UNITED STATES DISTRICT
DISTRICT OF MINNESOTA

Acorn Capital Group, LLC,

Appellant,

vs.

United States Trustee,

Appellee,

vs.

Polaroid Corporation, et al.,

Debtors-in-Possession.

Case No.: 09-996 (JMR)

APPELLANT'S BRIEF

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REQUEST FOR ORAL ARGUMENT

Appellant Acorn Capital Group, LLC ("Acorn") believes oral argument will assist the Court in fully understanding the fundamental errors in the Bankruptcy Court's Order Authorizing: (I) Sale of Certain of Debtors' Assets, Free and Clear of Liens, Claims, Encumbrances, and Interests; and (II) the Granting of Related Relief entered in the underlying bankruptcy case on April 17, 2009 ("Order") and the grounds upon which Acorn requests reversal of the Order and remand with instructions for reattachment of Acorn's liens to the sold assets.

STATEMENT OF JURISDICTION

The United States District Court for the District of Minnesota has jurisdiction over this appeal pursuant to 28 U.S.C. § 158(a) because the Order from which Acorn appeals is a final, appealable order.

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Whether the Bankruptcy Court erred in failing to require Polaroid Corporation and its affiliates (collectively, "Polaroid" or "Debtors") to make any evidentiary showing to satisfy their burden of establishing a bona fide dispute, and instead allowing Debtors to meet their burden solely based upon untested pleadings and allegations that were thoroughly refuted by the unrebutted evidence put in the record by Acorn.

2. Whether the Bankruptcy Court erred in preventing Acorn from conducting discovery to determine if there was an evidentiary basis for Debtors' claims of a bona fide dispute, even though Debtors' pleadings and the allegations contained therein were exceedingly vague, largely based "upon information and belief," and thoroughly refuted by the unrebutted evidence put in the record by Acorn.

3. Whether the Bankruptcy Court erred in permitting the sale of the assets in question free and clear of PAC Funding LLC's ("PAC") liens even though Debtors failed to establish a basis for doing so and, in particular, failed to establish that PAC has consented to this sale and, in fact, the unrebutted and irrefutable record established that PAC cannot consent to the sale free and clear of its liens without Acorn's consent, which was not obtained.

4. Whether the Bankruptcy Court denied Acorn due process of law by failing to provide Acorn with a meaningful opportunity to present evidence and arguments on its objections to the sale of Debtors' assets free and clear of Acorn's liens.

STATEMENT OF THE CASE

Acorn seeks reversal of the Order insofar as it authorizes Debtors to sell substantially all of their assets free and clear of Acorn's liens. Acorn respectfully requests the Court to reverse and remand with instructions to modify the Order to reattach Acorn's liens in the subject assets.

Absent consent by a creditor such as Acorn, Debtors bear the burden to establish the statutory basis pursuant to 11 U.S.C. § 363(f) to authorize the sale of assets free and clear of liens. Debtors failed to meet their burden and, in fact, were not required to do so by the Bankruptcy Court.

Acorn attempted to raise these issues with the Bankruptcy Court during the February 18, 2009 hearing on the bid procedures, but the Bankruptcy Court refused to consider Acorn's objections because, in the Court's view, the objections were not "ripe" at that time.

Acorn then tried to engage in legitimate discovery to depose Polaroid's Chief Executive Officer and former General Counsel who are intimately familiar with the underlying transactions that give rise to Acorn's liens, and who, therefore have direct first-hand knowledge of the factual basis, if any, for the allegations in Debtors' Adversary Complaint against Acorn. However, Debtors refused to cooperate with discovery and moved for a protective order to prevent the depositions. On March 26, 2009, the Bankruptcy Court granted a Protective Order holding, *inter alia,* that testimony from these individuals was not likely to lead to the discovery of admissible evidence.

Finally, after previously announcing its intention to apply a Rule 12(b)(6) pleading standard to determine whether Debtors had met their burden to establish a bona fide dispute by filing an Adversary Complaint against Acorn, the Bankruptcy Court failed to even apply this standard when it heard arguments during the April 16, 2009 sale hearing. With an ostentatious display of utter disinterest in this issue, the Court overruled Acorn's objections and approved Debtors' motion.

Acorn timely filed its Notice of Appeal of the Order on April 20, 2009.

Acorn previously moved the Bankruptcy Court for a stay of the Order pending appeal, which was denied. Thereafter, Acorn moved the District Court for a stay of the Order pending appeal.

STATEMENT OF FACTS

The underlying facts are set out in greater detail in Acorn's Objection to Sale Free and Clear of Liens Pursuant to 11 U.S.C. § 363(f) dated March 26, 2009 (A231-A269) [1] and the Affidavit of Marlon Quan, dated March 26, 2009 (A270-A579).

A. The PAC Funding Loan.

On November 1, 2004, PAC Funding, LLC ("PAC") and Acorn entered into a credit agreement whereby Acorn agreed to make revolving loans to PAC up to a $300 million commitment (as subsequently amended, "PAC Credit Agreement"). (A271.) Under the PAC Credit Agreement, the proceeds of each loan from Acorn would be used to purchase specifically identified goods, and each loan would be collateralized by accounts receivable generated from the resale of those same goods to recognized retailers at a mark-up or profit of no less than 10%. Upon each advance from Acorn, PAC was required to deposit cash equal to 10% of the requested financing into a blocked account which served as additional cash collateral for each loan. (*Id*.)

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*.)

B. The February Polaroid Loan.

Between late 2007 and February 2008, Polaroid approached Acorn and requested working capital financing. Specifically, Polaroid's current Chief Executive Officer

[1] Page numbers beginning with "A" refer to Appellant's Appendix, filed herewith.

("CEO"), Mary Jeffries, requested that Acorn make available to Polaroid a revolving loan facility and purchase order financing of up to $200 million. Jeffries represented that Polaroid required such financing to build its inventory of branded electronics, implement new product lines and expand into foreign markets, and that Polaroid was negotiating the terms of potential financing with other lenders, including Accord Financial and Gordon Brothers. (A272-A276.)

Given the size of the requested loan and the time necessary to undertake diligence and documentation, Acorn was unwilling to open a permanent working capital loan facility at that time, but was willing to make certain short-term secured loans to fund Polaroid's immediate working capital needs in the interim.

In response to various diligence requests, Polaroid furnished certain business information to Acorn, including financial statements, inventory and accounts receivable reports, financial projections illustrating the use of loan proceeds by Polaroid, and a draft of its 2007 unaudited financial statements. This information purported to reflect that Polaroid maintained substantial shareholder equity. (*Id*.)

On February 29, 2008, Polaroid's first loan from Acorn, in the principal sum of $15 million, was memorialized in the following agreements, among others:

> Promissory Note in the principal sum of $15 million with a term of 45 days.
>
> Security Agreement whereby Polaroid granted Acorn a security interest in its U.S. Inventory and Accounts to secure (i) amounts owed under the Promissory Note and (ii) the "Blocked Account Obligation," i.e., the obligation of PAC to replenish the Blocked Account with cash of up to $28 million.

> Subordination Agreement whereby Petters Company, Inc., Petters Company, LLC, Petters Capital, LLC, Thomas Petters, Inc. agreed to subordinate their rights and claims in and to Polaroid's assets ("Subordination Agreement").
>
> Limited Forbearance Agreement ("Forbearance Agreement"), pursuant to which Acorn agreed to forbear from exercising its remedies under the PAC Credit Agreement and the PAC Security Agreement and release to PAC more than $20 million being held in the Blocked Accounts. Upon information and belief, some portion or all of the funds released from the Blocked Accounts was advanced by PAC to or for the benefit of Polaroid.

Pursuant to these documents, Polaroid pledged its U.S. Inventory and Accounts to secure its obligations to repay the $15 million loan and its limited guaranty of PAC's obligation to maintain cash of at least $28 million in the Blocked Account (which PAC failed to do). (A274.)

C. The April Polaroid Loan.

After receiving the initial $15 million loan from Acorn, Polaroid continued to solicit additional financing from Acorn. Polaroid insisted that either a permanent financing or a strategic transaction would facilitate repayment of any additional loans from Acorn. More specifically and in addition to its other highly touted financing prospects: (a) Thomas Petters represented that Polaroid was on the verge of a major brand licensing deal in India; (b) Jeffries represented that Polaroid was in the process of negotiating several intellectual property licensing agreements that would generate cash with which Polaroid could repay any loan from Acorn; and (c) Polaroid's General Counsel, David Baer, represented that he was negotiating terms for sale of various licensing agreements which would provide the cashflow to repay Acorn loans.

Showcasing the value of its intellectual property, on March 11, 2008, Polaroid furnished Acorn with a valuation by the investment advisory firm Duff & Phelps which ascribed a value of at least $350 million to Polaroid's intellectual property. Polaroid produced additional and updated diligence and financial information, which reinforced the value of its assets (and, therefore, its solvency), while Jeffries and others maintained the idea that a sale or license of Polaroid's intellectual property was near.

As with the February loan, Jeffries and Baer were the lead negotiators for Polaroid. On April 18, 2008, Polaroid received its second loan from Acorn, in the principal sum of $10 million. This second loan was memorialized in the following agreements, among others:

> Promissory Note in the principal sum of $10 million with a term of 120 days.
>
> Amended and Restated Security Agreement whereby Acorn was granted a security interest in Polaroid's U.S. Inventory and Accounts. Like the February Security Agreement, Polaroid granted Acorn collateral to secure (i) amounts owed under the Promissory Note and (ii) the Blocked Account Obligation," i.e., the obligation of PAC to replenish the Blocked Account with cash of up to $28 million.
>
> On April 18, 2008, Acorn advanced $10 million to Polaroid. (A275.)

Under the documents memorializing the February and April loan transaction, Polaroid's U.S. Inventory and Accounts were pledged to secure (i) two loans totaling $25 million and (ii) the Blocked Account Obligation totaling $28 million. (*Id*.)

D. The May Polaroid Transaction.

In late April and early May 2008, Acorn engaged in further negotiations with Jeffries and Baer regarding Polaroid's continued need for financing. Unfortunately, by this time PAC had again defaulted on its loan obligations to Acorn. In view of this

default and the general economic decline in the Spring of 2008, Acorn decided to convert its revolving loan facility with PAC to a fully amortizing term loan facility. On May 12, 2008, a Fifth Amendment to the PAC Credit Agreement was entered into whereby Polaroid and PAC were afforded an additional 18 months to repay their Acorn related loan obligations which then totaled more than $281 million. (A276.)

Under the Fifth Amendment, PAC was given the flexibility of remitting only 50% (rather than 100%) of the proceeds received on its alleged receivables and Polaroid would be given the right to prime Acorn's first lien against U.S. Inventory, Accounts and U.S., Canadian and Mexican Trademarks (collectively, "North American Trademarks") with a new working capital loan facility from another lender up to $75 million. There were numerous conference calls, emails and other correspondence required to negotiate the Fifth Amendment, with extensive calls throughout the period May 5-12, 2008. In exchange for substantial direct and indirect financial benefits from Acorn, Polaroid agreed to guaranty PAC's obligations to Acorn and to secure that guaranty with additional collateral, namely a first priority lien against Polaroid's North American Trademarks. In connection with the Fifth Amendment to the PAC Credit Agreement, Polaroid and Acorn entered into a Second Amended and Restated Security Agreement ("Polaroid Security Agreement"). (A277.)

E. Polaroid's Bankruptcy Filing And The Sale Motion.

On December 18, 2008, Polaroid filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

As of the petition date, Acorn was owed more than $281 million by Polaroid secured by a first priority lien against Polaroid's U.S. Inventory, Accounts and its North American Trademarks. (A276.)

On January 28, 2009, Debtors filed a motion seeking, among other things, approval for the Purchase Agreement as well as bidding and auction procedures ("Bidding Procedures") for the proposed sale of substantially all of Debtors' assets, free and clear of all liens, claims and encumbrances ("Sale Motion"). (A1-A53.)

On February 13, 2009, Acorn objected to the bidding procedures asserting, among other things, that the Sale Motion cannot be allowed to proceed because Debtors failed to meet their burden to produce facts demonstrating either consent or the existence of a bona fide dispute under 11 U.S.C. § 363(f)(4). As a result, Acorn argued that it would be pointless to proceed further toward a sale unless Polaroid could establish a legal basis upon which its assets may be sold free and clear of Acorn's first priority lien against U.S. Inventory, Accounts and North American Trademarks. (A84-A107.)

On February 18, 2009, the Court heard arguments concerning the bidding procedures. In overruling Acorn's objection, the Court did not address the merits of Acorn's arguments under 11 U.S.C. §§ 363(f)(4)&(2), stating that it did not "need to reach the very specific discreet statutory issue on [the] merits of whether there is a bona fide dispute over Acorn Capital's claim within the meaning of 363(f)(4) . . . [because it

is] technically not ripe . . . until a sale is actually presented to the Court for approval." (AD2[2]; A190.) (For Order, *see* Ct. Docket No. 118.)

F. Polaroid's Filing Of Adversary Complaint And Refusal To Engage In Discovery Or To Divulge Basis For Facts Alleged In Their Complaint.

On February 12, 2009, Debtors commenced an adversary proceeding against Acorn by filing the Complaint (A54-A83). Among other things, the Complaint alleges that the pre-petition loan transactions between Polaroid and Acorn were fraudulent and, therefore, avoidable. 11 U.S.C. §§ 544(b), 548, 550(a), 551, 1107 and Minn. Stat. § 513.41, *et seq*.

The Complaint contains allegations made largely "upon information and belief," even though the Debtors had direct access to individuals such as Jeffries. In view of the fact that the Debtors' CEO, Jeffries, is one of the people most intimately familiar with and was directly responsible for Acorn's loans to Polaroid, Debtors' Complaint cannot rest on baseless speculation. Jeffries actively solicited loans from Acorn and renegotiated the terms of those loans when Polaroid was unable to meet initial lending terms. She knows full well that Acorn had absolutely nothing to do with the fraud perpetrated by Petters and several affiliates. Nevertheless, the Complaint alleges that Acorn engaged in fraud in connection with its loans to Polaroid.

Acorn repeatedly sought discovery to ascertain the basis for the allegations contained in the Complaint. Polaroid avoided any such discovery and withheld information that would (presumably) be relevant to their allegations. (A581 at ¶ 2.)

[2] Page numbers beginning with "AD" refer to Appellant's Addendum, attached hereto.

Specifically, Acorn's counsel endeavored to meet with Polaroid's counsel to discuss these matters on numerous occasions. Despite Acorn's efforts, Polaroid refused to cooperate or produce relevant information. (*Id*. at ¶ 3.)

Accordingly, on March 16, 2009, the same date Acorn filed its Answer and Counterclaim to the Complaint (A200-A230), Acorn's counsel served notices of taking depositions of Jeffries and Baer for March 23-24, 2009. (A581 at ¶ 4.) Acorn sought to depose Jeffries in her capacity as CEO, the individual who must have authorized the filing of the Complaint. Acorn also sought to depose Baer as former General Counsel, who also was intimately involved in soliciting financing from Acorn and negotiating the agreements to secure that financing. (*Id*. at ¶ 5.) Rather than produce these witnesses each of whom has first-hand knowledge of the pre-petition transactions, Polaroid refused and moved the Court for a protective order to prevent the depositions from going forward. (A581-A582 at ¶ 6.)

On March 26, 2009, the Court granted the Motions for Protective Order, thereby preventing Acorn from deposing Jeffries and Baer in connection with Acorn's sale objection. In connection with its ruling on the requested protective order, the Court stated that, in evaluating whether a bona fide dispute existed, its focus would be to determine whether the Complaint would withstand a motion to dismiss under Rule 12(b)(6). (AD3-AD4; A664-A668.)

G. Acorn's Supplemental And Continuing Objections To Polaroid's 363 Sale Proposal.

Acorn filed supplemental and continuing Objections to 363 Sale on March 26, 2009, and April 3, 2009, reaffirming its objections to Debtors' proposed sale of Polaroid's assets free and clear of Acorn's and PAC's liens. Following the Sale Hearing on April 16, 2009, the Court overruled Acorn's Objections and approved the sale. In overruling Acorn's Objections, the Court concluded that it did not need to consider evidence or even evaluate the Complaint under a 12(b)(6) standard.

At that hearing, after two months of waiting based on the Court's instruction that they were "not ripe" until the Sale Hearing, Acorn was again deprived of any meaningful opportunity to make its 11 U.S.C. §§ 363(f)(4)&(2) arguments or present evidence. After 7:00 p.m., when Acorn was finally permitted to present limited argument, the Court repeatedly interrupted counsel to Acorn and demanded that counsel "get on with [it]" and "warn[ed]" Acorn's counsel that he would be "on sudden death overtime." (AD5-AD6; A938-A939.) The Court went on to chastise Acorn's counsel for attempting to argue "a motion for dismissal under [Rule] 12(b)(6)" even though this is the very standard the Court had stated would be applied to determine whether Debtors had met their burden to establish a bona fide dispute. (*Id*.)

Thus, after a sale process was initiated some three months earlier and which consumed countless hours, indeed four or five full days, of Court time, Acorn was afforded only a few limited minutes to present a case in defense of its nearly $300 million claim. The Court summarily overruled Acorn's objections and subsequently entered its

formal written Order in this regard on April 17, 2009, authorizing Debtors to sell the assets free and clear of Acorn's liens. (A973-A999.)

LEGAL ARGUMENT

Debtors may sell their assets outside of the ordinary course of business "free and clear of any interest in such property of an entity other than the estate, *only if* –"

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f)(emphasis added).

In the Sale Motion, Debtors acknowledged that they bear the burden to establish that at least one of these subsections is satisfied with respect to each "interest" affected by the Sale Motion. (*See* A9 at ¶ 24.) However, when evaluated under any reasonable or legitimate standard, it is clear Debtors utterly failed to meet their burden to justify the sale of their assets free and clear of Acorn's liens under any of the bases set forth in 11 U.S.C. § 363(f).

Debtors successfully prevailed upon the Bankruptcy Court to ignore the statutorily and constitutionally protected property rights that Acorn has in the Debtors' assets. Rather than making any effort to obtain Acorn's consent to the proposed transactions or complying with the plain language of 11 U.S.C. § 363(f), Debtors made a series of baseless accusations in an attempt to conjure up the façade of a bona fide dispute

concerning the validity and extent of Acorn's liens. Based exclusively on these patently false accusations, Debtors convinced the Bankruptcy Court to disregard Acorn's security interest in Debtors' assets. These unsupported and patently false accusations as a matter of law cannot provide the Court with a legitimate basis upon which to sell Debtors' assets free and clear of Acorn's security interest. This is particularly true where, as here, the allegations giving rise to the dispute were completely refuted in sworn affidavits which the Debtor made no effort whatsoever to address.

I. STANDARD OF REVIEW.

In reviewing the Bankruptcy Court's Order approving Debtors' motion to sell substantially all of their assets free and clear of Acorn's liens, the standard of review for findings of fact is clear error, and for conclusions of law is *de novo*. *In re Wintz Cos.*, 219 F.3d 807, 811 (8th Cir. 2000); *In re Food Barn Stores, Inc.*, 107 F.3d 558, 562 (8th Cir. 1997). The Bankruptcy Court clearly erred as a matter of law by failing to require Debtors to make any evidentiary showing whatsoever to establish any of the 11 U.S.C. § 363(f) factors that would permit such a sale. The Bankruptcy Court's findings of fact likewise constitute clear error because they are wholly unsupported by any facts or evidence in the record. Rather, the Bankruptcy Court entered a 27 page sale order containing 11 pages of factual findings and 16 pages of legal findings with virtually no evidentiary record supporting it.

II. THERE IS NOTHING BONA FIDE ABOUT THE PRESENT "DISPUTE" BETWEEN POLAROID AND ACORN.

A. The Bankruptcy Court Applied The Wrong Standard And Erred By Not Requiring An Evidentiary Showing To Determine Whether A Bona Fide Dispute Existed.

Debtors have the burden of demonstrating that a bona fide dispute exists. *See In re Terrace Chalet Apartments, Ltd*., 159 B.R. 821, 828 (N.D. Ill. 1993); *In re Taylor*, 198 B.R. 142, 162 (Bankr. D.S.C. 1996). The phrase "bona fide dispute" is not defined in the Bankruptcy Code. Nevertheless, courts applying section 363(f)(4) have ruled that a "bona fide dispute" exists when there is "an *objective* basis for either a factual or legal dispute as to the validity of the debt." *In re Gaylord Grain L.L.C.*, 306 B.R. 624, 627 (8th Cir. B.A.P. 2004)(emphasis added).

Before a court may make a determination that a bona fide dispute exists, at a minimum, Debtors must produce evidence illustrating the factual grounds upon which an objective party can conclude that a good faith dispute exists. *In re Gaylord Grain L.L.C.*, 306 B.R. at 627 ("Courts utilizing this definition have held the parties to an evidentiary standard and evidence must be provided to show factual grounds that there is an 'objective basis' for the dispute."). Mere allegations unsupported by evidence are not sufficient. *In re Octagon Roofing*, 123 B.R. 583, 589-90 (Bankr. N.D. Ill. 1991); *see also In re Sw. Fla. Heart Group, P.A.*, 342 B.R. 639, 643-44 (Bankr. M.D. Fla. 2006)(holding trustee failed to establish existence of bona fide dispute and there was insufficient basis for selling property free and clear of interest). "[N]ot any alleged dispute satisfies [§ 363(f)(4)] . . . [i]t clearly entails some sort of meritorious, existing conflict. *In re*

Taylor, 198 B.R. 142, 162 (Bankr. D.S.C. 1996)(holding "[u]nder the specific conditions of this case . . ., the Debtor has failed to meet his burden of *persuading* the Court that the issues constituted a bona fide dispute within the meaning of § 363(f)(4)")(emphasis added).

The mere existence of an adversary proceeding does not meet this standard *per se*, rather, "a party must articulate in [the adversary] pleading or in an argument an objective basis sufficient under the facts and circumstances of the case for the court to determine that a bona fide dispute exists." *In re Robotic Vision Sys., Inc.*, 322 B.R. 502, 506 (Bankr. D.N.H. 2005).

This burden of production cannot be satisfied by the unsupported, conclusory statements and allegations contained in the Complaint. In view of the Debtors' failure to address the unequivocal sworn statements by Marlon Quan (Acorn's principal) and its unprecedented effort to insulate from examination its Chief Executive Officer who has intimate, first hand knowledge of the facts giving rise to Acorn's loans to Polaroid, it is clear that the Complaint filed by Debtors either (i) was not based upon any (much less a comprehensive) factual investigation, or (ii) was based upon fraudulent misinformation provided to counsel by one or more current or former Polaroid executives. Each material allegation in Polaroid's unverified Complaint has been discredited by unrebutted evidence provided under oath through the Affidavit of Acorn's principal Marlon Quan in support of Acorn's Objection. Unlike the Complaint, which rests "upon information and belief" of some unknown source, (likely non-existent), the Quan Affidavit unconditionally refutes any suggestion of impropriety by Acorn. Moreover, the Quan

Affidavit was unrebutted and therefore established that Acorn advanced at least $25 million to Polaroid in February and April and that it also provided substantial indirect financial benefits at Polaroid's request and at a time when Polaroid was solvent. Absent evidence by Polaroid that a genuine, good faith dispute exists between Debtors and Acorn, the mere fact that a proceeding has been commenced against Acorn cannot as a matter of law satisfy the bona fide dispute requirement of section 363(f)(4). To hold otherwise would eliminate the Congressional mandate that a dispute concerning a creditor's lien must be "bona fide" before a debtor will be permitted to sell assets free and clear of a such lien.

As noted, case law from other jurisdictions makes it clear that simply filing an adversary proceeding complaint is not by itself sufficient to meet this burden of production. *See In re Robotic Vision Sys., Inc.*, 322 B.R. at 506. Imposing the burden of evidentiary production on Debtors constitutes a proper exercise of the Court's gate-keeping function and ensures any sale of assets will comply with the Fifth Amendment's prohibition against deprivation of property without due process and just compensation.

Acorn's security interest in Polaroid's assets and its rights to liquidate and recover the value of its collateral constitute property rights protected by the Fifth Amendment. *See In re Townley*, 256 B.R. 697, 700 (Bankr. D.N.J. 2000)("The right of a secured creditor to the value of its collateral is a property right protected by the Fifth Amendment."); *In re Briggs Transp. Co.*, 780 F.2d 1339, 1342 (8th Cir. 1985)(protecting secured creditor's Fifth Amendment property rights); *In re Holly's, Inc.*, 140 B.R. 643, 686 (Bankr. W.D. Mich. 1992)(same).

There are significant constitutional limitations on any court's ability to prevent a secured party from exercising its Uniform Commercial Code ("UCC") Article 9 rights and remedies to recover the value of its collateral. Even the United States Bankruptcy Code was drafted in a manner that recognizes the constitutional property rights of secured creditors. *See Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589 (1935)("The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment."); *see also United States v. Sec. Indus. Bank*, 459 U.S. 70, 75 (1982)("[T]he bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation.").

In cases such as this one, where the Court is faced with mere tangential, or unsupported allegations of a bona fide dispute, confirming a sale free and clear of liens would be inequitable. *See, e.g., In re K.C. Mach. & Tool Co.*, 816 F.2d 238, 241 (6th Cir. 1987); *In re Rest. Assocs., L.L.C.*, No. 1:06CV53, 2007 WL 951849, at *9 (N.D. W. Va. March 28, 2007) (A1517-A1525); *In re Taylor*, 75 B.R. 682, 684 (Bankr. N.D. Ill. 1987)(citing 11 U.S.C. § 303(h)(1)).

B. The Bankruptcy Court Failed To Even Apply The Rule 12(b)(6) Sufficiency-Of-The-Pleadings Standard It Previously Articulated.

In connection with ruling on Polaroid's motion for a protective order, the Bankruptcy Court stated that in determining whether Polaroid had established a bona fide dispute as to Acorn's liens it would apply a Rule 12(b)(6) standard to Debtors' Complaint. At the Sale Hearing, however, the Bankruptcy Court refused to apply even this minimal standard.

The Bankruptcy Court, at one point, declared that it would apply a Rule 12(b)(6) standard to Debtors' Compliant to determine whether it established a bona fide dispute as to Acorn's liens on Polaroid's assets under 363(f)(4). A pleading attacked by a Rule 12(b)(6) motion to dismiss must provide the grounds for entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007). This requires more than labels and conclusions, or a formulaic recitation of a cause of action's elements; factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true. *Id*. at 1965. In *Bell Atlantic*, the Supreme Court sets forth a "plausibility standard" to state a claim at the pleading stage; a complaint cannot merely make legal conclusions regarding elements of the claim, but rather it must have enough factual enhancement to cross the line from possibility to plausibility. *Id*. at 1966. On a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Id*. (quoting *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932 (1986)).

In fact, numerous allegations in the Complaint are based "upon information and belief," which is a thinly veiled attempt to legitimize and give credence to otherwise unsupportable theories advanced by apparently overzealous lawyers. In fact, courts regularly reject as deficient pleadings altogether based "upon information and belief." *See Vohs v. Miller*, 323 F. Supp. 2d 965, 973 (D. Minn. 2004)("To allege fraud based on 'information and belief,' [] the allegation must be 'accompanied by a statement of [all] facts upon which the belief is founded.'" (citation omitted)); *see Windage LLC v. U.S. Golf Ass'n*, Civ No. 07-4897, 2008 WL 2622965 (D. Minn. July 2, 2008)(A1526-

A1529)(dismissing antitrust complaint where paragraphs pleaded "upon information and belief" did not "provide a factual context to suggest an agreement."); *In re Papst Licensing GMBH & Co.*, Misc. Action No. 07-493, 2009 WL 564600 (D.D.C. Mar. 5, 2009)(A1530-A1533)(dismissing complaint for failure to state claim where complaint amended only to state that "upon information and belief" infringement had occurred, thus court could "only presume that Pabst cannot point to any actual facts giving rise to a valid claim for relief").

Debtors' Complaint in this case is deficient on its face and fails to meet even the Rule 12(b)(6) standard that was articulated but never applied by the Bankruptcy Court. The deficient manner of Debtors' Complaint can be demonstrated by a brief review of the first two claims—actual and constructive fraud.

To state a claim for actual fraud, Polaroid must allege that it engaged in the relevant transactions with actual intent to hinder, delay or defraud its creditors. 11 U.S.C. § 548(a)(1)(A). Reviewing the allegations in paragraphs 54 through 57 of the Complaint, it is clear that Polaroid has done nothing more than recite the elements of a fraud claim and has not provided any factual basis for a claim. The closest the Complaint comes to alleging Polaroid's actual intent is in paragraph 45. Paragraph 45, however, is entirely conclusory and based upon "information and belief." As such, Polaroid has failed to properly state a claim for actual fraud.

Similarly, Polaroid has failed to properly state a claim for constructive fraud. To do so, Polaroid must allege that it did not receive reasonably equivalent value and that it was insolvent. 11 U.S.C. § 548(a)(1)(B)(i)&(ii). Again, paragraphs 59-62 of the

Complaint are merely formulaic recitations of the elements of a cause of action and do not satisfy the Rule 12(b)(6) standard. Moreover, nowhere in the Complaint does Polaroid even attempt to compare the value Polaroid obtained in connection with each of the three transactions with the security interest it granted. As such, Polaroid has not pleaded lack of reasonable equivalent value. Finally, Polaroid's only attempt to plead insolvency is found in paragraph 59, which does nothing more than paraphrase the definition of insolvency and is in no way grounded in fact. Because the information necessary to perform an analysis of reasonably equivalent value and insolvency is exclusively within Polaroid's control, Polaroid should be required to plead these facts with particularity and should not be permitted merely to recite the elements of the cause of action.

Debtors' conclusory and unsupported allegations regarding Polaroid's insolvency, Acorn's receipt of less than reasonably equivalent value, Polaroid's actual intent to hinder, delay and defraud creditors, and Acorn's lack of good faith all fail to meet even the plausibility standard under *Bell Atlantic*. Each of these baseless and conclusory allegations were directly refuted by the Affidavit of Marlon Quan. After a sale process that lasted nearly three months, the Debtor chose to shield knowledgeable parties from examination on the subject and hide behind its Complaint, rather than meet the statutory burden imposed upon it by Congress. The Bankruptcy Court's decision in this regard is plainly wrong and must be overturned.

III. NEITHER ACORN NOR PAC HAVE CONSENTED TO THE PROPOSED SALE.

Debtors lack the consent of both Acorn and PAC to the sale of Polaroid's assets free and clear of all liens, claims and encumbrances. Obviously, Acorn did not consent to the sale of Polaroid's assets free and clear of Acorn's direct security interest on those assets. Acorn also did not consent to the sale of Debtors' assets (i.e., the liens in favor of PAC), free and clear of Acorn's indirect security interest on those assets.

Debtors disingenuously asserted that PAC consented by not objecting to the relief sought in Debtors' Motion. (*See* A9 at ¶ 23.) In fact, PAC cannot consent to the sale of Debtors' assets free and clear of Acorn's security interest because: (i) Article 9 and the PAC Security Agreement provide that Acorn, not PAC, has the right to consent; (ii) the Subordination Agreement specifically prohibits PAC from consenting without Acorn's written consent; (iii) doing so is a breach of PAC's duty to protect and conserve its assets for the benefit of its creditors, such as Acorn; (iv) providing such consent is outside the ordinary course of PAC's business operations and thus requires prior Bankruptcy Court approval; (v) PAC has not sought or received court approval to do so as it would be required to do under Federal Rule of Bankruptcy Procedure 9019(a); and (vi) taking such an action is precluded by PAC's obligation to adequately protect Acorn's security interest in its assets.

Acorn has a security interest in PAC's assets. PAC's assets include a $10 million note from Polaroid secured by Polaroid's assets. Under UCC § 9-607(a)(3) and pursuant

to 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.

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 terms of the PAC Security Agreement, as well as under UCC § 9-607(a)(3). By virtue of those rights, Acorn stands in the shoes of PAC and has the right to refuse to consent to Debtors' sale of their property free and clear of PAC's security interest. Acorn hereby exercises its right to refuse to consent on behalf of PAC.

Additionally, pursuant to the Subordination Agreement, PAC is not permitted to exercise any of its rights as a secured party without first obtaining Acorn's written consent. Consenting or refusing to consent to the sale of assets in which it has a security interest is one of the rights a secured creditor, such as PAC, has in a bankruptcy proceeding. Because Acorn has not consented in writing to the proposed sale of Polaroid, PAC lacks the authority and ability to consent. Indeed, PAC has never sought authority from Acorn to consent. Moreover, PAC cannot consent to the sale of Debtors' assets free and clear because doing so would be a breach of PAC's duty to protect and conserve its assets for its creditors' benefit.

Finally, a conflict of interest on part of Polaroid's counsel prevents PAC from consenting to this transaction. In connection with the sale of Polaroid's assets, Lindquist and Vennum ("L&V") represents both Polaroid and PAC. Because PAC has a security interest in Polaroid's assets and because Polaroid has not proposed paying PAC as part of

the transaction, it is not in PAC's interest (or the interest of PAC's creditors) to permit the sale to go forward unless PAC is paid. L&V, acting for Polaroid, attempts to avoid this issue by arguing that PAC has not objected and hence has consented. However, PAC's lack of consent was a product of the conflict of interest that prevented L&V from objecting on PAC's behalf. PAC could not object to the sale without exposing L&V's current/actual conflict of interest.

IV. THE BANKRUPTCY COURT VIOLATED ACORN'S RIGHT TO DUE PROCESS BY REFUSING TO ALLOW ACORN A FULL AND FAIR OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENTS ON ITS OBJECTIONS.

The Bankruptcy Court refused to provide Acorn with a sufficient opportunity to present evidence and arguments and did not give these issues sufficient time and attention, thereby depriving and violating Acorn's right to a full and fair hearing as required by the Due Process Clause.

The Bankruptcy Court repeatedly refused to address the merits of and take evidence on Acorn's objections under 11 U.S.C. §§ 363(f)(4)&(2)—from as far back as the initial February 18, 2009 bidding procedures hearing, up to and including the April 16, 2009 Sale Hearing that resulted in the Order from which Acorn takes this appeal.

At the February 18, 2009 hearing, Acorn argued that under *In re Gaylord Grain L.L.C.*, 306 B.R. at 627, Debtors have an obligation to produce *some evidence* demonstrating a factual basis for the existence of a bona fide dispute to sell Polaroid's assets free and clear of Acorn's liens. (AD1; A144-A145.) In refusing to hear Acorn's objection

at that time, the Bankruptcy Court ignored the merits of its arguments under 11 U.S.C. §§ 363(f)(4)&(2) and stated that it did not "need to reach the very specific discreet statutory issue on [the] merits of whether there is a bona fide dispute over Acorn Capital's claim within the meaning of 363(f)(4) . . . [because it is] technically not ripe . . . until a sale is actually presented to the Court for approval." (AD2; A190.)

At the March 26, 2009, protective order hearing, the Bankruptcy Court again refused to address the merits of Acorn's arguments and, in connection with its ruling on Debtors' Motions for a Protective Order, the Court stated that, in evaluating whether to permit the sale of Polaroid's assets free and clear of Acorn's lien, its focus would be to determine whether the Complaint against Acorn would withstand a motion to dismiss under Rule 12(b)(6). With no case law precedent for this standard, this was the first time Acorn was put on notice that the Bankruptcy Court intended to apply a 12(b)(6) standard to a determination of whether a bona fide dispute existed as to Acorn's liens. (AD3-AD4; A664-A668.)

Again at the April 16, 2009 Sale Hearing, Acorn was deprived of any meaningful opportunity to make its 11 U.S.C. §§ 363(f)(4)&(2) arguments. When Acorn's counsel sought to argue that Debtors had failed to meet the newly imposed Rule 12(b)(6) pleading standard for showing a bona fide dispute, the District Court repeatedly cut Acorn's counsel off during argument, warning him to "get on with [it]" and then stated, inconsistent with its previously articulated standard, that Acorn's counsel would "not [be] arguing a motion for dismissal under 12(b)(6)." (AD5-AD6; A938-A939.) The Court also continued to refuse to hear evidence.

When Acorn's counsel attempted to argue that no bona fide dispute exists, even when applying the Bankruptcy Court's previously articulated 12(b)(6) standard, the Court stated "Stop wasting time haggling with me over whether I'm going to cut you off or I will right now and just rule on the basis of your written submissions. It has been a long day. . . . Get on with your argument right now." (*Id*.) In overruling Acorn's objections, the Court improperly stated as a basis the fact that Acorn responded to the Complaint with an Answer and Counterclaim, rather than filing a Motion to Dismiss pursuant to Rule 12(b)(6), and this demonstrated the existence of a bona fide dispute. Acorn's Answer and Counterclaim, however, was filed March 16, 2009, ten days before the Court announced the never-before articulated 12(b)(6) standard at the March 26, 2009 protective order hearing for a determination of whether a bona fide dispute exists and Debtors could sell Polaroid's assets free and clear of Acorn's claims.

As the transcripts of these hearings demonstrate, over the course of two months' time, Acorn was deprived of a fair opportunity to present evidence and arguments on its objection to the sale of Polaroid's assets free and clear of Acorn's liens. Even when Acorn's counsel was permitted to speak on these objections, those arguments were brushed over in haste, in the late evening of what was in the Court's words "a long day" of hearings. As a result, it is clear that the Bankruptcy Court did not provide these issues with sufficient time and attention and Acorn has been deprived due process of law.

V. SECTION 363(M) MAY NOT BE USED TO PROTECT THE BUYER FROM AN APPEAL CONCERNING DEBTORS' ATTEMPT TO STRIP ACORN'S LIEN.

Section 363(m) protects a "good faith purchaser" from the outcome of an appeal from an order authorizing a sale of assets under section 363(b) but does not protect a buyer from the court's decision to sell free and clear under 11 U.S.C. § 363(f). *See Clear Channel Outdoor v. Knupfer*, 391 B.R. 25, 36 (9th Cir. B.A.P. 2008). In other words, "Section 363(m) cleaves a distinction between authorizations to 'use, sell or lease . . . property of the estate' as set forth in § 363(b) and authorizations under § 363(f) to 'sell property under subsection (b) or (c) of this section free and clear of any interest in such property. . . .'" *Id.* Thus, good faith purchasers of a debtor's assets will acquire estate property subject to the risk of reversal or modification of an authorization under Section 363(f) to sell such property free and clear.

The facts of *Clear Channel Outdoor v. Knupfer*, 391 B.R. at 25, are common to the instant case as well as many other court-approved sale processes where the debtor seeks to sell its assets free and clear of all liens, claims, and encumbrances under § 363(f). In *Clear Channel*, the B.A.P. held that § 363(m) does *not* apply to lien-stripping under § 363(f). *Id*. at 35. Indeed, the B.A.P. concluded "that Congress intended that § 363(m) address only changes of title or other essential attributes of a sale. . . . *The terms of those sales, including the "free and clear" term at issue here, are not protected*." *Id.* at 35-36 (emphasis added).

For the same reasons set forth in *Clear Channel*, the buyer of Debtors' assets in this case is not protected by a good faith finding under § 363(m) at least not with respect

to any lien-stripping provision of an order entered on account of the Sale Motion. When the buyer chose to close on its purchase of Polaroid's assets while Acorn's appeal was pending, the buyer assumed the risk that the appellate court will reattach Acorn's $281 million in liens to the "Acquired Assets" if the appellate court(s) determine that there was no bona fide dispute under § 363(f)(4).

CONCLUSION

For the above-stated reasons, Acorn respectfully requests the Court to reverse the Order and remand with instructions to reattach Acorn's liens, claims and interests in the subject assets.

Dated: May 19, 2009

By: s/Thomas H. Boyd

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C), the undersigned hereby certify, as counsel for Appellant Acorn Capital Group, LLC, that this Brief was prepared in Microsoft Word 2003, using 13-point Times New Roman proportionally-spaced font, and further certify this brief complies with the type-volume limitation as there are 7,226 words in this brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to Microsoft Word 2003's word count. A disk filed with this Brief has been scanned for viruses and is virus-free.

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to keep this process open and to leave it for yourself to decide when you are faced with what the true alternatives are and look at this with an open mind going forward rather than close things down today.

THE COURT: I don't think I have got any questions at the moment. There may be some later, so thank you.

MALE SPEAKER: Sure.

THE COURT: All right. Then for Acorn, Mr. Rosow.

MR. ROSOW: Thank you, Your Honor.

On behalf of Acorn, I would like to touch on three of the issues that we have raised in our -- in our written papers. The first being the issue of a bona fide dispute as to Acorn's security interest. I will get into the detail on why I think Acorn is different than some of the other parties here in connection with it's security interests in a moment, but I would like to take a moment to talk about the standard on what the debtors's obligation is in connection with establishing a bona fide dispute.

It's -- it's clear from the case law in this Circuit that to establish a bona fide

dispute is not merely to mouth the words that there is a dispute or to make allegations, but that it requires the Debtor to meet an evidentiary standard, that it requires that the Debtor provide specific evidence to show a factual grounds for finding that an objective basis exists for that dispute.

To date --

THE COURT: What does that mean in practice, meeting an evidentiary standard? You mean a burden of production of evidence under oath documentary, whatever.

MR. ROSOW: Yes, Your Honor.

THE COURT: Okay. Where's your authority for that again?

MR. ROSOW: That's the In Re: Gaylord Grains case, it's an 8th Circuit BAP opinion, 306 BKY Reporter 624. The quote from that is evidence must be provided to show a factual basis that there's an objective basis for the dispute.

It's not enough to simply say we believe that there was actual intent to hinder, delay and defraud. We believe that the Debtor was insolvent at the time and I note for the Court

that --

THE COURT: Well, what's talked about here is really more of a constructively fraudulent transfer rather than actual intent to hinder or delay, right?

MR. ROSOW: I believe so. I believe so.

THE COURT: So the question is -- the evidence going to that really is much more structural than it is subjective.

MR. ROSOW: Solvency and reasonable equivalent value. Things that would be within the Debtor's control. I mean the Debtor is the party that entered into these transactions. The Debtor is the party that would have the information about whether it was solvent at the time. The Debtor is the party that would have information that would be relevant to establishing these things and it has failed completely to come forward with that evidence.

Instead the debtor --

THE COURT: What would you -- what burden would you put on a debtor in a context like the one at bar, where everything has just sort of come in all in a tumble, has everybody

acknowledges it has to?

MR. ROSOW: Yes.

THE COURT: Are you saying a debtor has to come forward with a mass of evidence that constitutes prima facie case? That can't possibly be what the people in the Bankruptcy Appellate Panel contemplated.

MR. ROSOW: I don't think it is a massive burden. I don't think it's a burden that they have to prove it beyond a reasonable doubt or even preponderance of the evidence. I don't even think it's a summary judgment standard, but I think they need to at least produce some sort of evidence that there's insolvency. They need to produce some sort of evidence that there are bona fide disputes and issues on the elements that are relevant, so simply saying we believe that the Debtor was insolvent at the time without any evidence or any factual background to support such a conclusionary legal statement is insufficient.

Now, do they need to have -- if they produce evidence that leads the Court to believe that there's an actual probable -- that there could be a determination that they are insolvent,

under the special sensitivities of this case and as special sensitivities, I don't think a soul here can ignore the fact that we are in pretty desperate economic times right now, there isn't a day that goes by that we don't have worse news about the U.S. economy and bad prognostications for the next six months, year, two years or more.

Everybody here has now acknowledged that something needs to be done with these assets promptly and I think clearing the deck to basically put everybody on the same footing in terms of their participation and the sale process overriding any presumptive preservation, whatever residual presumptive preservation of the right to credit bidding there maybe here is the appropriate way to handle this because if the Debtor should come up with the best offer being for a package for going concern, allowing credit bidding and it's uncontroverted, at least as far as I can see from the record before me, that neither of these parties holds a blanket lien against the whole works, so allowing credit bidding to nose it's way into the process and pluck out certain assets could throw all of that off the tracks and that's where the cause lies

here.

I ultimately ended up concluding, notwithstanding the rather sharp kind of colloquy that I had with Mr. Rosow, that in a way I don't need to reach the very specific discreet statutory issue on it's merits of whether there is a bona fide dispute over Acorn Capital's claim within the meaning of Section 363(f)(4). I don't really need to reach that. I mean that's technically not ripe. The application of Section 363(f)(4) on it's merits is technically not ripe until a sale is actually presented to the Court for approval.

Now, so I think perhaps there was a conflation there in the way that argument was structured up of the question of bona fide dispute with the whole question of allowance of a claim and whether there's an objection pending.

Now, the interesting thing I want to note here is that I do think that the citation made to Gaylord Grains, LLC, the Bankruptcy Appellate Panel Decision, 2004 306 B.R. 624 was inapposite and Judge Kressel was the author of that one, this one that came out of the Eastern District of Missouri, the bankruptcy court there, and if you

go to Page 627 in the discussion section on bona fide dispute it's -- I think one has to avoid reading too much into this, but there's some illumination here.

It starts off with saying in this case the Trustee did not file an adversary proceeding seeking to avoid the creditor's liens before he sought to sell the property free and clear of interests. Thus the issue becomes whether there's a bona fide dispute for the purposes of Section 363(f)(4). He doesn't say the issue is. He says whether the issue becomes, which sort of suggests to me that may be the mentality behind it, and I am only speculating here, because this would only be dicta anyway and I don't know if that it's specifically worded enough for dicta, but I think the whole tenor of the references made here including the reference on the following page, Page 628, stating that although the Trustee didn't file an adversary proceeding he may nevertheless sell free and clear if he can show an objective basis for avoiding liens, et cetera, et cetera.

It's sort -- it seems to be premised upon a bed rock assumption that if an adversary

proceeding were pending there is a bona fide dispute. I think this is reinforced by the fact that the commencement of an adversary proceeding, as I think Mr. Singer promptly noted, triggers Rule 11 considerations and any attorney, particularly in a high stakes matter like this one, should be doing a very comprehensive factual investigation before launching litigation or there's a violation of Rule 11, Bankruptcy Rule 9011 here and so while this talks about evidence being brought forward and it just says evidence must be provided to show factual grounds, there is an objective basis for the dispute, it says that and nothing more. I mean there's no speaking. There's no discussion here of weighing of evidence at all and the point being that if litigation hasn't been commenced, you're lacking, I think, the indicium of bona fide status for an objection that Rule 11, counsel's duties to the Court, potential liability for abuse of process and the like, otherwise give to the question of a bona fide dispute.

So I think the citation and the heavy reliance to Gaylord Grain, whether it was sort of in an attempt to advance the question of the

to hold here that the Bankruptcy Appellate Panel decision in Gaylord Grain can be distinguished from the situation at bar. There the trustee in question presenting a motion for sale free and clear had not filed an adversary proceeding and yet was saying that a sale free and clear was appropriate because he contended that the lienors positions, the secured parties liens were avoidable and would take action to do that at some point in the future. And the Bankruptcy Appellate Panel opinion, which I think Judge Kressel authored, made reference to some amount of evidence being brought forward, an evidentiary burden of some sort to prove up that there would be a bona fide dispute over it.

But expressly as I noted the last time around when I ruled on this issue, the discussion in Gaylord Grain opens with a recognition of the fact that proceedings, adversary proceedings had not been commenced yet. So, therefore, the issue became, a transitive verb there, the issue became whether there was a bona fide dispute.

Now, I'm not going to make too much of that observation and say that it has to be given substantive effect toward the end that if a complaint in adversary proceedings is commenced, there automatically is a bona fide dispute. But it strikes me that at that point what you do is take a look at the complaint and subject it to a Rule 12(b)(6) analysis. And maybe this one came to mind, certainly came to mind since the last hearing which I held forth on this issue because I have been laboring with my chamber staff over a decision disposing of a Rule 12(b)(6) motion and have had to look rather deeply into the Supreme Court's opinion in Twonbly v. Bell Atlantic, but I think you look at that complaint with a Rule 12(b)(6) analysis and if it looks like it would withstand a motion for dismissal for failure to state a claim, in other words if it contains enough of a factual narrative there that if true would make out a prima facie case for the relief, then there's a bona fide dispute.

But there's no way anybody can convince me that Section 363 requires any sort of

evidentiary inquiry when there is a pending proceeding to challenge the opponent's interest in the property in question and that pending proceeding says what it has to to go forward on its merits against a motion to dismiss. There's no basis for taking evidence at that point. And there's never really been a suggestion here from Acorn, which has sort of taken the lead on this issue, or Ritchie as to just how much evidence I would have to demand and what I do with it then. I mean, am I supposed to take a look at it from sort of a probable cause analysis as would be applicable in criminal cases and if there's sort of enough there that maybe there's enough to kind of go forward on, maybe well then I let it go. Or should it be a summary judgment analysis? Should I be applying a preponderance of the evidence burden? Should I be applying a burden of persuasion as well as production? What should I do with it? No. When you got an adversary complaint, proceeding complaint on file and it says enough to carry the matter forward, pass a motion to dismiss, there's enough specific recitation of facts that would

make out elements under which the lien could be avoided, then there's a bona fide dispute. And there's no way I'm going to be pulled into prejudging the merits of the two complaints at this point. As evidenced by the pleaded facts, they're pretty complex matters. Lots of historical fact, lots of transactional fact, lots of documentary fact and probably some real facts going to parties' intentions and transactions that would have occurred that aren't evidenced by transactional documents.

So it simply isn't appropriate when you've got two complaints in adversary proceedings that contain the degree of factual development in their allegations on their face that the two here are to allow discovery into the underlying factual merits, the evidentiary basis for those allegations heading into the hearing on a Section 363 sale.

Now, that's not to say that I have adjudged these complaints sufficient at this date to withstand a motion for dismissal. I'll take a look at it next week. But that's the standard I'm going to apply. And the reason why it's important to annunciate that

at this point is that otherwise, arguably, other things being equal and full this were not being raised at this late date in a fashion that merited the denial of the motion generally as I'd just done, maybe discovery might be appropriate. But not when you've got a complaint on file. Not when it has some meat to it and is worthy of looking at.

Now, of course, what that means, then, is there's always a risk inherent that if I did conclude that there weren't enough on the complaint to withstand a motion for dismissal, maybe I'd have to deny the motion for Section 363 sale. I can't say anything about that at this point.

But I am going to say that's the standard that I do intend to apply here. I don't think it's inconsistent with Gaylord Grain at all. I think I have to reach that issue because it does go to whether discovery is permissible in pursuit of certain evidence. That evidence I'm going to conclude simply because of the paper record before the Court in the commencement of the adversary proceedings is not necessary. It's not

relevant given what the debtor is going to rely upon to make out a bona fide dispute.

So one other matter here and I'm just going to note it for the record without resolving it. This whole question of sealing what was put into the in box this morning, I'm not prepared at this hour to get into that. I will take that up probably this evening and tomorrow morning and I'll get into some sort of -- I'll get out some sort of order on that tomorrow morning.

One way or another it sounds to me like everybody who -- I won't say everybody. It sounds to me like at least the parties here are aware of what the content of the objection is. What I may well do is provide that just because I'm not going to -- I'm not going to engage in any sort of analysis of what exceeds the confidentiality and what doesn't. I can't do that in isolation and in a vacuum. I may well just provide that that document is sealed until after the disposition of the sale motion and then unseal it. And, you know, I'm going to do all that basically based upon the fact that this has to be kind of done on the fly.

The due diligence room was set up with confidentiality requirements for very specific purposes relating to the, ultimately to the extent that the information would and disclosure of it would give an unfair advantage to competitors and thereby diminish the value of the assets. That's the general reason why commercial information is held under seal in court proceedings.

And while it rarely comes up around here, I certainly had the issue in Mesaba and I can see where it's appropriate here. I'm not going to -- since I don't even know exactly what is confidential and what isn't, I can't get into weighing what is there. Obviously, though, if I do end up granting the sale motion and approving a sale, the need to maintain that material in secret will probably no longer be there and we'll take that issue up at that point.

And the whole reason why I view this as being a rather important issue is that I feel very powerfully that this being a public institution and what goes on here being at least potentially a matter of public interest

in an open society, this court should not be readily sealing anything too much. I have watched over the years judges on the U.S. District Court seal an awful lot of material and I know it's routinely done in the state courts too, but the judges of this court feel fairly strongly that it should be done only when warranted. I'm willing to play ball here just because it's not worth getting into the issue and I don't want to do anything that would upset the dynamic of the sale process, but I'll reserve the right to unseal the content of that material fairly shortly depending upon the outcome of the sale process.

So that's my disposition. Counsel have anything further to note here? I intend to just enter the submitted orders because, frankly, I'm too tired to do anything else at this point today. And I'll look into the issue of sealing later. Anybody have anything else? All right. That's enough, then. Stand adjourned.

* * *

consider the 9(b) standard from the Federal Rules of Civil Procedure incorporated in through Rule 7009 into the bankruptcy rules. That rule requires that averments of fraud be stated with particularity. That ensures that the defendant, Acorn in this example, has fair notice of the grounds and claims and has an ample opportunity to respond to those.

Moreover, the complaint, and this comes from the Bell Atlantic line of cases and the Reshold Associates in Northern District of Illinois case cited in our pleadings, say that there must be more than conclusions and formulaic recitations of the element of cause of action. In other words, the complaints must articulate the who, what, where, when and why of the allegations.

Finally, allegations that are made on information and belief do not comply with the specificity requirement unless they're accompanied by statement of facts providing the basis for that belief. That's the Interlease Aviation Investors case, 257 F.Supp.2d, 1028, a Northern District of Illinois case.

Applying those standards to the case at bar we have to look at two claims, a claim for actual fraud and a claim for constructive fraud. Under the actual fraud claim, the debtor must show facts that Polaroid engaged in the relevant transactions with the actual intent to hinder, delay and defraud.

If we look at the paragraphs of the complaint, we first turn to paragraphs 54 through 57. Those are the actual fraud claim complaints. Those paragraphs are merely a formulaic recitation of the elements of the cause of action. They state no actual facts. They state things like the debtor's engaged in the following transactions with the intent to hinder, delay, and defraud. That is not a factual allegation. That's a legal conclusion. It's a mere recitation of the facts. On those paragraphs the complaint fails to state a claim. And under the Court's articulated standard, there's not a bona fide dispute.

The closest the complaint comes to making a factual allegation on the actual fraud issue is in paragraph 45. Paragraph 45

of the complaint starts out by saying on information and belief, the Acorn Capital collateral documents executed and delivered by Thomas J. Petters on behalf of Polaroid's Acorn Capital prior to or in connection with the PACT Funding transactions were part and parcel of a continuing scheme and conspiracy to defraud legitimate --

THE COURT: I'm going to warn you, Mr. Rosow, you're going to be on sudden death overtime here. You're not arguing a motion for dismissal under Rule 12(b)(6).

MR. ROSOW: That is correct, Your Honor. But we are arguing that no bona fide dispute exists. And a standard that the Court has articulated is --

THE COURT: Go on. Stop wasting time haggling with me over whether I'm going to cut you off or I will right now and just rule on the basis of your written submissions. It's been a long day.

MR. ROSOW: It has been a long day, Your Honor. And we've waited two months to make these arguments. We've waited patiently --

THE COURT: Stop. Get on with your argument right now.

MR. ROSOW: We believe that the allegations that are made on information and belief as set forth in the complaint are insufficient to form the basis to find that there's an actual bona fide dispute. We believe that the analysis, and I'm prepared to go through it, applies both to the actual fraud and to the constructive fraud claims.

Other courts considering such allegations in this context have ruled that when you're making fraud claims based on information and belief, that you cannot make those claims unless you can point to actual facts giving rise to a valid claim. That's the Interlease Aviation case. The Polaroid defendants have not done that in their complaint, and because they have not done that in their complaint, they have not stated a claim and they cannot survive under the standard that's been articulated in this case.

We believe the same analysis applies to the constructive fraud claims. The allegations made are mere recitations of the

facts. They have not analyzed reasonably equivalent value. They have done no comparison of the value that was provided to Polaroid and the value that Polaroid gave in connection with these transactions. There are no factual allegations on those issues and because they haven't done that, they have failed to meet and provide the factual allegations for that element of the cause of action.

Additionally, they have failed to allege any facts that would support the insolvency allegation that is required under a constructive fraud analysis.

This viewed in particularly in the context of the evidence that's in front of the Court in the form of the affidavits supplied by Marlin Quan which states that at the time these transactions were entered into, Polaroid provided financial statements that showed that it was solvent requires the Court to find that there's not a bona fide dispute here.

There are new arguments that were raised by Polaroid in connection with its responsive memorandum under 365(f). I have

not had an opportunity to in writing to respond to these arguments but I think they're both procedurally and substantively inappropriate. It's procedurally inappropriate to raise new arguments about selling free and clear of a $275 million lien the day before the hearing on the sale hearing is scheduled. It's inappropriate to make that argument seven weeks after you initially made your proposal to sell free and clear of Acorn's lien.

Substantively, it's inappropriate because the courts in the Clear Channel case, the courts in General Bearing Corporation, the court in In Re: Becker Industries, I can provide the Court with cites to all of these cases, reject the analysis provided by and the position provided by the Debtor in this case that 363(f) permits the sale free and clear if a cram down is permitted and says that that reading of 365(f)(5) would swallow up the rest of the provisions of 365(f) and cannot be permitted.

Moreover, the courts that have considered this have said that if you -- the

Congress wanted to include that kind of broad sweeping language, it could have simply referred to 1129(b) but chose not to do so. And having chose not to do so the Court should reject any attempt to justify the sale of assets free and clear under 365(f)(5).

We've argued on the standard and we've argued about the standard to be applied here in the context of this motion. We've argued that an evidentiary showing needs to be made. The Court has rejected that position at prior hearings.

We ask the Court to look at the In Re: Octagon Roofing case. It's cited in our papers and in the In Re: Robotic Systems cases cited in our papers. In both cases, adversary proceedings had been commenced prior to the bringing of a 363 sale and the Court in both of those cases held evidentiary hearings. It sought the testimony of witnesses. It looked at evidence. It looked at documents and only after considering those evidentiary submissions did the court authorize sales in those cases.

We believe that in this context the

Court should permit testimony. We would encourage the Court to do so. We would encourage the Court to permit us to call Mary Jeffries to the stand to ask her questions about what evidence she has for the allegations made in the complaints. We expected that the Court is going to deny that request but we make it nonetheless.

Turning to the issue of PACT Funding's consent. PACT Funding has an Article 9 security interest in Polaroid's assets. That sale, the sale that's being proposed here today, cannot be made free and clear of PACT's lien without PACT's consent, without the other showing under 363(f). PACT has not affirmatively consented to this sale and it cannot consent to this sale for reasons that are set forth and explained in our written objections. I.

want to touch on one of those issues and that's the issue of conflicts of interest. In connection with this proceeding Lindquist & Vennum represents both Polaroid and PACT Funding. It is PACT's -- not in PACT Funding's interest or in the interest of PACT

IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

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

AFFIDAVIT OF MARLON QUAN

STATE OF CONNETICUT)
) ss.
COUNTY OF FAIRFIELD)

I, Marlon Quan, being first duly sworn upon oath, state and allege as follows:

1. I am Chief Executive Officer of Acorn Capital Group, LLC, a Delaware limited liability company ("Acorn"), located at Two Greenwich Office Park, Greenwich, Connecticut. I submit this Affidavit as a supplement to the Objection to Polaroid's Motion For Sale Free and Clear of Liens Pursuant to 11 U.S.C. § 363(f).

loan facility at that time. Acorn was willing, however, to make certain short-term secured loans to fund Polaroid's immediate working capital needs in the interim.

7. In response to various diligence requests, Polaroid furnished certain business information to Acorn, including financial statements, inventory and accounts receivable reports and financial projections illustrating the use of loan proceeds by Polaroid. Polaroid also furnished Acorn with a draft of its 2007 unaudited financial statements. The diligence information provided to Acorn by Polaroid purported to reflect that Polaroid maintained substantial shareholder equity.

8. During separate conference calls on February 22 and 25, 2008, Jeffries and Polaroid's General Counsel David Baer (who, in addition to Polaroid, was also General Counsel to all other Petters related entities) negotiated the terms of Polaroid's initial loans from Acorn.

9. On February 29, 2008, Polaroid's first loan from Acorn, in the principal sum of $15 million, was memorialized in the following agreements, among others:

- Promissory Note in the principal sum of $15 million with a term of 45 days.[4]
- Security interest in favor of PAC in Polaroid's U.S. Inventory and Accounts.[5]
- Security Agreement whereby Polaroid granted Acorn a security interest in its U.S. Inventory and Accounts to secure (i) amounts owed under the Promissory Note and (ii) the Blocked Account Obligation," i.e., the obligation of PAC to replenish the Blocked Account with cash of up to $28 million.[6]

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[4] A true and correct copy of this promissory note is attached hereto as Exhibit 5.

[5] A true and correct copy of this security agreement is attached hereto as Exhibit 6. PAC perfected its security interest in Polaroid's U.S. Inventory and Accounts by filing a U.C.C. Financing Statement with the Delaware Department of State on February 29, 2008, true and correct copies of which are attached hereto as Exhibit 7.

[6] A true and correct copy of this security agreement is attached hereto as Exhibit 8. Acorn perfected its security interest in Polaroid's U.S. Inventory and Accounts by filing a

- Subordination Agreement whereby Petters Company, Inc., Petters Company, LLC, Petters Capital, LLC, Thomas Petters, Inc. agreed to subordinate their rights and claims in and to Polaroid's assets (the "Subordination Agreement").[7]

- PAC and Acorn also entered into a limited forbearance agreement (the "Forbearance Agreement"), pursuant to which Acorn agreed to forbear from exercising its remedies under the PAC Credit Agreement and the PAC Security Agreement.[8] Pursuant to the terms of the Forbearance Agreement, Acorn released to PAC more than $20 million being held in the Blocked Accounts. Upon information and belief, some portion or all of the funds released from the Blocked Accounts was advanced by PAC to or for the benefit of Polaroid.

10. Under the February loan documents, Polaroid pledged its U.S. Inventory and Accounts to secure its obligations to repay the $15 million loan and its limited guaranty of PAC's obligation to maintain cash of at least $28 million in the Blocked Account (which PAC failed to do).

11. After receiving the initial $15 million loan from Acorn, Polaroid continued to solicit additional financing from Acorn. Polaroid insisted that either a permanent financing or a strategic transaction would facilitate repayment of any additional loans from Acorn. More specifically and in addition to its other highly touted financing prospects: (a) Petters represented that Polaroid was on the verge of a major brand licensing deal in India; (b) Jeffries represented that Polaroid was in the process of negotiating several intellectual property licensing agreements that would generate cash with which Polaroid could repay any loan from Acorn; and (c) Baer represented that he was negotiating terms for sale of various licensing agreements which would provide the cashflow to repay Acorn loans.

U.C.C. Financing Statement with the Delaware Department of State on February 29, 2008, true and correct copies of which are attached hereto as Exhibit 9.

[7] A true and correct copy of the Subordination Agreement is attached hereto as Exhibit 10.

[8] A true and correct copy of the Forbearance Agreement is attached hereto as Exhibit 11.

12. Showcasing the value of its intellectual property, on March 11, 2008, Polaroid furnished Acorn with a valuation by the investment advisory firm Duff & Phelps which ascribed a value of at least $350 million to Polaroid's intellectual property, which, internally, Acorn discounted heavily for purposes of calculated underwriting adequacy, given Polaroid's illiquidity and market niche of branding. Polaroid produced additional and updated diligence and financial information, which reinforced the value of its assets (and, therefore, its solvency), while Jeffries and others maintained the idea that a sale or license of Polaroid intellectual property was near.

13. As with the February loan, Jeffries and Baer were the lead negotiators for Polaroid. On April 18, 2008, Polaroid's second loan from Acorn, in the principal sum of $10 million, was memorialized in the following agreements, among others:

- Promissory Note in the principal sum of $10 million with a term of 120 days.[9]
- A security interest in favor of PAC in Polaroid's U.S. Inventory and Accounts.[10]
- Amended and Restated Security Agreement whereby Acorn was granted a security interest in Polaroid's U.S. Inventory and Accounts. Like the February Security Agreement, Polaroid granted Acorn collateral to secure (i) amounts owed under the Promissory Note and (ii) the Blocked Account Obligation," i.e., the obligation of PAC to replenish the Blocked Account with cash of up to $28 million.[11]

14. On April 18, 2008, Acorn advanced $10 million to Polaroid.

15. Under the documents memorializing the February and April loan transaction, Polaroid's U.S. Inventory and Accounts were pledged to secure (i) two loans

[9] A true and correct copy of this promissory note is attached hereto as Exhibit 12.
[10] A true and correct copy of this security agreement is attached hereto as Exhibit 13.
[11] A true and correct copy of this security agreement is attached hereto as Exhibit 14.

totaling $25 million (although the first $15 million loan was admittedly repaid) and (ii) the Blocked Account Obligation totaling $28 million.

16. In late April and early May 2008, Acorn engaged in further negotiations with Jeffries and Baer regarding Polaroid's continued need for financing. Unfortunately, by this time PAC had again defaulted on its loan obligations to Acorn. In view of this default and the general economic decline being experienced in the Spring of 2008, Acorn decided to convert its revolving loan facility with PAC to a fully amortizing term loan facility. After further negotiations between the parties, on May 12, 2008, a Fifth Amendment to the PAC Credit Agreement was entered into whereby Polaroid and PAC were afforded an additional 18 months to repay their Acorn related loan obligations (including the Polaroid loan) which then totaled more than $281 million.[12]

17. Under the Fifth Amendment, PAC was given the flexibility of remitting only 50% (rather than 100%) of the proceeds received on its alleged receivables and Polaroid would be given the right to prime Acorn's first lien against U.S. Inventory, Accounts and U.S., Canadian and Mexican Trademarks (collectively, "North American Trademarks") with a new working capital loan facility from another lender up to $75 million. There were numerous conference calls, email and other correspondence required to negotiate the Fifth Amendment, with extensive calls throughout the period May 5-12, 2008. In exchange for substantial direct and indirect financial benefits from Acorn, Polaroid agreed to guaranty PAC's obligations to Acorn and to secure that guaranty with additional collateral, namely a first priority lien against Polaroid's North American Trademarks. In connection with the Fifth Amendment to the PAC Credit Agreement,

Polaroid and Acorn entered into a Second Amended and Restated Security Agreement (the "Polaroid Security Agreement").[13]

18. PAC made its regularly scheduled payment to Acorn in June and July of 2008 under the terms of the Fifth Amendment to the PAC Credit Agreement.

19. Throughout the summer of 2008, Polaroid, through Jeffries, Beaudoin and others, continued to request that Acorn establish a permanent working capital loan facility for Polaroid and continued to represent to Acorn that Polaroid was negotiating the terms of potential financing with other lenders, including Accord Financial and Gordon Brothers.

20. Acorn evaluated additional diligence information furnished by Polaroid, including financial statements, inventory and accounts receivable reports and financial projections.

21. On August 1, 2008, PAC failed to make its regularly scheduled payment to Acorn pursuant to the Fifth Amendment.

22. Acorn notified PAC in writing of its default under the Fifth Amendment on August 13, 2008.

23. Based on the court documents I have seen, the following day, on August 14, 2008, Acorn filed a complaint for breach of contract against Thomas J. Petters in the

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[12] A true and correct copy of the Fifth Amendment is attached hereto as Exhibit 15.

[13] A true and correct copy of this security agreement is attached hereto as Exhibit 16. Acorn perfected its security interest in Polaroid's North American Trademarks by filing UCC Financing Statements with the Delaware Department of State on May 13, 2008, true and correct copies of which are attached hereto as Exhibit 17, and by filing a Notice of Recordation of Assignment Document with the United States Patent and Trademark Office on May 14, 2008, a true and correct copy of which is attached hereto as Exhibit 18.

United States District Court for the Southern District of New York captioned *Acorn Capital Group, LLC, v. Thomas J. Petters*, No. 08-CIV-7236 (S.D.N.Y. Aug. 14, 2008).

24. Subsequent to August 14, Petters introduced to Acorn an affiliate of the Fortress Investment Group (a publicly traded hedge fund) ("Fortress"). The affiliate, Drawbridge Special Opportunities Advisors, LLC ("Drawbridge"), made a written proposal to purchase 100% of the debt owed to Acorn by PAC (and Polaroid), Petters Aviation and Petters Aircraft Leasing for a purchase price of 90% of $310 million outstanding in Petters related debt. The proposal, however, was subject to a brief period of diligence and an agreement by Acorn to forbear from exercising its rights against PAC and others while the parties formalized and consummated the purchase and sale. Acorn and Drawbridge memorialized their intentions in a letter agreement on August 25, 2008.[14]

25. On September 9, 2008, Acorn and Petters stipulated and agreed to extend the time for Petters to respond to Acorn's Complaint to October 1, 2008. Acorn only agreed to the stipulation in view of its ongoing negotiations with Drawbridge.

26. Based on the court documents I have seen, on September 24, 2008, the Federal Bureau of Investigation together with the Internal Revenue Service–Criminal Investigation Divisions and the United States Postal Inspection Service, based upon claims of fraud and other wrongdoing on behalf of Petters, executed a search warrant and seized records related to certain entities owned by Petters.

27. Also on September 24, 2008, Acorn received a letter from Drawbridge terminating its proposal to purchase the Petters-related debt from Acorn.[15]

[14] A true and correct copy of the letter agreement is attached hereto as Exhibit 19.
[15] A true and correct copy of the termination letter is attached hereto as Exhibit 20.

28. At no time prior to September 24, 2008, was Acorn aware of any fact or circumstance that would suggest any fraud or impropriety involving Petters, PAC, Polaroid or any affiliate thereof.

29. Based on the court documents I have seen, on October 3, 2008, Petters was arrested on charges of mail and wire fraud, money laundering and conspiracy.

30. Based on the court documents I have seen, on October 6, 2008, the United Stated District Court for the District of Minnesota placed the various affiliated Petters entities into receivership and appointed Kelley to serve as their receiver. Based on the court documents I have seen, by Order dated October 14, 2008, the District Court amended the receivership to place Kelley as receiver for Petters and other individuals. Based on the court documents I have seen, in an Order dated December 12, 2008, the District Court clarified that it intended Polaroid to be included within the group of entities subject to the receivership.

31. Based on the court documents I have seen, on December 1, 2008, Petters was indicted by a federal grand jury on charges of (i) mail fraud, (ii) wire fraud, (iii) conspiracy to commit mail fraud and wire fraud, (iv) money laundering, and (v) conspiracy to commit money laundering in violation of 18 U.S.C. §§ 371, 1343, 1956 and 1957.

32. Based on the court documents I have seen, on December 18, 2008, Polaroid and its affiliated companies filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

33. As of the petition date, Acorn was owed more than $281 million by Polaroid, and Acorn's claim is secured by a first priority lien against Polaroid's U.S. Inventory, Accounts and its North American Trademarks.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Marlon Quan

Subscribed and sworn to before me
this 26th day of March, 2009.

s/
Notary Public-State of Connecticut
My Commission Expires:

Amber Austin
NOTARY PUBLIC
State of Connecticut
My Commission Expires 7/31/2012

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