No.

IN THE

Supreme Court of the United States

IN RE: 388 ROUTE 22 READINGTON HOLDINGS, LLC

SB BUILDING ASSOCIATES LIMITED PARTNERSHIP,
PETITIONER

v.

BUNCE ATKINSON, CHAPTER 7 TRUSTEE FOR
388 ROUTE 22 READINGTON HOLDINGS, LLC.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

I. May Congress consistent with Separation of Powers principles deny Article III courts of the power to review an Article I court's decision allowing the sale of petitioner's bankruptcy property?

II. Can the unconstitutional deprivation of petitioner's property caused by the provisions of § 363(m) of the Bankruptcy Code be remedied by requiring *de novo* review by an Article III court?

PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

STATEMENT OF RELATED CASES

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The unpublished Opinion of the United States Court of Appeals for the Third Circuit in *In re:388 Route 22 Readington Holdings, LLC*, Court of Appeals No. 20-2629, decided and filed October 15, 2021, and reported at 2021 WL 4811409 (3rd Cir. 2021), affirming the district court's order dismissing petitioner's appeal as moot under 11 U.S.C. § 363(m), is set forth in the Appendix hereto (App. 1-6).

The unpublished Opinion of the United States District Court for the District of New Jersey in *In re:388 Route 22 Readington Holdings, LLC*, Civil Action No. 3:20-cv-01252, decided and filed July 27, 2020, and reported at 2020 WL 4282748 (D. N.J. 2020), denying petitioner's appeal as moot under 11 U.S.C. § 363(m), and granting the Trustee's motion to dismiss the appeal, is set forth in the Appendix hereto (App. 7-21).

The unpublished Decision of the United States Bankruptcy Court for the District of New Jersey in *In re:388 Route 22 Readington Holdings, LLC*, Case No. 18-30155, decided on January 28, 2020, allowing the sale of the Debtor's property, is set forth in the Appendix hereto (App. 22-34).

The unpublished Order of the United States Court of Appeals for the Third Circuit in *In re:388 Route 22 Readington Holdings, LLC*, Court of Appeals No. 20-2629, filed November 16, 2021, denying petitioner's timely filed petition for panel rehearing or, in the alternative, for rehearing *en banc*, is set forth in the Appendix hereto (App. 35).

JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit affirming the district court's order dismissing petitioner's appeal as moot under 11 U.S.C. § 363(m), was entered on October 15, 2021; and its Order denying petitioner's timely filed petition for panel rehearing or, in the alternative, for rehearing *en banc*, was decided and filed on November 16, 2021 (App. 1-6;35).

This petition for writ of certiorari is filed within ninety (90) days of the date the Court of Appeals denied petitioner's timely filed petition for panel rehearing or, in the alternative, for rehearing *en banc*. 28 U.S.C. § 2101(c). Revised Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Article I, § 1, U.S. Constitution:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article III, § 1, U.S. Constitution:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of

the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Article III, § 2, Clause 1, U.S. Constitution:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties....

United States Constitution, Amendment V:

No person shall...be deprived of life, liberty, or property, without due process of law....

11 U.S.C. §§ 363 (b); (c); and (m):

....

(b)
(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless—
(A) such sale or such lease is consistent with such policy; or (B) after appointment of a

consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease—
(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and (ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.
(2) If notification is required under subsection (a) of section
7A of the Clayton Act in the case of a transaction under this subsection, then—
(A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and
(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended—
(i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;
(ii) pursuant to subsection (g)(2) of such section; or
(iii) by the court after notice and a hearing.
(c)
(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1183, 1184, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter

into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

....

(m)

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not

affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

28 U.S.C. § 157 (Procedures):

(a)
Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.
(b)
(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.
(2) Core proceedings include, but are not limited to—
(A) matters concerning the administration of the estate;
(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case

under title 11;
(C) counterclaims by the estate against persons filing claims against the estate;
(D) orders in respect to obtaining credit;
(E) orders to turn over property of the estate;
(F) proceedings to determine, avoid, or recover preferences;
(G) motions to terminate, annul, or modify the automatic stay;
(H) proceedings to determine, avoid, or recover fraudulent conveyances;
(I) determinations as to the dischargeability of particular debts;
(J) objections to discharges;
(K) determinations of the validity, extent, or priority of liens;
(L) confirmations of plans;
(M) orders approving the use or lease of property, including the use of cash collateral;
(N) orders approving the sale of property other than property
resulting from claims brought by the estate against persons
who have not filed claims against the estate;
(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and
(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.
(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is

otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)

(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d)

The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.
(e)
If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

28 U.S.C. § 158(a)(1) & (d)(1):

(a) The district courts of the United States shall have jurisdiction to hear appeals [1]
(1) from final judgments, orders, and decrees;
....
(d)(1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

STATEMENT

Petitioner SB Building Associates Limited Partnership ("petitioner" or "SB") is the sole equity owner of the entity known as 388 Route 22 Readington Holdings, LLC ("the Debtor"). The Debtor owned one

significant asset: property located at 388 Route 22 in Readington, New Jersey. In 2011, Iron Mountain Information Management, LLC ("Iron Mountain"), holding a mortgage on the property, obtained a foreclosure judgment. In order to avoid a sheriff's sale, the Debtor filed for bankruptcy on July 31, 2013. In 2014, the bankruptcy proceeding concluded with confirmation of a plan of reorganization with the Debtor and Iron Mountain agreeing to a payment plan.

When the plan broke down, the Debtor filed for bankruptcy again on October 9, 2018. On November 19, 2018, the Bankruptcy Court converted the Debtor's case to a Chapter 7 liquidation and allowed Iron Mountain to foreclose, appointing respondent Bunce Atkinson, Esq. ("respondent" or "the Trustee") as Trustee.

The Trustee arranged for an auction in December of 2019. Just 3 bidders participated and 5 bids were received; the auction produced a high bid of $3.2 million. The proceeds satisfied Iron Mountain's mortgage, administrative and priority claims, and all unsecured creditors. SB received $100,000. The Trustee moved for approval of the sale. SB moved to reimpose the automatic stay because the bid was inadequate and did not satisfy the fair value metric set of *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 149 (3rd Cir. 1986) ("[f]air and valuable consideration is given in a bankruptcy sale when the purchaser pays 75% of the appraised value of the assets.").

SB requested the judge hear the testimony of Lawrence S. Berger, Esq. ("Berger") who represented the Debtor in the 10-year sewer litigation and the

realtor David Zimmel. Berger would testify about the high likelihood that sewer capacity would be obtained as a result of the ongoing litigation; the numerous upgrades since the last appraisal six years earlier; and that the Trustee's auction materials exaggerated the sewer problem, depressing the bids. Zimmel's testimony would speak as a realtor to the property's enhanced value since 2014. Finally, SB wanted an appraisal to be submitted to the Court before it decided whether the auction result fairly reflected the property's "value."

On January 28, 2020, the Bankruptcy Court, Ferguson, J., over SB's objections, granted the Trustee's motion to approve the sale (App. 22-34). She ruled that the sale was conducted "in good faith," a ruling which implied that the purchaser obtained the property for "value"(App. 26-27;32 citing *Abbotts Dairies*). She rejected the contention that the Trustee should have pursued the $5 million Zimmel offer because that offer "contained two substantial, perhaps insurmountable contingencies" (App. 27-28). She also found that "[t]he lack of any irregularity in the auction process coupled with 15 qualified bidders is strong evidence that the $3.2 million sale price is fair value" (App. 30).

Rejecting the need for an appraisal to establish "value," the court found "that a properly advertised and actively participated-in auction produces the best possible measure of fair value..., far better than the competing appraisals that SB argues are necessary" (App. 32). It therefore granted the Trustee's motion to approve the auction results and denied SB's to reinstate the automatic stay (*Id.*). SB requested the court to

immediately enjoin the sale to give SB time to submit a motion for a stay pending its appeal of the ruling (App. 33). The court denied the request and ordered the property to be sold "as is" with no warranties, lien claims or encumbrances (*Id.*).

SB noticed its appeal and immediately sought a stay of the sale order. The Bankruptcy Judge denied the motion on February 4, 2020. SB brought an emergency motion in the district court to stay the sale pending its appeal and it was denied on February 11, 2020. On March 23, 2020, the court of appeals also denied SB's emergency motion to stay the sale. In the meantime, on February 28, 2020, sale of the property to the auction's high bidder was consummated with full knowledge that SB contested the sale. The new buyer then listed the property for sale for $12 million.

On March 19, 2020, the Trustee moved in district court to dismiss SB's appeal arguing that it was moot pursuant to 11 U.S.C § 363(m), which provides for finality of a sale order where the buyer allegedly purchased it in good faith and no stay was issued pending appeal. SB opposed the motion asserting that the Trustee did not prove the "value" element of good faith and the matter should be remanded to the Bankruptcy Court to further develop the record on the property's "value."

On July 27, 2020, the district court, Wolfson, C.J., granted the Trustee's motion to dismiss SB's appeal as moot (App. 7-21). Employing a deferential review of the Bankruptcy Court's decision pursuant to 28 U.S.C. § 158(a)(1), i.e., a clear error standard for findings of fact and plenary review for issues of law, the district judge

affirmed the decision (App. 14-15). She refused to look beyond the auction results to establish "value;" she discounted the use of offers on the property as objective proof of fair value; and she minimized the testimony of Zimmel and Berger about the property's improved value (App. 15-19).

The district court agreed there were no deficiencies in the auction which depressed the sale price; that the Trustee used reasonable efforts to maximize the price; and that the sewer contingency was more serious than SB contended (App. 15;19-21). It also read *Abbotts Dairies* to hold that an auction presumptively produces the best measure of fair value instead of using other objective metrics including a current appraisal and proof of increased value (App. 14-15;19-20). In short, the district court, without permitting a full *de novo* review, rubber-stamped the findings and rulings of the Bankruptcy Court (App. 21).

SB appealed seeking *de novo* review of the district court's decision, arguing that the "value" metric of *Abbotts Dairies*, i.e., 75% of appraised value, was required for fair value determination of a non-collusive auction. It argued that a *de novo* review which considers the evidence adduced in Bankruptcy Court and *weighs* that proof would lead the Panel to conclude that (1) the Bankruptcy Court's record was incomplete because it lacked SB's proffered objective evidence of fair value such as a current appraisal or testimony about the property's improved value over that provided in a six-year-old appraisal; and (2) a remand was therefore necessary to cure this evidence insufficiency before a valid finding on the property's "value" could be made.

On October 15, 2021, the Panel affirmed the dismissal of SB's appeal as moot (App. 1-6). It endorsed the legal reasoning of the district court that the results of a non-collusive auction is always strong evidence that the purchaser paid fair value for the property (App. 4-5). It did not find clear error in any of the Bankruptcy Court's findings of fact, e.g., that the auction was well marketed; that it was not necessary to hear any testimony on value or consider fresh appraisals because it already had the sale price from a competitive auction; that the auctioneer accurately described the sewer issue; and that the auction advertising was adequate (App. 5-6). It therefore affirmed the dismissal of SB's appeal as moot pursuant to 11 U.S.C § 363(m) (App. 6).

On November 16, 2021, the court of appeals denied petitioner's timely filed petition for panel rehearing or, in the alternative, for rehearing *en banc* (App. 35).

On February 8, 2022, a week before this petition was filed, the Appellate Division of the Superior Court of New Jersey ruled in favor of the Debtor in its litigation seeking sewerage capacity for its former property at 388 Route 22 in Readington, New Jersey, granting other monetary relief as well. See *388 Route 22 Readington Realty Holdings, LLC v. Township of Readington et al.*, docket No. A-1826-18 (N. J. App. February 8, 2022).

REASONS FOR GRANTING THE PETITION

Congress May Not Consistent With Separation of Powers Principles Deny Article III Courts The Power To Review *de novo* An Article I Court's Decision Allowing Petitioner's Bankruptcy Property To Be Sold In Light Of The Claim That The Property Was Being Sold By The Bankruptcy Court Order Substantially Below Its Fair Value Without Permitting An Article III Review.

§ 363(m) of the Bankruptcy Code provides that a reversal or modification on appeal of an authorization to sell property will not affect the validity of the sale to an entity which bought the property "in good faith," whether or not the entity knew of the pendency of the appeal, unless such authorization and the sale were stayed pending the appeal. For § 363(m) to apply, the Bankruptcy Court must determine if the sale was made "in good faith," an assessment not only of the good faith of the purchaser but also whether the property was purchased "for value." *Abbotts Dairies*, 788 F.2d at 149-150. *Matter of Perona Bros., Inc.*, 188 B.R. 833, 839 (D. N.J. 1995).

In measuring the "value" element, *Abbotts Dairies* stated that while "generally speaking, an auction *may* be sufficient to establish that one has paid value," traditionally, fair value is objectively obtained in a bankruptcy sale where the purchaser pays 75% of the *appraised* value of the asset. 788 F.2d at 149 (emphasis supplied). Yet the Bankruptcy Court, a non-Article III tribunal, approved the sale of the Debtor's property based solely on the result of a non-collusive auction which took place during the Holiday season,

lasted only ten minutes, and produced just three bidders and five bids.

In so doing, the court refused to look beyond the auction results to establish "value;" it ignored unconsummated offers on the property as objective proof of value; and it refused to hear any testimony about the property's improved value. As it ruled, an auction "produces the best possible measure of fair value...,far better than... competing appraisals" (App. 32). By rejecting SB's proffered objective evidence and testimony about the value of the property and the correction of the auction materials regarding the ability of the property to obtain access to municipal sewers (agreed by all parties and the Court to significantly increase the value of the property), it deprived petitioner of its right to a fulsome and robust determination of value by having the opportunity to adduce objective evidence that the property was sold substantially below its fair value.

The district court and then the court of appeals denied petitioner's motion to stay the sale while it prosecuted its appeal of the sale. The Trustee moved in district court to dismiss the appeal claiming mootness under § 363(m) of the Bankruptcy Code. In response, petitioner requested the district court to review the Bankruptcy Judge's findings, i.e., to consider the evidence adduced in Bankruptcy Court and *weigh* that proof to see if petitioner's objective proof of the property's "value" was probative enough to overcome the auction result and, if it was, to decide the question of fair value or, if the evidence on the issue was incomplete, to remand the matter to the Bankruptcy Court to cure any evidence insufficiency on the issue.

See *Matter of Perona Bros., Inc.*, 186 B.R. at 840.

Instead, the district court employed a deferential review of the Bankruptcy Court's decision pursuant to 28 U.S.C. § 158(a)(1). It refused to look beyond the auction results to establish "value" and it read *Abbotts Dairies* wrongly to hold that an auction presumptively produces the best measure of value instead of using other objective metrics like a current appraisal and proof of increased value (App. 14-15;19-20).

Petitioner's appeal to the court of appeals again sought review pursuant to a standard which it argued would cause the Panel to recognize that the record in the Bankruptcy Court was incomplete because it lacked SB's proffered objective evidence of fair value and that a remand was therefore necessary to cure this evidence insufficiency before a valid finding on the property's "value" could be made. But the Panel again employed only a limited scope of review (App. 4-6).

Petitioner submits that § 363(m) fueled this scenario which unconstitutionally deprives it of its property through a court-ordered sale of the property by a non-Article III tribunal to a third party for inadequate consideration without any meaningful review by an Article III court. This scheme violates separation of powers principles because it elevates the rulings of Legislative courts over the jurisdictional power of Article III courts to decide the cases or controversies legitimately before it.

Once petitioner's motions for stay were denied, the Bankruptcy Court's order approving the sale was unreviewable because the only relief the district court

could provide an objector like SB was to undo the sale and that remedy is not permitted under § 363(m) on grounds of "statutory mootness." To the extent that the district court was *unable* to provide this remedy on account of § 363(m), it presents an issue of "equitable mootness" which also prohibits review of an Article I decision by an Article III court.

This structural problem where dispositive decisions of Article I courts are not subject to review by Article III courts prevents this Court's duty of superintendence over the federal system to insure that it provides meaningful remedies to federal litigants like petitioner. The issue comes within Supreme Court Rule 10(c)'s guidance about the considerations which point toward the Court's granting a petition for certiorari, i.e., that "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by th[e] Court, or has decided an important federal question in a way that conflicts with relevant decisions of th[e] Court."

In *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 716 (1996), the Court recognized that federal courts have a fundamental duty to exercise the jurisdiction they were given by Congress under Article III. *Id.* As the Court wrote in *Wisconsin v. Constantineau*, 400 U.S. 433, 437-438(1971), Congress could have routed all federal questions through the respective state court systems, saving to this Court the final say when it comes to the review of those state court judgments. *Id.* But the first Congress did not do so and instead created a federal system of courts which are empowered to hear claims by plaintiffs seeking a redress of their federal rights. *Id.*

In recognition of this power, the Court has repeatedly acknowledged that the federal courts have a "virtually unflagging obligation...to exercise [this] jurisdiction given them." *Quackenbush*, 517 U.S. at 716. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 821 (1976). *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964). *Wilcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909). *Cohens v. Virginia*, 19 U.S. 264 (1821).

An exception to this robust grant of power of the district court is the statutory mootness doctrine embodied in § 363(m). In *In re One2One Commc'ns, LLC*, 805 F.3d 428, 438-454 (3rd Cir. 2015) (Krause, J., concurring), the Circuit Judge criticized the sister doctrine of equitable mootness, observing that the doctrine is probably unconstitutional. *Id.* at 438; 439;446. The use of non-Article III tribunals to accomplish Article III business raises two constitutional concerns: (1) it infringes upon a litigant's "entitlement to an Article III adjudicator," a personal right affirmed by the Court in *Wellness International Network, Ltd. v. Sharif*, 575 U.S. 665, 678 (2015); and (2) it impermissibly threatens "the institutional integrity of the Judicial Branch." *Id.* at 444 quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986).

Judge Krause described the structural and constitutional impropriety of equitable mootness in the bankruptcy context which is equally applicable to Congress' attempt to make Bankruptcy Court decisions unreviewable pursuant to § 363(m) :

> [It] not only allows bankruptcy court decisions to avoid review, but also enables bankruptcy judges to insulate their decisions from review at their discretion. In turn, opportunistic plan proponents can (and...regularly do) use this to their advantage. As then-Judge Alito warned in [*Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 192 (3rd Cir. 2001)], "our court's equitable mootness doctrines can easily be used as a weapon to prevent any appellate review of bankruptcy court orders....It thus places far too much power in the hands of bankruptcy judges."

Id. at 445.

Such is the case here. The Bankruptcy Court refused to consider petitioner's proffer of objective proof about the property's value or the state of the all-important sewer litigation. The Bankruptcy Judge characterized this litigation as "pie in the sky;" but the New Jersey courts have vindicated SB on this score, its Appellate Division recently declaring that the property will be able to tie into municipal sewer services, substantially increasing its value. The auction materials inaccurately indicated that there was no possibility of such a tie-in, wrongfully decreasing the amounts bid at the auction sale.

The evidentiary record in Bankruptcy Court on the issue of the property's value was therefore markedly incomplete. Despite this evidentiary insufficiency, the court ordered the sale, denied petitioner's motion for stay pending appeal and after the sale was consummated, dismissed its appeal on grounds of mootness under § 363(m). The mootness

issue thus became a weapon for the Trustee to prevent meaningful appellate review by an Article III court of the sale order, at odds with petitioner's right to have an Article III court determine if there was a fair hearing and violative of separation of power principles.

In *Wellness International*, the Court spoke to similar concerns. A majority held that allowing Article I adjudicators like bankruptcy judges to decide so-called *Stern* claims submitted to them by consent does not offend separation of powers *so long as* Article III courts retain supervisory authority over the process. 575 U.S. at 678-679 (emphasis supplied). However, in dissent, Chief Justice Roberts explained that private parties cannot consent to an Article III violation; that Article III is "an inseparable element of the constitutional system of checks and balances;" and that "Congress may not confer power to decide federal cases and controversies upon judges who do not comply with the structural safeguards of Article III."*Id.* at 687-689;691;695-699.

Indeed, Congress had "have no constitutional authority to delegate the judicial power ----the power to 'render dispositive judgments'----to non-Article III judges...because no branch of government can delegate its constitutional functions to an actor who lacks authority to exercise those functions. *Id.* at 700-701 citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) and *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 472 (2001). As the Chief Justice warned, allowing parties to consent to Article III violations is a slippery slope which will only further enable coordinate branches of government like Congress to make the decisions of Article I tribunals like the Bankruptcy

Court immune from review by Article III courts. *Id.* at 704-705.

In order to cure this structural problem, Judge Krause suggests, among other things, *de novo* review by the court of appeals of determinations of mootness. *In re One2One Commc'ns, LLC*, 805 F.3d at 450-454. Commentators agree that where constitutional or jurisdictional facts are put in issue, e.g., whether the sale of bankruptcy property was undertaken in good faith and for "value" so as to determine the applicability of § 363(m) as a bar to appellate review, the district court (or the court of appeals) should employ *de novo* review of *both* the facts and the law. See Fallon, Richard H., Jr.,*Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 982-983;989 (1988) (citing *Crowell v. Benson*, 285 U.S. 22, 63-64 (1932)); Monaghan, Henry P., *Constitutional Fact Review*, 85 Colum. Law Rev. 229, 254-255 (1985) (independent record requirement is essential to maintain the independent exercise of judicial power, citing *Crowell*, *supra*).

In this context, *de novo* review by the district court (or the court of appeals) of dispositive decisions by the Bankruptcy Court where mootness is raised within the meaning of § 363(m) in order to bar review by an Article III court, means the ability of Article III courts to review *both* the facts and the law *anew*. See Note, *De Novo Judicial Review of Administrative Agency Factual Determinations Implicating Constitutional Rights*, 88 Colum. Law Rev. 1483, 1483 n. 3; 1502-1503 (1988).

Further, a decision on petitioner's motion for stay pending its appeal of the sale order should be informed by this right to *de novo* review of the Bankruptcy Court's order by Article III courts. This prophylactic measure insures that litigants who find themselves in Article I tribunals do not lose their fundamental rights to due process and the right to full review by an Article III adjudicator, a personal right affirmed by the Court in *Wellness International*. 575 U.S. at 678.

CONCLUSION

For the reasons identified herein, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Third Circuit and remand the case to the federal district court for the District of New Jersey in order to conduct a *de novo* review as to whether the Trustee has satisfied his burden of proof that sufficient value under *Abbotts Dairies*, i.e., 75% of appraised value, was given by the purchaser to justify approval of the auction sale or provide petitioner with such further relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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2021 WL 4811409
United States Court of Appeals, Third Circuit.

IN RE: 388 ROUTE 22 READINGTON HOLDINGS, LLC, Debtor

SB Building Associates Limited Partnership, Appellant

No. 20-2629

Submitted Under Third Circuit L.A.R. 34.1(a) on September 28, 2021(Opinion filed: October 15, 2021)

Appeal from United States District Court for the District of New Jersey (D.C. Civil Action No. 3:20-cv-01252), District Judge: Freda L. Wolfson

Attorneys and Law Firms

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Lawrence S. Berger, Esq., Berger & Bornstein, Morristown, NJ, Jay L. Lubetkin, Esq., Barry J. Roy, Esq., Rabinowitz Lubetkin & Tully, Livingston, NJ, for Appellant.

Before: AMBRO, KRAUSE, and BIBAS, Circuit Judges

OPINION*

AMBRO, Circuit Judge

Appellant SB Building Associates Limited Partnership is the sole owner of 388 Route 22 Readington Holdings, LLC (the "Debtor"). SB is

seeking to reverse an order by the United States Bankruptcy Court for the District of New Jersey authorizing the trustee for the Debtor, Bunce Atkinson (the "Trustee"), to sell the Debtor's property to Leon Kitovksy under 11 U.S.C. § 363. SB appealed the sale order to the District Court, but after the sale closed the Court dismissed the appeal as moot under § 363(m). SB now appeals that dismissal. As we agree that the property was sold for appropriate value, we affirm the District Court's order.

I.

The Debtor has one significant asset: property located at 388 Route 22, Readington, New Jersey. In 2011, Iron Mountain Information Management, LLC, which held the mortgage on the property, obtained a foreclosure judgment. To avoid a sheriff's sale, the Debtor filed for Chapter 11 bankruptcy. Litigation ensued; eventually the Debtor and Iron Mountain agreed to a payment plan. This arrangement, however, was short-lived. The Debtor filed for bankruptcy a second time in 2018. The Bankruptcy Court converted the proceeding to a Chapter 7 liquidation and allowed Iron Mountain to foreclose on the Debtor's property.

Iron Mountain gave the Trustee until the end of September 2019 to sell that property. He hired a realtor, David Zimmel, to market it. Zimmel received one written, preliminary offer for $5,000,000, but the Trustee turned it down because, in addition to being unsigned and permitting cancellation for "any reason or for no particular reason," Supp. App. 81–82, the proposal requested a due diligence period that would have required the sale to take place after the end of the previously agreed foreclosure stay period. Plus, the

offer contained two significant contingencies: (1) positive resolution of ongoing litigation to gain access to the public sewer system; and (2) receipt of an exemption from local zoning ordinances to allow a non-conforming use.

Instead, the Trustee and Iron Mountain arranged for an auction in December 2019. Twenty-two prospective buyers inspected the property, and fifteen made deposits to participate in bidding. Leon Kitovsky won with a bid of $3,200,000. The Bankruptcy Court approved the sale, which closed in March 2020. The sale price was sufficient to pay Iron Mountain and all claims against the Debtor's bankruptcy estate in full while still providing a distribution of over $100,000 to SB.

But SB maintains that the price was inadequate and moved to stay the sale. The Bankruptcy Court, the District Court, and our Court all denied the request. SB then appealed the sale order, and the District Court dismissed the appeal as moot per § 363(m). As noted, SB now appeals the dismissal.

II.

Bankruptcy Code § 363(b) permits a trustee to sell the property of a bankruptcy estate. 11 U.S.C. § 363(b). Subsection (m) promotes the finality of such sales. It provides that

> [t]he reversal or modification on appeal of an authorization under subsection (b) ... of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the

> appeal, unless such authorization and such sale or lease were stayed pending appeal.

Put simply, § 363(m) moots a challenge to a sale when "(1) the underlying sale or lease was not stayed pending the appeal, and (2) the court, if reversing or modifying the authorization to sell or lease, would be affecting the validity of such a sale or lease." *Schepis v. Burtch (In re Pursuit Cap. Mgmt., LLC)*, 874 F.3d 124, 135 (3d Cir. 2017). To reach this two-part test, we must first ask whether the buyer "purchased ... the property in good faith." *Id.* (quoting § 363(m)) (alterations omitted). That requires a purchase for "appropriate value." *Id.* at 137. The sole issue on appeal is whether Leon Kitovsky bought the property for appropriate (or fair) value.

SB challenges the Bankruptcy Court's decision on both legal and factual grounds. It argues the Bankruptcy Court misapplied the law by suggesting that a non-collusive auction is always sufficient to conclude value was paid. SB also challenges the Court's factual findings and its decision not to hear additional testimony. We consider each argument in turn.

SB faults the Bankruptcy Court for applying a *per se* rule that the results of a non-collusive auction conclusively establish fair value. But this misstates its decision. The Court found "that a properly advertised and actively participated in auction produces the best possible measure of fair value" and "[t]he lack of any irregularity in the auction process coupled with 15 qualified bidders is strong evidence that the $3.2 million sale price is fair value." Supp. App. at 126, 129. Its opinion correctly aligns with our holding in *Pursuit Capital* that, absent collusion, "a competitive auction strongly indicates that a purchaser has paid

appropriate value for estate assets." *In re Pursuit Cap. Mgmt.*, 784 F.3d at 137; *see also In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 149 (3d Cir. 1986) (holding that while "an auction may be sufficient to establish that one has paid 'value' for the assets of a bankrupt," it does not establish value when there is collusive conduct).[1] Here there was no allegation of collusion, leading the District Court to conclude—properly—that the auction was strong evidence that the purchaser paid fair value for the property.

In addition, the Bankruptcy Court's factual findings were not clearly erroneous. It found the auction was well marketed and generated substantial interest from numerous potential bidders. Ultimately fifteen prospective buyers deposited money to participate in the auction, and the property was sold for approximately 40% more than its assessed value in 2014. And as the District Court explained, considerable additional evidence also supported the Bankruptcy Court's decision.

SB has not identified any persuasive reason that the Bankruptcy Court's conclusion was incorrect. In that Court, SB argued a $5,000,000 offer was a better indicator of value than the auction result. The Court, however, concluded it was "illusory." Supp. App. at 124. It explained that Iron Mountain was under no obligation to give the Trustee more time to close the sale (as that offer required) and the offer "contain[ed] two substantial, perhaps insurmountable, contingencies" (resolution of the sewer-capacity litigation and obtaining a non-conforming use exemption). *Id.* Nor did the Court err in declining to hear additional testimony or order a new assessment because it already had sufficient evidence to determine that the purchase was for fair value. There is no clear

indication that additional evidence was needed when it already had the sale price from a competitive auction. In particular, the Court found that the auctioneer accurately described the property's sewer access and concluded that the auction advertising was adequate. This was sufficient evidence to conclude that the property was sold for appropriate value.

* * * * *

It has now been ten years since Iron Mountain obtained the foreclosure judgment. Over that decade SB used the bankruptcy process to delay repeatedly the sale of the Debtor's property. But proceedings eventually end. Section 363(m) serves to promote the finality of sales, and the District Court properly recognized that SB's challenge to the sale fails as moot. Accordingly, we affirm its order dismissing SB's appeal.

Footnotes

*This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

1We need not decide if *Pursuit Capital* misrepresented the holding of *Abbotts Dairies* when it stated that "a public auction, as opposed to appraisals and other evidence, is the best possible determinant of the value of assets." 874 F.3d at 136 (alterations omitted). Regardless whether a public auction is always the "best possible" way to determine the value of assets, *Pursuit Capital* instructs that a competitive auction is highly probative and, if competitive, can be sufficient to determine an asset's fair value. *See id.* at 138.

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NOT FOR PUBLICATION

United States District Court, D. New Jersey.

IN RE 388 ROUTE 22 READINGTON HOLDINGS, LLC, Debtor.

SB Building Associates Limited Partnership, Appellant,
v.
Bunce Atkinson, Chapter 7 Trustee for 388 Route 22 Readington Holdings, LLC Appellee.

Civil Action No. 3:20-cv-01252

Signed July 27, 2020

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OPINION

WOLFSON, Chief Judge

This matter concerns the validity of a sale of real property, which was an asset in a bankruptcy estate. SB Building Associates Limited Partnership ("SB"), the sole equity member of 388 Route 22 Readington Holdings, LLC (the "Debtor"), has appealed an order entered by the United States Bankruptcy Court for the District of New Jersey ('Bankruptcy Court") approving the auction sale of 388 Route 22, Readington, New Jersey ("the Property"). Presently before the Court is trustee Bunce D. Atkinson's ("Atkinson" or "the Trustee") motion to dismiss the appeal on the grounds that it is mooted by 11 U.S.C. § 363(m). For the following reasons, the motion is **GRANTED**, and the appealed is **DENIED**.

I. BACKGROUND AND PROCEDURAL HISTORY

The Court sets forth only the facts from the record relevant to the parties' dispute over the validity of the sale. The Debtor filed for bankruptcy on July 31, 2013. SB is the sole equity member of the Debtor, and Atkinson is the court-appointed trustee for the Debtor's Property. Iron Mountain, the mortgagee on the Property, obtained a judgment of foreclosure in July 2011, but negotiated a temporary stay with Atkinson to sell it. Atkinson hired David Zimmel ("Zimmel") to do so. However, Zimmel was unsuccessful, soliciting only one offer in six months for $5 million. Atkinson rejected the offer because the foreclosure stay would expire during the prospective buyer's 45-day due diligence period. Iron Mountain and Atkinson then agreed to an auction, and on December

17, 2019, Leon Kitovsky ("Kitovsky") purchased the Property for $3.2 million. *See* Mot. to Dismiss, Ex. A. The auction proceeds satisfied Iron Mountain's mortgage, all administrative and priority claims, and all unsecured creditors. SB also received $100,000. Nevertheless, SB filed a motion before the Bankruptcy Court objecting to the sale.

Following arguments on that motion, the Bankruptcy Court approved the sale from the bench. *See* Dkt. 118. The court first determined that the Trustee exercised sound business judgment when he rejected the $5 million private offer, and instead, sold the Property at an auction. That determination was "simple, ... because the sale [paid] all uncontested secured claims ... and unsecured creditors in full. It [ ] also salvaged something from nothing, in the sense that Iron Mountain already had a stay relief and [was] still permitting the Trustee to conduct the sale to allow the opportunity to pay creditors other than [itself]." *Id.* Indeed, "Iron Mountain was under no obligation to grant the Trustee any time whatsoever" to sell the Property. *Id.*

Next, relying on *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 147-50 (3d Cir. 1986), the Bankruptcy Court determined that the Kitovsky purchased the Property for value. The court rejected SB's contention that the $5 million private offer better establishes the Property's value, classifying the offer as "illusory," because it was not signed by both parties, and found that, in any event, it "contained two substantial, perhaps insurmountable contingencies." *Id.* The first contingency required the Property to gain access to the public sewage system to supplement its small septic tank, which can currently only service 30 people. Without such access, the Property is unfit for

industrial use or commercial development. The satisfaction of that contingency, in turn, depends on the outcome of an ongoing litigation that has been pending for many years. The other contingency required the Property to receive an exemption under local zoning ordinances for a legal non-conforming use, which likewise is a significant hurdle.

The Bankruptcy Court then rejected SB's contention that the Property was undervalued because the auction was held during the December 2019 holiday season. First, the court found that SB failed to "object by the deadline stated in the notice," which it received at least a month before the auction. *Id.* Second, the auction in fact "generated significant interest." *Id.* For example, seventy-seven prospective buyers registered, twenty-two inspected the Property, and fifteen delivered $150,000 to the auctioneer to bid. *Id.* Similarly, the Bankruptcy Court rejected SB's contention that the auction was procedurally deficient because of the low number of active bidders, as that was merely "a function of the Trustee's strategy to set the opening bid high." *Id.*

The Bankruptcy Court next addressed SB's contention that the auction price is inadequate, because the record lacks an appraisal. SB relied on *In re Perona Bros., Inc.*, 186 B.R. 833 (D.N.J. 1995), arguing that the district court in that case remanded the matter to the bankruptcy court solely because there was no appraisal in the record by which to measure the auction price. The Bankruptcy Court, however, found SB's position to be "far too broad a reading of *Perona*." Dkt. 118. Specifically, the court reasoned that SB disregarded the evidence of collusion in *Perona*, which called into question the good faith of the purchaser and ultimately led to "irregularity in the auction price." *Id.* The court

also rejected SB's contention that the auctioneer misled prospective buyers as to the Property's sewage capacity by failing to mention the related, yet still pending, sewage litigation. The court explained that the auctioneer stated only that the Property operates on a septic tank, which was a "true statement" both then and now, and that the representation simply reflected the "as-is condition." *Id.* As such, "it would not have been appropriate to delve into the details of litigation that has been ongoing for eight years." *Id.*

Finally, the Bankruptcy Court rejected a certification from Lawrence Berger ("Berger"), the general partner in the limited partnership which controls SB and one of SB's lawyers, representing that the Debtor received two $7 million offers in 2014—which offers were contingent upon the successful resolution of the sewage litigation—that better reflect the value of the Property. Noting that Iron Mountain obtained its foreclosure judgment nine years ago, the court emphasized that "Berger [did] not say that, as of today or any time in the immediate future, it is certain the Debtor will prevail," and "it is detrimental to all creditors to have to wait until endless litigation is pursued." *Id.* The Bankruptcy Court, accordingly, held that "a properly advertised and actively participated-in auction produce[d] the best possible measure of fair value," and "[t]the record amply supports approval of th[e] sale." *Id.*

Dissatisfied with the Bankruptcy Court's ruling, SB filed an emergency appeal before this Court and the Third Circuit Court of Appeals to stay the sale; both were denied. *See* Mot. to Dismiss, Ex. C. Thereafter, SB filed a Notice of *Lis Pendens* with the county land office declaring its interest in the Property, and continued to proceed with this appeal. *See* Mot. to

Dismiss, Ex. E. Atkinson now moves to dismiss the appeal, contending that it is moot under 11 U.S.C. § 363(m). SB asks the Court to remand with instructions to the Bankruptcy Court to further develop the factual record.

II. STANDARD OF REVIEW

District courts have mandatory jurisdiction to hear appeals "from final judgments, orders, and decrees" entered by Bankruptcy Courts, such as the sale order in the present case. 28 U.S.C. § 158(a)(1). The primary issue on appeal here, *i.e.*, the Bankruptcy Court's finding that Kitovsky acquired the Property for value within the meaning of § 363(m), is a factual finding that is reviewable only for clear error. *Abbotts Dairies*, 788 F.2d at 147; *In re Pursuit Capital Mgmt. LLC*, 874 F.3d 124, 135 (3d Cir. 2017); *Universal Minerals v. C.A. Hughes & Co.*, 669 F.2d 98, 103 (3d Cir. 1981).

III. DISCUSSION

11 U.S.C. § 363(m) provides, in part: "[t]he reversal or modification on appeal of an authorization ... of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith." The Court cannot consider an appeal of the sale of real property in a bankruptcy proceeding if the sale is moot under § 363(m). *See Cinicola v. Scharffenberger*, 248 F.3d 110, 127 n.19 (3d Cir. 2001) ("[W]e must first answer the question of statutory mootness before proceeding to the merits[.]"); *In re Pursuit*, 874 F.3d at 133; *Pittsburgh Food & Bev. Inc. v. Ranallo*, 112 F.3d

645, 647-48 (3d Cir. 1997) (explaining that § 363(m) is designed to promote finality).

In the Third Circuit, § 363(m) moots a challenge to a sale if: "(1) the underlying sale ... was not stayed pending the appeal, and (2) the court, if reversing or modifying the authorization to sell, ... would be affecting the validity of such a sale or lease." *Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490, 499 (3d Cir. 1998). Though framed as a two-part test, the court must also determine whether the buyer "purchased ... [the] property in good faith." *Abbotts Dairies*, 788 F.2d at 147; *Cinicola*, 248 F.3d at 122 ("[W]e have rejected a *per se* rule 'mooting appeals absent a stay of the sale ... at issue.' "). Because neither the Bankruptcy Code nor the Bankruptcy Rules defines good faith, courts have adopted "traditional equitable principles, holding that the phrase encompasses one who purchases in 'good faith' and for 'value.' " *Abbotts Dairies*, 788 F.2d at 147 (citations omitted).

Here, SB did not obtain a stay, as it failed to convince me or the Third Circuit that a stay was appropriate. Further, it is undisputed that reversing the Bankruptcy Court's sale order would affect the validity of the sale, as "[a] challenge to an authorized transaction will necessarily impact that transaction's validity if it seeks to affect 'the validity of a central element,' such as the sale price." *Alabama Aircraft Indus., Inc.*, 514 Fed App'x. 193, 195 (3d Cir. 2013) (quoting *Pittsburgh Food & Beverage, Inc. v. Ranallo*, 112 F.3d 645, 649 (3d Cir. 1997)). SB also does not challenge whether Kitovsky is a good faith purchaser, *i.e.*, "the integrity of [his] conduct in the course of the sale proceedings" is not at issue. *Abbotts Dairies*, 788 F.2d at 147.

SB's sole basis for appeal is that Kitovsky did not purchase the Property for value at the auction. SB's arguments on this point are virtually identical to those raised before the Bankruptcy Court. First, SB claims that the Bankruptcy Court "applied the wrong legal standard in determining whether value was paid." Opp. Br., at 7. SB also points to alleged deficiencies in the Bankruptcy Court's factual findings. In particular, SB argues that the court did not "look beyond the mere result of the auction and measure the auction against some objective proof of fair value," or hear testimony from Zimmel and Berger as to the Property's marketability. *Id.* Finally, SB maintains that deficiencies in the auction's bidding environment depressed the sale price, including "an incorrect and inaccurate description of the sewer capacity status of the Property, [the fact that it took place] when much of New Jersey's commercial real estate [investors were] away on vacation and could not attend, and [the fact that] it lasted only ten minutes among two bidders making only four total bids." Opp. Br., at 7, 12-14. In response, Atkinson argues that there is "ample evidence [in the record] that value was paid at the auction." *See* Mot. to Dismiss, at 6. Specifically, he points to "multiple certifications regarding the Property," which detailed the efforts to sell it prior to and during the auction, and a court-ordered valuation in 2014 that was performed soon after the Debtor applied for Chapter 7 protection. *Id.*

To begin, SB wholly fails to explain what was incorrect about the legal standard the Bankruptcy Court used to determine that Kitovsky paid value. *See* Opp. Br., at 7. It is clear from the record that the Bankruptcy Court applied the proper legal standard. The court made a specific finding of value on the basis

of *Abbotts Dairies*, 788 F.2d at 148, and did not suggest that "an auction *per se* establishes value," despite SB's contention. *See* Dkt. 118. Consistent with *Abbotts Dairies*, the court found that, on the record before it, an auction "produces the best possible measure of fair value." Dkt. 118. SB's argument in this regard lacks any basis.

Next, SB argues the Bankruptcy Court based its holding on inadequate factual findings, because it relied on the auction alone, and did not compare the sale price to "objective measures of value." Opp. Br., at 9. This argument is factually and legally unsupported. As a factual matter, in addition to the auction price, the Bankruptcy Court considered ample evidence, including: (1) the Auctioneer's Report detailing extensive advertising and marketing efforts; (2) a court-ordered valuation, filed on August 28, 2014, assessing the Property at $2,284,615.00; (3) the Debtor's own Amended Disclosure adopting the 2014 valuation and claiming a liquidation value of $1,484,999.75; (4) Iron Mountain's submission supporting the sale; (5) an email from Zimmel dated November 13, 2019, stating: "No one is going to buy the property for $4,500,000.00 or any other significant amount if they do not know that they have [sewage] capacity and a right to continue the non-confirming industrial use ... I don't even think you will obtain enough to pay the first mortgage whether [there] is an auction or not"; (6) submissions from Zimmel, Berger, and counsel for SB; and (7) testimony from Zimmel and Berger as to the value of the Property in a related hearing regarding its sewer capacity. These considerations form the basis of the Bankruptcy Court's order approving the sale, and the court properly weighed these facts. *See* Dkt. 118. Moreover, as a matter of law, a competitive public auction is

"[g]enerally speaking ... sufficient to establish that one has paid 'value' for the assets of a bankrupt." *Abbott Dairies*, 788 F.2d at 149. Finally, *Perona*, on which SB relies, is unpersuasive. As the Bankruptcy Court clearly explained, the purchaser at the auction in *Perona* was the debtor's President, with whom the debtor had an impermissibly "close relationship," and the property sold for less than the amount of an attached lien. Together these facts raised an inference that no *real* auction took place because of collusion. *Perona*, 186 B.R. at 140; *see also Abbott Dairies*, 788 F.2d at 149 (rejecting an auction on the basis of collusion); *In re Pursuit*, 874 F.3d at 137 (same). Not true here; there is no cogent evidence of impropriety in the present case that would undermine the integrity of the auction, raise an inference that it was "irregular[ ]," or establish the need for another measure of value. *See* Dkt. 118.

I also reject SB's contention that the Bankruptcy Court did not sufficiently consider the $5 million offer, which Zimmel solicited prior to Atkinson's decision to hold an auction. "Generally, unaccepted offers are not admissible evidence in support of fair market value of a property." *In re GGI Properties, LLC*, 588 B.R. 401, 417 (Bankr. D.N.J. 2018). Such offers are distinct from "unconsummated contract[s]," which carry more "evidentiary weight" and are more likely to reflect fair market value. *Id.* at 418. The $5 million offer, here, was not signed by both parties, which significantly reduced its probative value before the Bankruptcy Court. Even if the $5 million offer could be construed as an unconsummated contract, the Bankruptcy Court properly exercised its discretion to "discount [the offer] as untested by due diligence." *Id.* Moreover, "an unconsummated contract is entitled to little or no

weight in the absence of key information showing the likelihood that it is capable of being enforced." *In re Mocco*, 222 B.R. 440, 463 (Bankr. D.N.J. 1998). For example, "the more contingencies, the less weight to be given to the agreed-upon price, as the parties have reserved the opportunity to avoid the contract." *GGC Properties*, 588 B.R. at 419. Indeed, while a trustee has a duty to maximize value, he also has a duty to "avoid undue risk," *In re Buerge*, 479 B.R. 101, 107 (Bankr. D. Kan. 2012), such as the risk posed by a substantial contingency. *See In re Scimeca Foundation, Inc.*, 497 B.R. 753, 779 (Bankr. E.D. Pa. 2013). The $5 million offer in the present case is "replete with contingencies," which increased the likelihood that the buyer would opt out and that the contract would not be consummated. *GGC Properties*, 588 B.R. at 419 (quoting *Little Egg Harbor Tp v. Bonsangune*, 316 N.J. Super. 271, 281 (Super. Ct. App. Div. 1998)). As the Bankruptcy Court aptly concluded, these "perhaps insurmountable" contingencies entirely eliminated the offer's probative value. *Id.* (citing *Linwood Properties, Inc. v. Fort Lee Borough*, 7 N.J. Tax 320, 332-33 (1985) (construing such contracts as "not really contracts at all but ... offers or options to purchase which deserve little or no weight in the valuation process")); *Mocco*, 222 B.R. at 463.

Neither did the Bankruptcy Court err in concluding that "offers in the amount of $7,000,000 and in excess of $7,000,000 for the purchase of the property," which the Debtor apparently received in 2014, had no probative value, because they, too, were "contingent on the successful resolution of the sewer capacity [litigation]," which SB cannot guarantee would produce a favorable result. Opp. Br., Berger Certification, ¶ 15. Finally, despite SB's assertions to the contrary, "the highest bid is not always the best

bid," *United States v. Chemical Foundation*, 5 F.2d 191, 206 (3d Cir. 1925), *aff'd*, 272 U.S. 1 (1926), and "it [is] within the trustee's sound business judgment to accept a somewhat lower ... offer with no contingency." *In re JL Building, LLC*, 425 B.R. 854, 860 (Bankr. D. Utah 2011); *Scimeca*, 497 B.R. at 779.

Relatedly, SB argues that the Trustee hastily rejected the $5 million offer—and decided to sell the Property at auction—because the foreclosure stay that he negotiated with Iron Mountain would have expired during the prospective buyer's 45-day due diligence period. *See* Opp. Br., Berger Certification, ¶ 25. The implication SB seems to draw is that the looming foreclosure created "a compulsion to sell," which in turn lowered the auction price below fair market value. This argument is, however, without merit. The Bankruptcy Court made an affirmative finding that the Trustee acted in the best interests of the estate in choosing to conduct an auction. Dkt. 118; *In re ICL Holding Co.*, 802 F.3d 547, 551 (3d Cir. 2015) (approving the use of the "sound business purpose test" to judge a trustee's reasons for an asset sale); 11 U.S.C. § 704(a)(1) (stating that a trustee must "close [the] estate as expeditiously as is compatible with the best interests of parties in interest"); *see also Katchen v. Landy*, 382 U.S. 323, 328-29 ("[T]his Court has long recognized that a chief purpose of the bankruptcy laws is 'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period.' ") (quoting *Ex Parte Christy*, 3 How. 292, 312 (1845)). Indeed, the $3.2 million sale price was sufficient to fully pay all secured claims and unsecured creditors, leaving SB, the last-priority interest, with $100,000 to pay its debt obligations in a related bankruptcy proceeding. The Trustee was able to achieve this result even though

Iron Mountain had obtained prior stay relief, and thus, had no obligation to other creditors, nor a duty to allow the Trustee any more time to pursue a sale. As such, on these facts, there is no factual basis to disturb the Bankruptcy Court's finding that the Trustee's decision to sell the Property at auction was proper, nor do these facts establish that the Trustee did not use reasonable efforts to maximize the sale of the Property. *See In re Martin*, 91 F.3d 389, 394 (3d Cir. 1996).

SB further argues that, "[c]onsistent with the need for some objective measure of value," the Bankruptcy Court should not have approved the auction sale, because there is no appraisal on record against which to compare. Opp. Br., at 5, 10-11. SB points to both *Abbotts Dairies* and *Perona* for support. This argument, too, is factually and legally unsupported. I note that there is, in fact, an appraisal on record, ordered by the Bankruptcy Court in 2014. Compared to that appraisal, the auction price is 40% more. Even if the Court assumes that this appraisal is "stale" because market conditions have changed, neither *Abbotts Dairies* nor *Perona* supports SB's position. The *Perona* Court remanded that case for various reasons, only one of which was the absence of an appraisal. The primary ground was collusion, which tainted the auction and created "irregularity in[ ] the auction price." Dkt. 118. More importantly, although *Abbotts Dairies* advised that an asset in a bankruptcy proceeding is purchased for value when it is sold at 75% of its appraised value, the Third Circuit has neither mandated appraisals nor required an auction's price to be judged against an otherwise pegged asset value. Quite to the contrary, "[w]here no appraisal has been secured, a public auction conducted adequately has been found to establish that value was paid." *In re*

Lehigh Valley Professional Sports Club, Inc., 2002 WL 1349586, at *4 (Bankr. E.D. Pa. June 6, 2002) (holding that "an appraisal provided at the inception of the case was so off the mark as to be disregarded," but value was paid nonetheless) (citing *Abbotts Dairies*, 877 F.2d at 149)).

Finally, SB contends that the auction was not competitive, because it was conducted during the holidays. The Bankruptcy Court properly rejected this argument. Despite the timing, seventy-seven prospective buyers registered on the auctioneer's website after the auctioneer engaged in extensive marketing and advertising. Twenty-two people inspected the Property. Fifteen potential buyers delivered $150,000 to the auctioneer in order to bid on the Property. In the end, there were five bids from three bidders, despite the Trustee's strategic decision to start bidding at a high price. As the Bankruptcy Court correctly held, given these facts, the auction was competitive, which "strongly indicates that [Kitovsky] paid appropriate value for estate assets." *In re Pursuit*, 874 F.3d at 137.

Still, SB argues, a "material inaccuracy and omission[ ] in the auctioneer's marketing materials [ ] directly affected the marketability of the Property" at auction, depressing its price. Opp. Br., at 12. Because the Property operates on a small septic tank, which is insufficient to support industrial use or commercial development, the Debtor has sued to gain access to the public sewer system. After eight years of litigation, the case is on remand from the New Jersey Supreme Court, with no indication of how long it will last. *See* Dkt. 118; Opp. Br., Berger Certification, ¶ 15. The auctioneer's report did not include such information, stating only that "[t]he sewer capacity issue ... includes: the septic

system not currently working and may not be functioning, that if it does function or can be fixed – it can only service the needs of 30 people (limiting occupancy and use of the building), and that no other solution to expand capacity is readily apparent and/or practical." Opp. Br., Berger Certification, ¶ 15. The Court agrees with the Bankruptcy Court that the auctioneer's statement is neither inaccurate nor misleading. The auctioneer simply notified prospective buyers of the present condition of the Property—that it operates by septic, no more or less, which is a true description to this day. That description also accurately captures the "as-is condition" in which the Property was on the market. Far from better informing prospective buyers, relying on SB's mere "confidence" that it will eventually obtain access to public sewage would prematurely lend credence to the litigation that has lasted the better part of a decade. As the Bankruptcy Court pointedly noted, "it is detrimental to all creditors to have to wait until endless litigation is pursued." Dkt. 118.

In sum, there is sufficient evidence in the record to support the Bankruptcy Court's finding that Kitovsky paid value for the Property. The Bankruptcy Court also did not commit clear error by disregarding SB's proposed measures of value. SB's appeal is, therefore, moot under 11 U.S.C. § 363(m), and the Court **GRANTS** the Motion to Dismiss. Because the Court finds that SB's appeal is moot, the Court orders the Notice of *Lis Pendens* to be discharged.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY
Case No. 18-30155
Trenton, New Jersey
January 28, 2020 10:07 A.M.

IN RE:
388 ROUTE 22 READINGTON HOLDINGS, LLC,
Debtor.

TRANSCRIPT OF DECISION BEFORE THE HONORABLE KATHRYN C. FERGUSON UNITED STATES BANKRUPTCY COURT CHIEF JUDGE

A P P E A R A N C E S

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THE COURT: All right. Let's begin with Numbers 4 through 7, 388 Route 22.

MR. LUBETKIN: And Your Honor, before we begin, we would like this uploaded to the docket.

THE COURT: Okay. Would you like to enter your appearances?

MR. STEIN: Yes, Your Honor.

MS. KELLY: I'm calling Mr. Atkinson.

Let me try one more time, Judge.

THE COURT: Okay. All right. He can listen to it through PACER.

Let's begin with appearances please.

MR. STEIN: Yes, Your Honor. David Stein, Wilentz, Goldman & Spitzer, appearing for Iron Mountain Information Management, LLC, the Secured Creditor.

MR. HERZ: Michael Herz of Fox Rothschild appearing for the proposed buyer, Leon Katovsky.

MR. LUBETKIN: Good morning, Your Honor. Jay Lubetkin, Rabinowitz, Lubetkin & Tully, on behalf of SB Building Associates, Limited Partnership in its capacity as a Debtor-in-possession in proceedings before Judge Papalia.

MR. BERGER: Lawrence Berger, Berger & Bornstein, also for the equity holder.

THE COURT: Thank you. Please have a seat.

closed the record and stated that it did not want any further submissions. Despite that, Counsel for SB Building Associates filed additional papers and, naturally, the other parties felt obligated to reply. Let the record reflect that the Court did not consider any of the submissions made after the record was closed.

On January 21st, at the oral argument, it was on four interrelated Motions and the following constitutes the Court's ruling on those Motions.

The Chapter 7 Trustee has brought a Motion to approve the auction sale of estate property that was held in December. SB Building Associates has filed two Cross-Motions; one to transfer the case to Judge Papalia and another to reimpose the automatic stay. Finally, the Secured Creditor, Iron Mountain, has filed a Cross-Motion seeking to be paid in full.

SB Building Associates is the sole equity interest holder in the Debtor. It is also a Debtor along with two other entities in a consolidated Chapter 11 pending before Judge Papalia. The gist of SB's position in this Chapter 7 case is that the Court should deny approval of the sale presented by the Trustee because it will only result in about $100,000 going to SB Building and that will negatively impact the feasibility of the consolidated Chapter 11 cases before Judge Papalia.

The Court begins its analysis with the Cross-Motion can be granted by motion. The Court has the power under the equitable provisions of 105 of the Code to reimpose an automatic stay. You can see Wedgewood Realty Group, 878 F.2nd 693. However, reimposing the automatic stay is in the nature of injunctive relief and must be brought in an adversary proceeding, in accordance with Bankruptcy R. 7001(7).

The case law is remarkably consistent for the proposition that while the stay may be reimposed pursuant to the Court's equitable powers under 105(a), such relief may not be accorded on anything less than an adversary proceeding. And you can see for example In re: Gledhill, 76 F.3d 1070, the Wedgewood case itself at 878 F.2d 693, which holds, it's a Third Circuit case,

that a lapsed stay may be reimposed under the equitable provisions of 105 provided that the Debtor has properly applied for such injunctive relief under 7001.

You can also see In re: Ramirez, 188 B.R. 413, and also Mansaray-Ruffin, 530 F.3d 230, another Third Circuit case, that says where the rules require an adversary proceeding which entails a fundamentally different and heightened level of procedural protection to resolve a particular issue a Creditor has the due process right not to have that issue resolved without one.

Even if the Court were to overlook that particular procedural hurdle, the Court cannot find that on this record that SB has established grounds for an injunction. In order to obtain an injunction Courts in this Circuit consider, (1) whether the movant has made a strong showing that he is likely to succeed on the merits; (2) whether the movant will suffer irreparable injury if a stay is not granted; (3) whether a stay will substantially injure other parties; and, (4) whether the grant of a stay is in the public interest. And that's from Campbell Soup v Conagra, 977 F.2d 86.

SB approaches reimposition of the stay as if it is no different than the initial Stay Motion and argues that there is equity in the property above Iron Mountain's lien and that it can continue to make adequate protection payments that the Trustee had been making. That approach misses the vital point that there is no stay in place and there has not been a stay since 2018. At anytime Iron Mountain could have foreclosed on the property and eliminated the possibility of anyone other than Iron Mountain getting paid.

Instead, through the efforts of the Chapter 7 Trustee and the willingness of Iron Mountain to work with him and grant him several chances to sell the property that's the only reason we're here today. Now, SB wants the Court to reward the good faith that Iron Mountain has shown and reimpose the stay for an indefinite period of time based on the mere hope that a sale can be closed for 5 to $7 million. This Court certainly cannot see how that satisfied the public interest prong for an injunction.

SB has also failed to put forth any evidence of irreparable injury if the stay is not imposed. It might hurt his pocketbook, but economic loss does not constitute irreparable harm for the purposes of issuance of an injunction. That's from Acierno v New Castle County, 40 F.3d 645. Accordingly on this record, both procedurally and factually, the Court cannot grant the Motion to reimpose the stay.

That brings us to the Sale Motion. The Trustee's court-approved broker held an auction sale on December 17th and obtained a bid of $3.2 million. That's the sale of which he seeks approval today.

SB Building objects on two primary grounds; (1) that the auction was held during the holiday season so it did not garner sufficient interest; and, (2) that the stay should be reimposed and the Trustee directed to pursue the $5 million written offer for the property that was received. An additional issue was raised as to whether the auctioneer's description for the sewer capacity was accurate. All of those arguments boil down to whether the $3.2 million auction price represents fair value.

To approve a 363 sale the Court must find that there is sound business purposes to the sale. That's from In re: Lionel Corporation, 722 F.2d 1063. That is

simple in this instance because the sale will pay all uncontested secured claims, administration and unsecured creditors in full. It is also salvaging something from nothing in the sense that Iron Mountain already has stay relief and is still permitting the Trustee to conduct this sale to allow an opportunity to pay Creditors other than Iron Mountain.

Although there are many factors to be considered, the sound business purpose test has four basic requirements; (1) a sound business reason; (2) accurate and reasonable notice; (3) an adequate price, that is one that is fair and reasonable; and, (4) good faith. And that's from Titusville Country Club, 128 B.R. 396. The burden to prove these factors is on the sale proponent. That's from In re: Delaware & Hudson Railway Company, 124 B.R. 169.

The Third Circuit has also added a good faith element to the sale approval process; both the good faith of the purchaser, which is not in question here, and the good faith of the process. So part of the concept of good faith requires that the purchaser has obtained the assets for value. That's from Abbotts Dairies, 788 F.2d 147.

In support of its position that the auction price does not represent fair value, SB submits the certification of David Zimmel. Mr. Zimmel is the realtor whom the Debtor had used preconversion and who was later retained by the Trustee. Mr. Zimmel complains that given the sewer issues affecting the property and the due diligence any commercial buyer would
therefore, to market the property. He goes on to state that despite the limited marketing period he was given he generated a written offer for $5 million. Mr. Zimmel then states that it was a mistake for the Trustee not to pursue that offer and that he does not understand why

the Trustee did not pursue judicial action to obtain a stay extension to pursue the offer.

Those statements demonstrate a fundamental misunderstanding of what was within the Trustee's control. First, the 60-day time period was due to the limited amount of time that Iron Mountain granted the Trustee to pursue a sale. It cannot be overstated that Iron Mountain was under no obligation to grant the Trustee any time whatsoever. It had stay relief, it had all the chips, and it was highly improbable that this Court would have reimposed the stay over Iron Mountain's objection.

It certainly would not have reimposed the stay based upon the illusory $5 million offer. The offer that is being touted by SB as such strong evidence of value was not even signed by the proposed purchaser. Moreover, the proposal contains two substantial, perhaps insurmountable, contingencies. First, that the sewer issue be resolved and, second, that the expansion of a non-conforming use be obtained. Finally, Mr. Zimmel states that the auction was during a period when much of New Jersey's real estate community was away on vacation thereby depressing the sale price.

The time for SB to raise the timing argument is long-past. The Trustee's Notice of Proposed Public Sale setting forth the December sale date was filed on November 19th. SB did not object to it by the deadline stated in the notice. At oral argument SB's attorney justified the failure to object to a sale in December by saying that it had no real reason to object until it saw how the auction came out. If a high enough price was obtained, the argument went, then they would have been content with the December sale.

That position is simply untenable. It makes the objection period provided for the Notice of Public Sale

meaningless and renders the whole sale process unworkable. More importantly, the assertion that a December sale would not garner enough interest is belied by the fact, certified to by the Trustee, that the auction generated significant interest. Seventy-seven prospective buyers registered on the auctioneer's website. Of those, 22 inspected the property and 15 deposited $150,000 in certified funds to become registered and qualified to bid.

At oral argument Mr. Berger tried to downplay the auction stating that there were only two bidders and four bids. The Trustee later corrected him stating that the auctioneer's report shows three bidders and five bids. The Court finds that the focus on the number of active bidders is too narrow. The number of people who actually bid at the auction was the function of the Trustee's strategy to set the opening bid high. Rather, the number that truly reflects interest in the auction was the 15 prospective buyers that deposited $150,000 in certified funds and became registered and qualified to bid.

At oral argument, much ado was made over the fact that the Trustee has not prevented an appraisal to support the auction price for fair value. SB cited Matter of Perona Brothers, Inc., 186 B.R. 833, for the proposition that an auction was insufficient to establish fair value. The Court has considered Perona Brothers and finds that the Objector's position is far too broad a reading of Perona.

In that case, the Court found that an auction alone did not adequately establish value. But that finding was based on the particular circumstances of that case including that the property was sold for far less than the lien; there was no attempt to sell the property with the lien attached; and, there were only

two bidders; and, the successful bidder was the president of the Debtor, but no attempt was made to determine if he intimidated or tried to take unfair advantage.

In this case there is no suggestion that was any collusion, fraud or anything else that would call into question the good faith of the process, the Trustee or the proposed purchaser. The lack of any irregularity in the auction process coupled with 15 qualified bidders is strong evidence that the $3.2 million sale price is fair value. As Judge Kaplan noted in In re: Kara Homes, 2012 W.L. 6150377, while the public auction will not always conclusively establish value, when there is no evidence of fraud or collusion and there is competitive bidding that is an excellent barometer of value.

Likewise the Third Circuit in Abbotts Dairies stated that, and I'm gonna quote here, "Generally speaking, an auction may be sufficient to establish that one has paid value for the assets of a bankrupt." And that's from Abbotts Dairies at 149. While Abbots mentioned that a sale for 75 percent of appraised value was also an indicator of value it certainly did not mandate that there always must be an appraisal.

Here, given the adequate noticing for the sale, the high number of qualified bidders and the activity at the sale, the Court thinks that the auction was the best litmus test of the value of this property in its as is condition with septic service.

Additionally, the Court does not find that the auctioneer's statement about the sewer was inaccurate and drove down the price. It was noted that the service is by septic. That was a true statement at the time of the auction and remains true today. The sale was as is so there is no need, nor would it have been appropriate,

for the auctioneer to delve into the detail of the eight years of sewer litigation.

SB submitted the Certification of Lawrence Berger. in November of 2018 the Debtor had received two offers in the neighborhood of $7 million, both contingent on the successful resolution of the sewer capacity issue. Mr. Berger notes that he has had initial success on the sewer issue in the State Court at the trial level and at the Supreme Court. What Mr. Berger notably does not say in his certification is that as of today or anytime in the immediate future it is certain that the Debtor will prevail in its sewer litigation.

Without that certainty the only option the Trustee has is to sell the property as is. It is detrimental to all Creditors to have to wait until endless litigation is pursued. This is the Debtor's second Chapter 11 case. Iron Mountain obtained its Foreclosure Judgment in 2011. Nothing in the Code entitles the Debtor to endless time to pursue litigation or to chase after pipe dreams.

SB believes that the stay needs to be reinstated because if the Debtor prevails on its appeal to the District Court of Judge Kaplan's Conversion Order then the Trustee has no right to sell the property. There's no stay pending appeal. Again, the Court must deal with the facts as they are presently not as the Debtor hopes they might be. As I mentioned, the Debtor has not obtained a stay pending appeal from the District Court so the Trustee has full authority to sell this property.

This Court does not need to transfer the case to Judge Papalia so that he can consider whether the auction result represents fair value. The request to transfer the case appears to be nothing more than a delay tactic. Despite presiding over consolidated cases

with some common ownership Judge Papalia has no additional information regarding this sale other than what's been presented to this Court. Based on what's been presented to this Court the Court finds that a properly advertised and actively participated in auction produces the best possible measure of fair value. In fact, far better than the competing appraisals that SB argues are necessary.

The Court finds that the record amply supports approval of the sale. The proposed sale satisfies the business judgment test and is in good faith. The Trustee's Motion to Approve the Auction Results is granted. I'll enter the Order submitted by the Trustee. SB's Cross-Motion to transfer the case to Judge Papalia is denied with the standard Order. SB's Cross-Motion to reinstate the stay is denied with the standard Order.

Iron Mountain's Cross-Motion to order full payment is adjourned to allow Iron Mountain time to address what was raised in the most recent papers by SB. In the meantime, Iron Mountain can be paid but the additional attorney's fees claimed to be held in escrow by the Trustee. Thank you, Counsel.

Mr. Stein, how much time do you need to address the

MR. STEIN: Would three weeks be okay?

THE COURT: Sure. Do you need three weeks to file papers or three weeks -¬

MR. STEIN: Three weeks to file papers.

THE COURT: Okay. So today is the 28th. That brings you to the 18th. I'll let the Trustee respond by the 25th and adjourn the hearing to February 3rd (sic) at 10:00 and that's to address the attorney fee issue only.

Okay. Thank you.

MR. LUBETKIN: Your Honor, we have a number of requests. In the first instance, as was done in the Abbotts Dairies case, we would request that the Court enjoin the sale to give us an opportunity to submit a Motion which we'd like to submit in writing for a stay pending appeal.

THE COURT: I'm not going to do that. You can submit your Motion for Stay Pending Appeal in writing.

MR. LUBETKIN: Okay. Secondly then, Your Honor, I'd like to address a request for a stay pending appeal on the record right now.

THE COURT: You can make that in writing. Thank you, Counsel.

MR. STEIN: Your Honor, I had one issue. Your Honor said the briefing schedule is the 18th, February 18th, February 25, and you said February 3rd. Did you mean to say March 3rd?

THE COURT: I did, sorry.

MR. STEIN: Okay. Just wanted to make sure.

THE COURT: Yes, thank you.

MR. STEIN: I got it. Thank you.

THE COURT: Yes.

MR. LUBETKIN: Thank you, Judge.

MR. HERZ: Thank you.

THE COURT: Thank you. (Adjourned 10:27 a.m.)

CERTIFICATION: I, ISABEL E. COLE, court approved transcriber, certify that the foregoing is a correct transcript from the official digital audio recording of the proceedings in the above-entitled matter.

/s/Isabel E. Cole

Dated: March 20, 20
Isabel E. Cole
COLE TRANSCRIPTION, L.L.C.

Date Filed: 11/16/2021
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2629

In re: 388 ROUTE 22 READINGTON HOLDINGS, LLC,Debtor

SB BUILDING ASSOCIATES Limited Partnership, Appellant

(District Court Civil No.: 3-20-cv-01252)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY and PHIPPS, Circuit Judges,

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied

BY THE COURT,
s/ THOMAS L. AMBRO
Circuit Judge