

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

In re: ) Chapter 11  
) Case No. 09-30029  
RIVER ROAD HOTEL PARTNERS, LLC, ) (Jointly Administered)  
et al., )  
) Hon. Bruce W. Black  
Debtors. )

**NOTICE OF MOTION**

PLEASE TAKE NOTICE that on **Thursday, October 21, 2010 at 10:30 a.m.**, or as soon thereafter as counsel may be heard, we will appear before the Honorable Bruce W. Black, or any judge sitting in his stead, in Room 615 of the Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois 60604, and present *Debtors' Motion for Certification of Appeal to the Court of Appeals*, at which time you may appear as you see fit.

Dated: October 14, 2010

Respectfully submitted,

**RIVER ROAD HOTEL PARTNERS, LLC  
RIVER ROAD EXPANSION PARTNERS, LLC**

By: /s/ David M. Neff

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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
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In re: ) Chapter 11  
) Case No. 09-30029  
RIVER ROAD HOTEL PARTNERS, LLC, ) (Jointly Administered)  
et al., )  
) Hon. Bruce W. Black  
Debtors. )

**DEBTORS' MOTION  
FOR CERTIFICATION OF APPEAL TO THE COURT OF APPEALS**

River Road Hotel Partners, LLC and River Road Expansion Partners, LLC (together, the "Debtors"), by and through their undersigned counsel, hereby move for the certification of their appeal of the Court's Order Denying Debtors' Bid Procedures Motion (the "Order") directly to the United States Court of Appeals for the Seventh Circuit (the "Seventh Circuit") pursuant to 28 U.S.C. § 158(d)(2)(A) and Rule 8001(f)(3) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and in support thereof respectfully state as follows:

1. On August 17, 2009, the Debtors and certain of their affiliates filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. On August 20, 2009, the Court entered an order directing joint administration of the Debtors' cases under Case No. 09-30029.<sup>1</sup> On August 27, 2009, the Office of the United States Trustee appointed a statutory committee of unsecured creditors.

2. On June 4, 2010, the Debtors filed their Joint Chapter 11 Plan (as amended, the "Plan"), which contemplated the auction sale of substantially all of the Debtors' assets (the "Plan Sale") and distribution of sale proceeds to certain creditor constituencies. On that same date, the

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<sup>1</sup> The Debtors' cases have also been jointly administered with the cases of River Road Restaurant Pads, LLC (Case No. 09-30032), River Road Hotel Mezz, LLC (Case No. 09-30035), River Road Restaurant Mezz, LLC (Case No. 09-30039) and River Road Expansion Mezz, LLC (Case No. 09-30040).

Debtors filed the Debtors' Motion for an Order: (A) Approving Procedures for the Sale of Substantially all of the Debtors' Assets; (B) Scheduling an Auction; (C) Approving Assumption and Assignment Procedures; (D) Approving Form of Notice; and (E) Granting Related Relief (the "Bid Procedures Motion"), pursuant to which they sought to establish procedures for the Plan Sale, including a request to preclude the Debtors' secured creditors from credit bidding as a matter of law under 11 U.S.C. § 1129(b)(2)(A)(iii), or, alternatively, for cause under 11 U.S.C. § 363(k).

3. Certain of the Debtors' creditors, including Amalgamated Bank, as Trustee of the Longview Ultra I Construction Loan Investment Fund, both individually and in its capacity as administrative agent for itself and San Diego National Bank (collectively, the "Lenders"), objected to the Bid Procedures Motion, including the Debtors' attempt to preclude them from credit bidding at the Plan Sale.

4. On July 22, 2010, at a status hearing on the Bid Procedures Motion, the Court indicated that it would not preclude the Lenders from credit bidding at the Plan Sale as a matter of law under 11 U.S.C. § 1129(b)(2)(A)(iii) and scheduled a trial on the issue of cause under 11 U.S.C. § 363(k), which was conducted on August 23 and 24, 2010.

5. On August 31, 2010, the Court orally ruled that there was insufficient cause under 11 U.S.C. § 363(k) to preclude the Lenders from credit bidding at the Plan Sale.

6. On October 5, 2010, the Court entered the Order, a true and correct copy of which is attached hereto as Exhibit A, in which the Court held, *inter alia*, that the Debtors could not use 11 U.S.C. § 1129(b)(2)(A)(iii) to preclude the Lenders from credit bidding at the Plan Sale as a matter of law. (Order at 2-3.) In doing so, the Court specifically rejected the majority's holding in *In re Philadelphia Newspapers*, 599 F.3d 298 (3d Cir. 2010), where the United States Court of

Appeals for the Third Circuit held that secured creditors do not have an absolute right to credit bid when a debtor proposes to sell assets pursuant to a plan and provide secured creditors with the indubitable equivalent of their secured claims under 11 U.S.C. § 1129(b)(2)(A)(iii). The Court also ruled that the Debtors failed to offer sufficient evidence to support denying the Lenders the right to credit bid for cause under 11 U.S.C. § 363(k). (Order at 3-5.)

7. On October 14, 2010, the Debtors filed a Notice of Appeal from the Order pursuant to 28 U.S.C. § 158(a)(1) and Bankruptcy Rule 8001(a) (the "Appeal"). Specifically, the Debtors appeal the Court's conclusion in the Order that 11 U.S.C. § 1129(b)(2)(A)(iii) does not allow the Debtors to pursue the Plan Sale without providing the Lenders with the right to credit bid.

8. 28 U.S.C. § 158(d)(2)(A) provides that the court of appeals shall have jurisdiction over direct appeals from a final or interlocutory order of the bankruptcy court if the bankruptcy court, upon the motion of a party to the judgment, certifies 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 . . .

28 U.S.C. § 158(d)(2)(A).

9. 28 U.S.C. § 158(d)(2)(B) further provides that if the bankruptcy court determines, on its own motion or on the request of a party, that any one of the circumstances in section 158(d)(2)(A)(i)-(iii) exists, then the bankruptcy court "shall make the certification described in subparagraph (A)." 28 U.S.C. § 158(d)(2)(B) (emphasis added).

10. The Debtors satisfy all three criteria for certification of the Appeal directly to the Seventh Circuit. First, the Order involves a question of law as to which there is no controlling decision of the Seventh Circuit or the Supreme Court of the United States. Second, the Order directly conflicts with two courts of appeals decisions and at least one bankruptcy court decision that have held that secured creditors may be precluded from credit bidding as a matter of law when a debtor proposes to sell its assets pursuant to a plan and provide its secured creditors with the indubitable equivalent of their claims pursuant to 11 U.S.C. § 1129(b)(2)(A)(iii). *See Philadelphia Newspapers*, 599 F.3d at 312; *In re The Pacific Lumber Co.*, 584 F.3d 229, 246 (5th Cir. 2009); *In re CRIIMI MAE, Inc.*, 251 B.R. 796, 806-07 (Bankr. D. Md. 2000). Third, a direct appeal to the Seventh Circuit will materially advance the resolution of the Debtors' cases by determining whether the Debtors may proceed with their Plan or whether they must instead pursue reorganization through one or more alternative plans.

11. The Court's Order constitutes a final order under 28 U.S.C. § 158(a)(1). The Seventh Circuit treats as final "orders that ultimately determine a creditor's position in the bankruptcy proceeding, even though administration of the debtor's estate continues." *In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1299 (7th Cir. 1997) (citing *In re Sandy Ridge Oil Co.*, 807 F.2d 1332, 1334 (7th Cir. 1986)). The Order meets the legal standard for finality because it ultimately determines that the Lenders must be given the right to credit bid at the Plan Sale. Under virtually identical circumstances, the United States District Court for the Eastern District of Pennsylvania concluded in *In re Philadelphia Newspapers, LLC*, 418 B.R. 548, 557 n.12 (E.D. Pa. 2009) that the impact of an order denying a similar bid procedures motion "militate[s] in favor of treating the [order] as final for purposes of appeal."

12. Even if the Order is interlocutory, the Court may still certify the Appeal directly to the Seventh Circuit. *See Crosby v. Orthalliance New Image (In re OCA, Inc.)*, 552 F.3d 413, 418 (5th Cir. 2008) (accepting the direct appeal of an interlocutory order certified by the bankruptcy court under 28 U.S.C. § 158(d)(2)). *See also Ford v. Ford Motor Credit Corp. (In re Ford)*, 574 F.3d 1279, 1281-82 (10th Cir. 2009) (accepting the direct appeal of an interlocutory order from the bankruptcy court certified by both parties pursuant to 28 U.S.C. § 158(d)(2)(A) and Bankruptcy Rule 8003(d)); Collier on Bankruptcy ¶ 5.06[1] (Resnick & Sommer eds., 16th ed.) (recognizing that interlocutory orders are eligible for a direct appeal under 28 U.S.C. § 158(d)(2)). While 28 U.S.C. § 158(a)(3) and Bankruptcy Rule 8001(b) normally require an appellant to first file a motion seeking leave of court to appeal an interlocutory order, Bankruptcy Rule 8003(d) provides that the authorization by the court of appeals to accept a direct appeal of an interlocutory order "shall be deemed to satisfy the requirement for leave of appeal." Fed. R. Bankr. P. 8003(d).

13. To the extent that the Appeal is not certified to the Seventh Circuit pursuant to 28 U.S.C. § 158(d)(2) and the Order is not a final order, the Debtors alternatively move for leave to appeal the interlocutory order pursuant to 28 U.S.C. § 158(a)(3) and Bankruptcy Rules 8001(b) and 8003.<sup>2</sup> The standard for analyzing interlocutory appeals is very similar to the standard for certifying a bankruptcy appeal directly to the court of appeals: an appeal of an interlocutory order is permitted "when it (1) involves a controlling question of law; (2) over which there is substantial ground for difference of opinion; and (3) an immediate appeal from the order may

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<sup>2</sup> Bankruptcy Rule 8003(c) requires a motion for leave to appeal an interlocutory order to be filed within 14 days from the entry of the order appealed from unless otherwise directed by order of the court. Accordingly, the Debtors alternatively seek leave to appeal an interlocutory order at this time pursuant to Bankruptcy Rule 8003 only to preserve their right to timely appeal the Order to the extent that the Appeal is not certified directly to the Seventh Circuit pursuant to 28 U.S.C. § 158(d)(2) and the Order is not considered a final order pursuant to 28 U.S.C. § 158(a)(1).

speed up the litigation." *In re Auto. Profl, Inc.*, 379 B.R. 746, 751 (N.D. Ill. 2007). As discussed above, the Appeal satisfies all three criteria. First, the legal issue of selling assets through a chapter 11 plan without providing secured creditors with the right to credit bid pursuant to 11 U.S.C. § 1129(b)(2)(A)(iii) is a controlling question of law. Second, this Court's ruling on that controlling question of law differs from two courts of appeals decisions and at least one bankruptcy court decision. See *Philadelphia Newspapers*, 599 F.3d at 312; *Pacific Lumber*, 584 F.3d at 246; *CRIIMI MAE*, 251 B.R. at 806-07. Third, an immediate appeal of the Order would speed up the Debtors' reorganization efforts in bankruptcy by providing certainty with respect to the viability of the proposed Plan. Accordingly, to the extent the Order is considered interlocutory, the Court should grant the Debtors leave to appeal.

WHEREFORE, the Debtors respectfully request that the Court enter an order pursuant to 28 U.S.C. § 158(d)(2) certifying the Appeal directly to the United States Court of Appeals for the Seventh Circuit and granting such further relief as the Court deems just and equitable.

Dated: October 14, 2010

Respectfully submitted,

**RIVER ROAD HOTEL PARTNERS, LLC**  
**RIVER ROAD EXPANSION PARTNERS, LLC**

By: /s/ David M. Neff

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**CERTIFICATE OF SERVICE**

David M. Neff, an attorney, hereby certifies that on October 14, 2010 he caused a copy of *Debtors' Motion for Certification of Appeal to the Court of Appeals* to be filed via the Court's ECF system and served on the parties listed on the attached Service List, as so indicated.

/s/ David M. Neff



**MASTER SERVICE LIST – RIVER ROAD HOTEL PARTNERS, LLC**

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