

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

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

POLAROID CORPORATION, ET AL.,

Debtors.

08-46617 (GFK)

(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

**THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS'
OBJECTION TO PROPOSED SALE OF DEBTOR'S ASSETS**

The Official Committee of Unsecured Creditors (the "Committee") appointed in the above-captioned chapter 11 cases hereby files this Objection to Proposed Sale of Debtor's Assets (the "Objection"). In support of the Objection, the Committee, by and through its undersigned counsel, respectfully states as follows:

Background

1. On December 17, 2008 (the "Petition Date"), 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 the "Debtors" or "Polaroid") filed voluntary petitions

under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Minnesota. The Debtors continue to operate their businesses and manage their property as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

2. On January 8, 2009 the Office of the United States Trustee appointed the Committee in these bankruptcy cases.

3. On January 28, 2009, the Debtors filed a motion (the “Bidding Procedures Motion”) seeking entry of an order approving the sale free and clear of liens of substantially all of the Debtors’ assets to the stalking horse bidder, PHC Acquisitions, LLC (“Genii”), or to the successful bidder at an auction.

4. Thereafter, on February 18, 2009, the Court entered the Order (1) Approving Auction and Bidding Procedures; (2) Approving Break-Up Fee, Expense Reimbursement and Other Buyer Protections; (3) Approving Notice; and (4) Granting Related Relief (the “Bidding Procedures Order”). Among other things, the Court authorized the Debtors to pay to Genii a break-up fee of \$1,200,000 (the “First Break-Up Fee”) and expense reimbursement up to \$500,000.

The Auction

5. Pursuant to the Bidding Procedures Order, the Debtors and their financial advisor, Houlihan Lokey Howard & Zukin Capital, Inc. (“Houlihan Lokey”) conducted an auction (the “Auction”) that began on March 30, 2009 and closed on March 31, 2009. In advance of the Auction, Houlihan Lokey undertook extraordinary efforts to ensure that an active bidding process would occur. Among other efforts, Houlihan Lokey took steps to ensure that all parties could bid on “equal footing” by creating established values for all potential assets that buyers contemplated excluding from their asset purchase agreements. This schedule of value is attached hereto as **Exhibit A**, and all parties were notified that, while they might dispute the actual

amount that the Debtors' estates could realize for these assets, for the purposes of the Auction, these were the established values that would be used. (Transcript, Vol. I at 20:3-21:11.)¹

6. Although Genii was designated as the stalking horse bidder, it became clear that Genii was not going to be an active participant in the Auction. Fortunately, due to the considerable work of Houlihan Lokey, there were two additional participants in the process: (i) PLR Holdings, LLC (the "Joint Venture"), a joint venture between Hilco Consumer Capital, L.P. and Gordon Brothers Brands, LLC ("Hilco/GB") and (ii) Lithograph Legends, LLC, a single-purpose entity formed by Patriarch Partners LP ("Patriarch"). The auction began with the Debtors accepting Patriarch's bid, which was valued at \$43,725,000 (comprised of \$42,000,000 of cash and excluded assets valued by Houlihan Lokey at \$1,725,000), as the highest and otherwise best bid.² (See Transcript, Vol. I at 5:11-16.)

7. Thereafter, the bidding alternated between Patriarch and Hilco/GB, with the Debtors accepting the following sequence of bids:

- Hilco/GB: \$43,887,000 (cash of \$28,375,000 plus excluded assets of \$15,512,000)
- Patriarch: \$50,075,000 (cash of \$42,000,000 plus excluded assets of \$8,075,000)

8. At this point, Hilco/GB expressed its desire to increase its bid by including equity interests in the Joint Venture. Specifically, Hilco/GB offered a bid of \$57,637,000 (cash of \$32,375,000 plus excluded assets of \$15,512,000 plus a 15 percent equity stake valued at

¹ The Committee understands that the Debtors are submitting to the Court the complete transcript of the Auction.

² The actual cash consideration offered by Patriarch was \$43,850,000, which included \$1,850,000 to "top" the break-up fee and expense reimbursement of Genii. For the purposes of the Auction (and this Objection), all cash consideration is net of the break-up fee and expense reimbursement to Genii.

\$9,750,000).³ The Debtors, Houlihan Lokey and the Committee met with Hilco/GB, and after fully analyzing the Joint Venture's business plan determined that, while cash remained the most valuable currency, they would accept equity bids. While Hilco/GB valued the Joint Venture's equity at \$1 million per one percent share, Houlihan Lokey performed a valuation of the equity interests and determined that an appropriate value for equity in the Joint Venture was \$650,000 per percentage point.⁴ (Transcript, Vol. II at 12:5-9.) Patriarch strenuously objected that allowing bids including equity stakes violated the letter and the spirit of the Bidding Procedures Order, and that allowing any such equity proposal without a comprehensive valuation of the equity interest was fundamentally inequitable. (Transcript, Vol. II at 12:23-16:15.)

9. Nevertheless, Patriarch determined that it similarly would submit equity bids, and again, the Debtors, Houlihan Lokey and the Committee met with Patriarch and determined that its equity would be valued comparably to that of Hilco/GB (\$650,000 for every percentage of equity). The bidding then proceeded in earnest as follows:

- Patriarch: \$57,825,000 (cash of \$43,000,000 plus excluded assets of \$8,075,000 plus a 10 percent stake valued at \$6,500,000 plus account receivable collections of \$250,000)
- Hilco: \$58,287,000 (previous bid with equity increased to 16 percent)
- Patriarch: \$58,475,000 (previous bid with equity increased to 11 percent)

³ Hilco/GB conditioned this bid on the Debtors using "best efforts to get approval of the secondary break-up fee at the sale hearing" of \$1 million. (Transcript, Vol. II at 7:17-8:10.) Because the estate already is obligated to pay the First Break-Up Fee to Genii, the Committee objects to paying an additional break-up fee should that issue arise. See *In re Wintz Cos.*, 230 B.R. 840, 846-47 (8th Cir. B.A.P. 1999), *aff'd*, 219 F.3d 807 (8th Cir. 2000) (court must determine whether "the proposed fee, and the transaction as a whole, make economic sense and are in the best interest of the bankruptcy estate and its creditors").

⁴ Early on the first day of the Auction, counsel for Ritchie Capital Management, L.C.C. ("Ritchie") reiterated the position they have taken since the early days of these cases, namely that "any disposition of assets of the estate should focus on the potential for our significant equity upside of particularly the brand and the IP of this company." (Transcript, Vol. I at 11:10-17.) Given that both the Patriarch Bid and the Hilco/GB Bid include substantial and potentially extremely valuable portions of equity, any objection on that basis from Ritchie or any other party has become moot.

- Hilco: \$58,937,000 (previous bid with equity increased to 17 percent)
- Patriarch: \$59,125,000 (previous bid with equity increased to 12 percent) (the “Patriarch Bid”)

10. At that point, Hilco/GB announced that it intended to increase its bid to \$59,587,000, which was comprised of an 18 percent equity stake in the Joint Venture. Patriarch then stated that “we agreed ... that the maximum amount of equity that could be bid in this process would be 20 percent. And that’s on the basis of which I came back into the room with my higher bid of a million dollars of cash and 10 percent of the equity.” (Transcript, Vol. II at 25:23-26:7.) The Debtors accepted Patriarch’s request that the Debtors not accept more than 20 percent of equity. (*Id.*, Vol. II at 27:24-28:2.) Hilco/GB represented that it had never been told that equity bids would be capped at 20 percent. (Transcript, Vol. II at 26:11-20.) On that basis, Hilco/GB withdrew its previous bid of \$59,587,000. (*Id.* at 28:3-4.)

11. After further deliberations, Hilco/GB then submitted a new bid valued at \$61,212,000, which included the same consideration as its previous bid but with a 20.5 percent equity share (the “Hilco/GB Bid”).⁵ Hilco/GB conditioned its bid on it being accepted as higher and better by both the Debtors and the Committee. (Transcript, Vol. II at 38:6-16.) The Debtors rejected the Hilco/GB Bid. (*Id.*, Vol. II at 38:17-18.) The Committee “did not support the Debtors’ rejection of” the Hilco/GB Bid. (*Id.*, Vol. II at 38:21-25.) There were no further bids, and the Auction was closed.

⁵ Hilco/GB subsequently has executed an Asset Purchase Agreement along with a Limited Liability Company Agreement that substantiate the Hilco/GB Bid. (A copy of the executed Asset Purchase Agreement and the LLC Agreement are attached hereto as Exhibit B and Exhibit C, respectively.) Hilco/GB also has further increased its bid by agreeing to return to the estate 25 percent of any outstanding accounts receivables that Hilco/GB would collect post-closing, the same concession that Patriarch has made and that Houlihan Lokey valued at \$250,000. Thus, the value of the Hilco/GB Bid is \$61,462,000.

Argument

12. It is axiomatic that the Committee owes fiduciary duties to all other unsecured creditors. *See, e.g., Johns-Manville Sales Corp. v. Doan (In re Johns-Manville Corp.)*, 26 B.R. 919, 925 (Bankr. S.D.N.Y. 1983). Consistent with those fiduciary duties, the Committee's aim through the Auction was to maximize the value of the sale for the benefit of all unsecured creditors. Quite simply, the Committee cannot, consistent with its fiduciary duties, support a sale for the consideration included in the Patriarch Bid, which is valued at over \$2 million less than the Hilco/GB Bid.

13. There is no credible argument using the valuation methodologies adopted and applied at the Auction that the Patriarch Bid provides more value than the Hilco/GB Bid. For bids of both Patriarch and Hilco/GB, Houlihan Lokey agreed to value every one percent of equity at \$650,000. And, while both Patriarch and Hilco/GB each have credible arguments as to why their respective equity may have been undervalued for the purposes of the Auction, in the end, the Committee was satisfied that the values arrived at by Houlihan Lokey were appropriate. The Committee was similarly satisfied that Houlihan Lokey's valuation of the Excluded Assets was not only appropriate, but that it was equitable for each bidder. Given these accepted and uniform methods for valuing the Patriarch Bid and the Hilco/GB Bid, it cannot credibly be disputed that the Hilco/GB Bid is valued at over \$2 million more than the Patriarch Bid.⁶

⁶ The Committee fully understands and appreciates the Debtors' rationale for establishing a cap of 20 percent on equity consideration. Patriarch was extremely vocal about the ability of Hilco/GP to bid equity interests in lieu of cash consideration, and indeed at one point indicated that it may not continue to be a bidder at the Auction. Patriarch had also indicated that if participants were allowed to bid equity interests, its cash consideration would decrease. (See Transcript, Vol. II at 15:9-16) (Patriarch indicating that it would "start pulling back [its] cash" if Hilco's equity proposal was accepted). The Committee was similarly concerned that Hilco/GB would reduce its cash consideration in lieu of additional equity. Thus, limiting the amount of equity contribution served the dual role of ensuring the active participation of both Patriarch and Hilco/GP and maintaining cash consideration.

14. For that fundamental reason, the Committee respectfully requests that the Hilco/GB Bid (as fully supported by the Agreements attached as Exhibits B and C) be allowed as a higher and better bid than the Patriarch Bid.

15. The Committee recognizes and appreciates Patriarch's active participation in the Auction, and acknowledges that Patriarch brought considerable value to the estate and that certain aspects of the Patriarch Bid are advantageous.⁷ Because of the unique nature of this Auction, should the Court grant this Objection and further consider it equitable to do so, the Committee, consistent with its fiduciary obligations, would welcome Patriarch (and Hilco/GB) to submit additional bids to arrive at the truly highest and best offer for the Debtors' assets.

WHEREFORE, the Committee respectfully requests that the Court enter an order (i) ordering the Debtors to accept the Hilco/GB Bid valued at \$61,462,000 as the current highest and best bid; (ii) allowing Patriarch and Hilco/GB to continue to submit higher and better bids; (iii) disallowing the Second Break-Up Fee of \$1 million sought by Hilco/GB and (iv) granting such other relief as this Court may deem just and proper.

⁷ For instance, the Patriarch Bid provides substantially more cash than the Hilco/GB Bid, which reduces the impact caused by the uncertainty inherently attendant with liquidating the Excluded Assets and valuing equity.

Dated: April 3, 2009

Respectfully submitted,

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