No. 12-2639

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EL-SNPR NOTES HOLDINGS, LLC,

Creditor-Appellant,

v.

CASTLETON PLAZA, LP,

Debtor-Appellee.

Appeal from the United States Bankruptcy Court
Southern District of Indiana, Indianapolis Division (Case No. 11-01444-BHL-11)
The Honorable **Basil H. Lorch**, Bankruptcy Judge

Petition of Castleton Plaza, LP For Rehearing En Banc

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 12-2639

Short Caption: Castleton Plaza, LP, Debtor-Appellee - Appeal of EL-SNPR Notes Holdings, LLC

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Castleton Plaza, LP

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Taft Stettinius & Hollister LLP

(3) If the party or amicus is a corporation:

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Attorney's Signature: s/Paul T. Deignan Date: 2/28/2013

Attorney's Printed Name: Paul T. Deignan

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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Federal Rule of Appellate Procedure 35(b) Statement

Consideration by the full court is necessary because the Panel Opinion is contrary to the following decisions of the Supreme Court of the United States:

- *Conn. Nat'l Bank v. Germain*, 503 U.S. 249 (1992).

By construing 11 U.S.C. § 1129(b)(2)(B)(ii)[1] in a manner that ignores the clear and plain meaning of the statute and in a manner inconsistent with a comprehensive statutory scheme that balances the rights of creditors and debtors for the purpose of reorganization the Opinion eviscerates Chapter 11.

- *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship.*, 526 U.S. 434 (1999).

By concluding that only an auction can satisfy the requirement that the investment in a new-value plan be market tested, the Opinion disregards the Supreme Court's conclusion that market testing may include either an auction or the opportunity for creditors to propose a competing plan.

By concluding that the act of selecting the new owner of a reorganized debtor is property for purposes of the absolute priority rule, the Opinion disregards the Supreme Court's contrary conclusion.

- *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, ___ U.S. ___, 132 S. Ct. 2065 (2012).

By concluding that creditors are entitled to bid the value of their loans for the unencumbered equity in the reorganized debtor, the Opinion disregards the Supreme Court's interpretation of credit bidding.

[1] Unless otherwise noted, all statutory Section references are to 11 U.S.C. §§ 101—1531 (the "Bankruptcy Code").

Introduction

The Court should grant rehearing en banc to reaffirm the longstanding bankruptcy-law principle that the "absolute priority rule" does not apply when a debtor arranges for an infusion of new value by one who is not an equity holder, including when the new value comes from an insider. The Opinion, which will require a competitive auction in all such cases to determine what the new equity will be worth, is at odds with the text of the rule, recent Supreme Court decisions construing the rule and the intent of Congress. Unless vacated by the full Court, the Opinion will dramatically change Chapter 11 proceedings and essentially eliminate the opportunity to reorganize in bankruptcy for most businesses within this Circuit. And as the only Circuit Court thus far to have addressed this issue, this Court's ultimate pronouncement will undoubtedly have considerable influence in how this question is resolved nationally.

The purpose of Chapter 11 of the Bankruptcy Code is to allow business reorganizations pursuant to a plan which will pay creditors more than they would receive in a liquidation and where the requisite number of creditors agree. As recognized by the Supreme Court, "the two recognized policies underlying Chapter 11 . . . [are] preserving going concerns and maximizing property available to satisfy creditors." *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship.*, 526 U.S. 434, 453 (1999). The Opinion ignores the plain language of the absolute priority rule and construes it in a manner contrary to Supreme Court directives and the purpose and intent of Chapter 11 to achieve a policy that Congress never intended. By adding the words "insider of the debtor" to the absolute priority rule, the Opinion eviscerates Chapter 11 of the Bankruptcy Code, transforming it into another form of foreclosure and eliminating sources of new capital with which to reorganize.

Argument

I. The Opinion erred in extending to "insiders" a rule that expressly applies only to the "holder of any claim or interest." Only Congress can extend application of the absolute priority rule to non-holder "insiders," and Congress has chosen not to do so.

Section 1129 sets out the requirements for plan confirmation. A plan can be confirmed where every class of creditors has accepted it. A plan can also be confirmed where at least one class of creditors that is impaired under Section 1124 (i.e., not paid in full and/or paid over time) votes to accept the plan and the plan does not discriminate unfairly and is fair and equitable.

Section 1129(b)(2)(A) provides that for secured claims fair and equitable means that the secured creditor retains its liens and will receive full payment of its allowed secured claim with interest if paid over time. The Debtor's plan meets this requirement.

Section 1129(b)(2)(B)(i) provides that for unsecured claims fair and equitable means that the plan provides for payment in full of the allowed unsecured claims; or, Section 1129(b)(2)(B)(ii), if not being paid in full, that the holder of any claim or interest that is junior to the claims of the senior class of unsecured creditors will not receive or retain under the plan on account of such junior claim or interest any property …. (emphasis added).

Section 1129(b)(2)(B)(ii) is commonly referred to as the "absolute priority rule." A plan is to be confirmed even where unsecured creditors are not being paid in full and even when only one impaired class has accepted the plan as long as the plan complies with the relevant provisions of Section 1129, including Section 1129(b)(2)(B)(ii).

The relevant language of Section 1129(b)(2)(B) states that with respect to a class of unsecured claims:

> (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

> (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property ….”

The rule protects unsecured creditors and is not applicable to the class of secured claims.

The Debtor’s Plan provides that old equity will be cancelled and old equity will receive nothing. Pursuant to the Plan, Mrs. Broadbent, wife of the holder of old equity, will obtain the new equity in the reorganized debtor in return for a cash infusion of $375,000.00.

Because Mrs. Broadbent was not (and never had been) a claimant or an interest holder of the Debtor, the Bankruptcy Court ruled that Section 1129(b)(2)(B)(ii) did not apply to the Debtor’s Plan. Other bankruptcy courts have similarly concluded that if the proposed new equity owner was not a junior claimant or interest holder, Section 1129(b)(2)(B)(ii) was not triggered.

The Opinion said Section 1129(b)(2)(B)(ii) was violated because the statute applies not only to junior interest holders but also any “insider” of the debtor as that term is used in bankruptcy.

Congress is cognizant of its choices and courts “must presume that a legislature says in a statute what it means, and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” *HA-LO Indus., Inc. v. Center Point Props. Trust*, 342 F.3d 794, 797-98 (7th Cir. 2003) (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

By its clear terms, Section 1129(b)(2)(B)(ii) prohibits anyone having an interest (equity ownership) in the Debtor from receiving or retaining any property under the Plan on account of that interest. There is no reference to an insider of old equity or of the debtor anywhere in this subsection. In the same section (Section 1129), Congress did use “insider” in relation to the requirements for confirmation of a plan. Section 1129(a)(10) provides that if a class of claims is

impaired under the plan, in order for the plan nevertheless to be confirmed, at least one class of claims that is impaired under the plan has to vote to accept the plan; however, the court may not include acceptance of the plan by any insider to meet this at least one class requirement. Section 1129(c) includes the words "equity security holders." Subsection (c) provides that the court may confirm only one plan and that if more than one plan meets the requirements for confirmation, then the court, in selecting the plan to confirm, must consider the preferences of creditors and equity security holders in determining which plan to confirm. Thus, in the very same section, covering precisely the requirements to confirm a plan, Congress used the word "insider" where it meant to and did not include the word "insider" when it did not. The Supreme Court has instructed that when Congress has used a specific term within the statute in specific places, and yet does not use the term at other places, it is to be assumed that the selection and omission were intentional. *United Savings Assoc. of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988); *Precision Indus., Inc.v. Qualitech Steel SBQ, LLC*, 327 F.3d 537, 544 (7th Cir. 2003). This rule of construction applies with particular force here, where (1) the statute is a comprehensive and complex series of statutory provisions balancing the rights of creditors and debtors and (2) where the term "insider" has been specifically defined in the statute. *United States v. Fousto*, 484 U.S. 439, 453 (1988); *Precision*, 327 F.3d at 544.

II. Including insiders within the scope of the absolute priority rule dramatically expands the rule.

Section 101(31) provides an extensive and detailed definition of the term "insider." If the debtor is a partnership, "insider" means a general partner of the partnership, a relative of a general partner or person in control of the debtor, a person in control of the debtor and any managing agent of the debtor. If the debtor is a corporation, "insider" means any director, officer, person in control, partnership in which the debtor is a general partner, a general partner

of the debtor or a relative of a general partner, director, officer or person in control of the debtor. By concluding that the prohibitions against receipt or retention of property under the Plan because of old equity's ownership interests extends to any insider of the Debtor, the Opinion substantially expands the prohibition and all but eliminates the use of Chapter 11 reorganization for most businesses in the Seventh Circuit. Panel has construed the statute to mean that in Chapter 11 if old equity and/or any insider to the debtor is to become the new owner of the reorganized debtor in return for an infusion of capital or other funds, any creditor of that debtor must be given the right to bid to become the new owner instead and can do so through the process of bidding with its debt ("credit-bidding").

The Opinion justifies its extension of the absolute priority rule by equating "insiders" and "equity investors" based on perceived Congressional intent. *In re Castleton Plaza, LP*, No. 12-2639, 2013 U.S. App. LEXIS 3185 at *5-6 (7th Cir. Feb. 14, 2013) ("For many purposes in bankruptcy law, such as preference recoveries under 11 U.S.C. § 547, an insider is treated the same as an equity investor.") From this, the Opinion concludes that it "follows" that the absolute priority rule applies not only to junior creditors and old equity, but also to insiders. *Id*. at *6.

Section 547(c)(4)(B), the statute on which the Opinion's extension is based, does not equate insiders and equity security holders, it simply extends the standard preference look-back period from 90 days to one year for insider transactions. The choice in that instance to subject insiders to closer scrutiny was deliberate, a decision reflected by Congress' use of "insider" and "equity security holder" separately throughout Chapter 11. Because Section 547 protects against preferential transfers, Congress concluded that insiders are more likely to be preferred.

In Sections 1109(b) and 1121(c), Congress includes equity security holders but not insiders as parties in interest. Sections 1129(a)(5)(A)(ii) and 1129(c) refer only to equity security holders.

Section 1129(a)(5)(B), on the other hand, refers to the more expansive insiders. Clearly Congress' use of the words "equity security holder" and "insider" is deliberate, and when it intends to include the more expansive term it does so.

The Opinion essentially and practically turns Chapter 11 into a foreclosure proceeding.

No one raised any issue whatsoever regarding whether Mrs. Broadbent is a straw person or stand-in for her husband. The uncontroverted evidence is that Mrs. Broadbent has her own business interests in acquiring the equity of the reorganized Debtor, that she owns in her own name six other retail shopping centers, that she has her own net worth in excess of $10 million dollars, that she was using solely her own funds to provide the capital infusion, that she believed that Castleton Plaza would provide her a return on her investment eventually once the retail market had returned to normal and property values had improved, and that she had a business interest in owning Castleton Plaza because her separate company, owned solely by her, The Broadbent Company, which employs 70 persons, is the business that provides for the management, leasing and sale of approximately 40 separate retail properties. Thus, Mrs. Broadbent is exactly the type of family member related to the former owner who would have the incentive and resources to recapitalize the reorganized Debtor and help that reorganized entity complete its Plan, which provides for payment to all creditors. Under the Opinion, if Mrs. Broadbent wants to obtain the ownership interest of the reorganized entity, she must pay not only more than the equity is worth, but enough to satisfy the full amount of the claim of any creditor who objects to the Plan.

The Bankruptcy Court determined that the $375,000.00 infusion was an amount that met the test of being money or money's worth, substantial in amount, necessary for the reorganization and was reasonable in relationship to the value being obtained. Instead, the

Opinion has determined that Mrs. Broadbent can purchase the business if she is willing to bid with cash against the lender who can bid with credit and can bid up to $10.2 Million Dollars without having to expend a dime. Instead of being a test to determine the adequacy and fairness of the payment to obtain new equity, the Opinion is a test of how much the creditor will credit bid in order to control the outcome of the bankruptcy reorganization in spite of all other votes of all other creditors. Such a result is not only not a test of the fair value of the equity; but also reinstates complete control of Chapter 11 by one creditor contrary to the Supreme Court's confirmation that the 1978 Bankruptcy Code created a system of creditor approval of plans and prevented a single creditor from being able to highjack confirmation. *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship.*, 526 U.S. 434, 461-62.

In order to reorganize the reorganized entity needs ownership committed to reorganization and new capital. It is typically old shareholders and/or family that have the incentive to support the reorganization with new capital. It is one thing to ask someone to invest a sum of money to sufficiently capitalize but quite another to request the person come up with cash in excess of the company's debt. By extending the prohibition of the absolute priority rule to insiders of a debtor, the Opinion eliminates reorganization by exclusion of sources of capital. The only Bankruptcy Court to come to the conclusion that a plan that provides that an insider will become the owner of the reorganized debtor violated § 1129(b)(2)(B)(ii) did so because the Court was convinced that the insider, a daughter who had never been involved in the business, was a straw person for old equity and not a real investor. *In re Global Ocean Carriers, Ltd.*, 251 B.R. 31 (Bankr. D. Del. 2000); *contra Beal Bank, S.S.B. v. Waters Edge Ltd., P'ship*, 248 B.R. 668 (D. Mass. 2000); *Troy Savings Bank v. Travelers Motor Inn, Inc.*, 215 B.R. 485, 494 (N.D.N.Y. 1997);

The implications of the Opinion are significant. Suppose a corporation owned equally by 10 unrelated individuals. The company employs a CFO, who owns no equity in the company. Intent on reorganizing, but understanding that the company cannot pay its creditors in full, the owners seek out a new investor who holds no current interest in the debtor. The only party willing to invest in the company as a going concern is the wealthy uncle of a current owner, who has agreed to recapitalize the company through Chapter 11. The owners agree to cancel their equity and propose a plan that will issue new equity to the uncle in exchange for a substantial and necessary capital investment. The secured creditor, owed more than the company's assets are worth, prefers to liquidate in order to realize an immediate (albeit discounted) payoff, votes its unsecured deficiency claim and opposes plan confirmation. As a result of the Opinion, because the uncle is an insider of the debtor company by virtue of his relationship with the former owner, unless the uncle is willing and able to bid cash in excess of the lender's credit-bidding rights, the debtor's plan cannot be confirmed and the company cannot reorganize.

The effect of the Opinion extends well beyond this example. Assume the same underlying facts, but now the uncle of the CFO is willing to finance the company's reorganization. Although not an owner, the CFO is an insider of the company by virtue of his status as an officer. As a result of his relationship with the non-owner CFO, the uncle is also an insider. If the secured creditor opposes the plan, the company cannot reorganize under these facts either.

While this may be the Panel's preferred policy, it is not supported by the plain language of the Section 1129(b)(2)(B)(ii). "What the Bankruptcy Code provides, a judge cannot override by declaring that enforcement would be 'inequitable.'" *Sunbeam Prods., Inc. v. Chicago Am. Mfg., LLC*, 686 F.3d 372, 375 (7th Cir. 2012).

III. The Opinion's holding that only an auction satisfies the competition requirement is both contrary to *LaSalle* and wholly inconsistent with Chapter 11.

When the absolute priority rule is triggered, competition and market valuation are essential. On this, the Panel and the Supreme Court agree. *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship.*, 526 U.S. 434, 454 (1999); *In re Castleton Plaza, LP*, No. 12-2639, 2013 U.S. App. LEXIS 3185 at *5 (7th Cir. Feb. 14, 2013). They diverge, however, in what that competition entails.

Under *LaSalle*, the competition requirement may be satisfied by providing others an opportunity "either to compete for that equity or to propose a competing reorganization plan." *LaSalle*, 526 U.S. at 455. Such a process ensures fairness by exposing old equity's proposed contribution to market exposure. *Id*. at 457-58. According to the Opinion, only competitive bidding can satisfy the market test and neither the opportunity to file a competing plan nor the existence of such a plan is relevant. *Castleton*, at * 8 ("None of the considerations we have mentioned depends on whether Castleton proposed the plan during the exclusivity period."). This conclusion is contrary not only to the express direction of *LaSalle* but also to the entire Chapter 11 plan process. By prohibiting the opportunity to propose a competing plan as a means of market testing old equity's contribution, the Opinion dilutes creditor voting and subjects confirmation to the will of the secured creditor. In doing so, the Opinion renders the cramdown provision of the Bankruptcy Code meaningless.

The Opinion's auction procedure will not achieve a true market test of the offered price. This case is a clear example. As the Bankruptcy Court concluded, the actual cost to lender to acquire ownership of Castleton Plaza was $55,000 regardless of the amount of its bid because except for the $55,000 all money simply goes back to the lender once it is the owner. Mrs. Broadbent's $375,000 is the cost to her. The auction is hardly a test of fair value of the equity.

Thus, the auction procedure is not compelled by *LaSalle*, as it will not achieve the Opinion's objective of determining that the price being paid is fair. The Bankruptcy Court understood this and applied the strict scrutiny test that did meet the objective of review for fairness.

IV. The Bankruptcy Code makes credit bidding available only to *secured* creditors upon the sale of their collateral, and the Opinion improperly extends this right to unsecured creditors and the sale of unencumbered property in derogation of the unambiguous statute.

In redefining the market test required under *LaSalle*, the Opinion provides that in an equity auction under any new-value plan "creditors can bid the value of their loan." *Castleton*, at *2 (citing *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, ___ U.S. ___, 132 S. Ct. 2065 (2012)). *RadLAX* interpreted Section 1129(b)(2)(A), which sets forth the required treatment of secured claims under a plan, and whether a plan proponent can sell proceed under subsection (iii) to sell a secured creditor's collateral free and clear of liens and prevent the creditor from credit bidding under Section 363(k).

As noted by the Supreme Court, credit bidding "enables the creditor to purchase the collateral for what it considers the fair market price (up to the amount of its security interest) without committing additional cash to protect the loan." *RadLAX*, 132 S. Ct. at 2070, n.2. The process is a "method of ensuring to a secured lender proper valuation of its collateral at sale." *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 321 (3d Cir. 2010) (Ambro, C.J., dissenting). As made clear in Section 363(k) (and, by incorporation, Section 1129(b)(2)(A)(ii)), however, it is a right held solely by creditors with a lien on the property to be sold.

Under the Bankruptcy Code, credit bidding is available to secured creditors only when their collateral is sold free of liens. 11 U.S.C. §§ 363(f), (k). As written, the Opinion permits both secured and unsecured creditors to credit bid the face amount of their claims for the equity of the reorganized debtor, even when that equity is unencumbered by any lien.

V. Contrary to the holding in *LaSalle,* the Opinion finds a property interest based on old equity's ability to make appointment under the Plan.

A. The right to name the owner of the reorganized debtor in a plan of reorganization is not property for purposes of the absolute priority rule.

The Supreme Court expressed clear limits of "property" for purposes of the absolute priority rule. While old equity's exclusive opportunity to own the reorganized debtor under a plan is "property of some value" for purposes of the rule, *LaSalle*, 526 U.S. at 455-56, its right to propose that plan is not: the "exclusive opportunity to propose a plan under § 1121(b) is not itself 'property' within the meaning of subsection (b)(2)(B)(ii) . . . ." *Id*. at 454.

Every justice agreed that the right to propose a plan was not "property" for the rule. *Id*. at 459-60 ("No one contends that that exclusive right [to propose a plan] is a form of property that is retained by the debtor 'on account of' its prior status.") (Steven, J., dissenting).

Nevertheless, the Opinion states that, "under the plan of reorganization, George receives value on account of his investment, which gave him control over the plan's details. The absolute-priority rule therefore applies despite the fact that Mary Clare had not invested directly in Castleton." *In re Castleton Plaza, LP*, No. 12-2639, 2013 U.S. App. LEXIS 3185 at *8 (7th Cir. Feb. 14, 2013). This conclusion renders many of the statutory rights of a Chapter 11 debtor in possession meaningless. Pursuant to Section 1121, a debtor has the basic right to file a plan at any time during a voluntary case. The debtor has the right to formulate its plan and in doing so is required to provide adequate means for its implementation, which may include selection of the owner of the reorganized debtor and the price at which the new equity may be obtained. 11 U.S.C. § 1123. Once voting has concluded, the bankruptcy court must hold a confirmation hearing. 11 U.S.C. § 1128. A plan can be confirmed only if all requirements of Section 1129 are met. If the right to propose a plan is a property interest for purposes of the absolute priority rule

even when old equity's interest is completely cancelled and they will receive nothing under the plan, as the Opinion concluded, then every plan proposed by the debtor violates the absolute priority rule and is unconfirmable. Given the procedural mechanisms and safeguards built into the Chapter 11 plan process, including the ability of a debtor to proceed with cramdown confirmation under Section 1129(b), such a result would be inexplicable.

B. George Broadbent did not receive any property under the plan "on account of" his junior interest.

In addition to formulating the terms of the plan, which is not property under any analysis, the Opinion references two other forms of property Mr. Broadbent "receives" under the plan: (1) continuation of his salary as Executive Vice President and COO of The Broadbent Company; (2) an increase in family wealth.

In the absolute priority rule, "on account of" means "because of," and the rule is triggered by "a causal relationship between holding the prior claim or interest and receiving or retaining property . . . ." *LaSalle*, 526 U.S. at 451. The degree of causation necessary to trigger disqualification is something more than *any* and must be reconciled with "the two recognized policies underlying Chapter 11, of preserving going concerns and maximizing property available to satisfy creditors." *Id*. at 453 (citing *Toibb v. Radloff*, 501 U.S. 157, 163 (1991)).

As set forth in the record, George Broadbent earns an annual salary of $500,000 as an officer of The Broadbent Company, a management company that currently manages more than 30 commercial properties, including Castleton Plaza. Whether the Debtor's plan is confirmed or not, George Broadbent will continue to receive his salary as an officer of The Broadbent Company. No reading of the absolute priority rule can transform this into property received "on account of" his interest in the Debtor.

The Opinion cites an Indiana statute applicable only "[i]n an action for dissolution of marriage," for the proposition that George Broadbent receives property under the plan because "Indiana treats each spouse as having a presumptive interest in the other's wealth." *In re Castleton Plaza, LP*, No. 12-2639, 2013 U.S. App. LEXIS 3185 at *6 (7th Cir. Feb. 14, 2013) (citing IND. CODE. § 31-15-7-4). The Opinion acknowledges that Indiana is not a community property state and husband and wife can and do own property separately, and the record establishes that the Broadbents do so. Despite the law and the facts, the Opinion disqualifies the plan on the basis of the "indirect benefit" George Broadbent may receive from his wife's wealth. *Id*. Her wealth will decrease by the capital infusion and she will not see any return on her investment for at least five years. If she does eventually get a return, she may use it in her other businesses or for herself. If she shares with family it will be because she chose to do so.

VI. How to address the transfer of ownership of the Debtor to an insider.

There is a better way of addressing concerns about an insider paying a fair price for the equity than extending § 1129(b)(2)(B)(ii) to insiders. The first is the process followed by the Bankruptcy Court where the Court applied the same type of strict scrutiny to the transaction that it would apply if this were a sale of property of the debtor to an insider. Strict scrutiny means to determine that the sale is for a fair price, is not coercive or collusive, and that it is in the best interests of the creditors of the estate. At trial the Court found each of these elements to be the case. Alternatively, this Court could require that wherever the equity was going to be transferred to an insider, the exclusivity right of the debtor to propose a plan should be terminated and any creditor can submit a competing plan. This approach would require any creditor who wants to compete for the ownership to fully disclose its purposes, intentions and the consequences of confirmation of its plan and would preserve the right of creditors to vote for the plan which they

believe is in their best economic interest. Castleton Plaza specifically allowed the exclusivity period to terminate. The lender could have filed its own plan. Had it done so, it would have been required to include a disclosure statement that would disclose the significant facts about its plan and the consequence thereof to creditors. The evidence at trial underscores the importance of this piece. At the confirmation hearing, when the lender requested to bid for the equity, it told the Court it wanted to become the owner in order to be able to sell the property. Had the lender proposed such a plan, the evidence is that the creditors would have selected the Debtor's plan over the lender's plan because keeping the customers was in their better economic interest than full payment of their claim. The Bankruptcy Court would have had two confirmable plans. Under that scenario, Section 1129(c) provides that if the court has more than one confirmable plan it "shall consider the preferences of creditors and equity security holders in determining which plan to confirm." The best interests of creditors is served and one creditor cannot control the outcome.

The Court is urged to vacate the Opinion and (1) affirm the Bankruptcy Court, (2) determine that Section 1129(b)(2)(B)(ii) does not apply, and (3) direct that before the Bankruptcy Court's confirmation order can be final, the objecting creditor must be given an opportunity to file a competing plan.

February 28, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2013, I electronically filed the foregoing Petition of Castleton Plaza, LP for Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Paul T. Deignan
Paul T. Deignan
Attorney for Debtor-Appellee