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and its affiliates*

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

THE McCLATCHY COMPANY., *et al.*¹

Debtors.

)
) Chapter 11
)
) Case No. 20-10418 (MEW)
)
) (Jointly Administered)
)

**EMERGENCY MOTION OF ALDEN GLOBAL CAPITAL, LLC
AND ITS AFFILIATES SEEKING AN ORDER OF THE COURT
PRECLUDING THE CREDIT BIDDING OF CERTAIN SECURED CLAIMS
PURSUANT TO 11 U.S.C. §§ 105 AND 363(K)**

Alden Global Capital, LLC and its affiliates (“Alden”), by its counsel, hereby files this motion (the “Motion”) requesting entry of an order, substantially in the form attached hereto as **Exhibit A** (the “Order”), pursuant to sections 105 and 363(k) of title 11 of the United States Code (the “Bankruptcy Code”) precluding the indenture trustee, collateral agent, agent and prepetition lenders (collectively, the “Prepetition Secured Parties”) from credit bidding their

¹ The last four digits of Debtor The McClatchy Company’s tax identification number are 0478. Due to the large number of debtor entities in these chapter 11 cases, for which the Debtors have requested joint administration, a complete list of the debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors’ claims and noticing agent at <http://www.kccllc.net/McClatchy>. The location of the Debtors’ service address for purposes of these chapter 11 cases is: 2100 Q Street, Sacramento, California 95816.



secured claims with respect to: (A) (i) the \$157.1 million 7.795% secured term loans due July 15, 2030 (the “2L Loans”) and (ii) \$268.4 million 6.875% Senior Secured Junior Lien Notes due 2031 (the “3L Notes”); (B) the \$262.9 million 9.000% senior secured notes due 2026 (the “1L Notes”), solely with respect to assets that the Official Committee of Unsecured Creditors (the “Committee”) has alleged in its Standing Motion² were not properly perfected (the “Unperfected Assets”)³; and (C) the assets that the Committee has alleged in its Standing Motion to be unencumbered (the “Unencumbered Assets”)⁴ at the auction to be held by the above captioned debtors and debtors-in-possession (collectively, the “Debtors”) on July 9, 2020 (the “Auction”). In support of this Motion, Alden respectfully states as follows:

PRELIMINARY STATEMENT

1. In light of the Court’s preliminary ruling earlier this week that the Committee has raised colorable claims: (i) to avoid the 2L Loans and 3L Notes as fraudulent conveyances as well as claims for aiding and abetting breach of fiduciary duties and equitable subordination and (ii) in regard to the Unperfected Assets and Unencumbered Assets, it is essential that the Court hold a hearing to determine the Prepetition Secured Parties’ credit bid rights on account of their secured claims prior to the Auction scheduled to take place tomorrow. Cause exists under Bankruptcy Code section 363(k) to preclude the Prepetition Secured Parties from credit bidding their 2L Loans and 3L Notes secured claims and the claims on the Unencumbered Assets and

² Capitalized terms used herein but not defined shall have the meanings ascribed to such terms in the Motion of Official Committee of Unsecured Creditors for (I) Leave, Standing and Authority to Commence and Prosecute Certain Claims and Causes of Action on Behalf of Debtors Estates and (II) Exclusive Settlement Authority [Docket No. 546] (the “Standing Motion”).

³ The Unperfected Assets include the Debtors’ registered copyrights (alleged to be unperfected as to the 1L Notes only), tax refunds, and/or other tax attributes, including net operating losses.

⁴ The Unencumbered Assets include the “excluded collateral” as defined in the prepetition debt documents, including, without limitation, the accounts identified in Schedule C to the Standing Motion, the real property identified in Schedule D to the Standing Motion, and all potential commercial tort claims.

Unperfected Assets because the Prepetition Secured Parties' liens and claims in regard to such debt are in dispute due to the colorable claims alleged in the draft complaint attached to the Committee's Standing Motion (as defined below).

2. Allowing the Auction to go forward with ambiguity surrounding the ability to credit bid the 2L Loans and 3L Notes and the 1L Notes, 2L Loans and 3L Notes with respect to the Unperfected Assets and Unencumbered Assets will prevent both a fair process and the Debtors from maximizing the value of the assets and provide the Prepetition Secured Parties with an unfair advantage in the bidding at the Auction over other qualified bidders [REDACTED]

[REDACTED]. Additionally, allowing the 2L Loans and the 3L Notes to credit bid exposes the Debtors' estates to a loss of sale consideration in the event that the Committee's Standing Motion is granted and the Court were to eventually rule in the Committee's favor on the merits of the colorable claims. If the full amount of the 2L Loans and 3L Notes secured claims are available for credit bidding, bidders will [REDACTED]. If it is not possible to have a hearing on the Motion ahead of the scheduled Auction time, the Auction should be postponed.

3. It is unclear at the time of the filing of this Motion whether the Prepetition Secured Parties definitively intend to credit bid their 2L Loans and 3L Notes secured claims. On July 6, 2020, however, Debtors' counsel informed Akin Gump Strauss Hauer & Feld LLP ("Akin Gump"), counsel to Alden, [REDACTED]

[REDACTED]. This prompted Alden to submit a letter

(the “Letter”) through its counsel to Debtors’ counsel (with copies to Committee counsel and the board of directors of the McClatchy Company) attached hereto as **Exhibit B** expressing [REDACTED]

[REDACTED]. The Letter also stated that the Debtors should [REDACTED]

[REDACTED]. Alden has not yet received a response to the Letter and, as a result, seeks the relief sought in this Motion.

4. Alden would have filed this Motion immediately following the Court’s ruling on July 6, 2020, but [REDACTED]

[REDACTED].⁵

FACTUAL BACKGROUND

5. On February, 13, 2020 (the “Petition Date”), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

6. On February 26, 2020, the Office of the United States Trustee appointed the Committee.

7. On May 11, 2020, the Court entered the *Order (I) Establishing Bidding Procedures Relating to the Sale of Substantially All of the Debtors’ Assets; (II) Establishing*

⁵ [REDACTED], in addition to being unable to account for the unknown variables regarding credit bidding that are addressed herein.

Procedures for the Debtors to Enter Into Stalking Horse Agreement with Bid Protections in Connection with a Sale of Substantially All of the Debtors' Assets; (III) Approving Procedures for the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; (IV) Approving Form and Manner of Notice of All Procedures, Protections, Schedules and Agreements; (V) Scheduling a Hearing to Consider the Proposed Sale and (VI) Granting Certain Related Relief ([Docket No. 432]) (the “Bidding Procedures Order”) approving, among other things, the bidding procedures (the “Bidding Procedures”). The Bidding Procedures set forth procedures for the sale of substantially all of the Debtors’ assets and set: (i) July 1, 2020 as the deadline to submit a bid (the “Bid Deadline”); and (ii) July 8, 2020 as the date for the Auction, if necessary.

8. On May 21, 2020, the Company issued a press release announcing that certain of the Prepetition Secured Parties had submitted a non-binding term sheet to acquire the Company with a credit bid for the outstanding principal amount of the 1L Notes plus cash in an amount equal to \$30 million.

9. On June 22, 2020, the Committee filed the Standing Motion which attached a draft of the Committee’s Proposed Complaint as Exhibit A thereto.

10. The Court initially held a hearing on the Standing Motion on July 1, 2020. At the conclusion of the hearing the Court deferred its ruling on the Standing Motion until July 6, 2020 so that the Court may have the benefit of a report on the initial bids that had been submitted by the Bid Deadline, an understanding of the range of values for the bids, and whether they “cleared” the amount of the 1L Notes such that the alleged claims in the Proposed Complaint would be relevant.

11. [REDACTED].

12. On July 6, 2020, the Court issued a partial ruling on the Standing Motion, finding that the Committee has alleged colorable claims that, among other things: (i) the liens granted by the Subsidiaries in connection with both the 2L Loans and 3L Notes should be avoided as fraudulent transfers; (ii) certain of the Prepetition Secured Parties knowingly participated in and substantially aided, abetted, induced and encouraged the Fiduciaries in the alleged breach of fiduciary duties set forth in the Proposed Complaint; and (iii) claims of certain Prepetition Secured Parties should be equitably subordinated pursuant to Bankruptcy Code section 510(c). The Court also acknowledged that it seemed the parties essentially concluded the Committee should be allowed to pursue the claims related to the Unperfected Assets and Unencumbered Assets.

13. On July 7, 2020, Akin Gump submitted the Letter to Debtors' counsel on behalf of Alden.

14. On July 7, 2020, [REDACTED]

[REDACTED].

JURISDICTION AND VENUE

15. This Court has jurisdiction to consider this Motion under 28 U.S.C. §§ 157 and 1334. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

16. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

17. The statutory predicates for the relief requested herein are Bankruptcy Code sections 105 and 363(k).

RELIEF REQUESTED

18. By this Motion, Alden respectfully requests that the Court enter an order pursuant to Bankruptcy Code sections 105 and 363(k) precluding the Prepetition Secured Parties from

credit bidding their secured claims at the Auction with respect to the 2L Loans and 3L Notes and with respect to the Unperfected Assets and Unencumbered Assets.

BASIS FOR RELIEF

19. Bankruptcy Code section 363(k) allows a creditor to bid in a non-ordinary course of business sale, and if successful, to offset its claim against the purchase price of the property, if that creditor holds a lien securing an allowed claim. The right to credit bid, however, is not absolute. *See In re Aeropostale, Inc.*, 555 B.R. 369, 414 (Bankr. S.D.N.Y. 2016). Bankruptcy Code section 363(k) provides that:

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.

U.S.C. § 363(k) (emphasis added).

20. “The term ‘cause’ is not defined by the Bankruptcy Code and it is left to the court to determine whether cause exists on a case-by-case basis.” *In re Aeropostale, Inc.*, 555 B.R. at 414. The court has discretion in deciding whether to deny credit bidding. *Id.* at 415. Courts have limited the right to credit bid when the validity of a creditor’s lien is in dispute. *Id.* (citing *In re Daufuskie Islands Props., LLC*, 441 B.R. 60, 64 (Bankr. D.S.C. 2010) (holding that a secured creditor, whose lien and \$34 million claim were disputed and the subject of adversary proceedings seeking avoidance and equitable subordination, was not entitled to credit bid its claim at the sale of the debtor’s assets); *Nat’l Bank of Commerce v. McMullan (In re McMullan)*, 196 B.R. 818, 835 (Bankr. W.D. Ark. 1996), *aff’d*, 162 F.3d 1164 (8th Cir. 1998)). This Court’s determination that there are colorable claims for fraudulent conveyance and equitable subordination with respect to the 2L Loans and 3L Notes definitively puts the Prepetition Secured Parties’ secured claims in dispute and is alone sufficient to establish cause under

Bankruptcy code Section 363(k). Additionally, as previously noted, the parties do not contest the colorability of claims in regard to the Unperfected Assets and Unencumbered Assets.

21. Courts will also preclude the right to credit bid due to inequitable conduct. *See In re Aeropostale, Inc.*, 555 B.R. at 416. While the Prepetition Secured Parties may not have engaged in inequitable conduct with respect to the sale process itself, at this point in time, this Court has acknowledged that there are colorable claims for aiding and abetting breach of fiduciary duty and equitable subordination for prepetition conduct.

22. In the alternative, the Court should at least require the Prepetition Secured Parties to provide cash in escrow for any amount that exceeds their credit bid on account of the 1L Notes. *See In re RML Development, Inc.*, 528 B.R. 150 (Bankr. W.D. Tenn. 2014) (requiring creditor to provide cash in escrow for amount of credit bid in dispute).

NOTICE

23. Notice of this Motion will be given to all parties entitled to notice pursuant to the Case Management Order. *See* [Docket No. 106].

NO PRIOR REQUEST

24. No prior request for the relief sought in this Motion has been made by Alden or any other party in these proceedings.

RESERVATION OF RIGHTS

25. Alden fully reserves any and all of its rights under applicable law or equity.

CONCLUSION

WHEREFORE for the reasons set forth herein, Alden respectfully submits that the Court enter an order, substantially in the form attached hereto as **Exhibit A**, pursuant to Bankruptcy Code sections 105 and 363(k) precluding the Prepetition Secured Parties from credit bidding

their secured claims with respect to the 2L Loans and 3L Notes the 1L Notes, 2L Loans and 3L Notes and with respect to the Unperfected Assets and Unencumbered Assets and granting the relief requested herein and such further relief that the Court deems just and proper.

Dated: July 8, 2020
New York, New York

/s/ Lisa G. Beckerman

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*Counsel to Alden Global Capital, LLC
and its affiliates*

EXHIBIT A

Proposed Order

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

THE McCLATCHY COMPANY, *et al.*,¹

Debtors.

)
) Chapter 11
)
) Case No. 20-10418 (MEW)
)
) (Jointly Administered)
)
)

**ORDER GRANTING THE EMERGENCY MOTION OF ALDEN
GLOBAL CAPITAL, LLC AND ITS AFFILIATES SEEKING AN ORDER OF
THE COURT PRECLUDING THE CREDIT BIDDING OF CERTAIN
SECURED CLAIMS PURSUANT TO 11 U.S.C. §§ 105 AND 363(K)**

Upon the motion (the “Motion”)² of Alden Global Capital, LLC and its affiliates (“Alden”) for entry of an order (this “Order”) pursuant to sections 105 and 363(k) of title 11 of the United States Code (the “Bankruptcy Code”) precluding the Prepetition Lenders from credit bidding their secured claims with respect to the 2L Loans and 3L Notes and the Unperfected Assets and Unencumbered Assets, and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and venue being proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that the relief requested in the Motion is in the best interests of the Debtors’ estates, their creditors and other parties in interest; and Alden having provided adequate and appropriate notice of the Motion under the

¹ The last four digits of Debtor The McClatchy Company’s tax identification number are 0478. Due to the large number of debtor entities in these chapter 11 cases, for which the Debtors have requested joint administration, a complete list of the debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors’ claims and noticing agent at <http://www.kccllc.net/McClatchy>. The location of the Debtors’ service address for purposes of these chapter 11 cases is: 2100 Q Street, Sacramento, California 95816.

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

therefor, it is HEREBY ORDERED THAT

1. The Motion is granted to the extent provided herein.
2. The Prepetition Lenders are precluded from submitting a credit bid at the Auction on account of their 2L Loans and 3L Notes secured claims or on account of the 1L Notes, 2L Loans and 3L Notes with respect to the Unperfected Assets and Unencumbered Assets.
3. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.
4. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

New York, New York
Dated: July [], 2020

THE HONORABLE MICHAEL E. WILES
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT B

[attached.]

Akin Gump

STRAUSS HAUER & FELD LLP

LISA G. BECKERMAN

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July 7, 2020

VIA E-MAIL (van.durrer@skadden.com)

Van C. Durrer II, Esq.

Partner

Skadden, Arps, Slate, Meagher & Flom LLP

300 South Grand Avenue, Suite 3400

Los Angeles, CA 90071

Re: In re The McClatchy Company, et al./Case No. 20-10418 (MEW)/Auction

Dear Van,

I am writing to you in connection with the asset sale process being conducted by The McClatchy Company ("McClatchy") and its affiliated debtors and debtors-in-possession (collectively, the "Debtors").

Our firm represents Alden Global Capital, LLC and its affiliates ("Alden").

[REDACTED] An auction is currently scheduled to take place on Wednesday, July 8, 2020. [REDACTED]

Akin Gump
STRAUSS HAUER & FELD LLP

Van C. Durrer II, Esq.
Skadden, Arps, Slate, Meagher & Flom LLP
July 7, 2020
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[REDACTED]

To allow the prepetition lenders to credit bid the second and third lien debt in light of the Court's preliminary ruling [REDACTED] ignores the "cause" for not allowing such debt to be credit bid that the Court articulated in its preliminary ruling. Moreover, allowing the second and third lien debt to be credit bid exposes the Debtors' estates to the loss of sale proceeds in the event that the standing motion is granted and the Court were ultimately to issue a judgment in favor the estates' fraudulent conveyance claims and/or equitable subordination claims.

[REDACTED]

[REDACTED]

Sincerely,



Lisa G. Beckerman



Van C. Durrer II, Esq.
Skadden, Arps, Slate, Meagher & Flom LLP
July 7, 2020
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Erez Gilad, Esq.
Mr. Jonathan Knee
Mr. Jaison Thomas
Mr. Ryan Schoenig
Mr. Peter Farr
Mr. Sean M. Harding
Kevin J. Simard, Esq.
Mr. William Derrough
Mr. Adam Waldman
Hanan B. Kolko, Esq.
Members of the Board of Directors c/o Van C. Durrer II and Craig I. Forman