

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re:

Polaroid Corporation, et al.

Case No. 09-cv-00996-JMR

Debtor(s),

Acorn Capital Group, LLC

Appellant,

v.

United States Trustee

Appellee.

**OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED
CREDITORS OF PETTERS COMPANY, INC., ET AL., TO THE
EMERGENCY MOTION OF ACORN CAPITAL GROUP, LLC
FOR A STAY PENDING APPEAL**

The Official Committee of Unsecured Creditors appointed in the bankruptcy cases of Petters Company, Inc., *et al.*, (“Petters Committee”) hereby files this Objection to the Emergency Motion of Acorn Capital Group, LLC (“Acorn”) for a Stay Pending Appeal filed with this Court on April 28, 2009 (“Stay Motion”) for the jointly administered bankruptcy cases of Polaroid Corporation *et al.* (collectively, the “Debtors”), Bankruptcy Case No. 08-46617.¹

¹ Based on various substantial claims the Petters bankruptcy estates have against the Polaroid estate, the Petters Committee believes that it represents in excess of 50% of the unsecured claims against the Polaroid estate. Accordingly, the Petters Committee has clear standing to raise the objections raised in this memorandum.

ARGUMENT

Rule 8005 of the Federal Rules of Bankruptcy Procedure provides the mechanism to seek a stay of a judgment, order, or decree entered by a bankruptcy judge. To obtain a stay pending appeal, the movant must file a motion for stay of the order with the bankruptcy court in the first instance, and, if the motion is denied, it may be renewed in the district court. Fed. R. Bankr. P. 8005. A motion under Rule 8005 for a stay pending appeal is discretionary with the court and the decision of the bankruptcy judge will be overturned only if it is found to be an abuse of discretion. *In re Stratford Hotel Co.*, 120 B.R. 515 (E.D. Mo. 1990); *In re Dakota Rail, Inc.*, 111 B.R. 818, 820 (Bankr. D. Minn. 1990); *In re Wymer*, 5 B.R. 802 (9th Cir. B.A.P. 1980).

The standard for granting a stay pending appeal is the same as that for granting a preliminary injunction. *See, e.g., In re Delaware & Hudson Ry. Co.*, 90 B.R. 90, 91 (Bankr. D. Del. 1988). Factors a court must examine when determining whether or not stay should be granted include: (i) the likelihood that the appellant will succeed on the merits of its appeal; (ii) whether the appellant will suffer irreparable injury if the stay is not granted; (iii) whether there will be substantial harm to other interested parties if the stay is granted; and (iv) whether granting the stay would be harmful to the public interest.” *Id.*; *Dakota Rail*, 111 B.R. at 820. *See also General Motors Corp. v. Harry Brown’s, LLC*, --- F.3d ---, 2009 WL 1011504, *3 (8th Cir. 2009); *Watkins, Inc. v. Lewis*, 346 F.3d 841, 846-47 (8th Cir. 2003); *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (describing the factors for issuing a preliminary injunction). An injunction is an “extraordinary remedy,” and the party seeking the injunction bears

the burden to prove that an injunction is required. *General Motors*, 2009 WL 1011504, at *3; *Watkins*, 346 F.3d at 844.

For the reasons discussed below, the Petters Committee hereby joins in the objections to Acorn's Stay Motion that have been filed by the Debtors and by the Polaroid Committee.

I. ACORN WILL NOT SUFFER IRREPARABLE HARM IF A STAY IS NOT GRANTED

To prevail on a request for an injunction, a moving party must show (among other factors) that it will suffer irreparable harm if the injunction is not granted. "The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Watkins*, 346 F.3d at 844 (quoting *Bandag, Inc. v. Jack's Tire & Oil, Inc.*, 190 F.3d 924, 926 (8th Cir. 1999) and *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07, 79 S. Ct. 948 (1959)). As a result, a moving party's failure to show irreparable harm is, by itself, an independently sufficient ground to deny a request for an injunction. *General Motors*, 2009 WL 1011504, at *5; *Watkins*, 346 F.3d at 844. When a party possesses an adequate remedy at law, injunctive relief is not appropriate. *Watkins*, 346 F.3d at 844; *Dataphase*, 640 F.2d at 113.

As recently articulated by the Eighth Circuit, "irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages." *General Motors*, 2009 WL 1011504, at *5; *Iowa Utils. Bd. v. Fed. Commc'ns Comm'n*, 109 F.3d 418, 425 (8th Cir.1996) ("[A] party

must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief.”).

Here, Acorn cannot show that it will suffer any harm whatsoever if its Stay Motion is not granted. The validity of Acorn’s liens is currently the subject of litigation pending in the U.S. Bankruptcy Court. In the event that Acorn prevails in that litigation, its liens will attach to the Polaroid sale proceeds, which in turn, will provide adequate protection of Acorn’s interest. *See* Sale Order, ¶ 7. Accordingly, if Acorn’s liens are determined to be valid, it will possess an adequate remedy at law in the ability to enforce its liens against the sale proceeds. For this reason alone, its Stay Motion must be denied.

Under both the Fifth Amendment and the Bankruptcy Code, a secured creditor is entitled to receive value that is equal to the value of its collateral, and no more. *See* 11 U.S.C. § 506(a) (“An allowed claim of a creditor secured by a lien on property . . . is a secured claim to the extent of the amount of the value of such creditor’s interest in the estate’s interest in such property . . .”); *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 239, 109 S. Ct. 1026, 1029 (1989) (stating that, in bankruptcy, a claim is secured only to the extent of the value of the property on which the lien is fixed); *Wright v. Union Central Life Ins. Co.*, 311 U.S. 273, 278, 61 S. Ct. 196, 199-200 (1940) (stating that, under the former Bankruptcy Act of 1898, “[s]afeguards were provided to protect the rights of secured creditors, throughout the proceedings, to the extent of the value of the property. There is no constitutional claim of the creditor to more than that.”). Because Acorn is only entitled to receive payment under its liens to the extent of the value of its collateral, Acorn’s interests are adequately protected by Paragraph 7 of the Sale Order, which

provides that any valid liens that Acorn may possess will attach to the proceeds received from the sale. In light of this fact, it is clear that Acorn possesses an adequate remedy at law to recover the value of its liens by enforcing its rights against the sale proceeds.

In its memorandum, Acorn asserts that the sale proceeds are inadequate to protect its interest “because, *inter alia*, the sale of the assets has failed to maximize the value of these assets, in and of themselves, as well as in connection with the operation of the business as a going concern.” Acorn Mem. at 4-5. The uncontroverted testimony at trial, however, refutes this argument. During the trial, the Debtors’ financial advisor, Stephen Spencer of Houlihan Lokey, testified that Houlihan Lokey conducted a liquidation analysis for Polaroid’s assets and that the proceeds from the sale exceed the assets’ liquidation value by approximately \$72 million.² In addition, Mr. Spencer testified that Polaroid is rapidly running out of cash,³ that reorganization would require substantial investment capital,⁴ and that Polaroid has no access to capital or ability to obtain external financing,⁵ making reorganization not feasible.⁶ He further testified that Houlihan engaged in an extensive marketing process for the assets,⁷ and that the sale proceeds more than doubled the original \$42 million stalking horse bid price submitted by Genii

² Tr. Vol I, 99:19-25, 99:1-10, 100:11-25, 100:1-6.

³ Tr. Vol. I 71:5-25, 81:28-25, 87:12-17, 88:18-21, 89:17-20, 90:18-23; Tr. Vol II 17:11-21.

⁴ Tr. Vol. I 71:1-8, 72:15-25, 86:20-25, 86:1-8, 87:14-21.

⁵ Tr. Vol. I 71:4-8, 87:15-21.

⁶ Tr. Vol. I 72:2-5.

⁷ Tr. Vol. I 74:3-20, 75:21-25, 75:1-24, 76:1-21, 77:2-25, 79:9-25, 79:1-12.

Capital.⁸

In the face of this overwhelming testimony, Acorn simply cannot credibly state that the proceeds of the sale are inadequate to protect any interest it may have in Polaroid's assets. As described above, the evidence produced at trial showed that Polaroid's assets were adequately marketed and sold for a value substantially in excess of their liquidation value. No evidence whatsoever was produced at trial to suggest anything to the contrary. If Acorn truly believed that the sale failed to maximize the value of Polaroid's assets, it had every opportunity to produce evidence or witnesses at trial to prove its case. Having opted not to call even a single witness at trial (or ask a single question of Mr. Spencer on cross examination), Acorn cannot now argue that the sale proceeds are inadequate to this Court.⁹ Accordingly, since Acorn possesses an

⁸ Tr. Vol. I 76:22-25, 77:1.

⁹ On Page 36 of its memorandum, Acorn argues that "the Bankruptcy Court refused to provide Acorn with a sufficient opportunity to present evidence and arguments . . . thereby depriving and violating Acorn's right to a full and fair hearing as required by the Due Process Clause." Acorn Mem., at 36. This argument is flatly contradicted by the evidentiary record. Acorn's counsel had every opportunity to present evidence at trial on the question of the value of Polaroid's assets and whether the sale maximized the value of those assets. Despite having this opportunity to present evidence, Acorn chose not to call a single witness during the trial:

THE COURT: Alright. Am I to conclude, then, that the evidentiary record is completed here such as it is?

POL. COMM. From the Committee, yes, Your Honor.

THE COURT: And I don't hear anybody else offering anything. All right. The evidentiary record is complete.

(Tr. Vol. III 13:6-16.) In addition, despite Acorn's statements to the contrary, Acorn's counsel also was permitted to make extensive legal argument to the Bankruptcy Court. In fact, Acorn's legal arguments were so extensive they comprise twelve full pages of the transcript. See Tr. Vol. III, 72-84. Accordingly, Acorn's argument that the Bankruptcy Court deprived it of an opportunity to present legal argument is simply false.

adequate remedy at law to enforce its liens against the sale proceeds, it cannot show irreparable harm and its Stay Motion must be denied.

II. THE BANKRUPTCY ESTATE AND CREDITORS WILL SUFFER IRREPARABLE HARM IF THE SALE IS NOT CLOSED IMMEDIATELY

In contrast to Acorn, the bankruptcy estate and the creditors will undeniably be irreparably harmed if Acorn's stay motion is granted. Mr. Spencer has testified that, since Polaroid filed for bankruptcy, the company has been rapidly losing cash at a rate of approximately \$3 million to \$5 million per month and has substantially depleted its working capital.¹⁰ In light of these continued losses, it is imperative to close the sale to Hilco/Gordon Brothers immediately in order to avoid further losses and to preserve whatever existing value is left for the estate and creditors. A stay of the Polaroid sale would prolong the company's cash burn, would cause the estate to incur significant additional costs associated with litigating Acorn's appeal, and may jeopardize the viability of the sale itself. A stay of the Polaroid sale would cause substantial lost value for creditors, and once gone, there will be no ability to recover the lost value through any remedy at law. As a result, Acorn's motion should be denied and the estate should be allowed to close its sale of Polaroid's assets with Hilco/Gordon Brothers.

¹⁰ Tr. Vol. 1 87:12-17, 88:18-21.

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