No. _____

In the
Supreme Court of the United States

R. RAY FULMER, II,
Petitioner,

v.

FIFTH THIRD EQUIPMENT FINANCE COMPANY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

11 U.S.C. §363(m) moots claims against good faith purchasers at bankruptcy auctions if the claims invalidate the sale. In this case, the court's non-appealable approval of a §363 sale of the debtor's assets transferred $106 million in priority-violating distributions to preferred creditors and non-purchasers. The 6,000 non-preferred creditors received nothing. The court converted the proceeding to Chapter 7 and appointed a trustee four months post-sale. Petitioner sued the debtor's fiduciaries, Creditor Committee members and other non-purchasers for damages arising from their pre- and post-petition concealment of false asset valuations and breach of contractual and fiduciary duties owed to the debtor. Some of the false valuations were used to score the auction bids. The court dismissed the entire damages suit as an impermissible collateral attack on a final sale order. The Eighth Circuit affirmed, holding in part that the priority violations were non-jurisdictional errors.

Two related questions are presented:

Whether a final 11 U.S.C. §363 sale order that distributes assets in violation of priority is unenforceable due to jurisdictional error; and

Whether §363(m) bars damages claims against *non-purchasers* arising from duties existing and breached independent of a §363 sale, and which would not overturn the sale result or the sale approval order.

PARTIES TO THE PROCEEDING

Petitioner, appellant below, is R. Ray Fulmer III, Trustee.

Respondents, appellees below, are Fifth Third Equipment Finance Company ("Fifth"); Ryder Integrated Logistics, Inc. ("Ryder"); International Paper Company ("IP") URS Real Estate, LP ("URS"); Ball Metal Food Container, LLC ("Ball"); Syngenta Seeds, Inc. ("Syngenta"); Teneo Securities, LLC ("Teneo"); Andrew Torgove ("Torgove"); Lazard Middle Market LLC and Lazard Freres & Co. LLC (collectively, "Lazard"); Alvarez & Marsal, North America, LLC; Alvarez & Marsal Holdings, LLC and Alvarez & Marsal Private Equity Performance Improvement, LLC (collectively, "A&M"); Jonathan Hickman ("Hickman"); Sager Creek Vegetable Company, f/k/a Sager Creek Acquisition Corp., now known as 412, Inc.("Sager Creek"); 1903 Onshore Funding, LLC ("1903"); Cortland Capital Market Services, LLC ("Cortland"); Sankaty Credit Opportunities, IV, L.P.; Sankaty Credit Opportunities, IV, L.P. (Caymanian), Sankaty Credit Opportunities, (Offshore Master) IV; Sankaty Middle Market Opportunities Fund, L.P.; Sankaty Middle Market Opportunities Fund, L.P. (Caymanian), Sankaty Middle Market Opportunities Fund, (Offshore Master), L.P. (collectively, ("Sankaty").

CORPORATE DISCLOSURE STATEMENT

No public corporation owns 10% or more of the stock of the debtor entities. Appellant R. Ray Fulmer, II serves in the United States Trustee Program administered by the United States Department of Justice. The United States Bankruptcy Court in and for the Western District of Arkansas appointed Mr. Fulmer as Chapter 7 Trustee this matter (*In re: Veg Liquidation, Inc., f/k/a Allens, Inc.; All Veg, LLC, Debtors; No. 5:13-bk-73597*, referred to herein as "the Allens bankruptcy proceeding")

RELATED PROCEEDINGS

- *R. Ray Fulmer, II, Appellant v. Fifth Third Equipment Finance Company, et. al., Respondents*, (8th Cir.) No. 18-1786 (Judgment entered July 26, 2019).[1]

- *R. Ray Fulmer, II, Plaintiff-Appellant v. Fifth Third Equipment Finance Company, et. al., Defendants-Respondents* (8th Cir. B.A.P.) No. 17-6017 (Judgment entered March 26, 2018);

- *R. Ray Fulmer, II, Chapter 7 Trustee, Plaintiff v. Fifth Third Equipment Finance Co., et. al., Defendants No 5:16-ap-7017* (U.S.B.C, West. Dist. AR) (Order Dismissing Complaint, May 5, 2017).

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[1] The matters listed herein took place in the captioned adversary proceedings commenced in the jointly- administered Chapter 7 bankruptcies styled *In re: Veg Liquidation, Inc., f/k/a Allens, Inc.; All Veg, LLC, Debtors; No. 5:13-bk-73597, Chapter 7.*

- *R. Ray Fulmer, II, Chapter 7 Trustee, Plaintiff v. Fifth Third Equipment Finance Co., et. al., Defendants No 5:16-ap-7017* , (U.S.B.C, West. Dist. AR) (Order Granting in Part and Denying in Part Defendants' Motion to Dismiss Complaint, September 29, 2016).

There are no additional proceedings in any court that are directly related to this case.

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The Eighth Circuit opinion is reported at *Fulmer v. Fifth Third Equipment Finance Co. (In re Veg Liquidation, Inc.)*, 931 F.3d 730 and reproduced at Appx. A, pp. 1-17. The Eighth Circuit Bankruptcy Appellate Panel opinion is reported at *In re Veg Liquidation, Inc.*, 583 B.R. 203 reproduced at Appx. B, pp. 18-40. The bankruptcy court's *Order Dismissing Complaint* is reported at 572 B.R. 725 and reproduced at Appx. C, pp. 41-64. The bankruptcy court's *Order Granting in Part and Denying in Part Participating Defendants' Motion to Dismiss Complaint* is unreported, but available at 2016 Bankr. LEXIS 4160, and reproduced at App. D, pp. 65-76. Petitioner's *Motion for Leave to File Sur-Reply to Participating Defendants' Second-Stage Motion to Dismiss* is unreported, but is reproduced at App. F, pp. 102-108.

JURISDICTION

The Eighth Circuit issued its judgment on July 26, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 363 reproduced at Appx. E, pp. 77-84.

11 U.S.C. § 1123 reproduced at Appx.E, pp. 85-88.

11 U.S.C. § 1129 reproduced at Appx. E, pp. 89-97.

Fed. Rules of Bankruptcy Procedure, Rule 6004 reproduced at Appx. E, pp. 98-102.

INTRODUCTION

The First Question addresses the Eighth Circuit's refusal to follow *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017) ("*Jevic*") which described Congress' distribution priority scheme as "the basic underpinning of business bankruptcy law"…and "fundamental to the Bankruptcy Code's operation." *Id.* at 983-984.

The Eighth Circuit, in contrast, holds that a sale order's priority violation is not an unenforceable jurisdictional error, but rather is a lesser procedural error mooted by §363(m). Appx. A at pp. 12-14. Had *Jevic*'s dismissal order instead been preceded by an immediately non-appealable sale order violating priority in an Eighth Circuit bankruptcy court, §363(m) would bar any challenge. The Eighth Circuit followed the First Circuit's opinion in *Mission Prod. Holdings, Inc. v. Old Cold LLC*, 879 F.3d 376, 388 (1st Cir. 2018)("*Mission*").

The failure to follow priority rules is either jurisdictionally unenforceable, as *Jevic* strongly suggests, or it is merely an inconsequential procedural error, it just cannot be both.

Jevic drew a strong analogy to prohibited §363 schemes that circumvented Congress' creditor protections. Yet, the lower courts here held *Jevic* inapposite because there was no specific prohibition articulated regarding priority-violating §363 sale orders. Appx. A at pp. 12-14. The panel did not identify any Congressional intent permitting immediately non-appealable §363 sale orders to violate priority without

consent, when the Code prohibits appealable plan confirmation orders from doing so.

The enforceability issue now raised by two resistive Circuits causes disparate creditor protection across the nation. The consequences of forum shopping on this issue are unlikely to be benign. Instead, practitioners will not settle before a stipulated dismissal, they will hold more §363 sales to manipulate distribution priority while at the same time rendering any appeal moot through §363(m). Other Circuits will take note, and the prohibitions of *Jevic* will be obviated by the new maneuver. The issue should therefore not be permitted to linger.

The Second Question frames the irreconcilable conflict between the Second and Eighth Circuits on the scope of claims mooted by §363(m). The statute, by its terms, protects good faith purchasers from post-sale claims to invalidate the sale.

On substantially similar facts to this case, the Second Circuit permitted claims against *non-purchaser* fiduciaries that ran the auction, because resolution of the damages claims brought against them and arising from duties owed and breached independent of the sale, would not disturb the sale result or sale order at all. Like this case, the sale result merely increased the amount of recoverable damages for pre-sale misconduct. *Brown Media Corp. v. K&L Gates, LLP*, 854 F.3d 150, 162–63 (2d Cir. 2017)("*Brown*").

That each Respondent here would have been sued for damages regardless of whether a sale ever took place is significant. The auction result merely

increased the damages from millions of dollars of fee disgorgement to more than $500 million in treble damages, attorneys' fees and interest.

However, perceiving an impermissible collateral attack on the bankruptcy court's sale order, the court dismissed Petitioner's damages claims against the *nonpurchasers*. Appx. A, pp. 9-11. As a result, Eighth Circuit jurisprudence now bars post-sale claims against *non-purchasers* that neither disturb the sale result, the sale agreement or the sale approval order.

The Circuit conflict is patent and irreconcilable. Clearly, the claims in *Brown* would be dismissed in the Eighth Circuit, and the claims in *Fulmer* would not be barred in the bankruptcy-heavy Second Circuit. Insolvency professionals and fiduciaries serve an expensive role in bankruptcy. Holding them accountable in a uniform manner is necessary to protect creditors and debtors alike from actionable misconduct and to promote the just and valid adjudication of bankruptcy cases nationwide. Providing them with a blanket release once a sale closes fatally undermines those goals.

STATEMENT OF THE CASE

A. STATUTORY BACKGROUND

Successful Chapter 11 cases end with an §1129 plan confirmation governing the distribution of assets from the estate. 11 U.S.C. §§1123, 1129. Appx E, pp. 85-90; *Jevic, supra,* 137 S. Ct. at 978. Plan approval requires compliance with sixteen-separate disclosure-related procedural safeguards. §1129(a).

The Code's priority scheme is the "basic underpinning of business bankruptcy law" and strictly determines the order of payment by creditor class. Departures from priority occur only through creditor consent or "cramdown" procedures. §1129(b). *Jevic*, 137 S. Ct. at 983. All members of the same creditor class must receive the same treatment. §1123(a)(4). Appx. E, p. 85. Failed plans result in dismissal or conversion to a Chapter 7 managed by an appointed trustee who liquidates assets and distributes the proceeds to creditors by priority.

Some debtors, like Allens here, sell their core assets in a Chapter 11 §363 sale. A Stalking Horse bid starts the process and sets the bidding floor after court approval. The auction follows. The sale proponents present the best bid at another approval hearing, but need not comply with a plan's sixteen safeguards. §363(b),(f), Appx. E, pp. 77-78. Sales take less time and money than plans, but the lack of safeguards force non-preferred, unsecured creditors to rely on the diligence and loyalty of their creditors' committee. A debtor may avoid a sale if colluding bidders affected the price, but not where collusion between *non-bidders* did so. §363(n), Appx. E, pp. 77-78.

Unless the sale approval order is stayed pending appeal, §363(m) protects a good faith purchaser from losing the sale. Bankruptcy Rule 6004(h) stays the sale approval order for 14 days, but the court can, and did here, waive the stay and enter an immediately non-appealable order.

Sales cannot modify the rights and entitlements afforded creditors by an §1129 plan or otherwise

circumvent the Code's procedural safeguards, but interpretation of that maxim rests within the court's discretion. A sale that seeks to achieve those prohibited objectives is known as a *sub rosa* plan of reorganization. *Jevic*, supra, 137 S. Ct. at 986, citing *In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (5th Cir. 1983)(prohibiting §363 sale as a *sub rosa* plan that "short-circuited" protections of §1129); *In re Lionel Corp.*, 722 F.2d 1063, 1069 (2nd Cir. 1983) (sale approval reversed because §363 does not "gran[t] the bankruptcy judge *carte blanche*" or "swallo[w] up Chapter 11's safeguards").

B. THE ALLENS BANKRUPTCY

A failed private asset sale to Seneca Foods in 2012 compelled Allens to file a Chapter 11 petition the following year. Allens employed the same financial and restructuring fiduciaries for both the Seneca deal and for the Chapter 11.

Prior to the bankruptcy, Allens' largest unsecured creditor, Ball, agreed to fund the anticipated §363 auction bid of Sankaty's favored bidder, Sager Creek. *8th Cir. App.* 1626, 2016-2017. In return, Ball would receive a can supply contract, and a $4.5 million bonus if Sager Creek was re-sold. *Id.* Some of Allens' fiduciaries became aware of the agreement at some point, but the court appears to have been unaware because Ball did not file a disclosure. *8th Cir. App. 2105.*

Post-petition, Seneca Foods re-engaged to become the court-approved Stalking Horse bidder after Allens' fiduciary, Respondent Torgove valued the bid as leaving the estates with $32.9 million in real property,

$25 million in cash and the avoidance actions at $74 million. *8th Cir. App. 0870*. Seneca's bid was not sent to the creditor body. *8th Cir. App*. 0319; 0322.

The auction occurred one month later, on February 3, 2014. Fiduciaries Torgove and Hickman scored the bids. Ball and the Creditors' Committee asked the bidders to include the purchase of $74 million in avoidance actions in their bids, with a covenant not to sue.[2] Sager Creek agreed, but Seneca would not.

By auction day, Torgove valued the Seneca bid at $117 million and the Sager bid at $160 million. *8th Cir. App.* 0875-76. Torgove credited Sager for assuming Sankaty's $33 million of unsecured debt, and counted Sager's exercise of another's credit bid without any assignment of the credit to Sager. *8th Cir. App.* 0890. After devaluing the real estate by 80% on the day of the sale, Torgove offset the Seneca bid by $8.7 million for not taking $32.9 million of real estate. Torgove afforded Seneca no bid offset for the $74 million in avoidance actions Seneca left to the Estate. Sager took them for free.[3] *8th Cir. App.* 2106; 2112; 2118. Seneca then stopped bidding, and the auction ended.

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[2] Avoidance actions force the return and redistribution to the creditor pool of preferential pre-bankruptcy payments made to insiders or preferred creditors.

[3] The transfer of avoidance claims makes them non-actionable and therefore worthless due to the purchaser's lack of standing to pursue them. The avoidance claim transfer to Sager Creek permitted preferred creditors to retain the payments they would otherwise be required to pay back for to the estate for *pro rata* re-distribution to the entire creditor pool.

Sager's bid provided the least net benefit to the Estate by more than $50 million. Ball caused its Committee to enter a strict confidentiality agreement, blocking disclosure of the scheme to the creditor body. *8th Cir. App.* 2115; 2107. On February 11, 2014, the sale approval hearing took place. App. 1569. No bid comparison took place. *8th Cir. App.* 1631. Ball's Committee did not appear to object. *8th Cir. App.* 1632. The court was not told that Sager's bid fell from $160 million at auction to $124 million at the hearing, with the same assets being purchased. *8th Cir. App.* 1631. The court approved the sale, converted the case to Chapter 7 and appointed Petitioner as trustee.

The auction resulted in priority skipping distributions outside of a plan of reorganization. The disfavored unsecured creditors did not recover a cent. The Creditor's Committee received an $18 million credit on their claims by the elimination of the avoidance actions. *8th Cir. App.1625-1628.* Sager, as a third-party asset purchaser, received a distribution of $98.2 million in estate assets for no value, which by definition violates the priority scheme. Appx F, 102, at 104.

C. THE ADVERSARY PROCEEDING

The bid scoring by Allens' fiduciaries Torgove and Hickman required an exceptional skill-set to turn Sager's lowest bid into the highest bid without them spending an additional cent.

Petitioner commenced an adversary proceeding seeking money damages from the Respondents for breach of contract, breach of fiduciary duty, interference with contract, fraudulent conveyance and

other fraud and business torts, fraud on the court, and conspiracy, along with equitable causes of action to subordinate the Creditor Committee members' bankruptcy claims and to rescind the fiduciaries' contracts with fee disgorgement. Treble damages, interest and attorney's fees brought the recoverable damages to approximately $500 million.

Because the ultimate Allens' asset purchaser never filed the closing documents with the court as required, the purchaser remains unknown. However, upon Petitioner's discovery that Sager Creek and Sankaty interfered with the debtors' contracts with its fiduciaries before and after the Chapter 11 filing and sale, both entities were named as defendants.

The Committee Chair, Ball, received a half-billion dollar contract and the promise of a $4.5 million bonus upon re-sale. Because the bonus effectively provided Ball with an equity stake in Sager Creek, Petitioner sought to hold Ball responsible as a collusive bidder at the sale for §363(n) purposes. As a Committee member, Ball owed the estate and its constituent unsecured creditors a near-fiduciary duty to make disclosures and to maximize all creditors' recoveries instead of maximizing its own at their collective expense.

D. DISMISSAL AND APPEAL

Respondents brought two motions to dismiss pursuant to Fed. R. Civ. P. Rule §12(b)(6) before discovery commenced. In response to the first motion, the bankruptcy court dismissed Petitioner's §363(n) collusion allegations, rejecting the premise that Ball's

half-billion-dollar loan, supply and bonus equity agreement with Sager Creek made Ball a "bidder." The court dismissed Petitioner's fraud on the court claims holding that Respondents' concealment, collusion and asset value manipulation were not affirmative misrepresentations egregious enough to rise to the level of fraud that defiled the court. Appx. D 65, at 71-72, 74-75.

Before the court issued the second order dismissing the remainder of Petitioner's claims, Petitioner sought leave to file a sur-reply to address the upcoming *Jevic* opinion. Appx. F, 102 at 104. The court denied the motion. *Jevic* arrived March 22, 2017.

In the May 2, 2017 order dismissing Petitioner's complaint, the court found privity between the Petitioner, Ball and the creditors who, months before Petitioner was appointed, failed to object at the sale approval hearing. Ball's expectancy from its Sager Creek deal, and the forgiveness of $18 million in avoidance liability for Ball's Committee, did not enter the court's claim preclusion analysis. Appx. C 42, at 47-59.

Even though the court understood Petitioner's damages claims to be asserted against those owing duties independent of the sale, the court held that §363(m) nonetheless mooted those claims, too, as a collateral attack on a final sale order. Citing adequate notice for a separate auction of an airplane hangar, the court dispatched Petitioner's due process claims concerning notice for the actual sale at issue. The court never addressed *Jevic*. Appx. C 42, at 59-62. The court denied Petitioner's motion for leave to file a second-amended complaint. *Id*. at 62-64.

Eighth Circuit jurisprudence regards the bar of §363(m) broad enough to preclude even claims against third-parties if they undermine an integral part of the sale agreement upon which the third-parties contractually relied. *In Re Trism, Inc.,* 328 F.3d 1003, 1006-1007 (8th Cir. 2003). On appeal, the B.A.P. expanded *Trism* to eliminate causes of action against *all* third parties which are *inconsistent* with integral elements of the sale agreement, *and* sale order. Claim and issue preclusion were irrelevant to the BAP, which also held that §363 sales fall within *Jevic's* carve-out for offsetting Code-related objectives. Appx.B, 18, at 29-32.

On the First Question presented here, the Eighth Circuit held that a §363 sale order's priority violation is not an unenforceable jurisdictional error, but rather is a lesser procedural error mooted by §363(m). Appx. A 1, at 10-11; citing *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 269 (2010) (failure to convene an adversary proceeding to determine hardship prior to discharge of debtor's student loan obligation was a procedural error that did not void final discharge order). The court also held *Jevic* to be inapposite for the lack of a specific prohibition of priority-violating §363 sale orders. *Id.*

On the Second Question presented here, the Eighth Circuit held that suing third-party non-purchasers on claims related to the price paid at a §363 sale remain barred by §363(m). Appx. A 1, at 8-10. The court cited a nearly identical case to the present matter where the Second Circuit reached the opposite result:

> "This is not to say that the rule of finality governing asset sales under § 363 forecloses all

> suits related to sales of a debtor's assets. For example, a claim that a fiduciary's conduct kept a prospective bidder from securing adequate funding to make a more competitive bid does not necessarily call into question a bankruptcy court's determination that the successful bid was the best offer on the table. *See Brown Media Corp. v. K&L Gates, LLP*, 854 F.3d 150, 155, 162-63 (2d Cir. 2017)."

Appx. A at 10.

The Eighth Circuit opinion did not further distinguish the present matter from *Brown*, or explain the "threat" posed by the claims in this matter to the finality of the court's sale order, as compared to *Brown*.

REASONS FOR GRANTING THE PETITION

I. The Eighth Circuit Refuses to Follow *Jevic* and is Incorrect on the First Question Presented.

According to the Eighth Circuit a stipulated dismissal entered after an immediately non-appealable §363 sale which manipulates creditor priority creates an exception that will swallow *Jevic's* holding, and it will do so quickly. Resolution of this issue cannot linger.

Jevic identified three ways to end a bankruptcy: by dismissal, by conversion to Chapter 7 liquidation, and by plan confirmation. Congress afforded bankruptcy courts the authority to alter the distribution priority scheme in only one of them, and only when the aggrieved creditors consent: §1129 plan confirmation.

Jevic eliminated priority manipulation in stipulated dismissals by relying in part on the lessons learned from abusive §363 sales.

Priority manipulation is the greatest risk posed to what *Jevic* described as the most fundamental underpinning of business bankruptcies. Priority manipulation in the absence of plan confirmation safeguards can also serve as a significant reason to select a venue for the Chapter 11 filing, which can be a frequent goal of insolvency professionals. The practice may also make for an easier and less complex approval process for the court. Regardless of the justification for the practice, creditors suffer without consent, Congress provided no authority for priority manipulation to take place and therefore the practice is prohibited.

The Eighth Circuit here thought *Jevic*'s holding not specific enough to actually forbid priority manipulation in or resulting from §363 sales. To force the issue, the court also analogized priority's "fundamental underpinning" status to a mere procedural error – an omitted hardship hearing on a student loan discharge – that was not jurisdictional and therefore would not render the order void or unenforceable for Rule 60(b)(4) purposes. See *Espinosa*, *supra*. 60(b)(4), in their view was the only avenue for Petitioner to sue for damages. However, because there was no jurisdictional error, the court held, 60(b)(4) was unavailable.

Further, the court held that because priority manipulation is a non-jurisdictional procedural error, the sheer force of §363(m) finality attendant to the Allens' immediately non-appealable sale order

forecloses any redress for the court usurping Congressional power. The issue is statutorily moot.

The Eighth Circuit holding in this regard dilutes to insignificance the jurisdictional characterization of prohibited transgressions against Congress' distribution priority scheme found in *Jevic*. If the stipulated dismissal in *Jevic* occurred in the Eighth Circuit after a §363 sale, the issue would not have been appealable at all. The Eight Circuit followed the First Circuit's similar holding in *Mission*, *supra*.

As stated above, the misunderstandings concerning *Jevic*, and the liberties taken with it by at least two Circuits, must be addressed now. Leaving the matter unaddressed will perpetuate priority manipulation in §363 sales not only in the Eighth and the First Circuits, but also in other Circuits looking for a sanctioned replacement for stipulated dismissals.

Because the lower courts' holdings enforce nothing short of statutory mootness, future challenges will be few, as will future opportunities for this Court to make *Jevic*'s prohibitions, which may be implicit to some, more explicit.

II. An Intolerable Circuit Conflict Exists on the Second Question Presented.

If §363(m) finality was intended to bar or eliminate lawsuits brought by unsuccessful "sour grapes" bidders to upset the sale results, it did so because those bidders were owed no preexisting duty by the other auction participants. Any remedy they could envision would be statutorily defined by Congress, which are few, if any. Eliminating a cause of action against a good faith

purchaser takes nothing from the aggrieved bidder that they possessed before the auction.

The problem with the Eighth Circuit *expanding* the §363(m) bar to moot claims against *non-purchaser* fiduciaries for pre- and post-petition conduct is that the causes of action held as a right before the auction, and concerning duties existing and breached independent of the auction, are eliminated.

Indeed, broadening the §363(m) bar takes the form of a retroactive general release, which is rarely, if ever, afforded in bankruptcy, and was absent from the sale agreement and the order here. Culpable parties will therefore obtain from bankruptcy law that which could not be obtained from non-bankruptcy law. And, they would be released without notice to any aggreived party or non-party to the sale.

Further, eliminating causes of action for prohibited conduct, such as the sale of avoidance actions in the absence of extraordinary circumstances, and for the benefit of the Creditors' Committee, is unjust and reeks of Committee corruption. *In re Carragher*, 249 B.R. 817, 820 (Bankr. N.D. Ga. 2000)(emphasis added); *see also McCarthy v. Navistar Fin. Corp. (In re Vogel Van & Storage, Inc.)*, 210 B.R. 27, 32 (N.D.N.Y. 1997), *aff'd*, 142 F.3d 571 (2d Cir. 1998) ("It is also a well settled principle that neither a trustee in bankruptcy, nor a debtor-in-possession, can assign, sell, or otherwise transfer the right to maintain a suit to avoid a preference."). *In re McGuirk*, 414 B.R. 878, 879 (Bankr. N.D. Ga. 2009)(" In short, the "special powers" granted to trustees and debtors-in-possession "to fulfill their primary duty of marshaling the debtor's assets for the

benefit of the estate," are not assets that may be auctioned off.")

In this matter, like in *Brown*, Allens' fiduciaries ran the auction and scored the bids. Petitioner brought claims for fee disgorgement, rescission of the fiduciaries' contracts, contract breach, fiduciary breach and related claims against the Respondents for manipulating the Allens' asset values before and during the Allens' Chapter 11 proceeding.

If the fiduciaries' bid-scoring was *not* false, they scuttled Allens' pre-bankruptcy Seneca deal with gross asset over-valuation, triggering fatal liquidity loss and a Chapter 11 filing. If, instead, the pre-bankruptcy valuations and methodology were accurate, the bid scoring was patently false, costing the unsecured creditors more than $106 million. Culpability existed in either loss scenario.

As non-purchasers, Respondents were not shielded by the express provisions of §363(m), and were not released in the sale agreement or the approval order.

Respondents instead relied on the Eighth Circuit's broad view of sale finality doctrine. They argued that, because they were involved at some point with a §363 sale that closed, they could not be held liable for even pre-bankruptcy breaches of transactionally-distinct contractual, fiduciary and other legal obligations owed to Allens.

The bankruptcy court agreed and dismissed the entire complaint, and in doing so retroactively released the fiduciaries from liability not only for post-petition conduct, but also for their pre-petition conduct having

literally nothing to do with the §363 sale. The lower courts affirmed the dismissal of Petitioner's entire complaint for the same reason.

The breadth of the Eighth Circuit's version of sale finality directly conflicts with that of the Second Circuit. *Brown Media Corp. v. K&L Gates, LLP*, 854 F.3d 150, 162–63 (2d Cir. 2017) [suit against restructuring counsel for breach of fiduciary duty to assist a competing bidder in winning 363 auction.]

The conflict between the Circuits is irreconcilable and must be addressed to not only preserve causes of action against insolvency professionals, but also to deter unscrupulous behavior from taking place in the first instance. Failure to address the Circuit split will also encourage forum shopping into the Eighth Circuit for every highwayman attempting to strip creditors of recovery from the estate.

CONCLUSION

Petitioner respectfully requests that this honorable Court grant certiorari or otherwise rule in a manner which settles the issues presented. Permitting the affront to the holding in *Jevic* to linger will only perpetuate and expand the very conduct it was intended to prevent. In the interim, insolvency professionals will circumvent *Jevic* by holding §363 sales in advance of stipulated dismissals to invoke the bar of §363(m).

Respectively Submitted,

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