UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:	**Jointly Administered under Case No. 08-46617**
Polaroid Corporation, et al.,	Court Files No.'s:
Debtors.	08-46617 (GFK)
(includes:	
Polaroid Holding Company;	08-46621 (GFK)
Polaroid Consumer Electronics, LLC;	08-46620 (GFK)
Polaroid Capital, LLC;	08-46623 (GFK)
Polaroid Latin America I Corporation;	08-46624 (GFK)
Polaroid Asia Pacific LLC;	08-46625 (GFK)
Polaroid International Holding LLC;	08-46626 (GFK)
Polaroid New Bedford Real Estate, LLC;	08-46627 (GFK)
Polaroid Norwood Real Estate, LLC;	08-46628 (GFK)
Polaroid Waltham Real Estate, LLC)	08-46629 (GFK)
	Chapter 11 Cases Judge Gregory F. Kishel

DEBTORS' OBJECTION TO MOTION FOR LEAVE TO FILE OBJECTION, AND REPLY TO OBJECTION TO DEBTORS' MOTION AUTHORIZING SALE OF ASSETS BY EYEWEAR BRAND LIMITED, STYLEMARK, INC., STYLEMARK AB, STYLEMARK B.V., STYLEMARK, S.P.A. AND STYLEMARK, A.G.

TO: The entities specified in Local Rule 9013-3

Polaroid Holding Company, Polaroid Corporation, Polaroid Consumer Electronics, LLC, Polaroid Capital, LLC, Polaroid Latin America I Corporation, Polaroid Asia Pacific, LLC, Polaroid International Holding, LLC, Polaroid New Bedford Real Estate, LLC, Polaroid Norwood Real Estate, LLC and Polaroid Waltham Real Estate, LLC (collectively "Debtors" or "Polaroid"), through their undersigned attorneys, file this Objection to the motion of Eyewear Brand Limited, StyleMark, Inc., StyleMark AB, StyleMark B.V., StyleMark S.p.A., and Stylemark, A.G. (Collectively "Objectors" or "StyleMark") for leave to file objection to Debtors' motion authorizing sale of assets and Reply to the Limited Objection to Debtor's Motion Authorizing Sale of Assets filed by Objectors.

PROCEDURAL BACKGROUND

On January 28, 2009, Polaroid filed a motion with the Court requesting, among other things, court approval of certain auction and bidding procedures and the approval of the sale of its assets outside the ordinary course of business in accordance with § 363 of the Bankruptcy Code ("Sale Motion"). Such sale is to be to the highest and best bidder at the conclusion of an auction (the "Auction"). The sale expressly contemplates the sale of one of Polaroid's most valuable assets, its trademarks. By order dated February 18, 2009, the Court approved auction and bidding procedures and authorized Polaroid to sell certain of its assets outside the ordinary course of business ("Bidding Procedures Order"). Under all iterations of notice published and provided to all creditors and executory contract counter-parties, all objections to the sale were unequivocally due on or before March 26, 2009.

Separate and apart from objections to the sale, on March 16, 2009, Debtors served an *Initial Notice of Assumption and Assignment of and Amounts Necessary to Cure Defaults under Contracts and Leases to be Assumed and Assigned to Successful Purchaser* upon those parties whose contracts may be assumed and assigned to the stalking horse bidder, had that bidder been the prevailing bidder. Objections to the cure amounts or the assumption and assignment of acquired executory contracts were also unequivocally due on or before March 26, 2009. However, as with most 363 sales and auctions, the stalking horse bidder and other bidders have expressly reserved the right to perform due diligence and determine which contracts are to be assumed and assigned. Such normal changes do not, and did not, extend the deadline of March 26, 2009 to object to the proposed sale.

ARGUMENT

It is important to recognize that the Debtors have not sought to assume or reject the trademark license agreement with StyleMark at this time. Debtors are in the midst of the Auction, which will determine and establish the prevailing bidder. The prevailing bidder will then make final determinations as to which contracts it wishes to assume and have assigned to it, as was contemplated by the stalking horse bid filed on January 28, 2009. Similarly, the Debtors will, in the exercise of their sound business judgment, ultimately make determinations relative to the assumption and assignment or rejection of executory contracts. The treatment of the StyleMark trademark license agreements has not been finally determined at this juncture, and the objection advanced by StyleMark to the treatment of its executory contract is premature. Objections will and should be more appropriately addressed at a later scheduled hearing when certain relief is requested with respect to executory contracts. It appears that StyleMark is attempting to now turn its concerns about the ultimate treatment of its trademark license agreements with the Debtors, and whether such trademark license agreements will be assumed and assigned to the prevailing bidder or rejected by the Debtors, into an objection to the sale itself. For the following reasons, such objections should be overruled and properly addressed at a later scheduled hearing relating to the treatment of executory contracts.

The Objectors do not dispute the fact that the StyleMark trademark license agreement (the "Trademark License Agreement") constitutes an executory contract within the meaning of § 365 of the Bankruptcy Code. Indeed, any and all rights that the Objectors assert and seek to adjudicate now (literally days before the continued Auction and sale hearing) emanate from the terms of a prepetition executory contract. As a consequence of the Objectors' requested relief, which appears to seek an adjudication of rights relative to the potential treatment of the trademark license agreement in the context of the sale hearing and couch the debate (at least in part) in terms of rejection, the Debtors have necessarily been required to address the contentions.

A. In the Event Debtors Reject the StyleMark Trademark License Agreement, Debtors May Transfer Trademarks Free and Clear of StyleMark's Purported Interests Under Section 363(f).

Objectors generally state that the prevailing law that a trademark owner cannot sell or assign its interest in the trademark free and clear of existing contractual limitations, such as rights granted to licensees, absent rejection of such license agreements pursuant to § 365. *See, e.g., Icee Distributors, Inc., v. J&J Snack Foods Corp.*, 325 F. 3d 586, 593 (5th Cir. 2003). Accordingly, Debtors will either assign StyleMark's license agreements to the Prevailing Bidder in a separate hearing, or reject such license agreements as it is permitted under § 365(d)(2), at which time the interest StyleMark acquired under the contract will be extinguished. The Debtors are neither seeking to assume and assign this contract at this time, nor are the Debtors seeking to reject this executory contract at this time. In fact, with StyleMark not being a prepetition creditor, and having contracts that have been neither rejected nor assumed at this time, it is questionable whether StyleMark has standing to object to the non-assignment of its trademark license agreements.

B. If Debtors Ultimately Reject Eyewear License Agreements in the Exercise of Business Judgment, the Estate Will Benefit

At this time the Debtors have not sought to reject the StyleMark trademark license agreements. In the event Debtors do seek to reject the StyleMark trademark license agreements, such decision to assume or reject an executory contract is left to a debtor's business judgment. *In re Food Barn Stores, Inc.,* 107 F.3d 558, 566 n.16 (8th Cir. 1996). The test requires a debtor to demonstrate that rejection of the contract is in the best interest of the estate. *In re Crystalin, LLC*, 293 B.R. 455, 464 (8th Cir. B.A.P. 2003).

Where rejection of a trademark license produces *no benefit* at all for the debtor or its creditors, some courts have held that a debtor's rejection of the contract is not a valid exercise of the debtor's business judgment. *See, e.g., In re Matusalem*, 158 B.R. 514, 522 (Bankr. S.D. Fla. 1993) (emphasis added). In addition to economic considerations, courts consider other benefits to the estate that include brand unification, elimination of confusion in the marketplace that will improve customer relations, reductions in operating costs and increase effectiveness of marketing efforts. *In re Exide Technologies*, 340 B.R. 222, 242 (Bankr. D. Del. 2006). The one case cited by StyleMark in support of its statement that "courts" refuse request to reject licenses that will needlessly inflict great damage on a licensee, *In re Petur U.S.A. Instrument Co., Inc*., 35 B.R. 561 (Bankr. W.D. Wash. 1983), was expressly rejected by *Lubrizol Enterprises, Inc., v. Richmond Metal Finishers, Inc*., 756 F.2d 1045, 1048 (4^{th} Cir. 1985), authority that has continued vitality in connection with the rejection of trademark license agreements. More recently, in determining the benefit to the estate, courts have held that the burden or impact that rejection will have on a nondebtor party is not a factor to be considered. *In re Exide Technologies*, 340 B.R. at 245 n.33.

Here, in contrast with the facts of *Matusalem*, if the StyleMark trademark license agreements are rejected, there would be both economic and non-economic benefits for the debtor and the estate, which the Debtors, their advisors, and the Committee have evaluated. Accordingly, Debtors assert they will meet their burden to show that rejection of the StyleMark trademark licenses, if and when that occurs, and will be able to show that such determination was based on the exercise of its business judgment, and not the product of bad faith, whim or caprice. Again, the issue is not ripe, as Debtors have not sought to reject the StyleMark trademark license agreements. If and when the StyleMark trademark license agreements are assumed and assigned or rejected, it is at that time that the Court will have to assess Debtors' exercise of its business judgment.

C. If Debtors Reject the Trademark License Agreement, Such Rejection Will Unequivocally Terminate StyleMark's Rights under the Trademark License Agreement

StyleMark contends that regardless of whether its trademark license agreements are rejected, it may continue using the trademarks since rejection simply constitutes a breach of the agreement and not a termination of it. Since Debtors have not sought to assume and assign or reject the StyleMark trademark license agreements at this time, StyleMark's objection is premature. However, if the Court were to consider StyleMark's objections on the merits at this time, for the following reasons, such objections should be overruled.

1. StyleMark's Argument Is Not Supported by Statutory Language

In the event the Debtors reject the StyleMark trademark license agreements, StyleMark will retain no rights under the rejected agreement. In the event an executory contract is rejected, the holder of such contract is left with a claim for rejection damages unless § 365 provides additional protections. 11 U.S.C. § 365. StyleMark is a licensee to a trademark license agreements and Congress specifically provided additional protections to licensees of "intellectual property," including the right to retain their rights under the license agreement in the event of rejection. *Intellecutal Property Licenses in Bankruptcy Act* (IPLBA), Pub. L. No. 100-506, 102 stat. 2538 (1988), codified at 11 U.S.C. § 365(n). Congress, however, specifically and expressly denied those same rights to trademark licenses by the definition of "intellectual property" set forth in the Bankruptcy Code. 11 U.S.C. § 101(35A).

To allow StyleMark to receive the benefit of § 365(n), as it appears to be seeking now, when it is statutorily excluded from receiving such benefits would undermine the plain language of the statutory scheme enacted by Congress. Where the statute is clear and unambiguous, it should be applied accordingly. *In re Johnson*, 300 B.R. 471, 478 (Bankr. D. Minn. 2003) ("The utter clarity of the statute on its face would make resort to any legislative history unwarranted.") (citing *Davis v. Michigan Dept. of the Treasury,* 489 U.S. 803, 808 n.3 (1989); *Northern States Power Co. v. United States,* 73 F.3d 764, 766 (8th Cir.1996); *United States v. Field,* 62 F.3d 246, 249 (8th Cir.1995); *Arkansas AFL-CIO v. F.C.C.,* 11 F.3d 1430, 1440 (8th Cir.1993); *State v. McKown,* 475 N.W.2d 63, 66-67 (Minn.1991)). "Because Congress unambiguously indicated that trademark licenses are to be excluded from § 365(n), it does not allow the court to weigh the equities of this case." *In re Centura Software Corp.*, 281 B.R. 660, 670 (Bankr. N.D. Cal. 2002).

2. StyleMark's Argument Is Not Supported by Legislative History of Section 365(n)

Even if the Court were to examine the legislative history concerning § 365(n), the conclusion would be the same. S. Rep. No. 100-505, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.CA.N. 3200. According to the legislative history, the bill specifically "does not address the rejection of executory trademark, trade name or service mark licensees by debtor-licensors. *Id.* at *6, 3204. Congress' intent in enacting § 365(n) to permit an intellectual property licensee, of which trademark licensees are specifically excluded, to elect one of two sets of consequences to attach to that rejection: (1) treat the rejection as terminating the license, leaving the licensee with its rights as a contract creditor available to a licensee without enacting such legislation; or (2) allow the intellectual property licensee to retain its rights under the license, as such rights existed immediately prior to commencement of the case. *Id.* at *8, 3205. What would be the point of § 365(n) if rejection left unaltered the rights of trademark licensees?

3. StyleMark's Argument Is Not Supported By Case Law

In the event Debtors ultimately reject the StyleMark trademark license agreements, StyleMark, as licensee, is left with no rights to use the trademarks, but is entitled to a general unsecured prepetition claim for Debtor's breach of its executory contract. *Lubrizol Enterprises, Inc., v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985); *In re Exide Technologies*, 340 B.R. at 249 ("[t]he unique nature of intellectual property licenses requires different treatment than non-intellectual property related contracts upon rejection"); *In re Blackstone Potato Chip Co., Inc.*, 109 B.R. 557, 562 (Bankr. D.R.I. 1990) (rejection terminates a trademark license); *HQ Global Holdings, Inc.*, 290 B.R. 507, 513 (Bankr. D. Del. 2003)("A trademark license is terminated upon rejection and the licensee is left only with a claim for damages"); *In re Centura Software Corp.*, 281 B.R. at 673-74 (same). In fact, the *Centura Software Court* noted:

> There is significant consensus among courts and scholars regarding the licensee's rights under a rejected trademark license. See Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection"*, 59 U. Colo. L.Rev. 845, 919 (1988) (unless protected by § 365(n), the rejection of a technology contract is to be treated as if the debtor has broken a promise and will not perform its obligations, thereby giving the non-debtor a basis for a breach claim under § 365(g)); Norton, 6A Norton Bankr. L. & Prac.2d § 150:18 (because § 365(n) does not apply to trademarks, once a trademark license is rejected, the licensee cannot continue using the trademark and is left with a general unsecured claim against the debtor's bankruptcy estate); Riback, *The Interface of Trademarks and Bankruptcy*, 387 PLI/Pat at 66 (rejection of a trademark license can potentially destroy licensee's business because it is deemed to be a prepetition breach by the debtor and only gives rise to a prepetition claim for damages under §§ 365(g) and 502(g); specific performance is not an available remedy).

In re Centura Software Corp., 281 B.R. at 674.

StyleMark contends that rejection of the trademark license agreements does not deprive them from continuing to use such trademarks. "This argument misses the mark entirely." *In re HQ Global Holdings*, 290 B.R. at 513. The HQ Global Court continued: "[t]he essence of the Agreements was the Debtor's affirmative grant to the [licensees] of the right to use their proprietary marks. As a result of the rejection, that affirmative obligation of the Debtors to allow the [licensees] to use the marks is excused." *Id*. (citing *In re Centura Software*, 281 B.R. at 673). Courts routinely hold that once a trademark license is rejected, the licensee cannot continue using the trademark and is left with a general unsecured claim against the debtor's estate. As the *Exide Technologies Court* aptly stated:

> The primary benefit of rejecting a trademark license is reacquiring the right to use the mark in whatever capacity or market in which use by the licensor was previously excluded and extinguishing the licensee's right to use it. [Objector's] argument that a licensee's right to use a trademark does not revert back to the licensor upon rejection would mean that rejection of a trademark license would never offer meaningful relief to the debtor. *This would be an absurd result.*

In re Exide Technologies, 340 B.R. at 250 (emphasis added).

The authorities cited by StyleMark are a minority of cases and readily distinguishable in that they do not involve trademark licenses, but real property leases subject to other provisions of § 365. In other words, none of the authority cited by the Objectors in support of the proposition that continued rights under licensing agreements exist following rejection involve trademark licenses. As set forth above, there is substantial authority directly contradicting the proposition advanced by the Objectors in the hours before the sale hearing. *See, e.g., HQ Global Holdings*, 290 B.R. at 513 (holding that rejection terminates a trademark license agreement); *Centura Software*, 281 B.R. at 673-74 (finding trademark license agreements to be unique species of executory contracts, the rejection of which terminates the agreement). *Accord In re Exide Technologies*, 340 B.R. at 250.

D. StyleMark Is Not Entitled to Protection

Objectors can point to no provision in § 365, or anywhere else in the Bankruptcy Code, that requires, that contemplates or suggests protection to licensees of properly rejected trademark licenses pursuant to § 365(a). *In re HQ Global Holdings*, 290 B.R. at 514 (finding "[t]here is no authority for any transition period," nonetheless the court accepted Debtor's offer of a 30 day transition period to cease using the proprietary marks). This is particularly relevant where

Congress specifically failed to include a rejected trademark licensee within the province of § 365(n) and its licensee protections, instead providing rejected trademark licensees with the same avenue as any other rejected contracting party—filing an prepetition unsecured proof of claim for rejection damages.

Even if there were authority for a wind-down period, there is no authority for a wind-down period exceeding the period agreed to by the parties. *See, e.g., In re Exide Technologies*, 340 B.R. at 250-51 (permitting two-year transition period identical to that negotiated by two sophisticated businesses). Here, pursuant to Section 6.1 of the Amended and Restated License Agreement, the parties agreed that if the agreement were terminated, the licensees would immediately discontinue the manufacture and sale of the licensed articles and provides for a 180-day sell off period to dispose of then-existing licensed articles.

The Debtors respectfully request the Court deny any licensee protections at this juncture, as such protections are not contemplated by the Bankruptcy Code. If such protections are granted, they should be limited to 180 days (as provided in the operative agreement) and involve nothing more than Objectors and their sub-licensees selling off current existing inventory.

CONCLUSION

StyleMark, as any other party to an executory contract in these bankruptcy proceedings, is concerned about how its contract will be treated in the pending sale and bankruptcy proceedings; however, neither the Debtors nor the remaining bidders have sought to assume or reject StyleMark's trademark license agreements at this time. As such, objections relating to trademark license rejection is premature and Debtors respectfully assert should be overruled. To the extent the Court considers objections to, and ramifications of, the potential rejection of the StyleMark trademark license agreements, the Debtors respectfully assert such objections should be overruled. Section § 365, and the weight of case law, permit the Debtor, at some point in the future, to reject the StyleMark trademark license agreements if it is done in a reasonable exercise of the Debtors' business judgment. The result of such rejection would be that StyleMark will be unable to use Debtors' trademarks and will be entitled to assert a claim for rejection damages as a prepetition general unsecured creditor.

Pursuant to Local Rule 9013-2(c), the Debtors give notice that they may, if necessary, call one or more of the following individuals to testify about the factual matters raised in and relevant to this Motion: Robert McDonough, Senior Vice President of Finance, whose business address is 300 Baker Avenue, Concord, Massachusetts, 01742, Scott Hardy, Executive Vice President and General Manager of Polaroid America, whose business address is 4400 Baker Road, Minnetonka, Minnesota 55343, and Stephen Spencer, Director, Houlihan Lokey Howard & Zukin Capital, Inc., whose business address is 225 South Sixth Street, Suite 4950, Minneapolis, Minnesota 55402. Other representatives of Polaroid or Houlihan Lokey may also be called.

WHEREFORE, Polaroid respectfully requests the Court (1) deny Objector's motion for leave to file untimely response; and (2) overrule Objector's limited objections; (3) and grant such other, further or additional relief as the Court may deem just and equitable.

DATED: April 15, 2009

LINDQUIST & VENNUM P.L.L.P.

By: /e/ George H. Singer

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POLAROID CORPORATION

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

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CERTIFICATE OF SERVICE

Gretchen Luessenheide of the City of New Hope, County of Hennepin, State of Minnesota, being first duly sworn on oath, states that on April 15, 2009 she served the following document:

> Debtor's Objection to Motion for Leave to File Objection, and Reply to Objection to Debtors' Motion Authorizing Sale of Assets by Eyewear Brand Limited, StyleMark, Inc., StyleMark AB, StyleMark B.V., StyleMark, S.P.A. and StyleMark, A.G.

electronically by Notice of Electronic Filing upon all parties who have requested electronic service in these cases by filing the same via ECF with the Bankruptcy Court in the District of Minnesota.

/e/Gretchen Luessenheide
Gretchen Luessenheide