely objection to the LR sale provides an "independent ground for affirmance." (Opp'n 27.) The private sale procedures did not set any deadline for competing bids (other than the potential overbid by RREF), and, in any case, the Bankruptcy Court still needed to take KK-PB's offer into account in determining whether the sale to LR was in the best interest of the estate. Cf. In re Planned Sys., Inc., 82 B.R. 919, 922-23 (Bankr. S.D. Ohio 1988).

after confirmation of the Debtor's Plan, the plain language of such Plan continues to grant LR a new, unique type of protection never contained in the Sale Order's "authorization"- a contingent priming lien in the amount of $41,102,897.75 in the Hotel upon reversal of the Sale Order on appeal by this Court or the Eleventh Circuit and "either court mandates that the [Hotel] be re-conveyed back to the Debtor or that title to the [Hotel] shall otherwise re-vest back in the Debtor and such reconveyance/revesting actually occurs[.]" (Pet. 18; Bk. Ct. Doc. 1469 at 17 S 3.6 (Dec. 26, 2019)). On the one hand, the Debtor asserts that, under § 363(m), no appellate court has the power to unwind its sale of the Hotel to LR. (Opp'n 29-36.) On the other hand, the Debtor continues to defend the terms of its unauthorized post-closing agreement with LR as well as its unique Plan protections upon reversal of the Sale Order and re-conveyance of the Hotel by stating that "any sale can always be undone post-closing." (Opp'n 33.) Both statements cannot be true. Based on such facts and circumstances, § 363(m) does not prevent the Court's review of the petition.

III. KK-PB HAS STANDING TO APPEAL

The Debtor is also wrong that KK-PB lacks standing to appeal. (Opp'n at 36-38.) KK-PB holds a note secured by a mortgage on the Hotel, which is the subject of a separate pending appeal before the Eleventh Circuit. Although the Bankruptcy Court effectively disallowed KK-PB's mortgage claim by estimating

its value at $0.00, until the final disposition of KK-PB's appeal of that order, KK-PB retains standing on account of the claim.[2] Cf. Sears v. Sears (In re AFY, Inc.), 463 B.R. 483, 491-92 (B.A.P. 8th Cir. 2012) (holding that creditor that had claim disallowed by the bankruptcy court still had standing under that claim while the bankruptcy court's ruling was being appealed). KK-PB also has standing as a prospective buyer to challenge the sale to LR, because "an unsuccessful bidder challenging the intrinsic fairness of the sale has standing to appeal an order directing that sale." Licensing by Paolo, Inc. v. Sinatra (In re Gucci), 126 F.3d 380, 388 (2d Cir. 1997).[3]

IV. THE DEBTOR'S OTHER MISREPRESENTATIONS

The Opposition also misrepresents multiple facts that are not relevant to KK-PB's petition, but that the Debtor seems to have injected to smear Mr. Straub. KK-PB responds to the Debtor's most egregious misstatements below:

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[2] KK-PB appealed the Bankruptcy Court's estimation order to the United States District Court for the Southern District of Florida, which dismissed the appeal as constitutionally moot. *See* Case No. 19-CV-80342 (S.D. Fla. 2019). KK-PB is presently appealing that dismissal to the Eleventh Circuit. *See* Case No. 20-12361-AA (11th Cir. 2020).

[3] The Debtor also suggests, in passing, that KK-PB may lack standing because Kids2, LLC was the prospective buyer at the Sale Hearing, rather than KK-PB. (Opp'n at 1, 4). This is a red herring. KK-PB made it clear at the Sale Hearing that it was bidding on behalf of its designee Kids2, LLC, which is wholly owned by Mr. Straub. (Bk. Ct. Doc. 673 at 81 (Mar. 14, 2019)). It is very common for a winning bidder to vest ownership of the asset in an affiliated company, as KK-PB sought to do. The bidder is still plainly an aggrieved person if the court rejects the bid.

- The Debtor *repeatedly* states the Bankruptcy Court found that Mr. Straub "fraudulently caused" the prepetition transfer of his equity interest in the Debtor in exchange for cash and a note. (Opp'n 2-7, 13, 25, 37). The Bankruptcy Court made no such finding, as the Debtor well knows. To the contrary, the court found that, despite the Debtor's arguments, the evidence "d[id] not support a finding that Mr. Straub caused [the Debtor] to give the note and mortgage with actual intent to defraud creditors" and, in fact, that Mr. Straub "expected [the Debtor] to raise capital to complete the project, pay KK-PB's obligation, and make a success of the hotel."[4] See Bk. Ct. Doc. 603 at 7-8, 11 (Feb. 26, 2019).

- The Debtor asserts that Mr. Straub's interest in the Debtor, which he sold in 2013, was "worthless."(Opp'n 2-3). In fact, the Bankruptcy Court found, based on the testimony of the *Debtor*'s expert, that the Hotel was worth at least $19 million at the time of the transfer—far from "worthless." See Bk. Ct. Doc. 603 at 12-13 (Feb. 26, 2019).

- The Debtor refers to the felony conviction of the principal of New Haven Contracting South, Inc. ("New Haven"), as if that fact has some bearing on KK-PB's petition. (Opp'n 7-8.) It does not. The New Haven claim has nothing to do with KK-PB's petition, and further, the character of New Haven's principal has nothing to do with Mr. Straub.

[4] Rather than the "illicit fraudulent transfer" the Debtor claims occurred (Opp'n 25), the Bankruptcy Court found that the 2013 transfer was a "constructively fraudulent transfer" under Florida law—which does not require fraudulent intent. See Bk. Ct. Doc. 603 at 12-14 (Feb. 26, 2019).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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