

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

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UNITED STATES OF AMERICA,

Plaintiff,

Civil No. 08-SC-5348 (ADM/JSM)

v.

THOMAS J. PETTERS; PETTERS  
COMPANY, INC., PCI; PETTERS GROUP  
WORLDWIDE, LLC; DEANNA COLEMAN  
aka DEANNA MUNSON; ROBERT WHITE;  
JAMES WEHMHOFF; LARRY REYNOLDS  
dba NATIONWIDE INTERNATIONAL  
RESOURCES aka NIR; MICHAEL CATAIN  
dba ENCHANTED FAMILY BUYING  
COMPANY; FRANK E. VENNES JR. dba  
METRO GEM FINANCE, METRO GEM  
INC., GRACE OFFERINGS OF FLORIDA,  
LLC, METRO PROPERTY FINANCING,  
LLC, 38 E. ROBINSON, LLC, 55 E. PINE,  
LLC, ORLANDO RENTAL POOL, LLC, 100  
PINE STREET PROPERTY, LLC, ORANGE  
STREET TOWER, LLC, CORNERSTONE  
RENTAL POOL, LLC, 2 SOUTH ORANGE  
AVENUE, LLC, HOPE COMMONS, LLC,  
METRO GOLD, INC;

Defendants,

and

ACORN CAPITAL GROUP, LLC

Applicant Intervenors.

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**MEMORANDUM OF LAW IN SUPPORT OF ACORN CAPITAL GROUP,  
LLC'S EXPEDITED MOTION TO INTERVENE FOR A LIMITED PURPOSE  
TO CLARIFY, MODIFY OR LIFT THE STAY TO PERMIT ACORN TO  
ENFORCE ITS ARTICLE 9 RIGHTS AGAINST POLAROID CORP. AND  
POLAROID CONSUMER ELECTRONICS, LLC**

## **I. INTRODUCTION**

Acorn Capital Group, LLC (“Acorn”) seeks intervention in this lawsuit for the limited purpose of requesting the Court to clarify or modify its prior orders to permit Acorn to enforce its rights and remedies under Article 9 of the Uniform Commercial Code (“Article 9”) against Polaroid Corporation and/or Polaroid Consumer Electronics, LLC (collectively, “Polaroid”). Acorn’s motion should be granted for no less than three independent reasons. First, the United States has not established or even alleged a *prima facie* case for appointing a receiver over Polaroid. Second, the Court’s prior orders must be modified to permit Acorn to pursue its property rights and remedies as required by the Fifth Amendment to the United States Constitution, or requiring Polaroid to provide Acorn with adequate protection of its property rights. Third, Acorn alternatively requests the Court to lift the stay against litigation to permit Acorn to pursue its Article 9 claims against Polaroid.

## **II. BACKGROUND FACTS**

### **A. The Loan**

On November 1, 2004, Acorn entered into a Credit Agreement with PAC Funding, LLC (“PAC”) pursuant to which it agreed to loan PAC \$200 million. *See* Verified Pleading in Intervention, ¶ 1. The Credit Agreement was subsequently modified on several occasions, ultimately increasing the loan commitment to \$300 million. *Id.* ¶ 2. PAC in turn used a portion of the funds advanced by Acorn to make at least two loans to Polaroid for a total of \$25 million for Polaroid to use in its business operations. *Id.* ¶ 3.

To secure the amounts due under the Credit Agreement, Polaroid executed and delivered to Acorn a Security Agreement pursuant to which Polaroid granted Acorn a security interest in its inventory, accounts and U.S., Mexican and Canadian trademarks. *Id.* ¶ 4. The Security Agreement secures repayment of all amounts advanced to PAC under the Credit Agreement, which currently exceeds \$276 million. *Id.* ¶ 5.

**B. Ownership of Petters Entities.**

Based upon the information provided in the various bankruptcy proceedings:

- (i) Thomas J. Petters owns all of the stock of Thomas Petters, Inc.;
- (ii) Thomas Petters, Inc. in turn owns all of the stock of Petters Company, Inc.

and Petters Group Worldwide, LLC;

- (iii) Petters Company in turn owns PAC;

(iv) Petters Group Worldwide in turn owns Polaroid Holding Company (“Polaroid Holding”);

- (v) Polaroid Holding in turn owns Polaroid Corp.; and

- (vi) Polaroid Corp. in turn owns Polaroid Consumer Electronics.

*Id.* ¶ 6.

**C. The United States’ Complaints Against the Petters Entities**

On October 2, 2008, the United States commenced a lawsuit against Thomas Joseph Petters, Petters Company and numerous other individuals and entities. *See* Docket No. 1. In the lawsuit, the United States sought an injunction against Mr. Petters and Petters Company under 18 U.S.C. § 1345. *Id.* On October 6, 2008, the United States amended the complaint to add, among others, Petters Group Worldwide and Polaroid

Holding. *See* Docket No. 7. Later that day, the United States filed a Second Amended Complaint, removing Polaroid Holding as a party. *See* Docket No. 8. As it currently stands, Polaroid Holding and its subsidiaries are not named parties to the lawsuit. *Id.*

#### **D. The Receiver Orders and the Injunction Hearing**

On October 4, 2008, the Court issued an *ex parte* Temporary Restraining Order (“TRO”) freezing the assets of Mr. Petters, Petters Company and Petters Group Worldwide, but expressly excluding Polaroid Corporation and subsidiaries. *See* Docket No. 6, p. 5. Specifically, it stated “nothing in this Temporary Restraining Order shall be construed to restrain the assets of Polaroid Corporation and its subsidiaries. . . .” *Id.*

On October 6, 2008, the United States and Mr. Petters executed and filed with the Court a Stipulation for Entry of Preliminary Injunction, Order Appointing Receiver and Other Equitable Relief. *See* Docket No. 11. Later that day, the Court issued an Order For Entry of Preliminary Injunction, Order Appointing Receiver, and Other Equitable Relief (the “First Receiver Order”). *See* Docket No. 12. Unlike the TRO, the First Receiver Order expressly applies to:

**Defendants Petters Company, Inc.; Petters Group Worldwide, LLC; and any affiliates, subsidiaries, divisions, successors, or assigns owned 100% or controlled** by the foregoing but excluding: Thomas Petters, Inc, and its subsidiaries including but not limited to: MN Airlines, LLC, dba Sun Country Airlines (herinafter referred to as the “Entities”); their agents; including financial and banking institutions and other entities having possession or control of the Entities’ assets; their officers; their employees; and all persons in active concert or participating with the Entities in their affairs are hereby restrained and enjoined[.]

*See* Docket No. 12, p.4 (emphasis added).

On October 14, 2008, the Court issued an Order For Entry of Preliminary Injunction, Appointment of Receiver, and Other Equitable Relief (“Second Receiver Order”). *See* Docket No. 43. The Court explained that it had previously approved a stipulation entered into by the United States, Petters Company and Petters Group Worldwide and had appointed Douglas Kelly (the “Receiver”) as a receiver over those defendants. *Id.* The Court further explained that additional defendants had now stipulated to the entry of a preliminary injunction and receivership order. *Id.* Those defendants include:

Thomas Joseph Petters, Deanna Coleman, aka Deanna Munson, Robert White, James Wehmhoff, Larry Reynolds dba Nationwide International Resources aka NIR, and Michael Catain, dba Enchanted Family Buying Company.

*See* Docket No. 43, p. 2.

On October 21, 2008, the Receiver filed a Motion asking the Court to stay all litigation because of “[t]he ever-growing wave of civil litigation.” Docket No. 64, p 2. A hearing was held on this motion the very next day. *See* Docket No. 82, Ex. C (Transcript of October 22, 2008 hearing (“Tran.”)). At the hearing, the parties likened the purpose and nature of the stay to that found in bankruptcy. *See* Docket No. 82, Ex. C, Tran., 8 (discussing whether the proposed stay would essentially operate as an “automatic stay” under the Bankruptcy Code, 11 U.S.C. § 362(a)(1)). Further, the parties and the Court discussed the importance of the ability to lift the stay. For example:

[U.S. Attorney] BOOKER . . . We understand the need for self-help to be exercised by creditors and victims. This proposed order allows a safety valve for those people to come to this Court. In many ways this Court acts as a clearing house.

\* \* \*

THE COURT: I have page 18, the ‘except by leave of this Court’—

[U.S. Attorney] BOOKER: . . . They would have the ability to address this Court, file a motion asking for leave to get out from under the stay, similar to what happens in the bankruptcy arena[.]

*Id.* Tran., 11-12.

On October 22, 2008, the Court granted the Receiver’s motion and issued an Amended Order for Entry of Preliminary Injunction, Appointment of Receiver, and Other Equitable Relief (“Third Receiver Order”). *See* Docket No. 70. The Third Receiver Order defines “Defendants” to include:

Thomas Joseph Petters, Deanna Coleman, aka Deanna Munson, Robert White, James Wehmhoff, Larry Reynolds dba Nationwide International Resources aka NIR, and Michael Catain, dba Enchanted Family Buying Company; Petters Company, Inc.; Petters Group Worldwide, LLC; and any affiliates, subsidiaries, divisions, successors, or assigns owned 100% or controlled by the foregoing but excluding: Thomas Petters, Inc., and its subsidiaries including but not limited to: MN Airlines, LLC, dba Sun Country Airlines . . . . Defendants [also] include all those named in the case caption with the exception of Frank E. Vennes, Jr. and those entities listed as associated with Vennes in number 7 of the case caption.

*Id.* pp. 3-4, and n.1. The Third Receiver Order does not provide that the receivership attaches beyond the stock of the subsidiaries of the enumerated entities to the assets of those subsidiaries.

In the Third Receiver Order, the Court granted the Receiver’s request to impose a stay on actions against the “Defendants.” *See id.* Specifically, the Third Receiver Order provides that “except by leave of this Court,” creditors are:

enjoined from taking action that would interfere with the exclusive jurisdiction of this Court over the assets or documents of the Receivership Defendants, including but not limited to: . . .

B. Commencing, prosecuting, or continuing a judicial, administrative, or other action or proceeding against the Receivership Defendants, including the issuance or employment of process against the Receivership Defendants . . .

C. Filing or enforcing any lien on any asset of the Receivership Defendants, taking or attempting to take possession, custody, or control of any asset of the Receivership Defendants . . . whether such acts are part of a judicial proceeding, are acts of self-help, or otherwise.

*Id.* p. 18-19.

**E. Acorn’s Letters to Account Debtors and Polaroid’s Response.**

As secured party of Polaroid, Acorn was authorized by Minn. Stat. 336.9-607 to notify Polaroid’s account debtors to make payments directly to Acorn after the PAC loan went into default. Minn. Stat. § 336.9-607. After the PAC loan defaulted, Acorn properly sent letters to Polaroid’s account debtors instructing them to make payment directly to Acorn. *See* Verified Pleading in Intervention, ¶ 7. In response, Polaroid sent the account debtors letters stating that, because Polaroid is subject to a receivership, the account debtors should not make payments to Acorn, and should instead hold on to the sums. *Id.* ¶ 8.

**III. ARGUMENT**

**A. Acorn Has Standing to Intervene For a Limited Purpose.<sup>1</sup>**

Because Acorn has interests that will be impaired absent intervention, Acorn has standing to intervene in this lawsuit for the limited purpose of requesting the Court to clarify, modify or lift the stay imposed by the Third Receivership Order. If this is not done, Acorn stands to suffer substantial economic and financial injury, because it will be

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<sup>1</sup> At the present time, Acorn does not seek to intervene for any other purpose and specifically and affirmatively reserves any and all rights that it may have against the named Defendants in this action.

unable to realize on or protect its interest in its collateral, which consists of Polaroid's inventory, accounts receivable, U.S., Canadian and Mexican trademarks, and all proceeds (including cash proceeds) thereof.

Rule 24(a)(2), of the Federal Rules of Civil Procedure, permits intervention as a matter of right when “(1) the proposed intervenor has an interest in the subject matter of the action; (2) the interest may be impaired; and (3) the interest is not adequately represented by an existing party to the action.” *Sierra Club v. Robertson*, 960 F.2d 83, 85 (8th Cir. 1992). This Rule is “construed liberally” and courts “resolve all doubts in favor of the proposed intervenors.” *United States v. Union Elec. Co.*, 64 F.3d 1152, 1160 (8th Cir. 1995).

Rule 24(b) of the Federal Rules of Civil Procedure, which provides for permissive intervention, states as follows:

Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b). Here, Acorn qualifies for intervention under both 24(a) and 24(b).

First, under Rule 24(a), Acorn has monetary and property interests as it relates to the Court's imposition of the stay in the Third Receiver Order. Acorn holds an Article 9 security interest in the inventory, accounts receivable, and trademarks of Polaroid. This security interest constitutes a property right, which is protected by the Fifth Amendment to the United States Constitution. Under state law, Acorn is entitled to exercise its rights and remedies against its collateral by notifying account debtors to make payments of

amounts owed to Polaroid directly to Acorn. *See* Minn. Stat. § 336.9-607. Upon receipt of this notification, account debtors are required to make payments directly to Acorn. *See* Minn. Stat. § 336.9-608. Under state law, Acorn is also entitled to take possession of and liquidate Polaroid's inventory. *See* Minn. Stat. § 336.9-610. Acorn also has the legal right to foreclose on, liquidate, and realize on the proceeds from the liquidation of Polaroid's trademarks. *See* Minn. Stat. § 336.9-610. Acorn also has a security interest in all identifiable proceeds of its collateral, including cash generated from: the sale of inventory, collection of accounts receivable or licensing of the trademarks. Minn. Stat. § 336.9-203 and 315.

If Acorn's state law rights and remedies against the assets of Polaroid are stayed, Acorn will be unable pursue its Article 9 rights. Acorn's rights are impaired, in part, because Polaroid instructed its account debtors to withhold payments from Acorn on the basis of the Court's prior orders. As a secured creditor of Polaroid, Acorn is in a unique position because its security interests in the assets of Polaroid constitute property rights protected by the Constitution. *See* Section II(C)(1), *infra*. Acorn's interests are not being protected by any party to this suit, including the Receiver. Because Acorn seeks relief from the Court regarding the scope and applicability of the Court's Order, permitting Acorn's intervention will not prejudice the parties or delay adjudication. Acorn merely seeks intervention for the limited purpose of clarifying, modifying or lifting the stay against Polaroid.

**B. The United States Has Failed to Establish a Prima Facie Case That the Injunction Should Apply to Polaroid.**

Because the United States has not alleged a *prima facie* case that Polaroid must be enjoined from distributing its property, the injunction should not apply to Polaroid. The United States sought injunctive relief under 18 U.S.C. § 1345(a) to enjoin persons who are “violating or about to violate” the provisions of mail fraud, wire fraud, banking fraud, prohibitions against false statements, and conspiracy to defraud the federal government. *See* Docket No. 3, p. 4. Additionally, the United States cited 18 U.S.C. § 1345(a)(2) for its authority to enjoin “any person from withdrawing, transferring, removing, dissipating, or disposing of” any property obtained or traceable to “a banking law violation.” *Id.* p. 8.

The United States’ memorandum in support of its request for an injunction acknowledges that it must show that the entity over which it seeks a receiver violated the federal banking fraud statutes by committing a “banking law violation” under 18 U.S.C. § 1345(A)(2). *Id.* Likewise, the United States’ memorandum acknowledges that it must show that the entity over which it seeks a receiver is alienating or disposing of property obtained as a result of the banking law violations. *See* Docket No. 3, p. 13. The memorandum and the Affidavit of Eileen Rice, therefore, both lay out in detail how the specific Defendants defrauded investors, the fraud’s effect on financial institutions and the United States’ probable cause to believe that the Defendants are dissipating the proceeds from the fraudulent scheme. *See* Docket No. 3, p. 10-11; *see generally* Affidavit of Eileen Rice Docket No. 5. Specifically, the United States listed the named Defendants subject to the injunction as including:

Mr. Petters; Petters Company, Inc.; Deanna Coleman aka Deanna Munson; Robert White; James Wehmoff; Larry Reynolds dba Nationwide International Resources; Michael Catain dba Enchanted Family Buying Company; Frank Vennes, dba Metro Gem Finance, Metro Gem, Inc., Grace Offerings of Florida, LLC, Metro Property Financing, LLC, 38 E. Robinson, LLC, 55 E. Pine, LLC, Orlando Rental Pool, LLC, 100 Pine Street Property, LLC, Orange Street Tower, LLC, Cornerstone Rental Pool, LLC, 2 South Orange Avenue, LLC, Hope Commons, LLC, Metro Gold, Inc.

*Id.*

Nowhere in either document, however, is it alleged that Polaroid was party to the fraud or the alienation or disposition of property by violating banking laws. Accordingly, the United States has not shown, nor has it even alleged, a *prima facie* case that Polaroid committed mail, wire or banking fraud, or removed dissipated or disposed of property obtained traceable to a banking law violation. Therefore, the injunction should not apply to Polaroid, Acorn should be permitted to exercise its remedies against Polaroid, and Polaroid's account debtors should pay Polaroid's accounts receivables to Acorn, as required by state law. To the extent the Court applies the stay imposed by the Third Receiver Order to Polaroid, Acorn does not contest that the stay may apply to Polaroid's stock. The stay should not, however, apply to Polaroid's assets as those assets are not owned by any of the Defendants who are alleged to have violated the law.

**C. Acorn Requests the Court to Modify or Lift the Stay As Applied to Acorn's Claim Against Polaroid.**

If the Court concludes that the stay applies to Polaroid's assets, despite the United States' failure to state a *prima facie* case for appointing a receiver over Polaroid, Acorn requests the Court to (1) modify the Third Receiver Order to exclude actions by Acorn

against Polaroid's assets or, alternatively, (2) lift the stay of litigation to permit Acorn to enforce its Article 9 rights.

The Court has the authority to correct an order with a mistake or omission, or upon motion, relieve a party from an order or proceeding, "where applying it prospectively is no longer equitable" or for "any other reason that justifies relief." Fed. R. Civ. P. 60(a), (b); *Prudential Ins. Co. Am. Nat'l Park Med. Ctr.*, 413 F.3d 897, 903 (8th Cir. 2005). Additionally, the Third Receiver Order specifically contemplates that parties may seek leave of court to pursue their remedies. Accordingly, seeks an order requesting the Court to modify or lift the stay of litigation.

**1. The Stay Must Be Modified to Comply With Acorn's Fifth Amendment Property Rights.**

Acorn requests the Court to modify the Third Receiver Order to permit Acorn to enforce its Article 9 rights against Polaroid. Acorn has a constitutionally protected property right as a secured creditor, which is being impaired by the stay. As such, the stay must be modified to comply with the Fifth Amendment's prohibition against deprivation of property without due process and just compensation.

The Fifth Amendment to the United States Constitution provides that "No person shall be . . . deprived of . . . property . . . without due process of law, nor shall private property be taken for public use without just compensation." U.S. Const. Amend V. Due process of law requires adequate notice, hearing and procedures to contest the deprivation of property. *See Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). 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 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. Security 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.”).

By statute, the commencement of a case under the Bankruptcy Code results in an automatic stay of creditor actions and legal proceedings against the debtor. 11 U.S.C. § 362(a)(4 and 5) (staying acts to “create, perfect or enforce liens against property” of the estate or the debtor). The stay imposed by Section 362 extends to secured creditors, such as Acorn. *See* 11 U.S.C. § 101(37) (defining “lien” to include security interests). The bankruptcy stay of secured claims, however, is subject to significant limitations, which recognize the constitutional property rights held by secured creditors. For example, the

Bankruptcy Code provides that a bankruptcy court “*shall* grant relief from the stay” if a party’s property interests are not “adequately protected.” 11 U.S.C. § 362(d)(1) (emphasis added); *see also* Collier on Bankruptcy 361.02; 361-3 (adequate protection is a matter of right, not a matter of discretion) (*citing* H.R. Rep. No. 595, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 340, 343-44 (1977); S. Rep. No. 989, 95<sup>th</sup> Cong. 2d Sess. 52-53 (1978)). The Bankruptcy Code specifically authorizes the court to modify the stay to grant a party relief. 11 U.S.C. § 362(d).

Additionally, the Bankruptcy Code provides that a debtor cannot use “cash collateral”<sup>2</sup> unless: (i) each entity with an interest in the cash collateral consents; or (ii) the court enters an order that permits the debtor to use cash collateral. 11 U.S.C. § 363(c)(2).<sup>3</sup> The bankruptcy court cannot enter an order permitting a debtor to use cash collateral unless it conditions the use of cash collateral “as is necessary to provide adequate protection.” 11 U.S.C. § 363(e). Additionally, 11 U.S.C. § 363(c)(4) places an affirmative obligation on the debtor to “segregate and account for any cash collateral in the trustee’s possession, custody and control.” Section 363(p)(1) states that in any hearing under 363 “the trustee has the burden of proof on the question of adequate protection.” 11 U.S.C. § 363(p)(1). Section 361 of the Bankruptcy Code further provides several non-exclusive examples of “adequate protection” under Sections 362, 363, or 364. 11 U.S.C. § 361(1). This may include requiring that the debtor make cash

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<sup>2</sup> “Cash collateral” is defined as cash or cash equivalents in which the estate and any other party has an interest. *See* 11 U.S.C. § 363(a).

<sup>3</sup> Recognizing the importance of a secured lender’s rights in cash collateral, Minnesota’s Local Bankruptcy Rule 4001-2 spells out detailed procedures which a debtor in bankruptcy must follow in order to obtain permission to the cash collateral.

payments to compensate for the decrease in value of the interest in the collateral. *Id.*; see *In re Bermec Corp.*, 445 F.2d 367 (2d Cir. 1971); *In re Briggs Transp. Co.*, 780 F.2d at 1345-46 (citing *Bermec*). Adequate protection may also include granting an additional or replacement lien to the extent necessary to compensate for a decrease in value of the interest in the collateral, 11 U.S.C. § 361(2), or other relief “as will result in the realization by such entity of the indubitable equivalent of such entity’s interest in such property.” 11 U.S.C. § 361(3). An “indubitable equivalent” requires protection that will assure the creditor that its position will not be adversely affected by the stay. See, e.g. *In re Martin*, 761 F.2d 472, 476-77 (8th Cir. 1985) (adequate protection must be “completely compensatory” and as nearly as possible provide the creditor with the value of its bargained-for rights). Other forms of adequate protection may include conditioning the continuation of a stay on continued accounting to the creditor or properly insuring the collateral against loss or damage. See *Collier on Bankruptcy* 362.07(3)(b); 362-86.

The concept of adequate protection in the bankruptcy context is derived from the Fifth Amendment property protections. See *Wright v. Union Central Life Ins. Co.*, 311 U.S. 273 (1940); *Louisville Joint Stock Land Bank*, 295 U.S. at 555; *In re Briggs Transp. Co.*, 780 F.2d 1339, 1342 (8th Cir. 1985) (“By providing a creditor with a means of protecting its interest through section 362(d)’s adequate protection requirement, the competing interests of the debtor’s need to reorganize and the secured creditor’s entitlement to constitutional protection of its bargained-for property interests are reconciled.”); *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. Before the plan is confirmed, that property right is protected by the requirement of Code section 361.”); *In re Holly’s, Inc.*, 140 B.R. 643, 686 (Bankr. W.D. Mich. 1992) (section 362(d)(1) serves to protect a secured creditor’s Fifth Amendment rights).

Here, Acorn holds an Article 9 security interest in the inventory, accounts receivable, and trademarks of Polaroid, which constitute property rights protected by the Fifth Amendment. Acorn also has a security interest in all identifiable proceeds, including cash proceeds generated from the sale of inventory, the collection of accounts receivable or from licensing of the trademarks. Minn. Stat. §§ 336.9-203 and 315. Because of defaults under the loan documents, Acorn is entitled to exercise its rights and remedies against its collateral. If the Court’s Third Receiver Order is construed to impose a stay on litigation and collection activities by Acorn against Polaroid, then Acorn is being deprived of its constitutionally protected property rights with no means of protecting its interests. The Third Receiver Order, therefore, must be modified or clarified to comply with the requirements of the Fifth Amendment. Specifically, the Third Receiver Order should be amended to permit Acorn to exercise its remedies against Polaroid, or require that Polaroid provide Acorn with adequate protection. *See* 11 U.S.C. § 362(d). Failure to do so is a deprivation of a substantive constitutional right. Additionally, because the Receiver’s Motion for imposition of a stay was filed the evening before the hearing, and Acorn was not served with notice or made a party to the action, Acorn has been deprived of procedural due process if the Third Receiver Order is construed to limit Acorn’s property rights. *See Board of Regents*, 408 U.S. at 569.

## 2. **Alternatively, Acorn Seeks Leave of Court to Lift the Stay.**

Pursuant to its terms, the stay issued by the Third Receiver Order applies “except by leave of this Court.” *See* Docket 70, p. 18. If the Court does not modify or clarify the stay to comply with the Fifth Amendment, Acorn alternatively requests the Court to lift the stay to permit Acorn to pursue its remedies against Polaroid.

Although courts within Minnesota and the Eighth Circuit have not published any decision on the standard for determining a motion to lift a receivership stay to assert claims against a receivership, the United States Courts of Appeals for the Third and Ninth Circuits have addressed this issue, but only in the context of unsecured claims, which are not afforded constitutional protections. *SEC v. Wencke*, 622 F.2d 1363 (9th Cir. 1980) (“*Wencke I*”), and *SEC v. Wencke*, 742 F.2d 1230 (9th Cir. 1984) (“*Wencke II*”) (collectively “*Wencke*”); *United States v. Acorn Tech. Fund, L.P.*, 429 F.3d 438 (3d Cir. 2005). In *Acorn Tech. Fund*, the Third Circuit acknowledged the dearth of legal authority dealing with relief from stay in this context: “[g]iven how rare non-bankruptcy receiverships are, it is not surprising that [] few courts around the country have [faced this issue].” *Acorn Tech. Fund*, 429 F.3d at 438. Bankruptcy principles, as outlined above, are an appropriate analogy for the rights at issue here. In fact, the Third Circuit stated:

A receiver must be given a chance to do the important job of marshaling and untangling a company’s assets . . . [n]evertheless, an appropriate escape valve, which allows potential litigants to petition the court for permission to sue, is necessary so that litigants are not denied a day in court during a lengthy stay. . . . [W]e agree with the *Wencke* courts that the interests of litigants also need to be considered. Far into a receivership, if a litigant demonstrates that harm will result from not being able to pursue a colorably meritorious claim, we do not see why a receiver should continue to be protected from suit.

*Id.*; see *Wencke II*, 742 F.2d at 1232 (reversing the district court’s refusal to lift the stay).

Under *Wencke*’s three-prong test, when a movant seeks to assert claims against the entity in receivership, the Court considers:

(1) whether refusing to lift the stay genuinely preserves the status quo or whether the moving party will suffer substantial injury if not permitted to proceed; (2) the time in the course of the receivership at which the motion for relief from the stay is made; and (3) the merit of the moving party’s underlying claim.

*Id.* at 1231; accord *United States v. ESCI Capital, Inc.*, 685 F. Supp. 483, 485 (D. Md. 1988) (applying *Wencke* to grant motion to lift stay ordered in SBIC receivership action in which SBA was appointed receiver). Generally, the test “simply requires the district court to balance the interests of the Receiver and the moving party.” *SEC v. Universal Fin.*, 760 F.2d 1034, 1038 (9th Cir. 1985).

**a. Status Quo and Substantial Injury.**

As a secured creditor, Acorn will suffer substantial economic injury and its constitutionally protected property rights will be violated without relief from the stay. See *In re Briggs*, 780 F.2d at 1342; *In re Townley*, 256 B.R. at 700. Acorn is being denied any ability to recover on or protect its secured interest in Polaroid’s inventory, accounts, trademarks and cash. Because Acorn has legitimate claims to this collateral under Article 9, a continuation of the stay, especially without adequate protection, is far from preserving the status quo. The injunction inappropriately prevents Acorn from exercising its Article 9 rights and does nothing to protect those rights, which are legally superior to the rights of other investors and claimants who hold unsecured, subordinate claims.

**b. Time In the Course of the Receivership.**

The second *Wencke* factor deals with the time in the course of the receivership at which the motion for relief from the stay is made. *Wencke II*, 742 F.2d at 1231. In the context of unsecured creditors seeking relief from the stay, courts are “reluctant to set a clear cut-off date after which a stay should be presumptively lifted [because] [t]he second *Wencke* prong is inherently case-specific.” *Acorn Tech. Fund, L.P.*, 429 F.3d at 450. Courts have, however lifted a stay at a “fairly youthful age of the receivership—two years since its inception.” *ESIC Capital, Inc.*, 685 F. Supp. at 483. While these cases do not address unique constitutional and adequate protection issues presented by creditors with secured claims, to the extent that a party has a colorable claim against a receiver or the entities in receivership, due process demands that the claimant be heard. As the *Wencke* court recognized, “[a]t some point, persons with claims against the receivership should have their day in court. The receivership cannot be protected from suit forever.” *Wencke*, 742 F.2d at 1231.

Here, Acorn’s constitutional property rights are immediate, continuing and cannot be placed on hold. Even in a bankruptcy case, the adequate protection requirement is immediate, continuing and constant. *See* 11 U.S.C. § 362. From the first moment of a bankruptcy case, a debtor must adequately protect the interests of secured creditors and must segregate and account to secured creditors with respect to their cash collateral. *See* 11 U.S.C. § 363. Likewise, from inception of a bankruptcy case, a debtor is prohibited from using cash collateral without the secured creditors consent unless the debtor provides adequate protection and obtains permission from the Bankruptcy Court. *Id.*

These protections in bankruptcy are mandated by the Fifth Amendment to the Constitution. *See Wright*, 311 U.S. at 273; *Louisville Joint Stock Land Bank*, 295 U.S. at 555; *In re Briggs Transp. Co.*, 780 F.2d at 1342. Thus, because Acorn has a constitutionally protected property interest, the appropriate timing in the course of the receivership to provide relief from a stay or adequate protection is immediate and this factor weighs heavily in favor of lifting the stay.

**c. Acorn Has a Colorable Article 9 Claim.**

Lastly, in a determination of whether to lift a stay against litigation, courts applying the *Wencke* standards consider the merits of the movant’s underlying claim. *See ESCI Capital, Inc.*, 675 F. Supp. at 1464. Under this standard claimants need *not* establish likelihood of success on the merits of their underlying claim. *See Universal Fin.*, 760 F.2d at 1038. Courts applying *Wencke* only need to determine whether the claimant has a “colorable claim that entitles [it] to a trial on the merits.” *Wencke*, 742 F.2d at 1232 (holding that district court abused its discretion when it ruled on merits of movants’ intended claim in proceeding to lift stay). In other words, “if a claim *may* have merit—and factual development may be necessary to assess this—the district court will have to address the other *Wencke* factors.” *Acorn Tech. Fund, L.P.*, 429 F.3d at 438 (emphasis added); *see also ESIC Capital, Inc.*, 685 F. Supp. at 485 (concluding that the merits of the asserted claim were “substantial,” and that the movant would suffer “substantial injury” if the claim were not allowed to proceed).

Here, Acorn has clear Article 9 claims to the inventory, accounts receivable, trademarks and cash of Polaroid. Acorn’s claims are protected by the Fifth Amendment.

If the Court's Third Receiver Order is construed to stay Acorn's rights, then the Order is depriving Acorn of its constitutionally protected property rights. This deprivation has occurred without prior notice or an opportunity to be heard. Acorn's claims are far more than colorable, which weighs heavily in favor of relief from the stay.

Because all the factors enunciated in *Wencke* favor lifting the stay, and because of its constitutionally protected property rights, Acorn requests relief from the stay to pursue its rights and remedies claim against Polaroid, or for adequate protection of its interests.

#### **IV. CONCLUSION**

For the foregoing reasons, Acorn respectfully requests the Court to determine that, because the United States has not alleged a *prima facie* case, the stay should not apply to Polaroid. If the Court determines the stay does apply, however, Acorn requests the Court modify its Order to permit Acorn to pursue its rights and remedies under Article 9 against Polaroid.

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