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

Polaroid Corporation,

Plaintiff,

-vs.- ADV. No. 09-4032

Ritchie Capital Management, L.L.C., as administrative and collateral agent, Ritchie Special Credit Investments, Ltd., Rhone Holdings II, Ltd., Yorkville Investments I, L.L.C., and Ritchie Capital Structure Arbitrage Trading, Ltd.,

Defendants.

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS

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Creditors Ritchie Capital Management, L.L.C. ("RCM") and Ritchie Special Credit Investments, Ltd., Rhone Holdings II. Ltd., Yorkville Investments I, L.L.C., and Ritchie Capital Structure Arbitrage Trading, Ltd. (collectively, the "Ritchie Lenders," and together with RCM, "Ritchie") respectfully submit this Opposition to the Motion to Dismiss filed by Polaroid Corporation ("Polaroid").

INTRODUCTION

In response to Polaroid's Adversary Complaint, which seeks to avoid Ritchie's liens in certain of Polaroid's foreign trademarks, Ritchie asserted two counterclaims. Count I seeks a declaratory judgment of the validity and the extent of Ritchie's liens in the foreign trademarks. Count II seeks a declaratory judgment that its security interests in certain promissory notes issued by Polaroid, some of which are in turn secured by Polaroid's assets, are valid and enforceable. Polaroid has moved to dismiss or, alternatively, to strike, both counts. Polaroid's motion is devoid of merit and should be denied.

Polaroid contends that Count I warrants dismissal because it represents the "flip side" of Polaroid's challenge to the validity of Ritchie's liens in Polaroid's trademarks, and is thus duplicative. Courts, however, dismiss counterclaims as duplicative only where the counterclaims "serve no useful purpose." *Berger v. Seyfarth Shaw, LLP*, No. 07-5279, 2008 U.S. Dist. LEXIS 93496, at *5 (N.D. Cal. June 17, 2008). Count I plainly serves a useful purpose. Granting Ritchie the relief requested in Count I means more than a simple rejection of Polaroid's current challenges to Ritchie's liens – it would affirmatively establish the validity of Ritchie's liens. Polaroid does not, and could not, contend that merely fending off Polaroid's present attack on the liens would grant Ritchie such affirmative relief. Count I thus serves a purpose beyond defeating Polaroid's attack, and should not be dismissed as redundant.

Polaroid also challenges Ritchie's standing to assert Count II. This challenge is, to put it mildly, remarkable. Polaroid's challenge ignores a direct, disabling conflict of interest for Polaroid, as managed by Douglas Kelley ("Kelley"), Trustee for the controlling shareholder of Polaroid,[1] and for Lindquist & Vennum ("Lindquist"), Polaroid's counsel. As explained below, Ritchie obtained the security interests in Polaroid's assets that it asserts in Count II via an assignment from Petters Capital, LLC ("Petters Capital") and Petters Company, Inc. ("PCI") of promissory notes issued by Polaroid. Polaroid, managed by Kelley and with Lindquist as counsel, here contends that Ritchie does not have standing to assert those secured interests, and suggests that Petters Capital and PCI are the parties that must assert those interests. Kelley and Lindquist, however, are also Receiver and counsel, respectively, for Petters Capital and PCI.[2] Therefore, if Polaroid is correct that Petters Capital and PCI must assert the liens (and Polaroid is *not* correct), Kelley and Lindquist would be responsible for both contesting the liens on behalf of Polaroid and defending the liens on behalf of Petters Capital and PCI. And, Polaroid has already disputed the right of PCI and Petters Capital to assert secured interests in Polaroid's assets because of their purported involvement in the Petters Ponzi scheme.[3] Dismissing Count II would thus ensure that no one could advocate for the enforcement of the promissory notes other than Kelley and Lindquist, who have already compromised their position on the enforcement of the notes. The scenario proposed in the Motion to Dismiss is thus untenable, indeed outrageous, and cannot be allowed to come to fruition.

Polaroid's attempt to dismiss Count II also fails on the merits. Polaroid argues that, because Ritchie's liens in Polaroid's assets are rooted in promissory notes that Polaroid issued

[1] Kelley also serves as Receiver for Polaroid.
[2] Kelley also serves as Trustee for PCI.
[3] Polaroid took that position in papers it filed in the bankruptcy court in connection with the sale of Polaroid under Section 363.

not to Ritchie, but to Petters Capital and PCI, Ritchie has no standing because it was not a third-party beneficiary to those notes, and has not impleaded Petters Capital and PCI.[4] But Petters Capital and PCI assigned these notes to Ritchie as collateral. Well-established law, recently re-affirmed by the Supreme Court, grants Ritchie, as assignee, standing to bring suit to protect its assigned interests. Polaroid's arguments regarding third party beneficiary status and impleading Petters Capital and PCI are therefore wholly irrelevant, and fail. Ritchie has standing to assert Count II.

BACKGROUND

The Initial Loans From The Ritchie Lenders To PGW And The Extension Agreement

In February and May of 2008, the Ritchie Lenders and Petters Group Worldwide, LLC ("PGW") executed a series of unsecured, short-term promissory notes pursuant to which the Ritchie Lenders advanced over $158,000,000 to PGW. (Counterclaims ¶¶ 13, 15.) In August and September 2008, Ritchie and PGW negotiated an extension of the due dates on those promissory notes to December 19, 2008, which the Ritchie Lenders granted to PGW in exchange for receiving security for its loans. The parties' agreement is embodied in the Extension and Amendment Agreement dated September 19, 2008 ("Extension Agreement," attached as Exhibit C to Ritchie's Answer and Counterclaims). (Counterclaims ¶¶ 20-21.) The Extension Agreement called for the execution of three other agreements, which provide Ritchie with the security for the loans to PGW.

[4] As set forth in the Background section below, Ritchie received as security the pledge of six promissory notes issued by Polaroid or its affiliate, only three of which are in turn secured by Polaroid's assets. Count II seeks a declaration involving all six promissory notes. Polaroid's motion, however, appears to focus on only the claims involving the promissory notes secured by Polaroid's assets. Accordingly, Polaroid does not seek to dismiss or to strike Count II with respect to the pledge of the three promissory notes not secured by Polaroid's assets.

The Security Agreements And Collateral Assignments Of Promissory Notes

The first security agreement is the Trademark Security Agreement, dated September 19, 2008 and executed by Polaroid and RCM ("Trademark Agreement," Exhibit D to Counterclaims). The Trademark Agreement granted Ritchie a security interest in all of the trademarks owned by Polaroid in Brazil, India and China. (Counterclaims ¶ 22.) The second agreement is the Security Agreement, dated September 19, 2008 and executed by RCM, PCI and Thomas Petters, Inc. ("TPI") ("PCI Security Agreement," Exhibit E to Counterclaims). Under the PCI Security Agreement, TPI pledged to Ritchie a promissory note issued by Polaroid Consumer Electronics, LLC ("PCE") to TPI, and PCI pledged to Ritchie one promissory note issued by PCE to PCI and one promissory note issued by Polaroid to PCI (notes attached as Exhibit G to Counterclaims). (Counterclaims ¶ 24.) The third agreement is the Security and Intercreditor Agreement, dated September 26, 2008 and executed by RCM, RWB Services LLC, TLP Services, LLC ("TLP")[5] and Petters Capital ("PC Security Agreement," Exhibit F to Counterclaims). Under the PC Security Agreement, Petters Capital pledged to Ritchie three promissory notes issued by Polaroid to Petters Capital (notes attached as Exhibit H to Counterclaims). (Counterclaims ¶ 25.)

Importantly, the pledges of the promissory notes under the security agreements were collateral *assignments* by Petters Capital, PCI and TPI to Ritchie and TLP, as the case may be, of all of their respective rights in those promissory notes. The PCI Security Agreement states in relevant part:

> . . . the Pledgors [*i.e.*, PCI and TPI] do hereby *assign*, grant and pledge to, and subject to continuing security interest in favor of, the Administrative Agent [*i.e.*, Ritchie] . . . all the estate, right, title and interest of the Pledgors in, to and under the following . . .

[5] TLP is a wholly-owned subsidiary of RCM.

> (i) the Pledged Notes and the Intercompany Loan Documents . . . and
>
> (ii) the proceeds of all of the foregoing collateral, whether cash or non-cash, including:
>
> > (a) all rights of the Pledgors to receive moneys due and to become due or pursuant to the [Pledged Notes and Intercompany Loan Documents] . . .
> >
> > (b) all claims of the Pledgors for damages arising out of or for breach of or default under the [Pledged Notes and Intercompany Loan Documents] . . .

(PCI Security Agreement, § 2.1 (emphasis added).) Consistent therewith, the PCI Security Agreement also expressly states that Ritchie has "the exclusive right under all of the Assigned Agreements to . . . (b) compel performance and otherwise exercise all remedies under the Assigned Agreements" and "to demand, receive, enforce, collect or provide receipt for any of the foregoing rights or any property the subject of any of such agreements [and] to file any claims and to take any action which may be necessary or advisable in connection with any of the foregoing." (*Id.* § 2.5.) The PC Security Agreement contains nearly identical language regarding the assignment of the notes and associated rights from Petters Capital to TLP.[6] (*See* PC Security Agreement §§ 2.1, 2.5.)

Three of the promissory notes pledged as security are themselves secured by Polaroid's assets ("Secured Notes"). One Secured Note is the Amended and Restated Secured Subordinated Term Note, in the original amount of $20,000,000 and dated April 24, 2007, as amended and restated as of September 11, 2008, issued by Polaroid in favor of PCI ("PCI Secured Note"). (Counterclaims ¶ 24.) Another Secured Note is the Promissory Note, secured and in the original principal amount of $5,000,000, dated November 5, 2007, as amended and restated as of

[6] TLP, RCM's wholly-owned subsidiary, is designated as the "Administrative Agent" under the PC Security Agreement. TLP has authorized RCM to assert its rights under the PC Security Agreement and related agreements in this action.

September 11, 2008, issued by Polaroid in favor of Petters Capital ("PC Secured Note I"). (*Id.* ¶ 25.) The final Secured Note is the Promissory Note, secured and in the original principal amount of $5,000,000, dated November 12, 2007, as amended and restated as of September 11, 2008, issued by Polaroid in favor of Petters Capital ("PC Secured Note II").[7] (*Id.*)

The Polaroid Adversary Complaint And Ritchie's Counterclaims

In its Adversary Complaint, Polaroid contends that the security interests in Polaroid's foreign trademarks that Ritchie received in exchange for extending the due date of PGW's promissory notes are improper and that Polaroid received no benefit from those transfers, and for those reasons the security interests should be avoided as preferential or fraudulent transfers. (Polaroid Mem. at 4.) Ritchie answered the Adversary Complaint, and filed counterclaims with two counts.

Contrary to Polaroid's mischaracterization, Count I is not merely the "mirror image" of Polaroid's Adversary Complaint. Count I seeks a declaratory judgment "to determine the extent and validity of its security interests in the Polaroid Brazil, China and India trademarks." (Counterclaims ¶ 39.) The Adversary Complaint, however, focuses only on avoidance of those liens, and denying the relief sought thereunder would not produce an affirmative judgment of the validity and extent of Ritchie's liens. Count II seeks a declaratory judgment that Ritchie "has a valid and perfected security interest" in the pledged promissory notes issued by Polaroid and in the assets of Polaroid under the related agreements. (Counterclaims ¶¶ 45, 50-52, Wherefore Clause at 2.) The Adversary Complaint *does not* challenge the validity of the pledges in Count II

[7] The Secured Notes are all secured by a lien on substantially all of the assets of Polaroid pursuant to the Third Amended and Restated Pledge and Securities Agreement, dated September 11, 2008, by and among Polaroid, as grantor, and Petters Capital and PCI as secured parties. (Counterclaims ¶¶ 24-25.)

or the underlying security agreement granting the rights in Polaroid's assets, and indeed does not address those pledges at all. Polaroid's Motion to Dismiss likewise does not challenge the validity of the pledges in Count II or the underlying security agreement, and does not address at all the pledges of the promissory notes issued by Polaroid that were not in turn secured by Polaroid's assets.

ARGUMENT

I. Standards Applicable to Motions to Dismiss and Motions to Strike.

In considering a motion to dismiss under Rule 7012 of the Bankruptcy Rules and Rule 12(b)(6) of the Federal Rules of Civil Procedure, a court must liberally construe the claims and assume the facts alleged in the complaint to be true, drawing all reasonable inferences from those facts in the pleader's favor. *Bell Atlantic Corp v. Twombly*, 550 U.S. 540, 555 (2007); *Schwendimann v. Arkwright, Inc.*, No. 08-162, 2008 U.S. Dist. LEXIS 56421, at *4 (D. Minn. July 23, 2008). Proper pleading requires "more than labels and conclusions," but does "not need detailed factual allegations." *Twombly*, 550 U.S. at 555. "[T]he statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Erickson v. Partus*, 551 U.S. 93 (2008), and "be enough to raise a right to relief above the speculative level," *Twombly*, 550 U.S. at 555.

Polaroid alternatively seeks to strike Ritchie's counterclaims under Rule 7012(f) of the Bankruptcy Rules and Rule 12(f) of the Federal Rules of Civil Procedure. (Plaintiff's Mem. at 10.) Rule 12(f) permits a court to strike claims or allegations that are "redundant, immaterial, impertinent, or scandalous." F.R.C.P. 12(f). Striking a claim, however, is uniformly considered "an extreme and disfavored measure," *BJC Health Systems v. Columbia Casualty Co.*, 478 F.3d 908, 917 (8th Cir. 2007), and Rule 12(f) motions are "infrequently granted." *Stanbury Law Firm, P.A. v. Internal Revenue Service*, 221 F.3d 1059, 1063 (8th Cir. 2000); *see also, 2-12 Moore's*

Federal Practice, Civil § 12.37[1] (2009) ("[c]ourts disfavor the motion to strike, because it proposes a drastic remedy"). A Rule 12(f) movant bears the heavy burden of "demonstrating that the challenged allegations are so unrelated to plaintiff's claim as to be devoid of merit, unworthy of consideration, and unduly prejudicial." *Kramer & Frank, P.C. v. Wibbenmeyer*, No. 4:05CV2395, 2006 U.S. Dist. LEXIS 78449, at *5 (E.D. Mo. Oct. 27, 2006). Any doubt must be resolved in favor of maintaining the pleading. *MRSI, Inc. v. Bluespan, Inc.*, No. 2:05CV00896, 2006 U.S. Dist. LEXIS 68891, at *3 (D. Utah Sept. 21, 2006).

II. Count I Must Not Be Dismissed Or Stricken; Granting The Relief Sought In Count I Would Produce An Outcome Different Than Simply Denying Polaroid's Requested Relief, And Thus Count I Is Not Duplicative.

Count I of Ritchie's counterclaims seeks a declaration of both the validity and the extent of Ritchie's liens in certain of Polaroid's foreign trademarks. Polaroid argues that its Adversary Complaint already challenges the validity of those liens, and thus Count I should be dismissed because it "merely seek[s] resolution of matters that will be resolved as part of the claims that are already in the lawsuit." (Polaroid Mem. at 9.) Polaroid's argument founders on both the facts and the law.

Polaroid's argument fails because Count I is not simply the "flip side" of Polaroid's original claim. Unlike Polaroid's claim, Ritchie's request for declaratory judgment is not limited to the issue of whether Ritchie's claims are avoidable – it also seeks a declaration regarding the enforceability and extent of those liens. (Counterclaims ¶ 39.) Polaroid's argument thus collapses because it lacks the necessary factual foundation – a counterclaim duplicative of the original claims. *See Holzberlein v. Om Fin. Life Ins. Co.*, 2008 U.S. Dist. LEXIS 105111, *4 (D. Colo. Dec. 22, 2008) (counterclaim not duplicative where it sought determination of issue raised in original claim not just with respect to plaintiff, but also with respect to third parties).

Moreover, even if original claims and counterclaims mirror each other with respect to the factual and legal issues presented, courts will not dismiss the counterclaim as redundant if granting the relief sought in the counterclaim will produce an outcome different than that produced by simply rejecting the original claim. In *Iron Mountain Storage Corp. v. Am. Specialty Foods, Inc.*, the plaintiff sought a declaratory judgment that the defendant had to pay a certain price under the parties' contract, and the defendant counterclaimed for a declaratory judgment that it did not have to pay that price. 457 F.Supp. 1158, 1161-62 (E.D. Pa. 1978). Plaintiff sought dismissal of the counterclaim as a mere "mirror image" of plaintiff's claim. *Id.* at 1161. The court refused to dismiss the counterclaim, explaining:

> I know of no rule preventing the assertion of a counterclaim merely because the theory relied upon is the converse of that in the complaint. Defendants would have every right to seek a judgment declaring that their interpretation of the contract was the correct one. A ruling adverse to the 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*.

Id. at 1161-62 (emphasis added); *see also De Lage Landen Financial Services, Inc. v. Miramax Film Corp.*, No. 06-2319, 2009 U.S. Dist. LEXIS 2066, at *25 (E.D. Pa. Mar. 16, 2009) (upholding attorneys' fees for defendant's counterclaim because "a ruling against [plaintiff] on [plaintiff's] claims could merely have resulted in a judgment that defendant did not breach [plaintiff's] version of the contract, and not necessarily an affirmative declaration that [plaintiff's] version of the contract was invalid"); *Dominion Elec. Mfg. Co. v. Edwin L. Wiegand Co.*, 126 F.2d 172 (6th Cir. 1942); *United Wats, Inc. v. Cincinnati Ins. Co*, 971 F. Supp. 1375, 1381 (D. Kansas 1997); *Int'l Woodworkers v. McCloud Lumber Co*., 119 F. Supp. 475, 488 (N.D. Cal. 1953); *Makenta v. University of Pennsylvania*, No. 98-3376, 2002 U.S. Dist. LEXIS

415, at *3-4 (E.D. Pa. Jan. 11, 2002). And, even where the outcomes under both the original claims and counterclaims are similar, courts will still decline to dismiss a counterclaim, particularly at the outset of the litigation, because the plaintiff might voluntarily dismiss its claim. *See Kvaerner U.S. Inc. v. Kemper Envt'l Ltd.*, No 06-403 2006 U.S. Dist. LEXIS 78005, at *10 (W.D. Pa. Oct. 26, 2006) ("the declaratory judgment [counterclaim] gives the [defendants] the ability to have the Court rule on these issues if, for example, the plaintiff were to voluntarily dismiss its claim"). Dismissal is appropriate only if it is clear that the counterclaim would truly "serve[] no 'useful purpose'." *Berger v. Seyfarth Shaw, LLP*, No. 07-5279, 2008 U.S. Dist. LEXIS 93496, at *2 (N.D. Cal. June 17, 2008); *Pettrey v. Enter. Title Agency, Inc.*, No. 05-1504, 2006 U.S. Dist. LEXIS 8360, at *9 (N.D. Ohio Nov. 17, 2006).

As in *Iron Mountain*, resolving Ritchie's counterclaims will produce an outcome different than merely resolving Polaroid's claims. Defeating Polaroid's present challenge would establish only that Ritchie's liens do not have the defects identified in the Adversary Complaint. Prevailing on Count I, however, would establish affirmatively that Ritchie's liens are valid. Ritchie cannot obtain affirmative recognition of the validity of its liens by only defeating Polaroid's claims. Ritchie must specifically request that affirmative relief to obtain it, and because Count I in fact requests that relief, Count I "serves a useful purpose" and is not redundant.[8]

[8] The cases relied upon by Polaroid largely do not address – and thus do not dispute – this point. And the one case cited by Polaroid that does address the issue is in accord. In *Stickrath v. Globalstar, Inc.*, 2008 U.S. Dist. LEXIS 95127 (N.D. Cal. 2008), the court stated that dismissal of a purportedly redundant counterclaim is not proper where the counterclaim would "serve any useful purpose." *Id.*, at *11-12. Citing *Iron Mountain*, the court further noted that a "counterclaim may seek different relief, in addition to raising legal issues that the court may not reach in resolving the complaint and affirmative defenses," and that such counterclaims should not be stricken. *Id.* at *12. The court did dismiss the counterclaim at issue, but only because no different relief was sought, or legal issues raised, by the counterclaim, and thus it served no

Also, if Ritchie obtains the relief it requests under Count I, Ritchie's rights in its liens would not simply be established against Polaroid, but also for all purposes and against all parties in interest in the Polaroid bankruptcy case. This further demonstrates that the outcome under Count I is different than a simple rejection of Polaroid's claims. *See e.g., Morton International, Inc. v. Cardinal Chemical, Co.*, 967 F.2d 1571, 1573, 1577 (Fed. Cir. 1992) (a declaratory judgment regarding validity of a patent would not only "settle the rights of the parties more completely," but also extend beyond the rights and relationships of the two parties to the suit); *Makenta*, 2002 U.S. Dist. LEXIS at *3-4.

Finally, Polaroid does not contend that it would suffer any prejudice from the continued presence of Count I – and could not so contend because Polaroid argues that Count I is entirely duplicative of its original claim. Consequently, there is absolutely no need or reason to dismiss Count I at this early stage. Prudence suggests that, at a minimum, a decision on discarding Count I must wait until later in the course of this case, when future events can further inform the decision. *See, e.g., Leach v. Ross Heater & Manuf. Co.*, 104 F.2d 88, 91-92 (2d Cir. 1939) (reversing dismissal of counterclaim in part because "[w]hile it may turn out at trial that a decision on the merits of the plaintiff's [claim] will . . . render declaratory judgment unnecessary, in which case the counterclaim may be dismissed, we are of [the] opinion that it was error to strike out the counterclaim at so early a stage").

In sum, Polaroid's arguments for dismissal of Count I fail. Count I is not duplicative of Polaroid's claims because it seeks a declaration for all purposes, not limited to avoidance actions, as to the validity and extent of Ritchie's liens – an affirmative declaration that is fundamentally

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useful purpose. *Id.* at *15.

different than a mere determination that Polaroid's attacks on Ritchie's liens are infirm. Accordingly, Court I "serves a useful purpose," and should not be dismissed.[9]

III. Polaroid's Efforts To Prevent Ritchie From Asserting Its Liens In Count II Once Again Show Kelley And Lindquist To Be Conflicted, Which Precludes Them From Properly Pursuing This Action.

With its present Motion to Dismiss, Polaroid seeks to deny Ritchie the ability to assert in Count II the security interests in certain Polaroid-issued promissory notes that Petters Capital and PCI assigned to Ritchie. Polaroid argues that Petters Capital and PCI must instead assert those interests. But that position creates an immediate and direct conflict of interest. Kelley and Lindquist are Receiver and counsel, respectively, not only to Polaroid, but also to Petters Capital and PCI.[10] Thus, if Kelley and Lindquist are correct as a matter of law (and they are not), they would be responsible for both attacking those secured interests on behalf of Polaroid and defending against those attacks on behalf of Petters Capital and PCI. And Kelley and Lindquist have already decided the outcome of that contest – Polaroid, at the direction of Kelley and Lindquist, has asserted in papers filed with the bankruptcy court supporting the sale of Polaroid that the liens held by Petters Capital and PCI are invalid. (Polaroid's Status Report on Auction and Reply, at 15-16, 19-21 (Apr. 3, 2009) (Case No. 08-46617, Docket No. 239); Polaroid's Consolidated Reply to Objections, at 15-16 (February 17, 2009) (Case No. 08-46617, Docket No. 114)). Denying Ritchie standing would thus ensure that no one advocates for enforcement

[9] For the same reasons, there is no basis to dismiss Count I because it "replicates" Ritchie's Affirmative Defenses. (Polaroid Mem. at 7.) Ritchie's Affirmative Defenses do not seek any affirmative relief. (Answer at pp. 16-17.) Thus, Ritchie's Affirmative Defenses and counterclaims "are distinct and must be kept so," because a "counterclaim may entitle the defendant in the original action to some amount of affirmative relief," whereas "a defense merely precludes or diminishes the plaintiff's recovery." *Riverside Mem'l Mausoleum, Inc. v. UMET Trust*, 581 F.2d 62, 68 (3d Cir. 1978); *see also Makenta*, 2002 U.S. Dist. LEXIS at *3-4; *Cardinal Chem. Co. v. Morton Int'l*, 508 U.S. 83, 93-94 (1993); *MRSI Int'l, Inc. v. Bluespan, Inc.*, 2006 U.S. Dist. LEXIS 688191, at *4 (D. Utah Sept. 21, 2006).

[10] Kelley also acts as Trustee for PCI and for Polaroid's controlling shareholder.

of the Polaroid promissory notes or for Ritchie's interest as a secured party under the notes. This conflict is particularly unsettling because Lindquist, in successfully defeating a motion to disqualify them as counsel for PGW and Polaroid due to their inherent conflicts of interest, stated that they would ensure that they would never appear on both sides of a contested matter. (Transcript of Proceedings at 37, lines 5-20, In re: Petters Company, Inc., et al., Debtors, Case No. 08-45257 (Bankr. D. Minn. Mar. 13, 2009).) Lindquist has neither disclosed nor taken steps to remedy this patent conflict. Accordingly, Polaroid's effort to dismiss Count II should not proceed. *See, e.g., In re Big Mac Marine,* 326 B.R. 150, 154-55 (8th Cir. BAP 2005) (attorney cannot represent both debtor and creditor).

IV. Polaroid's Standing Arguments Are Inapposite; Ritchie Has Standing To Enforce The Liens In The Promissory Notes It Was Assigned.

Polaroid argues that Ritchie has no standing to assert "its indirect claim to Polaroid's assets" in Count II based upon Ritchie's liens in the Secured Notes, which were issued by Polaroid to Petters Capital and PCI and assigned to Ritchie.[11] (Polaroid Mem. at 11.) According to Polaroid, Ritchie lacks standing because it was not a third party beneficiary under the Secured Notes when Polaroid issued them to Petters Capital and PCI, and therefore Ritchie must, but did not, add Petters Capital and PCI as parties to this suit. (*Id.* at 12-14.)

Polaroid's arguments wholly miss the mark. Ritchie has standing based upon its status a as an assignee of liens in Polaroid's assets via the Secured Notes. Thus, it is irrelevant whether Ritchie is a third party beneficiary to the Secured Notes when issued by Polaroid, or whether Petters Capital and PCI are parties to this suit.

[11] As noted above, Polaroid appears to limit its argument to the Secured Notes. Accordingly, the request in Count II to declare Ritchie's security interests in the pledged notes not secured by Polaroid's assets is not challenged by Polaroid.

Initially, it is undisputed that Ritchie asserts liens in Polaroid's assets. Lienholders, as owners of property interests, have the right and authority to pursue actions to protect their liens. *See, e.g.*, *In re Popp*, 323 B.R. 260, 265-67 (9th Cir. B.A.P. 2005) (in context of appeal from sale order under Section 363(f), lienholder had sufficient property interest in assets of estate to confer standing to appeal).

Moreover, Polaroid's challenges to Ritchie's right to assert its liens on the grounds that Polaroid originally issued the Secured Notes not to Ritchie, but to Petters Capital and PCI, are foreclosed by the fact that Petters Capital and PCI collaterally *assigned* their rights under the Secured Notes to Ritchie. That assignment confers standing upon Ritchie and obviates the need for Petters Capital and PCI to appear in this case.

The language of the controlling documents effecting the assignment is clear, and it confers upon Ritchie all the rights possessed by Petters Capital and PCI under the Secured Notes. The PCI Security Agreement states that PCI and TPI, as Pledgors, "do hereby *assign*, grant and pledge" all rights "in, to and under" "the Pledged Notes and the Intercompany Loan Agreements," and expressly bestows upon RCM the "exclusive right" to exercise the remedies under and to enforce the assigned notes. (PCI Security Agreement, §§ 2.1, 2.5.) The PC Security Agreement contains functionally identical language regarding assignment of the promissory notes held by Petters Capital. (PC Security Agreement §§ 2.1, 2.5.) The Intercompany Loan Agreements effect the security interests in Polaroid's assets for the Secured Notes.

As assignee of the rights of Petters Capital and PCI under the Secured Notes, Ritchie indisputably has standing to assert those rights, including the security interests therein. Indeed, the Supreme Court recently held that an "assignee for collection" had standing to sue, even

though the assignee was obligated to turn over all proceeds from the suit to the assignors, who were not parties to the assignees' lawsuit. *See Sprint Comms. Co., L.P. v. APCC Servs., Inc.*, 128 S.Ct. 2531, 2536 (2008) (stating that "[a]ssignees of a claim, including assignees for collection, have long been permitted to bring suit"). Here, of course, Ritchie is more than a mere "assignee for collection;" Ritchie has acquired PCI's and Petters Capital's rights in the Secured Notes and therefore will receive a direct, personal benefit from validating those liens in Count II – Ritchie need not remit any proceeds or benefit of the suit to PCI or Petters Capital. The Dissent in *Sprint Comms.* likewise confirmed the ability of an assignee – other than an assignee solely for collection – to bring suit. Indeed, the Dissent described the right of "assignees to sue on their assigned claims" as an "undisputed[] point" that the Supreme Court recognized in *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 773 (2000). *Sprint Comms.*, 128 S.Ct. at 2553 (Roberts, C.J., dissenting); *see also Cedar Point Apartments, Ltd. v. Cedar Point Inv. Corp.*, 693 F.2d 748, 754 (8th Cir. 1984) (holding that plaintiff had standing under valid assignment of rights in subject employment agreement).

To demonstrate the long-standing, historical nature of the right of assignees to sue in their own name, the Supreme Court in *Sprint Comms.* catalogued a number of decisions from the 19th Century establishing that point. *See* 128 S.Ct. at 2546-49. One such decision, *Castner v. Austin, Sumner & Co.*, 2 Minn. 44 (1858), is particularly apt. *Castner* involved a suit by the assignees of certain notes against the issuer of the notes. *Id.* at *2. The assignor had pledged the notes to the assignees "as collateral security for an indebtedness." *Id.* In holding that the suit was properly brought in the name of the assignees only, the Minnesota Supreme Court rejected the precise argument that Polaroid raises here – that the assignor must be joined to the suit. *Id.* The court reasoned that "[w]hatever the relations of the plaintiffs to the assignor, can make no difference to

the defendants" as long the defendants "would [not] be subject to another suit for the same subject-matter." *Id.* No risk of a duplicative lawsuit exists here, and Polaroid does not contend to the contrary.

Polaroid does not challenge the validity of the assignments to Ritchie. If it did, however, such a challenge would not entitle Polaroid to a dismissal at the pleading stage. Polaroid has several available avenues through which it can pursue that argument if it desires. For instance, Polaroid could take discovery regarding the assignment from Ritchie, as well as from PCI and Petters Capital. Those entities presumably would be amenable to discovery because they are affiliates of Polaroid under the control of Kelley and Lindquist, but in all events they are subject to subpoena power. And, as the Supreme Court recognized in *Sprint Comms.*, if Polaroid believes that the presence of PCI and Petters Capital in this suit is necessary, Polaroid can assert claims against them, or move to join them in suit as indispensable parties under Rule 19. *Sprint Comms.*, 128 S.Ct. at 2545. It is clear, however, that whatever relevance PCI and Petters Capital might ultimately have to this suit, their absence has no impact upon Ritchie's standing, at the pleading stage, to assert its liens in Count II. *Id.*

Lastly, Polaroid argues that Count II should be dismissed because it "would require an analysis of facts and issues wholly unrelated to Polaroid's complaint." (Polaroid Mem. at 15.) But Count II and Polaroid's complaint both concern the validity of Ritchie's liens (albeit different liens) in Polaroid's assets, and thus can hardly be deemed "wholly unrelated." Furthermore, Rule 7001(2) states that adversary proceedings include a determination of "the validity, priority, or extent of a lien or other interest in property." Bankr. R. 7001(2). Accordingly, the bankruptcy rules expressly direct that Ritchie's claims in Count II can be

addressed as part of the adversary proceeding process, and not as part of the claims process. Count II is a proper counterclaim to Polaroid's Adversary Complaint.

CONCLUSION

For the reasons set forth herein, Ritchie requests that the Court deny Plaintiff's motion to dismiss under Rule 12(b)(6) and to strike under Rule 12(f).

DATED: April 30, 2009

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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

Polaroid Corporation,

Plaintiff,

-vs-

ADV. No. 09-4032

Ritchie Capital Management, L.L.C., as administrative and collateral agent, Ritchie Special Credit Investments, Ltd., Rhone Holdings II, Ltd., Yorkville Investments I, L.L.C., and Ritchie Capital Structure Arbitrage Trading, Ltd.,

Defendants.

ORDER DENYING MOTION TO DISMISS

Based upon the argument of counsel, pleadings, files, and the record in this matter, IT IS HEREBY ORDERED THAT:

1. Polaroid Corporation's Motion to Dismiss Defendants' counterclaim is denied with prejudice.

Dated this _____ day of _____, 2009.

BY THE COURT:

_____
The Honorable Gregory F. Kishel
Judge of District Court

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Polaroid Corporation,

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Ritchie Capital Management, L.L.C., as administrative and collateral agent, Ritchie Special Credit Investments, Ltd., Rhone Holdings II, Ltd., Yorkville Investments I, L.L.C., and Ritchie Capital Structure Arbitrage Trading, Ltd.,

Defendants.

UNSWORN CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2009, I caused the following documents:

Defendants' Opposition to Plaintiff's Motion to Dismiss and Proposed Order

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

- Daniel C. Beck dbeck@winthrop.com, tcooke@winthrop.com
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I further certify that I caused a copy of the foregoing documents to be mailed by first class mail, postage paid, to the following non-ECF participants:

N/A

Dated: April 30, 2009

/e/ Jill Thorvig
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