00-30645

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE MATTER OF: LILJEBERG ENTERPRISES, INC. , Debtor.

LIFEMARK HOSPITALS, INC.
Defendant/Appellant/Cross-Appellee,
v.
LILJEBERG ENTERPRISES, INC.
Plaintiff/Appellee/Cross-Appellant.

LILJEBERG ENTERPRISES, INC.
Plaintiff/Appellee/Cross-Appellant,
v.
LIFEMARK HOSPITALS, INC.
Defendant/Appellant/Cross-Appellee.

LIFEMARK HOSPITALS, INC.
Defendant/Appellant/Cross-Appellee,
v.
ST. JUDE HOSPITAL OF KENNER, LOUISIANA, LLC
Plaintiff/Appellee/Cross-Appellant.

LILJEBERG ENTERPRISES, INC.
ST. JUDE HOSPITAL OF KENNER, LOUISIANA, LLC
Plaintiffs/Appellees/Cross-Appellants,
v.
LIFEMARK HOSPITALS OF LOUISIANA, INC.; LIFEMARK HOSPITALS, INC.; AMERICAN MEDICAL INTERNATIONAL; TENET HEALTHCARE CORPORATION
Defendants/Appellants/Cross-Appellees.

On Appeal From The United States District Court For The Eastern District Of Louisiana

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PETITION FOR REHEARING EN BANC OF APPELLEES/CROSS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Local Rule 28.2.1, Appellees/Cross-Appellants Liljeberg Enterprises, Inc. and St. Jude Hospital of Kenner, Louisiana, LLC, certify that the following persons have an interest in the outcome of this lawsuit:

DEFENDANTS/APPELLANTS/CROSS-APPELLEES:

Lifemark Hospitals, Inc.
Lifemark Hospitals of Louisiana, Inc.
American Medical International
Tenet Healthcare Corporation

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PLAINTIFFS/APPELLEES/CROSS-APPELLANTS:

Liljeberg Enterprises, Inc.
St. Jude Hospital of Kenner, Louisiana, LLC

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Jacob L. Amato, Jr.
Golden & Fonte
Kenneth C. Fonte[1]

Respectfully submitted,

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SIDNEY K. POWELL

[1] Kenneth Fonte was terminated from representing St. Jude, LEI, and the Liljebergs; he no longer represents the Liljebergs or any of their entities.

DON M. RICHARD

STATEMENT OF COUNSEL

I express a belief, based on reasoned professional judgment, that the panel opinion conflicts with the following decisions of the Louisiana Supreme Court in that it judicially adds new elements to Louisiana's laws against bid-rigging at judicial sales, confuses the analysis necessary for bid-rigging with the separate and unrelated issue of a collateral mortgagee's duties, and thereby wrongly rejects this independent ground for upholding the district court's judgment.

Pease v. *Gatti,* 12 So.2d 684 (La. 1942);

Konen v. Konen, 115 So. 490 (La. 1928);

Swain v. Kirkpatrick Lumber Co., 78 So. 140 (La. 1918)*;*

Dynamic Marine Consortium S.A. v. M/V Latini, 179 F.3d 278 (5th Cir. 1999).

I further express the belief that the panel opinion conflicts with the following decisions of this Court and the Louisiana Supreme Court in that it misconstrues Louisiana's law of collateral mortgage and, in a matter of first impression, creates a limiting distinction regarding a collateral mortgagee's duties which has not been recognized by the Louisiana Supreme Court.

Trans-Global Alloy Ltd. v. First Nat'l Bank, 583 So.2d 443 (La. 1991);

Commercial National Bank v. Parsons, 144 F.2d 231 (5th Cir. 1944);

Diamond Services Corp. v. Benoit, 780 So.2d 367 (La. 2001).

Consideration by the Court en banc is necessary to secure and maintain uniformity of decisions in this Court.

Finally, I express the belief that this case raises many issues of exceptional importance to this entire Court. The panel has found "clearly erroneous" many fully supported fact-findings, thereby undermining the district judge's legal conclusions. The panel decision in this case conflicts with the following opinions in its application of the clearly erroneous standard of review. The outcome of this case is legally wrong and transcends this Court's role as a court of legal error and review.

FED.R.CIV.P. 52(a);

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982);

Nat'l Union Fire Ins. Co. v. Circle, Inc., 915 F.2d 986 (5th Cir. 1990);

Richmond Leasing Co. v. Capital Bank, 762 F.2d 1303 (5th Cir. 1985).

Respectfully submitted,

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SIDNEY K. POWELL

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DON M. RICHARD

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STATEMENT OF THE ISSUES WARRANTING *EN BANC* REVIEW

1. Whether rehearing en banc should be granted to correct the panel opinion on Louisiana law regarding bid-rigging because the panel opinion has judicially added two elements of proof–"duty" and "proximate cause"–which did not previously exist in the Louisiana remedy allowing annulment of a judicial sale for bid-rigging and collusion? In the alternative, whether this issue should be certified to the Louisiana Supreme Court?

2. Whether, as a matter of first impression, en banc review must be granted to correct Louisiana law, because the panel has created a new distinction in Louisiana law and wrongly held that a mortgagee holding collateral in pledge has no duty to reinscribe that collateral mortgage, and instead, shifted the duty to the mortgagor. Alternatively, whether this issue should be certified to the Louisiana Supreme Court?

3. Whether the panel opinion's new interpretation of an ambiguous contract provision in disregard of critical and supported factual findings by the district judge is an appropriate exercise of appellate review?

4. Whether the panel opinion conflicts with other decisions by this Court in that it sets aside fact-findings as "clearly erroneous" although significant and essentially undisputed record evidence specifically cited by the district judge supports them?

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Following a lengthy bench trial, a Louisiana federal judge found that Lifemark/AMI/Tenet ("Lifemark") deliberately committed bad faith, breached fiduciary duties, and colluded to rig bids and terminate St. Jude's ownership of St. Jude Hospital, dissolve the parties' hospital lease and pledge of basic rents, and cancel LEI's pharmacy contract (Op., A-1, pp.10-13, 18, 21). The Louisiana federal judge

applied two independent Louisiana grounds: (1) Louisiana law requiring annulment of collusive judicial sales, and, (2) Louisiana collateral mortgage law; for returning ownership of the hospital to St. Jude and reinstating the collateral mortgage, collateral mortgage note, and note in favor of LHI (RE6; 8:33). Pointing several times to a prior decision of this Court in a case involving the Liljebergs and *Travelers*, a panel of Texas judges reversed (Op., A-2). In so doing, the panel confused the separate Louisiana remedy of annulment with Louisiana collateral mortgage law, which alone requires a duty. The panel then also found, erroneously, that no duty existed, and used this as its basis for rejecting both of the Louisiana judge's grounds for granting St. Jude/LEI's remedy.

This Court should grant *en banc* review because the panel opinion judicially creates new law: (i) it wrongly confuses two independent Louisiana legal remedies; (ii) in a matter of first impression, it limits the scope of Louisiana collateral mortgage law and reverses based on an argument raised for the first time on appeal by Lifemark; and, (iii) it disregards the detailed and thorough fact-findings of the Louisiana judge's 105-page opinion, which were supported by the record–often by Lifemark's own witnesses.[2] Moreover, the prior decision of this Court which condemns conduct of the

[2] Contemporaneously with filing this petition for rehearing en banc, LEI/St. Jude is filing a petition for panel rehearing to address the many facts overlooked by the panel, which does not even mention the testimony of five of Lifemark's own employees that Lifemark

Liljebergs, who acted on the advice of their counsel at the time, is neither the law of the case nor a basis for overturning this decision. The facts of that case are not in this record. Due Process requires that this case be decided on this record and the egregious facts of Lifemark's conduct here.

STATEMENT OF THE FACTS NECESSARY FOR *EN BANC* REVIEW

At least five of Lifemark's employees testified that what has been ridiculed as an "alleged Big Scheme" and "unfounded conspiracy theory," was, in fact, Lifemark's avowed corporate policy. From the inception of its dealings with the Liljebergs, Lifemark never intended to honor its contracts with St. Jude/LEI, and developed a multi-pronged attack for ruining St. Jude/LEI, pushing the hospital into foreclosure, and driving the Liljebergs out of the pharmacy. Lifemark filed in federal court a motion to bid credits which it knew to be untrue and colluded at the hospital's judicial sale to rig the bids and wrest the hospital from St. Jude and the pharmacy from LEI. The trial court's numerous fact-findings, including those of bad faith and collusion, were compelled by the testimony of Lifemark/AMI's employees.

(i) Irv Gregory, a Lifemark executive, initially contacted LEI on behalf of Lifemark. He testified that Lifemark's President, Bill Mackey, bragged about having

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expressly planned from the beginning of its dealings with the Liljebergs to "rip" them "off," cause their financial ruin, and usurp the hospital and the pharmacy contract.

the upper hand with LEI, having LEI under time pressure, and drafting the pharmacy agreement so Lifemark "could whack [LEI] with it" (R42:12-13, 62). Lifemark's counsel also bragged to Gregory that Lifemark had drafted the contracts so ambiguously that they could be read to say "whatever we want it to say" to give Lifemark tight control and to cover whatever "maneuvers" Lifemark wanted to make (R42:21-22; 43:177).

(ii) Bobbie Holtsclaw, an AMI employee, testified that AMI never intended to honor its contracts with LEI, that AMI was going to delay the opening of the hospital to put financial pressure on LEI, and that AMI would do "whatever it had to do" to force LEI to relinquish the hospital (Ex776:7-14, 18).

(iii) Joe Vela, project accountant and employee of Lifemark/AMI for seven years, testified that from before the hospital opened, AMI's policy was to financially harm LEI to get LEI "completely out of the picture" (R42:119, 121, 147-48).

(iv) Ronald Colichia, senior vice-president of operations, admitted that Vela's statements were true, and testified that Lifemark planned to use time pressure to take advantage of St. Jude/LEI (R43:165, 175, 177, 180, 186-87).

(v) Wendell Alford, Lifemark's regional operations manager, verified that Lifemark's intent was to usurp the entire project (R45:474, 523). Alford described Lifemark's "RYLO Program"–a corporate acronym, directed toward LEI, for "Rip

Your Lips Off" (R45:482, 486-7). Alford said the contracts were drafted to increase Lifemark's ability to terminate LEI, and he was told that if he testified on behalf of LEI, he would never work in a major hospital again (R45:486-87, 520). Alford candidly admitted: LEI was "in the eleventh hour of its Certificate of Need and was needing to make a move on it. And we were experts; we knew what was going on; we knew how to take advantage of him" (R45:500, 502).

The panel ignores Lifemark's employees' testimony and instead calls the district judge's fact-findings "absurd" and "nonsensical." On this substantial record, however, Lifemark's own witnesses proved Lifemark's bad faith and provided sufficient evidence compelling the district judge's findings. The record is replete with credible evidence from Lifemark/AMI's own employees that Lifemark's expressed corporate policy from the beginning was to "rip off" LEI, seize the hospital, and terminate the pharmacy contract.

The record shows that Lifemark implemented its plan in two ways: by increasing the cost of the hospital project to make it financially impossible for St. Jude to continue, and through circumvention of the pharmacy contract to harm LEI[3] (R42:154-56). AMI deliberately and needlessly increased St.Jude/LEI's debt to

[3] Meanwhile, Lifemark recovered its building costs from the government through the 1122 certificate that LEI had worked so hard to obtain during the Treen administration (R42:154-56).

maximize financial pressure. Assistant hospital administrator Woeppel testified that when the hospital was almost complete, AMI ordered demolition, redesign, and reequipping of several areas to skyrocket LEI's debt-load (R42:96-98). Lifemark exclusively controlled construction–building without bids, requiring a medical office building ("MOB") beyond needed capacity, and a foundation for a second MOB to increase the cost of St. Jude's construction loan (R42:116-17, 121, 129-30). Lifemark's deliberate delays in opening the hospital also increased St. Jude's already exorbitant cost on the interim financing (R42:137, 146-48, 152-54; Ex776:7-14, 18). Colichia testified that Lifemark's plan was to put LEI at Lifemark's mercy to enable Lifemark to usurp the hospital (R43:207-09).

Lifemark tightened the screws financially by: (i) dropping the master lease on the MOB; and, (ii) circumventing and shorting LEI on the pharmacy contract (R42:119-21, 140, 154-55). Even the panel found that Lifemark was circumventing the parties' pharmacy contract and withholding money, wrongfully, from LEI[4] (Op., A-2). Additionally, from before the hospital opened, AMI had already planned not to renew its substantial lease on a significant portion of the MOB, to further pressure St. Jude into default (R42:107-09, 119, 121). Vela testified that Lifemark "lured" St.

[4] Despite finding numerous instances of circumvention by Lifemark, the panel found the district court's fact-findings of bad faith to be clearly erroneous–a holding which does not comport with this record.

Jude into a 5-year lease on the MOB with no intent to renew (R42:140). Having doctors on campus was essential to insure referrals to the hospital (R43:178). Many doctors left when Lifemark dropped the lease, and the hospital census dropped (R43:270; 48:847-48, 886-88). The former director of Lifemark's materials management department confirmed that Lifemark intended to financially ruin St. Jude/LEI (R48:905-6, 915), and that he was instructed by Lifemark to destroy incriminating documents (R48:919).

Lifemark arranged for Travelers to finance the high-priced MOB for St. Jude (R42:122; 43:177). Lifemark and Travelers then met several times to strategize toward foreclosure on the MOB and the hospital (Ex770:30, 44, 47-53, 68; 773:70-71). Lifemark could have stopped the foreclosure at any time during its many discussions with Travelers, but instead helped plan and encouraged it (Ex770:47-77; R26:1836-56).

Lifemark did not reinscribe the collateral mortgage, thereby lowering the hospital foreclosure price (R43:323, 335-42; Ex772:6). LHI then announced publicly that it would bid credits, to deter other bidders, all the while knowing that instead, LHL, its subsidiary that held the lease on the hospital, would actually bid–*through an LHI representative*– to purchase the hospital at the lowest possible price (Ex770:60-62, 73-79; 771:47-56). Lifemark held numerous meetings to accomplish its goal of St.

Jude/LEI's termination (Ex770:28-30, 69-79; 772:11-18; 771:56; 773:24, 41-51; 774:22-32). The $7,800,000 Lifemark agreed to pay Travelers was a bargain in its bad faith and collusive scheme to get the $38,000,000 "flagship hospital" and terminate the lease and pharmacy contract, which alone was worth $116,000,000 (50:75; Ex770:76-79). The panel opinion, which licenses Lifemark's wrongful conduct as simply "aggressive" business practices (Op., A-2, p. 38), does not accord with Louisiana law.

ARGUMENTS AND AUTHORITIES WARRANTING *EN BANC* REVIEW

I. Louisiana Law Recognizes Annulment Of A Judicial Sale As A Remedy For Bid-Rigging And Collusion, and Contrary To The Panel Opinion, This Remedy Does Not Require Findings Of Duty Or Proximate Cause.

The panel incorrectly overturned the district judge's fact-findings and infused additional elements into the legal ground used by the district judge to annul this judicial sale and refuse Lifemark's requested deficiency judgment (RE8:21-23, 32-33). Louisiana statutes provide that judicial sales may be set aside for fraud or ill practices, which include "bad faith." There are no additional "duty" or "proximate cause" prerequisites to this remedy. LA.REV.STAT.ANN. § 9:3169 (judicial sale may be set aside for nullity); LA.CIV.CODE art. 2004 (judgments may be annulled for fraud or ill practices). It is understood that parties may not rig bids or collude to affect the

outcome of a judicial sale, and that when this is done, the sale is invalid and the amount of any "deficiency judgment" is unreliable.

The Louisiana Supreme Court, in several published opinions, has recognized that annulment is a remedy for conduct that tends to stifle bidding at a judicial sale. *See Acadian Production Corp. of La. v. Savanna Corp.*, 63 So.2d 141, 142-43 (La. 1953); *Pearlstine v. Mattes*, 67 So.2d 582, 586 n.3 (La. 1953); *Pease v. Gatti,* 12 So.2d 684, 690 (La. 1942); *Konen v. Konen*, 115 So. 490, 491 (La. 1928); *First Nat. Bank of Abbeville v. Hebert*, 111 So. 66, 69 (La. 1926)*; Swain v. Kirkpatrick Lumber Co.,* 78 So. 140, 142 (La. 1918).

The evidence of "stifling" need not be overwhelming, and the party seeking annulment need only show that something was said or done that was likely to prevent competitive bidding, was done for that purpose, and had that effect. *Konen*, 115 So. at 491. LEI/St. Jude need not have offered proof that someone else would have bid higher than LHL. *Compare Pease*, 12 So.2d at 690 (affirming finding of stifling where mortgage debtor was present at sale but did not bid because of prearrangement with sole bidder); *Swain*, 78 So. at 140 (no one bid at the sale except colluder). Where there is an allegation of collusive bidding, the evidentiary focus is on the "tendency and character of the agreement made between the parties . . . [t]he vice is in the very

nature of the contract, and it is condemned as belonging to a class which the law will not tolerate." *McMullen v. Hoffman*, 174 U.S. 639, 647-48 (1899).

This record contains numerous facts to support the district judge's finding that Lifemark acted in bad faith and colluded to manipulate the judicial sale: (1) prior to the Travelers foreclosure, Lifemark held several meetings with Travelers and with Tenet (Ex770:28-31, 33-37, 44, 47, 48, 68, 72; Ex.772:11-12, 18; Ex.773:24, 44, 48-51, 70-71); (2) the primary consideration for Lifemark was "structuring the transaction" to eliminate the CPMA and terminate the hospital lease (Ex770:73, 76-77; Ex.772:11, 18, 32, 35, 49; Ex.773:24, 31-33, 41-51; Ex.774:20, 22); (3) by purchasing through LHL rather than LHI, the mortgagee, Lifemark knew it could terminate the lease and, hopefully, the CPMA (Ex772:55-56, 73, 76); (4) nonetheless, LHI publicly announced and filed in federal court a motion to bid its mortgage credits just prior to the judicial sale–even though it knew that LHI would *not* bid its mortgage credits (Ex770:62, 65; R8:21-23), and (5) unbeknownst to other potential bidders and two days after LHI's motion was granted, an *LHI* representative appeared at the judicial sale and bid on behalf of LHL, which presented the sole and minimum required bid (R43:342-43 R8:21-23).

En banc review is required because the panel decision conflicts with Louisiana law *and* this Court's affirmance of *Dynamic Marine Consortium S.A. v. M/V Latini*,

1999 WL 123808 (E.D.La. 1999), and the related case of *ANZ Grindlays Bank Ltd. v. M/V Latini*, 1999 U.S.Dist.LEXIS 2778 (E.D.La. 1999). There, collusion to chill bidding resulted in the annulment of a judicial sale under similar circumstances: (1) prior to the sale, the mortgagee announced its intent to bid credits; (2) at the sale, counsel for the mortgagee appeared to bid, but did so as a representative of the cohort and bid only for cohort; and (3) the purchasing cohort presented the sole bid at the sale. Although, as the panel noted, this decision was unpublished at the district court level, this decision was affirmed in the alternative in a published opinion of this Court that dismissed the appeal. There, Judges Politz, Higginbotham, and Davis said:

> According to the district court, at the time of the sale Tadros represented both the mortgage holder ANZ Grindlays and Ensenada. Prior to the sale, prospective bidders were informed, primarily by Tadros, that ANZ Grindlays planned to bid its $7 million mortgage. *This obviously and understandably chilled potential bidders*. On the day of the sale, Tadros appeared at the sale. He appeared, however, as counsel for Ensenada, not as counsel for ANZ Grindlays. Tadros gave no notice of this significant change in representation. There was no bid by ANZ Grindlays on its mortgage and Ensenada, in its sole bid, acquired the vessel for the minimum bid price. The district court found that no potential bidder except Ensenada knew that ANZ Grindlays would not place a bid and that Ensenada and ANZ Grindlays had an agreement that ANZ Grindlays would present no competition in the bidding process.

179 F.3d 278, 279-80 (5th Cir. 1999) (emphasis added). *See Pease*, 12 So.2d at 690.

The same facts support the district judge's findings of secrecy and agreement here. The panel should have affirmed on this record because the instant facts are the

same as in *Dynamic Marine,* and annulment of the tainted sale was justified under Louisiana law. At the least, this Court's affirmance in *Dynamic Marine* demonstrates that this Court should also have affirmed here under the controlling standard of review. Lifemark's filing of the false motion in federal court, and its collusion and bid-rigging, voided this sale and justified the district judge's annulment under Louisiana law. *Konen,* 115 So. at 491 (either "concealment or misrepresentation of facts, amounting to fraud" or statements and actions taken to "prevent[] competition" is "sufficient to annul the sale"); *Swain*, 78 So. at 142 (rescission is justified where Defendant "act[ed] . . . [to] deter[] [others] from bidding").

Indeed, in the materials which Lifemark had placed under seal in its malpractice suit against Jones Walker, and which St. Jude/LEI immediately sought to add to the record upon removal of the seal, there was even more evidence that Lifemark conspired to construct a "house of cards" plan to usurp the hospital and pharmacy from St. Jude/LEI (R32:9831-10026). Although the district judge did not admit these materials, because he had already reached his decision based on more-than-sufficient record evidence, these materials further reveal Lifemark's bad faith and collusive plan, and should now be considered because the panel has not accepted the district judge's fact-findings. The motion to reopen was erroneously denied, and a new trial should be granted based on these materials so that the truth of Lifemark's plan can

come to light. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 331-32 (1971).

The duty not to rig bids or collude at a judicial sale is inherent in Louisiana law, and it does not matter how the property came up for judicial sale or whether Lifemark played a part. Louisiana law does not require that the colluders have also "proximately caused" the default and/or foreclosure, as the panel states. It is enough under Louisiana law that they engaged in the collusive conduct. The district court did not err in applying this Louisiana remedy and annulling this judicial sale.

"Auctions should not be empty exercises." *First Nat. Bank of Jefferson v. M/V Lightning Power*, 776 F.2d 1258,1261 (5th Cir. 1985) (Rubin, J.). Public confidence in judicial sales demands that they be conducted fairly, and Louisiana's laws against collusion and bid-rigging instill public confidence and ensure that the property owner receives the highest possible price and is left with the lowest possible deficiency. *Coen v. Toups*, 168 So.2d 893, 896 (La. App. 2d Cir. 1964); *Konen,* 115 So. at 491. That this judicial sale was "confirmed" is immaterial because under Louisiana law, even confirmed judicial sales may be annulled for fraud or ill practices because there are considered absolute nullities. *See Schlater v. Brusle*, 22 So. 925 (La. 1897); *Slidell Bldg. Supply, Inc. v. I.D.S. Mortg. Corp.,* 273 So.2d 343 (La.App. 1st Cir. 1972), *writ denied,* 274 So.2d 708 (La. 1973). The district court appropriately

annulled this judicial sale, restored St. Jude Hospital to St. Jude/LEI, and denied Lifemark's requested deficiency judgment (RE8:14-33). En banc review should be granted and the panel decision vacated on this issue.

II. The Panel Opinion Judicially Creates A Distinction Not Previously Recognized In the Unique Louisiana Law Of Collateral Mortgage And Pledge.

Regarding the district judge's alternate remedial ground, the panel creates a new legal distinction which: (a) has not been recognized by the Louisiana Supreme Court; *see Diamond Services Corp. v. Benoit*, 780 So.2d 367 (La. 2001) (only addressing personal liability of maker/pledgor); *Trans-Global Alloy Ltd. v. First Nat'l Bank,* 583 So.2d 443, 452-54 (La. 1991) (not distinguishing third-party pledges but finding duty of pledgee to preserve collateral); and (b) was never argued by Lifemark in the court below (Op., A-2, n.29). The panel's holding creates a new and far-reaching distinction in Louisiana law–which more appropriately should be decided by the Louisiana Supreme Court–and, in any event, should not be drawn in this case because Lifemark has waived this argument on appeal. The argument was not made sufficiently in the district court to permit the district judge to rule upon it because the argument was not made in the district court at all. *Brown v. Ames*, 201 F.3d 654, 663 (5th Cir.), *cert. denied*, 531 U.S. 925 (2000) (failure to raise particular argument

constituted waiver even though the new argument related to the primary argument made below).

The legal and fiduciary duties identified by the district judge (RE8:14-33) are required under Louisiana law and should not have been disregarded. *See* LA.CIV.CODEANN.ART. 3167; LA.REV.STAT. §§ 9:4401, 9:5550 *et seq*., 10-9-207*; Trans-Global,* 583 So.2d at 452-54; *Pease*, 12 So.2d at 690; *Commercial Nat'l Bank v. Parsons*, 144 F.3d 231, 236 & n. 3 (5th Cir. 1944), *cert. denied*, 323 U.S. 796 (1945). At the least, this important issue of Louisiana collateral mortgage law should be certified to the Louisiana Supreme Court for determination, and this Court may still do so on petition for rehearing. *See Frey v. Amoco Prod. Co.*, 951 F.2d 67 (5th Cir. 1992) (certifying question of Louisiana law in response to petition for rehearing).

Louisiana collateral mortgage law is not like the law of the common law states. It is peculiarly civilian in basis, and the duties and obligations imposed are different. Indeed, the Louisiana Supreme Court has recognized mortgagee duties even in regard to conventional mortgages:

> The courts recognize that the mortgagee occupies a position of advantage, and the mortgagor usually occupies the position of one in necessitous condition, and thus a court will not allow undue advantage to be taken of mortgagor. The mortgagee will not be permitted to use his position to oppress or to drive an unconscionable bargain or to take any undue advantage. His conduct must be fair and frank. *Pease*, 12 So.2d at 690.

This duty is even more pronounced in the collateral mortgage setting because the collateral mortgage also possesses elements of pledge. *See* LA.CIV.CODE arts. 3100 *et seq.*; 3278 *et seq.*; LA.REV.STAT.ANN. §§9:5103 *et seq.*; §§ 9:5550 *et seq.*; *Diamond Services Corp.*, 780 So.2d at 370-72; *Texas Bank of Beaumont v. Bozorg*, 457 So.2d 667, 671 (La. 1984); *First Guar. Bank v. Alford*, 366 So.2d 1299, 1302 (La. 1978). The panel mistakenly rejected the pledge component of collateral mortgage law, and instead applied common law principles to this civilian creation, thereby confusing

Louisiana law. See *Commercial National Bank*, 144 F.2d at 236 & n. 3:

> The duties and relations of a pledgor and pledgee are governed more by the general maxims of equity than by the strict rules of common law. The very nature of the transactions gives rise to a trust relation between pledgor and pledgee, with its consequent duties to protect the debt or obligation and the collateral.

Pledge is an accessory contract governed by its own set of rules and standards. *See* LA.CIV.CODE. arts. 3133 *et seq*. Under the Civil Code, a pledgee is liable for "any loss or decay caused by its fault." LA.CIV.CODE art. 3167. This duty of reasonable care should apply equally to the pledge of the collateral mortgage note (RE8:28-29, n.3). *See also* LA.REV.STAT. § 9:4401 & §§ 9:5550 *et seq*.; § 10-9-207 (pledgee's duties under Chapter 9 same). To the extent there is an issue regarding the scope of application of the law of pledge to the collateral mortgage, St. Jude/LEI respectfully urges this Court to certify this important question to the Louisiana Supreme.

In addition to article 3167, Louisiana jurisprudence also imposes a fiduciary duty on a pledgee. The pledge relationship is "a trust relationship between the pledgor and pledgee with attendant duties to protect the debt or the obligation and the collateral. The pledgee is presumed to act for the pledgor's interest as well as for his own, although their interests are not identical." *Trans-Global*, 583 So.2d at 452-53. This is how Louisiana collateral mortgage law is different from the typical common law mortgage. In Louisiana, the law of pledge applies, and the collateral mortgagee

should not act in its own self interest to the detriment of the collateral mortgagor. *Cf. Pease*, 12 So.2d at 690 (mortgagee owes duty of fair and frank dealing); *Diamond*, 780 So.2d at 376-79 (only by application of pledge law is retroactive ranking given to future advance under collateral mortgage).

This Court similarly has described the pledge relationship as "fiduciary [in] character," stating there is a "trust relation between pledgor and pledgee with the consequent duty of the pledgee to protect the collateral." *Commercial National Bank*, 144 F.2d at 236 & n. 3. It has made clear that a pledgee "has no right to use the thing pledged for his own pleasure or benefit . . . [or to] . . . have the enjoyment of it or receive any profit from it without the consent, express or tacit, of the pledgor." *Id.* at 236. Lifemark's turning of the pledged collateral to its own use and advantage here was "violative of the spirit and nature of [the parties'] contract." HENRY DENIS, A TREATISE ON THE LAW OF THE CONTRACT OF PLEDGE, Chap. XX, § 205 at 19 (c. 1898); SLOVENKO, *Of Pledge*, 23 TUL.L.REV. 59, 119-22 (1958) (accord). Contrary to the law of other states, in Louisiana, Lifemark, as pledgee, was required to place St. Jude's interests above its own. *Noe v. Roussel*, 310 So.2d 806, 818 (La. 1975); *see Trans-Global*, 583 So.2d at 453; SLOVENKO, *Of Pledge*, 23 Tul.L.Rev. 59 (1958).

This included the responsibility of ensuring the continued viability of the thing pledged. *O'Kelley v. Ferguson*, 22 So.783, 787 (La. 1897). In *Trans-Global,* 583

So.2d at 452-54, the Louisiana Supreme Court held that FNBJ had a fiduciary duty both to ascertain the expiration date of a pledged letter of credit and to act to prevent its expiration. The same obligations applied to Lifemark regarding St. Jude's pledged collateral mortgage note. The Louisiana Supreme Court has not made the distinction that the panel has created with respect to a third party obligor. Louisiana commentators, Denis and Slovenko, both believe that a pledgee has a legal duty to reinscribe a pledged mortgage timely to prevent loss of rank. *See* SLOVENKO, *Of Pledge*, 23 TUL.L.REV. 59, 119-122; *and* DENIS, A TREATISE ON THE LAW OF THE CONTRACT OF PLEDGE, Chap. XX, § 270 at 226.

Contrary to the panel opinion, LHI breached its duties as pledgee when it failed to reinscribe the collateral mortgage timely, resulting in a loss of rank, and then collusively arranged to purchase the collateralized hospital at the judicial sale, and to cancel the lease and pledged rent[5] (RE8:28-29, n.3). *See* SLOVENKO, *Of Pledge*, 23 TUL.L.REV. 59, 119-122; DENIS, A TREATISE ON THE LAW OF THE CONTRACT OF PLEDGE, Chap. XX, § 270 at 226; MAX NATHAN AND ANTHONY DUNBAR, *The Collateral Mortgage: Logic and Experience*, 49 LA.L.REV. 39, 49 (Sept. 1988)

[5] Lifemark admitted that it took these actions in its own interest to secure ownership of the hospital and cancel the lease and pharmacy agreements (RE8:18-20, 29; Tenet's Br. n.16.). This violates its obligations under Louisiana law.

(collateral mortgagee is a "pledgee, who accepts a fiduciary duty as such," to the borrower).

The legal fact that Travelers theoretically could have foreclosed, despite Lifemark's prime mortgage, does not change the result or support the panel's decision. Lifemark was meeting with Travelers, steered Travelers to foreclose, and Lifemark's failure to reinscribe the collateral mortgage gave Travelers the first lien position–for Lifemark's benefit and contrary to its duties to the mortgagor. There was no evidence that Travelers would have foreclosed from its second lien position. To foreclose from second lien position, Travelers would have had to ensure that the $38 million first lien held by Lifemark was paid, *and* take the hospital subject to Lifemark's lease. That was not Lifemark's plan. The panel itself notes that no one else would have wanted the hospital bearing this lease (Op., A-2, p. 37). Lifemark carefully and deliberately set up and executed its plan to usurp the hospital. Had Lifemark not done so, it faced St. Jude's ultimate ownership of the hospital and LEI's perpetual control of the pharmacy because Lifemark's rental payments to St. Jude for the hospital were designed to offset and cover St. Jude's mortgage payments to Lifemark. It was all a wash, and Lifemark's bad faith and collusion was designed to prevent it.

The panel's reliance on the contract provisions allowing Lifemark to release the collateral also beg the question. Lifemark did not release the collateral and never

intended to do so. Rather, it schemed long and hard to make sure it kept it and to push St. Jude into judicial foreclosure. Moreover, none of these provisions operate to excuse Lifemark from its fiduciary duties or its blatant bad faith.

III. The Panel Decision Misapplies Bankruptcy Law And The Requisite Standard Of Review By Finding That The District Judge's Decision To Allow LEI To Assume The CPMA Pharmacy Contract Was Clearly Erroneous.

Based on the record, the district judge found that "[i]t would be incomprehensible . . . to imagine a scenario where anything other than assumption would be in the best interest of LEI," thus finding that assumption of the CPMA contract by LEI was justified under the business judgment rule of the Bankruptcy Code. 11 U.S.C. § 365; (RE8:78). The panel reached a contrary conclusion, reversing the district judge's factual finding and holding that it was clearly erroneous. *Richmond Leasing Co. v. Capital Bank*, 762 F.2d 1303, 1307-10 (5th Cir. 1985) (whether assumption satisfied business judgment rule is a factual finding reviewed for clear error); *Nat'l Union Fire Ins. Co. v. Circle, Inc.*, 915 F.2d 986, 989 (5th Cir. 1990) (if interpretation of contract turns on consideration of extrinsic evidence, review standard is clear error).

The district judge's fact-findings were not erroneous. To reverse, the panel had to: (1) overturn the district court's factual findings of Lifemark's bad faith and collusion; (2) reverse the court's decision to return the hospital to St. Jude; (3) find

that Lifemark should bear no responsibility even though its own conduct brought about the alleged breaches which Lifemark claims caused a cross-default under the CPMA contract; and, (4) reinterpret this same cross-default provision to state, in a place where it clearly lists "Lifemark" as the obligor, that it should instead have listed LEI. Additionally, while the panel notes that the district judge made no finding that LEI could cure this default, that is because the district judge's fact-finding was that no default occurred. The panel has overturned critical fact-findings and rescued Lifemark by using (and rewriting) a contract provision deliberately written by Lifemark in bad faith–all to prevent LEI from assuming a contract which the district judge clearly believed should be assumed by LEI on this record and under the business judgment rule of the Bankruptcy code.

Notably, a prior panel of this Court, composed of Judges Wisdom, Stewart and Dennis, affirmed LEI's reorganization plan and found that LEI's bankruptcy filing was in good faith (Unpub. Op., A-3). Although the issue of assumption was reserved, application of the governing standards in that decision also warranted affirmance here.

Continued operation of the hospital pharmacy is critical to LEI's rehabilitation as a debtor, and indeed, to its viability at all.

IV. Contrary To Long-Standing Precedent Of This Court, Which Has Consistently Declined To Substitute Its Opinions For Those Of Trial Judges And Carefully Applied The Clearly Erroneous Standard of Review,

Rarely Reversing On That Ground, The Panel Opinion Has Overturned Numerous Fact-Findings Despite Clear Evidentiary Support.

Finally, an error permeating the panel's opinion and conflicting with controlling precedent is its almost wholesale reversal of the district judge's fact-findings when they are supported by the record. This error affects numerous issues, including (1) rejection of the Louisiana remedy allowing annulment of judicial sales; (2) overturning the district judge's findings of bad faith, collusion, and breach of duty; and (3) reversal of the district judge's factual determination that assumption of the CPMA contract was permissible and in LEI's best interest.

The panel overturned virtually all fact-findings replete throughout a 105-page opinion, based on seven weeks of trial, a sixteen volume transcript, and seven boxes of exhibits. Only by discrediting the district judge's well-supported fact-findings was the panel able to reject the Louisiana remedies appropriately applied by the district judge and reverse assumption of the CPMA contract by LEI.

This Court is obligated by statute and Supreme Court precedent to uphold fact-findings which are supported in the record. FED.R.CIV.P. 52(a); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855-56 (1982); (Op., A-3). It may not second-guess the trial judge's findings if sufficient evidentiary support exists. *Id.*

In its opinion, the panel three times cites the Liljeberg's prior conduct in another case while it rejects the district court's well-supported findings that it was

Lifemark–not St. Jude/LEI–that acted inappropriately here. (Op, A-2, pp. 7, 32, n. 40). Despite a record full of evidence of Lifemark's bad faith, the panel calls the district judge's findings "inexplicable," "mere chimera," "absurd," "def[iant]," and "nonsensical." (Op., A-2, pp. 25, 27, 30, 32, 33). The Liljeberg's conduct in a prior case, which another panel of this Court found to be "egregious and unconscionable," is not before this Court. Nor did the Liljeberg's conduct in the prior case cause the Travelers' judgment.[6] The record and facts of that case are not part of the record here. Moreover, the district judge was aware of this Court's decision in that case when he made the numerous fact-findings of Lifemark's bad faith, collusion, and "devious and underhanded tactics" in this case that are supported by this record.

Moreover, as this Court also noted in the prior decision, the Liljeberg's counsel there did a woefully inadequate job representing these clients, filing a brief with a "paucity of record citations" and so short of compliance with the rules to "sorely tempt[] [the panel] to grant Travelers' motion to dismiss the appeal." The Liljebergs should not be judged in this case based on a prior case where they received

[6] The judgment was entered for rent the Liljebergs could not pay on the medical office building after being squeezed from several directions by Lifemark. Only a small portion of the judgment was attributable to the Liljebergs wrongs, and damages for those were added only by amendment to the judgment.

ineffective, even damaging representation. Further, for the same reasons that this Court was offended by the Liljeberg's prior counsel and the conduct of the Liljebergs (who acted on the advice of that counsel) in the prior litigation, this Court should be equally offended by the bad faith and deceitful conduct of Lifemark on this record. It was not until the record was developed in this case that many of the facts of what Lifemark was doing from the inception of its dealings with the Liljebergs came to light, and it is Lifemark's actions that are the basis of this lawsuit.

CONCLUSION

For these reasons, this case should be heard *en banc* and, either additionally or alternatively, the issue of the scope of the duty owed by a collateral mortgagee and the issue of the elements of bid-rigging in Louisiana law should be certified to the Louisiana Supreme Court.

Respectfully submitted:

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CERTIFICATE OF SERVICE

Pursuant to FED.R.APP.P. 25 and 31.1, undersigned counsel certifies that a true and correct copy of Appellees/Cross-Appellants' Petition for Rehearing En Banc was served via Federal Express upon counsel of record this ___ day of _____, 2002, as shown below:

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