

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

ACORN CAPITAL GROUP, LLC,

Appellant,

Case No. 09-cv-00996-JMR

v.

Judge James M. Rosenbaum

UNITED STATES TRUSTEE,

Appellee,

POLAROID CORPORATION,

Debtor-in-Possession.

Chapter 11 Cases

**THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS’
OBJECTION TO EMERGENCY MOTION OF
ACORN CAPITAL GROUP, LLC FOR A STAY PENDING APPEAL**

The Official Committee of Unsecured Creditors (the “Committee”) appointed in the chapter 11 cases of Polaroid Corporation and its affiliated debtors¹ (collectively, the “Debtors”) jointly administered as Case Number 08-46617 (GFK) hereby files this Objection (the “Objection”) to the Emergency Motion of Acorn Capital Group, LLC for a Stay Pending Appeal (the “Stay Motion”). The Committee, by and through its undersigned counsel, respectfully states as follows:

¹ The Debtors include Polaroid Corporation; 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; and Polaroid Waltham Real Estate, LLC. The Debtors’ chapter 11 cases are jointly administered under Case No. 08-46617 (GFK).

I. INTRODUCTION

In its Stay Motion, Acorn Capital Group, LLC (“Acorn”) once again ignores the well-settled law of the Eighth Circuit, which pursuant to section 363 of the Bankruptcy Code allows the Debtors to sell assets free and clear of Acorn’s purported secured interest. The Stay Motion rests on the preposterous argument that there is not a bona fide dispute as to Acorn’s interest as stated in section 363(f)(4), despite the fact that the Debtors have initiated an adversary proceeding and filed an adversary complaint against Acorn (the “Adversary Complaint”) in which the Debtors set forth in painstaking detail the factual and legal basis for disallowing Acorn’s interest. Moreover, Acorn also ignores that it could be compelled to accept a money satisfaction of its interest, which under section 363(f)(5) provides an independent and alternate basis for selling the assets free and clear of Acorn’s interest.

The Committee adopts and joins the arguments of the Debtors in their Objection to the Stay Motion (the “Debtors’ Objection”), and for the reasons stated therein, as well as the reasons stated below, the Committee respectfully requests that the Stay Motion be denied.

II. LEGAL STANDARD

In order to be granted a stay pending appeal, Acorn must make: “(1) a strong showing that [it] is likely to succeed on the merits of the appeal; (2) a showing that, unless a stay is granted, [it] will suffer irreparable injury; (3) a showing that no substantial harm will come to other interested parties; and (4) a showing that a stay will do no harm to the public interest.” *Reserve Mining Co. v. United States*, 498 F.2d 1073,

1076-77 (8th Cir. 1974). Because Acorn cannot show that it is likely to prevail on the merits of its appeal, that it will suffer irreparable injury absent a stay or that a stay will not cause substantial harm to other interested parties, the Stay Motion should be denied.

III. ARGUMENT

A. Acorn Is Unlikely to Succeed on its Appeal

I. Acorn's Interest Unquestionably Is in Bona Fide Dispute

If Acorn's interests are the subject of a bona fide dispute, section 363(f)(4) permits the Debtors to sell their assets free and clear of Acorn's interests. 11 U.S.C. § 363(f)(4). In order to determine whether a bona fide dispute exists, the Bankruptcy Appellate Panel in the Eighth Circuit has made clear that the court must determine "whether there is an objective basis for either a factual or legal dispute as to the validity of the debt." *In re Gaylord Grain, LLC*, 306 B.R. 624, 627 (8th Cir. B.A.P. 2004).

Although the interests in question need not be the subject of an adversary proceeding in order to satisfy the "bona fide dispute" requirement, in this instance, the Debtors have filed the extremely detailed Adversary Complaint, which outlines the factual and legal basis of the dispute. For all its protests that the Adversary Complaint is "shameless and reprehensible" and fails to meet the requisite pleading standards (Stay Motion at 23-24), Acorn fails to explain why it did not move to dismiss the claims made in the Adversary Complaint. Instead, Acorn answered and filed counterclaims. The explanation, of course, is obvious: the Adversary Complaint states valid legal claims for, among other things, fraudulent transfer, preferential transfer, disallowance, equitable subordination and recharacterization and, thus, satisfies the pleading requirements of

Federal Rules of Bankruptcy Procedure 7012. Acorn's recitation of its factual and legal disagreements merely confirms that a bona fide dispute exists.

2. *Acorn Can Be Compelled to Accept a Money Satisfaction*

Under section 363(f)(5), a sale can be free and clear of an interest in the sold property if the entity asserting the interest "could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." 11 U.S.C. § 363(f)(5). Such is the case for Acorn.

Distilled to their essence, Acorn's claims are that it loaned money to the Debtors or some affiliates of the Debtors and was granted a security interest in certain assets of the Debtors. The value of Acorn's interest is determined by the value of the underlying collateral. *See* 11 U.S.C. 506(a)(1) ("An allowed claim of a creditor secured by a lien on property in which the estate has an interest ... is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property.") The value of Acorn's alleged collateral was established through the conduct of an indisputably robust and competitive auction process that resulted in a sale price more than double the value of the stalking horse bid. *See id.* (value of secured creditor's interest "shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property"). Acorn then can be compelled to accept money in satisfaction of its interest, with its collateral valued by the auction and sale process.

B. The Debtors and Creditors Will Suffer Substantial Harm if a Stay Is Entered While Acorn Will Not Be Harmed if the Stay Is Denied

1. *The Debtors and Creditors Will Suffer Harm if a Stay Is Granted*

Acorn cannot and does not seriously contend that the Debtors, and their creditors, will not be substantially harmed if the sale is stayed. It is telling that after spending over 40 pages recounting the facts and arguing the prospects of its appeal, Acorn devotes a single page to attempting to argue that the Debtors will not be harmed by the stay Acorn seeks. Even more telling is Acorn's complete disregard and lack of mention of the interests of the legitimate creditors of the Debtors.

As was argued in response to the motion for stay pending appeal by Lithograph Legends, LLC, a stay of the pending sale to Hilco/Gordon Brothers would cause irreparable harm to the Debtors. It is incontrovertible that any delay of the sale will cause the estates to continue to bleed cash at the rate of \$3 million per month. Even more significantly, a delay creates the very real risk that Hilco/Gordon Brothers could back out of the sale, as they would be allowed to do under the terms of the Asset Purchase Agreement. So, not only will the estates have burned through their remaining unencumbered cash and be left without funds for day-to-day operations, but the Debtors may lose their highest and best offer to purchase their assets.

Acorn blithely pushes aside these grave risks and simply suggests that the Debtors will suffer no harm because even if Hilco/Gordon Brothers walks away from the sale, the Debtors then can turn around and sell the assets to Patriarch Partners, the back-up bidder. (Stay Motion at 42.) This rationale assumes far too much. It assumes that whenever Hilco/Gordon Brothers terminates the Asset Purchase Agreement, Patriarch will not itself have moved on from its desire to purchase the Debtors' assets. Indeed, Patriarch would not be contractually obligated to consummate a sale at that point. Acorn

also assumes (incorrectly) that a sale to Patriarch, if that were even possible at that point, would leave the Debtors in no worse position than had it closed on the sale to Hilco/Gordon Brothers. Acorn apparently ignores the entire sale hearing that the Bankruptcy Court conducted on April 16 during which the Bankruptcy Court denied the motion to sell the assets to Patriarch because its offer was not the highest and best. Any harm to the Debtors necessarily would fall on their creditors, as well, particularly as the creditors were the most vocal proponents for accepting the Hilco/Gordon Brothers offer rather than Patriarch's. For all these reasons, Acorn utterly fails in showing that no other party will suffer substantial harm.

2. Acorn Will Suffer No Harm if the Stay Motion Is Denied

Acorn, on the other hand, will suffer no legally cognizable harm if a stay is not granted and the sale to Hilco/Gordon Brothers proceeds. In fact, Acorn's interest in the assets that are sold will be replaced with a lien on the net sale proceeds of the same validity and priority as its prior interest. Thus, Acorn will be left in the same position it was in prior to the sale – if it is able to establish the validity of its liens, it will have a secured interest equal to the value of its collateral.

Acorn argues in passing that it would be harmed “because the sale of assets at issue has failed to maximize the value of those assets.” (Stay Motion at 40.) Acorn's argument is simply not credible given the value returned to the estate as a result of the sale to Hilco/Gordon Brothers. Hence, Acorn will suffer no harm if that sale is allowed to continue.

WHEREFORE, the Committee respectfully requests that the Court enter an order (i) denying the Stay Motion and (ii) granting such other relief as this Court may deem just and proper.

Dated: April 30, 2009

Respectfully submitted,

/e/ Theresa H. Dykoschak_____

Dennis M. Ryan (No. 161275)
Theresa H. Dykoschak (No. 0349999)
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402-3901
Telephone: (612) 766-7000
Facsimile: (612) 766-1600

- and -

Richard A. Chesley (IL 6240877)
Gregory S. Otsuka (IL 6270388)
PAUL, HASTINGS, JANOFSKY &
WALKER LLP
191 North Wacker Drive, 30th Floor
Chicago, Illinois 60606
Telephone: (312) 499-6000
Facsimile: (312) 499-6100

ATTORNEYS FOR THE OFFICIAL
COMMITTEE OF UNSECURED
CREDITORS