No. 21-

IN THE

Supreme Court of the United States

KK-PB FINANCIAL, LLC,

Petitioner,

v.

160 ROYAL PALM, LLC,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves a Petitioner who timely and expeditiously sought Article III court review of two bankruptcy court decisions, but never received a review on the merits. Instead, the District Court waited until the plan was confirmed, and then dismissed both appeals as moot because the plan had been confirmed. The Eleventh Circuit upheld the dismissals.

The case concerns constitutional mootness, and its interaction with "the curious doctrine of 'equitable mootness,' which [it has been argued] permit[s] [Article III Courts] to refuse to entertain the merits of live bankruptcy appeals over which they indisputably possess statutory jurisdiction and in which they can plainly provide relief." *In re Cont'l Airlines*, 91 F.3d 553, 567 (3d Cir. 1996) (en banc) (Alito, J., dissenting), *cert. denied*, 519 U.S. 1057 (1997). This judge-made doctrine has been criticized by courts and commentators, but this Court has never reviewed its legitimacy. Equitable mootness lacks a statutory basis, lacks any support in Supreme Court jurisprudence, is unconstitutional and allows federal judges to abdicate their responsibilities to adjudicate live controversies on the merits.

The questions presented are:

1. Does the dismissal of an appeal of a bankruptcy court confirmation order based on "equitable mootness" render an appeal from the same case "constitutionally moot," even though a possibility of relief for the appellant still exists?

2. Should the judge-made doctrine of "equitable mootness" in the context of bankruptcy appeals – which has been used to dismiss appeals despite the presence of federal jurisdiction and the existence of live disputes – be rejected or at least subject to a requirement to conduct a preliminary review of the merits of the appeal?

CORPORATE DISCLOSURE STATEMENT

Petitioner certifies that it has no parent company, that no publicly held company owns 10% or more of its stock, and that no publicly traded company or corporation has an interest in the outcome of this appeal.

Upon information and belief, Respondent has no parent company, no publicly held company owns 10% or more of its stock, and no publicly traded company or corporation has an interest in the outcome of this appeal.

STATEMENT OF RELATED PROCEEDINGS

KK-PB Financial, LLC v. 160 Royal Palm, LLC, No. 19-10962 (11th Cir. 2019), voluntarily dismissed April 1, 2019.

KK-PB Financial, LLC v. 160 Royal Palm, LLC, No. 19-11402 (11th Cir. 2019), rehearing denied on January 29, 2020.

KK-PB Financial, LLC v. 160 Royal Palm, LLC, No. 19-14527 (11th Cir. 2019), dismissed for lack of jurisdiction on February 6, 2020.

KK-PB Financial, LLC v. 160 Royal Palm, LLC, No. 19-90020 (11th Cir. 2019), petition denied on February 6, 2020.

KK-PB Financial, LLC v. 160 Royal Palm, LLC, No. 20-12361, 20-12368 (11th Cir.), opinion issued November 30, 2021; rehearing denied January 25, 2022.

KK-PB Financial, LLC v. 160 Royal Palm, LLC, No. 19-CV-80342-ROSENBERG (S.D. Fla. 2019), dismissed June 3, 2020.

KK-PB Financial, LLC v. 160 Royal Palm, LLC, No. 19-CV-80343-ROSENBERG (S.D. Fla. 2019), final judgment not yet entered.

KK-PB Financial, LLC v. 160 Royal Palm, LLC, No. 19-CV-80351-ROSENBERG (S.D. Fla. 2019), final judgment entered April 10, 2019.

KK-PB Financial, LLC v. 160 Royal Palm, LLC, No. 19-CV-80363-ROSENBERG (S.D. Fla. 2019), final judgment not yet entered.

KK-PB Financial, LLC v. 160 Royal Palm, LLC, No. 19-CV-81270-ROSENBERG (S.D. Fla. 2019), dismissed on October 31, 2019.

KK-PB Financial, LLC v. 160 Royal Palm, LLC, No. 19-CV-81483-MIDDLEBROOKS (S.D. Fla. 2019), dismissed on November 7, 2019.

KK-PB Financial, LLC v. 160 Royal Palm, LLC, No. 20-CV-80216-ROSENBERG (S.D. Fla. 2020), dismissed June 3, 2020.

KK-PB Financial, LLC v. 160 Royal Palm, LLC, No. 20-CV-80238-ROSENBERG (S.D. Fla. 2020), dismissed on March 5, 2020.

KK-PB Financial, LLC v. 160 Royal Palm, LLC, No. 20-CV-80239-ROSENBERG (S.D. Fla. 2020), final judgment not yet entered.

160 Royal Palm, LLC, v. Glenn Straub and Palm Beach Polo, Inc., No. 21-CV-81217-CANNON (S.D. Fla. 2021), final judgment not yet entered.

160 Royal Palm, LLC, v. Glenn Straub and Palm Beach Polo, Inc., No. 21-CV-81218-CANNON (S.D. Fla. 2021), final judgment not yet entered.

KK-PB Financial, LLC v. Scott N. Brown, No. 21-CV-81269-MIDDLEBROOKS (S.D. Fla. 2021), dismissed on October 14, 2021.

Glenn F. Straub and Palm Beach Polo, Inc. v. 160 Royal Palm, LLC, No. 21-CV-81546-MIDDLEBROOKS (S.D. Fla. 2021), final judgment not yet entered.

In re 160 Royal Palm, LLC, No. 18-19441-EPK (Bankr. S.D. Fla.), final decree not yet entered.

160 Royal Palm, LLC v. Glenn Straub and Palm Beach Polo, Inc., No 19-01873-EPK (Bankr. S.D. Fla. 2019), final judgment not yet entered.

Scott N. Brown v. KK-PB Financial, LLC, No. 20-01233-EPK (Bankr. S.D. Fla. 2020), final judgment not yet entered.

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Timothy K. Lewis & Ronald Mann, *Courts Should Review Bankruptcy Equitable Mootness Doctrine*, Legal Intelligencer (June 8, 2016) 27

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, filed November 30, 2021, is not reported, and can be found in Petitioner's appendix at App. A. The order of the United States District Court for the Southern District of Florida, filed June 3, 2020, is not reported, and can be found in Petitioner's appendix at App. B. The orders of the United States Bankruptcy Court for the Southern District of Florida, filed February 11, 2020 and February 26, 2019, are not reported and can be found in Petitioner's appendix at App. C and App. D, respectively. The denial of rehearing of the United States Court of Appeals for the Eleventh Circuit, filed January 25, 2022, can be found in Petitioner's appendix at App. E.

JURISDICTION

The judgment of the court of appeals was entered November 30, 2021, and the court of appeals denied Petitioner's petition for rehearing on January 25, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY AUTHORITIES INVOLVED

Pertinent portions of the Constitution, and Title 11 and Title 28 of the United States Code are reprinted in the appendix to this petition. *See* App. E. The constitutional and statutory provisions involved in this case include:

U.S. Const. art. III

11 U.S.C. § 363

11 U.S.C. § 364

11 U.S.C. § 502

11 U.S.C. § 506

11 U.S.C. § 1123

11 U.S.C. § 1141

28 U.S.C. § 157

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28 U.S.C. § 1291

28 U.S.C. § 1334

STATEMENT OF THE CASE

A. Legal Background

This case concerns two bankruptcy court appeals that were pending for years, but were never heard on the merits, because the District Court and Eleventh Circuit refused to exercise their duty to adjudicate the legal rights of parties who have "a concrete interest, however

small, in the outcome of the litigation." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Knox v. SEIU, Loc. 1000*, 567 U.S. 298, 307-08 (2012)). Here, despite "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *Colo. River Water Conser. Dist. v. United States*, 424 U.S. 800, 817 (1976) (citations omitted), the courts below dismissed a live controversy as moot without ever considering the merits.

The courts below used two – but separate – grounds to dismiss Petitioner's appeals; constitutional mootness and equitable mootness. This Court has repeatedly (and recently in bankruptcy cases like this) held that constitutional mootness demands the highest of legal standards to be met, that is, that the relief requested by the petitioner is "impossible." *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S.Ct. 1652, 1660 (2019) ("*Tempnology*").

In this case, the District Court and Eleventh Circuit ignored the fact – as recognized by this court in *Tempnology* – that the Petitioner whose claim was disallowed by the Bankruptcy Court could still, upon a reversal after a merits review, receive a recovery under a confirmed chapter 11 plan. Here, as in *Tempnology*, Petitioner relief is not only "possible" but the Respondent continues to pursue asset recoveries and make distributions to creditors which Petitioner is barred from participating in based on the rulings below.

In addition, the courts below relied on the oft-criticized doctrine of "equitable mootness," which "negates appellate review of the confirmation order or the underlying plan, regardless of the problems therein or the merits of the

appellant's challenge." *Ochadleus v. City of Detroit (In re City of Detroit)*, 838 F.3d 792, 798 (6th Cir. 2016). Equitable mootness has no basis in this Court's jurisprudence, existing instead as a "legally ungrounded and practically unadministrable 'judge-made abstention doctrine.'" *In re One2One Commc'ns, LLC*, 805 F.3d 428, 438-439 (3d Cir. 2015) (Krause, J., concurring) (citation omitted).

Petitioner, KK-PB Financial, LLC ("KK-PB") repeatedly explained to the courts below how a ruling in its favor would provide KK-PB concrete relief and vindicate important legal rights at stake. Nevertheless, finding that KK-PB's proposed relief would not "be easy to implement," the Eleventh Circuit affirmed dismissal of the appeal of the Bankruptcy Court's Confirmation Order based on equitable mootness, while holding a second appeal was *constitutionally* moot despite the possibility of relief KK-PB identified. App. 4a. The Eleventh Circuit's decision crystalizes the problems inherent with the equitable mootness doctrine. Not only is the existence of equitable mootness an unsupportable abdication of federal courts' responsibility to decide cases, it also encourages and enables dramatic expansions and misapplications of the narrow and demanding standard for constitutional mootness, which this Court has limited to the rare case in which relief is "impossible." *See Tempnology,* 139 S. Ct. at 1660. The Court should grant certiorari to clarify the limits federal courts can impose on their own jurisdiction.

B. Factual and Procedural Background

160 Royal Palm LLC (the "Debtor") is a special purpose vehicle whose purpose was to own a single parcel of real property—the unfinished, non-operational Palm

House Hotel (the "Hotel"). App. 53a. Petitioner KK-PB is owned and controlled by its sole manager, developer Glenn Straub (who is a former 100% owner of the Debtor). App. 54a, 61a. In 2013, Mr. Straub sold his equity interest in the Debtor to Palm House, LLC (the current equity owner of the Debtor) for $36 million. App. 61a-62a. In the transaction, KK-PB's principal received approximately $6.2 million in cash and KK-PB as lender in the form of "seller financing" received a promissory note for $27.468 million issued by the Debtor (the "Note"), and secured by a recorded mortgage (the "Mortgage"). (A0230-0266).[1]

In the bankruptcy case, the Debtor sought to sell substantially all of its assets, including the Hotel, in a public auction. App. 55a. Based on the Note and Mortgage it held in an amount in excess of $27 million at that time, KK-PB was the Debtor's largest secured creditor. Because the Debtor disputed KK-PB's mortgage claim (the "Mortgage Claim"), KK-PB filed a proof of claim, to which the Debtor filed a formal claim objection (the "Mortgage Claim Objection"). (A0283-0286; A0287-0289). The Debtor continued to operate as a debtor-in-possession but, unable to effectively reorganize, the Debtor decided to liquidate the Hotel and make a distribution to its creditors. App. 54a-55a. In October 2018, the Bankruptcy Court scheduled a public auction of the Hotel. (A0270-0282). The Debtor then moved to limit KK-PB's ability to use its Mortgage Claim to credit bid for the Hotel. App. 52a. In response, KK-PB moved under sections 363(k) and 502(c) of the Bankruptcy Code, asking the Bankruptcy Court to estimate its secured claim to permit it to credit bid at the auction. App. 52a.

1. Citations taking the form "A ___" refer to entries in the Appendix filed in the Court of Appeals for Case No. 20-12361.

1. The "Estimation Order"

The Bankruptcy Court held an evidentiary hearing to determine KK-PB's ability to credit bid and the value of KK-PB's claim for that limited purpose. On February 26, 2019, the Bankruptcy Court issued an Estimation Order which prevented KK-PB from credit bidding its Mortgage Claim. App. D. But the Bankruptcy Court did not stop there. Although the Debtor's motion did not seek a ruling on its Mortgage Claim Objection and did not seek to avoid the Note or Mortgage, the Bankruptcy Court's Estimation Order nonetheless decided those issues *sua sponte*, ruling that KK-PB's Mortgage Claim was "estimated as an unsecured claim in the amount of $0.00 for all purposes in this Chapter 11 case." App. 89a. The Estimation Order thus effectively disallowed KK-PB's Mortgage Claim and stripped KK-PB of its Mortgage Claim (including the Note and Mortgage). The Bankruptcy Court made this ruling even though it found that neither KK-PB nor its principal were involved in any intentional "fraudulent scheme" regarding the sale of the Hotel—indeed, it found that KK-PB's principal expected the Hotel to be successful and the Note repaid. App. 70a, 71a. Nevertheless, the Bankruptcy Court ruled that the Note and the Mortgage were likely to be found to be constructively fraudulent transfers under Florida law. App. 86a.

Seeking substantive review of the Bankruptcy Court's decision, KK-PB appealed the Estimation Order to the District Court in March 2019. App. 39a. Briefing in the Estimation Order appeal was substantially complete by July 2019. But the District Court did not act on the appeal.

KK-PB sought a stay of the Estimation Order in the Bankruptcy Court, the District Court, and the Eleventh

Circuit, but all three requests were denied. App. 2a. After the Debtor filed its first liquidating plan with the Bankruptcy Court in the summer of 2019, KK-PB sought a stay of the Estimation Order pending appeal from both the Bankruptcy Court and the District Court. App. 9a n.2. In November 2019, the District Court *sua sponte* certified KK-PB's appeal to the Eleventh Circuit, after which KK-PB sought a stay pending appeal from the Eleventh Circuit. App. 39a-40a. The Eleventh Circuit denied the petition for direct certification and KK-PB's motion for a stay pending appeal on February 6, 2020. App. 39a-40a. KK-PB then renewed its previous request for a stay pending appeal with the District Court, which the District Court denied on February 11, 2020. (A1118).

2. The "Confirmation Order"

In March 2019, at the Debtor's request, the Bankruptcy Court canceled the public auction of the Hotel and approved a private sale to LR U.S. Hotels Holdings, LLC for $39.6 million plus assumed liabilities. (A0368-0391).

After the Bankruptcy Court declined to confirm the Debtor's first liquidating plan (based on KK-PB's objections), and the Debtor withdrew its second plan (based on KK-PB's objections), the Debtor filed its Third Amended Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code (the "Plan") on December 26, 2019. (A0756-0847). On February 11, 2020, over KK-PB's objections, the Bankruptcy Court issued the Confirmation Order and confirmed the Debtor's Plan. App. C.

Again, as with the Estimation Order, KK-PB acted quickly in an attempt to protect its rights and sought substantive review of the Confirmation Order. On February

12, 2020, one day after the Bankruptcy Court entered the Confirmation Order, KK-PB filed an emergency motion to stay the Confirmation Order pending appeal, which the Bankruptcy Court denied on February 13, 2020. (A1206-1288). On February 13, 2020, KK-PB appealed the Confirmation Order to the District Court. Meanwhile, also on February 13, 2020, the Debtor announced that the Plan had become effective. (A1289-1296).

On February 14, 2020, KK-PB filed an expedited motion in the District Court for a stay of the Confirmation Order pending appeal. (A1297-1433). The District Court initially granted KK-PB a 10-day stay, through February 24, 2020 (A1434), but prematurely vacated that stay on February 19, 2020 (A1435). The next day, on February 20, 2020, the Debtor released nearly $32 million in distributions under the Plan. (A1436-1440).

On February 11, 2020, the Bankruptcy Court also approved approximately $17 million in fees for various of the Debtor's professionals on a final basis, including a contingency fee of approximately $15.5 million to the Debtor's counsel, Shraiberg, Landau & Page, P.A. (the "SLP Contingency Fee"), for obtaining the Estimation Order that effectively disallowed KK-PB's Mortgage Claim. (A1150-58). KK-PB appealed the order awarding the SLP Contingency Fee on the basis that the Debtor's counsel was not entitled to a fee for obtaining the Estimation Order while KK-PB's appeals were still pending. KK-PB's appeal of the contingency fee award ("Contingency Fee Appeal") is currently stayed by the District Court.

3. The Lower Courts' Decisions

Following distribution of the Plan proceeds, the Debtor moved to dismiss KK-PB's appeal of the Confirmation Order as equitably moot, arguing that the Debtor had substantially consummated the Plan. (A1441-1543). On March 5, 2020, the Debtor also moved to dismiss KK-PB's appeal of the Estimation Order as constitutionally moot. (A1544-1652).

Despite never having ruled on the merits of KK-PB's appeals, on June 3, 2020, the District Court quickly ruled on the Debtor's motions to dismiss without a hearing or oral argument. The District Court ruled that the Confirmation Order appeal was equitably moot because the Plan had been substantially consummated. App. B. In a single sentence regarding the Estimation Order, "[b]ecause the Court dismisses the Appellant's appeal of the confirmation order," the District Court ruled that the Estimation Order was thus constitutionally moot. App. 12a.

Without considering the merits of either appeal, in its November 30, 2021 opinion, the Eleventh Circuit affirmed dismissal of both appeals on the grounds of equitable and constitutional mootness. App. 3a-4a.

With respect to constitutional mootness, the Eleventh Circuit was as perfunctory as the District Court: "Given that the appeal of the confirmation order is equitably moot, KK-PB's appeal of the valuation [estimation] order is constitutionally moot." App. 4a. Thus, even though KK-PB's Estimation Order appeal had been pending for eleven months before the plan was confirmed, the

District Court and the Eleventh Circuit declared a live controversy "constitutionally moot," despite the clear avenues for possible monetary relief KK-PB identified and in disregard of KK-PB's significant non-monetary legal rights at stake in each appeal (both discussed further below). App. 4a. In affirming the District Court's refusal to exercise its federal jurisdiction, the Eleventh Circuit asserted that "KK-PB does not satisfactorily explain why its requested relief (which potentially runs in the millions of dollars) would not create problems for others." App. 4a. In other words, although it recognized that KK-PB's requested relief had potential value worth millions of dollars, the Eleventh Circuit held this case was "moot" simply because the relief requested might be difficult to obtain—not because the case was incapable of judicial resolution, and not because KK-PB's requested relief and recovery on its claim were impossible to obtain. *See id.*

Such rulings—avoiding entirely the merits of KK-PB's appeals—conflict with Supreme Court precedent on an important question of federal law, present an important federal question that the Supreme Court has not yet decided, and evidence a Circuit split.

REASONS FOR GRANTING THE PETITION

Supreme Court authority is plain that a case may be dismissed as moot "only if 'it is impossible for a court to grant any effectual relief whatever'" assuming the appellant prevails. *Tempnology,* 139 S. Ct. at 1660 (quoting *Chafin*, 568 U.S. at 172). Where, as here, an appellant retains such a "concrete interest, however small" in the resolution of an appeal, the appeal is not constitutionally moot. *Chafin*, 568 U.S. at 172 (quoting

Knox, 567 U.S. at 307-08). Although it cited *Tempnology*, the Eleventh Circuit effectively ignored *Tempnology*'s primary holding and abandoned the principle of *Chafin*, and concluded that KK-PB's appeal of the Estimation Order was constitutionally moot based solely on its finding that KK-PB's appeal of a later, and separate, order (the Confirmation Order) was equitably moot.

Further, the judge-made doctrine of "equitable" mootness has no statutory basis, has never been approved by the Supreme Court, conflicts with Supreme Court precedent commanding federal courts to unflaggingly exercise the jurisdiction bestowed upon them, and violates the separation of powers required by the Constitution.

Moreover, "equitable" mootness is anything but equitable. Its application has little to do with actual mootness, and instead (as happened here) invites courts to circumvent the merits of a live controversy and avoid difficult or messy questions of bankruptcy law that a court would prefer not to decide. Worse yet, courts can also indirectly use equitable mootness to dismiss appeals that are *not* equitably moot. Just such a perversion of constitutional mootness occurred here—although KK-PB still had significant legal rights at stake in the Estimation Appeal, it had no chance to vindicate those rights because the District Court held that equitable mootness of the Confirmation Order *per se* rendered relief for the appeal of the Estimation Order impossible. In fact, relief for KK-PB was not "impossible"—but the arbitrary judge-made standards of equitable mootness led the courts below to craft a legal fiction holding that it was and, at the same time, to conflated constitutional mootness with equitable mootness.

Equitable mootness already stifles the development of bankruptcy law by preventing appellate review of virtually all significant or complex bankruptcy court decisions to confirm a plan, and this case merits this Court's review on that basis alone. But this Court's review is even more essential to constrain the expansion of equitable mootness seen here, where the lower courts invoked the doctrine not only to dismiss a confirmation appeal, but also to label as constitutionally moot the appeal of a bankruptcy court decision *pre-dating* confirmation of the plan. If confirmation of a plan can extinguish *all* appeals in a bankruptcy case, parties have no recourse against the unbridled discretion of bankruptcy judges, since district courts and appellate courts can simply delay ruling on appeals of bankruptcy orders until confirmation of the plan, and proceed to find all such pending appeals "moot." Only the exercise of this Court's supervisory power can correct this abdication of federal courts' Article III jurisdiction, and the injustice it engenders. This Court's review will also settle the numerous circuit splits regarding the doctrine, which currently has no unified criteria for application and divergent standards of review.

A. The Eleventh Circuit Ignored Supreme Court Precedent Regarding Constitutional Mootness.

In *Tempnology*, the Supreme Court acknowledged as "settled law" that a court may dismiss a case for being moot "only if 'it is *impossible* for a court to grant any effectual relief whatever'" assuming the appellant prevails. 139 S. Ct. at 1660 (quoting *Chafin*, 568 U.S. at 172) (emphasis added). In *Chafin*, the Supreme Court made equally clear that where an appellant retains a "concrete interest, however small" in the resolution of an appeal,

the appeal is not constitutionally moot. 568 U.S. at 166 (quoting *Knox*, 567 U.S. at 307).

Yet, while providing only a single facial acknowledgement of the *Tempnology* decision, and no acknowledgement whatsoever of *Chafin*, the Eleventh Circuit dismissed KK-PB's appeal of the Estimation Order. The Eleventh Circuit's November 30, 2021 opinion conflicts with these Supreme Court decisions.

The Eleventh Circuit held: "Given that the appeal of the confirmation order is equitably moot, KK-PB's appeal of the valuation order is constitutionally moot." App. A at 4. But here, it is not *impossible* for KK-PB to obtain any effectual relief as a general unsecured creditor of the Debtor based on its promissory note.

As KK-PB explained to the Eleventh Circuit, however, clear avenues for possible monetary relief exist, and KK-PB's significant non-monetary legal rights are at stake in each appeal. *See* CA11 Initial Brief 23-27; Reply Brief 15-21. A live controversy still plainly exists.

The Eleventh Circuit asserted that "KK-PB does not satisfactorily explain why its requested relief (which potentially runs in the millions of dollars) would not create problems for others." App. A at 4. In other words, the Eleventh Circuit held this case was "moot" simply because it thought the relief requested (a monetary recovery on its claim) might be difficult to obtain, not because the case was incapable of judicial resolution and not because the relief was impossible to obtain. *See id.*

KK-PB explained that it can still recover from (i) the $15.5 million contingency fee awarded to the Debtor's counsel, Shraiberg, Landau & Page, P.A., for disallowing KK-PB's claim (which is the subject of a pending appeal before the District Court, *see* Case No. 9:20-cv-80239 (S.D. Fla.)); and (ii) future distributions to be made by the Debtor in connection with the Plan, which has ongoing adversary proceedings for recovery of funds for future distributions to creditors under the Plan ("Pending Estate Actions").[2] As the Supreme Court stated in *Tempnology*, "[s]uch claims, if at all plausible, ensure a live controversy." 139 S. Ct. at 1660. "Ultimate recovery . . . may be uncertain or even unlikely for any number of reasons, in this case as in others. But that is of no moment. If there is any chance of money changing hands, [the] suit remains live." *Id.*

The Eleventh Circuit held that these avenues of relief would require modification of the Plan, which is "binding on all parties." App. 4a. The Eleventh Circuit was incorrect, as the requested relief would not require Plan modification.

Debtor's counsel's rights to the $15.5 million contingency fee have not been fully resolved because KK-PB's Contingency Fee Appeal is still pending in the District Court below. In concluding that there could be no recovery for KK-PB without modifying the Plan, the Eleventh Circuit overlooked the pending Contingency Fee

2. Currently the following adversary proceedings against third parties are still pending: *160 Royal Palm, LLC v. South Atlantic Regional Center, LLC et al.*, Adv. Proc. 19-01740-EPK (Bankr. S.D. Fla. Nov. 21, 2019); and *Glickstein, Liquidating Trustee v. Wright*, Adv. Proc. 21-01186-EPK (Bankr. S.D. Fla. Jun. 22, 2021).

Appeal. If KK-PB prevails in that appeal, approximately $15.5 million in funds could be returned to the estate for the benefit of creditors, including, potentially, KK-PB. The availability of these funds as well as recoveries from the Pending Estate Actions for further distribution to creditors in the bankruptcy case does not require any modification of the Plan.

KK-PB can obtain "effectual relief" if the Estimation Order is remanded for consideration on the merits. In that case, KK-PB could prevail on the merits of the Estimation Order appeal and become, at a minimum, an unsecured Class 3 creditor with an unsecured deficiency claim in the amount of its promissory note (an amount the Bankruptcy Court had previously estimated at zero in the Estimation Order). And KK-PB could also prevail in the Contingency Fee Appeal, potentially returning $15.5 million to the Debtor's estate, in addition to potential future recoveries from Pending Estate Actions the Debtors are continuing to pursue. KK-PB would then be able to recover on its unsecured claim against future distributions still to be made to creditors under the Plan.

Moreover, "compliance with a judicial decision does not moot a case if it remains possible to undo the effects of compliance, as through compensation." *See Tempnology*, 139 S. Ct. at 1661 (internal quotation marks, brackets, and citation omitted). Changing the Plan—or compensating KK-PB as an unsecured creditor without changing the Plan—is certainly not *impossible*. Indeed, the impossibility factor required in order to find constitutional mootness is not automatically created just because all of an estate's assets have been distributed (which, as explained above, is *not* the case here). As the Supreme Court noted

in *Tempnology*, "courts often adjudicate disputes whose 'practical impact' is unsure at best, as when 'a defendant is insolvent.'" *Id.* (quoting *Chafin*, 568 U.S. at 175).

The Eleventh Circuit defies this Court's *Tempnology* holding that a case is not constitutionally moot where a creditor "can seek the unwinding of prior distributions to get its fair share of the estate" if it prevails, since even if such recovery may not make the creditor "rich, or even better off, [the case] remains a live controversy." *Id.* If "there is any chance of money changing hands," KK-PB's suit remains live. *Id.*

In sum, KK-PB's recovery on its unsecured deficiency Class 3 claim in connection with its Note would give KK-PB a chance to collect some monetary recovery on its Mortgage Claim by sharing in future distributions. And, where KK-PB retains such a "concrete interest, however small" in the resolution of the Estimation Order appeal, the appeal is not constitutionally moot. *Chafin*, 568 U.S. at 166 (quoting *Knox*, 567 U.S. at 307).

Even if monetary recovery were impossible, the lower courts' refusal to consider KK-PB's Estimation Order appeal was not harmless. After the Bankruptcy Court entered the Estimation Order, the Debtor initiated adversary proceedings against KK-PB, KK-PB's principal, and a KK-PB affiliate seeking to claw back funds related to the sale. *See 160 Royal Palm, LLC v. Glenn Straub, et al.* (*In re 160 Royal Palm, LLC*), Case No. 18-19441-EPK, Adv. No. 19-01873-EPK (Bk. S.D. Fla. 2019). The Bankruptcy Court applied issue preclusion in those adversary proceedings based on findings in the Estimation Order—findings KK-PB was never permitted

to challenge because the District Court waited for confirmation of the plan to moot KK-PB's Estimation Order appeal. The preclusive findings of the Estimation Order could negatively affect KK-PB (or KK-PB's owner, Glenn Straub), even though KK-PB has never been able to challenge those findings on a merits appeal.[3]

Where the outcome of an appeal would impact pending proceedings—as is the case here—courts have found a live "case or controversy" sufficient for Article III jurisdiction. *See In re Combined Metals Reduction Co.*, 557 F.2d 179, 194-95 (9th Cir. 1977) (holding that, among other things, an appeal of a confirmation order was not moot because, if the court "were to conclude that . . . the plan was erroneously confirmed by the district judge, then a decision to that effect could have some effect on the proceedings below," despite the fact that "much of the debtor's property has been liquidated, and many of the creditors have been paid"). The Eleventh Circuit's holding that relief on the Estimation Order appeal was "impossible" once it concluded the Confirmation Order appeal was equitably moot demonstrates that the doctrine of equitable mootness thwarts review not only of confirmation orders, but unrelated bankruptcy court orders as well. Only the exercise of the Court's supervisory power can force the nation's courts of appeals to interpret bankruptcy law rather than improperly delegate interpretation wholesale to bankruptcy court judges.

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3. Straub and the other entity prevailed at trial in this adversary proceeding in June 2021, when the Bankruptcy Court entered judgment in their favor; however, the Debtor has appealed the judgment, which appeal is currently pending.

B. Congress Has Specifically Authorized and Empowered Parties to Appeal Confirmation Orders to the District Courts and Circuit Courts of Appeals.

It cannot be denied that KK-PB has a right to judicial review of the Bankruptcy Court's Confirmation Order. Such a right has been endowed by Congress, if not the Constitution.

28 U.S.C. § 157(b)(1) provides that "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 . . . *subject to review* under section 158 of this title." (emphasis added). "Core proceedings" specifically includes "confirmations of plans." 28 U.S.C. § 157(b)(2)(L). Under 28 U.S.C. § 158(a), "[t]he district courts of the United States shall have jurisdiction to hear appeals" from judgments and certain orders "of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title." And under 28 U.S.C. § 1291, "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . . "

Congress thus gave parties to bankruptcy proceedings the statutory right to appeal final orders of the bankruptcy court in core proceedings, including confirmation orders. Congress has explicitly allowed certain transfers and distributions to be immunized against reversal on appeal in certain circumstances, unless bankruptcy court authorization to order such transfers and distributions is stayed pending appeal. *See* 11 U.S.C. §§ 363(m), 364(e).

Conversely, Congress has said nothing to authorize federal courts to abdicate their review responsibility with respect to confirmation orders. The United States Code contains no exception for equitable mootness. "Because Congress specified certain orders that cannot be disturbed on appeal absent a stay, basic canons of statutory construction compel us to presume that Congress did not intend for other orders to be immune from appeal." *In re One2One Commc'ns*, 805 F.3d at 444 (Krause, J., concurring); *cf. Walla Walla City v. Walla Walla Water Co.* 172 U.S. 1, 22 (1898) (applying "*expresio unius*" maxim).

C. Supreme Court Precedent Requires Article III Court Review of Confirmation Orders.

Supreme Court precedent also does not authorize federal courts to abdicate their review responsibility. Indeed, quite the opposite.

Federal courts' responsibility to hear cases over which they have jurisdiction is long-standing. In *Cohens v. Virginia*, Chief Justice Marshall wrote: "[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty." 19 U.S. (6 Wheat.) 264, 404 (1821).

In the last two hundred years, the Supreme Court has re-stated this principle repeatedly, and allowed very limited exceptions. *See, e.g.*, *Zivotofsky v. Clinton,* 566

U.S. 189, 194 (2012) ("[T]he Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'"); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) ("[F]ederal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress."); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (citing *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013)) ("[A] federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging.") (internal quotation marks omitted).

With respect to bankruptcy courts in particular, the Supreme Court has held that the delegation of powers to the bankruptcy courts does not violate the separation of powers required by the Constitution, *but only to the extent bankruptcy court orders are subject to the review of Article III courts*.

In *Stern v. Marshall*, the Supreme Court acknowledged the requirements of Article III of the Constitution: "Although the history of this litigation is complicated, its resolution ultimately turns on very basic principles. Article III, § 1, of the Constitution commands that '[t]he 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.' That Article further provides that the judges of those courts shall hold their offices during good behavior, without diminution of salary." 564 U.S. 462, 468 (2011). The Supreme Court further recognized in *Stern* that "[p]arties may appeal final judgments of a bankruptcy court in core proceedings to the district court, which *reviews them under traditional appellate standards*."

Id. at 474-75 (emphasis added). In *Wellness Int'l Network, Ltd. v. Sharif*, the Supreme Court held that "Congress gave bankruptcy courts the power to 'hear and determine' core proceedings and to 'enter appropriate orders and judgment,' subject to appellate review by the district court." 135 S. Ct. 1932, 1940 (2015). "Congress could choose to rest the full share of the Judiciary's labor on the shoulders of Article III judges. . . . Instead, Congress has supplemented the capacity of district courts through the able assistance of bankruptcy judges. *So long as those judges are subject to control by Article III courts*, their work poses no threat to the separation of powers." *Id.* at 1946 (emphasis added); *see also id.* at 1944 ("allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers *so long as Article III courts retain supervisory authority over the process*.") (emphasis added).

Indeed, in *Bullard v. Blue Hills Bank*, the Supreme Court acknowledged that while bankruptcy court orders denying confirmation are not entitled to immediate appellate review, if a bankruptcy court order grants confirmation, "a creditor can appeal without delay." 575 U.S. 496, 506 (2015). Lower courts frustrate this principle when they invoke the equitable mootness doctrine—and indeed with regard to one of the most consequential rulings that bankruptcy courts make. Preserving real oversight by Article III courts is particularly important in connection with the bankruptcy plan confirmation process—a process frequently marked by fiercely contested private-right claims involving large financial sums.

D. The Equitable Mootness Doctrine Invoked by Lower Courts Abdicates Federal Courts' Adjudication Responsibilities.

In his dissenting opinion in *In re Continental Airlines*, Justice Alito described "the curious doctrine of 'equitable mootness,' which [it has been argued] permit[s] federal district courts and courts of appeals to refuse to entertain the merits of live bankruptcy appeals over which they indisputably possess statutory jurisdiction and in which they can plainly provide relief." 91 F.3d 553, 567 (3d Cir. 1996) (en banc) (Alito, J., dissenting), *cert. denied*, 519 U.S. 1057 (1997). As the Solicitor General has since emphasized, the doctrine "is a relatively recent judicial construct of questionable foundation." Petition for Writ of Certiorari, *United States v. GWI PCS 1, Inc.*, 533 U.S. 964 (2001) (No. 00-1621), 2001 WL 34124814 at *22.

Courts have been unable to discern and identify any statutory basis for the doctrine. *See In re One2One Commc'ns*, 805 F.3d at 438 (Krause, J., concurring) ("[A]s courts and litigants . . . have struggled to identify a statutory basis for the doctrine, it has become painfully apparent that there is none.").

The term "equitable mootness" itself is a misnomer. It is "not technically 'mootness'—constitutional or otherwise—but is instead 'a prudential doctrine that protects the need for finality in bankruptcy proceedings and allows third parties to rely on that finality' . . . ." *In re City of Detroit*, 838 F.3d at 798.

Unlike every other doctrine of mootness this Court has recognized, "the prerequisites for equitable mootness

tend to show that there are very real 'concrete interest[s] . . . in the outcome of the litigation.'" *Beem v. Ferguson (In re Ferguson)*, 683 F. App'x 924, 927 (11th Cir. 2017) (quoting *Knox*, 567 U.S. at 307). When a court invokes the doctrine, "there is indeed a live controversy"—but the court abdicates its responsibility to decide it. *Id*.

Recent Supreme Court decisions have explicitly called into question "prudential" doctrines—articulating that discretion over the exercise of federal jurisdiction on "prudential" grounds is in "tension with our recent reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Lexmark*, 572 U.S. at 126. "Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because 'prudence' dictates." *Id.* at 128 (internal citation omitted). One need only substitute the words "appellate right" for "cause of action" to see the application of the same reasoning to equitable mootness.

Equitable mootness defies this Court's admonition that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River*, 424 U.S. at 813; *see also New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 368 (1989) (noting abstention is appropriate "only [in] exceptional circumstances"); *Sprint Commc'ns*, 571 U.S. at 72 ("In the main, federal courts are obliged to decide cases within the scope of federal jurisdiction.").

Further, the very limited abstention doctrines the Supreme Court has recognized bear little resemblance to

equitable mootness. Indeed, equitable mootness is really an abdication doctrine—beyond an abstention doctrine—and there is "no analogue for equitable mootness among the abstention doctrines" recognized by the Supreme Court either. *In re One2One Commc'ns*, 805 F.3d at 440 (Krause, J., concurring).

These abstention exceptions arise in "exceptional circumstances, where denying a *federal* forum would clearly serve an important countervailing interest . . . " *Quackenbush*, 517 U.S. at 716 (internal quotation marks and citation omitted) (emphasis added). The Supreme Court identified such exceptions, including:

> the power to refrain from hearing cases that would interfere with a pending state criminal proceeding, [citation omitted], or with certain types of state civil proceedings [citations omitted]; cases in which the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law [citation omitted]; cases raising issues 'intimately involved with [the States'] sovereign prerogative,' the proper adjudication of which might be impaired by unsettled questions of state law [citations omitted]; cases whose resolution by a federal court might unnecessarily interfere with a state system for the collection of taxes [citation omitted]; and cases which are duplicative of a pending state proceeding [citations omitted].

Id. at 716-17. These doctrines proceed from a premise that "[i]n rare circumstances, federal courts can relinquish their jurisdiction in favor of another forum." *Id.* at 722.

Equitable mootness cannot be based on the principles supporting these abstention doctrines. As noted in circuit court opinions criticizing the equitable mootness doctrine, such doctrines are true abstention doctrines—which contemplate and defer to adjudication in a different forum. "Federal courts abstain out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism." *Quackenbush*, 517 U.S. at 723 (citations omitted). Equitable mootness, by contrast, is utilized to simply abdicate the Article III court from substantive review under circumstances which guarantees that *no court* will hear the issue on the merits. *See, e.g.*, *In re City of Detroit*, 838, F.3d at 811 (Moore, J., dissenting) (distinguishing equitable mootness from abstention doctrines recognized by the Supreme Court); *In re One2One Commc'ns*, 805 F.3d at 439-440 (Krause, J., concurring); *cf. Quackenbush*, 517 U.S. at 716 (explaining abstention is warranted "[i]n rare circumstances" when "federal courts can relinquish their jurisdiction in favor of another forum.").

E. The Use of Equitable Mootness to Expand the Limited Doctrine of Constitutional Mootness and Its Potential to Frustrate the Development of Bankruptcy Law Warrants the Exercise of This Court's Supervisory Power.

Here, the Eleventh Circuit extended the dubious doctrine of equitable mootness even farther by relying on it to dismiss not only the appeal of a plan confirmation, but also KK-PB's appeal of the Bankruptcy Court's Estimation Order. KK-PB appealed the Estimation Order to the District Court nearly one year before the Plan was confirmed (A0348). Yet KK-PB's Estimation Order appeal was *never heard on the merits*, because the

District Court ran out the clock by waiting until the plan was confirmed. Such are the "dangers inherent" in the doctrine of equitable mootness—even where a creditor has a meritorious appeal unrelated to confirmation of the plan, a court can wield equitable mootness to "throw[] them out of court without reaching the merits of their arguments." *In re Cont'l Airlines*, 91 F.3d at 568 (Alito, J., dissenting).

The entirety of the District Court's analysis of KK-PB's Estimation Order appeal was a single sentence: "Because the Court dismisses the Appellant's appeal of the confirmation order, the Court must also dismiss the Appellant's appeal of the estimation order utilized in the confirmation order and valuing the Appellant's claim at zero." App. 12a. The Eleventh Circuit agreed with this perfunctory approach, holding that because "the appeal of the confirmation order is equitably moot, KK-PB's appeal of the valuation order is constitutionally moot." App. 4a. Thus, even though KK-PB's Estimation Order appeal had been pending for eleven months before the plan was even confirmed, the District Court and Eleventh Circuit bootstrapped the equitable mootness doctrine to declare a live controversy "constitutionally moot."

The equitable mootness doctrine has been utilized to impose many such injustices.

Equitable mootness "can easily be used as a weapon to prevent any appellate review of bankruptcy court orders confirming reorganization plans." *Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 192 (3d Cir. 2001) (Alito, J., concurring in the judgment). It is "open to substantial abuse, and invites manipulation of the bankruptcy process." Petition for Writ of Certiorari, *United States v.*

GWI PCS 1, Inc., 533 U.S. 964 (2001) (No. 00-1621), 2001 WL 34124814 at *23.

As noted by Judge Krause in her concurring opinion in *In re One2One Commc'ns*, because equitable mootness excises appellate review, it "not only tends to insulate errors by bankruptcy judges or district courts, but also stunts the development of uniformity in the law of bankruptcy." 805 F.3d at 447 (Krause, J., concurring). The equitable mootness doctrine thus prevents courts from developing uniform answers to important questions of bankruptcy law, as "courts commonly use the doctrine to sidestep" those questions. *See* Timothy K. Lewis & Ronald Mann, *Courts Should Review Bankruptcy Equitable Mootness Doctrine*, Legal Intelligencer (June 8, 2016). This refusal to address the hard questions arising out of bankruptcy plan confirmations prejudices litigants, who have nowhere to turn if appellate courts refuse to consider the merits of their live controversies. *See* Robert Miller, *Equitable Mootness: Ignorance is Bliss and Unconstitutional*, 107 Ky. L.J. 269, 290 (2018) (discussing the "strong tension" between equitable mootness and the "duty of federal courts to fully exercise their jurisdiction under statute and the Constitution").

Critics have also noted that equitable mootness even rewards parties' gamesmanship and pursuit of legally dubious plan terms because parties anticipate the lack of judicial review. *See, e.g., Nordhoff*, 258 F.3d at 191 (Alito, J., concurring) ("It is disturbing that Zenith, in an seeming attempt to moot any appeal prior to filing, succeeded in implementing most of the plan before the appellants even received notice that the plan had been confirmed."); *In re One2One Commc'ns*, 805 F.3d at 448 (Krause, J.,

concurring) (equitable mootness may "serve[] as part of a blueprint for implementing a questionable plan that favors certain creditors over others without oversight by Article III judges"); *R2 Invs., LDC v. Charter Commc'ns., Inc. (In re Charter Commc'ns., Inc.)*, 691 F.3d 476, 483-486 (2d Cir. 2012) (upholding dismissal of appeal of confirmation order on grounds of equitable mootness even though appellants argued that certain compensation to the debtor's controlling investor contravened the absolute priority rule and entire fairness standard, and that third-party releases were legally non-compliant, because "[e]ven if [appellants] are correct that the settlement consideration and releases are legally unsupportable, these provisions could not be excised without seriously threatening Charter's ability to re-emerge successfully from bankruptcy."); *see also id.* at 488 (holding, regarding alleged gerrymandering and violation of cramdown provisions of the Bankruptcy Code, that the "legal errors that [appellant] alleges, if proven, would require unwinding the Plan and reclassifying creditors. This is the opposite of a surgical change to the Plan. [citation omitted] . . . We therefore affirm the district court's exercise of its discretion in dismissing the claim that the cramdown provisions were violated as equitably moot as well."); Robert Miller, *Equitable Mootness: Ignorance is Bliss and Unconstitutional*, 107 KY. L.J. 269, 291 (2018) (noting the "strategic value of equitable mootness promotes gamesmanship and encourages any party to invoke it no matter the chance of success."); Chad Shokrollahzadeh, *Equitable Mootness and Its Discontents: The Life of the Equitable Mootness Doctrine in the Third Circuit After In re One2One Communications L.L.C. and In re Tribune Media Co.*, 18 Duq. Bus. L.J. 129, 152 (2016) (explaining the equitable mootness doctrine "may also encourage the hasty confirmation of fragile plans of dubious legality.").

Only the exercise of the Court's supervisory power can force the nation's courts of appeals to interpret bankruptcy law rather than delegate it wholesale to bankruptcy court judges.

F. The Circuits Are Split in Their Application of Equitable Mootness in Bankruptcy Cases.

There is no standard test for equitable mootness, and the courts of appeals "have fashioned many different routes" for applying the doctrine of equitable mootness to avoid deciding bankruptcy cases. *In re VeroBlue Farms USA, Inc.*, 6 F.4th 880, 889 (8th Cir. 2021).

The Tenth and Eleventh Circuits cite a non-exhaustive list of "questions" that "provide the reviewing court with the backdrop to evaluate the ultimate issue of whether a confirmation plan has progressed to the point where effective judicial relief is no longer a viable option." *In re Club Assocs.*, 956 F.2d 1065, 1069 n.11 (11th Cir. 1992); *see also Dill Oil Co. v. Stephens (In re Stephens)*, 704 F.3d 1279, 1282 (10th Cir. 2013). The Second Circuit has five factors. *See In re Charter Commc'ns.*, 691 F.3d at 481-82. The Third, Fourth and Ninth Circuits have four factors. *See In re Tribune Media Co.*, 799 F3d. 272, 278 (3d Cir. 2015); *Bate Land Co. LP v. Bate Land & Timber LLC (In re Bate Land & Timber LLC)*, 877 F.3d 188, 195 (4th Cir. 2017); *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. (In re Transwest Resort Props.)*, 801 F.3d 1161, 1167-68 (9th Cir. 2015). The First, Fifth and Sixth Circuits have three. *See Cooperativa de Ahorro y Credito v. Fin. Oversight & Mgmt. Bd. (In re Fin. Oversight & Mgmt. Bd.),* 989 F.3d 123, 129 (1st Cir. 2021); *Manges v. Seattle-First Nat'l Bank (In re Manges)*, 29 F.3d 1034, 1039 (5th Cir. 1994); *In re City of Detroit*,

838 F.3d at 798. The Seventh Circuit identifies two key factors. *Duff v. Cent. Sleep Diagnostics, LLC,* 801 F.3d 833, 840 (7th Cir. 2015).

The courts of appeals apply their factors in different ways. In the Second Circuit, for example, an appeal is presumed equitably moot where the debtor's plan of reorganization has been substantially consummated. *In re Charter Commc'ns., Inc.*, 691 F.3d at 482.

The Eighth Circuit, meanwhile, is the only circuit that requires "at least a preliminary review of the merits" of an appeal before equitable mootness can be invoked. *In re VeroBlue Farms USA*, 6 F.4th at 890 ("Writing on a clean Eighth Circuit slate, we conclude that an inquiry into these issues [merits review] is required before equitable mootness may be invoked in this case. This means that, on remand, the district court must make at least a preliminary review of the merits of [appellant's] appeal to determine the strength of [appellant's] claims, the amount of time that would likely be required to resolve the merits of those claims on an expedited basis, and the equitable remedies available…."). The Tenth Circuit has also identified as a factor to be considered: "(6) based upon a quick look at the merits of appellant's challenge to the plan, is appellant's challenge legally meritorious or equitably compelling?" *Search Mkt. Direct, Inc. v. Jubber (In re Paige)*, 584 F.3d 1327, 1339 (10th Cir. 2009).

Other circuits, such as the Eleventh did here, permit dismissal of appeals as equitably moot without any consideration of the merits. *See, e.g.*, *In re Phila. Newspapers, LLC*, 690 F.3d 161, 168 (3d Cir. 2012) ("Equitable mootness is a way for an appellate court to

avoid deciding the merits of an appeal."); *In re Transwest Resort Props.*, 801 F.3d at 1167 ("Equitable mootness is a prudential doctrine by which a court elects not to reach the merits of a bankruptcy appeal.") (citation omitted).

Though courts widely require substantial consummation and the absence of a stay to invoke equitable mootness, and consider the nature of the remedy sought by appellant and its potential effect on the plan and entities who may have relied on the plan and its confirmation, circuit court opinions diverge widely regarding the types of reliance needed to support equitable mootness. For example, the Ninth Circuit requires third-party reliance to satisfy the requirements of equitable mootness. *See, e.g., In re Transwest Resort Props.*, 801 F.3d at 1164-70 (citing *Bank of N. Y. Trust Co. v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 244 (5th Cir. 2009)) (rejecting as asserted innocent third party new investor who would become sole owner of reorganized debtor, because of its participation at every stage of the proceedings, and finding that "when a sophisticated investor . . . helps craft a reorganization plan that 'presses the limits' of the bankruptcy laws, appellate consequences are a foreseeable result.") (internal brackets omitted). Conversely, in *In re Charter Commc'ns*, the Second Circuit upheld the dismissal of an appeal of a plan that provided the debtor's controlling investor (a major participant in the pre-packaged plan, and not an innocent third party) with substantial cash as well as releases to him and management, in spite of their potentially legally unsupportable nature. Indeed, the Second Circuit acknowledged that the relief appellants sought in that case "would not adversely affect parties without an opportunity to participate in the appeal." 691 F.3d at 483-86.

The circuits are also split on whether the standard of review for an equitable-mootness dismissal is *de novo* or abuse of discretion.

The Second, Third, Ninth, and Tenth Circuits review dismissal on grounds of equitable mootness for abuse of discretion, examining conclusions of law *de novo* and findings of fact for clear error. *See Beeman v. BGI Creditors' Liquidating Trust (In re BGI, Inc.)*, 772 F.3d 102, 107 (2nd Cir. 2014); *Tribune Media Co. v. Aurelius Capital Mgmt., L.P.*, 799 F.3d 272, 277 (3d Cir. 2015); *In re Transwest Resort Props.*, 801 F.3d at 1168; *Drivetrain, LLC v. Kozel (In re Abengoa Bioenergy Biomass of Kan., LLC)*, 958 F.3d 949, 954 (10th Cir. 2020). The Fifth, Sixth and Eleventh Circuits conduct de novo review. *See Wells Fargo Bank N.A. v. Tex. Grand. Prairie Hotel Realty, L.L.C. (In re Tex. Grand Prairie Hotel Realty, L.L.C.)*, 710 F.3d 324, 327 (5th Cir. 2013); *In re City of Detroit*, 838 F.3d at 798; *NLG, LLC v. Horizon Hosp. Grp., LLC (In re Hazan)*, 10 F.4th 1244, 1252 (11th Cir. 2021). The First, Fourth, and Eighth Circuits are undecided. *See United Sur. & Indem. Co. v. López-Muñoz (In re López-Muñoz)*, 983 F.3d 69, 72 (1st Cir. 2020); *Bate Land Co. LP v. Bate Land & Timber LLC (Bate Land & Timber LLC)*, 877 F.3d 188, 195 n.5 (4th Cir. 2017); *In re VeroBlue Farms USA*, 6 F.4th at 889 n.5.

Only the intervention of this Court—either to end the doctrine of equitable mootness or to standardize its application—can end the confusion it has created for courts and litigants alike.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED NOVEMBER 30, 2021

In the
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 20-12361; 20-12368
Non-Argument Calendar

IN RE: KK-PB FINANCIAL, LLC,

Debtor,

KK-PB FINANCIAL, LLC,

Plaintiff-Appellant,

versus

160 ROYAL PALM, LLC,

Defendant-Appellee.

Appeals from the United States District Court
for the Southern District of Florida
D.C. Docket No. 9:19-cv-80342-RLR; 9:20-cv-80216-RLR

OPINION

Before Jordan, Rosenbaum, and Newsom, Circuit Judges.

PER CURIAM:

KK-PB Financial ("KK-PB") appeals from an order of the district court dismissing two of its bankruptcy appeals as equitably and constitutionally moot. Largely for the reasons stated in the district court's order, *see* D.E. 67 in Case No. 19-cv-80342-RLR, we affirm.

The two bankruptcy appeals filed by KK-PB are from (1) the bankruptcy court's confirmation of the debtor's bankruptcy plan, and (2) the bankruptcy court's determination that KK-PB's claim as a creditor was fraudulent, and therefore valued at zero. The district court concluded that the two appeals were moot under Eleventh Circuit precedent for a number of reasons. *See generally In re Club Associates, Inc.*, 956 F.2d 1065, 1069 n.11 (11th Cir. 1992) (setting out relevant factors in equitable mootness analysis).

First, KK-PB had not obtained a stay of either order—it had unsuccessfully sought a stay of the valuation order at the district court and the Eleventh Circuit and had unsuccessfully sought a stay of the confirmation order in the district court but not the Eleventh Circuit. The district court concluded that this factor did not weigh strongly in favor of either side but tended to weigh in favor of dismissal due to KK-PB's failure to seek a stay of the confirmation order in the Eleventh Circuit. *See* D.E. 67 at 3-4.

Second, the district court concluded—as the parties had agreed—that the bankruptcy plan had been substantially consummated under 11 U.S.C. § 1101. The debtor's property (the hotel) had been transferred to a third party; the debtor had disbursed almost $32 million to creditors; the debtor had paid $100,000 to the Town

of Palm Beach; and the debtor had paid a large amount of fees to the U.S. Trustee for the management of the property. *See* D.E. 67 at 4-5.

Third, the district court concluded that the relief sought by KK-PB—permitting its claim to be included in a class of allowed secured claims and striking a certain contingent lien—could not be granted because it was contrary to law. As to the merits of KK-PB's claim, the district court pointed out that the Eleventh Circuit had already rejected KK-PB's contention when it affirmed the sale of the debtor's property in 2019. *See In re 160 Royal Palm*, 785 F. App'x 829 (11th Cir. 2019). With respect to the lien issue, the district court explained that striking the contingent lien (which would activate if the Supreme Court reversed the sale of the property) would not aid KK-PB and would instead harm the purchaser of the property. *See* D.E. 67 at 5-6.

Applying de novo review, *see Bennett v. Jefferson County*, 899 F.3d 1240, 1246 (11th Cir. 2018), we find no error. For example, with respect to consummation, the parties agreed that the plan has been substantially consummated. The fact that the debtor's plan did not involve unusually complex transactions does not bar a finding of equitable mootness. *See In re Hazon*, 10 F.4th 1244, 1255 (11th Cir. 2021). And we are not convinced by KK-PB's argument that its so-called "narrowly-tailored remedy" would be easy to implement. In fact, KK-PB itself suggests that it would have to pursue the debtor's bankruptcy counsel for a portion of their fees. *See* Appellant's Br. at 17.

KK-PB may be correct in arguing that the district court conflated the merits with equitable mootness when

it reasoned that the relief sought was contrary to law. Be that as it may, KK-PB does not satisfactorily explain why its requested relief (which potentially runs in the millions of dollars) would not create problems for others.

Given that the appeal of the confirmation order is equitably moot, KK-PB's appeal of the valuation order is constitutionally moot. The confirmed plan, which stands, is binding on all parties and payments contrary to the plan are prohibited. *See* 11 U.S.C. § 1141(a). There is no way to modify the plan, as KK-PB suggests, if the appeal of the plan's confirmation is equitably moot. *See Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S.Ct. 1652, 1660, 203 L. Ed. 2d 876 (2019) (case is moot "only if it is impossible for a court to grant any effectual relief whatever to [a party] assuming it prevails") (internal quotation and citation omitted).

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, FILED JUNE 3, 2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NOS. 20-CV-80216-ROSENBERG,
19-CV-80342-ROSENBERG

BANKRUPTCY CASE NO. 18-19441-BKC

KK-PB FINANCIAL, LLC,

Appellant,

v.

160 ROYAL PALM, LLC,

Appellee-Debtor.

ORDER GRANTING APPELLEE'S MOTIONS TO DISMISS APPEALS AS MOOT

This matter arises out of a chapter 11 bankruptcy case of the Appellee, 160 Royal Palm, LLC (the "Debtor"). The underlying bankruptcy case has, at this point, nearly run to its conclusion. During the course of that proceeding, the Appellant, KK-PB Financial, LLC, filed nine different appeals. The majority of those appeals have terminated adversely to the Appellant, with the remaining two, final

appeals pending before this Court.[1] In connection with the Appellant's appeals, the Appellant filed eight motions to stay the bankruptcy proceeding. Those motions were all denied. With respect to the motions to stay filed in this Court, the motions to stay were denied because of a lack of probability of success on the merits. The Appellant filed its motions to stay because of its concern that, should a stay not be granted, its appeals would become moot if the bankruptcy proceeding ran to its conclusion. That is precisely what happened. Both of Appellant's appeals before this Court are dismissed as moot for the reasons set forth below. First, however, the Court briefly sets forth the state of litigation in the proceeding below.

The Debtor filed its bankruptcy plan on December 26, 2019. 19-80342, DE 60 at 4. Under the terms of the plan, the Debtor was to use the disposition of its primary asset (a hotel under reconstruction) to pay its creditors. *Id.* Every creditor voted to approve the plan except for the Appellant. *Id.* The court below approved and confirmed the plan, with the plan becoming effective on February 13, 2020. *Id.* The day prior, February 12, 2020, the Appellant filed its appeal of the confirmation order. *Id.* The Appellant sought a stay of the confirmation order, but this Court denied that request. After the Court denied Appellant's request for a stay, the Debtor proceeded with its obligations under the plan and disbursed funds to its creditors. *Id.* Because the bankruptcy court concluded that the Appellant's claim as a creditor was fraudulent, the Appellant received

1. A third pending appeal, case 20-CV-80239, is stayed pending resolution of the motions to dismiss.

nothing. Before the Court are two appeals. One appeal for the bankruptcy court's confirmation order of the bankruptcy plan, and another appeal over the valuation of the Appellant's claim at zero. The Debtor has moved to dismiss, arguing that the substantial consummation of the bankruptcy plan means that the Appellant's appeals are now moot. For the reasons set forth below, the Court agrees and grants both motions to dismiss.

Pursuant to binding Eleventh Circuit precedent, a bankruptcy appeal should be dismissed when the bankruptcy court has entered an order confirming a bankruptcy plan and the appellant has not obtained a stay of that order. The Eleventh Circuit has described this doctrine in cases such as *In re Holywell Corp.*, 911 F.2d 1539 (11th Cir. 1990) (reversed on other grounds). The need to dismiss the appeal as moot is because of the need for finality of plans of reorganization and the general inability of courts to grant relief on appeal when the plan has been substantially consummated:

> The mootness doctrine, as applied in a bankruptcy proceeding, permits the courts to dismiss an appeal based on its lack of power to rescind certain transactions. The mootness standard "is premised upon considerations of finality ... and the court's inability to rescind ... and grant relief on appeal." In dismissing the debtors' previous challenge, this court was guided by "the important policy of bankruptcy law that court-approved reorganization plans be able to go forward based on court approval

> unless a stay is obtained." Mindful of that policy, we will not entertain any challenge to the Plan which seeks to modify or amend its provisions.

Id. at 1543 (citations omitted). In determining whether such an appeal should be dismissed as moot, the Eleventh Circuit has instructed district courts to consider the following factors:

> (1) Has a stay pending appeal been obtained?
>
> (2) Has the plan been substantially consummated? If so, what kind of transactions have been consummated?
>
> (3) What type of relief does the Appellant seek on appeal? What effect would granting the relief have on third parties not before the Court?
>
> (4) Would the relief affect the re-organization of the Debtor as a revitalized entity?

The fourth factor does not apply in this case as the Debtor pursued liquidation—not re-organization. Accordingly, the Court considers the three remaining factors in turn.

(1) Has a stay pending appeal been obtained?

The parties do not dispute that the Appellant has not obtained a stay pending appeal. Although the Appellant pursued stays in the past in connection with other appeals at the Eleventh Circuit and although the Appellant pursued

a stay in this Court, the Appellant did not seek a stay at the Eleventh Circuit for its appeal of the confirmation order.[2] When an appellant does not diligently pursue a stay in connection with an appeal of a confirmation order, this factor weighs in favor of dismissal. *E.g., In re BGI, Inc.*, 772 F.3d 102, 110 (2d Cir. 2014). This is because the failure to seek a stay tends to create a situation where it would be inequitable to disturb orders on appeal. *See id.* at 108. Thus, this factor does not strongly weigh in favor of either side (due to the Appellant seeking a stay in this Court), but this factor does tend to weigh in favor of dismissal due to the Appellant's failure to seek or obtain a stay at the Eleventh Circuit.

(2) Has the plan been substantially consummated? If so, what kind of transactions have been consummated?

The concept of "substantial consummation" is defined in Section 1101 of the Bankruptcy Code. 11 U.S.C. § 1101. Substantial consummation does not require that all matters under the plan are completed. *Id.* Rather, it simply requires that property to be transferred under the plan has, in fact, been transferred, and the debtor's successor has assumed the management of the property. *Id.* Here, the parties do not dispute that the underlying confirmation plan has been substantially consummated, and the record plainly supports such a conclusion. The

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2. The Appellant did seek at stay at the Eleventh Circuit for its appeal of the estimation order in case 19-80342, however, the Eleventh Circuit denied that motion and dismissed the Appellant's appeal. *See* 19-14527.

Debtor's hotel was sold long ago to a third party. 20-80216, DE 16 at 8-10. The Debtor has disbursed almost thirty-two million dollars. *Id.* at 9. The majority of the Debtor's creditors are overseas. *Id.* Recovering monies from those creditors would be, to put it mildly, difficult. The Debtor has also paid one hundred thousand dollars to the Town of Palm Beach. *Id.* The property's new owner has continued to develop the property it purchased from the Debtor over a year ago. *Id.* Additionally, the Debtor has undertaken many other transactions in reliance upon the confirmation plan. The Debtor's funds were transferred to a liquidation trust and the Debtor purchased insurance (through the posting of a large bond). *Id.* Finally, the Debtor has paid a large amount of fees to the United States Trustee for the management of the property. *Id.* For the reasons set forth above, this factor weighs strongly in favor of dismissal. *Compare In re BGI*, 772 F.3d at 107 ("In our Circuit, a bankruptcy appeal is presumed equitably moot when the debtor's reorganization plan has been substantially consummated."), *with* DE 28 at 13 (wherein the Appellant conceded "Even though the Debtor has substantially consummated the Plan . . .").

(3) What type of relief does the Appellant seek on appeal? What effect would granting the relief have on third parties not before the Court?

In its Response, the Appellant clarifies that the relief it seeks is: (i) permitting its claim to be included in a class of allowed secured claims and (ii) striking a certain contingent lien. This relief cannot be granted for two reasons.

First, the relief sought is contrary to law. The Appellant's claim was not provided for in the bankruptcy plan because the bankruptcy court determined that the claim was fraudulent. The Appellant cites no authority for the proposition that a fraudulent claim must be provided for in a bankruptcy plan, that is was error not to provide for a fraudulent claim, or even that this Court could require the bankruptcy court to provide for a fraudulent claim. Additionally, the class of claims that the Appellant wants to be included in is the allowed secured claims, Class I. But the bankruptcy court expressly found that the Appellant's claim would *not* be included in that class when the underlying hotel property was sold and *that* decision in *that* order was affirmed by the Eleventh Circuit in one of the Appellant's earlier appeals. 19-CV-80351, DE 44.

Second, the Appellant fails to explain how the sought-after relief of striking a certain contingent lien would benefit it in any way. The contingent lien at issue is a lien that was granted to the third-party purchaser of the hotel property. That lien will activate if the Supreme Court of the United States should ever reverse the sale of the hotel to the purchaser. Thus, should the purchaser be forced to reconvey the hotel back to the Debtor, the lien serves to require the Debtor to refund the purchase price back to the purchaser. The Appellant fails to explain how this common-sense requirement to refund the purchase price, if removed, would aid the Appellant. In severe contrast, should the Court strike the lien, the potential prejudice upon the third-party purchaser is great. Indeed, the potential prejudice to the third-party purchaser is so self-evident that this point does not warrant further discussion.

See In re Nica Holdings, Inc., 810 F.3d 781, 787 (11th Cir. 2015) ("The equitable mootness doctrine seeks to avoid an appellate decision that would "knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the bankruptcy court.'"). For the foregoing reasons, this factor weighs in favor of dismissal.[3]

All factors being either neutral or in favor of dismissal, it is **ORDERED AND ADJUDGED** that Defendant's Motion to Dismiss at docket entry 29 in case 20-CV-80216 is **GRANTED** and that case is **CLOSED**. Because the Court dismisses the Appellant's appeal of the confirmation order, the Court must also dismiss the Appellant's appeal of the estimation order utilized in the confirmation order and valuing the Appellant's claim at zero. *In re Steffen*, 660 Fed. Appx. 843, 846 (11th Cir. 2016) ("If the events that occur subsequent to the filing of an appeal . . . deprive the court of the ability to give the . . . appellant meaningful relief, then the case is moot and must be dismissed."). Accordingly, Defendant's Motion to Dismiss at docket entry 60 in case 19-CV-80342 is **GRANTED** and that case is **CLOSED**.

DONE and ORDERED in Chambers, West Palm Beach, Florida, this 3rd day of June, 2020.

/s/ Robin L. Rosenberg
ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

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3. The Court adopts and incorporates here the reasoning and analysis as to each of the Debtor's points in the Motion and the Reply.

APPENDIX C — OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, WEST PALM BEACH DIVISION, FILED FEBRUARY 11, 2020

ORDERED in the Southern District of Florida
on February 11, 2020.

/s/ Erik P. Kimball
Erik P. Kimball, Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

Case No. 18-19441-EPK
Chapter 11

In Re:

160 Royal Palm, LLC,

Debtor.

ORDER CONFIRMING DEBTOR'S THIRD AMENDED PLAN OF LIQUIDATION AND ESTABLISHING DEADLINE TO FILE CLAIMS FOR REJECTION DAMAGES

THIS MATTER came before the Court for hearing on February 10, 2020 (the "Confirmation Hearing") to consider confirmation of the *Debtor's Third Amended Plan*

of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code [ECF No. 1469] (the "Plan") filed by 160 Royal Palm, LLC (the "Debtor"). Having considered: (a) the Plan; (b) the *Amended Disclosure Statement for Chapter 11 Plan of Liquidation Proposed by 160 Royal Palm, LLC* [ECF No. 969] (the "Disclosure Statement"), which the Court previously approved in its Order at ECF No. 975; (c) the *Confirmation Affidavit of Cary Glickstein* [ECF No. 1531] (the "Confirmation Affidavit"); (d) the evidence presented; (e) the proffered testimony of Cary Glickstein; and (f) the statements, arguments, and representations of counsel, the Court, pursuant to Federal Rule of Bankruptcy Procedure 7052, makes the following findings of fact and conclusions of law:

Findings of Fact and Conclusions of Law

Adequate Notice and Acceptance of Modified Plan

A. Adequate and sufficient notice, as required pursuant to the Federal Rules of Bankruptcy Procedure and the Court's *Order (I) Approving Disclosure Statement; (II) Setting Hearing on Confirmation of Plan; (III) Setting Hearing on Fee Applications; (IV) Setting Various Deadlines; and (V) Describing Plan Proponent's Obligations* [ECF No. 975], as well as the Court's *Order: (II) Setting Hearing on Confirmation of Plan; (III) Setting Hearing on Fee Applications; (IV) Setting Various Deadlines; and (V) Describing Plan Proponent's Obligations* [ECF No. 1500], was provided to all known creditors, equity security holders, the Office of the U.S. Trustee, and other parties in interest of: i) the Plan; ii) the

deadline to file and serve objections to confirmation of the Plan; iii) the deadline for voting on the Plan; and iv) the hearing on approval of the confirmation of the Plan. While the Plan was amended from the *Debtor's Amended Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* [ECF No. 968] (the "Prior Plan"), for the reasons set forth in the Court's January 15, 2020 *Order Granting Motion to Reset Plan Confirmation Hearing and Hearing on Fee Applications Without Requiring Resolicitation* [ECF No. 1495], the Plan does not require re-solicitation.

Jurisdiction and Venue

B. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the District Court's general order of reference. Confirmation of the Plan is a core proceeding under 28 U.S.C. § 157(b). Venue is proper in this district under 28 U.S.C. §§1408 and 1409.

11 U.S.C. § 1129(a)(1)

C. The Plan complies with the applicable provisions of the Bankruptcy Code, including without limitation 11 U.S.C. §§ 1122, 1123, 1125, and 1129 with respect to all classes of Claims[1] and Interests under the Plan and, therefore, the provisions of 11 U.S.C. § 1129(a)(1) have been satisfied.

1. Unless otherwise defined, any capitalized terms herein shall have the same meaning ascribed to them in the Plan.

11 U.S.C. § 1129(a)(2)

D. The Debtor, the proponent of the Plan, has complied with the applicable provisions of the Bankruptcy Code. Accordingly, the requirements of 11 U.S.C. § 1129(a)(2) have been satisfied.

11 U.S.C. § 1129(a)(3)

E. The Plan has been proposed in good faith and not by any means forbidden by law. Accordingly, the requirements of 11 U.S.C. § 1129(a)(3) have been satisfied.

11 U.S.C. § 1129(a)(4)

F. Any payments made or to be made by the Debtor and the Liquidating Trustee, or by a person issuing securities or acquiring property under the Plan, for services or for costs and expenses in or in connection with the case, or in connection with the Plan and incident to the case, have been approved by, or are subject to the approval of, this Court as reasonable. Accordingly, the requirements of 11 U.S.C. § 1129(a)(4) have been satisfied.

11 U.S.C. § 1129(a)(5)

G. The Plan discloses, in Sections 1.42 and 7.3.4, the identity of Cary Glickstein as the Liquidating Trustee, and Mr. Glickstein's affiliations with the Debtor as its Manager and former receiver have been disclosed in the Disclosure Statement accompanying the Plan. Section

10.1 of the Liquidating Trust Agreement discloses the nature of the Liquidating Trustee's post-confirmation compensation. The appointment of Cary Glickstein as Liquidating Trustee is consistent with the interests of creditors and Liquidating Trust Beneficiaries and consistent with applicable public policy. Accordingly, the requirements of 11 U.S.C. § 1129(a)(5) have been satisfied.

11 U.S.C. § 1129(a)(6)

H. No governmental regulatory commission has jurisdiction over the rates of the Debtor or the Liquidating Trust. Accordingly, 11 U.S.C. § 1129(a)(6) is not applicable.

11 U.S.C. § 1129(a)(7)

I. The Plan has four Classes. The Plan treats Class 1 as Unimpaired. The Plan treats Classes 2, 3, and 4 as Impaired. Classes 2 and 3 voted in favor of the Plan and have therefore accepted the Plan. Class 4 will receive no property or distribution under the Plan. The distribution of no value whatsoever to holders of Class 4 Interests is not less than the amount such holders would so receive or retain if the Debtor were liquidated under chapter 7 of the United States Bankruptcy Code. Accordingly, the requirements of 11 U.S.C. § 1129(a)(7) have been satisfied.

11 U.S.C. §§ 1129(a)(8) and 1129(b)(1)

J. Classes 2 and 3 are Impaired and have accepted the Plan. Class 1 is Unimpaired. Class 4 is Impaired, will receive or retain no property, and is therefore presumed

to have rejected the Plan. The Plan does not discriminate unfairly with respect to this dissenting class or between any classes. Furthermore, with respect to Class 4, the Plan is fair and equitable because no holder of a claim or interest that is junior to that of Class 4 will receive or retain any property, distribution, payment, or anything else under the Plan.

11 U.S.C. § 1129(a)(9)

K. The Plan provides that all applicable Allowed Administrative Claims are to be paid upon the latter of: (1) the Effective Date; (2) the date on which such claims becomes payable pursuant to a Final Order of the Court; (3) for Allowed Administrative Claims that represent liabilities incurred by the Debtor in the ordinary course of business after the Petition Date with regard to the Debtor, the date on which each such Claim becomes due in the ordinary course of such Debtor's business and in accordance with the terms and conditions of any agreement relating thereto; or (4) upon such other dates and terms as may be agreed upon by the Holder of any such Allowed Administrative Claim and the Debtor. Accordingly, the requirements of 11 U.S.C. § 1129(a)(9) have been satisfied.

11 U.S.C. § 1129(a)(10)

L. Two impaired classes of claims—Classes 2 and 3—have accepted the Plan. Accordingly, the requirements of 11 U.S.C. § 1129(a)(10) have been satisfied.

11 U.S.C. § 1129(a)(11)

M. The Plan is currently feasible, workable, and has a reasonable likelihood of success. The Plan itself provides for the liquidation, rather than the reorganization, of the Debtor, and such liquidation of all the Debtor's assets that are necessary to fund the Plan has already occurred, with the only remaining extra assets to be liquidated consisting of pending and future litigation claims to which the Liquidating Trust will be adequately equipped and funded to pursue for the additional benefit of holders of Class 3 Claims. Specifically:

i. Section 9.1 of the Plan provides that the Plan's Effective Date shall occur once the following events have occurred: (1) the Court shall have entered this Confirmation Order; (2) the Court shall have approved the Disclosure Statement; (3) the Debtor shall have executed and delivered all documents, agreements and instruments required under the Plan; and (4) the Debtor or Liquidating Trustee shall have received the Sale Proceeds released by the escrow agent pursuant to Section 7.4 of the Plan. Each of these required events has already occurred or will occur shortly;

ii. The sale of Sale Assets, including the Debtor's real property located at 160 Royal Palm Way, Palm Beach, Florida (the "Real Property") by the Debtor to LR U.S. Hotels

Holdings, LLC ("LR"), has been approved by the Court in its Sale Approval Order and such order has been affirmed by the United States Court of Appeals for the Eleventh Circuit. Section 7.4 of the Plan provides that the Debtor and LR shall expeditiously execute and transmit all documents and notices required to effectuate the release of the resulting Sale Proceeds from escrow to the Debtor or Liquidating Trust, and provides that any escrow agent shall release such funds on the date this Confirmation Order is entered;

iii. Claim No. 70-3, which KK-PB Financial, LLC filed as a claim in the amount of $39,684,844.73 secured by the Real Property, was estimated by the Court at $0 and completely disallowed. The Bankruptcy Court's order estimating and disallowing such claim is unstayed and is pending appeal to the United States District Court, following the United States Court of Appeals for the Eleventh Circuit's recent denial of a KK-PB's petition for permission for direct appeal and the Eleventh Circuit's recent denial of KK-PB's motion for stay pending appeal. In its own order denying KK-PB Financial, LLC's request for a stay pending appeal in that matter, the Bankruptcy Court determined that "KK-PB has a negligible likelihood of success on its appeal from the Estimation Order;" and

iv. Finally, the Court's Sale Approval Order states that "As the Court has pointed out, in light of the disallowance of KK-PB's mortgage claim for all purposes in this case, and particularly for purposes of this sale, KKPB is not entitled to any adequate protection of that alleged secured claim and so is not entitled to a lien on the proceeds of sale." That is, the sale of the Real Property was completely free and clear of Claim No. 70-3, and no part of that Claim has attached to the Sale Proceeds.

Therefore, the Effective Date will occur shortly, and on the Effective Date, the Debtor will have sufficient cash available to make all payments and meet all payment obligations required under the Plan. Accordingly, the requirements of 11 U.S.C. § 1129(a)(11) have been satisfied.

11 U.S.C. § 1129(a)(12)

N. The Plan provides for payment in full of all U.S. Trustee fees payable under 28 U.S.C. § 1930 and all fees payable under Section 1930 of Title 28. To the extent any fees remain due and owing, they will be paid on the Effective Date of the Plan. Accordingly, the requirements of 11 U.S.C. § 1129(a)(12) have been satisfied.

11 U.S.C. § 1129(a)(13)

O. The Debtor has no retirement plan, and the Debtor therefore has no obligation to provide retiree benefits. Accordingly, 11 U.S.C. § 1129(a)(13) is not applicable.

11 U.S.C. §§ 1129(a)(14) and (15)

P. The Debtor is not an individual. Accordingly, 11 U.S.C. §§ 1129(a)(14) and (15) are not applicable.

11 U.S.C. §§ 1129(a)(16)

Q. The Debtor is a Florida for-profit limited liability company. Accordingly, 11 U.S.C. § 1129(a)(16) is not applicable.

Federal Rule of Bankruptcy Procedure 3020(e)

R. Cause exists to waive the fourteen-day stay of this Confirmation Order.

Prior Order and Oral Findings Incorporated by Reference

S. The Court's oral findings of fact and conclusions of law announced on the record at the Confirmation Hearing are attached hereto as Exhibit A and incorporated by reference herein. Furthermore, the Court's January 15, 2020 *Order Granting Motion to Reset Plan Confirmation Hearing and Hearing on Fee Applications Without Requiring Resolicitation* [ECF No. 1495] is incorporated herein by reference.

Requirements for Confirmation Satisfied

T. All of the requirements for Confirmation under 11 U.S.C. § 1129 have been satisfied. Confirmation of the Plan

is in the best interests of the Debtor's Estate, creditors, equity interest holders, and all other parties in interest.

Having considered the foregoing, it is **ORDERED AND ADJUDGED** that:

1. All objections to confirmation of the Plan, including the objections filed by KK-PB Financial, LLC at ECF Nos. 1327 and 1516, are **OVERRULED**.

2. The Plan is **CONFIRMED** and **APPROVED** in all respects.

3. The Findings of Fact and Conclusions of Law set forth above shall constitute findings of fact and conclusions of law of this Court pursuant to Federal Rule of Bankruptcy Procedure 7052. To the extent any finding of fact shall later be determined to be a conclusion of law, it shall be so deemed, and to the extent any conclusion of law later shall be determined to be a finding of fact, it shall be so deemed.

4. Notice was adequate and sufficient under the Bankruptcy Code, the Bankruptcy Rules, the Local Rules and Orders of this Court, and the Due Process Clause of the United States Constitution.

5. The Effective Date shall occur upon the entry of this Confirmation Order and once all other conditions set forth in Section 9.1 are satisfied. The Debtor shall file a Notice of the Effective Date with the Court upon the occurrence of the Effective Date.

6. All Equity Interests in the Debtor are hereby **EXTINGUISHED**.

7. Any escrow agent in possession of the Sale Proceeds shall release such funds to the Debtor or Liquidating Trustee, and, if they have not done so already, the Debtor and LR shall expeditiously execute and transmit all documents and/or notices required to effectuate the timely release of such funds.

8. The appointment of Cary Glickstein as the Liquidating Trustee pursuant to Section 7.3.4 of the Plan is hereby **APPROVED**. The Liquidating Trustee shall be compensated pursuant to Section 7.3.6(j) of the Plan. All Estate Professionals employed by the Debtor pursuant to Court approval shall be deemed employed by the Liquidating Trustee pursuant to the same terms and conditions of such previously-approved employment.

9. The Liquidating Trust Agreement is **APPROVED** and the Debtor is **AUTHORIZED AND DIRECTED** to execute the Liquidating Trust Agreement and to thereby convey and otherwise transfer all of its assets to the Liquidating Trustee to be held in trust for the benefit of the Liquidating Trust Beneficiaries subject to the term and provisions of the Plan and the Liquidating Trust Agreement.

10. If the Sale Approval Order is reversed by mandate of the United States Court of Appeals for the Eleventh Circuit or the United States Supreme Court **and** either court also mandates that the Sale Assets be

re-conveyed back to the Debtor or that title to the Sale Assets shall otherwise re-vest back in the Debtor **and** such re-conveyance/re-vesting actually occurs, then LR—or any successor-in-interest— shall have a priority lien on the Sale Assets that is senior to that of any holder of a Claim or Interest in the Case. Such priority lien (the "Sale Assets Lien") shall secure a claim of LR—or any successor-in-interest—not to exceed $41,102,897.75, plus the U.S. Trustee Fee Sum (defined below), if any, for the Court-approved sums actually expended by LR—or any successor-in-interest—for the acquisition of the Sale Assets and specifically comprised of: (a) the $39,600,000 cash purchase price paid by LR to the Debtor and approved by the Court in Paragraphs E and 19 of the Sale Approval Order; (b) the $350,000 breakup fee paid from the Sale Proceeds to RREF II Palm House, LLC pursuant to the Paragraph 17 of the Sale Approval Order; (c) the $450,000 commission to broker Cushman & Wakefield U.S., Inc. paid by LR pursuant to Paragraph 19 of the Sale Approval Order and Section 6.2 of the Asset Purchase Agreement incorporated therein; (d) the $250,000 paid by LR to the Debtor for repayment of the Debtor's advance to the Town of Palm Beach and Town of Palm Beach Code Enforcement Board on behalf of LR pursuant to Paragraph 18 of the Sale Approval Order; (e) the $175,452.65 in 2018 Palm Beach County real estate taxes owed by the Debtor and paid by LR on behalf of the Debtor pursuant to Paragraph 19 of the Sale Approval Order and Section 6.2 of the Asset Purchase Agreement incorporated therein; (f) the $277,445.10 in recording fees and transfer taxes paid by LR to the Palm Beach County Clerk of the Circuit Court pursuant to Paragraph 19 of the

Sale Approval Order and Section 6.2 of the Asset Purchase Agreement incorporated therein; and (g) any United States Trustee's fees owed by the Debtor and paid from the Sale Proceeds (the "U.S. Trustee Fee Sum") pursuant to Paragraph 19 of the Sale Approval Order and Section 6.1 of the Asset Purchase Agreement incorporated therein (the "Sale Assets Claim"). The Sale Assets Claim and the Sale Assets Lien, as well as any future right by LR—or any successor-in-interest—to ever receive the Sale Assets Claim and the Sale Assets Lien, shall be satisfied, settled, released, extinguished, and discharged upon the earlier of the following events:

a. the entry of an order by the United States Supreme Court rejecting or denying any petition for certiorari regarding any decision of the United States Court of Appeals for the Eleventh Circuit affirming the Sale Approval Order in Case No. 19-11402;

b. the entry of an order by the United States Supreme Court that, following the grant of a writ of certiorari, dismisses the Supreme Court case involving the review of any decision of the United States Court of Appeals for the Eleventh Circuit affirming the Sale Approval Order in Case No. 19-11402;

c. the entry of an order by the United States Supreme Court affirming the Sale Approval

Order and/or affirming any lower court order affirming the Sale Approval Order;

d. the entry of an order by the United States Supreme Court reversing the Sale Approval Order but otherwise determining that, pursuant to 11 U.S.C. § 363(m), such reversal does not affect the validity of the sale approved in the Sale Approval Order;

e. the time upon which the Sale Approval Order reaches the status of not being subject to any further review on appeal or writ of certiorari; or

f. the repayment of the Sale Assets Claim.

Such satisfaction, settlement, release, extinguishment, and discharge of the Sale Assets Claim and the Sale Assets Lien shall occur within seven days of the Bankruptcy Court determining the occurrence of one of the foregoing events.

11. In the event the Sale Approval Order is reversed by mandate of the United States Court of Appeals for the Eleventh Circuit or the United States Supreme Court **and** either court also mandates that the Sale Assets be re-conveyed back to the Debor or that title to the Sale Assets shall otherwise re-vest back in the Debtor **and** such re-conveyance/re-vesting actually occurs, then LR—or any successor-in-interest— shall also have the right to seek allowance of a Post-Confirmation Administrative

Claim arising from any funds reasonably expended by LR—or any successor-in-interest—to preserve, maintain, and develop the Sale Assets prior to any requirement to re-convey to, or re-vest the Sale Assets with, the Debtor.

12. The Debtor or Liquidating Trustee, as applicable, shall execute, file, or record any documents reasonably requested by LR to perfect or further evidence the Sale Assets Lien and the Sale Assets Claim.

13. The Debtor and/or Liquidating Trustee, as applicable, shall take all necessary action to prosecute/defend any challenges to, or appeals of, the Sale Approval Order and this Court's March 1, 2019 *Order: (I) Granting Expedited Motion Seeking Approval of Procedures for Amended Sale Process and (II) Scheduling Final Hearing to Consider Approval of Sale Assets Free and Clear of Liens, Claims and Encumbrances* [ECF No. 619].

14. Any and all executory contracts and unexpired leases—other than any director and officer insurance policy—not assumed by the Debtor on or before the entry of this Confirmation Order are **REJECTED**.

15. **Any party to a contract or lease rejected pursuant to this Order with a claim for rejection damages ("Rejection Claim") may file with the Court a claim within thirty (30) days from the date of entry of this Confirmation Order and serve a copy on the Debtor's counsel ("Rejection Claim Bar Date"). The Debtor shall have thirty (30) days from receipt thereof to file an objection to such Rejection Claim. ANY**

CREDITOR WHO FAILS TO FILE A REJECTION CLAIM ON OR BEFORE THE REJECTION CLAIM BAR DATE WILL BE FOREVER BARRED, ESTOPPED, AND ENJOINED FROM ASSERTING SUCH REJECTION CLAIM AGAINST THE DEBTOR, THE LIQUIDATING TRUST, THE LIQUIDATING TRUSTEE, OR THE ESTATE, AND THE DEBTOR, THE LIQUIDATING TRUST, THE LIQUIDATING TRUSTEE, THE ESTATE, AND PROPERTY OF THE SAME WILL BE FOREVER DISCHARGED FROM ANY AND ALL INDEBTEDNESS OR LIABILITY WITH RESPECT TO SUCH CLAIM. IN ADDITION, THE HOLDER OF SUCH REJECTION CLAIM SHALL NOT BE PERMITTED TO PARTICIPATE IN ANY DISTRIBUTION IN THE CHAPTER 11 CASES ON ACCOUNT OF SUCH CLAIM, OR RECEIVE FURTHER NOTICES REGARDING SUCH CLAIM.

16. Such documents that may be necessary or appropriate to effectuate the Plan are **APPROVED**.

17. ***Cary Glickstein, the Liquidating Trustee, and all professionals employed by the Debtor, the Liquidating Trustee, or the Liquidating Trust, shall neither have nor incur any liability to any person or entity, excluding the Debtor, Liquidating Trust, and Liquidating Trustee, for any and all claims and causes of action arising on or after the Petition Date up through the time this case is closed, involving or relating to any act taken or omitted to be taken in connection with, or related to, formulating, negotiating, preparing, disseminating, implementing, or administering the sale of property of the estate, or any***

other contract, instrument, release or other agreement or document created or entered into in connection with the Plan or any other post-petition act taken or omitted to be taken in connection with or in contemplation of the administration of the estate; provided, however, that the foregoing provisions of this paragraph shall have no effect on the liability of any person that results from any such act or omission that is determined to have constituted gross negligence, willful misconduct, or fraud; provided further, that nothing contained herein shall preclude any governmental entity from pursuing a criminal, police or regulatory action against any entity.

18. ***All entities who have held, hold, or may hold Claims against or Equity Interests in the Debtor are, with respect to any such Claims or Equity Interests, permanently, enjoined from and after the Confirmation Date from taking any of the following actions (other than actions to enforce any rights or obligations under the Plan): (i) commencing, conducting, or continuing in any manner, directly or indirectly, any suit, action or other proceeding of any kind (including any proceeding in a judicial, arbitral, administrative or other forum, or any discovery) against or affecting, the Sale Assets, the Liquidating Trustee, or the Liquidating Trust or any of its property, including property of the Estate transferred to the Liquidating Trust pursuant to the Plan; (ii) enforcing, levying, attaching (including any prejudgment attachment), collecting or otherwise recovering by any manner or means, whether directly or indirectly, any judgment, award, decree, order, or encumbrance of any kind against the Sale Assets,***

Liquidating Trustee, the Liquidating Trust or any of its property, including property of the Estate transferred to the Liquidating Trust pursuant to the Plan; (iii) asserting any right of setoff, directly or indirectly, against any obligation due the Debtor, or any of its property, except as contemplated or allowed by the Plan; (iv) creating, perfecting, or otherwise enforcing in any manner, directly or indirectly, any encumbrance or lien of any kind against the Sale Assets, Liquidating Trustee, or the Liquidating Trust or any of its property, including property of the Estate transferred to the Liquidating Trust pursuant to the Plan; (v) acting or proceeding in any manner, in any place whatsoever, that does not conform to or comply with the provisions of the Plan; provided, however, that nothing herein shall constitute a waiver of any rights or defenses of such persons with respect to such actions, provided, further, that this injunction shall neither bar any entity from asserting any defense in an action commenced by or on behalf of the Debtor, nor prohibit any entity from asserting any right expressly preserved or contemplated by the Plan; provided, furthermore, that nothing contained herein shall preclude the IRS from pursuing an action against any entity, or preclude any governmental entity from pursuing a criminal, police or regulatory action against any entity.

Nothing herein shall be construed as enjoining any party's prosecution or defense of any appeal of any order entered by the Court in this Case.

19. The Court confirms, for the avoidance of doubt, that: (a) the Plan does not convey any Claims or Causes of

Action belonging to any holder of an Allowed Unsecured Claim and not belonging to the Debtor's estate against anyone other than i) the Debtor, (ii) Cary Glickstein, (iii) the Liquidating Trustee, and (iv) the professionals employed by the Debtor, the Liquidating Trust, and the Liquidating Trustee (the "Creditor Claims") to the Liquidating Trust; and (b) nothing in the Plan, as confirmed, is intended to or shall limit the rights of any holder of an Allowed Unsecured Claim to pursue any of the Creditor Claims and Causes of Action, except as provided in paragraphs 10.5 and 10.6 of the Plan against (i) the Debtor, (ii) Cary Glickstein, (iii) the Liquidating Trustee, (iv) the professionals employed by the Debtor, the Liquidating Trust, and the Liquidating Trustee, (v) the Sale Assets, (vi) property of the Debtor, and (vii) property of the Liquidating Trustee.

20. Unless otherwise provided in the Plan or this Order, all injunctions or stays provided for in the Bankruptcy Case under sections 105 or 362 of the Bankruptcy Code or otherwise, and extant on the Confirmation Date, shall remain in full force and effect until the Effective Date.

21. The Debtor and Liquidation Trustee are authorized to enter into settlements with respect to any asserted claims, including allowed claims, upon such reasonable terms and conditions as may be approved by the Bankruptcy Court.

22. The Bankruptcy Court shall retain exclusive jurisdiction to enforce all injunctions or stays provided for under the Plan.

23. This Order is in recordable form, and shall be accepted by any filing or recording officer or authority of any applicable governmental unit for filing and recording purposes without further or additional orders, certifications, or other supporting documents.

24. Pursuant to Section 1146(a) of the Bankruptcy Code, the issuance, transfer or exchange of notes or equity securities under the Plan, creation of any mortgage, deed of trust or other security interest, the making or assignment of any lease or sublease, or the making or delivery of any instrument of transfer under, in furtherance of, or in connection with the Plan, any merger agreements or agreements of consolidation, deeds, bills of sale or assignments, or any other documents executed in connection with any of the transactions contemplated by the Plan, and related loan and security documents, shall not be subject to any stamp, real estate transfer, mortgage recording, or other similar tax.

25. Under 11 U.S.C. §§ 105(a) and 1142 of the Bankruptcy Code, the Court shall retain exclusive jurisdiction and venue over all matters arising out of arising in, or related to the above-captioned bankruptcy case and the Plan to the fullest extent permitted by law, including, without limitation, jurisdiction and venue to determine all discovery, controversies, or disputes arising under or in connection with: (a) any agreement or transaction approved by the Court during the Bankruptcy Case; (b) any prior Order entered by the Court during the Bankruptcy Case, and furthermore, the matters set forth in Article XII of the Plan.

26. After the Effective Date, the Debtor or the Liquidating Trustee, as applicable, shall file with the Bankruptcy Court quarterly reports in a form reasonably acceptable to the United States Trustee. On and after the Effective Date, the Debtor or the Liquidating, as applicable, shall remain obligated to pay 28 U.S.C. § 1930 quarterly fees to the United States Trustee until the earliest of this case being closed, dismissed, or converted to a case under Chapter 7 of the Bankruptcy Code.

27. Notwithstanding Federal Rule of Bankruptcy Procedure 3020(e), this Order shall be immediately effective, subject to the terms and conditions of the Plan.

28. The Debtor shall serve a copy of this Order upon all parties entitled to notice thereof pursuant to Federal Rule of Bankruptcy Procedure 3020(c), and Local Rules 2002-1(c)(11) and 3020-1(D), and shall file a certificate of service with the Court.

Submitted by:

Philip J. Landau, Esq.
Shraiberg, Landau & Page, P.A.
Attorneys for the Debtor
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Philip J. Landau is directed to serve copies of this Order upon all interested parties and to file a certificate of service with the Court.

EXHIBIT A

In re: 160 Royal Palm, LLC
Case No. 18-19441
Chapter 11

After an evidentiary hearing held on February 10, 2020 to consider, *inter alia*, confirmation of the *Debtor's Third Amended Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* [ECF No. 1469], the Court made the following findings of fact and conclusions of law on the record:

The Court has before it for confirmation the Debtor's Third Amended Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code, which is in the docket at ECF number 1469.

The Court previously approved the disclosure statement by order entered at ECF number 975. Although the disclosure statement related to a prior filed first amended plan, the Court ruled that the modifications represented by the third amended plan now before the Court for confirmation, as compared with the first amended plan, did not require additional disclosure or solicitation. The Court incorporates in full here its order entered at ECF number 1495.

In support of confirmation, among other evidence, the debtor offered the affidavit of Cary Glickstein, in the form required by the Court, which is filed at ECF number 1531, the certificate on acceptance of the plan and tabulation of

ballots, in the form required by the Court, which is filed at ECF number 1528, and the corrected affidavit of Michelle Clapp, which is filed at ECF number 1535.

KK-PB Financial, LLC filed the only timely objections to confirmation. You can find these in the docket at ECF numbers 1327 and 1516. For ease of reference, I will refer to KK-PB Financial, LLC as "KK".

The plan is straightforward. The debtor was the owner of a partially re-constructed hotel project in Palm Beach, Florida. The Court previously approved the sale of the hotel project. Under the plan, the proceeds of the sale will be distributed to pay administrative expenses and to pay creditors consistent with the priority required under the Bankruptcy Code.

Class 1 of the plan includes the secured claims of specified parties. These claims are to be paid in full. Class 1 is not impaired. As the Court previously ruled in the order entered at ECF number 1495, the modifications presented in the third amended plan do not result in impairment of this class.

Class 2 of the plan includes the claims of the Town of Palm Beach. Those claims are to be paid pursuant to a settlement previously approved by the Court. Class 2 is impaired, and so the Town of Palm Beach is entitled to vote on the plan. The Town voted in favor of confirmation. Class 2 is an impaired accepting class.

Class 3 of the plan includes all unsecured claims against the bankruptcy estate. The holders of claims in Class 3

will receive their *pro rata* share of the proceeds from sale of the hotel, after payment of administrative expenses and payment to holders of allowed claims in Classes 1 and 2. Class 3 is impaired, and so holders of claims in Class 3 are entitled to vote on the plan. The holders of claims in Class 3 voted overwhelmingly in favor of confirmation. Class 3 is an impaired accepting class.

Class 4 of the plan includes all equity interests in the debtor. The debtor's equity will receive no distribution under the plan and is therefore deemed to have rejected the plan.

The plan provides for a disputed claims fund to act as a reserve for claims that are subject to objections yet to be ruled on by this Court. The plan provides for a liquidating trust, under a form of trust agreement to be approved by the Court, consistent with typical practice, to oversee pursuit of litigation on behalf of the estate after confirmation, and to administer distributions to creditors, among other things.

The Court set a deadline for the filing of written objections to confirmation of the debtor's plan, and a second objection deadline to permit objections to changes represented in the plan now presented for confirmation as compared with the first amended plan. Any objection not raised in a timely filed written objection was waived.

KK filed two timely written objections to confirmation of the plan.

In its second written objection filed at ECF number 1516, KK incorporated arguments it made in ECF number 1481. The Count overrules these objections for the reasons stated in the order entered at ECF number 1495. The Court's analysis in that prior order is bolstered by the Eleventh Circuit's recent issuance of its mandate on the appeal from the sale order, which was affirmed, and the Eleventh Circuit's denial of a motion to stay the estimation order pending appeal, which motion KK filed specifically to prevent confirmation of the plan today.

KK argues that the plan does not satisfy the feasibility requirement of section 1129(a)(11) of the Bankruptcy Code. Section 1129(a)(11) states: "Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan."

In reviewing the feasibility of a plan, the Court considers whether it offers a reasonable prospect of success and is workable. A possibility of failure is not fatal. In cases where the reorganized debtor will continue in operation post-confirmation, the Court considers whether the reorganized debtor will be able to generate sufficient cash flow to make the future payments contemplated under the plan. In this case, we have a liquidating plan. Meeting the feasibility standard is less complex in the case of a liquidating plan. Congress used the word "likely" in section 1129(a)(11). The question for the Court is whether confirmation of the debtor's plan is likely to be followed by further liquidation that is not already contemplated in the plan.

KK argues that the plan does not contemplate the possibility that the debtor could lose either of two pending appeals and that failure to address the possibility of loss in either appeal causes the plan to be infeasible.

KK appealed this Court's orders approving the sale procedure and the sale of the debtor's hotel property. Those rulings were affirmed by the District Court and by the Eleventh Circuit. KK's motion for panel rehearing by the Eleventh Circuit was denied. The Eleventh Circuit issued its mandate on February 6, 2020. Even if KK further challenges the sale procedure and sale orders, by petition for writ of certiorari to the Supreme Court, based on the merits of its arguments it is extremely unlikely it will be successful. And, because the plan effectuates the approved sale of the hotel property and release of the sale proceeds, the sale is protected under section 363(m). KK's continued challenge to the sale, if any, would have no impact on the feasibility of the plan.

KK alleged a claim in the approximate amount of $39.6 million, secured by a mortgage on the debtor's hotel property. In February 2019, the Court entered an order estimating that claim under section 502(c) as an unsecured claim in the amount of $0. The effect of that ruling is that KK's mortgage claim is disallowed.

KK appealed the Court's estimation order by notice of appeal filed in March 2019. In November 2019, the District Court certified the appeal to the Eleventh Circuit. In addition, KK asked the Eleventh Circuit to accept a direct appeal. The Eleventh Circuit recently denied the request

for direct appeal and dismissed the appeal for lack of jurisdiction. It appears that the appeal from the estimation order is returned to the District Court. In any case, there has been no substantive ruling on the appeal from the estimation order. Motions for stay pending appeal, including at the Eleventh Circuit, have been denied.

KK argues that the debtor's plan does no contemplate the possibility that it will be successful in overturning the estimation order and that the plan is thus not feasible. This argument turns on its head black letter law with regard to the enforceability of final orders and judgments, the requirement to obtain a stay pending appeal, and mootness of appeals.

This Court's estimation order is a final order subject to appeal as of right, as KK itself acknowledged in its own appeal. As with any final order or judgment, the estimation order is enforceable unless it is overturned or stayed. The estimation order is not stayed. Thus, the estimation order is enforceable.

Consistent with the estimation order, the debtor's plan makes no provision for treatment of KK's disallowed mortgage claim. There is no need for the debtor to reserve for a claim that was disallowed by an un-stayed final order. If the debtor's plan is confirmed, it likely will be substantially consummated soon thereafter, with distributions made to administrative claimants and holders of properly allowed claims. The appeal from the estimation order would then become moot as it would no longer be possible to fashion a remedy that would not materially harm other creditors

For the applicable mootness standard, I refer the parties to decisions of the Eleventh Circuit, In re Club Associates, a 1992 decision reported at 956 F.2d 1065. In re Holywell Corporation, a 1990 decision reported at 911 F.2d 1539, which was reversed on other grounds.

The fact that KK's appeal from the estimation order may become moot if the debtor's plan is confirmed is the risk it took by not obtaining a stay of the estimation order. The burden is on the party seeking such a stay and KK has not satisfied that burden to the satisfaction of this Court or the Eleventh Circuit, which denied the motion for stay on the merits before dismissing the appeal. To rule as KK requests would eliminate the need to even seek a stay pending appeal.

Even if KK's appeal from the estimation order was somehow not subject to dismissal as moot upon substantial consummation of the debtor's plan, the existence of that appeal does not cause the plan to be infeasible. As the Court previously ruled in its order denying KK's motion for stay pending appeal, in the docket at ECF number 1056, KK has only a negligible likelihood of success in the appeal. Thus, it is not likely -- for the transcript I am stressing the word "likely" -- that confirmation of the debtor's plan would be followed by the need for further liquidation, as contemplated by section 1129(a)(11).

KK also suggests that the plan is not feasible because "there is no indication that LR intends to instruct the escrow agent to release the funds on the confirmation date." By the term "funds" KK refers to the net sale

proceeds from the sale of the hotel. But section 7.4 of the plan explicitly provides that the sale proceeds will be released by any escrow agent on the confirmation date and the debtor and LR are required to execute and transmit all necessary documents to accomplish this. LR confirmed on the record today that it is bound by the terms of the plan. In addition, the debtor filed at ECF number 1557 a letter from counsel for LR confirming that LR will join the debtor and execute a joint instruction to the escrow agent for disbursement of funds held in escrow.

In its second written objection, at ECF number 1516, KK argues that at a hearing on December 20, 2019 this Court recognized that if the estimation order was reversed on appeal and/or KK's disallowed mortgage claim was somehow reinstated, that mortgage claim would be a disputed claim and potentially an allowed claim under the debtor's current plan. Having reviewed the transcript from that hearing, the Court said no such thing. Indeed, on December 20, 2019 the debtor had yet to file the plan set for confirmation today, so no one could have been commenting on the plan now under consideration. In any case, applicable law does not require the plan to treat KK's disallowed mortgage claim as a disputed claim, as the Court has several times ruled, most recently in the order at ECF number 1495.

Nor does the debtor's description of the risks associated with KK's appeal from the estimation order, outlined at pages 28 to 29 of the disclosure statement, support KK's conclusion that success in its appeal from the estimation order would necessitate a reserve for its disallowed

mortgage claim. In the disclosure statement, the debtor sets out the worst case scenario for creditors, not taking into account the mootness standard, which is black letter law. The risks presented by the superseded first amended plan, which did not provide for immediate distribution of sale proceeds, are no longer present in the current plan, which does. Not surprisingly, the current plan explicitly provides that KK's disallowed mortgage claim does not have the benefit of a reserve. KK cites the relevant provisions of the plan in paragraph 4 of its objection at ECF number 1516. It is not necessary for the debtor to give KK the benefit of a stay pending appeal that it has not in fact obtained.

Somewhat disingenuously, KK seeks what it calls clarification that "if the Estimation Order is reversed and/or the Mortgage Claim is reinstated, KK would not be barred from seeking recovery of the Mortgage Claim." KK is not entitled to any such ruling. The mootness of the appeal from the estimation order is exactly the risk KK undertook by not obtaining a stay pending appeal.

It should be noted that certain of KK's arguments on this issue are based on a faulty premise. Even if an order was entered reversing this Court's ruling in the estimation order, the mortgage claim would not be reinstated as it suggests. KK's mortgage claim would still be subject to pending objections which would then be determined by a new evidentiary hearing. But, this would happen only if the debtor's plan was not confirmed and substantially consummated prior to reversal; otherwise, the claim objection procedure would also be moot.

As an alternative to its feasibility objection, KK asks the Court to defer confirmation of the plan until the appeal from the estimation order runs its course. In support of this argument, KK cites In re DeMarco, a decision of the Bankruptcy Court in the Middle District of Florida issued in 2000. You can find the decision reported at 258 Bankruptcy Reporter 30.

In DeMarco, the Bankruptcy Court had issued an order disallowing a secured claim of the IRS. The IRS appealed that ruling to the District Court, but did not obtain a stay pending appeal. From the decision, it appears that the IRS did not even seek such a stay. The chapter 13 debtor then sought to confirm a plan that expressly provided that the IRS would receive nothing and that the debtor would retain the property free of the claimed lien of the IRS. The Bankruptcy Court determined that it would defer confirmation of the debtor's chapter 13 plan because confirmation of the plan might cause the IRS's appeal to become moot, leaving the IRS with no remedy. The effect of the ruling in DeMarco is to give the IRS the benefit of a stay pending appeal that it neither requested nor proved.

The DeMarco decision is an outlier, for obvious reasons. For an analysis in line with the overwhelming majority, I direct the parties to Judge Walrath's well-reasoned decision in In re Washington Mutual, Inc., from 2011, which you can find at 461 Bankruptcy Reporter 200. Judge Walrath later vacated part of this decision addressing a separate matter. Her discussion of this issue is at pages 217 to 220. As Judge Walrath points out, the objecting party could avoid the mootness problem by seeking a

stay pending appeal. As she says, to rule otherwise would preclude the court from dealing with confirmation of any plan contrary to an objecting party's position on appeal, possibly stalling the bankruptcy case indefinitely. This outcome would be inconsistent with the basic tenet that an un-stayed final order or judgment is enforceable in spite of an appeal. You can find another useful analysis of this issue in In re Sabine Oil & Gas Corp,, a 2016 decision reported at 548 Bankruptcy Reporter 674.

For these reasons, the Court will not defer confirmation so KK can proceed with its appeal from the estimation order.

In its original objection to confirmation, filed at ECF number 1240, KK raised a number of objections to language contained in sections 10.5 and 10.6 of the first amended plan. The amended objection, filed at ECF number 1327, replaced ECF number 1240 and substantially narrows the arguments. While KK mentions section 10.5 in its amended objection, the language it points to appears only in section 10.6 and relates only to the provisions in that section. KK's amended objection makes no argument against implementation of section 10.5 of the plan now before the Court, and any objection to section 10.5 is thus waived.

The entirety of KK's substantive objection to section 10.6 is contained in paragraph 20 of ECF number 1327. KK states that "[t]he language in Section 10.6 of the Plan, deeming receipt of a distribution to be consent, is impermissible. Conditioning a creditor's right to a distribution on the creditor giving up rights pursuant to third party releases

violates fundamental principles of the Bankruptcy Code." In the plan now before the Court, the debtor removed the deemed consent language, and so this objection is moot. Even so, the Court notes that the two decisions cited by KK, Zenith and Conseco, do not apply in this case. Those decisions address releases of non-debtor parties. In contrast, the release at issue here is aimed only at protecting those involved in administration of this case and ensuring the sanctity of the confirmed plan as the sole source of recovery for claims.

Section 10.5 contains an exculpation provision aimed at protecting the debtor's sole manager, the post-confirmation liquidating trustee, and professionals employed by the estate and the liquidating trusts from claims of the debtor's creditors, carving out claims resulting from gross negligence, willful misconduct and fraud, Such an exculpation provision is typical in chapter 11 plans, including liquidating plans such as the one presented today, and has been routinely approved. The provisions addressed to the liquidating trustee and the liquidating trust itself typically are also reflected in the liquidating trust agreement that becomes effective after confirmation of the plan. In both instances, the exclusion of claims resulting from gross negligence, willful misconduct, and fraud is widely considered appropriate. Again, I note that KK's two operative written objections do not even address this provision.

Section 10.6 is even less troubling in its scope. It applies to .all holders of claims against and equity interests in the debtor "with respect to any such Claims or Equity

Interests." Section 10.6 prohibits holders of claims and equity interests from pursuing the liquidating trustee or the liquidating trust, by any means, in connection with any claim against or equity interest in the bankruptcy estate. The effect of section 10.6 is to limit holders of claims and equity interests to the treatment that is provided in the plan. They are not permitted to try to get a leg up on fellow creditors by suing the liquidating trustee, attempting to place a lien on the liquidating trust, or taking similar action. Section 10.6 explicitly preserves any defenses any holder of a claim or equity interest may have to actions brought on behalf of the estate or liquidating trust, and also explicitly preserves the right of the IRS to pursue other parties and the rights of governmental entities to pursue criminal, police and regulatory actions.

There is nothing unusual about section 10.6, Indeed, it reflects the state of the law regarding the effect of confirmation of a chapter 11 plan. Upon confirmation, the Plan has the effect of a contract binding on all parties, supplanting the legal rights that governed prior to confirmation. Creditors may look only to enforcement of the plan and are not permitted to pursue the debtor and its officers, a reorganized debtor or, as in this case, a liquidating trust, other than as provided in the plan itself. Section 10.6 is tailored to achieve this end. Other than KK's objection to language that was removed from section 10.6, now moot, there were no objections to section 10.6, and so any potential objections were waived.

The debtor may include relevant language in a proposed confirmation order mirroring sections 10.5 and 10.6. In

addition, the liquidating trust agreement may include language relevant to the trust and the trustee.

There are no other timely objections to confirmation. So that the record is clear, the Court overrules all objections to confirmation of the plan.

Certain of the EB-5 creditors filed motions for clarification, at ECF numbers 1514, 1519, and 1530. The Court confirms that the plan does not in any way convey to the liquidating trust any claims or causes of action, owned by creditors of the debtor, against parties other than the debtor or the bankruptcy estate, or in any way impair the ability of creditors of the debtor to pursue such independent claims, whether already pending or which later may be pursued, against anyone excluding only the specific persons and entities listed in sections 10.5 and 10.6 of the plan. It is the Court's view that the provisions of the plan are clear and that the motions for clarifications are not necessary, but it appears that the movants are concerned about potential arguments made by their adversaries elsewhere, and so the Court grants the motions for clarification at ECF numbers 1514, 1519, and 1530. The debtor may include appropriate language in the proposed confirmation order, granting these motions for the reasons stated on the record.

Having reviewed the evidence admitted in support of confirmation, and in light of the provisions of the plan, the Court finds that both the plan and the debtor, as proponent of the plan, have complied with all relevant provisions of the Bankruptcy Code and the plan is confirmed.

In a separate motion filed at ECF number 1522, the debtor asks the Court to waive the 14-day stay that otherwise applies to an order confirming a chapter 11 plan under Bankruptcy Rule 3020(e). Among other things, the debtor argues that, via meritless litigation in state court, KK is trying to obtain control of the Debtor, and that KK will continue its no-holds-barred litigation of every action taken by the debtor in this case, to the material detriment of rightful creditors in this case.

KK responded to the motion at ECF number 1548. Among other things, KK argues that to make the confirmation order immediately effective would permit the debtor to consummate the plan quickly, thus potentially denying KK the ability to seek a stay of the confirmation order and thereby preserve an appeal of the confirmation order.

The Court points out that any move by a creditor, such as KK, to obtain control over the debtor in an attempt to improve the possibility of payment on its claim would be a violation of the automatic stay in this case. In addition, once the plan becomes effective, any such action likely would be a violation of the injunctive provisions of the plan and confirmation order. Such actions could subject the creditor to contempt of court and sanctions, which could include damages and potentially punitive damages.

The Court's determination whether to shorten or eliminate the stay under Bankruptcy Rule 3020(e) is subject to the exercise of discretion. There is little case law on the issue. In considering the motion, the Court considers all relevant circumstances, which in this case includes the entire course of the case.

Based on presentations at today's hearing, and taking into account the entire history of this case, it appears likely that KK is pursuing litigation in state court against the debtor's sole equity owner for no valid reason other than to interfere with consummation of the plans confirmed today. The equity owner likely has no assets, and so there is no other good reason to pursue an action against it. It is unclear whether KK could obtain relevant relief in that particular state court action in the near term. But the debtor's concerns are well founded. KK's history of extreme litigiousness in this case, objecting to and appealing nearly every substantive ruling requested by the debtor no matter the weakness of KK's positions, was to a great extent aimed at delay and causing increased cost to the estate and creditors. The substantial possibility of further mischief by KK, to the material detriment of the debtor's actual creditors, militates in favor of making the confirmation order immediately effective. Taking into account all the circumstances of this case, equity does not support further delaying consummation of the plan. The Court will exercise its discretion under Bankruptcy Rule 3020(e) to eliminate the 14-day stay of the confirmation order. The motion at ECF number 1522 will be granted. The debtor may address this relief in the proposed confirmation order.

As is the custom in this district and elsewhere, the debtor may present a proposed confirmation order. The proposed order may include typical findings of fact consistent with the evidence admitted in support of confirmation. The Court will review the proposed order to ensure it is appropriate. The proposed confirmation order should

specifically incorporate the findings of fact and conclusions of law made by the Court on the record today. My courtroom deputy will provide counsel for the debtor with a document, to be attached to the confirmation order as an exhibit, that includes the entire oral ruling made today.

The debtor filed a proposed confirmation order at ECF number 1539. Although the debtor is not required to tender the proposed confirmation order in exactly that form, I have reviewed that form of order and it is acceptable. I note that the ECF reference for Mr. Glickstein's affidavit, on page 2, should be changed to 1531. The debtor may also wish to update the reference to the appeal of the estimation order, on page 7, as the Eleventh Circuit recently dismissed that appeal after denying a stay lending appeal on the merits.

KK's request that the debtor be required to provide it with a copy of the proposed confirmation order before submitting it to the Count is denied. While a chapter 11 debtor typically provides a proposed confirmation order to the Court, that order when entered is an order of the Court and it is up to the Court to determine what is and is not included. It is not necessary, or customary, for a proposed confirmation order to be provided to an objecting party whose objections have all been overruled. This ruling likely has limited effect, as the debtor has in fact filed a form of proposed order at ECF number 1539, and the final form of proposed order is likely to be very similar.

Congratulations to the debtor. This is a milestone in your effort to provide the best recovery possible to creditors in this case.

APPENDIX D — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, WEST PALM BEACH DIVISION, FILED FEBRUARY 26, 2019

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA,
WEST PALM BEACH DIVISION

February 25, 2019, Decided

CASE NO. 18-19441-EPK,
CHAPTER 11

In re:

160 ROYAL PALM, LLC,

Debtor.

ORDER ESTIMATING THE CLAIM OF KK-PB FINANCIAL, LLC AND DENYING ABILITY TO CREDIT BID

This matter came before the Court for evidentiary hearing on January 8, 2019, January 11, 2019, February 15, 2019, and February 19, 2019 upon the *Debtor's Motion to Limit Credit Bids with Respect to Sale of Substantially All of Its Assets* [ECF No. 103] filed by 160 Royal Palm, LLC (the "Debtor"); *Secured Creditor KK-PB Financial, LLC's Motion to Estimate Claim for Purposes of Credit Bidding Pursuant to 11 U.S.C. §§ 502(c) and 363(k)* [ECF No. 133] filed by KK-PB Financial, LLC ("KK-PB"); and

Secured Creditor KK-PB Financial, LLC's Motion to (I) Modify and Terminate Automatic Stay; or (II) Dismiss Chapter 11 Proceeding [ECF No. 69] filed by KK-PB. On February 22, 2019, the Court heard closing arguments from the Debtor, the EB-5 Investors,[1] and KK-PB, and made findings of fact and conclusions of law on the record as follows:

> The Debtor in this case, 160 Royal Palm, LLC, is the owner of a hotel construction project located in the Town of Palm Beach. The hotel is locally known as the Palm House Hotel.
>
> The Palm House Hotel has a tortured history. During its reconstruction, ownership of the hotel property has transferred more than once. No owner has been able to complete the project. It sits dormant and neglected.
>
> It is alleged that the person most recently in control of the Debtor, Robert Matthews, along with others, used the hotel project to solicit investments from foreign nationals under the EB-5 program, enticing investments of more than $500,000 each from dozens of foreign investors based on the promise

1. The EB-5 Investors referred to in this order are the creditors who filed claims 3-1 through 65-1 in this chapter 11 case. Another group of EB-5 claimants, identified in ECF No. 172 as the Other Palm House Investors, filed an objection to KK-PB's motion to estimate claim but did not participate in the evidentiary hearings or closing argument in these matters.

of eased acquisition of green cards. Those EB-5 Investors, many of whom have filed proofs of claim in this case and have been represented in this particular matter, allege that a substantial portion of the funds they invested ended up flowing through the Debtor and that some of those funds were used as part of the consideration for a 2013 sale of the equity interest in the Debtor. The EB-5 Investors have initiated a suit in the District Court here in West Palm Beach against a number of parties involved in this alleged scheme, including the Debtor in this case and KK-PB Financial, LLC. KK-PB Financial is solely owned and controlled by Glenn Straub, the former equity owner of the Debtor. I mention these parties in particular as they are the focus of the matters now before the Court.

KK-PB Financial claims a mortgage on the hotel property. KK-PB initiated a foreclosure action in the Florida state courts several years ago. That action was followed by the appointment of a receiver. Eventually, the state court not only authorized the receiver to file a bankruptcy petition, but also authorized that receiver to supplant the Debtor's management. Thus, the Debtor in this case is managed by the former state court receiver, Mr. Cary Glickstein.

The stated purpose of this bankruptcy case is to facilitate a controlled liquidation of the Debtor's

assets. The Debtor filed this case to avoid the loss of all potential equity in its property to the foreclosing creditor. The goal of this case is to preserve that value for the Debtor's other creditors including, in particular, the EB-5 Investors.

The Debtor sought offers for the hotel property. The Debtor entered into a stalking horse contract with a significant player in the real estate market. The Debtor then filed appropriate motions for approval of an auction procedure, thereby permitting the possibility of higher and better offers for the property. The stalking horse contract presents a tight timeline for the Debtor, requiring that the auction and sale hearing be accomplished in short order. Thus, the matters now before the Court require resolution as quickly as reasonably possible.

KK-PB Financial claims a mortgage on the property. Generally speaking, the holder of a lien securing an allowed claim has the right to credit bid its claim in connection with any sale of its collateral proposed under section 363 of the Bankruptcy Code. KK-PB seeks to exercise that right in connection with the Debtor's proposed auction sale of the hotel property. The Debtor opposes KK-PB's request to credit bid in connection with any sale.

In furtherance of its request to credit bid in connection with the proposed auction of the hotel property, KK-PB filed a motion to estimate its claim under section 502(c). That is in the record at ECF number 133. There are responses at ECF numbers 166, 169 and 174.[2]

Section 502(c) permits the Court to estimate any claim for purposes of allowance where the liquidation of the claim would unduly delay the administration of the case. The concept behind this provision is that in many circumstances during a bankruptcy case there is not sufficient time to permit extensive discovery and an extended evidentiary hearing to determine a disputed claim. This case presents exactly such a circumstance. This Debtor has a limited time to maintain its rights under a significant stalking horse contract for the sale of substantially all of the assets of the estate. The issues raised in connection with KK-PB's secured claim in this case could require discovery done over a period of months and an extended trial. It is appropriate to use the claim estimation process under section 502(c) to address allowance or disallowance of KK-PB's claim. Not only is it important to determine whether KK-PB will be permitted to credit bid on the hotel property, but whether KK-PB has

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2. In addition, the Court considered the response filed by the Debtor at ECF No. 163.

a valid lien may impact its right to object to the proposed sale under section 363.

Estimation under section 502(c) can be for any purpose in connection with a bankruptcy case. Indeed, the text of that provision states that estimation is for purposes of allowance. In many instances, the estimated claim is the claim for all purposes including eventual distribution in the case. In its motion, KK-PB asks the Court to estimate its secured claim solely for purposes of the auction sale of the hotel property. In its response, the Debtor asks not only that the Court estimate KK-PB's claim for purposes of participating in the auction, but that the Court estimate KK-PB's claim at $0 generally, for all purposes in this case.

It is useful to quote from Collier on Bankruptcy on this issue. Collier is the leading treatise on bankruptcy law.

"Section 502(c) expressly states that estimation is 'for purpose of allowance under this section'; thus, an estimation under section 502(c) generally should result in an allowed claim for all purposes in the bankruptcy case. Most subsections of section 502 refer to claims allowed under subsection (a), (b) or (c). Moreover, the section addressing reconsideration of claims, section 502(j), does not use the term 'estimated claim' but refers instead to a 'claim that has

been allowed or disallowed.' Indeed, nowhere in the Bankruptcy Code is a distinction drawn between claims allowed under subsection 502(a), (b) or (c). Accordingly, a claim allowed under section 502(c) is on equal footing with other claims allowed under section 502."

Later in the same part of the treatise, it is stated that "[a]s an order applying section 502(c) allows or disallows a claim for all purposes in the case, principles of finality might apply, in appropriate circumstances, for the same reasons those principles apply to other orders allowing or disallowing claims under section 502."

In reading these two quotations from Collier I have left out internal quotations and citations. I should note that in a footnote Collier points out that 28 USC section 157(b)(2)(B) and Bankruptcy Rule 3018 both contemplate estimation of claims solely for purposes of confirmation of a chapter 11 plan, but that these are the only instances where estimation for a limited purpose is contemplated in the relevant statutes and rules.

Thus, the Court's estimation of the claim of KK-PB Financial today will result in estimation of that claim for all purposes in this bankruptcy case. That will include plan confirmation and distributions.

The case law in this circuit and elsewhere provides this Court with wide discretion in how to approach estimation from a procedural standpoint. This Court's procedural approach to estimation is subject to appeal on an abuse of discretion standard. Many times an estimation proceeding will focus on documentary evidence, deposition transcripts, and affidavits, and the Court will provide only a truncated hearing. In this case, after consultation with the parties, the Court set four full days of evidentiary presentation followed by an additional half day for closing argument. This has been a particularly fulsome presentation in the context of claim estimation. There were hundreds of proposed exhibits and a number of fact and expert witnesses. It is hard to imagine how an evidentiary hearing on an objection to KK-PB's claim, outside the estimation process, would have been more detailed.

In addition to responding to KK-PB's motion to estimate, the Debtor filed a motion seeking a ruling from the Court that KK-PB should not be permitted to credit bid in connection with the auction of the hotel property. That is on file at ECF number 103. KK-PB responded at ECF number 164. The Debtor's motion is in effect the mirror image of KK-PB's motion to estimate. The Debtor argues that KK-PB's claim is subject to dispute for a variety reasons and also that, even if KK-PB's claim would be

allowed as a secured claim, the Court should prohibit KK-PB from credit bidding for cause.

Finally, KK-PB filed a motion for relief from the automatic stay, seeking to continue with its foreclosure action in state court or, in the alternative, for dismissal of this case. That motion can be found at ECF number 69. The Debtor responded at ECF number 102.

All three of these matters, KK-PB's motion to estimate, the Debtor's motion to limit credit bidding, and KK-PB's motion for relief from stay or dismissal, were heard together in a concurrent evidentiary hearing. The Court has considered the evidence admitted during the evidentiary hearing. The Court has considered the arguments of the parties.

Let me begin with KK-PB's motion for relief from stay or for dismissal of the case. KK-PB's goal is to return to state court to complete its foreclosure action. At the evidentiary hearing, KK-PB presented nearly no evidence to support the substantive allegations in this motion nor did counsel point to any such evidence in closing argument. But even if KK-PB's secured claim is allowed in full, there is not cause for relief from stay at this time. The Debtor filed this case in an attempt to realize value for all of its creditors, not just for KK-PB. The Debtor has diligently pursued that sale, entering into a

contract with a stalking horse purchaser. This is an appropriate use of chapter 11. The Court has approved a procedure for the proposed sale consistent with regular practice in this circuit. There is a very short timeline for that sale. The Debtor and other creditors should have the chance to see if the proposed auction will result in a potential distribution to creditors in this case. There is little or no harm to KK-PB under the circumstances, even if it does indeed have an allowed secured claim in this case. The potential harm to other creditors is significant. KK-PB's motion for relief from stay or for dismissal at ECF number 69 will be denied.

I will address the motion to estimate and the motion to limit credit bidding in tandem as the issues relevant to those motions are the same. It is useful first to describe the transaction that lies at the center of the present dispute.

As of 2013, 160 Royal Palm, LLC, the Debtor in this case, was owned and controlled by Glenn Straub. Mr. Straub was the sole member of 160 Royal Palm and was also its manager. Mr. Straub negotiated a sale of the hotel property to Robert Matthews. The proposed sale was documented by a traditional purchase and sale agreement. The Debtor was to sell its real property to an entity formed for the purpose of the transaction. The buyer was to be beneficially owned solely by Mr. Matthews. The negotiated

purchase price was $36 million. Of this sum, 25% was to be paid in cash and the remaining amount was to take the form of seller financing secured by a mortgage on the hotel property. In other words, Mr. Straub agreed to sell the hotel property and the consideration was to be partly cash and partly a mortgage obligation.

The 2013 purchase and sale agreement was amended twice. The first amendment is most important for purposes of these matters. In the first amendment, the parties agreed that the purchaser could have the option of acquiring the membership interest in 160 Royal Palm, LLC rather than purchase the real property directly. In the end, the purchaser exercised this option. Thus, rather than a real estate transaction, the transaction took the form of the sale of an equity interest. But the parties preserved all of the other aspects of the transaction as originally contemplated. In order to facilitate the seller financing, it was necessary for Mr. Straub to rely on an entity separate from 160 Royal Palm. Thus, as a result of the closing, the loan obligations were payable to KK-PB Financial, LLC which also received the benefit of the mortgage given by 160 Royal Palm.

The transaction closed at the end of August 2013; specifically, August 30, 2013. The end result of the transaction is that 160 Royal Palm remained the title owner to the hotel property,

but Mr. Straub sold his 100% membership interest in 160 Royal Palm to an entity beneficially owned by and controlled by Mr. Matthews. The cash portion of the purchase price, after adjustments, was paid directly to Mr. Straub. 160 Royal Palm itself gave a note in favor of KK-PB Financial, secured by a mortgage on the hotel property.

There was a delay in the payment of the cash portion of the purchase price to be distributed to Mr. Straub. In the motion to limit credit bidding the Debtor seems to make a point of this, but the evidence does not support any negative inference. Likewise, the evidence supports the conclusion that some of the funds paid to Mr. Straub, about $2.6 million, are traceable to funds provided by the EB-5 Investors. But the evidence admitted in these matters would not permit the Court to conclude that Mr. Straub knew this was the case at the time.

There was another, more important delay, following the August 2013 closing. The mortgage given by 160 Royal Palm, securing the hotel property in favor of KK-PB Financial, was not recorded until the following March 2014, about 7 months after the closing. The Debtor argues that this delay was intentional. The Debtor alleges that Mr. Straub was assisting Mr. Matthews and others in misleading potential EB-5 Investors by purposely causing the

mortgage not to be recorded so that EB-5 Investors would not know of the existing lien on the hotel property prior to their investments. The Debtor alleges that more than $10 million was invested by EB-5 Investors between the August 2013 closing and the recording of the mortgage in March 2014. Mr. Straub's counsel at the time, Craig Galle, testified credibly that Mr. Straub always intended the mortgage to be recorded immediately, that they were surprised it had not been recorded, and that the failure was due to counsel for Mr. Matthews who also acted as escrow agent for the closing. Based on the evidence admitted in these matters, the Court cannot conclude that Mr. Straub had any bad intent in connection with the delay in recording of the mortgage.

Let me transition now to the claim of KK-PB as presented in this matter. The evidence includes the original purchase and sale agreement and two amendments, and the loan documents including the note and mortgage. KK-PB also offered the testimony of Craig Galle who represented Mr. Straub and KK-PB Financial in connection with the sale transaction and the seller financing. Mr. Galle gave a thorough and credible history of the transaction. Through the testimony of Salvatore Spano, KK-PB also addressed in detail the calculation of its claim as presented in its proof of claim, which was also admitted. There is some dispute as

to whether KK-PB's claim as presented in its proof of claim, in the amount of $39,684,844.73, should be reduced by a sum equal to the broker's commission reimbursement included in the claim tabulation and by the amount of one payment on the note. These subtractions would reduce the claim to $37,548,635.30. In the end, it will not matter whether KK-PB's claim as presented is $39.6 million or $37.5 million as will be apparent further along in this ruling.

The Debtor presented a number of arguments in support of its request that KK-PB's claim be deemed unsecured, at a minimum, to that the claim be estimated at $0 and therefore be entitled to no distribution in this case, at the most extreme.

In its motion, the Debtor begins by arguing that the note and mortgage held by KK-PB are not enforceable as there was a complete lack of consideration. The Debtor points out that the Debtor, 160 Royal Palm, undertook the obligation represented by the note and gave a mortgage on its property but that the Debtor, as an entity, received nothing in the transaction. But this argument presents a fundamental misunderstanding of the transaction. At the time of the transaction, 160 Royal Palm was a single purpose entity owned solely by Mr. Straub and controlled by him. For tax purposes, it was a flow-through

entity. Likewise, the purchaser for the hotel property under the original purchase and sale agreement was another single purpose entity beneficially owned solely by Mr. Matthews. The purchase and sale agreement, as initially formed, represented a sale of Mr. Straub's indirect ownership of the hotel property to Mr. Matthews. There is nothing unusual about this structure. Commercial real estate transactions often involve entities formed particularly for purposes of the subject property. That the final transaction took the form of a purchase and sale of the membership interest in 160 Royal Palm is also not unusual. Indeed, in years past, before the State of Florida became wise to this practice and relevant laws were amended, it was common for parties to structure real estate transactions as equity sales in order to try to avoid payment of obligations to the state. But even now there are valid reasons to prefer an equity transaction, not the least of which is preservation of development rights held by the title owner of property. The Debtor argues that in the end the transaction looks like a leveraged buyout, where the target, the Debtor, ended up with all the baggage in the form of new debt obligations and a lien on its assets but itself received no benefit other than a new owner. Indeed, this is true. But that does not mean there is a complete lack of consideration. That is because the consideration flows between the real parties in interest, Mr. Matthews and Mr.

Straub. That the transaction could be subject to challenge for other reasons does not mean that there was a complete lack of consideration.

In its motion, the Debtor also argues that the note and mortgage are not enforceable as they are unconscionable. The Debtor argues that Mr. Straub was effectively on both sides of the transaction, because he was the owner of 160 Royal Palm the moment before it agreed to give him, indirectly through KK-PB, a note and mortgage for which 160 Royal Palm would receive nothing. But to say that this structure represents unconscionable and thus unenforceable obligations would be to say that all leveraged buyouts are automatically subject to challenge for this reason. The selling equity owners are always the ones that cause the company to undertake the weight for payment for their shares. The Court is not aware of any case law ruling solely on this basis and the Debtor did not cite any.

The Debtor argues that the claim of KK-PB Financial is subject to equitable subordination as permitted by section 510 of the Bankruptcy Code. Under 11th Circuit precedent, a claim is subject to equitable subordination if the claimant was involved in inequitable conduct, that conduct resulted in injury to other creditors or conferred an unfair advantage on the creditor, and subordination of the claim

is otherwise consistent with the Bankruptcy Code. The inequitable conduct need not be directly related to acquisition of the creditor's claim. Equitable subordination applies only to that portion of a claim necessary to remedy the wrong identified by the Court.

The first step in presenting an equitable subordination case is to prove that the creditor in question acted in a manner that requires the Court to exercise its equity powers. In support of this request for relief, the Debtor argues that Mr. Straub was effectively on both sides of the August 2013 transaction, causing 160 Royal Palm to pay him, and to become obligated on a loan payable to his entity, for Mr. Straub's own equity interest in 160 Royal Palm. But, again, this argument ignores the purpose of the transaction, which was effectively to transfer control of the hotel property from Mr. Straub to Mr. Matthews, which was accomplished. The Debtor argues that Mr. Straub knew that 160 Royal Palm would be unable to service the debt owed to KK-PB. There is no evidence to support the conclusion that Mr. Straub had that subjective understanding at the time of the closing. Indeed, based on the evidence admitted here, he expected 160 Royal Palm to raise capital to complete the project, pay KK-PB's obligation, and make a success of the hotel. The Debtor argues that Mr. Straub assisted Mr. Matthews in misleading EB-5

Investors by purposely delaying recording of the mortgage. As I noted a few minutes ago, the evidence submitted in this matter does not support that conclusion. Lastly, the Debtor argues that Mr. Straub had an unusually close relationship with Mia Matthews, Mr. Matthews spouse, and that Mr. Straub provided loans and assistance to Mr. Matthews that should cause the Court to infer that Mr. Straub was somehow Mr. Matthews conspirator in all regards. The evidence admitted in this matter does not support that conclusion. Without additional proof of inequitable conduct on the part of Mr. Straub, there can be no equitable subordination.

This is an appropriate point to comment on Mr. Straub's credibility as a witness in this matter. I was admitted to the bar more than 28 years ago. Since that time, as a lawyer, as a client representative, and as a judge, I have seen hundreds of evidentiary hearings and trials. It is possible that I have forgotten a noteworthy witness or two. But scanning all of those hearings, I cannot remember a witness who was more evasive than Mr. Straub. Mr. Straub himself and also his counsel suggest that Mr. Straub's approach to answering questions is a symptom of several infirmities. Yet this is not consistent with my experience in watching Mr. Straub testify in this matter. When it suited him, Mr. Straub could answer yes or no and provide a concise explanation. When it did not

suit him, Mr. Straub would ramble on at length, seemingly addressing a question other than the one asked. If this was not an intentional act on Mr. Straub's part, it is hard to imagine how he could have capacity to manage the many significant commercial real estate investments that he is solely responsible for overseeing. The Court does not believe that Mr. Straub is unable to answer direct questions. It is clear that Mr. Straub is unwilling to answer questions that he perceives are not to his advantage to answer.

But does Mr. Straub's lack of credibility before this Court mean that he was involved in a conspiracy with Mr. Matthews and others including, among other things, causing the KK-PB mortgage not to be recorded for seven months? Am I suspicious of Mr. Straub's actions in this matter? Yes, I am. Is that suspicion sufficient to support the Debtor's theories based in equity in this matter? No, it is not. There needs to be concrete evidence to support the Debtor's claims based in equity, and the Debtor did not meet its burden on those claims.

Let me be clear that the Court makes no finding that Mr. Straub and/or KK-PB did not have any involvement in the fraudulent scheme described by the Debtor and the EB-5 Investors. The Court is only finding that in the context of this claim estimation procedure, which involves solely the determination of the claim of KK-PB

in this bankruptcy case, that the Court has not seen sufficient evidence to support the Debtor's claims in this regard. Today's ruling will have no impact on the ability of the Debtor or the EB-5 Investors or anyone else to pursue their claims against KK-PB, Mr. Straub, and others.

The Debtor has waived the re-characterization argument and so the Court need not address it.

Now we get to the meatiest parts of the Debtor's argument, the components on which the parties spent the most time in the evidentiary hearing and at closing argument.

The Debtor argues that both the note obligation undertaken by the Debtor in favor of KKPB Financial in August 2013, and the later recording of the mortgage in favor of KK-PB Financial in March 2014, constitute fraudulent transfers that are avoidable under applicable law.

Under section 544(b)(1) of the Bankruptcy Code, the Debtor may avoid any transfer of an interest of the Debtor in property or any obligation incurred by the Debtor that is voidable under applicable law by a creditor holding an unsecured claim. For applicable law, the Debtor looks to Chapter 726 of the Florida Statutes. The Debtor relies on the actual fraud provisions and both constructive fraud provisions provided under Florida law.

Before getting to the merits of any fraudulent transfer claim, the Court must address the question of whether any fraudulent transfer action could be pursued by the Debtor in this bankruptcy case against KK-PB. KK-PB argues that this bankruptcy case was commenced more than 4 years after both the August 2013 closing, at which the note was given by the Debtor to KK-PB, and after the mortgage was recorded in March 2014. KK-PB argues that, under applicable non-bankruptcy law, no claim could be pursued by any creditor as fraudulent transfer claims would be barred by the statute of limitations, and so the Debtor cannot pursue any such claim under section 544.

The Debtor raises two arguments in response to this. Both arguments have merit.

First, the EB-5 creditors filed their initial complaint in the District Court against various parties, including KK-PB, on November 14, 2016. That complaint was filed within 4 years after both of the transfers at issue in this case. That initial complaint included fraudulent transfer counts, but none of those fraudulent transfer counts focus on transfers made by 160 Royal Palm. The EB-5 creditors' initial complaint included claims against KK-PB based in unjust enrichment and requested an equitable lien on the hotel property ahead of the rights of KK-PB. In the Court's view, that initial complaint

did not contain sufficient factual allegations to support a fraudulent transfer claim against KK-PB to avoid the note obligation undertaken by 160 Royal Palm in August 2013. However, the factual allegations contained in the EB-5 creditors initial complaint are in fact sufficient to form the basis of a fraudulent transfer claim against KK-PB seeking to set aside the late-recorded mortgage as a fraudulent transfer. Under Rule 15, the EB-5 Investors have the right to amend the District Court complaint to state a claim based on the facts already stated in the original complaint and arising under a different legal theory, and any such claim would relate back to the original complaint. Thus, the EB-5 Investors could pursue a fraudulent transfer claim identical to one posed by the Debtor here, seeking to set aside the late-recorded mortgage given by 160 Royal Palm to KK-PB Financial. From the evidence admitted here, it appears that the EB-5 Investors are in fact pursuing such an amended complaint.

Any fraudulent transfer claim based on the Debtor becoming obligated on the mortgage to KK-PB is now property of the estate in this bankruptcy case. That claim can only be pursued by the Debtor. The Debtor could seek to intervene as a plaintiff in the District Court action, solely to pursue that claim, and then ask the District Court to refer the matter to this Court consistent with 28 U.S.C. section 157 and the standing order of reference in this District.

I need to address here a specific point of procedure that may be relevant to this analysis. A claim under section 544 is a core matter subject to bankruptcy jurisdiction under 28 USC section 1334. When an action is pending in a United States District Court and that action falls under federal bankruptcy jurisdiction, such an action is not subject to removal to a bankruptcy court as the relevant removal statute applies only to removal of state actions. Instead, the action is subject to referral to the applicable bankruptcy court. There is no time limit on such referral. Thus, the Debtor here is free to seek to have the relevant claims in the EB-5 District Court action specifically referred to this Court.

In summary, the EB-5 Investors brought a claim against KK-PB within 4 years after the transfers at issue. That claim states facts that would support the same fraudulent transfer claim presented by the Debtor here with regard to avoidance of KK-PB's mortgage. The EB-5 creditors' complaint could be amended to present a timely fraudulent transfer theory based on the same facts and that fraudulent transfer claim would relate back to the filing of the EB-5 creditors' original complaint. And the resulting claim is property of the estate in this case which only the Debtor can pursue. That claim could then be referred to this Court consistent with federal law and the standing

order of reference in this district. While this sounds like a novel analysis, let me point out that this is in fact the purpose of section 544. There are creditors who could indeed pursue a timely fraudulent transfer claim against KK-PB and Congress has given that claim to the Debtor to pursue for the benefit of all of its creditors. This outcome is exactly what was intended by Congress.

But the Debtor has another, also valid, legal argument to support the timeliness of its fraudulent transfer challenges to KK-PB's secured claim, not just the mortgage but also the note obligation. Section 544(b)(1) requires only that there be an unsecured creditor who could pursue a claim under otherwise applicable law. Certain creditors are given special rights to pursue fraudulent transfer claims for an extended period of time. In this case, the SEC is a creditor of the estate. The evidence includes judicial notice of proof of claim number 71 filed by the SEC as well as judicial notice of the District Court complaint filed by the SEC in which the Debtor is named as a relief defendant. In addition, the evidence in this case indicates that a significant amount of EB-5 Investor funds ended up with the Debtor, both before the closing in August 2013 and after that date including before and after the late recording of KKPB's mortgage. In the SEC's complaint filed in the District Court, the SEC

seeks, among other things, disgorgement of all ill-gotten gains as a result of defrauding the EB-5 creditors as well as civil penalties. The Court notes that the SEC's claim is allowed in this bankruptcy case, as no objection to claim has been filed to date. The Court also notes that the SEC is listed in the Debtor's schedules as a creditor holding an unsecured claim against the estate. As the Debtor points out, the SEC has the benefit of an extended statute of limitations for pursuit of fraudulent transfer claims. For the SEC, the period is 6 years, under 28 USC sections 2415(a) and 2416. There is precedent for extension of the fraudulent transfer period for the benefit of the bankruptcy estate in cases where the United States is a creditor. I refer the parties to *Tronox Inc. v. Kerr McGee Corp. (In re Tronox Inc.)*, 503 B.R. 239, 272-75 (Bankr. S.D.N.Y. 2013) and to *Mukamal v. Citibank N.A. (In re Kipnis)*, 555 B.R. 877 (Bankr. S.D. Fla. 2016). Based on the evidence admitted in this matter, the SEC is both an existing creditor at the time of each of the alleged transfers and also a future creditor, and thus may take advantage of claims under Florida Statutes sections 726.105 and 726.106.

Having ruled that it is possible for the Debtor to bring timely fraudulent transfer claims against KK-PB, it is appropriate to address the merits of the fraudulent transfer claims.

The first step in any claim under section 544(b)(1) is that there must be a creditor with a claim allowable in this case that could also pursue a claim under relevant fraudulent transfer law. This is typically referred to as a triggering creditor. The amount of the claim of a triggering creditor is not relevant. The claim amount need not bear any relation to the transfer a Debtor or trustee seeks to avoid. For claims under section 726.105, the creditor need not have been a creditor at the time of the transfer as that provision includes both existing and future creditors from the point of view of the time of transfer. For claims under section 726.106, the creditor must have been a creditor at the time of the transfer. Section 726.105 includes claims based in actual intent to defraud and constructive fraud claims tied to unreasonably small assets or intent to incur debts beyond the ability to pay. Section 726.106 includes constructive fraud claims based on insolvency of the Debtor.

The Debtor offered evidence to support the conclusion that there are more than one creditor that may support relief under each of these provisions. These creditors include the EB-5 Investors, whose claims arose partly prior to each of the transfer dates and partly after those dates. These creditors also include the SEC and several parties who provided goods and services to the hotel project. Thus, there

are multiple creditors who have claims that are allowable in this case. It does not matter that those claims have not been finally allowed. The fact that they are facially allowable at least in part is sufficient for purposes of these matters.

Thus, the Debtor met its initial burden of showing that there are in fact creditors of this estate who could bring claims under Florida Statutes section 726.105 and 726.106. The Court must now address the elements of those claims.

Before moving to a more detailed analysis of the fraudulent transfer concerns, it is important to note again the context of this ruling. The Court is not now ruling on a fraudulent transfer claim brought by the Debtor against KK-PB by way of complaint. The Court is ruling on a motion to estimate KK-PB's claim and the Debtor has objected to estimation of that claim, in part, on the ground that KK-PB's note and/or the mortgage securing it are subject to avoidance. It is not necessary here for the Court to determine conclusively that there is an absolute right to success on the part of the estate or on the part of KK-PB for that matter. Indeed, there is substantial case law to the effect that, for purposes of estimation, the Court may consider the probability of success or failure of components of a claim or challenges to a claim in estimating the claim.

Let's start with the Debtor's actual fraud argument, based in Florida Statutes section 726.105. The Debtor points to so-called badges of fraud that the Debtor believes support the conclusion that Mr. Straub, controlling 160 Royal Palm up to the moment prior to the closing, had actual intent to defraud creditors of 160 Royal Palm when he caused that entity to become obligated to KK-PB and grant a mortgage to KK-PB. The Debtor argues that Mr. Straub was an insider of the Debtor. This appears obvious as a technical matter, but in the context of the transaction is not significant. The Debtor adds that there was no consideration for the obligations undertaken by KK-PB, but as the Court has already pointed out this is not the case. The Debtor argues that the Debtor became insolvent as a result of the obligation to KK-PB. The Court agrees that this is the case, and will analyze this in more detail in a moment. But insolvency, by itself, does not indicate actual fraud. Finally, the Debtor argues that Mr. Straub caused the mortgage to be concealed for 7 months, misleading EB-5 Investors who invested more than $10 million. But the evidence admitted in this matter does not lead the Court to conclude that Mr. Straub concealed the mortgage. To the contrary, it was in Mr. Straub's best interest that the mortgage be recorded immediately and it appears that this is what his counsel intended. The evidence admitted here does not support a finding that

Mr. Straub caused 160 Royal Palm to give the note and mortgage with actual intent to defraud creditors.

For constructive fraud claims under either section 726.105 or 726.106, the transfer must be made without receiving a reasonably equivalent value. The Debtor itself received nothing at all from the transaction. No value at all was received by the Debtor on account of the note or the mortgage. This element is met.

KK-PB argues that the Court should collapse the overall transaction, taking into account that control over the hotel property was transferred in consideration of the note and mortgage obtained by KK-PB. It is not appropriate to approach the fraudulent transfer analysis in this case from that vantage point. At the time of the closing, and again when the mortgage was recorded, the Debtor had significant obligations to others that were then unpaid and that remain unpaid now. To collapse the Debtor with its equity owner for purposes of determining reasonably equivalent value would be to the detriment of those creditors. The Court is not aware of any case law in this or any other circuit that would permit determination of reasonably equivalent value as KK-PB argues under these circumstances.

The final element for relief under the constructive fraud provision of section 726.105 requires the Debtor to show either that at the time of the transfers the Debtor was engaged or was about to engage in a business for which its remaining assets were unreasonably small in relation to its business or the Debtor intended to incur or reasonably should have believed that it would incur debts beyond its ability to pay as they became due. In this case, the evidence supports both conclusions.

The question of whether a Debtor's remaining assets are unreasonably small, in this context, typically requires an analysis of whether at the time of the transfer there was a likelihood of future insolvency or inability to pay debts as they become due. Based on the evidence admitted in this matter, on the date of the closing, it was very likely that the Debtor would be unable to pay the debt service to KK-PB. Indeed, it is undisputed that the Debtor was able to make only 3 payments to KK-PB before defaulting. For the same reason, the evidence supports the conclusion that the Debtor should reasonably have believed that it would be unable to pay KK-PB's note obligation, which was its largest ongoing payment obligation. The recording of KK-PB's mortgage only increased the Debtor's financial stress by making it less likely the Debtor could obtain additional capital. Thus all of the elements for relief under section 726.105(1)(b) are satisfied in this case.

The final element for relief under section 726.106 is insolvency. The Debtor must either have been insolvent at the time of the transfers or was made insolvent by the transfers. The evidence admitted in this matter indicates that the Debtor was rendered insolvent by the note obligation to KK-PB entered into at the closing in August 2013, and the Debtor remained insolvent at the time the mortgage was recorded in March 2014.

In determining that the Debtor was rendered insolvent by the note obligation and remained insolvent at the time the mortgage was recorded, the Court has relied on expert testimony by Jeffrey Brown, an expert in valuation of hotel properties, and Marcie Bour, a forensic accountant, each offered by the Debtor. KK-PB did not offer contrary expert testimony.

Mr. Brown presented an extremely thorough analysis of the retrospective value of the hotel property on the relevant dates, based on both the income capitalization approach and the comparable sales approach. Mr. Brown's assumptions were reasonable and well supported and his analysis well presented, logical, and consistent with industry practice. KK-PB has suggested that, based on certain of Mr. Brown's testimony on cross-examination, that the Court should adjust Mr. Brown's calculations to reflect several modified assumptions. Based on Mr.

Brown's own testimony, those modifications would not be reasonable. The Court accepts Mr. Brown's opinions of value without modification.[3]

Ms. Bour was equally thorough. With only a few exceptions, Ms. Bour's assumptions were reasonable and well supported. Her analysis was well presented, logical, and consistent with industry practice.

Ms. Bour's discounting of the Debtor's liability to KK-PB is not appropriate under the law. When determining insolvency under Florida law for purposes of fraudulent transfer analysis, liabilities should be included consistent with the legal obligations of the Debtor at the time of valuation and not altered to reflect what alternative financing might be available to the Debtor. This adjustment results in an increase in the Debtor's liabilities on August 31, 2013 by about $6.9 million and on March 29, 2014 by about $6 million.

The Court also takes issue with Ms. Bour including as a liability of the Debtor as of

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3. KK-PB offered lay opinion testimony of Mr. Straub, and the Court also heard lay opinion testimony from Mr. Ryan Black, regarding the value of the Debtor's hotel property on relevant dates. The Court gave no weight to this testimony. Mr. Straub and Mr. Black lack the expertise of an appropriate expert witness, such as Mr. Brown. In addition, Mr. Straub's testimony suffered from apparent bias.

August 31, 2013 the sum shortly thereafter paid to Mr. Straub in cash as part of the purchase price for his equity interest in the Debtor. This was not a legal obligation of the Debtor and should not be included as the Debtor's liability. That the funds flowed through the Debtor makes no difference. This results in a decrease in the liabilities of the Debtor on that date by about $6.2 million.

Finally, the Court also takes issue with Ms. Bour including as an asset in her August 31, 2013 balance sheet a cash balance of about $2.6 million as the evidence shows that those funds were not assets of the Debtor but were parked with the Debtor for later payment to Mr. Straub as part of the equity sale transaction. This results in a decrease in assets of about $2.6 million on August 31, 2013.

KK-PB takes issue with the inclusion of about $832,000 for liens and obligations, about $8,900 for Van Linda Ironworks, and about $5.4 million for New Haven Contracting South, shown on Ms. Bour's August 31, 2013 balance sheet. Based on the evidence admitted in this matter, the Court finds these items are appropriate for inclusion in the solvency analysis. But even if they are not, and they are backed out of the calculation, the Debtor was woefully insolvent on August 31, 2013.

Similarly, KK-PB takes issue with the inclusion of about $832,000 for liens and obligations, about $11,700 for Van Linda Ironworks, about $2.2 million for New Haven Contracting South, about $536,000 for USREDA, about $2.975 million shown on the Debtor's books as retainage received, and about $7.63 million shown as advanced to Galle and Evans. Based on the evidence admitted in this matter, the Court finds all of these items are appropriate for inclusion in the solvency analysis. But even if they are not, the Debtor remained woefully insolvent on March 28, 2014 when the mortgage was recorded.

Thus, all the elements for relief under section 726.106(1) are satisfied in this case.

Under Florida statues section 726.109(4) a good faith transferee has certain rights equivalent to the value given to the Debtor. But here no value was given to the Debtor itself, and so KK-PB may not take advantage of the good faith defense. Again, as I noted a few minutes ago, given the circumstances of this case, in particular the existence of a number of creditors who would be harmed by such an analysis, the collapsing of the Debtor with its owner for purposes of this defense would not be appropriate. Because KK-PB is the initial transferee of the note and mortgage, it also does not have the benefit of the good faith defense under section 550 of the Bankruptcy Code.

As a result of these rulings, the note obligation would be avoidable under section 544 and the mortgage would also be avoidable under section 544 and would be recoverable for the estate under section 550.

I find that the evidence admitted in this matter proves these claims by a preponderance of the evidence. In other words, if this was a trial on the merits of a complaint presenting the fraudulent transfer claims under section 544, the Debtor would have won.

The result of this analysis is that the Court will estimate the claim of KK-PB, for all purposes in this bankruptcy case, as an unsecured claim and will estimate the claim amount as zero dollars. Because KK-PB has neither a lien nor an allowed claim, KK-PB is not permitted to credit bid under the explicit text of section 363(k). Thus, the Debtor's motion seeking an order prohibiting KK-PB from credit bidding will be granted.

The Debtor also asked the Court to deny KK-PB the right to credit bid under the "for cause" standard in section 363(k). The were two arguments in this regard. First, it was alleged that Mr. Straub committed bad acts and that this constitutes cause. Based on the evidence admitted in these matters, the Court is unable to make such a finding in this case. Second, it

was argued that allowing KK-PB to credit bid would chill bidding to the detriment of other creditors. I am aware that there is some case law suggesting that this would be sufficient to constitute cause under section 363(k). I do not agree with that case law. The Supreme Court has repeatedly ruled that state law lien rights are sacrosanct in bankruptcy matters except where Congress has explicitly provided otherwise. The ability of a secured creditor to protect its lien rights by bidding its own claim in a sale of its collateral is a central component of the rights of a lien holder. The credit bid right should be abrogated only under very unusual circumstances. To suggest that a sale process will be easier, more efficient, or more fruitful without one party bidding is simply not enough. This analysis is not necessary to the Court's ruling today, as the Court will grant the Debtor's motion to prohibit KK-PB from credit bidding for other reasons.

New Haven Construction responded at ECF number 169 noting that it holds a lien senior to that of KK-PB, in the approximate amount of $3.3 million, contrary to KK-PB's suggestion that it was in first position. It appears that KK-PB has since acquired that New Haven claim. The Court's ruling today has no impact on that New Haven claim, which appears to be a valid, secured claim that may have credit bid rights.

> For the foregoing reasons, the Court will grant the Debtor's motion to limit credit bidding, ECF number 103, and will enter an order prohibiting KK-PB from credit bidding its claim represented by proof of claim number 70-3 in any sale of the Debtor's hotel property and related assets. With regard to KK-PB's motion to estimate its claim at ECF No. 133 and the Debtor's response thereto, the Court will enter an order estimating the claim as an unsecured claim and estimating its amount as $0, for all purposes in this case. The Court will deny KKPB's motion for relief from stay or to dismiss this case, found at ECF No. 69. The Court will prepare its own orders.

In the motion to limit credit bidding, the Debtor also requested that Palm House Hotel, LLLP be denied any ability to credit bid in connection with the sale of the Debtor's hotel property and related assets. Palm House Hotel, LLLP was duly served with the motion and the notice of hearing and failed to respond. ECF No. 111. Thus, the Debtor's request to deny any credit bid rights of Palm House Hotel, LLLP will be granted.

For the forgoing reasons, the Court ORDERS and ADJUDGES as follows:

1. In light of *Secured Creditor KK-PB Financial, LLC's Motion to Estimate Claim for Purposes of Credit Bidding Pursuant to 11 U.S.C. §§ 502(c) and 363(k)* [ECF No. 133] and the *Debtor's Response in Opposition*

to KK-PB Financial, LLC's Motion to Estimate Claim for Purposes of Credit Bidding Pursuant to 11 U.S.C. §§ 502(c) and 363(k) [ECF No. 163], the claim of KK-PB Financial, LLC, represented by proof of claim 70-3 as the same may be amended, is estimated as an unsecured claim in the amount of $0.00 for all purposes in this chapter 11 case.

2. The *Debtor's Motion to Limit Credit Bids with Respect to Sale of Substantially All of Its Assets* [ECF No. 103] is GRANTED. KK-PB Financial, LLC, on account of its claim represented by proof of claim 70-3 as the same may be amended, and Palm House Hotel, LLLP, shall not be permitted to credit bid under 11 U.S.C. § 363(k) in connection with any sale of the Debtor's real property located at 160 Royal Palm Way, Palm Beach, Florida 33480, related assets, or any part thereof.

3. Nothing in this order shall be construed as a ruling by the Court with regard to proof of claim 72-1 filed by New Haven Contracting South, Inc., or affecting the rights, if any, of the holder of such claim to credit bid at any sale of the Debtor's assets in this case.

4. *Secured Creditor KK-PB Financial, LLC's Motion to (I) Modify and Terminate Automatic Stay; or (II) Dismiss Chapter 11 Proceeding* [ECF No. 69] is DENIED.

ORDERED in the Southern District of Florida on February 25, 2019.

/s/ Erik P. Kimball
Erik P. Kimball, Judge
United States Bankruptcy Court

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Copy to:

Philip J. Landau, Esq.

Philip J. Landau, Esq. is directed to serve a copy of this order on all appropriate parties and file a certificate of service.

APPENDIX E — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JANUARY 25, 2022

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-12361-AA

IN RE: KK-PB FINANCIAL, LLC,

Debtor.

KK-PB FINANCIAL, LLC,

Plaintiff-Appellant,

versus

160 ROYAL PALM, LLC,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

BEFORE: JORDAN, ROSENBAUM, and NEWSOM, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Appellant KK-PB Financial, LLC is DENIED.

APPENDIX F — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Article III

Section 1. 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.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[1]

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact,

1. This clause has been affected by the Eleventh Amendment.

with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

11 USC § 363

§ 363. Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title [*11 USCS § 552(b)*], whether existing before or after the commencement of a case under this title.

(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 [*11 USCS § 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 [*15 USCS § 18a(a)*] in the case of a transaction under this subsection, then—

(A) notwithstanding subsection (a) of such section [*15 USCS § 18a(a)*], 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 [*15 USCS § 18a(b)*],

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) [*15 USCS § 18a(a)*], unless such waiting period is extended—

(i) pursuant to subsection (e)(2) of such section [*15 USCS § 18(e)(2)*], in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section [*15 USCS § 18(g)(2)*] *;* 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 [*11 USCS § 721, 1108, 1183, 1184, 1203, 1204,* or *1304*] 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 au thorization 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.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section—

(1) in the case of a debtor that is a corporation or trust that is not a moneyed business, commercial corporation, or trust, only in accordance with nonbankruptcy law applicable to the transfer of property by a debtor that is such a corporation or trust; and

(2) only to the extent not inconsistent with any relief granted under subsection (c), (d), (e), or (f) of section 362 [*11 USCS § 362*].

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used , sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362 [*11 USCS § 362*]*).*

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

> **(1)** applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> **(2)** such entity consents;
>
> **(3)** such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> **(4)** such interest is in bona fide dispute; or
>
> **(5)** such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

(1) partition in kind of such property among the estate and such, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of

such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(l) Subject to the provisions of section 365 [*11 USCS § 365*], the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title [*11 USCS §§ 1101* et seq., *1201* et seq., or *1301* et seq.] may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(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.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(o) Notwithstanding subsection (f), if a person purchases any interest in a consumer credit transaction that is subject to the Truth in Lending Act or any interest in a consumer credit contract (as defined in *section 433.1 of title 16 of the Code of Federal R*egulations (January 1, 2004), as amended from time to time), and if such interest is purchased through a sale under this section, then such person shall remain subject to all claims and defenses that are related to such consumer credit transaction or such consumer credit contract, to the same extent as such person would be subject to such claims and defenses of the consumer had such interest been purchased at a sale not under this section.

(p) In any hearing under this section—

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

11 USC § 364

§ 364. Obtaining credit [Caution: See prospective amendment note below.]

(a) If the trustee is authorized to operate the business of the debtor under section 721, 1108, 1183, 1184, 1203, 1204, or 1304 of this title [11 USCS § 721, 1108, 1183, 1184, 1203, 1204, or 1304], unless the court orders otherwise, the trustee may obtain unsecured credit and incur unsecured debt in the ordinary course of business allowable under section 503(b)(1) of this title [11 USCS § 503(b)(1)] as an administrative expense.

(b) The court, after notice and a hearing, may authorize the trustee to obtain unsecured credit or to incur unsecured debt other than under subsection (a) of this section, allowable under section 503(b)(1) of this title [11 USCS § 503(b)(1)] as an administrative expense.

(c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title [11 USCS § 503(b)(1)] as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt—

> **(1)** with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title [11 USCS § 503(b) or 507(b)];
>
> **(2)** secured by a lien on property of the estate that is not otherwise subject to a lien; or

(3) secured by a junior lien on property of the estate that is subject to a lien.

(d)

(1) The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if—

(A) the trustee is unable to obtain such credit otherwise; and

(B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

(2) In any hearing under this subsection, the trustee has the burden of proof on the issue of adequate protection.

(e) The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

(f) Except with respect to an entity that is an underwriter as defined in section 1145(b) of this title [11 USCS § 1145(b)], section 5 of the Securities Act of 1933 [15 USCS § 77e], the Trust Indenture Act of 1939 [15 USCS §§ 77aaa et seq.], and any State or local law requiring registration for offer or sale of a security or registration or licensing of an issuer of, underwriter of, or broker or dealer in, a security does not apply to the offer or sale under this section of a security that is not an equity security.

11 USC § 502

§ 502. Allowance of claims or interests

(a) A claim or interest, proof of which is filed under section 501 of this title [*11 USCS § 501*], is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title [*11 USCS §§ 701* et seq.], objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

> **(1)** such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;
>
> **(2)** such claim is for unmatured interest;
>
> **(3)** if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;

(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title [11 USCS § 523(a)(5)];

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds—

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of—

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds—

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of—

(i) the date of the filing of the petition; or

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates;

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor; or

(9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) [*11 USCS § 726(a)*] or under the Federal Rules of Bankruptcy Procedure, except that—

(A) a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide; and

(B) in a case under chapter 13 [*11 USCS §§ 1301* et seq.], a claim of a governmental unit for a tax with respect to a return filed under section 1308 [*11 USCS § 1308*] shall be timely if the claim is filed on or before the date that is 60 days after the date on which such return was filed as required.

(C) [Deleted]

(c) There shall be estimated for purpose of allowance under this section—

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(2) any right to payment arising from a right to an equitable remedy for breach of performance.

(d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which

property is recoverable under section 542, 543, 550, or 553 of this title [*11 USCS § 542*, *543*, *550*, or *553*] or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title [*11 USCS § 522(f)*, *522(h)*, *544*, *545*, 547, *548*, *549*, or *724(a)*], unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title [*11 USCS § 522(i)*, *542*, *543*, *550*, or *553*].

(e)

(1) Notwithstanding subsections (a), (b) and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that—

(A) such creditor's claim against the estate is disallowed;

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or

(C) such entity asserts a right of subrogation to the rights of such creditor under section 509 of this title [*11 USCS § 509*].

(2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim had become fixed before the date of the filing of the petition.

(f) In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(g)

(1) A claim arising from the rejection, under section 365 of this title [11 USCS § 365] or under a plan under chapter 9, 11, 12, or 13 of this title [*11 USCS §§ 901* et seq., *1101* et seq., *1201* et seq., or *1301* et seq.], of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(2) A claim for damages calculated in accordance with section 562 [*11 USCS § 562*] shall be allowed under subsection (a), (b), or (c), or disallowed under subsection (d) or (e), as if such claim had arisen before the date of the filing of the petition.

(h) A claim arising from the recovery of property under section 522, 550, or 553 of this title [*11 USCS § 522*, *550*, or *553*] shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(i) A claim that does not arise until after the commencement of the case for a tax entitled to priority under section 507(a)(8) of this title [*11 USCS § 507(a)(8)*] shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on

account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

(k)

(1) The court, on the motion of the debtor and after a hearing, may reduce a claim filed under this section based in whole on an unsecured consumer debt by not more than 20 percent of the claim, if—

(A) the claim was filed by a creditor who unreasonably refused to negotiate a reasonable alternative repayment schedule proposed on behalf of the debtor by an approved nonprofit budget and credit counseling agency described in section 111 [*11 USCS § 111*];

(B) the offer of the debtor under subparagraph (A)—

(i) was made at least 60 days before the date of the filing of the petition; and

(ii) provided for payment of at least 60 percent of the amount of the debt over a period not to exceed the repayment period of the loan, or a reasonable extension thereof; and

(C) no part of the debt under the alternative repayment schedule is nondischargeable.

(2) The debtor shall have the burden of proving, by clear and convincing evidence, that—

(A) the creditor unreasonably refused to consider the debtor's proposal; and

(B) the proposed alternative repayment schedule was made prior to expiration of the 60- day period specified in paragraph (1)(B)(i).

Appendix F

11 USC § 506

§ 506. Determination of secured status

(a)

(1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title [*11 USCS § 553*], is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(2) If the debtor is an individual in a case under chapter 7 or 13 [*11 USCS §§ 701* et seq. or *1301* et seq.], such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired

for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless—

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title [*11 USCS § 502(b)(5)* or *502(e)*]; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title [*11 USCS § 501*].

11 USC § 1123

§ 1123. Contents of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—

(1) designate, subject to section 1122 of this title [*11 USCS § 1122*], classes of claims, other than claims of a kind specified in section 507(a)(2), 507(a)(3), or 507(a)(8) of this title [*11 USCS § 507(a)(2)*, *507(a)(3)*, or *507(a)(8)*], and classes of interests;

(2) specify any class of claims or interests that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's implementation, such as—

(A) retention by the debtor of all or any part of the property of the estate;

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to

in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

(6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, of a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends;

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee; and

(8) in a case in which the debtor is an individual, provide for the payment to creditors under the plan of all or such portion of earnings from

personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary for the execution of the plan.

(b) Subject to subsection (a) of this section, a plan may—

(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

(2) subject to section 365 of this title [11 USCS § 365], provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(3) provide for—

(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;

(5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and

(6) include any other appropriate provision not inconsistent with the applicable provisions of this title [11 USCS §§ 101 et seq.].

(c) In a case concerning an individual, a plan proposed by an entity other than the debtor may not provide for the use, sale, or lease of property exempted under section 522 of this title [*11 USCS § 522*], unless the debtor consents to such use, sale, or lease.

(d) Notwithstanding subsection (a) of this section and sections 506(b), 1129(a)(7), and 1129(b) of this title [*11 USCS §§ 506(b)*, *1129(a)(7)*, and *1129(b)*], if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

11 USC § 1141

§ 1141. Effect of confirmation

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)

> **(1)** Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title [*11 USCS § 502(g)*, *502(h)*, or *502(i)*], whether or not—

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title [*11 USCS § 501*];

(ii) such claim is allowed under section 502 of this title [*11 USCS § 502*]; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) A discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharge under section 523 of this title [11 USCS § 523].

(3) The confirmation of a plan does not discharge a debtor if—

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title [*11 USCS § 727(a)*] if the case were a case under chapter 7 of this title [*11 USCS §§ 701* et seq.].

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter [*11 USCS §§ 1101* et seq.].

(5) In a case in which the debtor is an individual—

(A) unless after notice and a hearing the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan;

(B) at any time after the confirmation of the plan, and after notice and a hearing, the court may grant a

discharge to the debtor who has not completed payments under the plan if—

(i) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 [*11 USCS §§ 701* et seq.] on such date;

(ii) modification of the plan under section 1127 [*11 USCS § 1127*] is not practicable; and

(iii) subparagraph (C) permits the court to grant a discharge; and

(C) the court may grant a discharge if, after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge, the court finds that there is no reasonable cause to believe that—

(i) section 522(q)(1) [*11 USCS § 522(q)(1)*] may be applicable to the debtor; and

(ii) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) [*11 USCS § 522(q)(1)(A)*] or liable for a debt of the kind described in section 522(q)(1)(B) [*11 USCS § 522(q)(1)(B)*];

and if the requirements of subparagraph (A) or (B) are met.

(6) Notwithstanding paragraph (1), the confirmation of a plan does not discharge a debtor that is a corporation from any debt—

(A) of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) [11 USCS § 523(a)] that is owed to a domestic governmental unit, or owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 [*31 USCS §§ 3721* et seq.] or any similar State statute; or

(B) for a tax or customs duty with respect to which the debtor—

(i) made a fraudulent return; or

(ii) willfully attempted in any manner to evade or to defeat such tax or such customs duty.

Appendix F

28 USC § 157

§ 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 [*28 USCS § 158*].

(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 [*11 USCS §§ 1101* et seq., *1201* et seq. or *1301* et seq.]

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 [*11 USCS §§ 1501* et seq.].

(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) [*28 USCS § 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 [*28 USCS § 158*].

(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.

Appendix F

28 USC § 158

§ 158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals[—]

> **(1)** from final judgments, orders, and decrees;
>
> **(2)** from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and
>
> **(3)** with leave of the court, from other interlocutory orders and decrees;

and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title [*28 USCS § 157*]. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)

> **(1)** The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to

hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that—

> **(A)** there are insufficient judicial resources available in the circuit; or
>
> **(B)** establishment of such service would result in undue delay or increased cost to parties in cases under title 11.

Not later than 90 days after making the finding, the judicial council shall submit to the Judicial Conference of the United States a report containing the factual basis of such finding.

(2)

> **(A)** A judicial council may reconsider, at any time, the finding described in paragraph (1).
>
> **(B)** On the request of a majority of the district judges in a circuit for which a bankruptcy appellate panel service is established under paragraph (1), made after the expiration of the 1-year period beginning on the date such service is established, the judicial council of the circuit shall determine whether a circumstance specified

in subparagraph (A) or (B) of such paragraph exists.

(C) On its own motion, after the expiration of the 3-year period beginning on the date a bankruptcy appellate panel service is established under paragraph (1), the judicial council of the circuit may determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(D) If the judicial council finds that either of such circumstances exists, the judicial council may provide for the completion of the appeals then pending before such service and the orderly termination of such service.

(3) Bankruptcy judges appointed under paragraph (1) shall be appointed and may be reappointed under such paragraph.

(4) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(5) An appeal to be heard under this subsection shall be heard by a panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title [*28 USCS § 152*].

(6) Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.

(c)

(1) Subject to subsections (b) and (d)(2), each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b) (1) unless—

(A) the appellant elects at the time of filing the appeal; or

(B) any other party elects, not later than 30 days after service of notice of the appeal, to have such appeal heard by the district court.

(2) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules [*USCS Court Rules, Bankruptcy Rules, Rule 8002*].

(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.

(2)

(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—

(i) the judgment, order, or decree involves a question of law as to which there is no

controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel—

(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A);

then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

(C) The parties may supplement the certification with a short statement of the basis for the certification.

(D) An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal.

(E) Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.

Appendix F

28 USC § 1291

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Appendix F

28 USC § 1334

§ 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)

> **(1)** Except with respect to a case under chapter 15 of title 11 [*11 USCS §§ 1501* et seq.], nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.
>
> **(2)** Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United

States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title [*28 USCS § 158(d)*, *1291*, or *1292*] or by the Supreme Court of the United States under section 1254 of this title [*28 USCS § 1254*]. Subsection (c) and this subsection shall not be construed to limit the applicability of the stay provided for by *section 362 of title 11, United States Code*, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction—

(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of *section 327 of title 11, United States Code* [*11 USCS § 327*], or rules relating to disclosure requirements under section 327 [*11 USCS § 327*].