

**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 EMERGENCY MOTION OF ACORN CAPITAL
GROUP, LLC ("ACORN") FOR STAY PENDING APPEAL**

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 Emergency Motion of Acorn Capital Group, LLC ("Acorn") for an Emergency Motion for a Stay Pending Appeal brought by Acorn pursuant to Rules 8005 and 8011 of the Federal Rules of Bankruptcy Procedure (the "Motion"). Pursuant to the Motion, Patriarch seeks 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 Order”) until a final determination of Acorn’s appeal from that Sale Order or for sufficient time to permit the United States District Court a full opportunity to address the propriety of a further stay pending determination of the appeal.

The imposition of a stay of the Court’s Sale Order pending a potentially protracted appellate process creates substantial uncertainty and risk for these bankruptcy estates and threatens to jeopardize anticipated recoveries associated with the sale transaction approved by the Court—particularly in the absence of a substantial bond and current funding required to maintain the status quo and the burn rate experienced from current operations.

RELEVANT BACKGROUND FACTS

On February 12, 2009, Polaroid filed its adversary complaint seeking, among other things, the avoidance and recovery of liens and other assets of Polaroid fraudulently and preferentially transferred at the direction of Acorn Capital and Thomas J. Petters shortly before the commencement of the Bankruptcy Cases and the disallowance, the subordination and/or recharacterization of claims against the PC and PCE bankruptcy estates pursuant to §§ 105, 502, 506, 510(c), 544(b), 547, 548, 550, 551 and 1107 of the Bankruptcy Code and Bankruptcy Rule 7001 et seq., the Minnesota Uniform Fraudulent Transfer Act, codified at Minn. Stat. § 513.41 et seq. (“Acorn Complaint”). *See, Polaroid Corporation v. Acorn Capital Group*, ADV 09-4031 (Docket No. 1 and, along with its exhibits, is incorporated by reference herein).

Any and all assignments, security interests, liens, claims, encumbrances, conveyances, pledges, guaranties, transfers and/or obligations, in whole or in part, of any kind set forth in and/or contemplated by the Acorn Capital Collateral Documents (including, without limitation, any and all payments or other consideration realized or collected by Acorn Capital in connection with the exercise of any rights, remedies or privileges under any of the foregoing) and as set

forth in the Acorn Complaint are collectively referred to in the Complaint as the “Fraudulent Transfers.”

Prior to February 2008, Polaroid had no direct debtor/creditor relationship with Acorn, nor did it have a direct debtor/creditor relationship with PAC Funding, a subsidiary entity of Petters Company, Inc. In early 2008, when Polaroid sought additional capital urgently needed to fund ongoing operations, Polaroid received \$10 million in funds from PAC Funding (which remains outstanding). In exchange for these funds received from PAC Funding, Petters granted a security interest in Polaroid’s assets to PAC Funding’s creditor Acorn as security for the debts of PAC Funding in excess of \$250 million. This series of overreaching transfers, in derogation of Petters’ fiduciary duties to Polaroid, and which were to the benefit of Acorn and to the significant detriment of Polaroid and its creditors, could be described as the types of transfers chapter 5 of the Bankruptcy Code is designed to prevent.

ARGUMENT

A. Acorn Must Satisfy Standards for Imposition of Stay Pending Appeal

A stay pending appeal is in the nature of a preliminary injunction. In order to obtain a stay of the Court’s Sale Order pending appeal, the burden of proof is on Acorn to demonstrate each of the following elements: (1) that it is likely to prevail on the merits of any such appeal, (2) that irreparable injury will result if the stay is denied, (3) that the Debtors will not be substantially harmed by the imposition of a stay, and (4) that the public interest will be furthered by the granting a stay. *In re Wire Rope Corp. of Am., Inc.*, 302 B.R. 646, 648 (Bankr. W.D. Mo. 2003); *Hutchins v. Fordyce Bank & Trust Co. (In re Hutchins)*, 216 B.R. 1, 4 (Bankr. E.D. Ark. 1997). A failure to satisfactorily address any one of the elements necessary for a stay is sufficient reason to deny the relief. *PAS, Inc. v. PRN Pharmacy Systems, Inc. (In re PRN Pharmacy Systems, Inc.)*, 150 B.R. 441, 444 (Bankr. E.D. Ark. 1993). Acorn has failed to satisfy

any of the four required prerequisites for the imposition of a stay pending appeal. Accordingly, Acorn's Motion should be denied.

B. Acorn is Not Likely to Succeed on the Merits of the Appeal

Acorn cannot satisfy the first factor because it cannot make a strong showing that it is likely to succeed on the merits of its appeal. Acorn raises essentially one issue on appeal—whether the requirements of § 363(f) were satisfied in order to sell Polaroid's property free and clear of Acorn's interest in such property. Debtors must satisfy only one of the above elements for the sale of assets free and clear of liens, claims and interests for such sale to be authorized pursuant to § 363(f) of the Bankruptcy Code. Because the Debtors satisfied more than one of the above elements, the sale of Polaroid's assets free and clear of Acorn's purported interests was properly granted by the Court.

a. PAC Funding's Consent Was Provided, Satisfying Section 363(f)(2)

It is clear from the objections filed by Acorn to the approved sale that it does not consent to the sale free and clear of its purported liens, claims and interests. Acorn, however, wears two hats in these cases: One as a direct claimant; the other as an indirect claimant as a creditor of a creditor of Polaroid, PAC Funding, LLC ("PAC Funding"). PAC Funding is a wholly-owned subsidiary of Petters Company, Inc. and integrally involved in the Petters Ponzi scheme. Acorn is a creditor of PAC Funding owed in excess of \$250 million by PAC Funding. Here, PAC Funding consented to the sale. Alternatively Acorn lacks the necessary standing to challenge PAC Funding's consent in these proceedings.

1. Consent Was Provided Under Section 363(f)(2)

The assets of Polaroid's may be sold free and clear of liens, claims and interests as to those entities that have either affirmatively consented, or have not directly objected to such sale. *See, e.g., Veltman v. Whetzal*, 93 F.3d 517, 521 n.5 (8th Cir. 1996) (implied consent can be found

“when a party with an interest in the bankruptcy estate fails to object after receiving notice of the sale under subsection 363(f)(2)” (citations omitted). Here, PAC Funding, through its affirmative consent as well as lack of an objection, consented to the sale of Polaroid’s assets free and clear of PAC Funding’s interest, satisfying the required element under § 363(f)(2).

2. Acorn Lacks Standing to Object on Behalf of PAC Funding

As a creditor of Polaroid’s creditor, Acorn, as a third party, does not have standing to object or withhold the consent of PAC Funding under 11 U.S.C. § 363(f)(2) in these cases. Under 11 U.S.C. § 1109, “[a]n entity may be [a] real party in interest and have standing in one respect while he [sic] may lack standing in another respect.” *In re A.P.I. Inc.*, 331 B.R. 828, 857 (Bankr. D. Minn. 2005). *See In re South State Street Bldg. Corp.*, 140 F.2d 363 (7th Cir. 1944); *In the Matter of Ofty Corp.*, 44 B.R. 479 (Bankr. D. Del. 1984). “[S]tanding to object must be determined on a particularized basis.” *Id.* at 857. “A judgment creditor of a creditor of the bankrupt is not a ‘party in interest’ because the judgment creditor was not itself a direct creditor of the bankrupt.” *In re Comcoach Corp.*, 698 F.2d 571, 574 (2d Cir. 1983) (*citing In re Toar Train Partnership*, 15 B.R. 401 (Bankr. D. Vt. 1981)). While it certainly may withhold consent as to its direct claim, it has no standing to object under 11 U.S.C. § 363(f)(2), to PAC Funding’s consent to a sale free and clear of its interests.

3. Acorn’s Attempt to Exercise its Rights as Secured Creditor of PAC Funding is in Violation of the Automatic Stay

Acorn has asserted that PAC Funding may not consent by operation of Section 9-607(a)(3) of the Uniform Commercial Code. Acorn asserts that PAC Funding has defaulted on its obligations to Acorn and U.C.C. § 9-607 permits it, as PAC Funding’s creditor, to pursue its remedies under the PAC Security Agreement in this proceeding. PAC Funding, however, has filed for protection under the Bankruptcy Code in a pending Chapter 11 proceeding in the United

States Bankruptcy Court, District of Minnesota, Case No. 08-45371, filed October 17, 2008, and jointly administered under the case Petters Company, Inc., Case No. 08-45257. The automatic stay provisions of the Bankruptcy Code provide broad protections to debtors and because Acorn has not sought, nor has it been granted, relief from the automatic stay in the PAC Funding bankruptcy case, the stay operates to prevent Acorn from asserting a state law collection claim, allegedly founded upon U.C.C. § 9-607, against the bankruptcy estate of PAC Funding directly, and as Acorn alleges, indirectly against Polaroid. Acorn cannot act under U.C.C. § 9-607 to enforce its security interest against PAC Funding in these cases without first obtaining relief from the automatic stay in the PAC Funding bankruptcy case. Acorn asserts that it steps directly into the shoes of PAC Funding under U.C.C. § 9-607, but it is precisely this step that the automatic stay does not permit.

Because PAC Funding and other creditors with liens securing claims have either consented or not objected, Acorn cannot show a likelihood of success on appeal on this issue and its Motion should be denied.

b. The Purported Acorn Liens Against Polaroid Are Subject to Bona Fide Dispute

The purpose of § 363(f)(4) is to allow the sale of property of the estate free and clear of disputed interests so the liquidation of the assets is not unnecessarily delayed while such disputes are litigated. *Moldo v. Clark (In re Clark)*, 266 B.R. 163, 171 (9th Cir. B.A.P. 2001); *In re Durango Georgia Paper Co.*, 336 B.R. 594, 597 (Bankr. S.D. Ga. 2005); *In re Robotic Vision Systems, Inc.*, 322 B.R. 502, 506 (Bankr 2005). The Bankruptcy Code does not define “bona fide dispute,” however, many courts, including the Eighth Circuit Bankruptcy Appellate Panel, have stated that the court must determine “whether there is an objective basis for either a factual or legal dispute as to the validity of the debt.” *In re Gaylord Grain, L.L.C.*, 306 B.R. 624, 627

(8th Cir. B.A.P. 2004) (Kressel, C.J.) (*quoting In re Busick*, 831 F.2d 745, 750 (7th Cir. 1987) and *also citing In re Octagon Roofing*, 123 B.R. 583, 590 (Bankr. N.D. Ill. 1991)). “Clearly this standard does not require the court to resolve the underlying dispute, just to determine its existence.” *Id.* at 627. Here, there is an objective basis to dispute the validity of Acorn’s debt.

1. **The Standard for Determining Whether a Bona Fide Dispute Exists**

In determining whether a bona fide dispute exists, however, the propriety of the lien does not have to be the subject of an immediate or concurrent adversary proceeding. *In re Gaylord Grain, L.L.C.*, 306 B.R. at 628; *In re Collins*, 180 B.R. at 452, n.8; *In re Oneida Lake Dev., Inc.*, 114 B.R. at 357-58; *In re Bedford Square Assoc., L.P.*, 247 B.R. 140, 145 (Bankr. E.D. Pa. 2000). It is not even necessary that the bona fide dispute even be between the debtor and the lien holder. *See In re Gulf States Steel, Inc.*, 285 B.R. 497, 507 (Bankr. N.D. Ala. 2002) (*citing In re Gerwer*, 898 F.2d 790, 733 (9th Cir. 1990) (a bona fide dispute need not be between the debtor or trustee and lienholder, but rather, if the outcome of dispute over interest will affect value of estate, statutory language of 363(f)(4) is sufficient to embrace interest)). Rather, as correctly acknowledged, even by Acorn in its pleadings, “a party must articulate in a pleading or in an argument an objective basis sufficient under the facts and circumstances of the case for the court to determine that a bona fide dispute exists.” *In re Robotics Vision Systems, Inc.*, 322 B.R. at 506 (emphasis added).

While the above courts have found a bona fide dispute to exist without having a pending adversary proceeding, in this case, the liens, claims and interests of Acorn is the subject of a pending adversary proceeding that clearly articulates an objective basis to avoid, subordinate, recharacterize and/or disallow any and all asserted liens, claims and interests (whether directly or indirectly) of Acorn. The pleadings’ clearly-articulate a basis for disputing Acorn’s liens that

more than satisfies the requirements of § 363(f)(4) as being in a bona fide dispute. Federal Rule of Civil Procedure 8 requires “a short and plain statement of the claim showing that the pleader is entitled to relief,” in order to “give the defendant fair notice of what the ... claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Recently, the Supreme Court said that to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6) “we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (U.S. 2007). It is important to note that Acorn did not file a motion to dismiss the adversary complaint under Rule 12(b)(6), made applicable to adversary proceedings through Fed. R. Bankr. P. 7012, nor invoke Bankruptcy Rule 9011. Instead, Acorn answered the complaint and asserted counterclaims. Therefore, by its own actions, Acorn has not disputed there is some factual and evidentiary support for the allegations contained in the Acorn Complaint.

The Court need not conduct a trial, or take evidence and resolve the bona fide dispute. Here, the Debtors articulated in the Acorn Complaint, as well in their written and oral arguments, a factually supported objective basis from which the Court properly concluded a bona fide dispute exists as to Acorn’s interests in Polaroid’s assets.

2. **Acorn’s Liens and Claims Are Clearly Subject to Bona Fide Dispute**

The purported security interest in Polaroid’s assets granted by Petters in favor of Acorn is scheduled by the Debtors as disputed. Additionally, as alleged in the Acorn Complaint¹ Acorn and Thomas Petters (“Petters”) collectively engaged in a series of transactions through Petters Company, Inc. and its wholly-owned subsidiary PAC Funding, as part and parcel of a continuing

¹ Due to their voluminous nature, the complaint and exhibits to the complaint are not being submitted to the Court again with this motion, but such documents are incorporated by reference herein.

scheme to extract value from Polaroid through a series of overreaching agreements and avoidable transfers made to or for the benefit of Acorn and to the detriment of legitimate creditors and investors of Polaroid. Polaroid alleges in the complaint that upon discovery of breaches by Petters and PAC Funding of representations and warranties regarding the existence, amount, nature and quality of collateral pledged by PAC Funding to secure financing by Acorn, Petters, Acorn and PAC Funding orchestrated a series of transactions, agreements and transfers to secure the obligations of PAC Funding in an attempt to shore up, conceal and cover approximately \$275,000,000 in Acorn losses. The complaint further alleges that such transactions, agreements and transfers were made for no or less than fair value to Polaroid, and which resulted in substantial injury to Polaroid and its legitimate creditors. The interest of Acorn in the assets of Polaroid, to state the obvious, is the subject of a bona fide dispute and the Court properly granted such sale free and clear of Acorn's purported lien pursuant to § 363(f).

c. **Acorn Can Be Compelled, in a “Legal or Equitable Proceeding,” to Accept a Money Satisfaction of their Interests.**

A sale under 11 U.S.C. § 363 may be free and clear of any lien, claim or interest in the property if “such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.” 11 U.S.C. § 363(f)(5). It is firmly established that since Acorn may be compelled in a cram-down proceeding under 11 U.S.C § 1129(b) to accept monetary satisfaction of their interest, such existence of a cram-down proceeding satisfies a sale free and clear under 11 U.S.C. § 363(f)(5).

“By its express terms, Section 363(f)(5) permits a sale free and clear if the trustee can demonstrate the existence of another legal mechanism by which a lien could be extinguished without full satisfaction of the secured debt.” *In re Gulf States Steel, Inc. of Alabama*, 285 B.R. 497, 508 (Bankr. N.D. Ala. 2002). “Cases requiring full payment under Section 363(f)(5) are

obsolete, inasmuch as they are inconsistent with the bankruptcy code.” *Id.* at 508. *See also In re Grand Slam, U.S.A., Inc.*, 178 B.R. 460, 462 (E.D. Mich. 1995); *In re Healthco Intern., Inc.*, 174 B.R. 174, 176 (Bankr. D. Mass. 1994) (since any lien can be discharged by full payment of the underlying debt pursuant to § 363(f)(3), it makes no sense that § 363(f)(5) requires full payment). “The phrase ‘could be compelled’ only requires that the interest in question be subject to final satisfaction on a hypothetical basis, not that there be an actual payment of the sale in question.” *In re Gulf States Steel*, 285 B.R. at 508. *See also In re WBQ Partnership*, 189 B.R. 97, 107 (Bankr. E.D. Va. 1995). Under § 1129(b)(2)(A) of the Bankruptcy Code, a Chapter 11 plan proponent can satisfy a secured claim, over the objection of the claimant, by cash payments having a present value equal to the value of the allowed secured claims. *See* 11 U.S.C. § 1129. *See also* 11 U.S.C. § 506(a). “Such a cram-down proceeding complies with the description of proceedings referred to in subparagraph (f)(5).” *In re Healthco Intern., Inc.*, 174 B.R. at 176. *See also In re Grand Slam*, 178 B.R. at 462; *In re Gulf States Steel*, 285 B.R. at 508; *In re Oglesby*, 196 B.R. 938, 944 (Bankr. E.D. Va. 1996); *In re WBQ Partnership*, 189 B.R. 97, 107 (Bankr. E.D. Va. 1995); *In re Hunt Energy Co., Inc.*, 48 B.R. 472, 485 (Bankr. N.D. Ohio 1985); *contra Clear Channel Outdoor, Inc. v. Knapfer, Chapter 11 Trustee (In re PW, LLC)*, 391 B.R. 25 (9th Cir. B.A.P. 2008) (“*Clear Channel*”).

Courts have also found potential causes of action under Chapter 5 of the Bankruptcy Code to qualify as such a legal proceeding that permits a sale free and clear of liens and interests under § 363(f)(5). *See, e.g., In re James*, 203 B.R. 449, 454 (Bankr. W.D. Mo. 1997) (finding a potential cause of action under § 547 to qualify as a “legal or equitable proceeding” that can force a sale free and clear); *In re Heine*, 141 B.R. 185, 189-90 (Bankr. S.D. 1992) (a preference action under § 547 was held to be a “legal or equitable proceeding” that satisfied lien

extinguishment under § 363(f)(5)). In two paragraphs of § 363(f), Congress intended only nonbankruptcy law to apply in subparagraph 1 and did not so limit subparagraph 5 to only nonbankruptcy law. As such, a plain language reading of the statutory text does not limit § 363(f)(5) to only nonbankruptcy law. An interpretation that requires subparagraph 5 to only apply nonbankruptcy law effectively writes subparagraph 1 out of § 363(f).

Here, cramdown under § 1129(b)(2)(A), as well as avoidance actions pursuant to chapter 5 of the bankruptcy code, are proceedings that would compel Acorn to accept a money satisfaction of their alleged interest. The existence of such proceedings satisfy the requirement of § 363(f)(5), permitting the Court to authorize Polaroid to sell its assets free and clear of all asserted interests.

d. Conclusion

Because Polaroid can establish at least one of the elements of § 363(f), the sale of Polaroid's assets free and clear of these liens, claims and interests is authorized by the Bankruptcy Code. *In re Elliot*, 94 B.R. 343, 345 (E.D. Pa. 1988). The Order entered by the Court also provides that to the extent any such liens, claims and interests are not avoided, subordinated, recharacterized or otherwise disallowed, such liens, claims and interests will attach to the net proceeds of this sale with the same validity, priority, dignity and effect as existed prior to the sale. Acorn has not demonstrated any likelihood of success on the merits on appeal. Therefore, Acorn's Motion for stay pending appeal should be denied.

C. Acorn Will Not Suffer Irreparable Injury if the Stay Pending Appeal is Denied

"The best way to determine the market value of property is to expose the property to the marketplace." *In re Mama's Original Foods, Inc.*, 234 B.R. 500, 504 (Bankr. C.D. Cal. 1999) (citing *Bank of America v. 203 North LaSalle Street Partnership*, 526 U.S. 434 (1999)); *see also*

United States v. Edgar, 971 F.2d 89, 94 (8th Cir. 1992) (quoting *Albrecht v. Herald Co.*, 452 F.2d 124, 131 (8th Cir. 1971) (“It is well established that the ‘fair market value would be that price a willing seller could secure from a willing buyer.”)); *Malley-Duff & Assocs. v. Crown Life Ins. Co.*, 734 F.2d 133, 148 (3d Cir.), *cert. denied*, 469 U.S. 1072 (1984). The “market value of estate property ... is the highest price that an informed buyer is willing to pay after the property has been appropriately exposed to the marketplace for a reasonable period of time.” *In re Mama’s Original Foods, Inc.*, 234 B.R. at 504. Here, the auction process was designed to, and has achieved Polaroid’s goal of obtaining the maximum value for its assets for its estates estate and their creditors. Acorn’s argument that the values of Polaroid’s assets have not been maximized, after the conclusion of a robust and competitive auction process with multiple bidders, effectively doubling the stalking horse bid, must be resoundingly rejected.

Regardless, Acorn has an interest in a certain sub-set of Polaroid’s trademark assets. Since that subset of assets is included within the assets being sold pursuant to the Sale Order, the value of Acorn’s lien has been preserved by the grant of a replacement lien that will attach to the net sale proceeds with the same validity and priority as before the sale. Therefore, Acorn’s purported interest in Polaroid’s assets will be adequately protected by such replacement lien. Because Acorn cannot show it will be irreparably harmed, its Motion should be denied.

D. Debtors and the Bankruptcy Estates Will Be Substantially Harmed by Imposition of Stay Pending Appeal

With its current rate of consumption of cash resources, Polaroid lacks the financial resources to continue operating on its unencumbered assets alone. Since the commencement of the bankruptcy cases, the Debtors have been utilizing unencumbered cash to fund operating expenses that are necessary to continue normal business operations and preserve the value of the bankruptcy estates. The unencumbered funds utilized by the Debtors to date to fund the

administration of the bankruptcy cases and the sale process consist of approximately \$20.75 million of proceeds received by the Debtors prior to the bankruptcy filings in connection with the settlement of a commercial tort claim (the “Commercial Tort Claim Proceeds”). The Debtors anticipate that the Commercial Tort Claim Proceeds will be completely exhausted within the next 45 days or so in the event that a sale transaction is not promptly consummated. *See generally*, Sale Hearing, Debtors’ Exhibit Q [Cash Flow Forecast]. Indeed, the Debtors’ cash flows reflect a substantial existing cash burn rate currently in excess of \$3,000,000 per month. *See* Affidavit of Stephen Spencer, Director, Houlihan Lokey Howard & Zukin Capital, Inc., attached hereto as Exhibit A.

The lack of funds availability and deteriorating financial condition of these Debtors make an immediate consummation of the contemplated Sale and the pending Motion paramount. *See generally*, Sale Hearing, Debtors’ Exhibit Q [Cash Flow Forecast]; Sale Hearing, Debtors’ Exhibit D [Historical Financial Performance]; Transcript of Sale Hearing, Testimony of Stephen Spencer, Houlihan Lokey, at pp. 81-83, 87-91. Time is of the essence. The imposition of a stay of the Court’s Sale Order pending a potentially protracted appellate process creates substantial uncertainty and risk for these bankruptcy estates and threatens to jeopardize anticipated recoveries associated with the sale transaction approved by the Court—particularly in the absence of a substantial bond and current funding required to maintain the status quo and the burn rate experienced from current operations. For these reasons, Acorn’s motion should be denied.

E. The Public Interest Will Not be Furthered by Granting a Stay Pending Appeal

Significant harm to the public interest would occur if the pending sale were not able to be completed in a timely manner, Polaroid’s cash resources are depleted, Polaroid ceases operations

and the historic iconic Polaroid brand exits the consumer marketplace. See generally, *In re Adelphia Communications Corp.*, 333 B.R. 649, 666 (S.D.N.Y. 2005) (recognizing that a stay of a pending sale transaction was not in the public interest as it would undermine the debtor's ability to fulfill one of its main functions under the Bankruptcy Code, namely, the obligation to achieve a maximum distribution to creditors in a minimum amount of time). The public interest will be harmed by granting Acorn's Motion for a stay pending appeal, particularly when purported secured creditors' interests are adequately protected by replacement liens in the sale proceeds.

F. Any Stay Pending Appeal, to the Extent Granted by this Court, Should Be Accompanied by an Appropriate Bond/Letter of Credit and Other Security to Preserve the Status Quo and Provide an Adequate Remedy.

In the event that the Court determines for some reason that a stay pending appeal is appropriate, it is imperative that any such relief be conditioned upon the imposition of certain requirements, including the posting of a substantial bond/letter of credit, provisions for ongoing funding needs and other requirements that will need to be adequately tailored to ensure that the status quo is adequately preserved. Rule 8005 of the Federal Rules of Bankruptcy Procedure enables the Court to fashion any "appropriate order during the pendency of the appeal on such terms as will protect the rights of all parties in interest." Fed. R. Bankr. P. 8005. As such, the bankruptcy court may condition any stay upon the posting of an adequate bond or other security in order to secure any loss or damage that may be ultimately sustained as a result of the stay pending an appeal. The bankruptcy court has substantial discretion in determining whether the form, amount and sufficiency of any bond or other relief proposed is sufficient to support a stay. *Monzack v. ADB Investors (In re Max Sugarman Funeral Home, Inc.)*, 94 B.R. 16, 17 (Bankr. D.R.I. 1988). The purpose of requiring a bond and imposing other relief is to indemnify the

party against damages that are the natural and proximate result of the stay pending appeal. *In re Theatre Holding Corp.*, 22 B.R. 884, 885-86 (Bankr. S.D.N.Y. 1982); *In re Miraj & Sons, Inc.*, 201 B.R. 23, 27-28 (Bankr. D. Mass. 1996).

In this case, a bond/irrevocable letter of credit, while a significant component of security that should be required as a condition of any stay pending appeal will not, alone, be sufficient to preserve the status quo. Indeed, the form and amount of security required should be sufficient to adequately compensate the Debtors and the bankruptcy estates from all damages attendant any delay. This would include the value of the Hilco/Gordon Brothers bid that could be placed in jeopardy with any protracted delay, the costs attendant to any appeal, interest and, notably, committed funds necessary to preserve the estates and fund operations during the pendency of the appeal (i.e. the burn rate). The Debtors believe that the constituent elements of security in connection with any stay pending appeal should include the actual costs incurred by the estates in connection with any appeal and at least the following additional items:

Bond/LC Amount:	\$87,612,000 (Value of Hilco/Gordon Bros. Bid)
Interest:	\$275,000 per month ²
Burn Rate:	\$3,000,000 per month ³

It is important to recognize that, in addition to the substantial quantifiable costs set forth above and attributable to preserving the status quo during the pendency of a stay, there are a number of additional implicit costs associated with a delay that are not readily quantifiable. For example, the costs associated with the attendant impact on the estate's portion of the equity in the newly formed enterprise, the potential reduction in values and uncertainties associated with excluded assets and the opportunities lost with contracting counterparties and vendors and substantial

² Assumes a 6% annual percentage rate of interest calculated with reference to \$55,000,000 cash portion of the purchase price associated with the Hilco/Gordon Brothers bid.

³ The Debtors would expect that the funding requirements represented by the burn rate that would be necessary to preserve the status quo would be paid by Patriarch on a current basis as a condition for maintaining any stay pending appeal.

professional fees born by the estate are not susceptible to mathematical calculation but are nevertheless very real.

G. Conclusion

The Auction has concluded. The Court has entered an order authorizing Debtors to proceed with the sale of its assets free and clear of purported liens, claims, encumbrances and interests. In determining whether such sale could proceed free and clear of such liens under § 363(f), the Court considered and applied relevant Eighth Circuit case law, as well as persuasive case law from other circuits, in holding that it need not take evidence now to resolve the bona fide dispute as to the validity of Acorn's purported liens, but merely determine objectively that such dispute exists based on the record before as contained in pleadings and arguments presented to the Court. Through this appeal, Acorn apparently seeks to modify or reverse existing case law applied by this Court in granting Debtors' Sale Motion. Since the current case law within the Eighth Circuit does not support Acorn's arguments, it cannot be determined that Acorn has any strong likelihood of success on the merits on appeal. Additionally, weighing the equities of irreparable harm tips strongly in favor of denying Acorn's Motion, and permitting the sale of Polaroid's assets proceed.

WHEREFORE Polaroid respectfully requests the Court enter an order (1) denying Acorn's Motion in its entirety or, in the alternative, requiring the imposition of an appropriate bond/letter of credit and other security and requirements designed to compensate the Debtors for the damages, costs and losses sustained during the course of any period occasioned by a stay pending appeal; and (2) granting such other, further or additional relief as the Court may deem just and equitable.

DATED: April 22, 2009

LINDQUIST & VENNUM P.L.L.P.

By: /e/ George H. Singer

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**ATTORNEYS FOR
POLAROID CORPORATION**

Exhibit A

AFFIDAVIT OF STEPHEN SPENCER

I, Stephen Spencer, being first duly sworn, depose and say as follows:

1. I am the Director of Houlihan Lokey Howard & Zukin Capital, Inc. ("Houlihan Lokey"), whose business address is 225 South Sixth Street, Suite 4950, Minneapolis, Minnesota 55402.

2. This Affidavit is being provided in support of the objection of the debtors in the jointly administered bankruptcy cases of In re Polaroid, et al., BKY Case No. 08-46617 (collectively "Polaroid") to a request for a stay pending appeal of the Court's Order entered on April 17, 2009 approving a sale transaction (the "Sale Transaction") between Polaroid and PLR Acquisition, LLC, a joint venture comprised of Hilco Consumer Capital, L.P. and Gordon Brothers Brands, LLC (the "Buyer").

3. In connection with any delay of the contemplated Sale Transaction the Polaroid bankruptcy estates will incur various explicit (readily quantifiable) and implicit (more difficult to quantify with specificity but no less real) costs. The major factors influencing the costs attendant a delay are described in the following paragraphs:

A. Substantial Existing Cash Burn. Polaroid is currently generating significant ongoing cash losses. The rate of cash consumption is in excess of \$3,000,000 per month. The cash losses are a result of compromised cash collections due to business deterioration coupled with significant cash disbursements to fund operations which have continued effectively unabated. The business is also currently funding large monthly administrative expenses associated with the engagement of various bankruptcy professionals. Under these circumstances, an expedited sale transaction minimizing further cash diminution will unequivocally enhance recoveries to the bankruptcy estates. Further, it is anticipated that Polaroid will deplete remaining commercial tort claim proceeds within the next forty-five days, necessitating the use of cash collateral to operate and administer the estates.

B. Expediting Time to Close Sale Transaction Is Critical. To the extent that any stay pending appeal results in a substantial delay in closing of the contemplated Sale Transaction, the bankruptcy estates would not only be required to bear the additional explicit cash costs associated with the cash burn previously identified, it would also be required to bear the implicit elevation in risk to transaction execution, potential further diminution in ongoing business performance, and further damage to the Polaroid brand.

C. Uncertainty with Respect to Employees, Customers and Suppliers Enhances Execution Risk. Delayed transaction execution also creates higher risk of employee flight, further strains Polaroid's relationships with its customers and suppliers and increases execution risk due to uncertainty. Polaroid's customers and vendors are also seeking long overdue resolution to the company's tenuous

financial and operational circumstances. The Polaroid brand has been materially reduced in the channel today and risks further channel loss through delay that may impact an acquiror's business plan if an expedited resolution is not reached.

- D. Delay of Excluded Asset Monetization Creates Uncertainty, Enhances Execution Risk and Negatively Impacts Recoveries.** Delaying the Sale Transaction explicitly impacts Polaroid's ability to realize value through divestiture, liquidation or collection (i.e. the forgone interest on proceeds realized) of excluded assets. Implicit costs of delay include heightened uncertainty regarding the estate's ability to realize the estimated proceeds. Among other execution risks the estate has already commenced the sale of various excluded assets, which involves communications with transaction counterparties. Continued delay may result in diminished interest from counterparties or doom efforts to consummate monetization transactions.
- E. Significant Bonding and Other Requirements Would Need to be Satisfied in Order to Avoid Irreparable Harm.** I have reviewed the bonding and other requirements set forth in the Polaroid Objection and believe that the relief requested by the debtors in its pleadings in the event that a stay pending appeal should be granted by the Court would be necessary to avoid irreparable harm. It is important to recognize that the many implicit costs, including reduced value of excluded assets, missed opportunities with customers, employees and trade, and the attendant impact on the estate's portion of equity, are only a few of the more salient implicit costs that have not been factored into the bond calculation due to the difficulty in ascribing a specific monetary impact.

FURTHER AFFIANT SAYETH NOT.

Dated this 22nd day of April, 2009

/e/ Stephen Spencer
Stephen Spencer

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re

**JOINTLY ADMINISTERED UNDER
CASE NO. 08-46617:**

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; 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

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 22, 2009 she served the following document:

Debtors' Objection to Emergency Motion of Acorn Capital Group, LLC ("Acorn") for a Stay Pending Appeal

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