

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re: Court File Nos.:

Polaroid Corporation et al., 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; and 08-46628 (GFK)
Polaroid Waltham Real Estate, LLC) 08-46629 (GFK)

Chapter 11 Cases
Judge Gregory F. Kishel

Jointly Administered Under
Case No. 08-46617

**EMERGENCY MOTION
FOR A STAY PENDING APPEAL**

Lithograph Legends, LLC, ("Patriarch")¹ hereby moves, pursuant to Rules 8005 and 8011 of the Federal Rules of Bankruptcy Procedure, for an emergency order staying this Court's April 17, 2009 Order Authorizing: (I) Sale of Certain of the Debtors' Assets, Free and Clear of Liens, Claims, Encumbrances, and Interests; and (II) the Granting of Related Relief (the "Sale Approval Order"), until final determination of Patriarch's appeal from that Order or, at a minimum, for sufficient time to permit the district court a full opportunity to address the propriety of a further stay pending determination of the appeal. The Court will hear Patriarch's motion at a date and

¹ Lithograph Legends, LLC is the party bringing this motion, but for convenience it is referred to in this motion as "Patriarch" because it is an affiliate of Patriarch Partners, L.P.

time to be determined by the Court. This motion is based on Patriarch's Memorandum of Law in Support of Emergency Motion for a Stay Pending Appeal and the facts and law cited therein.

Dated: April 20, 2009.

/e/ Robert T. Kugler

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**MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY
MOTION FOR A STAY PENDING APPEAL**

Lithograph Legends, LLC, ("Patriarch")¹ moves, pursuant to Rules 8005 and 8011 of the Federal Rules of Bankruptcy Procedure, for an emergency order staying this Court's April 17, 2009 Order Authorizing: (I) Sale of Certain of the Debtors' Assets, Free and Clear of Liens, Claims, Encumbrances, and Interests; and (II) the Granting of Related Relief (the "Sale Approval Order") (Attached as Exhibit 1), until final determination of Patriarch's appeal from that Order or, at a minimum, for sufficient time to permit the District Court a full opportunity to address the propriety of a further stay pending determination of the appeal.

¹ Lithograph Legends, LLC is the party filing this motion, but for convenience it is referred to in this motion as "Patriarch" because it is an affiliate of Patriarch Partners, L.P.

I. Summary: Why an Immediate Stay Is Warranted

This appeal arises from a fundamentally flawed auction of the Debtors' assets that resulted in a sale to a *lower bidder*. The Bankruptcy Court established a clear set of bidding procedures that, among other things, (i) valued the equity portions of each bidder's offers equally and (ii) adopted the Debtors' valuation of certain assets, including artwork. The parties then engaged in a public auction before the Bankruptcy Court on April 16, 2009. Applying the valuations endorsed by the Court and accepted by the parties, the Debtors determined that Patriarch won the auction with the highest and best offer of \$86.4 million (net to the estate), which was \$488,000 higher than the final competing bid submitted by Hilco/Gordon. The Debtors then moved for Bankruptcy Court approval of the sale.

In an unprecedented and surreal turn of events, the Bankruptcy Court approved the motion, but declared the lower bid of PLR Holdings, LLC ("Hilco/Gordon")² to be the winner. The Bankruptcy Court reached this startling result by disregarding the bidding procedures it had established in a written order, which all the parties relied upon in conducting the auction. Contrary to its prior order, the Bankruptcy Court concluded that the equity portion of Hilco/Gordon's bid should be valued at some undefined and unknown amount greater than the equity portion in Patriarch's bid. This determination was based on concerns raised by certain creditors that the LLC agreement between Hilco/Gordon and Polaroid was more favorable to the estate than the similar agreement between Patriarch and Polaroid. The Bankruptcy Court reached this conclusion, however, without actually reviewing the terms of the two agreements, without receiving any evidence as to the appropriate monetary value of the disparate contractual

² PLR Holdings, LLC was the losing bidder at the auction, but for convenience it is referred to in this motion as "Hilco/Gordon" because it is an affiliate of Hilco/Gordon Brothers.

terms, and without allowing counsel for Patriarch to be heard on the matter. The Bankruptcy Court then compounded this error by raising concerns that the previously accepted valuation of certain artwork should now be deemed too low. All of this occurred after the auction had closed and Patriarch had been declared the winner, and in a proceeding from which Patriarch was barred. The Bankruptcy Court repeatedly directed Patriarch's counsel to "sit down" whenever he tried to question a witness, introduce evidence or present arguments. Indeed, when Patriarch's counsel offered to accept the Hilco/Gordon LLC agreement, which was raised as an impediment to the auction result only after the auction was over, the Bankruptcy Court rejected the offer as coming too late. Thus, the losing bid was effectively revised upward through an increase in the value of its equity component and an increase in value of an excluded asset, while the winning bidder was told to "sit down" and prohibited from matching it, or even responding at all to the new developments.

The result of this process is that the Debtors did not and cannot receive the highest and best offer for their assets. And Patriarch was deprived of the right to participate in a fair auction pursuant to the judicially established bidding procedures. By revising the bidding procedures after the auction was completed and overruling the business judgment of the Debtors in declaring Patriarch the auction winner, the Bankruptcy Court violated well-established principles of bankruptcy law and clearly abused its discretion. Thus, Patriarch has a strong likelihood of success on the merits of its appeal. Further, Patriarch will be irreparably harmed in the absence of a stay because the appeal may be rendered moot if the sale is permitted to close.³ This proceeding sets a dangerous precedent for Section 363 auctions in an economic environment

³ Under section 363(m) of the Bankruptcy Code, the reversal or modification on appeal of a sale approval order does not affect the validity of the sale to an entity that purchased in "good faith." Although the Court found that Hilco/Gordon acted in good faith, no evidence was presented at the hearing to support that finding.

where bankruptcy auctions are expected to become more common. The Court should grant a stay in order to maintain the status quo and permit a meaningful appellate review to proceed.

II. Statement of Facts

On January 28, 2009, Polaroid filed a motion with the Bankruptcy Court seeking, among other things, the entry of an order approving auction and bidding procedures for the orderly sale of its assets. On February 18, 2009, the Bankruptcy Court entered its Order (1) Approving Auction and Bidding Procedures; (2) Approving Break-Up Fee; Expense Reimbursement and Other Buyer Protections; (3) Approving Notice; and (4) Granting Related Relief (the "Bidding Procedures Order"). The Bidding Procedures Order, among other things, authorized Polaroid to auction off its assets pursuant to section 363 of title 11 of the United States Code (the "Bankruptcy Code"), and established the bidding procedures ("Bidding Procedures") that were to govern the sales process. *See* Bidding Procedures Order (Attached as Exhibit 2) at 2, Ex. A. In so doing, the Bankruptcy Court determined that the Bidding Procedures (as defined in the Bidding Procedures Order) "are fair, reasonable and appropriate and are designed to maximize the value of the Debtors' estates." (Bidding Procedures Order at 2).

Under the Bidding Procedures Order, the Bankruptcy Court authorized Polaroid to "select, in their business judgment, the highest or otherwise best offer(s), and the Successful Bidder or Bidders and the next highest and best offer(s), and the Back-Up Bidder or Bidders..." Consistent with Polaroid's right to select the winning bid, the Bidding Procedures provided it with "the right to determine the value of any Qualified Bid ... and which Qualified Bid or Qualified Bids constitutes the highest or otherwise best offer. (Bidding Procedures at 5). The Court's own Bidding Procedures Order plainly recognized the discretion to be afforded to Polaroid as debtor to use its *business judgment* to select the highest and best offer. (*Id.*)

Following two unsuccessful attempts to conclude an auction and approve a winning bid,⁴ the Bankruptcy Court ordered that a third auction be held in open court on Thursday, April 16, 2009. *See* Order Re: Debtors' Motion for Authority to Sell Certain of Debtors' Assets Free and Clear of Liens, Etc. dated April 9, 2009 (the "Supplemental Procedures Order") (Attached as Exhibit 3). Importantly, the Supplemental Procedures Order established the rules under which the continuation of the auction process was to occur, including rules for valuing the parties' bids:⁵

- Paragraph 4(a) provided that the parties' previously negotiated agreements with Polaroid – the purchase agreement and the LLC agreement – would govern the proposed sale, and would not (with certain exceptions) be subject to change.
- Paragraph 4(c) of the Supplemental Procedures Order provided that any equity component of the bids was to be valued equally for both Bidders, at \$650,000.00 per percentage-point-unit of equity. (Supplemental Procedures Order at 3.) This was intended to eliminate any debate or uncertainty concerning the value of the equity component of any bid, and placed the bidders on a level playing field;
- Polaroid had previously provided the parties with a schedule valuing Excluded Assets – assets that various bidders had contemplated leaving behind. (Tr. (Attached as Exhibit 4) at p. 97-98). Paragraph 5 of the Supplemental Procedures Order placed the Court's imprimatur on the valuations set forth on that schedule by ordering that "the procedures previously established by the Debtors to account

⁴ A full discussion of the flaws in the bidding process is beyond the scope of this filing, but Patriarch intends to provide a complete record regarding the bidding process in connection with its appeal. Suffice it to say that the process was severely flawed in many respects.

⁵ Only two bidders, Patriarch and Hilco/Gordon, were authorized to participate in the April 16 auction. Supplemental Procedures Order at 2.

for the value of 'Excluded Assets' that are not to be purchased by a particular bidder" would govern. (Supplemental Procedures Order at 3). For example, under the Polaroid schedule the art collection, (excluded from the Hilco/Gordon bid but included in the Patriarch bid), was fixed in value for bidding purposes at \$6.5 million. (Tr. p. 192).

Polaroid conducted the auction using the rules set forth in the Supplemental Procedures Order – an order issued just seven days earlier. As each bid was made during the auction, Polaroid would consider the bid – all the while consulting with its financial advisors as well as with the official creditors' committee – and would determine whether the bid was consistent with the Court's procedures. Based on its examination of each bid during the action, Polaroid then would announce the bid's valuation and whether the company officially "accepted" the bid. After multiple rounds of bidding, Patriarch made a bid valued at \$86.4 million (net to the estate) – a bid that was \$488,000 higher than Hilco/Gordon's last bid. When Hilco/Gordon declined to bid further, the auction concluded. Based on the Debtor's judgment, and in accordance with the rules of the auction, Patriarch had submitted the highest and best bid, and it was therefore declared the winner.

Based on Polaroid's determination, which was made in full compliance with the Bankruptcy Court's orders and established procedures, and in the presence of the Bankruptcy Court, Polaroid moved the Bankruptcy Court to approve the Patriarch purchase, including the asset purchase agreement.

The Bankruptcy Court then convened the approval hearing. During this hearing, counsel for certain creditors and creditor groups began to raise objections to Polaroid's selection of Patriarch as the winning bidder. They raised these objections not by presenting any witnesses or

documentary evidence, but by argument to the Court and by limited cross-examination of Stephen Spencer, the Debtors' financial advisor.

The creditors' objections fell into two categories. First, they contended that provisions in the Patriarch LLC agreement rendered equity in its new company less valuable in some indeterminate amount. Second, the creditors contended that the art collection, which the Hilco/Gordon bid would leave behind, was worth more than the \$6.5 million attributed to it in the Court-approved schedule, thus making the Hilco-Gordon bid more valuable. (Tr. p. 244-45).

At the end of the Sale Approval Hearing, the Bankruptcy Court decided to reject the Debtors' selection of Patriarch and disregard the undisputed expert testimony of the Debtors' financial adviser. Instead, it approved the Hilco/Gordon bid as the highest and best. Although the Court's precise reasoning is not fully clarified by the transcript, the Court appeared to accept the creditors' arguments described above. In effect, the Court held that the value of equity in the Patriarch bid was less than the \$650,000-per-point figure specified in the Supplemental Procedures Order, while the value of the art collection being left behind by Hilco/Gordon was potentially more than the applicable amount fixed by the Supplemental Procedures Order. (Tr. p. 280-81).

Although Patriarch's counsel attended the Sale Approval Hearing, the Bankruptcy Court ruled that Patriarch had no "standing" to speak or question witnesses. (Tr. p. 184-188). Accordingly, when Patriarch sought to do either of these things, the Bankruptcy Court cut counsel off, ordering, for example: "That's all the more I'm going to hear from you right now. Okay? I'll ask you to take a seat" (Tr. p. 261-62).

In refusing to approve the Patriarch bid, the Bankruptcy Court abandoned the valuation rules it had ordered would govern the auction. Indeed, the Bankruptcy Court refused to

authorize Polaroid to enter into the Patriarch asset purchase agreement solely based upon limited testimony adduced by creditors that suggested, albeit for reasons that have obvious flaws but which the Bankruptcy Court refused to allow counsel for Patriarch to address, that the Hilco/Gordon bid should be considered more valuable for reasons that expressly contradicted the court-ordered procedures.

III. Argument

A. The Standard for Granting a Stay Pending Appeal

The standard for granting a stay pending appeal is the same as that for granting a preliminary injunction. *See, e.g., In re Delaware & Hudson Ry. Co.*, 90 B.R. 90, 91 (Bankr. D. Del. 1988). The party seeking such relief must show that: "1) it is likely to prevail on the merits of its appeal; 2) it will suffer irreparable injury absent a stay; 3) a stay will not cause substantial harm to other interested parties; and 4) a stay will not harm the public interest." *Id.*; *United States v. Trans World Airlines, Inc. (In re Trans World Airlines, Inc.)*, 18 F.3d 208, 211 (3d Cir. 1994). No one factor is determinative. Instead, "[p]roper judgment under Rule 8005 entails a delicate balancing of all the elements." *In re Trans World Airlines*, 2001 Bankr. LEXIS 729, *8 (Bankr. D. Del. Mar. 27, 2001).

As shown here, Patriarch meets this burden on all four factors and, thus, should be granted a stay pending the outcome of its appeal.

B. The Court Erred by Failing to Follow its Own Bidding Procedures Orders.

The Sale Approval Order does not explain the reason that the Bankruptcy Court elected to approve the Hilco/Gordon bid over the auction-winning Patriarch bid, which the Debtors sought to approve. The Court's statements on the record at the Sale Approval Hearing, however, demonstrate that the Court accepted the arguments of some creditors that the equity included in Patriarch's proposal was less valuable because of differing provisions of Patriarch's LLC

agreement compared to Hilco/Gordon's. This purported difference, the Court concluded, outweighed the otherwise higher value of the Patriarch bid.

The Bankruptcy Court's decision to devalue the equity in the Patriarch proposal, however, flatly contradicts the Court's own order seven days earlier, which set the value of the equity in *both parties'* bids. As the Court ruled: "[f]or the purposes of comparing the parties' bids, *the value of any such equity component . . . shall be calculated on the basis of \$650,000.00 per percentage-point-unit of the equity share offered as part of the bid, as previously established by the Debtors.*" (Supplemental Procedure Order, para. 4(c) (emphasis added)).

The Court's citation of the value of the art collection as a basis for preferring the Hilco/Gordon bid similarly contradicts its prior order. The April 9 Supplemental Procedures Order expressly approved Polaroid's valuation of the Excluded Assets applicable to *both* bids, including valuing the art collection at \$6.5 million. The creditors' objections assumed, contrary to that order, that the art collection was worth more; a valuation that would favor the Hilco/Gordon bid which, unlike the Patriarch bid, left the collection behind. If the Court had followed its own Orders, however, it could not have adopted the creditors' position.

Not only did the Court fail to follow its own order on equity valuation, it revised the value of the Patriarch equity *with no evidence in the record* supporting any monetary value whatsoever to the purported differences between the LLC agreements. To the contrary, the only financial expert who testified – Stephen Spencer of Houlihan Lokey – testified that he assigned *no value* to these purported differences. (Tr. p. 154-55, 188-91). He also unqualifiedly affirmed that the Patriarch bid was highest and best.

15 Q. Thank you. Now, Steve, we concluded
16 the auction process here about two hours ago. At
17 the end of the auction who did you declare to
18 have the highest and best bid?

19 A. We declared Patriarch to have the highest and
20 best bid.

21 Q. And why was that?

22 A. It exceeded the Hilco Gordon Brothers bid by
23 approximately \$488,000.

24 Q. And at this time do you believe their bid to
25 be the highest and best bid?

1 A. At this time I believe their bid to be the
2 highest and best bid, yes

(Tr. p. 96-97).

Moreover, the Court adopted these conclusions about the purported differences between the Patriarch LLC agreement and the Hilco/Gordon LLC agreement without once actually examining the provisions themselves in any detail. In fact, not a single witness, and not a single lawyer who was permitted to speak, ever cited any specific words of Patriarch's LLC agreement – or Hilco/Gordon's, for that matter – in support of an argument criticizing the Patriarch agreement. Had that been done, a number of gross distortions of the Patriarch agreement could have been refuted.⁶

Perhaps most significantly, having devalued the Patriarch equity in violation of its own order, and having done so with no evidence of any monetary value supporting such a devaluation, the Bankruptcy Court refused to permit Patriarch to address the Court's decision, by either explaining the Patriarch agreement, clarifying the Patriarch offer, or improving the offer given the Court's new ground rules.⁷ Despite the Court's earlier order that Patriarch's counsel stop talking and sit down, Patriarch nevertheless attempted to resolve the purported issues over its own LLC agreement by *offering to accept the Hilco/Gordon LLC agreement*. (Tr. p. 283-84).

⁶ For example, creditors' counsel argued that the Patriarch agreement would permit unlimited dilution of the estate's interest by addition of new equity, (Tr. p. 248-49), but there was no discussion of section 7.8 of the Patriarch agreement, which specifies the preemptive rights that customarily protect a minority member from dilution.

⁷ As described above, Patriarch's CEO, Lynn Tilton, was briefly called as a witness, but she was not questioned on these topics, and the Bankruptcy Court's rulings prohibited Patriarch's own counsel from doing so itself.

The Court declined to consider this offer because it came "a little late," but the Court did not explain how Patriarch could have made this offer earlier, before it knew that the Court would deviate from its prior valuation orders. Nor did the Court specify the method Patriarch should have used to communicate the offer when the valuation arguments against the Patriarch agreement were not made by the creditors, or accepted by the Court, until a hearing in which Patriarch was not permitted to participate.

Finally, by changing the valuation standard in the middle of the approval hearing and selecting the Hilco/Gordon bid, the Bankruptcy Court created significant omissions in the evidentiary record supporting the selection of the Hilco/Gordon bid. Because the Sale Approval Hearing concerned the Debtors' motion to approve the Patriarch bid, the Debtors adduced evidence explaining, for example, the factors that influenced the choice of Patriarch and the care they took in discharging their duties with respect to that choice. The Debtors called the Patriarch CEO, for example, to testify to Patriarch's good faith and proper conduct throughout the bidding process. By contrast, the Creditors' Committee called no witness in support of the Hilco/Gordon bid, and there is, consequently, no evidence in the record of Hilco/Gordon's good faith. The record contains only the statements of counsel, which of course are not evidence.

These significant flaws in the Court's procedures render its rejection of the debtor-selected Patriarch bid, and approval of the Hilco/Gordon bid, fundamentally unfair and prevent Polaroid from selecting the highest and best bid for the estate's property. *See In re Harwald Co.*, 497 F.2d 443, 444-45 (7th Cir. 1974); *see also In re Financial News Network*, 126 B.R. 152, 156 (S.D.N.Y. 1991) (noting that "court-imposed rules for the disposition of assets are to be enforced strictly in order to provide an adequate basis for comparison of offers ... and to protect other bidders who have limited their bids to the announced terms") (citations omitted); *cf. In re United*

Healthcare System, Inc., 1997 WL 17674, at *6 (D.N.J. Mar. 26, 1997) (finding "the Bankruptcy Court improperly compared appellant's bid to those made after the sale was awarded to appellant"); *In re Titusville Country Club*, 128 B.R. 396, 400 (Bank. W.D. Pa. 1991) (Court could not consider post-auction offers because "the integrity of the Bankruptcy Court sale procedures should be protected"). Accordingly, the Order is likely to be reversed on appeal and should be stayed.

B. The Court Improperly Disregarded the Debtor's Business Judgment.

A bankruptcy court has wide discretion in many areas, but its role is more limited in a sales-approval hearing under Chapter 11 when the debtor has conducted an auction and selected a bid. A court may not blithely substitute its own judgment for that of the debtor. Instead, its proper task is to review the *debtor's choice* of successful bidder under the business judgment rule, and to ensure that the debtor's choice "does not reflect an abuse of the *discretion accorded to it* in making this choice." *In re After Six, Inc.*, 154 B.R. 876, 883 (Bankr. E.D. Pa. 1993) (emphasis added); *see generally In re Food Barn Stores*, 107 F.3d 558, 564 (8th Cir. 1997) (courts may upset the result of a judicial auction only "if there was fraud, unfairness or mistake in the conduct of the sale ... or ... the price brought at the sale was so grossly inadequate as to shock the conscience of the court") (citations omitted; alteration in original).

The standard the court must employ in approving a 363 sale is a business judgment standard. *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983); *In re Gulf States Steel, Inc.*, 285 B.R. 497, 514 (Bankr. N.D. Ala. 2002); *In re Condere Corp.*, 228 B.R. 615, 630 (Bankr. S.D. Miss. 1998); *In re Gulf Coast Oil Corp.*, Case Nos. 08-50213, 08-50215, 2009 WL 361741, at *4 (Bankr. S.D. Tex. Feb. 11, 2009). The debtor must establish that it has sound business reasons for proceeding with the sale. *Lionel*, 722 F.2d at 1071.

It cannot be disputed that the Debtors exercised sound business judgment in selecting Patriarch as the winning bid. The Debtors conducted a thorough, lengthy auction process pursuant to the ground rules established by the Court. Paramount among those ground rules were valuation principles that were designed to provide a mechanism to compare competing bids and to avoid precisely the type of debate that the Court permitted to occur at the approval hearing. Those valuation principles, which included the \$650,000.00 per-percentage-point equity valuation and the valuation of Polaroid's art collection, each of which was attacked by the creditors at the hearing, were determined by the Debtors' sophisticated financial advisors in consultation with both the Debtors and the creditors' committee. The Debtors' care in making their choice cannot reasonably be questioned and, indeed, was never questioned during the Sale Approval Hearing.

Despite the Debtors' efforts, there is no indication that the Court gave the Debtors' choice *any* deference, much less the substantial discretion afforded to debtors under the business judgment rule. Instead, the Court blindly accepted the unsubstantiated and erroneous statements of certain creditors who presented *no* evidence and disregarded the evidence submitted by the Debtors. (Tr. p. 273-76).

In favoring creditors' views over the Debtors' selection and the evidence, the Bankruptcy Court committed clear error. The Bankruptcy Court appeared to treat this case as if a trustee had been appointed, even though it remains a proceeding under Chapter 11 in which there is no trustee. As the court held in *After Six*, even if a Chapter 11 case may ultimately lead to liquidation rather than reorganization, the Debtors' choice – if supported by reasoned business judgment – is still paramount.

[A] liquidating Chapter 11 case is nevertheless first and foremost a Chapter 11 case. Having neither sought to convert this case to a

Chapter 7 case nor to appoint a trustee, the [creditors' committee] has relegated its constituency to a position where, under the Code, its views must be subjected to the deference to the Debtor's wishes.

As we perceive it, the critical issue is whether the Debtor's request satisfies the [363 standards], and its choice of a successful bidder does not reflect an abuse of the discretion accorded to it in making this choice.

After Six, 154 B.R. at 883 (citations omitted). So too here. The Debtors' business judgment is paramount, and there is no evidence the Debtors abused their discretion.

Instead of addressing whether the Debtors had exercised reasoned business judgment in their selection of Patriarch as the winning bid, the Court instead turned to the creditors and inquired whether *their selection* was reasonable. In closing arguments, Committee counsel argued as follows:

I asked Mr. Spencer, Your Honor, has he ever seen a case similar to this where the wishes of the creditors committee whose assets these are was not respected by the debtors in a sale process like this. He's not aware of it, Your Honor. We're not aware of it.

(Tr. p. 247-48). *After Six* is precisely the type of case committee counsel was apparently not aware of. The court in *After Six* correctly identified that "the critical issue is whether the Debtors' ... choice of a successful bidder does not reflect an abuse of the discretion accorded to it in making this choice." *Id.* at 883. In the end, despite finding "the Committee's position not only appropriate but socially responsible," the court concluded that the debtor had not abused its discretion and that it "must defer" to the debtors' determination. *Id.* at 884.⁸

⁸ Polaroid also valued Patriarch's intention to "hire back a number, if not all" of the current Polaroid employees. (Tr. p. 196-97). Counsel for the creditors incorrectly argued that there was no evidence of such an intention in the record of the hearing. (Tr. p. 245-48). Continued employment of a debtor's employees, as Patriarch intends here, is a positive factor contributing to the value of a bid, though it was not quantified by Polaroid. *See In re After Six, Inc.*, 154 B.R. 876, 883 (Bankr. E.D. Pa. 1993).

C. **The Court Erred in Excluding Patriarch from Participation in the Sale Approval Hearing on the Grounds that Patriarch Had No "Standing."**

Although Patriarch's counsel attended the Sale Approval Hearing, the Bankruptcy Court ruled that Patriarch had no "standing" to speak or question witnesses. (Tr. p. 184-88).⁹ This ruling is plainly erroneous, as Patriarch attempted to point out at the hearing. As the winning bidder, whose bid was the subject of the hearing, Patriarch was a *party in interest* under the Bankruptcy Code, and therefore was entitled to "appear and be heard on any issue in a case under this Chapter." 11 U.S.C. § 1109(b). By the specific language of this section of the Code, a party in interest is *not* limited to the debtors, the creditors, the trustees, and the other named constituencies. *See* 11 U.S.C. § 102 (3). In *In re Summit Corp.*, 891 F.2d 1, 5 (1st Cir. 1989), a bidder was found to be a party in interest and was entitled to participate in discovery. The court found that a limited interpretation of "party in interest" that excluded competitive bidders would be "contrary to the goal of maximizing the value of the estate and would undermine the process of disposing of its assets." *Id.*; *see also In re Amatex Corp.*, 755 F.2d 1034, 1042 (3d Cir. 1985) (The definition of a "party in interest" should be liberally construed to permit interested parties in bankruptcy cases the "absolute right to be heard and to insure their fair representation.").

By preventing Patriarch from participating in the hearing, the Bankruptcy Court might as well have conducted the hearing in Patriarch's absence. That is what happened in *In re Time Sales Fin. Corp.*, 445 F.2d 385 (3d Cir. 1971). There, the winning bidder in a private sale authorized by the bankruptcy court did not attend the approval hearing on approval of the sale because the trustee inadvertently failed to send him notice. *Id.* at 386. During the approval hearing, a *different* bidder made a slightly higher offer for the property, and that offer was

⁹ Patriarch's CEO, Lynn Tilton, was briefly called as a witness by Polaroid and cross-examined by creditors. But Patriarch itself was not permitted through counsel to question any witnesses, adduce evidence, make arguments, or even speak at any length on the record to the Court.

accepted and ultimately approved by the District Court. *Id.* On appeal, however, the Third Circuit reversed. The winning bidder "had a vital interest in attending the hearing personally . . . not only *to protect his bid* but if there were a higher bid or bids *to meet it or them and if necessary and he so desired, to top any raise in the bidding.*" *Id.* at 386 (emphasis added). The "totally unfair exclusion of [the winning bidder] from the hearing on his own bid" could not stand. *Id.* at 387; *see also Felts v. Bishop (In re Winstead)*, 33 B.R. 408, 410 (M.D.N.C. 1983) (citing *Time Sales* and reversing approval of a new, higher bid made at the approval hearing for an earlier, winning bid, when the earlier winning bidder did not receive notice of the hearing; the winning bidder "was a party in interest" and thus was entitled to notice to protect his bid).

Patriarch has standing to prosecute its appeal of the Sale Approval Order despite the Bankruptcy Court's erroneous finding that it did not have standing to participate in the hearing. Patriarch is not a mere "failed bidder" seeking the profit it might have made. Instead, it was the declared winning bidder after the auction, and its bid was the subject of the Polaroid motion to approve the sale and the Sale Approval Hearing. Even more significant, as explained above, Patriarch has standing because its appeal seeks to demonstrate that the approval hearing and the sale to Hilco/Gordon was "tinged by fraud, mistake or unfairness [that] would generally result in an accepted bid below that which might have been expected in a fair, free market situation." *Harwald*, 497 F.2d at 444-45 ("[W]hen an unsuccessful bidder attacks a bankruptcy sale on equitable grounds related to intrinsic structure of the sale, he brings himself within the zone of interests which the Bankruptcy Act seeks to protect and regulate.").¹⁰

¹⁰ Although *Harwald* was a Bankruptcy Act case, it has continuing vitality under the Bankruptcy Code. *Candlewood Partners LLC v. Hedstrom Corp. (In re Repurchase Corp.)*, Case No. 04 C 8000, 2008 WL 4542966, at *3 (N.D. Ill. April 22, 2008) (although *Harwald* was decided under the Bankruptcy Act, "[t]he same is true today under the Bankruptcy Code").

As explained in more detail above, the improper exclusion of Patriarch from participation in the hearing, the Court's failure to follow its own order on bidding procedures, and the Court's failure to give appropriate deference to the debtors' choice of bid, all render the Sale Approval Order fundamentally unfair. In such circumstances, Patriarch has standing to raise these issues. *See id.*; *see also* (*Kabro Assocs., LLC v. Colony Hill Assocs. (In re Colony Hill Assocs.)*), 111 F.3d 269, 273-74 (2d Cir. 1997); *Licensing by Paolo, Inc. v. Sinatra (In re Gucci)*, 126 F.3d 380, 389 (2d Cir. 1997); *Repurchase Corp.*, 2008 WL 4542966, at *3; *The Wine Group v. Diamante (In re Hat)*, 310 B.R. 752, 758 (Bankr. E.D. Cal. 2004); *Dick's Clothing & Sporting Goods, Inc. v. Phar-Mor, Inc.*, 212 B.R. 283, 288-89 (Bankr. N.D. Ohio 1997); *McDonnell v. Hotin (In re Hotin)*, 63 B.R. 226, 227 (D. Mass. 1986).

D. Patriarch Will Suffer Irreparable Harm in the Absence of a Stay, and the Debtors and the Public Interest Will Not Be Harmed.

Under section 363(m) of the Bankruptcy Code, Patriarch's appeal may be mooted if a stay is not granted and if Polaroid and Hilco/Gordon close the transaction. *See, e.g., In re Reagan*, 2009 WL 805144, at *4 (8th Cir. B.A.P. Mar. 20, 2009). In contrast, granting a stay will benefit the estate and the public interest. A stay will protect the estate's interest, and the public interest, in ensuring that Polaroid receives the highest and best bid for its property. A stay will not occasion significant delay because Patriarch intends to seek an accelerated schedule for the disposition of its appeal.

IV. Conclusion

For these reasons, Lithograph Legends, LLC respectfully requests that the Court stay the April 17, 2009 "Order Authorizing: (I) Sale of Certain of the Debtors' Assets, Free and Clear of Liens, Claims, Encumbrances, and Interests; and (II) the Granting of Related Relief" until final

determination of Patriarch's appeal from that Order, or alternatively until Patriarch has an opportunity to seek a stay in the District Court.

Dated: April 20, 2009.

/e/ Robert T. Kugler

Robert T. Kugler (#194116)

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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Court File Nos.:

Polaroid Corporation et al.,

08-46617 (GFK)

Debtors.

(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;

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Polaroid International Holding LLC;

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Polaroid New Bedford Real Estate, LLC;

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Polaroid Norwood Real Estate, LLC; and

08-46628 (GFK)

Polaroid Waltham Real Estate, LLC)

08-46629 (GFK)

Chapter 11 Cases

Judge Gregory F. Kishel

Jointly Administered Under

Case No. 08-46617

**AFFIDAVIT IN SUPPORT OF
EMERGENCY MOTION FOR A STAY PENDING APPEAL**

I, Adam Maier, counsel for Lithograph Legends, LLC's ("Patriarch"),¹ submit this affidavit in support of Patriarch's Emergency Motion for a Stay Pending Appeal ("Emergency Motion"). I verify that the facts set forth herein are true to the best of my personal knowledge and belief.

A. Nature of the Emergency

On Friday, April 17, 2009, this Court entered an order authorizing the immediate sale by the Debtors of the assets of Polaroid to PLR Holdings, LLC ("Hilco/Gordon")² (April 17, 2009

¹ Lithograph Legends, LLC is the party bringing the affiliated motion, but for convenience it is referred to in this affidavit as "Patriarch" because it is an affiliate of Patriarch Partners, L.P.

² PLR Holdings, LLC was the losing bidder at the auction, but for convenience it is referred to in this affidavit as "Hilco/Gordon" because it is an affiliate of Hilco/Gordon Brothers.

Order Authorizing: (I) Sale of Certain of the Debtors' Assets, Free and Clear of Liens, Claims, Encumbrances, and Interests; and (II) the Granting of Related Relief (the "Sale Approval Order"). Patriarch is filing a Notice of Appeal of the Sale Approval Order and its Emergency Motion. Patriarch's appeal may be rendered moot if the Debtors and Hilco/Gordon close the transaction.³ To maintain the *status quo ante*, and thus to prevent irreparable harm to both Patriarch and the bankrupt estate, it is imperative that this Court stay the Sale Approval Order until disposition of Patriarch's appeal or, in the alternative, for sufficient period to permit the United States District Court for the District of Minnesota to address a further stay pending determination of the appeal, as requested by Patriarch's Emergency Motion.

On Thursday, April 16, 2009, I attended the auction for the sale under section 363 of assets of the Debtors. Patriarch won the auction against the last bid of the only remaining competitor, Hilco/Gordon, who refused to bid further. The Debtors valued Patriarch's winning bid under the Court-ordered rules at \$86.4 million (net to the estate). The Debtors accepted Patriarch's bid as the highest and best offer, and moved the Court to approve the sale to Patriarch.

Later that afternoon, however, during the approval hearing on the Debtors' motion (the "Sale Approval Hearing"), the Court denied approval of the sale to Patriarch. Instead, the Court approved a sale to Hilco/Gordon based on its last bid — a bid that the Debtors valued at \$488,000 *less than* the final Patriarch bid that won the auction. Patriarch believes and intends to argue on appeal that: (a) the Court's approval of Hilco/Gordon's final bid did not comport with the standard set forth in its own prior Order for valuing proposed equity interests included in bids; (b) the Court denied Patriarch the opportunity to respond to the change by explaining or improving its bid under the new standard; and (c) the Court refused to acknowledge Patriarch's

³ Under section 363(m) of the Bankruptcy Code, the reversal or modification on appeal of a sale approval order does not affect the validity of the sale to an entity that purchased in "good faith."

standing to speak at the Sales Approval Hearing regarding Patriarch's own bid. Patriarch was unable to refute erroneous claims made at the hearing about the value of the Patriarch proposal and was unable to make an improved offer.

B. Attempts to Contact Opposing Counsel Regarding the Motion

I, or other counsel for Patriarch, have made every practicable effort to notify opposing counsel of the anticipated filing of this Emergency Motion so that counsel will have enough time to respond to it. Following are specific actions denoting when and how opposing counsel was notified:

1. On April 18, 2009, Gregory Gordon left voicemail messages for Daryle Uphoff, George Singer, and James Lodoen, counsel for the Debtors, indicating that Patriarch intended to appeal and requesting that the Debtors postpone the closing to allow Patriarch time to file its appeal and seek a stay from the Court.

2. On April 18, 2009 at 3:17 pm, Robert Kugler placed calls and sent an email to Robert Raschke and Michael Ridgeway of the U.S. Trustee's office requesting to confer over the weekend or on Monday, April 20, 2009 regarding Patriarch, intending to inform them of the appeal. Neither Mr. Raschke nor Mr. Ridgeway have yet responded.

3. On April 19, 2009, Mr. Gordon spoke to Mr. Uphoff requesting that the Debtors' counsel inform Douglas Kelley (the court appointed receiver of the Petters assets, including Polaroid), of the appeal and requesting that Mr. Kelley contact Mr. Gordon to discuss the appeal. Mr. Uphoff agreed to contact Mr. Kelley and to request that he contact Mr. Gordon.


4. On April 19, 2009 at 9:59 pm, I sent an email to various creditors' counsel stating that Patriarch would be filing an emergency motion first thing the following morning and, directing them to contact Mr. Gordon or Mr. Kugler if that information raised any issues that they would like to discuss.

Dated: April 20, 2009

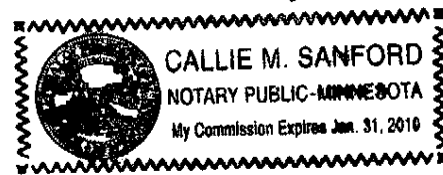


Adam D. Maier (#386870)

Subscribed and sworn to before me on this 20th day of April, 2009.



NOTARY PUBLIC



**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

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08-46629 (GFK)

Chapter 11 Cases

Judge Gregory F. Kishel

Jointly Administered Under

Case No. 08-46617

CERTIFICATE OF SERVICE

I, Callie Sanford, declare, under penalty of perjury, that on April 20, 2009, I filed:

EMERGENCY MOTION FOR A STAY PENDING APPEAL;

**MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION
FOR A STAY PENDING APPEAL;**

**AFFIDAVIT IN SUPPORT OF EMERGENCY MOTION
FOR A STAY PENDING APPEAL; AND**

**[PROPOSED] ORDER ON PATRIARCH'S EMERGENCY MOTION
FOR A STAY PENDING APPEAL**

with the Clerk of Bankruptcy Court through ECF, and that ECF will send an e-notice of electronic filing to the following:

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I further certify that I caused a copy of the foregoing documents and Notice of Electronic Filing to be mailed by First Class Mail, postage prepaid, to the following:

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Dated: April 20, 2009

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/e/ Callie M. Sanford
Callie M. Sanford

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

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Chapter 11 Cases

Judge Gregory F. Kishel

Jointly Administered Under

Case No. 08-46617

**ORDER ON PATRIARCH'S
EMERGENCY MOTION FOR A STAY PENDING APPEAL**

On this ____ day of _____, 2009, the Court heard Lithograph Legends, LLC's (Patriarch's) motion for an emergency order staying this Court's April 17, 2009 Order Authorizing: (I) Sale of Certain of the Debtors' Assets, Free and Clear of Liens, Claims, Encumbrances, and Interests; and (II) the Granting of Related Relief, based on Patriarch's Memorandum of Law in Support of Emergency Motion for a Stay Pending Appeal, filed April 20, 2009.

IT IS HEREBY ORDERED that Patriarch's motion is GRANTED.

HONORABLE GREGORY F. KISHEL
UNITED STATES BANKRUPTCY JUDGE