UNITED STATES BANKRUPTCY COURT

DISTRICT OF MINNESOTA

In Re: BKY No. 08-46617

Polaroid Corporation,

Debtor.

BEFORE THE HONORABLE

GREGORY F. KISHEL

United States Bankruptcy Judge

* * *

TRANSCRIPT OF PROCEEDINGS

4-9-09

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Proceedings recorded by electronic sound recording, transcript prepared by transcription service.

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APPEARANCES

MR. JAMES A. LODOEN, MR. DARYLE UPHOFF and MR. GEORGE SINGER, Attorneys at Law, Suite 4200, 80 South Eighth Street, Minneapolis, Minnesota 55402 appeared on behalf of Debtor.

MR. GREGORY OTSUKA, Attorneys at Law, 13th Floor, 191 North Wacker Drive, Chicago, Illinois 60606 appeared on behalf of Polaroid.

MS. THERESA H. DYKOSCHAK, Attorney at Law, Suite 2200, 90 South Seventh Street, Minneapolis, Minnesota 55402 appeared on behalf of Polaroid.

MR. CHRIS LENHART and MR. MARK KALLA, Attorneys at Law, Suite 1500, 50 South Sixth Street, Minneapolis, Minnesota 55402 appeared on behalf of Hilco Gordon Brothers.

APPEARANCES (Cont'd)

MR. ADAM MEIER, Attorney at Law, Suite 2300, 150 South Fifth Street, Minneapolis, Minnesota 55402 appeared on behalf of Patriarch.

MR. GREGORY GORDON and MR. JIM KAREN, Attorneys at Law, 2727 North Harwood Street, Dallas, Texas, 75201 appeared on behalf of Patriarch.

MR. DAVID RUNCK, Attorney at Law, Suite 400,775 Prairie Center Drive, Eden Prairie, Minnesota 55344 appeared on behalf of Petters unsecured creditors.

MR. BRYAN KRAKAUER, Attorney at Law, One South Dearborn, Chicago, Illinois 60603 appeared on behalf of named Ritchie Capital.

APPEARANCES (Cont'd)

MR. JAMES M. JORISSEN, Attorney at Law, Suite 2500, 100 South Fifth Street, Minneapolis, Minnesota 55402 appeared on behalf of Ritchie Capital.

MS. AMY SWEDBERG, Attorney at Law, Suite 3300, 90 South Seventh Street, Minneapolis, Minnesota 55402 appeared on behalf of Flextronics.

MS. PETER KREBS, Attorney at Law, Suite 2100, 333 W. Wacker Drive, Chicago, Illinois, 60606 appeared on behalf of Harmer Group.

MR. MICHAEL ROSOW, Attorney at Law, Suite 3500, 225 South Sixth Street, Minneapolis, Minnesota 55402 appeared on behalf of Acorn Capital.

P R O C E E D I N G S

THE COURT: We are on the record and today's matters are continued hearings on motions in two related groups of Chapter 11 cases, different groupings jointly administered, the one being the grouping in which the lead case is that of the Polaroid Corporation, File 08-46617. The other being in the group in which the Petters Company, Inc. is the lead case, File 08-45257.

These matters were continued over from April 6th on motions by both Debtors for authority to sell certain assets and we should start off by Counsel noting appearances for the record and if anybody is back in the public seating I want you to speak loudly if you speak so we make sure that you're picked up by the recording system.

MR. LODOEN: Good morning, Your Honor. James Lodoen on behalf of Polaroid along with Daryle Uphoff and George Singer.

MR. OTSUKA: Good morning. Greg Otsuka from Paul Hastings. Theresa Dykoschak

from Faegre & Benson on behalf the Polaroid Official Committee.

MR. KALLA: Good morning, Your Honor. Mark Kalla and Chris Lenhart of Dorsey & Whitney on behalf of PLR Holdings and with us today in the courtroom are Mr. Raphael Klotz [sic] of Gordon Brothers Brands and Eric Kaupe [sic] of Co-Consumer Capital.

MR. RUNCK: Good morning, Your Honor. David Runck on behalf of the Petters unsecured creditors.

MR. JORISSEN: Good morning, Your Honor. Jim Jorissen and Brian Krakauer on behalf of Ritchie Capital.

MR. ROSOW: Good morning. Michael Rosow from Winthrop & Weinstine on behalf of Acorn Capital.

MR. WEINBERG: Good morning, Your Honor. Justin Weinberg from Gislason & Hunter on behalf of Ron Peterson.

MR. MEIER: Good morning, Your Honor. Adam Meier, Leonard Street & Dinard, on behalf Patriarch Partners.

MR. GORDON: Greg Gordon of Jones

1 Day also on behalf of Patriarch Partners and
2 Jim Karen, also Jones Day, on behalf of
3 Patriarch partners.
4 MR. KAREN: Good morning.
5 MS. SWEDBERG: Good morning. Amy
6 Swedberg on behalf of the Harmer Group as
7 local counsel and also Summit Technology and
8 Flextronics.
9 MR. KREBS: Good morning, Your
10 Honor. Peter Krebs of Skadden Arps on behalf
11 of the Harmer Group.
12 THE COURT: Other appearances to
13 note? All right. Good enough.
14 I will just say that -- let me just
15 establish one rule when we get down to
16 attorneys' argument. Those of you who are
17 from out of town, especially those of you who
18 haven't been regular fixtures in the
19 proceedings for the last several months in
20 these cases, just note your name when you
21 argue, if you would please, so the court
22 recorder can be sure to identify you
23 immediately and we don't have any questions.
24 All right. Well, I understand things have
25 been active over the last couple of days and

filings were made this morning, one of them fairly late coming, as well as yesterday afternoon. I have tried to get up to speed on them consistent with the demands of certain commitments on the home front that I had, so we're going to go forward.

Mr. Lodoen, I will turn the floor over to you.

MR. LODOEN: Good morning, Your Honor. If it would please the Court, we would request an opportunity to meet with the Court in chambers to apprise the Court on a couple of issues with respect to the sale process and those that would be participating in that would be the parties pursuant to the Court's order that we consulted with and worked with in determining what to propose as the highest and best bid, mainly that would be the Unsecured Creditor's Committee in this case, the Unsecured Creditor's Committee in PGW and PCI. Ron Peterson is not available, but I have spoken to him and have comments to relay on his behalf to the Court. It would also include counsel for the Acorn and Ritchie Group, so if the Court would grant

that request that -- we think it would be appropriate to proceed that way.

THE COURT: Well, we do have an objection by one of the bidders here to the matter going forward according to the procedures that have been happening over the last couple of days and I take it you would exclude counsel for both of them from this conference?

MR. LODOEN: We would exclude counsel for both of the buyers from the conference, yes.

THE COURT: All right then. Okay. Mr. Kalla, you're straining at the bit to be heard.

MR. KALLA: Yes, Your Honor. We were excluded from the last conference that was held after the last hearing that was continued to today and we relied on the order that came out of that hearing. We would very much like to be part of any such conference today.

THE COURT: All right. Counsel or Mr. Lodoen, why don't you --

MR. GORDON: I have to stay here,

1 Your Honor?
2 THE COURT: Go ahead. Come on up
3 to the podium. I would rather have you
4 heard.
5 MR. GORDON: Good morning, Your
6 Honor. Again, Greg Gordon, Jones Day, on
7 behalf of Patriarch and it's really Patriarch
8 on behalf of Lithograph Legends the other
9 proposed purchaser here.
10 Our preference would be as well also to be
11 included in any conference or even better to
12 have matters dealt with on the record in open
13 court.
14 As Your Honor is aware from statements I
15 think we made to the Court on Monday and also
16 from our objection that we think there's been
17 a bit of a lack of transparency with the
18 process to date and we would be in favor of
19 the matters being considered in open court.
20 Thank you.
21 THE COURT: Okay.
22 MR. LODOEN: Your Honor, may I?
23 THE COURT: Yes.
24 MR. LODOEN: Your Honor, we will
25 see to that for the time being. Ultimately

we would like an opportunity to have an in chambers discussion, but for the time being I think we can defer that and go on the open court record if that is the parties' preference, if that's the Court's preference.

THE COURT: All right. That would be quite frankly, you know, given the nature of Patriarch's submission today, I am getting a little leery of doing anything back in chambers with the exclusion of anybody who's pushing their way forward and by that I would include both of the bidders at this point.

MR. LODOEN: Your Honor, let me try to summarize what has transpired in the last -- well, in the hours since we were before the Court on Monday morning.

At approximately -- well, a couple minutes before 4:00 and a couple minutes after 4:00 on Tuesday we received the two bids from Hilco and from Patriarch.

At that point in time the value of the bids based upon the metric and summarized in the summary that we filed with the Court show the Hilco bid at approximately five million dollars superior.

1 From about 4:00 on until approximately
2 3:00 in the morning and resuming again about
3 8:00 the following morning, the Debtors and
4 their advisors and the parties referenced in
5 the Court's order were all engaged in review
6 and analysis of the bids, were reviewed and
7 asking questions, obtaining clarification,
8 all designed towards determining which of the
9 bids was the highest and best bid.
10 The Hilco bid on its face, given the
11 consideration, was viewed as the highest and
12 best bid at that time, but there are
13 questions and clarifications that needed to
14 be included in the Hilco documents.
15 The reason that's the case is because
16 prior to Monday the Debtor had been focused
17 on revising schedules and clarifying the
18 asset purchase agreement and the schedules
19 with Patriarch because that's who the Debtor
20 had believed it would be proceeding forward
21 to bring to the Court as the highest and best
22 bid.
23 As of that point in time -- as of Monday
24 the Patriarch's documents were in almost
25 final form and there wasn't much additional

1 work that needed to be done with respect to
2 those documents and those are the documents
3 that Patriarch filed on Tuesday.
4 The Hilco documents, on the other hand,
5 were not in -- as final form with respect to
6 clarification of points and with respect to
7 updating the schedules and making them more
8 current in terms of pure cost, et cetera,
9 simply because the Debtors had not had the
10 opportunity to be engaged with Hilco for the
11 several days prior to that particular --
12 prior to Monday, so the time from 4:00 on
13 Tuesday until early last evening when the
14 report and the -- and the Hilco documents
15 were filed with the Court was spent cleaning
16 up those documents, addressing clarification
17 issues and in large part spent working with
18 the various creditor constituencies to make
19 sure that everyone was in agreement that the
20 Hilco bid was the highest and best bid at
21 that time.
22 We submitted the Hilco bid as the highest
23 and best bid last evening and then after it
24 was submitted late in the evening we heard
25 rumblings and particularly Patriarch's

1 counsel told me on the phone that they would
2 be coming up here to -- to submit a new bid
3 and we did not see that until we awoke this
4 morning and saw the filings and did not know
5 what the bid would be until that time.
6 The Patriarch bid is -- is approximately
7 three million dollars higher than Hilco's in
8 terms of total value the way that everyone
9 has been valuing or everyone at least but the
10 bidders have been valuing the bid package as
11 part of the transaction and the Patriarch bid
12 also has approximately 17 million more of
13 cash and consequently less equity than does
14 the Hilco package.
15 I suspect the different constituencies may
16 view -- some may view the cash bid as
17 preferable, others may view equity as
18 preferable, but the important point is that
19 on a bottom value basis it's slightly under
20 three million dollars higher.
21 So we are -- we have been consulting
22 obviously with the Debtors and meeting with
23 Polaroid management this morning and also
24 with other parties and the Debtor's position
25 recognizing that the Court's order that setup

1 these procedures that was entered on Monday
2 contemplated a final -- a final bid process,
3 feel compelled to come forward in support of
4 the Patriarch bid at this time for three
5 reasons that the Debtors believe it to be a
6 higher and better bid.
7 No. 1, as I said, it has almost three
8 million dollars of additional value.
9 No. 2, it's a higher cash component and a
10 less stock component which the Debtors
11 believe is preferable.
12 And the third component is that the
13 Debtors believe that the business plan and
14 the representations of Patriarch includes
15 retaining employees, approximately 70
16 employees, of Polaroid.
17 Now, there's nothing in the documents that
18 requires Patriarch to do that, but that is
19 the understanding.
20 We have also provided when I walked in
21 this morning, Your Honor, a list of, I don't
22 know, 40 or 50 signatures of employees that
23 they had asked that we present to the Court.
24 I would do that if Your Honor will receive
25 it. The employees encourage the Court to

1 support the Patriarch --
2 THE COURT: On what basis am I
3 supposed to receive this, as an exhibit or
4 what? I am not going to take it over the
5 bench. All right. I am just not going to do
6 that.
7 With all due to respect to employees who
8 want to keep their jobs, I have got to act
9 like a court and just receive documents
10 either if put in an electronic format and
11 filed, I can't stop the clerk from accepting
12 it and the clerk can't stop anybody from
13 filing it, but I am not just going to take it
14 over the bench or give it any evidentiary
15 weight. I can't give it any evidentiary
16 weight without farming testimony.
17 MR. LODOEN: Okay, Your Honor.
18 THE COURT: I have got to do the
19 judge thing.
20 MR. LODOEN: So, Your Honor, I
21 think that this -- it does raise a bit of a
22 quandary, I would suspect, for the Court and
23 for -- and for the various parties here.
24 We have got a court order that does talk
25 about the process. On the other hand, as

1 fiduciaries to the estate, we have a proposal
2 that the Debtors believe is a higher and
3 better bid and believe that by accepting or
4 at least considering the Patriarch proposal
5 that was filed this morning that is a higher
6 and better bid now.
7 The Debtors recognize that we aren't in a
8 position just to say, okay, hey, Patriarch
9 and don't give Hilco another opportunity. I
10 think the Debtors proposed a resolution of
11 this given that the documents are final for
12 both parties. The documents are viewed as
13 even and -- and substantially similar in
14 terms of the deal points for both parties in
15 terms of contracts, switching, et cetera,
16 that we are in a position to go forward,
17 basically bidding on two items if the Court
18 would allow that at this time and that would
19 be more cash or more equity with respect to
20 the Patriarch bid and more cash with respect
21 to the Hilco bid because the Hilco bid is at
22 25 percent equity cap level that the
23 constituents had agreed to on Monday and that
24 is -- that's what we're presenting to the
25 Court and that the Debtors believe that in

1 fulfillment of their fiduciary obligation to
2 the Court we have to request that the Court
3 proceed on that basis.
4 THE COURT: All right. Again just
5 tell me exactly what mechanically you are
6 proposing right now, that I now preside over
7 a --
8 MR. LODOEN: I --
9 THE COURT: Let me finish what I
10 am saying.
11 That I now preside over a continuing
12 auction process or what?
13 MR. LODOEN: That would be one
14 alternative that would seem fairly
15 straightforward at this point in time because
16 all of the documents are in place and we
17 could show up at a designated time that was
18 workable for both the parties in
19 consideration of the religious holidays for a
20 number of people right now. I suspect this
21 would move into sometime next week and show
22 up and each party would have an opportunity
23 to just -- Patriarch would have an
24 opportunity to bid their cash or their equity
25 and each point of equity is valued at

1 $650,000.00. Hilco would have an opportunity
2 to bid more cash and determine at that point
3 in time who the -- who the winner is.
4 Alternatively if the Court does not want
5 to do that, I guess with those parameters we
6 could -- we could try to go back and conduct
7 that on our own and bring it back to the
8 Court.
9 I suppose an alternative would be to
10 have -- have the Debtor or their
11 professionals conduct it in the court room
12 and then advise the Court as to where it was
13 at and if there are any issues to be resolved
14 at that point in time we could knock on your
15 door and see if you would come out and
16 entertain them.
17 THE COURT: The third alternative
18 is the way Chapter 7 Trustees do it,
19 admittedly not for quite a complex of assets
20 like this, but the hearing on sale is noticed
21 out as being the place where countervailing
22 bids would be taken as long as an objection
23 is filed in advance and then an auction is
24 done not within my purview, not on the
25 record, and then I just take the bench after

1 that.
2 I am just throwing that out by way of
3 observation that that's a process that is
4 used, a functional mechanism anyway.
5 MR. LODOEN: The positive part of
6 all of this, Judge, even though we are not
7 getting to completion as quickly as had been
8 anticipated by various parties, is that the
9 value for the estate and for the creditors is
10 being sufficiently maximized and is
11 increasing and management views that as
12 important. We believe that the Creditor's
13 Committee will view that as important and I
14 can also tell you that the Receiver in his
15 capacity as a quasi board member of Polaroid
16 views that as important as well.
17 THE COURT: Okay. One point then,
18 you're basically suggesting then that each of
19 those parties, if bidding were to continue
20 under direction from me, each of those
21 parties then would be bidding on the basis of
22 terms and conditions already memorialized --
23 MR. LODOEN: Yes.
24 THE COURT: -- in their asset
25 purchase agreement. There would be no

1 further negotiation which seems to have been
2 one rather large impediment to getting to yes
3 on this.
4 MR. LODOEN: Yes, yes, yes and I
5 would not characterize it, Judge, as much
6 negotiation as clarification. We have got
7 copies of the -- of the bid packages here in
8 nice bound forms that we can distribute to
9 parties, including the Court if you would
10 like it, and you will see the magnitude of
11 the documents. I think probably the stalking
12 horse bid was originally filed and these are
13 a lot like that.
14 There's -- there's in excess of 500
15 different contracts being dealt with and it's
16 just inherent in going through the documents
17 that there are areas where they can be viewed
18 as ambiguous or unclear and we need clarity
19 and we're to the point now where we have got
20 two sets of documents signed by each bidder
21 that we are, absent some unknown
22 circumstance, prepared to represent to the
23 Court today that we're willing to proceed
24 with.
25 THE COURT: Now, if I am reading

1 the submission so far correctly, the two
2 bidders each want a slightly -- at least
3 slightly different array of assets, right,
4 but those components have been split out,
5 have been assigned values and it all kind of
6 goes out according to a structured --
7 MR. LODOEN: For example --
8 THE COURT: And retained or
9 excluded assets would be the ones that the
10 Debtor would keep. Those have been assigned
11 values at least by --
12 MR. LODOEN: Yes, and attached to
13 the revised summary and sale procedure that
14 we filed last night, we have Exhibit A.
15 One of the largest items of distinction is
16 the art collection. The art collection has
17 been excluded by Hilco, so the Debtors will
18 take it upon themselves to sell that art
19 collection. The Debtors have obtained
20 appraisals from Christie's, have an
21 understanding of what that art collection is
22 worth and believe that they will be able to
23 realize that value or more.
24 The Patriarch proposal anticipates
25 acquiring the art collection and they are, in

1 essence, paying six and a half million
2 dollars for the art collection according to
3 this schedule process.
4 THE COURT: All right. That's the
5 value that's been deemed to the art
6 collection by Houlihan?
7 MR. LODOEN: We have obtained an
8 appraisal from Christie's Auction House.
9 THE COURT: Okay.
10 MR. LODOEN: And this is the low
11 end of what we believe to be a conservative
12 estimate of what we can get for that art
13 collection. It's unknown. It would
14 anticipate that it would be sold sometime
15 this fall.
16 THE COURT: All right. So the two
17 sets of documents would be the already
18 executed proposed asset purchase agreements,
19 all of their attached exhibit schedules, et
20 cetera, et cetera, et cetera.
21 What else?
22 MR. LODOEN: Included with each of
23 those is an LLC agreement.
24 THE COURT: Right.
25 MR. LODOEN: It's my understanding

1 that neither of the LLC agreements have been
2 changed at all since they were submitted on
3 Tuesday at 4:00. We believe that's the case.
4 The LLC agreements were submitted in final
5 form. There are little differences between
6 them. One can be weighed one way. One can
7 be weighed the other, but on balance the
8 parties, at least the Debtors, view those LLC
9 agreements as -- as substantially similar.
10 THE COURT: Okay. Anything else
11 by way of sort of the organic documents that
12 would be part of the framework for bidding
13 going forward?
14 MR. LODOEN: Not that I can think
15 of, Your Honor.
16 THE COURT: All right. Well,
17 there will be some more questions, but I just
18 wanted to see just what the Debtor's position
19 was at this point, so that's your proposal
20 that bidding go forward based upon newly
21 produced heightened interest in acquisition
22 at a higher price on the part of Patriarch
23 and that it go forward on one of those three
24 procedures?
25 MR. LODOEN: That's right, Your

1 Honor. At the end of the day, the Debtors
2 believe it's about value. We have got two
3 bidders who have a different model in place
4 for this company.
5 We have got Patriarch who would intend on
6 using the license within it's own array of
7 companies principally and perhaps expand from
8 there and Patriarch is a company that
9 envisions keeping the -- kind of the
10 Minnesota group intact, whether that's for a
11 period of time or forever, we don't know, but
12 that is the contemplation.
13 Hilco intends on taking the brand and
14 licensing that basically to a lot of
15 different third parties in conjunction with a
16 model that they have used with other
17 acquisitions and would be generating value to
18 their entity by that scenario and then they
19 would simply be liquidating the other assets
20 that they are acquiring.
21 We have got a couple of a different
22 models, but at the end of the day the Debtors
23 are valuing the highest and best bid based
24 upon the -- based upon the value principally.
25 There are certain lesser considerations, but

1 ultimately based upon the value that's being
2 bid pursuant to the parameters which are now
3 cash and $650,000.00 per point of equity in
4 the NewCo.
5 THE COURT: And the backdrop of
6 all of this is at two different levels of
7 depth. No. 1, the Polaroid debtors do not
8 envision themselves as operating their way
9 as -- their own way out of Chapter 11,
10 reorganizing under the terms of a plan and
11 going forward with continuation of business
12 through their own corporate entities.
13 No. 2, the deeper backdrop here is, of
14 course, the overarching structure of the
15 Petters Company Chapter 11 cases and behind
16 them, of course, the receivership, the
17 criminal proceedings involving Thomas Petters
18 and all the rest of that and the --
19 ultimately the perceived need to liquidate,
20 reduce to value and then account for it
21 through criminal processes, civil processes
22 and bankruptcy processes, right? I mean
23 that's sort of the deep backdrop to all this.
24 MR. LODOEN: That's a fair
25 summarization, Your Honor, with respect to

1 the earlier two points that you mentioned,
2 and we would -- ultimately when we get to the
3 point of approving a final and best bid, we
4 would either proffer or submit testimony to
5 this effect that if there's no sale in -- no
6 sale occurs, the company runs out of it's
7 tort claim proceeds fund which is the
8 unencumbered assets by about June.
9 Thereafter, there's 25 million of cash
10 that has been set aside pursuant to the
11 earlier cash collateral agreement that
12 principally Acorn, perhaps the Ritchie folks,
13 and perhaps Ron Peterson on behalf of the
14 RLB -- RWB Chapter 7 proceeding in Chicago,
15 assert a security interest in. Those are all
16 disputed, but at this point in time they are
17 asserting interest in that cash and in order
18 to operate past about June we would need some
19 mechanism to free up that cash and it could
20 be challenging to come up with some type of
21 adequate protection when the company is
22 continuing to lose money on a regular basis.
23 The second reason that the company is not
24 proposing a reorganization plan is that under
25 any scenario it would not only need to use

its own cash, but it would need a substantial infusion of capital in order to move forward on a different business model and the company simply does not have access to that capital in these markets and given its circumstances in its Chapter 11 proceedings and given the circumstances surrounding it that you spoke to a few minutes ago.

THE COURT: All right. Well, this will come back around to you, I'm sure, but I want to hear everybody's first take on the Debtor's proposal and then -- well, let's see. We'll hear from Committee's Counsel first.

MR. OTSUKA: Thank you, Your Honor. Greg Otsuka on behalf of the official Committee of Unsecured Creditor's.

Your Honor, as Mr. Lodoen referred to, I think that the developments of this morning put many parties in this court and the Court itself in a difficult situation, including the Committee.

Unlike Mr. Lodoen, we had not heard from either Patriarch or the Debtors that Patriarch had intended to submit a new bid.

1 We just heard about it like the rest of the
2 world this morning when it hit the docket and
3 nevertheless, we are torn.
4 On the one hand we respect the Court's
5 order which we supported when it was entered.
6 We supported it because it in our view
7 provided finality to the process and it, in
8 essence, would resolve all of the various
9 objections by parties, what we considered
10 process type objections. It was clear and --
11 the way it was contemplated would lead to a
12 clear winner and as of 8:30 this morning,
13 that's where the Committee stood.
14 I would also say that under the Rules
15 there was nothing that prevented Patriarch
16 from making the bid that they now submit this
17 morning two days ago.
18 That said, on the other hand, of course,
19 the Committee has fiduciary duties to all
20 unsecured creditors and the committee has
21 been consistent -- consistent mantra along
22 with those fiduciary duties is our goals are
23 obviously to maximize the value to the
24 estate, what's the higher and better offer
25 and the Committee also has been very clear on

1 the record at the auction, on the record in
2 court and to all parties that the Committee
3 values cash as a means of consideration.
4 It's hard to ignore a new bid that puts
5 eight million dollars additional cash into
6 the estate.
7 So in the end I think that's where the
8 Committee comes out that recognizing our
9 fiduciary duties we would support accepting
10 at this point the Patriarch bid and I will
11 speak to that in a second under what
12 conditions.
13 As Your Honor will recall, after the
14 auction the Debtors have proposed that
15 Patriarch was the highest and best offer
16 received and that that -- Patriarch's offer
17 at that point, which I believe was 69.125
18 million in total consideration, should be
19 accepted as the winning bid.
20 At that point the Committee objected and
21 while we recognize that it's not an exact
22 mirror image, but at that point the Committee
23 objected and said Hilco's bid, which had been
24 rejected at the auction, would provide more
25 value to the estate on that basis, it should

1 be accepted, so we believe that the
2 consistent position is that as of right now
3 Patriarch's revised bid is the highest and
4 best offer.
5 That being said, we do not think that as
6 Mr. Lodoen suggested that Patriarch could be
7 declared the winner at this point by any
8 means and while I am not sure which of the --
9 what the best mechanism for determining the
10 winning bid is, I think that whatever is
11 proposed has to take into account first and
12 foremost not -- not being in the situation
13 again where, in essence, money is left on the
14 table.
15 So I understand the questions Your Honor
16 is asking regarding procedures and for
17 further bidding and I am not preparing to say
18 right now what I think is the best course.
19 All I would say is that if the Court is
20 inclined to accept the Patriarch offer that
21 Hilco definitely be allowed to continue in
22 the process as it choses.
23 Thank you.
24 THE COURT: Okay. All right.
25 Mr. Runck, and your constituencies, of

1 course, is the Creditor's Committee and the
2 Petters General and Petters Company cases
3 which has an interest here because Polaroid
4 is a subsidiary of Petters General, correct?
5 MR. RUNCK: That's exactly right,
6 Your Honor.
7 THE COURT: Just for the record.
8 MR. RUNCK: In addition, the
9 Petters' estates have claims against the
10 Polaroid estate, so we feel that we have an
11 interest in the outcome of this matter two
12 different ways.
13 First of all, as the creditors of the
14 parent company but also as the parent
15 company, Petters entities have direct claims
16 against the Polaroid estate.
17 Your Honor, when I was preparing for this
18 hearing I was preparing --
19 THE COURT: If such a thing is
20 even possible.
21 MR. RUNCK: I was prepared to come
22 in here and announce that the Committee has
23 withdrawn its objections and we
24 wholeheartedly support the Hilco bid for
25 these assets. Obviously this morning, like

1 the Polaroid committee, we were made aware of
2 the Patriarch bid.
3 Your Honor, our economic analysis in
4 comparison of the two bids is that the
5 Patriarch bid is clearly the higher bid. By
6 my view the Patriarch entity has increased
7 their cash portion by approximately
8 8.1 million and when you compare the total
9 amounts of the bids it looks like Patriarch
10 is three million higher than Hilco.
11 Your Honor, clearly our Committee's role
12 in these cases and the creditors' role in
13 these cases is to maximize value of the
14 estate. That's probably the most important
15 principle in bankruptcy law, so that's what
16 we're primarily concerned with.
17 We have to acknowledge, of course, that
18 the Patriarch bid is the highest bid at this
19 point in time.
20 Your Honor, on Page 8 of our objection we
21 cited Eighth Circuit cases that set forth
22 what we think is the law in the Eighth
23 Circuit on these issues which is the Court
24 has discretion to consider competing bids up
25 until the time it signs the order approving

1 the sale and I am referring specifically to
2 the Farmland case and the Food Barn case and
3 we think in -- of course, according to those
4 cases, Your Honor, the Court has to balance a
5 number of factors and the factors that the
6 Court balances when considering this issue
7 is, of course, the -- balance the factor of
8 maximizing value of the estate, but you also
9 have to balance the factor of finality and
10 integrity of the auction process and you have
11 to balance the factor of the reasonable
12 expectations of the bidders.
13 Your Honor, from my perspective my
14 committee doesn't balance three factors. We
15 only balance one factor which is maximizing
16 the value to the estate, so from that
17 perspective, like I said, we believe that the
18 Patriarch bid is the highest.
19 The Court has issued it's order on Monday
20 that set a clear deadline for submitting
21 bids. The Patriarch bid is clearly late and
22 in violation of that order, so I don't think
23 we're in a position to say whether or not the
24 Court should enforce the terms of its prior
25 order that was issued.

1 In the absence of that order we would
2 support Patriarch because it is the highest
3 and best bid and we believe, of course, that
4 the Court is inclined to support the higher
5 bid and maximize value to the estate then, of
6 course, Hilco needs to have an opportunity to
7 continue to participate in this process so
8 that neither bidder is prejudiced by this
9 decision.
10 Bottom line, Your Honor, I think we're in
11 a position that is very similar to the
12 Polaroid committee which is we're in a
13 difficult position. Our primary role, our
14 primary job in this cases is to maximize
15 value, so we have to acknowledge that the
16 Patriarch bid is the highest bid, but at the
17 moment, like everyone else in this room, I am
18 bound by your order that was issued on Monday
19 and so unless that order is relaxed in some
20 fashion, like I said, then we're bound by
21 that as well.
22 THE COURT: Okay.
23 MR. RUNCK: Thank you, Your Honor.
24 THE COURT: All right. Let's see,
25 I will hear from Ritchie, Mr. Jorissen,

1 Mr. Krakauer.
2 MR. KRAKAUER: Your Honor, Brian
3 Krakauer on behalf of Ritchie Capital.
4 First one housekeeping matter. We had
5 originally filed our objection to the sale
6 process with a motion for leave to file. I
7 just wanted out of precaution that some of
8 the information we had in there came out of
9 the Debtors data room and we were just
10 concerned about not violating the NDA. We
11 had signed -- there's not been an objection
12 to our motion for leave to file, so I just
13 wanted to make sure our objection -- our
14 leave to file was granted so our objection at
15 least is of record.
16 THE COURT: Run that one by me
17 again.
18 MR. KRAKAUER: When we filed our
19 objection on the 26th to the original sale
20 order, it contained some information we had
21 gotten from the Debtors --
22 THE COURT: Right.
23 MR. KRAKAUER: -- in their data
24 room pursuant to an NDA, non-disclosure
25 agreement, so as a precaution instead of

1 filing it we filed it with a request for
2 leave to file it so that there wouldn't be an
3 issue about violating the NDA and there has
4 not been an objection to our filing, so I
5 just wanted to make sure.
6 THE COURT: All right. This is
7 above and beyond what we are originally
8 concerned with on the whole sealing issue?
9 MR. KRAKAUER: Correct, Your
10 Honor. This is just to get our piece of
11 paper on file with the court, really just a
12 housekeeping issue.
13 THE COURT: I don't believe
14 anybody has objected and it's -- the horse is
15 out of the barn frankly.
16 MR. KRAKAUER: Okay.
17 THE COURT: I will grant that
18 leave.
19 MR. KRAKAUER: Your Honor, in
20 connection with where we are our perspective
21 is a little bit different than others who
22 have spoken before. We have viewed the
23 fundamental issue in this case really as to
24 what should be done with the Debtors and how
25 you best maximize value.

1 We -- and the law supports the fact that
2 what a debtor in possession is supposed to do
3 is try and reorganize and that it is only in
4 an extraordinary situation that you resort to
5 a 363 sale and that if it's possible to
6 reorganize, the company should do so.
7 We have not felt that enough attention was
8 given to the alternative of reorganization.
9 As we have looked at it, we see a very
10 critical, valuable asset which is the
11 Polaroid brand and I think the fact that the
12 bidding has gone on here and you have two
13 parties who are very intent on trying to
14 acquire these assets is indicative of the
15 fact that there is a great amount of value in
16 that brand and that handled appropriately and
17 marketed appropriately could generate a very,
18 very substantial value for this estate and
19 there are have been offers as recently as
20 last summer and valuations done indicating
21 hundreds of millions of dollars attributed to
22 the value of the brand, so there's something
23 there.
24 So that raises two questions. One, why
25 first can't you realize that value in an

1 auction process if you're even looking at it
2 and I think one of the answers to that is the
3 situation that we are currently in in the
4 economy. Financing is extraordinarily
5 difficult. Even with an active auction you
6 have very substantial limitations on people's
7 ability to raise cash and to bid with cash
8 and you are getting very active auctions, but
9 our view is that you would get more value by
10 focusing on trying to reorganize and get the
11 value of this company through that process
12 than you would by essentially exposing it to
13 primarily cash bids and that's been true, not
14 in this Court, but I think if you went around
15 the country over the last six months and
16 looked at what used to be a very standard
17 practice of putting things up for auction and
18 getting the highest cash bid you would find
19 in bankruptcy proceedings that does not
20 happen very much.
21 I have been in a few myself where that's
22 been attempted and the results have not been
23 very good. The fact that you're getting
24 activity here is an indication that there is
25 real value here but it's not necessarily an

1 indication that it's the highest or best
2 value.
3 The second issue is the points that the
4 Debtors is raising in terms of whether or not
5 there's a practical way to reorganize. They
6 have pointed to the cash burn which have
7 recited at about a million dollars a week and
8 they have pointed to the limitation on
9 resources.
10 In terms of the cash burn, that is based
11 on their current configuration of how their
12 employee bases and how their cost structure
13 is.
14 If you viewed this company as primarily
15 based upon -- primary value being in the
16 brand you would have a very different cost
17 base and you could very radically reduce the
18 number of employees, reduce the burn, and
19 stabilize this company in a way where --
20 where you could -- would not be having
21 anything like that burn and would have the
22 ability to reorganize.
23 The second -- the question of capital
24 resources in terms of the ability to -- to
25 reorganize. A branding strategy is not a

capital intensive strategy. There's an ability to do that off of working capital of certainly single digit millions a year in terms of a cost base and we have heard numbers in the 1, 2, 3 million dollar range in terms of actual costs that you incur in a branding strategy, so that's very, very much in the realm of what could be available. There's managements for hire to do those sorts of things.

What is true, I think, is that the strategy that this company was engaged in is a much more capital intensive strategy, so when the Debtors say they don't have the capital to pursue their business, what they are really talking about is the business they had been pursuing which is developing new and working with other companies like -- like developing new high tech products, trying to market those products and making money off of trying to put new products in the marketplace which will in some sense replicate the way Polaroid started with the Polaroid camera which was obviously fabulously successful at one point. That's an expensive strategy.

1 High risk. High reward. Put a lot of money
2 into something, if it works, then you're able
3 to generate many multiples of money you put
4 in, but you need a lot of money to do that.
5 I don't argue with that.
6 The branding strategy doesn't depend upon
7 that, so we have had an issue. It's not --
8 we have been raising this for quite some time
9 with the Debtors of just this strategy of
10 putting it up for auction, so I wanted to say
11 that for the record because we do believe if
12 that is the best alternative it's still
13 available. They can still do that right now
14 and the --
15 To the extent they are talking about cash
16 collateral issues, the parties that they are
17 talking about, who would object to the use of
18 cash collateral if it got to that point in
19 June and didn't cut back on expenses sooner,
20 are Ritchie, Acorn and Lancelot. The three
21 of us have all indicated an interest in the
22 branding strategy and the -- the bid that we
23 submitted, which was rejected by the Debtor,
24 was based on our belief that there was a lot
25 of value there and that bid was essentially a

1 credit bid, but it would allow -- would have
2 allowed to basically separate the assets or
3 basically in rough form said take all the
4 assets other than the brands, leave them
5 behind for the other creditors, we will take
6 the brand, the intellectual property, and
7 we'll take the risk that they are able to
8 develop something on that because we think we
9 can make a lot of money and let's split up
10 the pot. That was rejected, but it's our
11 view it should have been considered because
12 it does show a difference in view of what
13 should be done.
14 And then second in terms of the credit
15 bid, we do believe that that's something that
16 should have been considered. I won't belabor
17 that because we argued that before Your Honor
18 and you have made your decision, but in a
19 more normal process there would have an
20 opportunity for our (Unintelligible) to be
21 addressed by this Court and for a
22 determination to be made. We believe that
23 there -- it would be upheld and that makes a
24 diff -- given our belief and having the best
25 maximized value, that would have put

1 ourselves in a very different position and we
2 think that's what should have happened.
3 That is our basic view of where we are. I
4 realize it doesn't get to the issues, just
5 the more fundamental issues rather than the
6 issues that you're here with today.
7 I would make one point about that. There
8 is a discussion about measuring cash versus
9 equity. Our view on that in terms of these
10 bids is somewhat different. We do view the
11 equity component of what's being proposed as
12 being a very valuable component. We were
13 not, for instance, in favor or are in favor a
14 cap on the amount of equity they could bid.
15 We would value at least Hilco's equity
16 substantially higher than the Debtor is
17 attributing it. We have some questions
18 about -- more fundamental questions about
19 Patriarch's equity, certainly not for cash.
20 They are a very viable company and have the
21 ability to put in cash and complete a bid,
22 but their business plan is different and one
23 of the issues is simply that with regard to
24 Patriarch Lithograph a lot of the value they
25 appear to see has been talked about today is

1 by using the brand for their affiliates in
2 terms of their products and that may be all
3 well and good, may be a very viable business
4 strategy. I don't doubt that that might have
5 a lot of value to them and that's why they
6 are here, but in terms of being a minority
7 equity holder in the company that is spending
8 -- that is focusing on using the assets of
9 the NewCo, if you will, to supply to
10 affiliates, it puts a lot of stress on what
11 the deals are with those affiliates and how
12 the transfer pricing is actually done and
13 it's just very, very difficult to police
14 effectively whereas Hilco does not have that
15 model. They are selling to outsiders, so you
16 don't run into that problem.
17 They did -- Patriarch did put a provision
18 that's in there LLC agreement basically
19 saying that any agreement with affiliates has
20 to be done on market terms, but as a
21 practical matter that's just very difficult
22 to police and I am not faulting them for
23 proceeding that way. It's a very -- I don't
24 understand why they would want to engage in
25 that business strategy and they have made a

1 proposal to try and deal with it. It's just
2 effectively very, very hard to deal with it
3 and I think that does have an impact on
4 ultimately the value of their equity.
5 Your Honor, that's our view. Thank you.
6 THE COURT: All right. Thank you.
7 Okay. Mr. Rosow.
8 MR. ROSOW: Thank you, Your Honor.
9 Michael Rosow on behalf Acorn Capital.
10 Our objection has been and continues to be
11 the objection on the sale of these assets
12 free and clear of our liens. It doesn't seem
13 to me at this time that right now is the
14 appropriate time to address that issue.
15 I have talked with counsel for the Debtor
16 and I think that what makes sense to do is to
17 get through the issue that is primarily in
18 front of the Court and then come back and
19 deal with the objection that we have at a
20 later time, unless the Court wants me to do
21 it now.
22 THE COURT: No, I don't think I
23 need you to expand on it because it's --
24 again, because of recent developments I am
25 going to say this once again, it's not quite

1 ripe, but it would be at the time that an
2 actual proposal for sale, that is the final
3 one proffered by the Debtors, is presented to
4 the Court and then it's at that point that
5 the question of whether the sale should be
6 free and clear would be ripe.
7 MR. ROSOW: On the issue that's
8 presently in front of the Court, we don't
9 take a position.
10 THE COURT: Okay. Well, Mr. Kalla,
11 Mr. Lenhart.
12 MR. KALLA: Thank you, Your Honor.
13 Your Honor, I think it seems like most of
14 the people who argued in front of you today
15 were in effect saying, gosh, we have been
16 bribed with a lot of cash at the last second
17 but we really think that the integrity of the
18 process should be upheld and, Your Honor, I
19 think the real issue here today, especially
20 after your order earlier week, is whether you
21 follow the procedure established and take
22 into consideration the finality and integrity
23 and expectations of the party as Mr. Runck
24 stated or whether you can allow somebody to
25 come in and completely ignore the process,

1 put in a low ball bid on a sealed bid
2 procedure, holding a higher bid in hand to
3 wait and see if anybody else came out with
4 another bid and then at the last second come
5 in with apparently cash and apparently
6 documents, none of which many of the parties
7 have seen and --
8 THE COURT: I don't want to
9 overstate this, but I am tempted to get a
10 little rhetorical here. Any bidder that
11 participated in that rather agonizing process
12 that ran over two days on the 30th and 31st
13 shouldn't be accusing anybody else of low
14 balling the offer. That went forward by fits
15 and starts very slowly with lots of haggling.
16 MR. KALLA: Your Honor, we have a
17 lot of complaints about that process and in
18 fairness a bidding process is dynamic and
19 you're right.
20 THE COURT: You can say what you
21 want to about the process, but your client
22 didn't pony up meaningfully in large
23 increments until it absolutely was forced to
24 and neither did Patriarch, did they?
25 MR. KALLA: They did, Your Honor.

1 THE COURT: Did your client?
2 MR. KALLA: Yes, they did, Your
3 Honor.
4 Just for the record, Your Honor, if I can
5 briefly describe from our perspective what
6 happened here. We weren't the original
7 stalking horse. We negotiated this bid very
8 hard. We came up with an APA. The day we
9 were ready to sign it, the Debtor decided to
10 go with another stalking horse, so we were
11 very involved in the process at the
12 beginning.
13 Then we came into town on Sunday night.
14 We negotiated documents. We had a bid that
15 topped the stalking horse bid. We were a
16 qualified bidder. We stayed up through a
17 bomb scare in the office when we were
18 working. People worked until six in the
19 morning. Then we went through the two days
20 of bidding that you've seen and maybe you
21 have read on the transcript.
22 At the end of that process -- in the
23 middle of that process, Your Honor, the
24 Debtor promised us a break up fee if we
25 continued to bid and at that point we

1 submitted a bid that was seven million
2 dollars higher. At the end of the process
3 even the Debtor's financial advisor will tell
4 you, would testify, that we had the highest
5 and best bid, but they felt bound by this
6 secret agreement that wasn't revealed to us
7 as a bidder to go with the other bid.
8 They never said that the Patriarch bid was
9 the highest and best. They just said that
10 they were going with it and their financial
11 advisor would say our's was the highest and
12 best bid, so Your Honor, that's what brought
13 us to Tuesday.
14 The Creditor's Committees were outraged
15 with the process and also thought our's was
16 the highest and best bid and that's why we
17 came before you this week, Your Honor, to
18 reopen that process.
19 Now, people did complain about the process
20 here and we didn't say much about it because
21 you established a procedure that seemed very
22 clear and we were willing to live by that.
23 We were willing to bid at that hearing, Your
24 Honor, and I am asking you just to uphold the
25 integrity of your order which seemed very

clear to me.

Your Honor, I looked at the order again this morning and if you just go through it, Item No. 1, the final bids shall be presented before the Court today. I am not sure where that's at.

Item No. 2, that the improved bids had to be submitted by 4:00 p.m. on Tuesday. We submitted our bid all signed up by 4:00 p.m. on Tuesday and I don't think Patriarch did. Maybe they were a couple of minutes late. I don't know. We were on time. They weren't.

Then your order said, and I think this was negotiated by the parties, said Houlihan could not disclose such bids until 4:00 and it seems to me that the apparent clear purpose of that was you didn't want one bidder to look at the other one's bid and then change its bid. This was a sealed auction. Parties were supposed to come up with their highest and best bid.

You also said in the next paragraph that the parties could do no additional due diligence before that bid was submitted. Well, I submit, Your Honor, that I think

1 Patriarch has been doing a lot of due
2 diligence since our bid was in. I don't know
3 why there's a bunch of employees here, but I
4 suspect that's part of it.
5 Mr. Lodoen came here today and suggested
6 that they were bound to hire a lot of these
7 employees and that was pursuant to the
8 documents that were allegedly submitted today
9 by Lithographic Legends. We just got a copy
10 of this unsigned asset purchase agreement
11 this morning and it doesn't say what they say
12 it is. They have absolute discretion to drop
13 various contracts prior to closing, large
14 rejection damages resulting. They have no
15 requirement to hire any employees. If you
16 look at Paragraph 5.C it says no right to
17 employment. They have complete discretion
18 not to make any of those offers.
19 It refers to transition agreements which
20 we haven't seen copies of and they say they
21 think that the LLC agreement that they had
22 hasn't changed. The prior LLC agreement we
23 had allowed them to completely eviscerate a
24 claim on the equity by diluting it
25 completing.

1 Now, I don't know if that's still the
2 case, Your Honor, but that's what the
3 document that we were just handed says, the
4 unsigned document.
5 We twice provided signed, fully executed
6 documents with a bid that we were told was
7 the highest and best bid, including
8 specifically the one setup by your order.
9 Now, I didn't get news of this other bid
10 until this morning. Your Honor, a
11 significant national holiday started
12 yesterday, Passover. We came here having
13 been told last night and seeing the filed
14 document that we were the highest and best
15 bid. We were prepared to close on our bid as
16 early as next week and, Your Honor, I think
17 the Debtor will tell you that there's
18 probably a million dollars burn a week on
19 this process.
20 I don't think we can participate in an
21 another bidding process before Thursday just
22 because of how many people are observing
23 Passover.
24 So Your Honor, again, it's hard to maybe
25 get a complete feel for that auction by just

1 reading a transcript or listening to what
2 people said about it, but I think that we
3 resolved that at the last hearing before Your
4 Honor through this process of what happens in
5 a sealed bid.
6 Now, there will be other sales in these
7 Petters related cases and other sales before
8 Your Honor in this District. If people think
9 that they can go to a sealed bid process with
10 two bids and comply or largely comply with
11 the process setup and submit the lower bid,
12 but then the next day before the hearing
13 suggest that they have a higher bid with cash
14 all incomplete dereliction of the duty, that
15 kind of pocket bidding, it doesn't promote
16 the highest value in this case or in any
17 other case.
18 You know, when is finality a real thing.
19 When does an order mean what it says it
20 means.
21 THE COURT: At least in the
22 abstract though how did the sealed bidding
23 promote highest value if then another party
24 came forward after that and said gosh, we
25 really think it's worth more to us now.

1 MR. KALLA: Yes, but if you
2 have --
3 THE COURT: I mean it's sort of a
4 pox on both your houses, isn't it?
5 MR. KALLA: It is. It is.
6 THE COURT: I mean neither of
7 these -- both of these parties held a lot of
8 cards back from a head on head process that
9 was structured up and went on over the course
10 of two days.
11 MR. KALLA: Well, Your Honor,
12 nobody submits in an open auction probably
13 their highest bid and even if they did submit
14 their highest bid when another bid comes in
15 they would reconsider it. In our case we had
16 numerous discussions with various of the
17 principals of my client, but we thought that
18 this process here was to submit the highest
19 and best bid and it was very --
20 THE COURT: Which process are you
21 talking about though? We have had at least
22 two of them.
23 MR. KALLA: Right. I guess we
24 thought both were, but clearly after the
25 disappointment of the initial process, your

1 order is very clear. There's nothing unclear
2 about your order, Your Honor, about when a
3 final bid should be submitted. Now, yes, you
4 had the discretion to -- ultimately it has to
5 come before a judge who says this is the
6 highest and best bid and conceivably somebody
7 else could come in with a bundle of cash and
8 you would approve that, but in this case,
9 Your Honor, are you going to allow someone to
10 thwart the order in this way?
11 If they had a higher bid -- our bid was
12 about ten million dollars higher than our
13 list bid. They held one back which the
14 Debtor's Counsel said today was five million
15 dollars less than our bid. Now, they can
16 come in at the last second and submit a cash
17 bid without documents reviewed by anybody.
18 Your Honor, I just think the integrity of
19 the process is severely undermined if parties
20 don't have to follow the order and can submit
21 cash and unexecuted documents at the last
22 moment and subvert the process.
23 For those reasons, Your Honor, I think the
24 Court should approve the bid of PLR Holdings
25 as the highest bid, the one that followed the

1 rules, was submitted according to the
2 procedures set out in the order and was
3 clearly the highest and best bid. It's
4 executed. It's ready to go. My clients can
5 close next week and save the estate a million
6 dollars a week.
7 Thank you.
8 THE COURT: All right. Just a
9 minute, Mr. Kalla. So, for instance, under
10 the Eighth Circuit's opinion in Food Barn
11 Stores, is that what you're structuring --
12 MR. KALLA: Yes.
13 THE COURT: -- your argument
14 under?
15 MR. KALLA: Yes.
16 THE COURT: So you think integrity
17 of the process at this point and given the
18 history here is the value that has to sort of
19 prime itself over the others.
20 MR. KALLA: I think they are all
21 important, Your Honor. Their bid today is
22 illusory. Nobody has had a chance to vet it.
23 You heard several people say they didn't get
24 it until this morning.
25 But also, Your Honor, it really erodes the

1 integrity of the process. I think that the
2 finality of our prior order setting up this
3 procedure, the expectations of parties coming
4 in to bid -- you know, who's going to come
5 into bid or who's going to submit a high bid
6 if they can all always supplement it at the
7 last second in spite of a clear court order.
8 THE COURT: But ultimately,
9 though, the Eighth Circuit in Food Barn and
10 Farmland Industries did toss it back to the
11 discretion of the bankruptcy court weighing
12 all these facts.
13 MR. KALLA: It's always in your
14 discretion, Your Honor, and again I urge you
15 to -- this process has been flawed.
16 The one thing that hasn't been flawed is
17 the order that you signed setting up this
18 procedure and I think that will give people
19 the courage to come in and follow the
20 procedures and bid their best bid.
21 THE COURT: All right. Thank you.
22 All right. On behalf of the Patriarch now,
23 Mr. Gordon.
24 MR. GORDON: Good morning again,
25 Your Honor. Greg Gordon, Jones Day, on

1 behalf of Patriarch.
2 I did want to respond to some of the last
3 comments that were made. I mean to suggest
4 that our bid is illusory is an incorrect
5 statement. That bid was submitted based
6 on -- the same documentation that was
7 submitted on Tuesday. That documentation has
8 been fully vetted to suggest otherwise is
9 incorrect. That was fully vetted, fully
10 negotiated with the Debtors. They can come
11 back and either confirm what I say or deny,
12 but I assure Your Honor that those documents
13 have been fully negotiated.
14 It's also not true that it's not signed.
15 Those documents are signed as well and we're
16 prepared to move forward on those documents
17 and, in fact, the only change in those
18 documents is that we had to change the date
19 to move the date forward and we had to
20 increase -- and we agreed to increase the
21 cash consideration by 8.1 million dollars.
22 One of the things, Your Honor, I thought I
23 would start with just so the record is clear,
24 Your Honor has heard about the bid, but I
25 thought it might be helpful for Your Honor

just to be sure we're all on the same page. If you look at the exhibit that was attached to the revised report submitted by the Debtors which shows the comparison of the three bids, just to show you where we have moved, Your Honor, all you have to do is look at the top box that has 47.625 million dollars in cash, add to it 8.1 million dollars, that's the change in our bid. That takes the cash up to a net number of $59,725,000.00. We also have to pay the break up fee and expense reimbursement which is another 1.7 million dollars and then otherwise, Your Honor, the bid stays the same, so the assets that we excluded that are valued stay the same. The amount of the equity stayed the same.

Then Your Honor if you go down to the bottom of the chart if you simply add the 8.1 million dollars to the bid at the bottom it moves that bid from $65,700,000.00 to $73,800,000.00. I hope I didn't move too quickly there Your Honor. I had to note it for myself.

THE COURT: No.

1 MR. GORDON: From our perspective,
2 Your Honor, there's simply no question and I
3 don't think anyone is disputing it here
4 today, that this bid as submitted to the
5 Court is now the highest and best bid not
6 only by virtue of the fact that it's the
7 highest amount of consideration. It's by far
8 the highest amount of cash over, 17 million
9 dollars in additional cash.
10 It also leaves behind fewer assets which
11 addresses an execution risk that the -- some
12 of the parties have addressed throughout this
13 process and there's a risk that the estate
14 keeps these assets, liquidates, and doesn't
15 realize the numbers that are actually
16 reflected so there's actually a lower
17 execution risk as well.
18 I should also point, Your Honor, as you're
19 aware, Patriarch was obviously qualified as a
20 qualified bidder at the very outset of the
21 process. It started out as basically in
22 first place as the auction began, so there's
23 no question about the ability or the
24 financial wherewithal of Patriarch and I
25 don't know if Your Honor is aware of what

1 Patriarch is, but Patriarch is a very large
2 private equity fund. It manages about six
3 billion dollars in assets and it's in the
4 business of acquiring distressed companies
5 and rebuilding those companies and that's
6 what's intended in the case of Polaroid.
7 This is a75-year old company with an
8 iconic brand, significant history and
9 Patriarch's objective here is to acquire the
10 assets and rebuild that company and to do
11 that in partnership with the employees of
12 Polaroid.
13 Now, in our view, Your Honor, the process
14 should be reopened and it should be made
15 public and we would advocate an open auction
16 process that's supervised in some respects by
17 the Court and really, Your Honor, I say that
18 for all the reasons that Your Honor made the
19 decision you made on Monday.
20 I think I stood before you on Monday, Your
21 Honor, and made virtually the same arguments
22 that counsel for Hilco made this morning and
23 you overrode my objection and I tried to
24 learn from that.
25 THE COURT: Your client didn't

1 learn enough to come forward with a blow them
2 out of the water bid, did it?
3 MR. GORDON: Let me comment on
4 that, Your Honor, because we came in with a
5 bid that was -- we were at 59.1 million. We
6 came in with a bid at 65.7 million, that's a
7 significant increase over the bids,
8 particularly -- I know Your Honor has taken a
9 look at the transcript. You saw the fits and
10 starts. We were moving.
11 Our initial bid went up about 6 and half
12 million dollars in the auction. We were
13 trying to move it ahead. We weren't making a
14 low ball bid. We thought that was the
15 winning bid and we were surprised to find out
16 in the early evening last night that -- what
17 the nature of the Hilco bid was and I had a
18 conversation with Ms. Lynn Tilton who was
19 founder and chief executive officer of
20 Patriarch Partners and, Your Honor, I should
21 point her out to you because she is here in
22 the courtroom sitting right in the back there
23 about three rows back, she's waving to you,
24 but we had a conversation literally within
25 five minutes after we found out what the

1 amount was.
2 Ms. Tilton feels very strongly about this
3 company. I know she's prepared to testify
4 today if Your Honor is interested to tell you
5 what her business plan is because some
6 statements have been made about her business
7 plan that aren't accurate I don't think.
8 She's prepared to do that.
9 But within five minutes we had a
10 conversation and she was prepared to bid more
11 and at that point we put the wheels in motion
12 to put together an objection to improve the
13 amount of the bid. We contacted Debtor's
14 counsel at that point and let them know it
15 was coming and we filed it as soon as we
16 could.
17 People were literally working all night to
18 try to move this forward. I apologize to the
19 Court because I know it's frustrating for the
20 Court to get filings relatively shortly
21 before a hearing of this magnitude, but I
22 assure Your Honor we did the best we could to
23 get it here as fast as we could based on the
24 schedule that unfolded yesterday.
25 Now, the reasons, Your Honor, that I would

1 note, and I will try to be relatively brief
2 here, while we think it's appropriate for you
3 to move forward with a further auction
4 process here and basically make further
5 modifications in light of Tuesday's orders
6 is, No. 1, the process itself.
7 I think virtually every constituency in
8 this case has come up to the podium or filed
9 pleadings indicating that in one way or
10 another in their view the process was flawed
11 and I don't need to get into that, but I
12 noted on the plane coming up this morning --
13 I mean literally every objection that was
14 filed had one complaint or another and we had
15 our own complaints, as Your Honor knows from
16 my presentation on Monday. Rules not being
17 enforced, rules changing, rulings being set
18 then ignored, lack of transparency,
19 allegations of secret agreements and the
20 like. You have heard all of that.
21 In our view Your Honor made a decision on
22 Monday which is over our objection, we
23 weren't happy about it, but it was a decision
24 to move forward with bids submitted under
25 seal. That doesn't assure an open -- an open

1 process in our minds.
2 The 363 typically keep contemplates where
3 you have an open auction people can make bids
4 out in the open, other parties who are there
5 can respond out in the open.
6 All this was was basically a one and done
7 after an in chambers conference and a meeting
8 among lawyers excluding the bidders and all
9 that and even -- we had concerns yesterday,
10 Your Honor, because you know, noon obviously
11 came and went. Your order said that the
12 report had to be filed by noon. It came and
13 went. We were calling, emailing trying to
14 find out what was happening we literally
15 didn't find out, I don't think, until 7:00
16 last night what had happened and we're not
17 certain why.
18 THE COURT: There's no monopoly of
19 grievance for other party's delay in this
20 case, is there?
21 MR. GORDON: No.
22 THE COURT: Everybody has a gripe
23 against everybody else.
24 MR. GORDON: I agree. That's
25 really my point, Your Honor. Every party has

1 a complaint against the process and I'm sure
2 people are complaining about Patriarch.
3 We're complaining about other parties. I
4 agree with that statement.
5 The only point I am making, Your Honor, in
6 light of that, we should make this an open
7 process. Now, we submitted our bid to the
8 court. We wanted it to be out in the open.
9 We think if there should be a further auction
10 here, which we're fine with, we're prepared
11 to go, it should be in open court. It should
12 all be in the open. Let's eliminate the
13 objections. Let's eliminate any appearance
14 of tainting the process and do it publicly
15 and be done with it, whatever the highest and
16 best bid is, it is.
17 As Mr. Lodoen pointed out, the good news
18 at this point -- this is a very complex array
19 of assets. It's been very hard to get bids
20 down to apples to apples. We're to that
21 point now in every respect because not only
22 do we have all the valuations of the
23 respective assets, but each party has
24 completed agreements and the bidding is
25 greatly simplified over the problems we had

1 at the auction well over a week ago.
2 I think the second thing I would point
3 out, Your Honor, and the parties have said
4 this already, the paramount aim here it seems
5 to me from the perspective of these estates
6 is to obtain or achieve the highest and best
7 bids and again many of the constituents, if
8 not all of them, either in the objections
9 they filed or their appearances in front of
10 Your Honor have said exactly the same thing,
11 that's their goal to do that, that's why we
12 had the objections that were filed last
13 Friday which we obviously disagree with about
14 the auction being prematurely closed, that
15 further bidding should have been permitted.
16 The parties had a fiduciary duty to stand by
17 and obtain the highest and best bids and I
18 think you have heard similar comments by the
19 principle parties in interest this morning
20 and again we think it's indisputable that we
21 now have the highest and best bid.
22 We believe you have the authority to do
23 it. You have already had a discussion with
24 the other attorneys about that and I won't go
25 back over that, but the Eighth Circuit has at

1 least two, if not three, cases it seemed to
2 address the fact that until the sale order is
3 entered this Court has wide latitude and wide
4 discretion to make adjustments in the process
5 to ensure that the estate achieves the
6 highest and best bid.
7 And then lastly, Your Honor, I will point
8 out and I sense that you were somewhat
9 irritated about this earlier, and I do want
10 to point out that Patriarch had nothing to do
11 with this. There is an issue of jobs at
12 stake here as well.
13 We have a completely different business
14 plan than Hilco has. Our bid contemplates
15 the assumption and continuation of the
16 Minnetonka lease and the use of those
17 employees. The Hilco bid clearly does not.
18 It's a liquidation business plan versus our
19 plan and our intent, as I said before, is to
20 work in partnership with the Polaroid
21 employees to rebuild this company.
22 So in conclusion, Your Honor, I would just
23 say that you have before you now what we
24 believe is a significantly higher and better
25 bid. We think it's indisputable. We signed

1 the documents.
2 I've indicated Ms. Tilton is here. She's
3 ready to address Your Honor to testify if you
4 think that's appropriate and it seems to me
5 you've been urged in the past by the parties
6 in interest to continue the process if it was
7 possible for these estates to get a higher
8 and better bid. I think you have done it
9 once. You can certainly do it again for the
10 same reasons. I think, Your Honor, there is
11 clearly ample authority from the Eighth
12 Circuit to do that.
13 Thank you, Your Honor.
14 THE COURT: Let me ask you, if you
15 state that your client would be willing if I
16 ordered it to participate in a renewed open
17 bidding process, tell me what you think about
18 mechanically how that should be setup.
19 MR. GORDON: Well, I think -- I
20 think the last two suggestions that
21 Mr. Lodoen made, either one would be fine. I
22 think they should be in the court. I think
23 there should be a transcript like there was
24 before so there's no question about that and
25 I think either Your Honor should preside over

it, if Your Honor is willing to do that, and I'm sure you have a busy schedule and maybe that doesn't work, or at a minimum if Your Honor were available so that if disputes come up those disputes could be addressed. Either of those alternatives from my mind would be fine and I think if that were to happen that would eliminate -- there's been a lot -- as you put it, you put it better than I did, a lot of complaining between the parties as to who did what to whom. That could all be overcome, I think, if the process is opened up and supervised by the Court or the Court is available, readily available to handle disputes.

THE COURT: What sort of disputes should I be sticking my nose into in administration of the assets of the estate? That's not really what a judge is all about under the structure of the Bankruptcy Code.

MR. GORDON: That's true, but I think it is the responsibility of the Court to ensure that there's been a fair process and a process with integrity that provides at least an appearance, if not certainty, that

1 the highest and best bid can be obtained.
2 THE COURT: Well, if it just gets
3 stripped down to numbers, which I think is
4 what's being said here by the proponents of
5 reopening it, everybody goes ahead, bound or
6 consenting to be bound, by the form of asset
7 purchase agreement LLC documents and so
8 forth, then you literally are just out
9 numbers.
10 MR. GORDON: I don't disagree with
11 that, Your Honor.
12 THE COURT: So why do I stick my
13 nose into any of that? Where do the disputes
14 come up?
15 MR. GORDON: Well, I'm certainly
16 not suggesting you would be sticking your
17 nose in disputes about numbers and the like,
18 but it's impossible for me to stand in front
19 of you and try to imagine any scenario that
20 might come up, but you saw the transcript.
21 We have admittedly got two aggressive bidders
22 here. I just can't even forecast what the
23 issues might be.
24 My only request is that if there's an
25 issue that comes up that arguably to go to

1 the integrity of the process in some way, and
2 I can't tell Your Honor what it might be, but
3 Your Honor would be available to address it.
4 THE COURT: All right.
5 MR. GORDON: Thank you very much.
6 THE COURT: All right. Well,
7 everybody has had one shot. I will give them
8 all one more on what I should be doing here.
9 Mr. Lodoen.
10 MR. LODOEN: Your Honor, for the
11 Court's convenience I have got two documents
12 here I have marked as Debtor M and Debtor S.
13 Debtor M is a -- what I would characterize
14 as a neatly organized form of the Hilco bid
15 that was filed last night.
16 Debtor S is the Patriarch bid that was
17 submitted at -- on Tuesday and it's my
18 understanding from Patriarch's Counsel that
19 there are just the two minors changes, the
20 date and the cash amount in the one that was
21 filed this morning, so I would just give
22 those to the Court for convenience purposes
23 if the Court would want to take them or I
24 could not even call them an exhibit, just
25 give them to the Court for convenience

1 purposes, whatever the Court would prefer.
2 THE COURT: Well, you know, I can
3 really only take cognizance of it if it's a
4 filed document or if it's received as an
5 exhibit.
6 I suppose what I could do is ask if
7 anybody has any problem with me accepting
8 those as exhibits even though we don't really
9 have an evidentiary issue at this point.
10 Does anybody have any problem with that?
11 And I am not sure what utility they would
12 provide to me for the determination on the
13 somewhat more abstract issues I have got, but
14 not hearing any objection, I am going to go
15 ahead then and I will take into evidence what
16 have been marked as Debtor's Exhibits M and S
17 for whatever use I end up making of them
18 which I don't envision at this point.
19 MR. LODOEN: I can tell you we
20 have given a copy of the Patriarch one to
21 Hilco's Counsel earlier this morning and we
22 also have three or four more copies for
23 Counsel if anybody else wants those after the
24 hearing.
25 Also, Your Honor, I neglected to mention

1 when I was up here the first time that we
2 spoke with Ron Peterson this morning and
3 Mr. Peterson's position, to quote him, he
4 said, well, I'm probably a bit old fashioned
5 and think that the bids as submitted pursuant
6 to the Court's order and rules are the bids
7 that should be considered, so I am leaving
8 that the Court for --
9 THE COURT: Maybe I ought to let
10 his Counsel verify that.
11 MR. WEINBERG: That's true, Your
12 Honor. I didn't speak before because I
13 wasn't going to really add anything to what
14 the other people already said.
15 THE COURT: I am afraid I ignored
16 you, but you could have pushed your way
17 forward and I wouldn't have taken offense.
18 MR. WEINBERG: Absolutely. Thank
19 you.
20 THE COURT: Okay.
21 MR. LODOEN: Your Honor, there's
22 just two or three point that I want to
23 follow-up on that arose from the presentation
24 of the different parties.
25 First of all, Ritchie's Counsel really

1 talks a lot about valuing. I can tell Your
2 Honor that -- that I believe we have got in
3 our -- in our moving documents at some point
4 that 426 million dollars was paid for this
5 company when it was acquired by PGW back in
6 the spring of 2005.
7 We're prepared to ultimately offer into
8 evidence, if we don't have it in by virtue of
9 our motion pleadings already, the
10 approximately 145 million dollars of assets
11 have been sold to date, so in terms of core
12 assets what is left is really 280 million of
13 assets.
14 THE COURT: At a 2005 valuation?
15 MR. LODOEN: Right, right and
16 there are other reasons why -- you know, why
17 we think that the price was significantly
18 overpaid for at that point because of various
19 liabilities that weren't known, but we won't
20 get into that at this point.
21 The point is we're really approaching 100
22 million dollars of value here for Polaroid
23 when we take the various bids and the cash
24 that's on the table and while that doesn't
25 arise to 281 million, given the conditions

1 back in 2005 and the conditions today and the
2 particular market and economy, we think that
3 it's a noble effort and certainly
4 substantial, substantial increase from the
5 stalking bid, from the discussions with Hilco
6 before they were the stalking -- before the
7 stalking bid occurred and where we are at
8 today. We think that's progress.
9 We take some umbrage with the various
10 parties' consideration that the auction
11 process was flawed and I don't want to get
12 into that again either, Your Honor, but the
13 simple fact of the matter is that the parties
14 could bid cash and bid equity up to
15 20 percent and before the auction closed at
16 the end of the day parties had the
17 opportunity to bid cash and equity up to
18 20 percent. The parties were always bidding
19 with cash. They were always bidding with
20 equity that was valued the same for either
21 party. We think that made for a fair
22 process.
23 Now, it was a flexible process. It was a
24 contentious process. It was an aggressive
25 process. There was a lot of posturing being

1 done by the two bidders, but at the end of
2 the day, Your Honor, we don't believe it was
3 a flawed process and we believe that the
4 process has not only not been flawed, but
5 it's a maximized value for the estate and I
6 will leave it at that.
7 Unless the Court has any additional
8 questions, we remain committed to our earlier
9 position that the Debtors believe that the
10 Patriarch proposal presently is the higher
11 and best offer on the table and that its
12 fiduciary obligation to the -- as debtors in
13 possession to parties in interest, creditors
14 and the estate, that it is supporting that
15 offer at the moment and in order to be fair
16 going forward Hilco and Patriarch ought to
17 have an opportunity to bid on the cash -- a
18 cash equity basis that I proposed earlier in
19 some process at a future date that's
20 convenient to both parties.
21 THE COURT: All right. I don't
22 think I have got any other questions right
23 now. Okay. Anything from the Committee?
24 MR. OTSUKA: No, Your Honor.
25 THE COURT: Okay. Mr. Runck,

1 anything?
2 MR. RUNCK: No. Thank you, Your
3 Honor.
4 THE COURT: Mr. Krakauer?
5 MR. KRAKAUER: Very small point,
6 Your Honor. Just trying to understand what
7 was being proposed to be sold, there was at
8 one point a real estate asset called Watch
9 City Development Properties which was a large
10 piece of commercial relocated some miles
11 outside of Boston and for a while,
12 particularly last summer and fall, the --
13 Polaroid was saying that that had a lot of
14 value. We have inquired about it. We were
15 told that the Debtor has made a decision
16 that -- viewed it as a liability rather than
17 an asset. I guess it was -- Polaroid's
18 interest, although I have not seen any
19 underlying documents, was the nature of some
20 sort of lease which required continued
21 payments by Polaroid to keep up the
22 development and that therefore they have
23 rejected that lease and that therefore it is
24 no longer -- is an asset. There's nothing
25 that's being transferred and I just wanted to

1 get that on record that it was, in fact --
2 what, in fact, was going on. There was no
3 real estate associated with that. That was
4 it.
5 THE COURT: Okay. Did you just
6 want to note that or did you want
7 confirmation to that affect from anybody or
8 what?
9 MR. KRAKAUER: Your Honor, it's
10 not true. I would like somebody to -- I
11 would like the Debtor to say it's not true.
12 If it is true, I will take that as
13 confirmation.
14 THE COURT: All right.
15 MR. KRAKAUER: I am sorry. I
16 should have clarified.
17 MR. LODOEN: May I respond?
18 THE COURT: Yes.
19 MR. LODOEN: There are two
20 components of this Watch City property.
21 The Watch City property was sold by the
22 Debtor into a joint venture and I don't
23 recall the exact number, but I believe it was
24 approximately 70 million dollars, give or
25 take, that was paid to the Debtor for the

1 sale of that property.
2 The Debtor owns 50 percent in the Watch
3 City joint venture. It's an LLC.
4 The Debtor also entered into a lease with
5 that joint venture by which it needed to --
6 it had certain obligations under that lease.
7 That lease was rejected between Christmas and
8 New Years, as Your Honor will recall.
9 THE COURT: I do remember, yes,
10 there was some exigency to that.
11 MR. LODOEN: Right, there was a
12 kick in of $600,000.00 a month that was due
13 under that lease starting on January 1, so we
14 came in on an expedited basis and rejected
15 that. That lease then has been rejected.
16 The Debtor still owns an interest in that
17 joint venture. That joint venture is -- is
18 likely to be either conveyed back to the
19 other party to that joint venture or
20 surrendered or given up. We're not quite
21 sure how we will do that, but it appears that
22 that joint venture is extensively under water
23 and it appears that there is no opportunity
24 for the Debtor to recognize any value from
25 that and we have been having ongoing

1 negotiations with respect to that joint
2 venture and ultimately expect to be before
3 the Court sometime in the not too distance
4 future with a motion to dispose of that
5 interest one way or another.
6 THE COURT: All right. In any
7 event, to answer Mr. Krakauer's question, it
8 is not among the complex of assets that's
9 subject to the sale proposal right now?
10 MR. LODOEN: That is correct.
11 THE COURT: Okay. Very good. All
12 right.
13 Mr. Rosow, was there anything else that
14 you wanted to add?
15 MR. ROSOW: No.
16 THE COURT: All right. Mr. Kalla?
17 MR. KALLA: Thank you, Your Honor.
18 Your Honor, at this point PLR Holdings
19 feels like it timely submitted a bid that was
20 not only the highest and best as determined
21 by the Debtors, but really was the highest
22 and best that they could bid at the time
23 under those circumstances. They submitted it
24 on the condition of the continuing break up
25 fee that was briefly mentioned at the last

1 hearing.
2 At this point, Your Honor, I can't commit
3 to getting a response from them as to whether
4 they could participate in a continuing or
5 another auction before not next Friday
6 because of the Passover holiday.
7 I would submit that if Your Honor does go
8 beyond the terms of the order to re-initiate
9 or do some other bidding process, that you
10 let parties submit their best bid and not
11 have an equity cap, allow us to come in,
12 present evidence as to why our bid is the
13 best and I think to the extent this process
14 has to be resurrected it seems to me that's
15 the way to get the best -- the highest and
16 best bid here.
17 THE COURT: Where's the evidence
18 to go in that? Would it go to the value of
19 equity if the cap were removed or what? I
20 mean I don't see how evidence can go to raw
21 dollars. Raw dollars are raw dollars.
22 MR. KALLA: Exactly. But, Your
23 Honor , the 600 -- I mean the process of
24 valuing an equity bid at $650,000.00 per
25 point is somewhat arbitrary to begin with. I

1 mean these are two different companies and
2 magically it's the same value.
3 We presented during the auction process,
4 Your Honor, a very significant presentation
5 to the creditors about why the equity of --
6 of Hilco and Gordon Brothers, who are in the
7 process of promoting and exploiting brands,
8 Your Honor, they are not liquidators.
9 Neither of those entities in the joint
10 venture are involved in any liquidations.
11 They are involved to exploit the brand.
12 They put out a presentation to the
13 creditors and under their presentation they
14 valued each point at a million dollars.
15 Now, we have talked a lot about how the
16 process was flawed and I understand people
17 had to try to incorporate a lot of things in
18 a very short time, but Your Honor, if you're
19 looking for the highest and best offer, the
20 parties should be able to explain why there's
21 is the highest and best and we would like to
22 present testimony as to the value of the
23 equity contribution and not have an arbitrary
24 cap on it.
25 THE COURT: Let me ask you this:

1 kind of speaking in the abstract, but this is
2 very much an issue right here now, where does
3 a bidder that is not a creditor with a claim
4 against the estate, where does a bidder have
5 standing to raise the issue of what's in the
6 estate's best interest and to second guess
7 the steward of the estate, the debtor in
8 possession, in it's judgment as to what the
9 value is?
10 MR. KALLA: Your Honor, that's --
11 that's a hurdle that, you know, we can't
12 always clear without your allowing it. I
13 mean the point is we --
14 THE COURT: Yes, but I'll allow --
15 I might allow it if you had a legal theory
16 and I am not seeing how your client would
17 have standing at that point to -- if the
18 Debtor said we like the other bid better, in
19 our judgment it provides more value and as
20 long as the Debtor has a rational for
21 assigning value to an equity process, how am
22 I supposed to second guess them when you have
23 no stake in the estate and therefore have no
24 interest coming back out of it. Your
25 interest lies in getting the asset.

1 MR. KALLA: That's correct, Your
2 Honor. However, I submit that we are now a
3 creditor of the estate based on a promised
4 break up fee in exchange for our bidding of
5 very significantly higher bids during the
6 auction process, so I think we do have
7 standing as a creditor.
8 But, Your Honor, what I am asking is for
9 you to --
10 THE COURT: But if that break up
11 fee is so small in relation to either of the
12 proposed considerations it doesn't really
13 matter. You are going to get paid no matter
14 what, right?
15 MR. KALLA: I am happy to hear you
16 say so.
17 THE COURT: That's not a personal
18 guarantee I will say and I am saying that
19 with a smile.
20 MR. KALLA: Your word is good for
21 me, Judge.
22 THE COURT: Well, it's Mr. Lodoen
23 really who more speaks to that issue, but I
24 am just saying in the abstract here, okay.
25 MR. KALLA: Your Honor, I am just

1 saying the way to maximize the bids is to
2 give us the incentive to come with our whole
3 case because twice we feel we have come in
4 with fully executed documents with the
5 highest and best bid and there's been a
6 breakdown at the last second. Give us --
7 give us reign to come in with a presentation.
8 I hope that we'll be supported in the
9 meantime, but we'll come prepared if Your
10 Honor gives us that lead. There's nothing
11 that says you can't allow us to do that.
12 I believe we have standing as a creditor
13 today. We're prepared to do it. We have
14 done it to the creditors.
15 I am asking for some structure here, Your
16 Honor. I mean this -- to say this process
17 has been dynamic is an understatement. If
18 you want the bidders to come in and put their
19 best food forward, we can do that. We can do
20 that a week from -- we can do it next Friday
21 and we'll come with all the presentation. We
22 will tell you why our bid is better.
23 We had a very lengthy presentation to
24 creditors that we would like to present in
25 court. Obviously we need Your Honor's lead

to do that if we don't have a proponent and we hope to have one by then, but the way these things have gone, who knows.

THE COURT: All right.

MR. KALLA: Thank you.

THE COURT: All right. Let's see, Mr. Gordon, did you have anything you wanted to add?

MR. GORDON: Greg Gordon again, Your Honor. I guess the only thing I would say is one of the last comments Counsel made was about breakdowns at the last minute.

That's the position we feel we were in, Your Honor, and I am not going to reiterate what I went through on Monday, but we won the auction. We were declared the highest and best bidder. The creditors, everybody who's here in the room today was there. They saw exactly what happened. Hilco was there. Everyone you see in the courtroom today for Hilco was there. Hilco didn't submit a bid and we were declared the winner and the Debtors filed a report on the following Friday, said we were a winner.

We came into court on Monday morning

1 thinking we were the winner and then things
2 all came out from under us and even during
3 the auction, Your Honor, you may remember
4 from the transcript we went in with an
5 understanding there wouldn't be any equity
6 bid at all, that the estate wasn't interested
7 in equity and then there was a reversal of
8 course basically that began the second day of
9 the auction.
10 The first day of the auction Hilco kept --
11 two or three times, I remember, tried to bid
12 equity. The estate rejected those bids as
13 not meeting the criteria.
14 We came back in the following day and they
15 made a different equity bid and that was
16 accepted and we had to adapt to that.
17 The other thing I would point out, Your
18 Honor, on the equity valuation just so Your
19 Honor knows, we put on our presentation on
20 the business -- on our business plan on
21 that -- on the second day of the auction. We
22 think our equity was valued around two
23 million dollars and Houlihan Lokey came back
24 and said they valued both at $650,000.00. We
25 didn't like that either, but I did want to

1 give Your Honor the additional
2 (Unintelligible) from our perspective.
3 We felt that the rug was pulled out from
4 under us and it's interesting now for us to
5 hear that from Counsel for Hilco.
6 THE COURT: All right. Does
7 anybody have anything else. Mr. Lodoen?
8 MR. LODOEN: Your Honor, if we go
9 back and start valuing equity again we're
10 back to where we were last Monday morning and
11 I don't think --
12 THE COURT: Only I think I'm
13 supposed to be pulled into that process.
14 MR. LODOEN: Yes, you're supposed
15 to help value and, Your Honor, we'll have it
16 to you.
17 THE COURT: I sort of have enough
18 to do already here. I am saying that with a
19 smile. I'm not saying --
20 MR. LODOEN: What you have heard
21 is what we heard back then. Hilco was upset
22 because they only got $650,000.00 per point
23 of equity credit.
24 Patriarch was upset because they only got
25 $650,000.00 worth of credit because they both

1 think they can do a better job than the other
2 of maximizing the value of NewCo.
3 $650,000.00 was arrived at first and
4 foremost with the assistance of the Debtor's
5 financial advisors, Houlihan Lokey, one of
6 the best in the business, who took the
7 models, who contacted their other -- their
8 other professionals in different parts of the
9 country, ran through some of these numbers,
10 worked their models and came back with
11 numbers that were both fairly close.
12 We bounced this off of the -- or not
13 bounced it off, but reached this number in
14 consultation with the Polaroid Creditor's
15 Committee. I believe PGW and PCI Creditor's
16 Committee was involved in that with their
17 financial consultants, Huron Consulting and
18 we all agreed that that would be the -- the
19 trading value, if you will, of the stock and
20 their respective NewCo.
21 To suggest that now we go back and start
22 trying to revalue that is something that we
23 certainly would not be supportive of. We
24 think it's simple at this point. The
25 documents are in place. We can go forward.

In Hilco's place they have maxed at the 25 percent equity. They can come forward and bid with cash.

Patriarch has equity left and cash left. They can come forward and bid in combination until they reach their 25 percent equity and at that point I don't know what issues could arise.

It seems simple, but Your Honor we thought that this was simplified at other stages in this process and it has found not to be so, but we believe that the process at this point is straightforward and that it ought to be fairly simple and easy to move forward on that basis and the Debtors would ask you to do so.

Thank you.

THE COURT: All right. Anybody else have anything else to offer on this? Mr. Lenhart.

MR. LENHART: Can I just clarify something. Mr. Lodoen made reference to a cap, said it was an agreed cap. We're carrying out the procedures -- if equities indeed were $650,000.00 we don't -- and the

1 goal here is the highest and best offer, we
2 don't understand why there's a cap on equity.
3 That's the one issue we would ask Your Honor
4 to think about that answer.
5 THE COURT: I probably have enough
6 already in the record that I can address that
7 issue by way of argument.
8 Mr. Lodoen, was there anything else you
9 wanted to note on that?
10 MR. LODOEN: Can I have just a
11 minute or two.
12 THE COURT: Yes.
13 MR. LODOEN: Your Honor, could we
14 just take a couple of minutes just to step
15 out. We're not even asking for recess, just
16 a minute to step out.
17 THE COURT: All right. Go ahead.
18 That's fine. We'll go off the record.
19
20 (A discussion was had off the record)
21
22 MR. LODOEN: The Debtors's
23 position is that the auction out to proceed
24 with kind of the same parameters that have
25 been in place with the 25 percent equity cap

1 and the further bidding is either by cash
2 or -- by cash from Hilco or cash and equity
3 from Patriarch because they are not at the
4 cap.
5 We have just briefly visited with the two
6 Creditor's Committees. They may have a
7 different view on that and they can speak to
8 their position.
9 THE COURT: Okay. I am not sure I
10 was really putting any impetus on anybody to
11 change their mind or position necessarily. I
12 just wanted Mr. Lenhart question to be
13 answered and I think you have answered it as
14 to position.
15 All right. Anybody have anything else to
16 offer then?
17 MR. OTSUKA: Your Honor, just two
18 points very briefly. As to the last -- the
19 25 percent cap, and I understand maybe it's
20 not up for decision right now, I am not sure,
21 it's the -- Polaroid Creditor's Committee's
22 position that we think that in view of the
23 progress of the bids we would be in favor of
24 removing the 25 percent cap as an outright
25 rule. Certainly we reserve the right to on a

1 bid by bid basis make a determination
2 whether, you know, a bid in our view is --
3 has too much equity at the expense of cash or
4 whatever the case might be, but in terms of
5 setting the rule at the outset, we think that
6 there should not be a 25 percent cap given
7 how the progress of the bids have gone.
8 The second point --
9 THE COURT: Isn't that just going
10 to create issues for me?
11 MR. OTSUKA: Actually I don't
12 believe so, Your Honor. I mean assuming
13 that --
14 THE COURT: Somebody else is going
15 to come in and say excessive risk is being
16 taken on by this bid if it goes to 30 percent
17 or 40 or 50 percent equity.
18 MR. OTSUKA: Well, frankly,
19 somebody could say that right now.
20 THE COURT: Well, of course, but
21 there's -- there's a cutoff point set here by
22 the Debtor in consultation with financial
23 advisors that presumably is based upon some
24 principled assessment of risk going forward
25 via consideration coming in an equity stake

1 in an as yet unlaunched company, but if you
2 take that off then the question is well, does
3 their operation bode more risk or does their
4 operation bode more risk and that's an issue,
5 okay, which sort of gets us back into the
6 realm of more contention rather than less.
7 MR. OTSUKA: Understood, Your
8 Honor. From the Committee's point of view,
9 we have always made clear that we value cash
10 and I guess our view in agreeing to the
11 25 percent cap in the first place was we did
12 not want to see equity be bid up at the
13 expense of cash. That's not what has
14 happened and frankly if a bid comes in that
15 values -- that increases equity at the
16 expense of cash, I can say that the Committee
17 will certainly take that into account.
18 Our only point is we don't think that
19 there should be an artificial cap at the
20 beginning. We're basically limiting our
21 judgment on which is the better offer.
22 The second point goes to the -- the issue
23 of Patriarch's documents and particularly its
24 LLC agreement. As Your Honor can imagine,
25 given the schedule of events, there was

1 limited time to fully negotiate one set of
2 documents or fully understand all of the
3 issues presented by Hilco's documents. At
4 least the Committee feels that it did not
5 have the opportunity because it viewed
6 Hilco's sealed bid as higher than Patriarch's
7 bids to negotiate any terms in the Patriarch
8 LLC agreement, so we would just ask that we
9 reserve the right to do that prior to an
10 auction if the Court orders a further
11 auction.
12 THE COURT: All right.
13 MR. OTSUKA: Thank you.
14 THE COURT: Mr. Runck.
15 MR. RUNCK: Thank you, Your Honor.
16 I just want to note for the record that
17 from the Petters -- the Petters Committee's
18 perspective, Your Honor, having a cap on
19 equity in an auction doesn't make sense as
20 long as the cash doesn't go down, so we would
21 be in favor of lifting the cap on equity as
22 long as it is clear that the levels of cash
23 either stay at their current levels or they
24 go higher.
25 In an auction context as long as the cash

1 stays the same or goes higher, if we get
2 additional equity that represents more value
3 to the estates so we think that would be a
4 good thing. We don't see the rationale for
5 imposing a cap on equity as long as there's a
6 floor on cash.
7 Now, I think that will raise a question as
8 to how any additional equity above 25 percent
9 would be valued, but both the Debtors and the
10 Petters Committee have financial advisors
11 that are capable of making that determination
12 and advising us on how to evaluate any
13 competing bids that we receive.
14 THE COURT: So the PCI committee
15 is essentially saying that it shouldn't be as
16 simple as it was headed to become.
17 MR. RUNCK: Well, Your Honor, I
18 still think it's relatively simple. I mean
19 this is an auction.
20 THE COURT: Nothing is simple in
21 this case.
22 MR. RUNCK: I guess that's true,
23 Your Honor.
24 Your Honor, as long as the numbers keep
25 going up, that's good for the estates. I

1 agree with the Polaroid Committee's view and
2 the Debtors view that we don't want to be in
3 a situation where the cash goes down and is
4 replaced with equity. I agree with that
5 completely.
6 I just think it makes more sense in the
7 context of an auction rather than placing
8 caps let's place a floor. Let's place a
9 floor on the cash that's currently on the
10 table and if parties want to throw in
11 additional equity and additional cash they
12 can do that in their own determinations. I
13 don't see how that's bad for the estate,
14 especially in a situation where my creditors
15 are owed such a substantial amount of money.
16 We frankly view equity with -- we like
17 equity. We like to see the fact that these
18 bids have an equity component because that
19 gives our estate a chance for some upside in
20 this endeavor.
21 THE COURT: All right.
22 MR. RUNCK: Thank you, Your Honor.
23 MR. KALLA: May I?
24 THE COURT: You may as long as
25 it's brief.

1 MR. KALLA: Just one point on the
2 equity to reiterate what Mr. Runck said, Your
3 Honor.
4 We have a fully executed agreement today
5 that's being rejected. It involves X dollars
6 worth of cash, equity at the 25 percent cap
7 and some assets left behind using the
8 Debtor's valuations. Those are fixed
9 numbers.
10 To say that we can't bid any more equity
11 is really leaving something on the table.
12 There's no additional risk for the Debtor.
13 It's what we have to give.
14 These two companies in the Linen and
15 Things case and Shaper Image and the Bombay
16 Company have done this. They have offered a
17 piece of their equity in their revitalization
18 of the brand to the creditors. Twice the
19 creditors have taken that and they have
20 benefited tremendously by it in the upside.
21 The one time they didn't it, and we can
22 present testimony on this, their cash offer
23 was far less than they got by taking a piece
24 of the equity.
25 What I am saying, Your Honor, is to cut

1 off that limit arbitrarily, they can value it
2 how they want to. Up to 25 they value it at
3 $650,000.00 a point. It's hard to see that
4 it's valueless for another point. So Your
5 Honor, we would ask that the cap be removed
6 and we'd be allowed to bid with everything we
7 have.
8 THE COURT: All right.
9 MR. KRAKAUER: I just want to
10 point out, the world changes from time to
11 time. Over the last six months that you have
12 seen a lot of processes trying to realize
13 value is situations where previously people
14 had to look for cash. Cash was available,
15 financing was available, and what Hilco said
16 is absolutely right. The deals that have
17 been done over the last six months have had
18 substantial equity components and there's a
19 reason for that. The reason for that is it
20 realizes more value by allowing people to bid
21 equity where financing is much, much tougher
22 to get.
23 The idea here that there is isn't a
24 consensus on it, if you want to maximize
25 value, we're talking about increments to

1 value and how you -- that comes in the form
2 of equity and you can get more value by
3 equity, that ought to be considered. It is
4 not -- may involve ultimately some testimony
5 if there were disputes about how to value,
6 but that can be done and there be a decision
7 made and you have heard from the creditor
8 constituencies here, not just Ritchie but
9 from both the Petters Committee and from the
10 Polaroid Committee that equity has value and
11 that it ought to be allowed as an increment
12 here so that we can get the most value.
13 I think it's appropriate to do so and
14 follow the practice that has been followed in
15 other jurisdictions.
16 THE COURT: Mr. Lodoen, was there
17 anything else that you wanted to add?
18 MR. LODOEN: Your Honor, I view
19 this auction process like a pyramid. We
20 started at the bottom with a lot of latitude.
21 We came forward, thought we were getting to a
22 process but weren't quite there with the
23 Court's order. We're kind of halfway up.
24 Now we're trying to come up to the point and
25 get the job done and to the extent we go back

1 and leave the opportunity open to start
2 valuing equity or start looking at an
3 incremental bid and say, well, let's all get
4 together and figure out how to do that, that
5 is not moving forward to get the job done and
6 to simplify the process in my mind and I am
7 very wary of that.
8 We have twice set a cap, set a 20 percent
9 cap in consultation with both Committees at
10 the auction that folks are on board with.
11 That ended up blowing up as the Court knows
12 from what's been presented regarding the
13 auction.
14 When we were here on whatever day it was,
15 Monday, in chambers all the creditor
16 constituents, we set the 25 percent cap and
17 everybody was in consensus with that, as I
18 understood as we asked at that -- in chambers
19 meeting that included all the constituents
20 except for the two bidders. We think that
21 that -- that that needs to stay in place
22 because of the inherent risk of more equity,
23 inherit risk with being a minority
24 shareholder in an LLC or a minority --
25 holding a minority membership interest in a

1 limited liability company, which we would do
2 in either -- in either case unless it would
3 arise above 50 percent and neither one of the
4 buyers, I am certain, will allow that to
5 happen.
6 So we think that that 25 percent cap is a
7 reasoned and reasonable limitation and at the
8 end of the day it's from the Debtor's
9 perspective -- they view cash as the valuable
10 asset and think that at some point equity
11 needs to stop and we need to deal with cash
12 only and that's where we are right now.
13 Thanks.
14 THE COURT: All right. Well, I
15 will cut to the chase in terms of the
16 mechanics going forward here. I will ask
17 everybody to come back at 3:00. I am trying
18 to set that at a time so that I won't be late
19 coming back out on the bench because I
20 invariably underestimate the amount of time
21 it's going to take me to articulate the
22 conclusion after having reached it.
23 I haven't reached one yet here as to what
24 should happen going forward, so we will
25 reconvene at 3:00. Everybody find someplace

in downtown Saint Paul to hang out until then.

By way of a general observation here, it strikes me just intuitively that the various successive impasses that these parties have all been reaching are very much a product of the fact that everybody here is operating in what is historically a down market in virtually every sector, the retail market, the ultimate end market for the products that Polaroid companies purvey. Certainly a down market in availability of financing. Down market in terms of the willingness to take risk and that's why, shall we say, the bidding process here wasn't as vibrant as we might have seen 18 months ago or 2 years ago or the sort of market process that lead to the price at which Mr. Petters acquired this company back four years ago.

The down markets and the collision of all of them and the hesitancy to take on an excessive level of risk with the recognition that if we are at the bottom there's only upside produces a lot of tension and that tension obviously has evolved it's way out

1 through the multiplication of positions that
2 are taken here and the tension ultimately
3 ends up falling right on the bench, right on
4 me, to resolve in some way with all of the
5 urged positions here and to arrive at a way
6 to go forward from here toward a sale of
7 these assets.
8 I have got some ideas here, but I do need
9 to take another look at the -- couple of
10 Eighth Circuit opinions previously cited by
11 Counsel and to -- from the identification of
12 factors that I am to bring to bear in
13 exercise of my discretion, arrive at some
14 type of result, whether by way of further
15 procedure or not going forward here that's
16 going to best serve all constituencies, so I
17 hope to be able to do that in the next two
18 hours and 12 minutes, people.
19 So we will reconvene at 3:00 sharp by the
20 courtroom clock and see where it goes from
21 there. We're in recess.
22
23 (A recess was had in the proceedings)
24
25 THE COURT: Polaroid Corporation

1 and Petters Company, Inc.
2 My apologies for being 20 minutes late.
3 As my wife would tell you, I never show up
4 less than 15 to 20 minutes late anyplace.
5 I am prepared to pass on the issues that
6 were posed this morning related to procedure,
7 to pass on parties various requests and I
8 don't need to summarize anything that
9 happened. It's all fresh in everybody's
10 memory.
11 I did take a deeper look into various
12 pronouncements by the Eighth Circuit Court of
13 Appeals and the Eighth Circuit Bankruptcy
14 Appellate Panel cited by various parties in
15 connection with this.
16 The most helpful case, of course, was the
17 Food Barn Stores, Inc. decision. 107 F.3d
18 558, rendered 12 years ago now in 1997.
19 Additionally Wintz Companies, 219 F.3d 807,
20 Eighth Circuit, 2000 and the Bankruptcy
21 Appellate Panel Decision in Farmland
22 Industries, 289 Bankruptcy Reporter 122.
23 It does indeed emerge really most
24 pointedly from the very subtle nuanced and
25 very aware language of the Food Barn Stores

1 opinion that when presented with a term like
2 the one at bar, sale of assets, large
3 controversy, controversy over procedure that
4 lead to the ascertainment of a winning bidder
5 and weighing various values of the bankruptcy
6 process which are indeed in tension and
7 conflict in this sort of setting, that indeed
8 the trial judge is vested with a very broad
9 range of discretion to weigh all of those
10 factors.
11 I really like this one here on Page 567
12 talking about Food Barn Stores, talking about
13 that decision. This case is a classic
14 example of the challenges confronted by the
15 Bankruptcy Court in making decisions that
16 incorporate an attempt to mollify each of the
17 antagonistic considerations relevant to a
18 sale of asset property.
19 Now, the case at bar here, Polaroid
20 Corporation, is not really a classic example,
21 to some extent both because of the broader
22 economic back drop and the specifics of this
23 Debtor's history over the relevant recent
24 past, its markets and the like.
25 This case is kind of sui generis, self

1 generated, almost unique, but the tensions
2 here among all of these values as the events
3 have ripened over the course of the last week
4 are really heightened here.
5 I have attempted to weigh all of these
6 various values as the Eighth Circuit
7 identified them and as Counsel here all
8 recognized come into play here.
9 There is a large value to be put on
10 certainty, finality, promoting reliance on
11 annunciated processes because ultimately
12 these sales end up being approved by the
13 court. It's as a result of an administrative
14 process that the court does not perform, the
15 trustee or debtor in possession acting as a
16 trustee in bankruptcy perform the
17 administrative process of soliciting bids,
18 conducting an auction, ascertaining a
19 successful bidder and purchaser and the like,
20 but the Court ultimately has to approve it,
21 to the extent that the sale process met the
22 requirements of the code and rules and the
23 sale terms themselves meet the substantive
24 requirement of the codes.
25 Now, I have said before and I will say

1 again, I think that there's a fair bit of
2 discretion ultimately in the steward of the
3 estate, the trustee or the debtor in
4 possession to structure up a sale of assets
5 and then to go ahead and conduct a
6 solicitation in bidding process that has to
7 be done, guided of course by the fiduciary
8 obligation to maximize the realization, but
9 in the last instance because of the
10 fundamental division between administrative
11 and judicial functions in bankruptcy I have
12 no business trying to control that process.
13 I only have sort of a quality control or
14 legal compliance function after the fact as
15 well as before the fact for approval of the
16 process that would be then launched, but I am
17 not involved in the actual down and dirty
18 work of conducting the process and ultimately
19 the determination as to what assets to sell
20 in what configuration, what package, what
21 sorts of consideration to take into account
22 in receiving bids and the judgement as to the
23 valuation of the consideration if it's not in
24 cash. I think significant deference is due
25 to the steward of the estate, the trustee or

1 the debtor in position under Chapter 11 here.
2 So parties can come forward and protest
3 mightily as to the specifics of what
4 happened, but ultimately I do have to defer
5 to a degree to how the debtor in possession
6 set things up and how it went forward.
7 On the other hand, however, the Eighth
8 Circuit clearly recognized when looking at
9 the results of an auction or bidding process
10 trafficking in the assets of the bankruptcy
11 estate, the Court does have the right to
12 judge in hindsight and in what I thought was
13 a really remarkably nuance kind of analysis
14 the Eighth Circuit started out in Food Barn
15 at Page 564 by saying that sort of the
16 classic rule going back to the days of the
17 Bankruptcy Act of 1898, here they cite a 1947
18 decision of the Third Circuit. A court would
19 mandate the reopening of bidding upsetting
20 the results of a properly conducted judicial
21 auction only if, quote, there was fraud,
22 unfairness or mistake in the conduct of the
23 sale or the price brought at the sale was so
24 grossly inadequate as to shock the conscious
25 of the court, unquote.

1 Shocking the conscious of the court is
2 sort of a -- as an expression that has had
3 its days probably in jurisprudence. Courts
4 aren't shocked by very much anymore and in
5 the commercial context, you know, it's all a
6 matter of perspective anyway by and large.
7 Now, the Eighth Circuit goes on
8 immediately after that to say we are in
9 agreement with these general conventions.
10 They say it's just a convention. It's just
11 sort of an observation, kind of a guiding
12 rule of thumb, not necessarily a hard and
13 fast standard, but we are also cognizant that
14 an unwavering adherence to formality is not
15 normally advisable in bankruptcy cases and
16 they talk about then going on to the
17 importance of finality and regularity in
18 proceedings in order to encourage further
19 bidding and to make sure that parties come
20 forward in reliance on the certainty that
21 would be afforded by the final result.
22 But on the other hand, of course, the
23 Eighth Circuit says the Court must also
24 remain mindful of ubiquitous desire of the
25 unsecured creditors and the primary objective

1 of the Bankruptcy Code or a primary
2 objective, I should say, to enhance the value
3 of the estate at hand.
4 So again, I like these metaphors because
5 they recognize the tough spot that a
6 bankruptcy judge is put in. The Eighth
7 Circuit refers to the tight rope a bankruptcy
8 judge must navigate when presiding over
9 judicial sales, so it -- there has been to be
10 a balancing of the need for finality against
11 the interest in maximizing the estates worth
12 and ultimately the Eighth Circuit does
13 recognize that the whole question of
14 promoting certainty, finality and in creating
15 an atmosphere for reliance on a process
16 ultimately has to reverberate to the whole
17 question or against the whole question of
18 when the participants' expectations, and this
19 is the Eighth Circuit's wording, quote,
20 becomes sufficiently crystalized so as to
21 render (Unintelligible) anticipated results,
22 unquote.
23 So the Eighth Circuit went on here to
24 basically hold that -- in the words of that
25 great scholar Yoggi Berra, it ain't over 'til

1 it's over. Really expectations do not
2 crystalize in the sense of becoming hardened
3 and entitled to unquestioned deference until
4 such time as a bankruptcy judge enters the
5 order approving a particular proposal for
6 sale.
7 Now, I think that's really underlined in
8 Food Barn Stores because in that case my now
9 deceased colleague, Judge Koger from Kansas
10 City, apparently from the bench identified at
11 the behest of a debtor in possession a
12 specific purchaser and said that he would
13 approve the sale and then something happened
14 after that and the decision isn't really
15 clear, but ultimately and apparently fairly
16 quickly Judge Koger reopened the bidding.
17 It was as a result, I think, of the
18 interposition of another party involved as
19 well and the Eighth Circuit affirmed him in
20 doing so, so even after a judge has named the
21 punitive winner of a bidding process, but
22 before the entry of an order, the final
23 binding judicial act and adjudication as --
24 in approval of the disposition of estate
25 assets, a court can pull it back under the

1 right circumstances and it goes back to
2 weighing all of those various factors.
3 The frame of reference, of course, the
4 sort of language that the Eighth Circuit uses
5 in Food Barn Stores is, I think, very artful
6 and very tightly reasoned and very
7 thoughtfully rendered from an appellate
8 perspective.
9 Now, my colleagues in the Eighth Circuit
10 on the Bankruptcy Appellate Panel in 2003 in
11 Farmland Industries stated in a much more
12 pointed fashion, being of course trial judges
13 themselves in their regular day job, and
14 said, quote, we reiterate, however, that it
15 is unlikely that reasonable expectations of
16 certainty could ever exist prior to a hearing
17 where court approval is required.
18 And ultimately then they said that at that
19 court hearing the question then can become,
20 as the Eighth Circuit treed it in Food Barn,
21 an issue can be recognized as to whether
22 bidding should be reopened for the right
23 circumstances.
24 The Bankruptcy Appellate Panel in Farmland
25 Industries said the justifiable expectations

of a purchaser could not have crystalized to to a point of certainty prior to the entry of an order approving the sale.

So again it sort of underlines it's within my power today to go ahead and accede to the request to reopen a bidding process here. The question is whether I should.

Now, I will start off laying out the back drop of the law that way with expressing perhaps a little bit of chagrin, but also I suppose recognizing some irony in how this matter went forward and I say that with all due deference to all of the participants in this process.

They all clearly went very strongly at the process of bidding for these assets. The Debtor certainly went very strongly and its financial consultant went very strongly at the process trying to maximize the value, and yet as I observed earlier, the whole thing, as evidenced by the transcript, went forward by fits and starts. Clearly a lot of posturing, as somebody this morning put it, took place, a lot of blustering around.

I will say that, you know, a lot of the

1 fairly strong statements that were made by
2 the parties, and it went directly to terms
3 and conditions, there wasn't a lot of
4 genuinely irrelevant, insulting behavior
5 there. At one point things got a little
6 personal, I suspect, when everybody was
7 totally exhausted in the middle of the
8 afternoon on the second day, but it got quite
9 emotional.
10 Now, in hindsight, you know, I will just
11 observe, both of these bidders at various
12 turns during the course of the auction
13 process and here today have trumpeted their
14 success in rehabilitating distressed
15 companies. They both have regaled their own
16 experience in participating in sales of
17 assets in Chapter 11 cases under Section 363
18 throughout the country and yet on the other
19 hand both of them claim to have been blind
20 sided, to have been taken for patsies, for
21 suckers at one point or another in the course
22 of the bidding process. There's a little bit
23 of disjunction there shall we say.
24 I am not necessarily going to fault
25 anybody for it here and I am not really going

1 to make any judgments personally or
2 professionally about any of the participants
3 in this.
4 You know, from my perspective, and I will
5 say it's a relatively broadly informed
6 perspective without real regards to the
7 specifics of what has happened in this case,
8 a bankruptcy judge is always the last one to
9 really know what's going on in a Chapter 11
10 case, as my colleagues have all observed, but
11 from my perspective it would have been
12 difficult for the Debtors, their attorneys,
13 even an experienced financial consultant like
14 Houlihan Lokey to know exactly what to expect
15 in terms of the structuring of bids here.
16 These are a group of companies that went
17 through a major near complete transition in
18 terms of their operation and structure over
19 the last 6 to 7 years. As a result of their
20 entanglement with the whole Petters matter,
21 apall sort of was cast over their presence in
22 the financial markets and then, of course, we
23 had the broader conditions in the American
24 and world economy at this point and, you
25 know, those broader conditions play a lot

1 into this but in ways that intuitively I can
2 only vaguely grasp.
3 You have depressed markets in consumer
4 goods, but on the other hand you have the
5 hope that perhaps the recession is bottomed
6 out, that it couldn't possibly get much
7 worse, that there is an upside to buying
8 assets like this and putting them back into
9 play in the marketplace.
10 But on the other hand, anybody who wishes
11 to buy them has to find the money to do so if
12 it doesn't have it itself so it's no wonder
13 really that funds that amass capital for the
14 purchase of buying and rehabilitating
15 financially distressed entities are the ones
16 that come forward here. You don't really
17 have anybody else by way of an actual
18 competitor or a potential entrant in and of
19 itself that would be coming in cold with
20 other people's money to back up its offer for
21 this.
22 And then, of course, you have the nature
23 of the Debtor's current assets. This Debtor
24 doesn't really hold hard assets. It doesn't
25 traffic in hard assets per se. It doesn't

1 maintain inventory of its own products. It
2 serves basically as a conduit and since the
3 transition which really only came to fairly
4 full fruition a year or two ago, since the
5 transition it has served as a conduit for the
6 development and perfection and then in turn
7 marketing of the goods that bear its
8 distinctive trademarks.
9 Now, that is a transition that I think
10 many companies involved in the production of
11 consumer goods have gone through or are going
12 through now, but yet it ends up being
13 something very different, something that only
14 sophisticated investors are going to get
15 involved in.
16 So it was difficult even for as an
17 experienced group of professionals as
18 Houlihan Lokey really, I'm sure, to know just
19 what to expect by way of what would be
20 forthcoming.
21 Now, I do want to note something right out
22 of the gate in addressing just as a general
23 precept some of the concerns that have been
24 addressed throughout about being blind sided
25 and that is that the bidding procedures that

1 were appended to the February 18th order
2 approving the auction and bidding procedures
3 and the notice, essentially the authorization
4 of the Debtor to go ahead and launch the
5 effort to sell the assets, specifically at
6 Page 4, it unquestionably does say that a
7 proposed purchase price in cash, securities
8 or other form of consideration, which is
9 determined by the Debtors to be acceptable,
10 et cetera, et cetera, et cetera, is to be
11 brought forward as the specification of the
12 incremental bid amount that, of course, we
13 see sprinkled throughout the transcript to
14 the actual bidding.
15 Everybody was on notice that securities,
16 quote-unquote, which of course can mean
17 equity in a successor entity that would be
18 holding the actual assets that would be
19 purchased, could be part of the
20 consideration.
21 Now, when the bidding started fairly
22 quickly on the representative of Patriarch
23 complained and started complaining rather
24 mightily that it really hadn't been disclosed
25 that a proffer of some share of equity in the

1 successor entity would be recognized as a
2 component of a purchase price.
3 I don't know whether that speaks to
4 communications that have been made
5 previously, what that actually evidences.
6 There's no question but that securities,
7 quote-unquote, could be put on the table in
8 connection with this process.
9 But on the other hand, I will recognize
10 fully, and this is in accordance with
11 statements that Mr. Lodoen made at several
12 different stages in the process at getting
13 this bidding procedure launched that the
14 debtor and Houlihan Lokey were going to
15 reserve as much latitude as possible in the
16 proffer of these assets for sale, including
17 the right to break them up into parcels of
18 assets, to sell them en masse, to sell a core
19 of assets with others to be excluded, to take
20 whatever was appropriate in consideration so
21 this obviously was going to be a fluid
22 process all around, so expectations again for
23 the bidders coming in weren't necessarily
24 fixed in stone. Everybody had to be prepared
25 to be fairly flexible, shall we say.

1 But on the other hand, you know, I am not
2 going to necessarily fault any bidder that
3 came forward figuring, hey, cash is king in
4 this posture. These debtors in Chapter 11
5 need to get out of the operating business.
6 They need to reduce the assets of value to
7 cash as quickly as possible. That's probably
8 what they want. That's what we'll come
9 forward to.
10 A lot of the accusations here of being
11 blind sided are things that I simply can't
12 get my arms around. I don't have a record to
13 it. Frankly I don't care to at this point.
14 It ultimately ends up being irrelevant, but I
15 just want to kind of note to show that I did
16 review this and this all kind of goes to my
17 conclusions as to the expectations to be
18 derived from the bidding process, based upon
19 the structure of it as it actually unfolded
20 here. I just want to note certain things
21 about what happened here.
22 Hilco opened with bid No. 1 which did
23 include a one percent equity component.
24 Patriarch immediately demanded an enunciation
25 of the rules and that the process stick with

1 rules and equity was the whole point of that.
2 There was immediately a protest that
3 Patriarch and its principals hadn't really
4 conceived of a profer of equity in a
5 successor entity being on the table as a bid
6 component.
7 Now, Houlihan Lokey deferred considering
8 whether or not to allow an equity component
9 at that point. Things kind of stayed
10 loosey-goosey. So it did reject the Hilco
11 bid at least at that point, including an
12 equity component.
13 Hilco revised the bid, came back with a
14 cash only bid. Patriarch upped that cash
15 bid.
16 So in its bid No. 2 Hilco then injected,
17 bang, a 20 percent equity component right
18 there toward the middle of the afternoon on
19 Tuesday. Now, that seemed to have been a day
20 stopper or pretty close to it. Things
21 recessed in the mid to late afternoon and
22 then the second day Hilco went back on the
23 record, was recognized what its offer had
24 been, including the 20 percent equity
25 component.

1 Houlihan Lokey then accepted the notion of
2 including an equity component as part of an
3 offer. That's the first time that it really
4 was put in unequivocal fashion that equity
5 could be put on to the table.
6 Patriarch protests at that point and
7 demanded the profer, the production of some
8 kind of business plan so the question of
9 valuing an equity component could be
10 commenced.
11 Now, Houlihan Lokey at that point would
12 not commit to an amount of equity that it
13 would consider apparently either by way of
14 floor or by way of cap.
15 Patriarch in its third offer then added in
16 a ten percent equity component.
17 I just want to note by way of a side maybe
18 to break up some of the tension here, at this
19 point the Hilco -- the Hilco representative
20 expressed some frustration with how rapidly
21 things were changing and communicated the
22 fact that he or she had to communicate with
23 principals of Hilco, some of whom were in
24 Europe, regarding the amount of authority
25 that they had going forward and here's the

statement that's just sort of emblematic of all of this, quote, this is not like, you know, easy, unquote. I am afraid I would have to agree.

Now, Hilco No. 3 bid went up to a 16 percent equity component and then they went back and forth and back and forth. Houlihan Lokey then at that point announced that a 20 percent equity cap would be imposed and then there was some sort of impolite behavior between the parties.

Patriarch then made a final bid or what turned out to be a final bid. Hilco made a last bid. It overbid on equity, to use the term that lawyers used this morning, tried to bump it up to 20.5 percent equity stake in the successor. Houlihan rejected that and then the auction was pretty quickly adjourned at that point.

My re-review in the last couple of hours of the transcript of the auction proceedings sort of underlines my initial conclusion from my skimming of them earlier this week that it was, in indeed, a fits and starts sort of process in which frankly sort of the rules of

1 engagement here in the contention for the
2 assets were not really clearly defined. I
3 don't necessarily fault the debtor in
4 Houlihan Lokey fatally for this, but on the
5 other hand, I can see where quite clearly the
6 way the original bid process was opened and
7 the way it went forward was less than optimal
8 for generating a maximum recovery for the
9 estate fairly promptly and with certainty.
10 So then we were supposed to convene the
11 day after the auction process. We were
12 supposed to convene on March 31st, but the
13 auction bled over to March 31st or March 30th
14 and then there were rapid fire succession of
15 calls to my calendar clerk about obtaining a
16 continued date and time for the hearing
17 because things had to be done to finalize the
18 terms of an asset purchase agreement that
19 would be put before the Court and, of course,
20 I would have to have those final terms in
21 order to give the Court's stamp of approval
22 to a sale process and various other details.
23 And that -- I am just given to understand
24 it sort of went back and forth and back and
25 forth and back and forth here.

1 There ended up being continued expressions
2 of contention apparently with the way the
3 bidding process had gone and, of course, I am
4 sure that the non-prevailing bidder, the
5 Hilco parties, had a real problem with the
6 outcome of it.
7 So then we got to Monday's hearing which
8 resulted, of course, in the order that I
9 entered on Tuesday morning. It came in a
10 little after I had to leave on Monday, so the
11 order was entered on Tuesday, continuing the
12 matter over to today.
13 During the course of the chambers
14 conference there was an expression that by --
15 by the debtor that due to the considerable
16 number of expressed contentions with the
17 bidding process, that they were making a
18 proposal to take in one final closed bid from
19 each of the parties with an eye towards
20 accepting one or the other and they -- a
21 structure for doing that was proposed.
22 Now, that really promised to resolve an
23 awful lot of issues both as raised by the
24 parties to the bidding and as raised by
25 creditors and I ended up going ahead and

1 adopting that as a last measure to try to
2 maximize value here.
3 Now, I will say that under that Eighth
4 Circuit authority I think under the
5 circumstances I was quite justified in going
6 ahead and doing that.
7 Ultimately however, I will say that my
8 thought process in going through it was not
9 as thorough going as it should have been and
10 buying in to it and as a result of what's
11 happened then over the last 24 hours, I am
12 going to have to say unfortunately that last
13 measure was also less than optimal for
14 generating maximum recovery to the estate.
15 My closer look in to how things have gone
16 forward at the -- through the auction
17 process, the continuing uncertainty as to the
18 acceptable composition of types of
19 consideration to be included in any bid, the
20 rather pitched antagonism between the parties
21 which got sort of personal a couple of
22 different times there, all of which sort of
23 lead me to conclude that ultimately -- this
24 process, including the extension of it that I
25 ordered on Monday, does not serve that one

1 factor of generating maximum recovery for the
2 estate through a measured process that's
3 predictable and open to the greatest extent.
4 Now, the question is then in passing on
5 the request to further reopen it or one last
6 shot of an open bidding process, the question
7 is then how does that weigh against those
8 other values which I have heard from opposite
9 sides now. I have got to protect the
10 integrity of the process and somehow it's
11 thrown back on me to be the guardian of that.
12 Well, I have often said and sometimes
13 somewhat sanctimoniously the judge is really
14 the last one and sometimes the only one to be
15 concerned about the integrity of processes in
16 bankruptcy cases, both administrative
17 process, administering assets of the estate,
18 administering the business of the Debtor and
19 in judicial process and ensuring due process,
20 making sure that everybody has their right to
21 their day in court, that I decide factual and
22 legal issues appropriately after everybody
23 has had their say and their full input, put
24 in their full evidence and their full
25 argument, so it does indeed fall back on me

1 to determine just where the integrity of the
2 process best lies here.
3 I don't particularly ever like to take
4 back on an order that I have entered. I
5 mean, No. 1, I happen to think that in our
6 system with the power that judges have to
7 determine the rights and in bankruptcy the
8 future fortunes of people and businesses,
9 they should be able to rely on orders that
10 were entered, so it really would only be with
11 some residual misgivings at least that I
12 would ever chose to go forward and
13 essentially alter expectations that claim --
14 that people claimed to have been fixed on the
15 basis of one of my orders and ultimately the
16 question here -- at which point did people
17 have a valid expectation of finality.
18 Well, you know, the difficulty that I have
19 got with giving full and final effect to the
20 results of that sealed bidding process is
21 that it was obviously less than optimal for
22 generating maximum recovery because there was
23 no direct head on head competition as there
24 was in that rather difficult auction process.
25 The problem -- the pitfall for that other

1 auction process that the Debtor and Houlihan
2 Lokey were considering was that parties
3 couldn't quite agree on exactly what was
4 being sold, although that kind of fell into
5 line fairly quickly, and I am referring maybe
6 there more to the Genii [sic] bid for part of
7 the Debtor's assets which basically was
8 ignored and not improperly so, I guess, if
9 you had somebody that was -- two bidders that
10 were willing to buy the whole thing then the
11 Debtors were within their rights in not even
12 entertaining a bid to chop off part of it,
13 but ultimately there you had two parties that
14 were pitched head to head but then were
15 haggling over what they cared to put in and
16 the problem is I can't dismiss out of hand
17 any party that felt that it was not
18 completely prepared to come forward to offer
19 equity if it had had any kind of expectation
20 that that wasn't going to be allowed on the
21 table.
22 Is offering equity in a new company and
23 gauging how much you want to put against an
24 opponent's bid that includes an equity stake
25 ends up involving some kind of deemed

1 valuation of that equity component and for
2 that obviously, particularly for a proposed
3 start-up, you need information. You need
4 that business plan. You need some kind of
5 projections. You need some indication of the
6 wherewithal, the initial capitalization. You
7 need a lot more information than that.
8 That's difficult to muster as it is,
9 particularly given the fact that some of it
10 is bound to be proprietary or confidential
11 and, in any event, if you don't really know
12 that you have to have it then you are not
13 going to when you step forward.
14 As I say, I can't get my arms around the
15 issue of whether Patriarch was completely
16 blind sided or not, but I am not going to
17 deem Patriarch to have been fully on notice
18 by virtue of that -- inclusion of that one
19 word securities, quote-unquote, in the
20 bidding procedures to have been completely on
21 notice that the Debtor through Houlihan Lokey
22 was going to entertain pitched bidding with
23 an equity component.
24 I am also going to observe that both of
25 these bidders are very sophisticated

1 entities, at least by their own protestations
2 and clearly by the way they have conducted
3 themselves throughout, by the fact that they
4 have very experienced lawyers from
5 prestigious law firms representing them here
6 in Saint Paul, Minnesota and as evidenced by
7 the fact that they both have powerful
8 interests in the assets of this distressed
9 company which they say with resources that
10 they have to bear, they will put to better
11 and more productive use.
12 Both of these parties are sophisticated,
13 so I have to lay a grain of salt to the
14 protestations from both sides that they have
15 been blind sided, but on the other hand, this
16 has not gone forward the way it should have
17 to have lead to finality by 10:30 this
18 morning, a finality that people were willing
19 to accept as having been fairly and squarely
20 achieved.
21 Both sides in due course have claimed to
22 have been blind sided and ultimately it's an
23 unknowable and at this point it's not really
24 my job. It's not something I would undertake
25 with any great relish anyway to determine who

1 really was more aggrieved.
2 As I observed to one of the lawyers this
3 morning, nobody here has any monolopy on
4 claims to having been aggrieved by a process.
5 On the other hand, I am not going to fault
6 those who brought the process forward because
7 of all of the rather vast unknowables that
8 were bound to have had a prominent role in
9 structuring up how bids were going to come
10 forward, how much interest there was going to
11 be in the first place and then how bids were
12 going to come forward, how quickly they were
13 going to come forward, what increments and
14 what the composition of bids were going to
15 be.
16 Ultimately in the exercise of my
17 discretion granted unequivocally to me and a
18 broad discretion as it is, recognizing the
19 fact that these are complex situations and
20 also putting -- at this juncture given the
21 unique nature of these cases, their back drop
22 against the Petters affair generally, the
23 need to preserve the currency of the assets
24 the Debtor does have and to maximize a return
25 for the creditors of these companies and in

1 turn any residuum to go to the Petters
2 General case where there is also a large need
3 for funds, I am going to put a premisses on
4 the maximizing of realization over the more
5 abstract goal and definitely subordinated
6 goal of, quote, integrity in the process,
7 unquote, and parties reliance.
8 You can't tell me that either of these
9 parties was prepared for anything other than
10 a knock down, drag out job of hectoring one
11 another when they headed into this process
12 and, boy, the transcript of that auction sure
13 shows that they engaged in it.
14 Ultimately that process ended up not
15 achieving the prompt resolution through a
16 final asset purchase agreement.
17 Mr. Lodoen was quick to sort of state
18 this morning that it wasn't so much a
19 continuing negotiation. It was just a devil
20 lies in the details matter, but in point of
21 fact things were so complicated, and I have
22 no doubt that there was probably some
23 continuing wrangling about the process, that
24 things weren't in full and final form, and a
25 request was made to me on Monday to reopen

1 the process for one last shot did not come
2 out of nowhere.
3 Among other things, I suspect it was
4 because there was some surprise that the
5 bidding was so hard bitten and went ahead by
6 relatively minor increments. I mean when you
7 compare what happened here to what happened
8 across the hall in the Hecker Car Rental
9 auction that Judge O'Brien presides over
10 where the bidding more than doubled the
11 stalking horse bid, you know, you have to
12 think something was at work here and whatever
13 was arrived at, despite all the hectoring,
14 might not be quite all that these assets are
15 really worth.
16 Well, subsequent events, at least as
17 measured by the currency of the marketplace,
18 the currency of later bids that was proven to
19 have been right, so I am not -- I am going to
20 say that in hindsight not approving the
21 result of the bidding process at Lindquist &
22 Vennum was not inappropriate and I am just
23 going to say, and I will take as much blame
24 for this as anybody else will, the measure
25 that was pitched to me and that I ended up

1 adopting on Monday for a last final closed
2 bid was not appropriate. As I said earlier,
3 it was less than optimal for generating a
4 last shot of value for the estate.
5 So I am going to order that the bidding
6 process be reopened and, of course, as soon
7 as I started asking questions about that this
8 morning things got a lot more complicated and
9 we ended up taking another 20 minutes after I
10 thought that we were going to adjourn.
11 Ultimately, however, what I am going to do
12 here is keep it simple and basically under
13 the terms and conditions that Mr. Lodoen
14 proffered.
15 A bidding process for these assets is
16 going to reconvene on Thursday, April 16th at
17 9:30 a.m. I know a request was made to me to
18 defer it after next week in light of Passover
19 observance, but unfortunately as attuned as I
20 try to be to everybody's religious
21 observances, and I have done this many times
22 in the past, made amends for that, it's just
23 not feasible.
24 I am going to be out of town at a Federal
25 Judicial Center seminar that I have been

1 committed to for nine months the following
2 week, April 20th, and this is not going to
3 bleed over for three weeks. Nothing is going
4 to be served by that. And I have got a
5 personal commitment that's going to take me
6 out of the office next Monday and ultimately
7 because of other things on the Court calendar
8 on Tuesday and Wednesday, really Thursday is
9 the first day and as it turns out probably
10 the only day next week I am going to be able
11 to set this up.
12 Now, as evidenced by the fact that I am
13 making reference to my own calendar, I will
14 say that given the sui generis, unique nature
15 of this case, I am going to do something for
16 the first time ever and that is to say I am
17 going to be present during the bidding
18 process.
19 Now, my predecessor on this bench whose
20 place I took 23 years ago, 22 and a half
21 years ago, Judge John Connelly, of course
22 started off as a referee in bankruptcy under
23 the Act of 1898 and referees back then did a
24 lot things in the administration of the
25 estate and he loved to preside over auctions

of assets.

Now, I came of age under the Bankruptcy Code as did all of my fellows and we sort of studiously avoided doing that. However, in light of the contentious history of what's gone on here and in light of the fact that I think it would be appropriate to have the ultimate authority both present during the bidding and to maintain order, I will take the bench.

However, I am not going to be taking bids. The person taking bids can either be counsel for the Debtors or somebody from Houlihan Lokey and this is going to be a stripped down process. There is going to be no more haggling over equity components or equity cap.

The equity cap is going to stay at the 25 percent fixed by the Debtor pursuant and set forth, I believe, in the order entered on Tuesday. No more than that. I am not going to permit -- I am not going to accede to the request that I order the Debtor, let's put it that way, to accept bids with equity components in excess of 25 percent. That's

1 going to reopen everything.
2 This is where I defer to the judgment of
3 the Debtor and its financial advisor that the
4 estates should not be taking on as a
5 component of purchase any more risk in
6 realization that -- other than to the extent
7 of 25 percent in a purchaser entity.
8 Now, I've had it pitched to me and
9 Mr. Krakauer I have no doubt speaks from a
10 lot more experience than is generally had in
11 this court, we don't do a lot of big Section
12 363 sales here, enough of them that we have
13 some idea how they work, but not like the big
14 commercial ones that you see reported on in
15 the various bankruptcy reporting services. I
16 have no doubt whatsoever that equity and
17 equity in a greater measure than this is
18 playing a more significant role these days.
19 Cash is hard to come by and bankruptcy
20 estates are willing to take the upside out of
21 the hopes that perhaps we are at the low end
22 of the recession and companies will be able
23 to revive, consumer buying will revive and
24 there will be greater value and equity come
25 the future.

1 This Debtor with its advisors has elected
2 not to be willing to undertake that risk and
3 I am not going to second guess that. I am
4 going to accord that much deference to it.
5 So the bidding will reopen with
6 conditions. The floor for the bidding is
7 going to be the last amount of cash per
8 Patriarch's bid submitted today.
9 Both bidder's proposals will be subject to
10 the terms of the asset purchase agreements,
11 LLC agreements and so forth already submitted
12 to the Debtor subject to the couple of fine
13 tuned details noted on the record here today.
14 There will be the same equity cap which
15 will be at the same point unit valuation
16 which I believe was $650,000.00. Mr. Lodoen
17 has attested to having that issue fully
18 evaluated as to both of the bidding entities
19 and being persuaded that that was an
20 appropriate measure of the value to be
21 attached for comparability between the two
22 bids.
23 Hilco may proceed by cash increments
24 alone. It has maxed out, I believe.
25 Patriarch may proceed by equity and cash

1 components and there will be the same bidding
2 increment of $150,000.00.
3 Now, there is some ambiguity, I guess, in
4 the -- in the record as to whether Hilco had
5 maxed out or not and whether it would be
6 considered -- whether we were to consider
7 things as having been according to the end of
8 the -- end of the auction procedure and
9 Mr. Lodoen maybe you can refresh my memory,
10 did Hilco -- the closed bid offer include a
11 25 percent equity component?
12 MR. LODOEN: Yes, it did.
13 THE COURT: All right, fine. So
14 that's on the table here. So that bid will
15 be considered to be Hilco's for the purposes
16 going forward and for the purposes of
17 determining the equity cap and the amount of
18 cash proposed by Patriarch today is the four
19 going forward, so that's -- those are going
20 to be the rules here.
21 Now, let me just say that when I am
22 sitting on the bench here it's going to be
23 more as an observer and as a stern presence
24 to make sure that parties behave themselves
25 personally than anything else.

I don't frankly see the likelihood of any legal disputes going forward. This is going to be a process simply where it's going to go back and forth and back and forth until it stops and then when it does stop, given the fact that there will already be the packages of the asset purchase agreements, LLC documentation and so forth and the amount, I will be able to then at that point once the bidding has stopped identify a bidder to which the Debtor would be authorized to sell and then we'll go on to the legal issues, particularly those raised in objection by creditors to the entry of an order memorializing that authorization.

So essentially what I am doing is I am adopting the Debtor's proposal here to bring it back into a face-to-face bidding -- competitive bidding arena one last time.

The offer forthcoming this morning for Patriarch is evidence that there was additional value in these assets. Somehow or other the previous processes presented real impediments to ferreting out that value.

I am doing this in exercise of my

1 discretion, weighing these considerations,
2 and I don't think either side can credibly
3 claim that it was a babe in the woods, blind
4 sided by anything that happened during the
5 course of it.
6 Each bidder was sort of caught at a
7 disadvantage by the way things kept shifting
8 and to my view anyway based upon the limited
9 amount of documentation that I have seen,
10 limited knowledge I gained, I don't know that
11 anybody is to fault in any conclusive way for
12 the way things kept shifting, but they are
13 going to stop shifting come next Thursday and
14 I would look forward then to reaching the
15 issues on the merits of whether I should go
16 ahead and authorize the Debtor to do this
17 according to the terms of the motion.
18 We also have the Petters Company motion
19 relating to other assets and I don't know
20 what the status of that is, but frankly I'm
21 going to defer consideration of that over to
22 next Thursday as well and whether that's been
23 resolved or not we will address that on
24 Thursday also.
25 I have got the full day clear on Thursday.

I would hope that I won't have to use the whole thing, but I will give parties the opportunity and frankly, you know, I don't see that -- this bidding process is going to run more than about an hour, if that, and I am not going to entertain really any requests for recesses like I see the people from Houlihan did over and over and over again. I don't fault them for doing so because of the fact that it became a moving target. Parties had to confer and clearly requests had to be made for authority, at least on the part of one side, but I just -- I didn't expect to see it go forward in increments in a fairly regular way and, as I say, my presence at it is going to be much more as an observer and as one ready to go forward and then when we're on the record -- we will make a record of the bidding process. I guess that was an appropriate request by one of the lawyers earlier on today.

All right. I think that's all the more I have to say. I will try to cobble together an order myself along those line making it as simple as possible and I will have to get it

out by the end of the day today, so I will do that.

All right. I hesitate to open it up, but I am going to. Go ahead, Mr. Lenhart.

MR. LENHART: I would rather not take issue with anything Your Honor said. Hilco Gordon Brothers will abide by all of it.

I heard Your Honor say there will be no permitted changes to the asset purchase agreement, the LLC agreement, those documents as they were submitted prior to today's hearing as they sit today and if that's the case -- that's aside from changing the dollar amount of cash and in the case of Patriarch changing the equity. That's certainly fine -- is that what Your Honor's ruling was? I just wanted to understand.

THE COURT: That was my understanding of what Mr. Lodoen's proposal was and it seems to me that that leaves everything just in terms of identifying which apples we have in each box.

MR. LENHART: That's correct and that's fine. That's fine.

1 THE COURT: Okay. Anybody have
2 any comment on that? I don't see how we
3 could get into any kind of principle process
4 otherwise.
5 MR. OTSUKA: Your Honor, just very
6 briefly a point of clarification on the last
7 issue regarding agreements that are in place.
8 The committee had requested, and I am not
9 sure the Debtor's position on this issue has
10 been clearly established, but in terms of the
11 Patriarch LLC agreement, that agreement came
12 in very late in the process and, as I said,
13 because at least the Committee and I
14 believe -- I am not going to speak for the
15 Debtors, but my understanding was the Debtors
16 viewed Hilco's consideration as greater --
17 the negotiation or the clarification
18 regarding the LLC agreement, we didn't deal
19 with Patriarch's, so it just sort of came in
20 and it was resubmitted today, but I don't
21 know that it's ever been fully approved by
22 the Debtors or the Committee, so I don't want
23 to be negotiating it by any means at the time
24 of the auction, but I would -- I would at
25 least ask for some number of days in advance

of the auction to at least revisit some issues with Patriarch.

MR. LENHART: If it hasn't been -- the Committee issue aside, if it hasn't been approved by the debtor, is there another bid here today? I don't understand why there's a higher bid, but I would leave that to Your Honor.

THE COURT: Mr. Lodoen.

MR. LODOEN: Your Honor, the Debtors have -- have reviewed and have been negotiating with respect to both LLC agreements and the Debtors are comfortable with them. If the Committee wants some time to look at it and see if anything needs to be tweaked on it, I guess we don't feel like we need that, but I am not going to stand in the way of the Committee doing it if the Committee wants to do that.

I guess with respect to the LLC agreements, I am not sure that we care one way or the other.

THE COURT: I am guessing the terms really should be cognates of one another, right?

MR. LODOEN: No, it's not that simple.

THE COURT: I guess I am just being simple minded then. I am saying that with a smile. It wouldn't be the first time that it happened. Okay.

MR. LODOEN: Can I just talk to Mr. Singer for a second.

THE COURT: Why don't you.

(A discussion was had off the record)

MR. LODOEN: Your Honor, the Committee suggests that they be given an opportunity to look at the LLC agreements and perhaps we could have -- we could just have a status conference with the Judge maybe 48 hours before the auction next week to advise the Court if there are any changes to the LLC agreement, that would give the parties -- all the parties 48 hours before the auction to contemplate that and it was also if there's any other issues that pop up before the auction to make sure everything is completely set.

1 The Debtors have also -- the Court also, I
2 think, referenced the floor and I missed this
3 but a couple of people have mentioned it to
4 me, that the floor would be the Patriarch's
5 cash number.
6 Did the Court mean the total consideration
7 number of 73 million --
8 THE COURT: Yes.
9 MR. LODOEN: -- 800,000.
10 THE COURT: All right. So you're
11 suggesting a status conference then Tuesday.
12 Mr. Lenhart, was there anything you wanted
13 to say?
14 MR. LENHART: Is it the LLC
15 agreement that we're going to talk about in
16 48 hours or is that and any other thing that
17 arises? Is there going to be changes to the
18 APA too now? Can we draw a box around the
19 LLC agreement at least?
20 THE COURT: I would think that's
21 appropriate. Mr. Lodoen, is that --
22 MR. LODOEN: Yes, Your Honor, we
23 don't anticipate any changes to the -- to the
24 asset purchase agreement. As we told the
25 Court, we are okay with the LLC agreement,

1 but the Committee hasn't had the opportunity
2 to spend as much time on it as we have.
3 MR. LENHART: (Unintelligible).
4 THE COURT: Yes.
5 MR. LODOEN: The asset purchase
6 agreements are fine as they are.
7 THE COURT: All right. All right.
8 I don't know what's on my calendar for next
9 Tuesday, but I will reserve some time and we
10 will have a status conference in the court
11 room. I will put notice of that in the order
12 and I will just expect parties to make
13 themselves available for discussion as to
14 that issue then.
15 Debtors have already committed themselves
16 to accepting the form and content of the
17 Patriarch LLC agreement. This is just for
18 the benefit of the Committee's review in the
19 Polaroid case.
20 All right. Anything else?
21 MR. SINGER: There's one more
22 motion pending, Your Honor.
23 THE COURT: All right. That would
24 be good to get to something different.
25 MR. SINGER: Your Honor, I will

1 make it quick because they are related
2 motions. It's the motion of the PGW case to
3 transfer domain names in connection with the
4 sale. I just want -- I am expecting it from
5 a report that's pending. It's our
6 expectation that we will continue that over
7 to the sale hearing as well.
8 THE COURT: Right. I thought I
9 was referring to that, but I was probably
10 being too vague and I think that should be
11 continued over.
12 Does anybody disagree? It's all part of
13 the -- all part and parcel of the sale.
14 MR. LODOEN: Your Honor, excuse
15 me, does the Court contemplate that there
16 would be a hearing on the date of the auction
17 after the auction --
18 THE COURT: Yes.
19 MR. LODOEN: -- to produce
20 whatever evidence is necessary to --
21 THE COURT: Yes.
22 MR. LODOEN: And oral argument
23 with respect to any remaining issues?
24 THE COURT: Right, right, right.
25 I will make sure I make note of this at the

hearing then. Everybody should come prepared to produce their evidence. The Debtors in the first instance for their prima facie showing and as to any subsisting objections. I think many of the objections are boiled down to matters of law, but I want to get the motion for authority to sell itself submitted on the basis of a record that would be completed that Thursday.

All right. Good enough. Anything else? That should take care of it then so we will recess over to next Thursday then and I will get that order out.

* * *

STATE OF MINNESOTA)
) Ss.
COUNTY OF DAKOTA)

BE IT KNOWN, that I transcribed the tape-recorded proceedings held at the time and place set forth herein above;

That the proceedings were recorded electronically and stenographically transcribed into typewriting, that the transcript is a true record of the proceedings, to the best of my ability;

That I am not related to any of the parties hereto nor interested in the outcome of the action;

WITNESS MY HAND AND SEAL:

S/ LESLIE PINGLEY

_____

Leslie Pingley

Notary Public