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; 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; Polaroid Waltham Real Estate, LLC)	08-46621 (GFK) 08-46620 (GFK) 08-46623 (GFK) 08-46624 (GFK) 08-46625 (GFK) 08-46626 (GFK) 08-46627 (GFK) 08-46628 (GFK) 08-46629 (GFK) Chapter 11 Cases Judge Gregory F. Kishel

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Polaroid Corporation and Polaroid Consumer Electronics, LLC, Plaintiffs, -vs.- Acorn Capital Group, LLC, as lender and as Administrative and collateral agent, Defendant.	**ADV. No. 09-04031**

ACORN'S MEMORANDUM IN OPPOSITION TO POLAROID'S MOTION TO DISMISS

Acorn Capital Group, LLC ("Acorn"), respectfully submits this Memorandum in Opposition to Plaintiffs Polaroid Corporation's ("PC") and Polaroid Consumer Electronics, LLC's ("PCE") (collectively, "Polaroid," "Plaintiffs" or "Debtors") Motion to Dismiss Acorn's Counterclaim.

INTRODUCTION

The Debtors initiated an adversary proceeding against Acorn by filing the Adversary Complaint ("Complaint") on February 12, 2009. The Complaint alleged, *inter alia*, that Acorn's liens in PC's and PCE's U.S. Inventory, U.S. Accounts and North American Trademarks are *invalid and unenforceable* because, according to the Debtors, the liens were fraudulently or preferentially transferred. Acorn answered the Complaint by denying the allegations and asserted a number of affirmative defenses to the allegations and claims made by the Debtors. Additionally, Acorn properly interposed a Counterclaim seeking an declaratory judgment that Acorn's liens in the Debtors' assets are *valid and enforceable*, as established by Acorn's direct interest in PC's and PCE's U.S. Inventory, U.S. Accounts and North American Trademarks, and Acorn's indirect interest in PAC Funding LLC's ("PAC") lien on PC's and PCE's assets. The relief sought by Acorn in its Counterclaim thus seeks an adjudication that is distinct from and broader in scope than the claims made and the relief sought by the Debtors in the Complaint.

If Acorn simply defeats the Debtors' claims based on one or more of the affirmative defenses asserted in its Answer, Acorn will only have succeeded in getting the Complaint dismissed. However, such a determination that Acorn's liens are *not*

invalid and *not unenforceable* will not in and of itself equate to a determination that Acorn's liens are *valid* and *enforceable*. Acorn has asserted its Counterclaim which affirmatively seeks a declaratory judgment that its liens are *valid and enforceable*. Acorn has made the reasoned decision that it makes abundant good sense and will be most efficient to seek such relief now through the Counterclaim it has asserted in this adversary proceeding, rather than pursuing that relief in a different and/or subsequent adversary proceeding.

Acorn is clearly entitled to seek an affirmative adjudication that its liens and interests in Polaroid's assets are valid and fully enforceable. Adjudication of Acorn's Counterclaim in these adversary proceedings is explicitly authorized by the Bankruptcy Rules and the Declaratory Judgment Act, and the Debtors' Motion to Dismiss is nothing more than yet another example of their established record for giving Acorn the run around. If Acorn had instead served a complaint to commence a separate action seeking to have its liens declared valid and enforceable, which would clearly be within its rights per Bankruptcy Rule 7001(2), then the Debtors would quite likely have sought dismissal of that separate action on the grounds that Acorn was required to assert such claims for relief as a compulsory counterclaim in this proceeding and that such a separate action would be an unnecessary waste of the parties' and the Court's resources.

The fact that the Debtors' Complaint and Acorn's Counterclaim involve the same liens does not make these pleadings duplicative. For example, a determination with respect to the Complaint that the liens are *not invalid and not unenforceable* on a particular basis is not the same as an affirmative declaration with respect to the

Counterclaim that the liens *are valid and are enforceable*. Thus, the Complaint and the Counterclaim seek different relief with respect to these liens, and the disposition of those pleadings will result in substantively different judgments.

Indeed, the fact that the Debtors' and Acorn's respective pleadings assert claims for relief that relate to the same underlying liens actually demonstrates that this adversary proceeding is the proper forum for Acorn to assert its Counterclaim seeking a declaratory judgment that the liens are valid and enforceable. Seeking such a declaratory judgment here and now in the instant adversary proceeding will avoid piecemeal adjudication, wisely channel the use and expenditure of the parties' resources, and promote the interests of judicial efficiency.

The Debtors have not argued and frankly cannot demonstrate that they would be prejudiced in any legitimate way by litigating Acorn's Counterclaim seeking this affirmative adjudication in this case, or that there would be any waste of either the parties' or the Court's resources in having this adjudicated in this adversary proceeding.

Finally, the Debtors cannot demonstrate that Acorn is required to add any additional parties in order to obtain the relief it has sought in the Counterclaim. Acorn is seeking to enforce its interests, both direct and indirect, in the Debtors' assets, and there is no need for other parties to be added to this adversary proceeding for this Court to enter a declaratory judgment that the liens and interests at issue are valid and enforceable. Acorn certainly has standing to assert its declaratory judgment Counterclaim seeking the Court's determination that Acorn's indirect interest in PAC's lien on PC's and PCE's assets are valid and enforceable. Indeed, the Debtors have conceded as much by raising

these same interests and liens in their Complaint, and attempting to have Acorn's direct and indirect lien interests declared invalid and unenforceable. In any event, if PAC or any other party who may have a bona fide interest has a legitimate basis for participating in this adversary proceeding, then those parties are perfectly free to seek to intervene and the Court can rule on any such motions and requests if and when the time arises.

Accordingly, Acorn requests that this Court deny the Debtors' Motion to Dismiss Acorn's Counterclaim seeking a declaration that Acorn's liens in PC's and PCE's assets are valid and enforceable to the fullest extent permitted by law.

BACKGROUND

A. Acorn's Liens.

On November 1, 2004, PAC Funding and Acorn entered into a credit agreement, as subsequently amended on December 14, 2005, September 6, 2006, January 19, 2007, October 29, 2007, and May 12, 2008, whereby Acorn agreed to make revolving loans to PAC up to a $300 million commitment ("PAC Credit Agreement"). (Countercl. ¶ 3) Also on November 1, 2004, PAC and Acorn entered into a security agreement ("PAC Security Agreement") pursuant to which PAC granted Acorn a first priority security interest in PAC's assets, which secured the full amount of PAC's debt to Acorn. (*Id*. ¶ 4.) Acorn perfected its security interest in PAC's assets by filing UCC Financing Statements with the Delaware Department of State on February 28, 2005, and on March 3, 2005. (*Id*. ¶ 5)[1] In connection with the PAC Credit Agreement and PAC

1 Specifically, PAC's assets include all Accounts; all Investment Property; all Contract Rights, Commercial Tort Claims, cash, Chattel Paper (whether Tangible or Electronic),

Security Agreement, PAC and Acorn entered into two separate blocked account agreements with Crown Bank and Associated Bank to perfect Acorn's security interest in those accounts ("Blocked Account Agreements"). (*Id*. ¶ 6.)

On March 4, 2008, Acorn made a $15 million advance pursuant to the PAC Credit Agreement. (*Id*. ¶ 7.) As requested by PAC, Acorn wired these funds directly to PCE. (*Id*. ¶ 8.) Acorn, PAC, PCE, PC and certain Petters companies documented this transaction. (*Id*. ¶ 9.) PC and PCE executed a $15 million promissory note in favor of PAC. (*Id*. ¶ 10.) PC and PCE granted PAC a security interest in PC's and PCE's U.S. Inventory and Accounts. (*Id*. ¶ 11.) PAC perfected its security interest in PC's and PCE's U.S. Inventory and Accounts by filing a UCC Financing Statement with the Delaware Department of State on February 29, 2008. (*Id*. ¶ 12.) PC and PCE granted Acorn a security interest in PC's and PCE's U.S. Inventory and Accounts. (*Id*. ¶ 13.) Acorn perfected its security interest in PC's and PCE's U.S. Inventory and Accounts by filing UCC Financing Statement with the Delaware Department of State on February 29, 2008. (*Id*. ¶ 14.)

Petters Company, Inc., Petters Company, LLC, Petters Capital, LLC, Thomas Petters, Inc. (collectively, "Creditor"), PAC, and Acorn entered into a subordination agreement subordinating the Creditor's secured claims in PC's and PCE's assets to Acorn's security interest in PC's and PCE's assets ("Subordination Agreement").

Deposit Accounts, Equipment, General Intangibles (including Payment Intangibles and Software), Goods, Health-Care-Insurance Receivables, Instruments (including any Promissory Notes), Inventory, Letter of Credit Rights and all Supporting Obligations; all Documents; and all Proceeds or products of any and all of the foregoing. (*Id.* ¶ 5.)

(*Id*. ¶ 15.) Pursuant to the terms of the Subordination Agreement, PAC agreed that it would "not, without the prior written consent of [Acorn], exercise any rights of PAC Funding as a secured party, with respect to the enforcement of its rights as a secured party, until all of he Obligations have been indefeasibly satisfied in full." (*Id*. ¶ 16.)

PAC and Acorn also entered into a limited forbearance agreement on February 29, 2008 ("Forbearance Agreement"), pursuant to which Acorn agreed to forbear from exercising its remedies under the PAC Credit Agreement and the PAC Security Agreement. (*Id*. ¶ 17.) Pursuant to the terms of the Forbearance Agreement, Acorn permitted PAC to access over $20 million being held pursuant to the Blocked Account Agreements. (*Id*. ¶ 18.)

On April 18, 2008, Acorn made a $10 million advance pursuant to the PAC Credit Agreement. (*Id*. ¶ 19.) Again, as requested by PAC, Acorn wired these funds directly to PCE. (*Id*. ¶ 20.) Acorn, PAC, PC, PCE and certain Petters companies documented this transaction. (*Id*. ¶ 21.) PC and PCE executed a $10 million promissory note in favor of PAC. (*Id*. ¶ 22.) PC and PCE granted PAC a security interest in PC's and PCE's U.S. Inventory and Accounts. (*Id*. ¶ 23.) PC and PCE granted Acorn a security interest in PC's and PCE's U.S. Inventory and Accounts. (*Id*. ¶ 24.)

In connection with the fifth amendment to the PAC Credit Agreement, on May 12, 2008, PC, PCE and Acorn entered into a Second Amended and Restated Security Agreement ("Polaroid Security Agreement"). Pursuant to the terms of the Polaroid Security Agreement, PC and PCE absolutely and unconditionally guaranteed the payment of all amounts owing to Acorn pursuant to the PAC Credit Agreement. (*Id*. ¶ 25.)

Acorn perfected its security interest in PC's and PCE's U.S., Canadian, and Mexican Trademarks by filing UCC Financing Statements with the Delaware Department of State on May 13, 2008, (*Id*. ¶ 26.), and by filing a Notice of Recordation of Assignment Document with the United States Patent and Trademark Office on May 14, 2008, (*Id*.).

In addition to PC's and PCE's U.S. Inventory and Accounts already pledged to Acorn, the Polaroid Security Agreement granted Acorn a security interest in PC's and PCE's North American Trademarks. (*Id*. ¶ 27.) In return, Acorn agreed to modify its prior agreements with PAC, PC and PCE to permit PC and PCE to pledge its assets as collateral for a credit facility for working capital. (*Id*. ¶ 28.)

B. The Debtors' Complaint and Acorn's Answer, Affirmative Defenses, and Counterclaim.

The Debtors filed the Complaint on February 12, 2009, making baseless allegations that, through the course of Acorn's investment commitments of at least $300 million over several years through PAC for the purpose of financing the purchase of electronic equipment and other goods, Acorn somehow participated in the massive fraud and Ponzi scheme allegedly perpetrated by Tom Petters that has resulted in losses to investors reportedly in excess of $3 billion. In particular, the Debtors made incredible allegations that Acorn engaged in a "fraudulent scheme" and inflicted "substantial injury to the Polaroid companies and their creditors," and that the Debtors entered in these transactions for "no or less than fair value." In its Memorandum in Support of Motion to Dismiss ("Motion"), the Debtors continue to unfoundedly assert Acorn's culpability by

stating that Acorn was involved in "orchestrating a plan targeted at securing the value of Polaroid in an attempt to conceal millions of dollars in losses." (Motion at 3.)

In an effort to strip Acorn of its valid liens, the Complaint asserts claims that Acorn's liens in PC's and PCE's U.S. Inventory, U.S. Accounts and North American Trademarks are invalid and unenforceable because, they claim, these liens were fraudulently or preferentially transferred. Specifically, the Debtors assert claims for fraudulent transfer based on actual fraud: 11 U.S.C. §§ 544(b), 548(a)(1)(A), 550, 550(a), 551, 1107 and Minn. Stat. § 513.41 et seq.; constructive fraud: 11 U.S.C. §§ 544(b), 548(a)(1)(B), 550(a), 551, 1107 and Minn. Stat. § 513.41 et seq.; insider fraud: 11 U.S.C. §§ 544(b), 550(a), 551, 1107 and Minn. Stat. § 513.41 et seq.; claims based on preferential transfer: 11 U.S.C. §§ 547, 550, 551 and 1107; disallowance: 11 U.S.C. § 502(b) and (d); lien avoidance 11 U.S.C. § 506(d); equitable subordination: 11 U.S.C. § 510(c); recharacterization: 11 U.S.C. § 105; and declaratory relief: 11 U.S.C. § 105.

In its Answer to the Complaint, Acorn stated affirmatively and categorically that it did not take any actions in furtherance of efforts to perpetrate the fraudulent scheme of which Tom Petters now stands accused. Acorn's Answer included a counterclaim seeking declaratory relief that Acorn has a valid and enforceable lien in the Debtors' assets, as established by Acorn's direct interest in PC's and PCE's U.S. Inventory, U.S. Accounts and North American Trademarks, and Acorn's indirect interest in PAC's lien on PC's and PCE's assets.

In its Answer, Acorn also asserted affirmative defenses that generally and specifically rebut the elements of the causes of action set forth in the Complaint upon

which the Debtors seek to invalidate Acorn's claims, namely that Acorn's liens were fraudulently or preferentially transferred. Specifically, Acorn's affirmative defenses include:

> Polaroid's Complaint fails to state claims and/or causes of action for which relief may be granted;
>
> Polaroid's Complaint fails to plead fraud and other alleged intentional acts with particularity;
>
> Acorn acted at all relevant times herein in good faith and without knowledge or notice of any alleged fraud on the part of the Debtors;
>
> Polaroid's claims are barred to the extent the transfers at issue involved a contemporaneous exchanges for new value;
>
> Polaroid's claims are barred to the extent the transfers at issue were made in the ordinary course of business;
>
> Polaroid's claims may be barred by the doctrines of laches, estoppel and/or waiver;
>
> Polaroid's claims are barred by the doctrine of unclean hands;
>
> Polaroid's claims are barred because Polaroid was not insolvent at the time the transfers and obligations were made;
>
> Polaroid's claims are barred because it received a reasonably equivalent value in exchange for the transfers and obligations that were made;
>
> Polaroid's claims are barred because there was neither constructive fraud, nor was there any actual intent to hinder, delay, or defraud any entity to which Polaroid was indebted, or became indebted, at the time the transfers and obligations were made;
>
> Polaroid's claims are barred because Acorn gave value for the transfers and obligations at issue in this matter and received such interest in good faith and have a lien on, and may retain its interest in, such transfers and may enforce such obligations; and
>
> Polaroid has failed to establish a bona fide dispute.

Acorn asserted these affirmative defenses in order to obtain dismissal of Polaroid's Complaint seeking to have Acorn's liens determined to be *invalid and unenforceable*. Without more, if and when Acorn succeeds with one or more of these affirmative defenses, that is all Acorn will obtain in this adversary proceeding.

Accordingly, in addition to its Answer and affirmative defenses contained therein, Acorn has interposed its Counterclaim asserting that Acorn's liens in PC's and PCE's U.S. Inventory, U.S. Accounts and North American Trademarks are *valid and enforceable*, and requesting the Court to enter a judgment in its favor so holding that its liens in Polaroid's assets are *valid and enforceable*. Acorn's Counterclaim is thus distinctive from and broader in scope than both the Complaint and the Answer containing the affirmative defenses in this adversary proceeding.

ARGUMENT

The Debtors are simply and fundamentally wrong in claiming that Acorn's Counterclaim is duplicative of its Answer and affirmative defenses to the Debtor's Complaint. On the contrary, far from being duplicative, Acorn's Counterclaim is essential if Acorn is to obtain an affirmative adjudication that its liens and interests are valid and enforceable. Acorn is not assured it will obtain such affirmative declaratory relief by merely defending the claims made by the Debtors that those liens and interests are invalid and unenforceable. Thus, Acorn has properly brought its Counterclaim to obtain an affirmative declaration that its liens in Polaroid's assets are valid and enforceable.

Indeed, it is exceedingly sensible and appropriate for Acorn to pursue an affirmation declaration as to the validity and enforceability of its liens in this adversary proceeding, rather than having to do so elsewhere at some other stage of the above-captioned bankruptcy case. Since Acorn is going to be required to expend its resources in this adversary proceeding to defend and defeat the frivolous allegations and claims made by the Debtor who seeks to have Acorn's liens declared invalid and unenforceable, then the most efficient method of proceeding in terms of Acorn's and the Court's resources would be for Acorn to seek an affirmative declaration now in this adversary proceeding once and for all that its liens and interests in Polaroid's assets are valid and enforceable, rather than potentially litigating these liens piecemeal and repeatedly over the course of this bankruptcy case.

Finally, there is no need to add PAC as a party, and the litigation of Acorn's rights which arise from its agreements with PAC does not create undue complexities or added burdens in this adversary proceeding. Article 9 and the security agreement entered into between PAC, Polaroid and Acorn expressly provide that Acorn has the right to enforce obligations on behalf of PAC. Moreover, since PAC's failure to enforce these obligations is a breach of PAC's duty to protect and conserve its assets for the benefit of its creditors, such as Acorn, Acorn is suffering a concrete, imminent injury caused by the Debtors' attempt to invalidate Acorn's legitimate liens, which can be redressed by the Court's favorable decision on Acorn's Counterclaim seeking a declaration that its liens are valid. Moreover, the Debtor has put the subject matter of Acorn's indirect interests at

issue in the case, and therefore, Acorn is entitled to seek affirmative declaratory relief as to the validity and enforceability of these liens.

I. LEGAL STANDARD.

Bankruptcy Rule 7012 expressly provides that the Federal Rules of Civil Procedure 12(b)-(i) apply in adversary proceedings. The Debtors have moved to strike Acorn's Counterclaim under Rule 12(f) and to dismiss Acorn's Counterclaim under 12(b)(6). The criteria for Rule 12(f) motions are similar to those under Rule 12(b)(6). The standards and principles invoked by courts in applying these rules are familiar and well established.

Rule 12(f) permits the court "to strike from a pleading an insufficient defense or redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). A Rule 12(f) motion to strike is "a drastic remedy which is disfavored by the courts and is infrequently granted." *FDIC v. R-C Marketing and Leasing, Inc.*, 714 F. Supp. 1535, 1541 (D. Minn. 1989) (citation omitted); *see also Lunsford v. Cabou*, 570 F.2d 221, 229 (8th Cir. 1977).

A Rule 12(f) motion to strike will be granted only where the Court is convinced that there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defenses succeed. *Id.* The challenged allegations must be so (1) unrelated to the plaintiff's claims as to be unworthy of *any* consideration as a defense *and* (2) their presence in the pleading throughout the proceeding will be "prejudicial to the moving party." 5C Wright to Miller, *Federal Practice & Procedure* §1380, at 397 n. 11 (3d ed. 2004) (*citing Abrams v. Lightolier,*

Inc., 702 F. Supp. 509, 511 (D.N.J. 1988); *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 402 F. Supp. 636, 638 (S.D.N.Y. 1975)).

Thus, a motion to strike must be denied when no prejudice could result from the challenged allegations even when the allegations fall literally within a category set forth in Rule 12(f). *Id*. at 444 (*citing Rawson v. Sears Roebuck & Co.*, 585 F. Supp. 1393, 1397 (D. Colo. 1984) (refusing to strike immaterial maters in briefs when moving party could not demonstrated undue prejudice); *Augustus v. Board of Pub. Instruction of Escambia County Fla.*, 306 F.2d 862, 868 (5th Cir. 1962) ("[M]otion to strike should be granted only when the pleading to be stricken has no possible relation to the controversy . . .[or] there is no showing of prejudicial harm to the moving party."). Moreover, Rule 12(f) motions to strike must be denied if the challenged allegations might serve to achieve a better understanding of the plaintiff's claims for relief or other useful purpose. *Id*. at 448; *see e.g. Lanier Bus. Prods. v. Graymar Co.*, 342 F. Supp. 1200, 1202 (D. Md. 1972) (denying motion to strike pleading headings and counterclaims where counterclaims "arise out of the same series of transactions or occurrences").

Rule 12(b)(6) permits as a defense to a claim a motion to dismiss for a "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Like Rule 12(f), under Rule 12(b)(6), a "motion to dismiss for failure to state claim is viewed with disfavor and is rarely granted." 5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* §1357, at 321 (1990) (footnote & citations omitted). When proceeding under Rule 12(b)(6), the factual allegations pleaded in a claim must be accepted as true. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Murphy v. Lancaster*, 960 F.2d

746, 748 (8th Cir. 1992); *Brennan v. Chestnut*, 777 F. Supp. 1469, 1472 (D. Minn. 1991). In addition, the Court must resolve any ambiguities concerning the sufficiency of the claims in favor of the pleading party. *Hughes v. Rowe*, 449 U.S. 5, 10 (1980); *Cruz v. Beto*, 405 U.S. 319, 322 (1972); *see also Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc.*, 988 F.2d 1157, 1160-1161 (8th Cir. 1993).

In analyzing the adequacy of allegations under Rule 12(b)(6), the Court must construe the claim liberally and afford the pleading party all reasonable inferences to be drawn from those allegations. *Turner v. Holbrook*, 278 F.3d 754, 757 (8th Cir. 2002). However, the claim must allege "more than labels and conclusions" and "a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twornbly*, 550 U.S. 544, 557, 127 S. Ct. 1955, 1965 (2007). Thus, the issue before the Court "is not whether the [pleading party] will ultimately prevail at trial, but rather whether they are entitled to proceed with their claims." *In re Digi Intern., Inc.*, 6 F. Supp. 2d 1089, 1095 (D. Minn. 1998) (citing *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1982)).

II. ACORN'S COUNTERCLAIM SEEKS RELIEF THAT IS BROADER IN SCOPE THAN THE COMPLAINT AND AFFIRMATIVE DEFENSES ASSERTED IN THE ADVERSARY PROCEEDING BECAUSE THE COUNTERCLAIM SEEKS AN AFFIRMATIVE ADJUDICATION AND JUDGMENT THAT ITS LIEINS AND INTERESTS IN THE DEBTORS' ASSETS ARE VALID AND ENFORCEABLE .

Adjudication of Acorn's Counterclaim in these adversary proceedings is explicitly authorized by the Bankruptcy Rules and the Declaratory Judgment Act, and doing so in this adversary proceeding advances the interests of judicial efficiency. The Debtors

nonetheless move to strike and/or dismiss the Counterclaim by erroneously and, frankly, disingenuously concluding that "Acorn's Counterclaim is simply redundant of Polaroid's claims and Acorn's affirmative defenses." Motion at 9. This superficial argument is simply wrong.

In fact, Acorn's Counterclaim seeks a determination that is distinct from and broader in scope than the Debtors' Complaint and Acorn's Answer containing its affirmative defenses to that Complaint, which focus on the specific elements of the Debtors' claims that these liens are invalid by virtue of alleged fraudulent or preferential transfers. While the Debtors' case focuses on having Acorn's liens determined to be *invalid and unenforceable*, Acorn's case by and through the Counterclaim seeks to have these liens declared to be *valid and enforceable*.

The Bankruptcy Rules define an "adversary proceeding" as, among other things, "a proceeding to determine the *validity*, priority, or extent of a lien or other interest in property . . . ." *See* Fed. R. Bankr. P. 7001(2). Counterclaims to determine the validity or invalidity of a lien are thus commonplace in bankruptcy court. *See e.g. In re Johnson*, 108 B.R. 689, 695 (D. Minn. 1989); *In re Cheqnet Sys, Inc*., 246 B.R. 873, 881 (E.D. Ark. 2000); *In re Ulmer*, 1992 WL 1482495 at*9 (Bankr. D.N.D. May 8, 2002).

A counterclaim seeking declaratory relief of the sort asserted by Acorn in this adversary proceeding is certainly an appropriate vehicle for a party to have its liens declared valid and enforceable. The Declaratory Judgment Act permits federal courts to "declare the rights and other legal relations of *any interested party* seeking such declaration . . . ." 228 U.S.C. § 2201 (emphasis added); *see Metro-Goldwyn-Mayer*

Studios Inc. v. Grokster, Ltd., 269 F. Supp. 2d 1213, 1226 (C.D. Cal. 2003) (explaining that the purpose of the Declaratory Judgment Act is "clarifying and settling the legal relations of the parties, or affording a declaratory plaintiff relief from the uncertainty, insecurity, and controversy giving rise to the proceeding").

Courts deny motions to strike counterclaims for declaratory judgment as redundant unless they nearly identically mirror or are the direct converse of another claim in the proceeding. *See Admiral Ins. Co. v. Heath Holdings USA, Inc.*, No. Civ.A.3:03-CV-1634-G, 2004 WL 576055 at*2 (N.D. Tex. March 12, 2004) (denying motion to dismiss counterclaim for declaratory judgment and rejecting argument that counterclaims were "identical and duplicative" of affirmative defense); *c.f. In re Messina*, Nos. 99 B 29371, 02 A 01041, 2003 WL 22271522 at*9 (Bankr. N. D. Ill. Sept. 29, 2003) (striking counterclaims for declaratory relief as redundant because one "mirrored" and the other was "merely the opposite of" the Trustee's causes of action in the complaint).

Even the non-bankruptcy cases cited by the Debtors illustrate this point. For example, in *Stickrath v. Globalstar, Inc.*, 2008 WL 2050990 (N.D. Cal. May 13, 2008)–which the Debtors cite in their Motion at page 8–the Court emphasized that "it is not always appropriate to strike declaratory judgment counterclaims *simply because they concern the same subject matter or arise from the same transaction* as the complaint." *Id.* at *4 (emphasis added). Instead, "[t]he court should *focus on whether the counterclaims 'serve any useful purpose*,' and should dismiss or strike a redundant counterclaim *only when 'it is clear that there is a complete identity of factual and legal issues* between the complaint and the counterclaim.'" *Id.* (quoting *Pettrey v. Enterprise*

Title Agency, Inc., 2006 WL 3342633, at *3 (N.D. Ohio Nov. 17, 2006) (emphasis added). The Court then went on to list several examples that are analogous to the situation in the instant case, where courts have declined to dismiss. *Id.* at *4 & n.3. In a patent or trademark infringement case, for example, the defendant's potential for success in obtaining a determination of "no liability" is all well and good, but that same defendant would still derive separate and independent benefit from asserting a counterclaim that would go further to adjudicate the validity of the underlying trademark or patent. *Id.* at *4. In those circumstances, courts are well advised to deny motions to dismiss such counterclaims. *Id.* (citing *Pettrey*, at *3; *Digital Envoy, Inc. v. Google, Inc.*, 2006 WL 824412, at *2 (N.D. Cal. March 28, 2006); *Cardinal Chem. Co. v. Morton Int'l*, 508 U.S. 83, 94-96 (1993); *Dominion Elec. Mfg. Co. v. Edwin L. Weigand Co.*, 126 F.2d 172 (6th Cir. 1942)). The Court identified other situations in which courts have denied motions to strike counterclaims that relate to the same contract or transaction as the complaint, where "the counterclaim may seek different relief, in addition to raising legal issues the court may not reach in resolving the complaint and affirmative defenses." *Id.* (citing & discussing *Iron Mountain Sec. Storage Corp. v. Am. Specialty Foods, Inc.*, 457 F.Supp. 1158, 1161-62 (E.D. Pa. 1978) (court held counterclaim in breach of contract case was "not superfluous" even though it sought to adjudicate the same contract that formed the basis for the complaint because it sought relief "beyond the scope of the complaint"; "*[a] ruling adverse to plaintiff on plaintiff's claim would merely result in a judgment that plaintiff was not entitled to the relief requested; although it might logically follow from that judgment that defendants' interpretation of the contract was the correct one,*

defendants would not be entitled to a judgment to that effect unless they specifically requested one.'") (emphasis added); *LeMaster v. USAA Life Ins. Co.*, 1995 WL 708656, at *3 (M.D. Fla. Nov. 27, 1995)(court declined to strike the counterclaim in a case revolving around benefits under an insurance policy because "[t]he counterclaim sought to rescind the insurance policy, while the complaint alleged breach of contract, and the counterclaim sought the 'affirmative relief of costs and equitable remedies as opposed to mere affirmative defenses which are used to negate liability.'")).

Moreover, bankruptcy courts regularly make determinations to exercise jurisdiction over claims and controversies to avoid the inefficiencies of piecemeal adjudication and promote judicial economy by aiding in the efficient resolution of connected matters of a debtor's estate. *See In re Lemco Gypsum, Inc.*, 910 F.2d 784, 787 (11th Cir. 1990) (*citing In re Fietz*, 852 F.2d 455, 457 (9th Cir. 1988)); *see also First Union Nat. Bank ex rel. Southeast Timber Leasing Statutory Trust v. Pictet Overseas Trust Corp., Ltd.*, 351 F.3d 810, 815 (8th Cir. 2003) (permitting counterclaims for efficiency of avoiding second lawsuit and ensuring decision by court already familiar with facts).

Indeed, Acorn's Counterclaim could well be viewed as a compulsory counterclaim under Rule 13(a) of the Federal Rules of Civil Procedure (adopted in Bankruptcy Rule 7013(a)) since it arises out of the same transactions and set of facts as those that are presumably the basis for the Debtors' Complaint–to the extent it is possible to even discern that from the Debtors' highly generalized and conclusory allegations–and "would be nonlitigable under res judicata if not asserted as part of this case." *Iron Mountain Sec.*

Storage Corp., 457 F.Supp. at 1162 (citing 3 *Moore's Federal Practice* 13.12[1] (2d ed. 1974)).

Here, Acorn has every right to assert its Counterclaim in this adversary proceeding for a declaratory judgment that its liens are valid. Without the assertion of its Counterclaim, Acorn could successfully defend the Debtors' Complaint that alleges the liens are invalid and unenforceable and still be left without a determination that its liens are valid and enforceable. The fact that the liens underlying the claims in the Complaint also underlie Acorn's counterclaim does not bolster the Debtors' argument that the claims are duplicative as the Debtors suggest because the claims in the Complaint and the Counterclaim seek different relief. If the Debtors were to lose on their claims that Acorn's liens are invalid because, in fact, they were not fraudulently or preferentially transferred, such a determination that the liens are *not invalid* on those bases does not equate to an affirmative determination that Acorn's liens are *valid*.

Finally, litigating the parties' respective claims and competing requests for relief concerning the same underlying liens here and now in this adversary proceeding promotes the interests of judicial efficiency. For example, in making both determinations, the Court will need to consider the underlying liens and transactions discussed above in detail as well as the fraudulent transfer and preferential transfer statutes cited in the Debtors' Complaint. The Court will likely need to go further, however, in making a determination on Acorn's Counterclaim that Acorn's liens are valid and enforceable, than it will if only called upon to determine the Debtors' claims that

Acorn's liens are invalid on the specific basis that they were fraudulently or preferentially transferred. That should be done in this adversary proceeding.

Therefore, Acorn's counterclaim for a declaration on validity is not duplicative and the Debtors' motion to strike or dismiss Acorn's Counterclaim must be denied.

III. ACORN HAS STANDING TO ASSERT ITS COUNTERCLAIM FOR DECLARATORY RELIEF SEEKING THE COURT'S DETERMINATION THAT ACORN'S INDIRECT INTEREST IN PAC'S LIEN ON POLAROID'S ASSETS IS VALID AND ENFORCEABLE.

The Debtors have also moved to dismiss and/or strike Acorn's Counterclaim as it relates to Acorn's interest in PAC's lien on Polaroid's assets, claiming alternatively that (1) Acorn lacks standing and (2) such claims would "inject issues wholly unrelated" to the Debtors' Complaint and "would require an analysis of facts and issues wholly unrelated to Polaroid's complaint." Debtors' motion at 13-14. The Debtors' contentions are contrary to basic Uniform Commercial Code ("UCC") law and the terms of the parties' security agreement. Moreover, since the Debtors themselves have raised these issues in their Complaint, they cannot now fairly claim that Acorn lacks standing and Acorn's Counterclaim has somehow improperly "injected" these facts and issues into this adversary proceeding.

Acorn most certainly has standing to seek declaratory relief in this matter as to the validity and enforceability of the PAC lien in which Acorn has an indirect interest. First, Article 9 and the PAC Security Agreement provide that Acorn has the right to enforce obligations on behalf of PAC. Second, the failure to enforce PAC's obligations is a breach of PAC's duty to protect and conserve its assets for the benefit of its creditors,

such as Acorn. Acorn is suffering a concrete, imminent injury caused by the Debtors' attempt to invalidate Acorn's legitimate liens, which can be redressed by the Court's favorable decision on Acorn's Counterclaim seeking a declaration that its liens are valid.

The requirement of standing is both a "constitutional limitation on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Sedin*, 422 U.S. 490, 498 (1975) (citation omitted). Standing requires a party to have a personal stake in the outcome of the controversy. *Baker v. Carr*, 369 U.S. 186, 204 (1962). To ensure a personal stake, a plaintiff seeking to invoke federal court jurisdiction must demonstrate: (1) an injury that is concrete, particularized, and actual or imminent rather than conjectural or hypothetical; (2) a causal connection between the injury and the challenged conduct, such that the injury may be fairly traceable to the conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Applying the law to the undisputed facts in this case, it is very clear that Acorn has standing to seek declaratory relief in this matter as to the validity and enforceability of the PAC lien in which Acorn has an indirect interest.

Acorn has a security interest in PAC's assets. PAC's assets include a $10 million note from Polaroid, which is secured by Polaroid's assets. Pursuant to Article 9 of the UCC and section 6(e) of the PAC Security Agreement, Acorn is entitled to enforce Polaroid's obligations to PAC under the $10 million note secured by Polaroid's assets.

The applicable provisions of the UCC clearly provide that, upon an event of default under the PAC Credit Agreement, Acorn, *inter alia*:

> may enforce the obligations of an account debtor or other person obligated on collateral and exercise the rights of the debtor with respect to the obligation of the account debtor or other person obligated on collateral to make payment or otherwise render performance to the debtor, and with respect to any property that secures the obligations of the account debtor or other person obligated on the collateral[.]

UCC § 9-607(a)(3). The comments to Section 9-607 state that the section "explicitly provides for the secured party's enforcement of the debtor's rights in respect of . . . (other third parties') obligations . . . ." UCC § 9-607 comment 3. Thus, for example, when a debtor defaults, "the security interest in an account receivable operates as an assignment by the debtor to the secured party of the right to receive payment from the account debtor." *Mooney v. Univ. Sym. of Maryland*, 943 A.2d 108, 111 (Md. Ct. App. 2008) (citing generally § 9-607(a)(1)), overruled on other grounds by *Univ. Sym. of Maryland v. Mooney*, 966 A.2d 418 (Md. 2009). In short, "[t]he assignee stands exactly in the shoes of his assignor." *Bank of Waunakee v. Rochester Cheese Sales, Inc*. 906 F.2d 1185, 1189 (7th Cir. 1990).

Pursuant to the PAC Security Agreement, Acorn has a first priority security interest in PAC's assets, which includes the $10 million note secured by Polaroid's assets. When PAC defaulted under the Forbearance Agreement, Acorn became entitled to pursue its remedies under the PAC Security Agreement. Acorn's remedies under Article 9 of the UCC and the PAC Security Agreement include the right to enforce Polaroid's obligations to make payments or otherwise render performance to PAC under the $10 million note. By virtue of those rights, Acorn stands in the shoes of PAC and would have the right and standing to assert a counterclaim in this adversary proceeding.

Moreover, Acorn would have standing to assert its Counterclaim in the adversary proceeding on behalf of PAC because PAC's failure to do so is in violation of PAC's duty to protect and conserve its assets for its creditors' benefit, which includes Acorn. An insolvent debtor has a duty to protect and conserve the property in its possession for the benefit of the creditors. *In re Halux, Inc.*, 665 F.2d 213, 216 (8th Cir. 1981); *In re Schwen's, Inc.*, 20 B.R. 638, 641 (D. Minn. 1982). This duty includes administering the bankruptcy estate for the creditors' benefit. *In re Schwen's, Inc.*, 20 B.R. at 641. In doing so, the administrator may not have an adverse interest, or be in active competition between two interests where one interest can only be served at the expense of the other. *In re J & M Dev. of Cass Co., Inc.*, 2004 WL 1146451, at *3 (Bankr W.D. Mo., May 19, 2004).

According to PAC's schedules, PAC has only approximately $12 million in assets and over $300 million in liabilities, making PAC insolvent. Acorn is PAC's largest creditor with approximately $281 million in claims for unpaid and outstanding loans to PAC. The remaining two creditors are affiliates of PAC. As such, PAC owes Acorn a duty to act in Acorn's interests by protecting and conserving its assets for the benefit of Acorn and other creditors. As Chapter 11 Trustee of PAC, Douglas Kelley (represented by Lindquist & Vennum, which is also counsel for Polaroid) is obligated to act in both the best interests of PAC and its creditors. Mr. Kelley has also been involved in an uncertain capacity with the Debtors. These interests are in current, active competition with one another. Each creditor has a unique interest in certain assets of a particular company or companies comprising the Debtors and benefit from a maximization of the

value of those particular assets. This interest is in tension with the Debtors' interest in obtaining value for the Debtors' assets as an unallocated whole.

Failing to assert a Counterclaim seeking the validity of PAC's liens is not in Acorn's best interests because it will deprive Acorn of the value of its secured claim against PAC and maximize Acorn's indirect interest in Polaroid's U.S. Inventory, U.S. Accounts and North American Trademarks. PAC's failure to assert a claim seeking the validity of its liens is a breach of PAC's duty to protect and conserve its assets for the benefit of Acorn and other PAC creditors. Therefore, Acorn has standing to bring this counterclaim and the Debtors' motion to dismiss must fail.

The Debtors' contention that Acorn's Counterclaim is barred because it failed to serve a timely third party complaint against PAC is misplaced to say the least. Motion at 12-13. Acorn was not required to serve PAC with a third party complaint in order to seek declaratory relief in this adversary proceeding with respect to the validity and enforceability of these security agreements. As it has already established, Acorn has standing to enforce its indirect lien claims. Therefore, Acorn has no reason nor any need to either add PAC as a party or commence a third party action against PAC in order to pursue declaratory judgment relief as to the valid and enforceable nature of its liens and interests under these security agreements.

Finally, the Debtors' argument that Acorn was required to join PAC as a party to this action, as well as the Debtors' contention that the litigation of Acorn's indirect interest in PAC's lien on Polaroid's assets will inject matters outside of their Complaint, are all contrary to the allegations and claims contained in their Complaint. The Debtors

have not joined PAC as a named party in this adversary proceeding, and yet they have asserted allegations of fraud and other improper actions with respect to, *inter alia*, PAC's security agreements and promissory notes with Polaroid (Complaint at ¶¶30, 34, 36-47) and pursue claims for affirmative relief including, *inter alia*, disallowance, equitable subordination, and recharacterization with respect to Acorn's indirect interests and claims by virtue of agreements with PAC (Complaint at ¶¶ 94, 103, 107). Specifically, the Debtors contend that any claim that may be asserted by virtue of transactions or agreements between PAC and Polaroid or Acorn should be "disallowed" (*Id*. ¶ 94), "equitably subordinated" (*Id*. ¶ 103) and/or "properly characterized as equity investments" (*Id*. ¶ 106).

Thus, the Debtors' own Complaint put at issue Acorn's indirect interests in PAC's lien on Polaroid's assets, and therefore the Debtors will suffer no prejudice as a result of Acorn's counterclaim which seeks, *inter alia*, to have these liens declared valid and enforceable, including the PAC liens in which Acorn had an indirect interest. 5C Wright & Miller, *Federal Practice & Procedure* §1380, at 397 p. n. 11 (3d. ed. 2004).

CONCLUSION

For the foregoing reasons, Acorn respectfully requests the Court to deny the Debtors' Motion to Dismiss in all respects.

Dated: April 30, 2009

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IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

	Jointly Administered under Case No. 08-46617
In re:	
Polaroid Corporation, et al.,	Court File Nos.: 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

Polaroid Corporation,	
Plaintiff,	Chapter 11 ADV. No. 09-04031
vs.	Judge Gregory F. Kishel
Acorn Capital Group, LLC, as Lender and Administrative and Collateral Agent,	
Defendant.	

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2009, I caused the foregoing **ACORN'S MEMORANDUM IN OPPOSITION TO POLAROID'S MOTION TO DISMISS** to be filed electronically with the Clerk of Court through ECF, and that ECF will send an e-notice of electronic filing to the following persons:

- Daniel C. Beck dbeck@winthrop.com, tcooke@winthrop.com
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I further certify that there are no manual recipients.

Dated: April 30, 2009

WINTHROP & WEINSTINE, P.A.

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