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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

4-16-09

VOLUME III

* * *

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APPEARANCES

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. JASON PRICE AND MR. STEPHEN SPENCER, Attorney at Law, Fourth Floor, 123 North Wacker Drive, Chicago, Illinois 60606-1700, appeared on behalf of Debtor.

MR. DENNIS RYAN, Attorney at Law, Suite 2200, 90 South Seventh Street, Minneapolis, Minnesota 55402-3901, appeared on behalf of unsecured creditors.

MR. RICHARD CHESLEY and MR. GREGORY OTSUKA, Attorneys at Law, 13th Floor, 191 North Wacker Drive, Chicago, Illinois 60606, appeared on behalf of unsecured creditors.

APPEARANCES (Cont'd)

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MR. CHRIS LENHART AND MR. MARK KALLA,
Attorneys at Law, Dorsey & Whitney, Suite 1500, 50
South Sixth Street, Minneapolis, Minnesota
55402-1498, appeared on behalf of Hilco Gordon
Brothers.

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

MS. LYNN TILTON AND MR. GREGORY GORDON,
Attorney at Law, 2727 North Harwood Street,
Dallas, Texas 75201, appeared on behalf of
Patriarch.

MR. STEVE MEYER, Attorney at Law,
3300 Plaza VII Building, 45 South Seventh Street,
Minneapolis, Minnesota 55402, appeared on behalf
of Stylemark.

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APPEARANCES (Cont'd)

MR. GREGG A. LOWRY, Attorney at Law,
Suite 2200, 2200 Ross Avenue, Dallas, Texas 75201,
appeared on behalf of Stylemark.

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 Ritchie Capital.

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

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APPEARANCES (Cont'd)

MS. AMY SWEDBERG, Attorney at Law,
Suite 3300, 90 South Seventh Street, Minneapolis,
Minnesota 55402-4140, appeared on behalf of
Flextronics.

MR. 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,
Winthrop & Weinstine, Suite 3500, 225 South Sixth
Street, Minneapolis, Minnesota 55402-4629,
appeared on behalf of Acorn Capital.

MR. MICHAEL DOVE, Attorney at Law,
P.O. Box 458, 2700 South Broadway, New Ulm,
Minnesota 56073-0458, appeared on behalf of
Trustee.

P R O C E E D I N G S

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THE COURT: All right.

Counsel.

MR. FLEMING: Your Honor, Terry Fleming on behalf of Polaroid. We've discussed the issues that have been raised in the motion in limine and I'm finally -- or with the understanding that there will be no inquiry at this time about the lien issue and that the testimony will be limited to questions relating to the sales process and other possible sales alternatives that she considered. There's no need to have the motion heard at this time.

THE COURT: All right.

MR. KRAKAUER: And, Your Honor, with respect to the lien issue, talked to Acorn and they're expecting to argue that later so we'll just put that off until later.

THE COURT: Expecting to argue what?

MR. KRAKAUER: Well, Acorn is here. The issue of whether or not it's appropriate to hear evidence on the liens that

1 Acorn had and Ritchie.

2 THE COURT: All right.

3 MR. KRAKAUER: So it's being
4 put off. And otherwise not agreeing to limit
5 my testimony but if Polaroid has an objection
6 to it, they can raise that. I'm not intending
7 to limit the things that I'll ask but I will
8 say that I expect this examination to last
9 five minutes or less.

10 THE COURT: Okay.

11 MR. KRAKAUER: And if there's
12 an objection to something, they can raise it.
13 Ms. Jeffries.

14 UNKNOWN SPEAKER: I mean, we
15 will object. I'm not sure if he was saying
16 that's something other than the understanding
17 I stated.

18 MR. KRAKAUER: Well, I believe
19 if -- it's our understanding. But let me ask
20 my questions. If he has an objection to my
21 question as we're going, he'll state it.

22 THE COURT: And believe me,
23 I'll deal with that objection.

24 MR. KRAKAUER: I understand.

25 THE COURT: All right. Ma'am,

1 come forward if you would, please.

2 MR. KRAKAUER: And I would say
3 the questions I have go to alternatives
4 considered as well as valuation issues.

5 THE COURT: Raise your right
6 hand, ma'am.

7

8 MARY JEFFRIES

9

10 A witness in the above-entitled action,
11 after having been first duly sworn,
12 testifies and says as follows:

13

14 THE WITNESS: I do.

15 THE COURT: Thank you. Please
16 take the witness stand.

17

18 EXAMINATION

19

20 BY MR. KRAKAUER:

21 Q Ms. Jeffries, in terms of alternatives to
22 pursuing a sale, did you look at possibility
23 of licensing agreements overseas, the company
24 entering into licensing agreements overseas to
25 generate revenue and build a reorganization

1 around that?

2 A Yes. We looked at licensing opportunities.

3 Q And did you solicit -- did you solicit any
4 parties in Europe or the Middle East or the
5 far east to possibly enter into licensing
6 agreements with Polaroid as a way to possibly
7 fund a reorganization plan?

8 A Since the bankruptcy?

9 Q In this last -- I'm asking first in terms of
10 this process.

11 A In this process?

12 Q This sale process?

13 A No, we haven't.

14 Q Isn't it true that previously there was an
15 interest expressed by some parties -- in the
16 parties in India particularly with respect to
17 licensing of the Polaroid brand?

18 A Yes.

19 Q And didn't you represent to Ritchie this past
20 summer that, in fact, there was parties in
21 India who were -- who you believed were very
22 interested in licensing the brand in India for
23 down payment of \$200 million additional
24 royalties in excess of that?

25 A We had a letter of intent, a non-binding

1 letter of intent, yes.

2 Q For that amount?

3 A Uh-huh.

4 Q And did you believe that at the time that that
5 represented a real offer?

6 A Yes.

7 Q And do you believe at the time that reflected
8 then of the value of the Polaroid brand in
9 India?

10 A Yes.

11 Q And you had every reason to think that and
12 still have reason to think that that was
13 reflective of what the brand was worth this
14 past summer?

15 A Based upon that letter of intent, yes.

16 Q And then to the fall as well?

17 A Uh-huh.

18 Q Is that a yes?

19 A Yes.

20 MR. KRAKAUER: That was it.

21 Thank you.

22 THE COURT: All right.

23 MR. KRAKAUER: I'm sorry.

24 BY MR. KRAKAUER:

25 Q Did you go back to that party or any other

1 parties now and seek offers like that?

2 A Yes, we did. Yes.

3 Q And who did you go to over the last two or
4 three months?

5 A Back to the Spice Group who was the
6 non-binding letter of intent.

7 Q And they told you at this point they're not
8 interested?

9 A Yes.

10 Q Thank you. Did you go to anybody else in
11 Asia?

12 A The Gomay Group.

13 Q And they said?

14 A No, they weren't interested.

15 Q Okay.

16 MR. KRAKAUER: Thank you.

17 THE COURT: Mr. Chesley?

18 MR. CHESLEY: Two questions,
19 Your Honor.

20

21 EXAMINATION

22

23 BY MR. CHESLEY:

24 Q Ms. Jeffries. The transaction Mr. Krakauer
25 asked you about, that never closed, did it?

1 A No.

2 Q And in fact, based upon your experience with
3 the company, do you believe that the process
4 that was led by Houlihan Lokey with your
5 active participation yielded the highest and
6 best value for the assets of Polaroid?

7 A Yes, I did.

8 MR. CHESLEY: Thank you. I
9 have nothing further, Your Honor.

10 THE COURT: All right.
11 Anybody else? Very good. Thank you, ma'am.
12 You may step down. All right. Other proof?
13 Any other witnesses?

14 MR. UPHOFF: Your Honor, can I
15 call a rebuttal witness, please?

16 THE COURT: Going to?

17 MR. UPHOFF: The issues that
18 have been raised about the LLCs.

19 MR. CHESLEY: We would object
20 to that, Your Honor. There was no direct --
21 there was no contrary testimony put into the
22 record. The only testimony that was
23 represented in the Debtor's case in chief, the
24 only evidence put in in response to that was
25 the evidence with respect to Stylemark and

1 whatever that was from Mr. Krakauer.

2 MR. UPHOFF: (Unintelligible)
3 should have the right to express her opinions
4 about the LLCs as she has --

5 THE COURT: Who would you be
6 calling?

7 MR. UPHOFF: The head of
8 Patriarch.

9 MR. CHESLEY: Your Honor, she
10 testified. They had every opportunity to ask
11 every one of those questions. At some point
12 it has to end.

13 MR. UPHOFF: Well, I think it
14 was rebuttal to the later testimony.

15 MR. CHESLEY: That testimony
16 was before she took the stand.

17 THE COURT: Mr. Uphoff, I'm
18 just going to ask you to have a seat for a
19 minute here. I'm going to -- I'm going to
20 sustain the objection. Ms. Tilton was called
21 in the first instance as the Debtor's second
22 witness. The inquiry of her was relatively
23 brief and then really we've only had two other
24 witnesses since then, Mr. Landorf as
25 Stylemark's witness and Ms. Jeffries as the

1 Ritchie Group's witness. So she would not be
2 at this point a rebuttal witness to any
3 evidence that came in after the Debtor rested
4 its case in chief. So that's technical but I
5 guess to use Mr. Chesley's words, it does have
6 to end sometime. And while we sometimes do
7 give a little greater latitude than you would
8 in a jury trial in the context of bankruptcy
9 cases, I'm not convinced that I should
10 exercise any sort of discretion in favor of
11 giving that latitude at this point.

12 MR. UPHOFF: Your Honor, at
13 this point I would like to call Jed Stewart as
14 a rebuttal witness.

15 THE COURT: Okay. As to?

16 MR. UPHOFF: As to the LLC
17 agreements.

18 MR. CHESLEY: Same objection,
19 Your Honor. There's been nothing presented
20 since the testimony was presented in the case
21 in chief. It controverts the same exact
22 issue. Different person, same issue.

23 THE COURT: And that is
24 correct. The objection is sustained. You
25 can't call a rebuttal witness to reopen your

1 case in chief and that's essentially what that
2 would be doing. You can only call a rebuttal
3 witness as to proof that came in at the behest
4 of other parties after you have concluded your
5 case in chief.

6 All right. Anything else? I don't
7 know where that leaves us, quite frankly, but
8 counsel will have a lot more ideas about that
9 than me. All right. Am I going to conclude,
10 then, that the evidentiary record is completed
11 here such as it is?

12 MR. CHESLEY: From the
13 Committee, yes, Your Honor.

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

17 Now where do we go?

18 MR. CHESLEY: Since no one's
19 standing and I am, I'll just proffer
20 something, Your Honor. We've been here a long
21 time. I think the issues have been very fully
22 vetted before the Court. We are happy to rest
23 on the record. If the Court wants a very
24 brief summation to close this today, we're
25 happy to do that. But I think for myself, and

1 obviously I'll let the other creditors who
2 have spoken today speak their mind on this,
3 but we think the issues are relatively clear.
4 We're happy to sort of bring it all together
5 if the Court would like.

6 If the Court wants to review any
7 supplemental documents, any legal authority,
8 we're happy to provide that to the Court, you
9 know, almost instantaneously if that would
10 help the Court. We'd like to end this today
11 if we could.

12 THE COURT: Well, I certainly
13 would too but the question is just what I'm
14 going to be given to do my job after the
15 parties -- what I have been given I should say
16 to do my job after the parties have finished
17 their presentations here. I need to have more
18 structure on this imposed here as to how the
19 content of the LLC agreements factor into this
20 determination. I mean, I think I've
21 identified at least one of the issues and that
22 would go to the question of which is the
23 highest and best offer at this point. And
24 then, of course, we've got a whole bunch of
25 other issues that have been raised by

1 objections that have not been resolved as yet
2 on the record.

3 MR. CHESLEY: Your Honor, may
4 I? If we could potentially segregate this
5 into resolving effectively highest and
6 otherwise best, maybe we could then move to
7 what are the other objections that are out
8 there may be the best -- at least as I'm
9 looking at Debtor's counsel, certainly argue
10 with respect to the other documents you need
11 to look at, Your Honor, actually it is our
12 view that you don't need to look at any other
13 documents. You've heard the testimony of the
14 Debtor's financial advisors and you've
15 heard -- well, you will hear and you probably
16 gleaned the positions of the other creditor
17 stakeholders here which is they believe, and
18 again it's their money, it's their equity,
19 they believe is highest and otherwise best.
20 So we don't believe you need to make a side by
21 side. I think you've gotten the testimony.
22 If you want to review them, obviously they're
23 here. We're happy to walk you through them,
24 summarize them in writing or otherwise. But
25 we think in light of the positions of the

1 creditors committee, the other creditors and
2 most importantly the testimony of Mr. Spencer,
3 you have everything you need to make the
4 decision.

5 THE COURT: Well, you're not
6 going to be walking me through anything that
7 has yet to be submitted under seal assuming
8 that ends up being relevant.

9 MR. CHESLEY: Yeah.

10 THE COURT: And I only have
11 sort of a hazy understanding at this point as
12 to how relevant --

13 MR. CHESLEY: Yeah. I sort of
14 put that issue aside, Your Honor, because
15 from -- and again, I'm sort of back where I
16 didn't want to go before on this issue. We
17 understand the issue that's been presented.
18 We understand where Patriarch is on this. I
19 don't want to prejudice their position in any
20 way, but we think the sealed process that is
21 in place addresses many of those issues. We
22 have that document if the Court would like to
23 see it in the context of the argument and the
24 testimony that's been presented.

25 But again, it's just one of the

1 factors, the qualitative factors that are out
2 there that go to highest and otherwise best.
3 And again, we come back to, you know,
4 obviously we uphold our committee extensively.
5 The others have as well and at the end of the
6 day this is sort of where we came out.

7 MR. UPHOFF: Your Honor, may I
8 suggest that we have a post-hearing brief of
9 some kind to put structure on this. And I'm
10 not thinking that this will take very long.

11 THE COURT: All right. Listen
12 to me here. I'm out of the state next week
13 and I think I told people that was the case
14 and I structured this thing up starting back
15 in early March knowing darn well I had this
16 commitment to a seminar through the Federal
17 Judicial Center that's been on my calendar for
18 nine months. I tried to structure this thing
19 up in early March to make sure that we were
20 working against that and there's been constant
21 slippage and I've allowed that with the hope
22 that I wouldn't get dropped with something
23 just before I left. So I am not going to
24 bleed this out over beyond next week to have
25 to pick it up when I get back. That's not

1 going to happen. So I'm not taking any
2 briefing here. The question is how this is
3 going to be structured up now and conceivably
4 tomorrow to give me something so I can give
5 you a decision.

6 MR. CHESLEY: And, again, I
7 come back to I think it's all there, Your
8 Honor. I don't believe there's anything
9 outside what you have heard today that you
10 need to consider for the purposes of making
11 this first decision. There are other issues
12 that come up with respect to certain other
13 parties. I respect their rights and that we
14 can resolve hopefully consensually, if not,
15 you know, very quickly tomorrow I would assume
16 with everybody. But we need to get past sort
17 of this threshold issue. And it's at least
18 the Committee's view and I would certainly
19 welcome anybody else to jump in here, that you
20 have everything at this point you need to make
21 that decision.

22 MR. SINGER: Your Honor, I
23 don't want to -- the one exception to that, of
24 course, is Patriarch documents have not been
25 filed with the Court and the modification to

1 the LLC agreement that we intend to file would
2 be part of the filing. So the LLC agreements
3 that are in issue now have not been file yet
4 with the Court.

5 THE COURT: Well, I know. And
6 that's been sort of the problem all along and
7 I really thought that the process was going to
8 result in certainty as to that heading into
9 this hearing but it didn't.

10 MR. LOWRY: Your Honor, we're
11 delighted with whatever process the Court
12 chooses. We simply want an opportunity to
13 argue our limited objection which does go
14 beyond just highest and best. It goes to the
15 ability to sell the assets under 363(f).

16 MR. CHESLEY: Your Honor,
17 clarification. Is that issue moot if Hilco is
18 chosen?

19 MR. LOWRY: I'm so sorry.
20 Yes. It is an issue because we've got a
21 resolution with Hilco on the assumption of our
22 licenses and consents that it wouldn't be an
23 issue with Hilco. So I apologize for not
24 clarifying that. And perhaps we could find
25 some other resolution with the other bidder.

1 THE COURT: All right. Well,
2 I think I'd like to hear the parties out on
3 the question that's the threshold issue here
4 which is which is the highest and best offer
5 considering all of the circumstances including
6 the outcome to that auction process that took
7 a good chunk of time today here. And I need
8 each contending side here to identify just how
9 those documents that would be put under seal
10 play or don't play into that consideration.
11 I've taken testimony but I need to know how
12 that would factor in because we've got that
13 logistical issue there as to whether I can
14 give you a decision yet today or not.

15 So all right. Go forward on that. I'm
16 going to hear from the Debtor first.

17 MR. CHESLEY: Your Honor, the
18 only sealed document is the issue with respect
19 to Stylemark.

20 THE COURT: Right.

21 MR. CHESLEY: That's the
22 only --

23 THE COURT: Okay.

24 MR. SINGER: That's correct,
25 Your Honor. I guess with the Court's

1 permission, I would like to, you know, offer
2 up the document, and I do have a manual
3 version here if that's acceptable to the Court
4 for consideration. This was -- what our
5 intention was after today they -- they started
6 as -- file this electronically connected to
7 the entire bid package.

8 THE COURT: All right. Okay.

9 MR. SINGER: May I approach?

10 THE COURT: You may. Sure.

11 I'm going to take cognizance of this on the
12 representation that this will be filed under
13 seal later. And filing under seal as we do it
14 through our iteration of CM/ECF it would be
15 filed to the in-box. And since we're after
16 close of business, the case administrator will
17 not be looking at this until first thing
18 tomorrow morning anyway. So it will not be
19 formally docketed or sealed until first thing
20 in the morning even if it goes in through
21 CM/ECF tonight. So I'm going to consider this
22 printout hard copy here for whatever relevancy
23 it has when the time comes. All right. Okay.

24 MR. UPHOFF: Thank you, Your
25 Honor. Your Honor, we would urge the Court to

1 accept the Patriarch offer. We have had
2 perhaps the most extraordinary auction process
3 in the history of 363. And I don't think any
4 of us wants to go through the chronology but
5 it has lasted for nearly three weeks. That
6 process has been robust and spirited. It has
7 resulted in a bid by Patriarch that is nearly
8 half a million dollars greater than the Hilco
9 bid. Not only is it a half a million dollars
10 greater, it has over eight and a half million
11 dollars more of cash. We consider that to be
12 significant in this estate.

13 There was an agreement reached on
14 March 31 on the value of the equity and it was
15 agreed to be \$650,000 a point. Each bidder
16 has maxed out on that equity portion.

17 The difference between the bids in
18 addition to the substantial cash is the
19 excluded assets. The Hilco bid leaves more
20 assets with the estate, and with that, Your
21 Honor, the execution risk that comes with that
22 and the Debtor does not wish to take that
23 execution risk. It is not, in the Debtor's
24 judgment, similar to cash. It would require
25 effort and money to execute on that and it is

1 impossible to say whether or not those values
2 would be realized.

3 In addition to the greater cash, in
4 addition to being a higher bid, in addition to
5 the testimony of the professionals retained by
6 the Debtor, Houlihan Lokey, whose, I believe,
7 credentials cannot be questioned here, this
8 bidder, the winning bidder, Patriarch, has
9 indicated that it desires to affirm the lease
10 that the Debtor presently has at the Baker
11 Road facility and to retain a number of the
12 Debtor's employees. That is an important
13 factor. It's not a financial factor but it is
14 a factor in our judgment.

15 The creditors committee has, for
16 whatever reason, determined that there are a
17 number of so-called qualitative factors that
18 result in their support of the Hilco Gordon
19 Brothers bid. Your Honor, these LLC
20 agreements were negotiated with the Debtor's
21 counsel. Admittedly there are differences
22 between them but these differences are not a
23 difference which you can put a quantitative
24 number on. Some are better or one might be
25 better in one respect or one might be better

1 in the other respect, but the fact of all of
2 this remains that we had a bidding process, we
3 had an auction, we had the rules set up and to
4 determine the winner we looked to the highest
5 dollar amount. The Patriarch bid is clearly
6 the better bid from a financial standpoint and
7 we would urge this Court to approve the
8 Debtors entering into that and we do not leave
9 that whatever so-called qualitative
10 differences that the creditors or others may
11 see in these LLC agreements can justify the
12 financial differences to this estate,
13 particularly the cash that is coming to this
14 Debtor and the elimination of the execution
15 risk that is presented by the Hilco Gordon
16 Brothers bid. Thank you.

17 THE COURT: All right. Very
18 good. Thank you.

19 MR. CHESLEY: Thank you, Your
20 Honor.

21 THE COURT: Go ahead,
22 Mr. Chesley.

23 MR. CHESLEY: Thank you.
24 Please the Court, counsel. At the outset I do
25 want to thank the Court for its time today and

1 obviously both of these participants who
2 actively participated in a very vibrant
3 process and a very difficult market. At the
4 end of the day, Your Honor, the issue is
5 highest and otherwise best. We know that.

6 When I wrote my comments out, I had
7 originally written out that we don't dispute
8 that the Patriarch bid, according to the
9 rules, was higher. In fact, based upon
10 Mr. Spencer's testimony, Your Honor, we
11 actually take exception to that as well based
12 upon the calculation of the change made to the
13 LLC agreement and the reduction of the
14 preferred return of a \$5 million a year
15 difference. These are substantial amounts.

16 And with all due respect to the
17 Debtor's counsel, Your Honor, this is return
18 to the estate. The estate is the creditors in
19 this case and we cannot lose sight of the fact
20 that at the end of the day, as Mr. Spencer
21 testified and everyone knows, this return goes
22 to the creditors.

23 So let me talk briefly, Your Honor,
24 because the creditors did consider all of
25 these factors despite counsel's statement that

1 apparently we did not. We considered these
2 issues with a very sophisticated creditors
3 committee and with the insight of Mr. Spencer
4 because, as the Court knows, we chose not to
5 retain a separate financial advisor to
6 preserve the estate's resources. So we're
7 relying upon Mr. Spencer and talking to our
8 committee and all of the other significant
9 stakeholders who you have heard from today and
10 potential stakeholders because that's an issue
11 that will have to be resolved. All of those
12 believe that the Hilco Gordon Brothers bid is
13 highest now and otherwise best.

14 Let me talk for a minute, Your Honor,
15 about why we believe that based upon the
16 evidence. First of all, the cash difference
17 is not as enormous as counsel indicates. The
18 cash difference with cash and cash equivalents
19 is \$488,000. We heard argument about
20 execution risk with respect to the lone
21 excluded asset, the art. But Mr. Spencer
22 didn't testify about execution risk. To the
23 contrary. While Houlihan Lokey used a base of
24 \$6.5 million for every bidder on that asset,
25 he testified that the Sotheby's valuation puts

1 that art at the between 7.3 and \$11.3 million.
2 The creditors committee did consider that
3 value in making its qualitative determinations
4 that this is the highest and otherwise best
5 bid.

6 A number of other factors lead to this,
7 Your Honor. The subjective or the qualitative
8 differences in the LLC, these are not of the
9 Committee's imagination. This is of
10 Mr. Spencer's testimony as a very experienced
11 financial advisor who has done deal after deal
12 in this space. While the debtors may believe
13 and Patriarch may believe that these are
14 comparable provisions or comparable documents,
15 the evidence doesn't support that and at the
16 end of the day, Your Honor, that is of no
17 moment here. This is, as Mr. Spencer
18 acknowledged and the Court is well aware, the
19 creditors' equity. And the creditors have, as
20 they have stated today, a strong preference
21 for all of the reasons we have articulated for
22 the Hilco Gordon Brothers equity.

23 We've already talked about the
24 elimination of the 10 percent preferred stake
25 and the true monetary value that likely will

1 bring to the estate.

2 Also, there was undisputed evidence
3 about Hilco's track record in this space.
4 Sharper Image, Linens & Things, Bombay, large
5 cases where they have done this. Their
6 experience, their track record in identical
7 deals was a significant issue that the
8 Committee relied upon in making this
9 determination that on an equity basis if cash
10 got close, which it did today, the Hilco
11 Gordon Brothers' equity was preferred.

12 And finally, Your Honor -- before I do
13 that, there was another factor the debtors
14 talked about and that is employees. We are a
15 big proponent and we actually think there is
16 economic value if employees are hired. The
17 problem is Patriarch had every opportunity to
18 make that abundantly clear in their document
19 time and time again and it is not there. So
20 statements that decide the Debtor's position
21 on that recognize cannot be quantified we
22 believe again is not supported by anything
23 before the Court.

24 The last issue, Your Honor, is, at
25 least for the creditors committee and some of

1 the other stakeholders of the creditors,
2 perhaps the 800-pound gorilla in this room.
3 The Court is well aware that this estate and
4 these creditors, there may be a long road
5 before we can distribute what has been reaped
6 from the sale by virtue of litigation that may
7 exist, claims that may exist and the process
8 to get those resolved. We understand it will
9 be contentious. We understand it will be
10 costly. We understand it will be time
11 consuming. Obviously, Your Honor, one of the
12 factors that our committee did consider is the
13 currency that would be available to deal with
14 these various claims and these various pieces
15 of litigation. Our committee deliberated on
16 this long and hard and determined that the
17 currency that they wanted to use based upon
18 the stated preferences of those we have to
19 deal with in the coming weeks and months and
20 hopefully not years is the Hilco Gordon
21 Brothers equity.

22 I asked Mr. Spencer, Your Honor, has he
23 ever seen a case similar to this where the
24 wishes of the creditors committee whose assets
25 these are was not respected by the debtors in

1 a sale process like this. He's not aware of
2 it, Your Honor. We're not aware of it. And
3 we believe, based upon the enormous stake that
4 these creditors have and all creditors have in
5 this process, that the Court should deny the
6 motion to approve the Patriarch deal and
7 approve Hilco Gordon Brothers as the winning
8 bidder.

9 Thank you, Your Honor.

10 THE COURT: All right.

11 Mr. Runck?

12 MR. RUNCK: Thank you, Your
13 Honor. Your Honor, as Mr. Chesley stated, in
14 the creditors' view, Your Honor, the creditors
15 are the entities that make up the estate in
16 this case. This, the sale proceeds and all
17 the components thereof, Your Honor, are the
18 consideration for the benefit of the
19 creditors, Your Honor. This is, in short, our
20 money and we feel this should be our choice.
21 And for the first time, Your Honor, in these
22 cases the creditors have spoken and are
23 speaking in a uniform voice. And to my
24 knowledge, that's the first time this has
25 happened in this case. I haven't seen the

1 creditors agreeing on anything, but today we
2 agree that we prefer the Hilco bid over the
3 Patriarch bid. The Polaroid committee feels
4 that way. My committee feels that way.

5 Your Honor, we agree that valuing
6 equity is a highly uncertain process. There's
7 a lot of factors to be considered, both
8 quantitative and qualitative. There's a lot
9 of risks involved. There are substantial
10 risks involved. And as a result of those
11 risks, you have to take into account the form
12 of the LLC agreement, the risks that may be
13 involved and may be incumbent in being a
14 minority holder in the new company.

15 And, Your Honor, you heard Mr. Spencer
16 testify that he, too, like us, he prefers the
17 qualitative factors in the LLC agreement
18 provided by Hilco. The testimony is in the
19 record that supports our judgment on this
20 point, Your Honor.

21 The issues that were brought out during
22 the testimony, Your Honor, is that in the
23 Patriarch LLC agreement there's a higher risk
24 of dilution in reduction of the minority
25 interest.

1 Your Honor, in the Hilco agreement
2 there's greater transparency. We get invited
3 to meetings. We get to know what's going on.
4 We receive audited financials. Your Honor,
5 there was testimony that showed that Hilco has
6 a lower need for operating capital in future
7 capital infusions. That also reduces, Your
8 Honor, the risk of dilution of our minority
9 interest.

10 And very importantly to me, Your Honor,
11 in the Hilco agreement there is a clear exit
12 strategy. The LLC agreement itself provides a
13 waterfall that tells us how the money will be
14 distributed. It sets forth a priority
15 structure that says every year there's going
16 to be a distribution of income to the
17 following people in the following amounts.
18 The Patriarch agreement has no such provision.
19 It says distributions will be made by the
20 manager in the manager's sole discretion.
21 Your Honor, that's just simply an unworkable
22 provision and it requires us to have blind
23 faith. And it's just something that we can't
24 deal with.

25 With respect to, Your Honor, the

1 valuation of the equity, I would also point
2 out, as has been pointed out many times before
3 you today, that Hilco, as part of their last
4 bid, they removed the preferred return on
5 their initial capital contribution. And
6 you've heard testimony that that increases the
7 value to the company in the amount of
8 \$5 million per year. That's a substantial
9 factor.

10 But, Your Honor, stepping back from the
11 equity determination for a minute, just to
12 simplify things from our perspective, even if
13 you were to value both equity interests
14 equally, even if Hilco and Patriarch's equity
15 interests were valued exactly the same, the
16 record before you, Your Honor, shows that the
17 scales here still tip in favor of Hilco. And
18 what I'm referring to is specifically the art
19 collection.

20 The difference here, Your Honor,
21 between the two bids is a net amount of
22 \$488,000. Under the Hilco bid the estate gets
23 to keep the art. They've been given a credit
24 in exchange for that in the amount of
25 \$6,500,000. You heard testimony today that

1 that art has been appraised within the range
2 of 7.3 million to 11.3 million. Your Honor,
3 even under the most pessimistic view under the
4 appraisal -- and that appraisal, by the way,
5 was conducted by Sotheby's. They know a lot
6 better than I do what the value of that art
7 is. Sotheby's is telling us the art is worth
8 7.3 to \$11.3 million. Even under the low end
9 range of that, Your Honor, if the art only
10 takes in \$7.3 million, that means the value of
11 the Hilco bid goes up by 800,000 right there.
12 That offsets the difference between the two
13 bids in our view.

14 So, Your Honor, taking into -- well,
15 then finally, Your Honor, then there's this
16 issue regarding Stylemark. And I haven't seen
17 whatever was filed under seal so I'm not going
18 to comment on it, but clearly from the sound
19 of people's comments today, that also tips in
20 favor of Hilco.

21 So there are a number of factors, Your
22 Honor, that aren't listed on the Debtor's
23 Exhibit H. There are a number factors here
24 that have been brought out in testimony that
25 clearly tip the scales in favor of Hilco. And

1 like the Polaroid committee, Your Honor, our
2 committee also favors the bid by Hilco and we
3 believe that represents the highest and best
4 value to our estate. Thank you, Your Honor.

5 THE COURT: Thank you. Give
6 me just a second. Others, creditors first.

7 MR. LOWRY: Thank you, Your
8 Honor. Gregg Lowry for Eyewear Brand and
9 Stylemark. Your Honor, we filed a limited
10 objection that raised some legal points
11 dealing with the ability to sell the
12 trademarks under 363(f).

13 THE COURT: Now, is this going
14 to impact on the highest and best offer issue
15 because that's what I want to hear?

16 MR. LOWRY: I'm so sorry. I
17 don't think it really does, Your Honor.

18 THE COURT: Okay. Don't
19 worry. You'll be heard on that --

20 MR. LOWRY: Okay. I didn't
21 realize that. My apology, Your Honor.

22 THE COURT: -- when your time
23 comes.

24 MR. LOWRY: Thank you, Your
25 Honor. It usually does.

1 THE COURT: I'm trying to deal
2 with this one thing at a time. All right.
3 Mr. Krakauer?

4 MR. KRAKAUER: Your Honor,
5 first, before on why we thought a sale was not
6 appropriate, I take it you don't want me to
7 repeat that right at this moment?

8 THE COURT: Not at this
9 moment.

10 MR. KRAKAUER: Okay. That's
11 fine.

12 THE COURT: I'm just trying to
13 determine in isolation and maybe in the
14 abstract the highest and best.

15 MR. KRAKAUER: I understand.
16 So I'll make it brief. I'll address it in a
17 hypothetical if you were to approve a sale
18 today.

19 THE COURT: Right.

20 MR. KRAKAUER: Our view also
21 is that the Hilco bid is much superior for all
22 the reasons the creditors committees from both
23 cases have said. I've been practicing a
24 little more than 25 years. I don't think I've
25 ever seen a case before where you've had every

1 single creditor constituency come down on an
2 issue about valuing two bids and saying one is
3 better than the other and a debtor go off in a
4 separate direction.

5 And in this case in particular we're
6 dealing with essentially a liquidation. This
7 particular debtor, no matter which bid goes
8 through, is not going to be around very much
9 longer in present form. And I don't know what
10 interest they're pursuing but it does not
11 appear to be the creditors' interest as
12 articulated by the creditors. And I think
13 that is inconsistent with what is intended by
14 the Bankruptcy Code.

15 As to the particulars on the various
16 agreements, I think you've heard them before
17 but I think you could also -- Mr. Chesley's
18 statement that the value of the Patriarch
19 equity is not viewed as highly as articulated
20 by the debtor is a correct one. There are too
21 many issues with it and one simply would not
22 value it.

23 There are reasons, a number of reasons
24 to value the Hilco equity much, much higher.
25 And in essence, what you're doing so much is

1 not -- the important thing is not determining
2 whether the point estimate is right so much of
3 whether \$650,000 is the right number in this
4 particular circumstance. The issue is the
5 relative benefits of each equity bid. And I
6 think in this particular case there's no
7 question that the Hilco one is superior on the
8 equity component.

9 I will come back and speak later on the
10 issue whether a sale should go forward. Thank
11 you, Your Honor.

12 THE COURT: Okay. Thank you.
13 All right. Hearing from creditors first here.

14 MR. TERRIEN: Good evening,
15 Your Honor. Mike Terrien on behalf of Ron
16 Peterson as trustee for Lancelot and Klosses
17 (phonetic). I would adopt everything that my
18 three predecessors have said about why the
19 Hilco bid is a higher and better bid.

20 And just wanted to give you some
21 perspective on why Mr. Peterson made the
22 business judgment that he did that the Hilco
23 bid is higher and better. And it really does
24 boil down in large part to different -- to
25 what have been described as the qualitative

1 differences. In the Patriarch agreement it's
2 really a nonmarket agreement in a lot -- in
3 many ways.

4 THE COURT: I'm sorry, it's a
5 what?

6 MR. TERRIEN: A nonmarket
7 agreement. It's an agreement that you
8 wouldn't see -- well, I've never seen anything
9 like that. I'll just put it that way. There
10 are no checks. We're a minority shareholder
11 with no rights and no checks under that
12 agreement. There's not even a -- there's not
13 even a requirement that we be delivered
14 audited financial statements. There's not a
15 third party overseeing how the financial
16 statements are going to be prepared and
17 ensuring us that we can rely on them. There's
18 no participation rights in meetings or
19 decisions. There's no oversight rights.
20 There's no -- Hilco at least gives us the
21 opportunity to observe what's going on.
22 Patriarch expressly excludes us from any
23 opportunity to observe what's going on.

24 With respect to dilution, we have
25 25 percent of the equity. But you heard the

1 testimony that on day two for essentially zero
2 dollars that 25 percent of the equity can be
3 diluted to, in effect, nothing. You have to
4 divide by zero in order to work through the
5 formula to determine what they can do to our
6 equity. And when you divide by zero, you get
7 nothing left. And I don't know what Patriarch
8 intends to do. I can't speak to their
9 subjective intent. But as a rational economic
10 actor having reserved the right to buy this
11 company one day and wipe us out the next, I
12 don't know why they wouldn't. And I don't
13 have any confidence that they won't and I
14 wouldn't blame them if they did. Patriarch
15 has its own investors to answer to. Why
16 should it not exercise rights that it has to
17 enhance its own value. I would expect that it
18 would and I'm concerned that it will. And if
19 it does, \$16 million worth of the bid that was
20 offered to this Polaroid estate will, in
21 effect, evaporate. And even if they're not
22 cavalier enough to do it to the point of
23 completely eliminating our equity, the choice
24 is theirs and we have nothing to say about it.
25 That's not a position we're comfortable with.

1 Patriarch also has ability to control
2 transactions with its own affiliates under
3 this agreement. It's disclaimed that the
4 business opportunity -- any duty in connection
5 with the business opportunity doctrine in the
6 document. It's made clear that it can enter
7 into affiliate transactions. We've got no
8 ability to see the economics of them, to see
9 if they're fair, to see if they're market, to
10 see if money that's coming into this new
11 entity is being funneled off to Patriarch
12 affiliates. We've got no way of overseeing
13 that. There are express rights to keep that
14 information from us in the document, give us
15 no way to oversee that and no way to know that
16 we're being treated fairly.

17 At the end of the day they have kept
18 such complete control over both the ability to
19 manipulate our economic interest and over the
20 information that they have to provide us that
21 they can do whatever they want to us and they
22 don't even have to tell us about it. So
23 that's \$16 million we have real trouble
24 ascribing any value to.

25 THE COURT: All right. Any

1 other creditor wish to be heard on this?

2 Mr. Rosow, I'm going to ask you. Does
3 Acorn want to be heard on this?

4 MR. ROSOW: Not on this issue,
5 Your Honor.

6 THE COURT: All right. Okay.
7 Mr. Gordon, now, I ruled earlier there's a
8 standing issue here. What do you think you
9 want today?

10 MR. GORDON: Well, Your Honor,
11 now I think what's happened -- this all goes
12 now to the integrity of the auction process.
13 I mean, we've just gone through an auction and
14 now Your Honor's being asked to change all the
15 rules of the game after the fact. There's no
16 question that we have standing.

17 I would cite to Your Honor the In Re:
18 Hat case where the Court made very clear if a
19 bidder has issues with the way the auction is
20 handled, which is what this directly goes to
21 now, that we have a right to be heard on that
22 issue. And I'd ask to be heard on that basis,
23 Your Honor.

24 I will tell Your Honor as well that
25 statements are being made about the LLC

1 agreements. They are simply not true and
2 you're not being walked through the
3 agreements. And I'm very concerned that --
4 and I know Your Honor's very careful but I
5 think you're being put in a very difficult
6 position of generalized statements are being
7 made about documents but nobody's actually
8 comparing them and giving you the fact that
9 you can say one thing about the Patriarch
10 document but it's in the Hilco document too
11 where this \$5 million thing, that's all a red
12 herring. We never had the \$5 million item to
13 begin with. So all that did was bring that
14 agreement back closer to our agreement.
15 They're making it sound like it's a big sea
16 change that should affect valuations. But
17 fundamentally this now goes to the integrity
18 of the process. It's, frankly, in my view,
19 making a mockery out of the auction process we
20 just spent the last several hours going
21 through.

22 THE COURT: All right. That's
23 all the more I'm going to hear from you right
24 now. Okay? I'll ask you to take a seat
25 before I determine whether I'm going to hear

1 you on anything else. Okay? All right.

2 Mr. Chesley, was there something you
3 wanted to --

4 MR. CHESLEY: Well, I was
5 going to respond to that but I don't believe
6 it's probably necessary.

7 THE COURT: Mr. Uphoff?

8 MR. UPHOFF: Do I get an
9 opportunity to come back to the podium?

10 THE COURT: Yeah, one more.
11 Should have my head examined but I'm going to
12 allow you to do that. And it has nothing to
13 do with you personally. It just has to do --

14 MR. UPHOFF: I get tired of
15 myself.

16 THE COURT: -- the amount of
17 input at this hour.

18 MR. UPHOFF: I feel compelled
19 to respond to a number of remarks that were
20 made here today, Your Honor.

21 One, which troubles me greatly, is the
22 statement that the Debtor has gone off in a
23 separate direction. That, unfortunately, from
24 their perspective is not the case here. The
25 Debtor --

1 THE COURT: From whose

2 perspective? You're saying they.

3 MR. UPHOFF: From

4 their perspective I do not believe that they
5 are right. I believe that we, the Debtor, has
6 held true to the course. We set up the rules.
7 The rules were clear. The creditors committee
8 and their counsel and their consultants all
9 agreed on the rules and now we are really in a
10 totally different scenario as far as I'm
11 concerned. And I will just say one comment
12 from --

13 THE COURT: Let me ask you
14 about this. I mean, I'm starting to develop a
15 few thoughts about this here. We had a
16 bidding process here today that was designed
17 to quantify consideration that had monetary
18 value and to ascertain what each party wanted
19 to come forward and to furnish by way of
20 monetary value. But then we had this separate
21 and parallel process that the Debtor undertook
22 to put the legal infrastructure attendant to
23 receiving equity as part of that consideration
24 into place, right?

25 MR. UPHOFF: That's correct.

1 THE COURT: And that consisted
2 of, in the first instance, the asset purchase
3 agreements but, more importantly, the LLC
4 agreements because that would structure up the
5 legal incidence of being a minority
6 shareholder in the successor entity, the
7 purchaser of the assets. Now, the Debtor did
8 that with both sides but didn't smash the two
9 bidders against one another to arrive at the
10 very same incidence of ownership.

11 MR. UPHOFF: That is correct.

12 THE COURT: The LLC agreements
13 are different in terms of the legal attributes
14 in the various ways that have been identified
15 here by the creditor constituencies, the legal
16 attributes to being a minority shareholder.
17 Now, given the fact that this really did not
18 end up being a complete apples to apples
19 arrangement in terms of that array of legal
20 incidence to being a minority shareholder, I'm
21 not sure that there was a rule per se that
22 would say that the prevailing bid that arrived
23 at just the dollar value had to be the winner
24 that I had to approve. I mean, if you can
25 tell me to the contrary in any of the

1 operating rules of this, if you can point to
2 me something specific, fine. But I am being
3 pitched here the argument by the creditors
4 constituencies that I should consider, number
5 one, their wishes since they are going to be
6 the goat here. Their successor, a liquidating
7 trust, some type of post-confirmation entity
8 if a plan is confirmed in this case is going
9 to be the successor in interest to that
10 minority shareholding and is going to have to
11 live with that and at this point wants to reap
12 maximum benefit to that shareholder. And
13 they're saying that benefit is to be
14 considered not just in terms of the raw
15 \$650,000 per unit valuation that Houlihan
16 Lokey quantified for it, it's also to be
17 considered on an ongoing basis in terms of the
18 right to participate and basically, to put it
19 sort of bluntly and dirtily, the right to
20 minimize the likelihood of being iced out,
21 frozen out, oppressed as a minority
22 shareholder in this new entity and that's
23 formed through a legal infrastructure.

24 Now, the Debtor went ahead with both of
25 these parties and negotiated out those terms

1 but they aren't the same. So I'm not sure how
2 I can be told that I can't consider that and
3 consider their wishes in connection with that
4 as part of the calculus in determining what
5 the highest and best offer is that's at bar
6 here.

7 That's sort of where I'm coming to
8 after hearing this whole thing out over the
9 course of the day.

10 MR. UPHOFF: I think that's
11 correct, Your Honor. Let me tell you what
12 bothers me a great deal and I think you heard
13 Mr. Gordon earlier today. For whatever reason
14 the creditors committee has never bothered to
15 speak directly with Mr. Gordon about
16 Patriarch's LLC. That would lead me to
17 believe that this hullabaloo, if you will,
18 about we are so in love with this LLC but we
19 can't live under this LLC is, frankly, a red
20 herring. If it was so important, it would
21 have merited one phone call. And Mr. Gordon,
22 and I believed him when he said today that not
23 one word, and that's what bothers me again
24 about the rules.

25 The rules were from my perspective,

1 \$650,000 per equity. Houlihan Lokey arrived
2 at that in consultation with all of the
3 constituents. The debtor I think has been a
4 tremendous steward for these creditors. We've
5 driven this from 42 million to 88 million.
6 But the suggestion that we're going off in a
7 separate direction is one that, frankly, I
8 resent. If anyone's going off in a separate
9 direction here, Your Honor, it is the
10 creditors committee.

11 I will use as an another example the
12 art. During the auction process everyone
13 agreed the art is going to be assessed at this
14 value. Now we have coming up here well, maybe
15 it's worth 7 million, maybe it's worth
16 11 million. Your Honor, maybe it's worth
17 2 million when you get done with the
18 commissions and the costs of preserving this
19 art until it's sold. Maybe. But everyone
20 agreed. We put a number on it, six million
21 five. I do not appreciate people coming up
22 here and saying, well, now we're going to put
23 a different number on it.

24 And, frankly, I feel that way about the
25 LLC issue. I really honestly believe that the

1 creditors committee is making this an issue
2 that really doesn't belong here.

3 THE COURT: You say it's a red
4 herring but, you know, red herring, going back
5 to the classic analogy, is supposed to lead
6 the bloodhound off in a different direction.

7 MR. UPHOFF: Yeah.

8 THE COURT: Right?

9 MR. UPHOFF: True. You're
10 right.

11 THE COURT: Because it is a
12 rather distinctive smell. But where are we
13 leading them away from and where are we
14 leading them to --

15 MR. UPHOFF: Here's an
16 example --

17 THE COURT: Your imputing your
18 opponents with something but I don't know what
19 it is.

20 MR. UPHOFF: They made a big
21 issue out of eliminating the preferred today
22 and this is \$5 million more to the estate.
23 Well, the reality is until they did that, it
24 was \$5 million worse than the Patriarch LLC.

25 THE COURT: But they both

1 still ended up cashing out the way they did up
2 to that point.

3 MR. UPHOFF: I understand.
4 But the reality is this did not change this
5 auction process one bit. Houlihan Lokey isn't
6 putting a penny on that as an addition. If
7 anything, it brings them in line with
8 Patriarch.

9 Your Honor, the Debtor has run this
10 auction with as much vigor as it possibly
11 could summon. We have gotten the highest
12 value, so much higher than anyone anticipated.
13 And as far as I'm concerned, from the rules of
14 the game here injecting the LLC because it has
15 some provision here or some provision there
16 that we like better than this one or don't
17 like as well as that one, if that were really
18 an issue, if that were really an issue, one
19 person from the creditors committee would
20 have, sometime in the last ten days, made one
21 call to Patriarch. That did not happen and
22 that's why I do not believe that it is an
23 issue here which should drive this decision.
24 Thank you.

25 THE COURT: All right.

1 MR. CHESLEY: May I, Your

2 Honor?

3 THE COURT: You may.

4 MR. CHESLEY: One point and
5 one point only.

6 THE COURT: Calmly.

7 MR. CHESLEY: I will try.

8 THE COURT: You've been
9 straining at the bit.

10 MR. CHESLEY: I have, Your
11 Honor.

12 THE COURT: Take a deep
13 breath.

14 MR. CHESLEY: Because of the
15 aspersions that have been cast. Had counsel
16 talked to his partner, he would have learned
17 that, in fact, what we did in lieu of staying
18 away from talking to the specific parties, we
19 used the Debtor as the conduit with respect to
20 our comments repeatedly to the LLC agreement.
21 I have the string of e-mails, Your Honor,
22 where we forwarded our e-mails to Mr. Singer
23 who forwarded those on to Patriarch who did
24 exactly what we asked in some occasions, some
25 they did not. They responded to comments. We

1 review those and use the Debtors as a conduit
2 so we would not be dragged in the middle.

3 THE COURT: This isn't the
4 first time that's been said, for the record.

5 MR. CHESLEY: I would like
6 counsel, please, who was involved in that
7 process to confirm that.

8 MR. UPHOFF: I'm aware of that
9 and I will confirm that. It's just that there
10 was no direct contact between the creditors
11 and this bidder which, under a normal
12 circumstance, Your Honor, I would say I would.

13 THE COURT: I think everybody
14 wanted a little more orderliness going through
15 this process, among other reasons because of
16 the way in which the auction went forward.

17 MR. CHESLEY: Exactly. We had
18 no contacts with the Hilco Gordon Brothers
19 team either, Your Honor. We ran this process
20 exactly how we said we would do it. So I do
21 resent that aspersion that the Committee did
22 not consider this, the Committee did not think
23 this was important. Far to the contrary. We
24 have had meeting after meeting where we had
25 analyzed these issues and discussed these

1 issues. And for the Debtors to say that
2 they're right because they're right and the
3 creditors are off on their own because they
4 don't agree with the debtors, Your Honor,
5 simply ignores what this is about. The
6 creditors have made a decision and they stand
7 in unison before the Court.

8 This is not an issue, Your Honor, of
9 looking at a provision to a provision. It is
10 the totality of the experience and the
11 deliberation of everybody from Mr. Peterson to
12 our committee to the Petters committee to
13 Ritchie as to which we believe is the highest
14 and otherwise best.

15 Let me just make a final comment with
16 respect to the art. I didn't bring the art
17 up. Counsel brought the art up when they
18 raised the issue of execution risk. There was
19 no testimony of execution risk. The only
20 testimony was Mr. Spencer. He was the
21 witness, Your Honor. He was the witness who
22 talked about qualitative differences,
23 differences that are in two bids that are
24 very, very close on a dollars to dollars
25 basis. If this is an issue where the LLC

1 didn't matter as counsel seems to allude, then
2 why did everybody spend so much time working
3 through it, negotiating it and trying to reach
4 a conclusion? The answer is everybody thought
5 it was important because, as counsel
6 indicated, Mr. Terrien said this is
7 \$16 million. This is real consideration, real
8 currency of the stakeholders. We take it very
9 seriously. We resent any aspersions that we
10 have not and it is the reasoned decision of
11 the creditors committee whose equity this will
12 be perhaps to be shared with others, that is
13 the highest and otherwise best bid. Thank
14 you, Your Honor.

15 THE COURT: All right.
16 Anybody else want to be heard on a second
17 round? All right. I'm not going to hear
18 either of the two bidders out as to the
19 incidence of their bid here and as to the
20 legal incidence of the LLC agreements going
21 forward.

22 In considering this I am, first of all,
23 mindful of the fact that the creditors'
24 interests are in the driver's seat here.
25 There's no question about it. The debtor, as

1 debtor in possession vested with the powers of
2 a trustee and the fiduciary obligations of a
3 trustee, brought the process forward and it
4 ended up in the last instance leading to a
5 rather powerful engine for the augmentation of
6 value recovery for the estate. As measured
7 against the original stalking horse bid, the
8 amount of dollar value to be attributed to
9 either these bids is very close to or slightly
10 more than on a net basis the original -- twice
11 the original amount of the original stalking
12 horse bid. So the process was definitely
13 worth it going through.

14 Now, the real question here that's put
15 at bar, and this is the issue I'm addressing
16 here, is what is to be considered as the
17 highest and best offer. The case law makes
18 that sort of the driving consideration here.
19 What gives the most bang for the buck.

20 Now, when you're talking about a pure
21 liquidation, reduction solely to cash or even
22 reduction to cash equivalence that can be
23 objectively quantified as to value, that's
24 relatively easy. I'm going to hold that
25 that's not the sole consideration here in the

1 calculus as to highest and best offer. The
2 reason being, of course, because of the
3 structure of the bids that have been made by
4 both sides and really brought up to the
5 designated maximum in terms of significance in
6 the structure of the bids by both sides, we're
7 talking about the equity.

8 The successor to these debtors going
9 forward after confirmation of a plan, whatever
10 that successor is going to be under a plan,
11 some kind of post-confirmation trust,
12 liquidating agent or whatever, this is
13 generally done where a debtor in possession
14 going through Chapter 11 does not carry
15 forward on an operating basis and does a
16 liquidation of its operating assets but then
17 has additional legal business to be done or
18 additional financial business to be done,
19 collection, realization on future revenue
20 streams and the like or has to go through
21 litigation to collect on intangible assets in
22 the form of causes of action. That all ends
23 up being vested in an independent third party
24 that in some respects functions as a successor
25 to an unsecured creditors committee, in some

1 respects as analogized to a trustee in
2 bankruptcy, has some kind of independent
3 specific duty to maximize realization, to
4 vigorously reduce everything down to cash, and
5 eventually to make a distribution to those who
6 are entitled to it by way of creditors claims
7 and then down to equity in the debtor if there
8 is any surplus.

9 Now, that entity going forward under
10 both of these offers is going to have a piece
11 of the rock in the successor entity. It's
12 going to have, at the outset, a 25 percent
13 minority equity share, shareholding of some
14 sort in the entity that would buy these assets
15 and then go forward in some form of business
16 operation.

17 Now, the form of business operation has
18 already been vetted and I'm not even going to
19 get into that. And I know there have been
20 some rather fervent pleas that one bidder
21 proposes to maintain some kind of local
22 infrastructure in Minnesota to continue to
23 employ Minnesotans. And then there's been the
24 accusation that the other one doesn't intend
25 to do anything of the sort and will run a

1 fundamentally different operation.

2 Those considerations aren't really at
3 play here since we're not looking at
4 100 percent realization from the sale of these
5 assets in distribution on account of the
6 universe of claims here, at least insofar as I
7 understand it at this point. Those
8 considerations, the community considerations
9 are powerful ones but they don't drive the
10 process.

11 Contrary to what those in the media
12 say, the bottom line in Chapter 11 is the
13 interests of creditors, those who have made
14 the original investment in the business that
15 then has failed, has gone through severe
16 distress. They are the stakeholders in the
17 process first and foremost with the primed
18 right to consideration here.

19 So analogizing this, among other
20 things, and this is a thought that popped into
21 my head actually during counsel's closing
22 argument, the Eighth Circuit almost a hundred
23 years ago in passing on approval of
24 settlements by bankruptcy estates in *Drexel v.*
25 *Loomis* and an even earlier decision, the name

1 escapes me at the moment, said that in terms
2 of comprising down a dispute in which a
3 bankruptcy estate has a right of realization,
4 a claim against a third party or whatever, the
5 Court is to consider the paramount interests
6 of creditors and their reasonable wishes under
7 the circumstances. Well, any settlement of a
8 cause of action is a disposition of property
9 of the estate. And taking into mind that same
10 general consideration, the interests of
11 creditors and their reasonable wishes under
12 the circumstances, I think that's a very close
13 approximation of the language that the Eighth
14 Circuit used in the days of our grandparents
15 in Drexel v. Loomis. I think you can take
16 consideration of that and certainly have the
17 right to not only in terms of their
18 participation as parties in interest in a more
19 abstract way but you also, in a situation like
20 the one at bar, the Court has to take into
21 consideration those creditors' wishes as to
22 the nature of the risk that they're going to
23 be carrying going forward as minority
24 shareholders in a successor entity that holds
25 these assets.

1 As a minority shareholder, the
2 successor in interest to the creditors, a
3 trustee, liquidating trust, whatever, is going
4 to hold a piece of the rock in that new entity
5 which is another asset that has to have both a
6 current fixed value and obviously has certain
7 future rights. Equity in a business entity
8 produces not only the possibility of selling
9 that equity, that shareholding, that piece of
10 the rock for a lump sum to somebody else, it
11 also holds the prospect of sharing in
12 distributions from the profits. Just as any
13 shareholder in a corporation has that right,
14 the equity in any latter days form of business
15 organization, limited liability companies and
16 the whole array that the legislatures have
17 created over the last 20 years, has the right
18 to that and the question is the risk to that
19 going forward. And that's where the hard
20 headed evaluation by creditors constituencies
21 should be considered. And under the
22 circumstances, that's a rather powerful factor
23 in the case at bar.

24 All of the creditors that have arrayed
25 themselves behind the Hilco Gordon bid here

1 are hard headed. They're all sophisticated
2 parties, the membership of the creditors
3 committee, as well as an experienced trustee
4 in bankruptcy who I believe is chair of the
5 committee in the Petters group case at least,
6 and they all have arrayed out as to one
7 position on this question of which is the
8 highest and best offer.

9 Now, the question that's presented to
10 me here is in the first instance am I to
11 consider only the quantified dollar value of
12 the bidding going into the question of what's
13 the highest and best offer or should I be
14 considering those alternate separate
15 attributes going to one component of the
16 consideration. And it's my conclusion that I
17 can't ignore them. I can't ignore the fact
18 that this is I'm going to be a minority
19 shareholding in a privately-held company.
20 It's not going to be readily fungible, salable
21 on an open market. So the attributes, the
22 protections to that minority shareholding have
23 to be a very powerful factor for consideration
24 here.

25 I am going to conclude that it's not

1 necessary for me to do a point by point, blow
2 by blow, provision by provision review of the
3 two LLC agreements. This is not really
4 completely an issue of law. I am content with
5 deferring to the judgment of all of these
6 creditor constituencies that the equivalent
7 25 percent at the outset shareholding to be
8 given in the successor entity to be formed by
9 Hilco Gordon has more attractiveness from the
10 standpoint of the protections to be given to a
11 minority shareholder up front legally speaking
12 as set forth in the form of the LLC agreement.
13 And I am content with giving deference to the
14 ones whose money it is after all that we're
15 dealing with here.

16 This is not going to be the Debtor's
17 money. I am not going to impugn in any way
18 what the Debtor has done going through the
19 process here. The Debtor has dealt with an
20 extremely fluid situation in very trying
21 economic times. I've already made my remarks
22 about what happened at the auction and how I
23 am not faulting the Debtor for the fact that
24 the auction conducted at the Lindquist &
25 Vennum offices was rather tumultuous. I think

1 there were reasons why more hard and fast
2 rules weren't established in the first
3 instance, and as it came out, there weren't
4 going to be all cash offers which I suspect is
5 what the debtor was really trying to ferret in
6 the first instance and to channel the bidding
7 that way was going to end up involving equity
8 which, yes, does end up involving a risk. But
9 there's already been testimony here from
10 Mr. Spencer and as well as representations by
11 lawyers that that is the way it's going
12 nowadays. Cash is more scarce than it was a
13 few years ago in part because that cash wasn't
14 really quite real to very many people as real
15 as it is right now. So equity stakes are
16 coming forward and that's the way it came
17 forward here.

18 And over the course of long hard
19 bidding today, both of those equity stakes
20 bumped their way up to the maximum and they
21 sort of locked out there and I don't blame at
22 all the Debtor or the Committee for wanting to
23 put that kind of cap on it at this point in an
24 effort to ferret out as much of a cash
25 component of as high a value as possible.

1 But so you came forward with this kind
2 of equity stake proffered. So the real
3 question is, then, what is the future value,
4 the future attractiveness of that equity
5 stake. And it follows as sure as the sun
6 comes up in the morning that if there are more
7 protections afforded up front to that equity
8 stake, that it's going to be more attractive
9 to a future purchaser if the successor on
10 behalf of the creditors decides to sell that
11 in the future. And on an ongoing basis
12 there's more protection by way of guaranteed
13 access to relevant information, guaranteed
14 access at least by way of observation to
15 decision making processes, and what has been
16 identified, I believe, as the waterfall, if
17 I'm remembering the metaphor correctly, the
18 identified and specified future, contemplated
19 future distributions out of future revenues.

20 I can only take the way that this has
21 been structured completely outside my purview
22 and necessarily so. I could have no part in
23 demanding of anybody that these LLC agreements
24 be structured in a specific way and I
25 certainly couldn't demand of anybody that they

1 be negotiated out to be identical.

2 MR. GORDON: Your Honor, I'm
3 sorry to interrupt. To make it easier for
4 you, Patriarch will accept the Hilco LLC
5 agreement. We'll just accept it because we
6 don't see them as materially different. We'll
7 sign it.

8 THE COURT: I'm making my
9 decision. It's a little late to be
10 forthcoming with that. I closed my record.

11 So the upshot of all of this, what we
12 have here is bids that vary by \$488,000 in
13 terms of raw cash value but we have all of
14 these other attributes that are at issue here.
15 The constituencies that really are far more in
16 the driver's seat in terms of protecting their
17 own interests and protecting their own future
18 interests attach significantly more value to
19 the structure of attributes that was
20 forthcoming from Hilco and Gordon. And under
21 the circumstances, they opine and argue that
22 that outweighs the raw dollar value there even
23 if without consideration of the several other
24 factors.

25 And you've got the factor of the

1 concession that was late coming, yes, going to
2 the distribution rights on account of any
3 preferred equity generating potentially
4 \$5 million toward the bottom line in the
5 successor entity in the first year as well as
6 the various other factors that have been
7 quantified in here, the estate's reservation
8 of the art collection. And I full well, you
9 know, see that this one cuts both ways. We're
10 at a low ebb in terms, I'm sure, of
11 marketability of art, but on the other hand,
12 the attribution of value to it is something
13 that's been done already.

14 All factors considered here, I am going
15 to hold that as presented, when I closed the
16 record and heard all argument here, taking
17 into consideration the reasonable wishes of
18 the creditors under the circumstances and
19 quantifying everything tangible, the tangible
20 values and taking into consideration the
21 opinions of the stakeholders here as to the
22 enhanced value of the LLC agreement
23 attributes, I'm going to hold that the highest
24 and best offer is that made by Hilco and
25 Gordon Brothers. And that will be the basis

1 from which we go forward here to resolve the
2 rest of this motion.

3 So that's my ruling based on that
4 rationale. All right. Yeah, Mr. Singer.

5 MR. SINGER: I saw you looking
6 at the clock and we obviously have this motion
7 we need to deal with and there are several
8 other pressing ones that are time sensitive
9 but I'm hoping the Court will indulge us to
10 get through but I hope that can happen rather
11 quickly. But if the Court will indulge us for
12 further two minutes to confer with our client
13 and talk to the creditors committee, I think
14 that would be productive as well.

15 THE COURT: Yeah. I was going
16 to say I guess I'd like an idea here as to
17 where we're going to go from here. I know for
18 sure you're going to want me to hear the
19 motion for extension of the exclusivity period
20 and I don't want to forget that but we need to
21 kind of determine what else. I've already
22 made arrangements with building security to
23 make sure that we are protected and secure
24 until at least 7:30 and we'll go beyond that
25 if necessary but I do hope we don't have to.

1 All right. Let's take five minutes here.

2

3 (A break was had in the proceedings)

4

5 THE COURT: All right. Let's
6 get on with the remainder of the business
7 here, then. Mr. Uphoff?

8 MR. UPHOFF: Your Honor, at
9 this time the Debtor will move the approval of
10 the Hilco Gordon Brothers bid.

11 THE COURT: Very good. Based
12 on the ruling I just made, I'm going to
13 approve that bid without reaching other issues
14 and specifically the whole Stylemark issue.

15 MR. UPHOFF: Thank you, Your
16 Honor.

17 THE COURT: But in terms of
18 highest and best offer, that is what I am
19 going to -- I made that determination already
20 so I will approve that bid. I'm not
21 authorizing the Debtor to carry forward quite
22 yet.

23 MR. UPHOFF: I understand,
24 Your Honor.

25 THE COURT: It comes with the

1 motion. Okay. Let's see. Who's on first
2 here?

3 MR. LOWRY: I was going to
4 come -- go on for the sale. Is that what the
5 Court wants to take up now?

6 THE COURT: Yes. Do you have
7 something to say that's going to make it a
8 little easier?

9 MR. LOWRY: Yes, sir.

10 THE COURT: That would be a
11 first. Not from you. Not from you. Not from
12 you.

13 MR. LOWRY: Come up here
14 otherwise.

15 THE COURT: That would be a
16 first in this case.

17 MR. LOWRY: Yes, sir. I
18 understand. Your Honor, as an --

19 THE COURT: I really don't --
20 I try not to be nasty to lawyers, you know.

21 MR. LOWRY: Thank you, Your
22 Honor.

23 THE COURT: We're all playing
24 in the same band.

25 MR. LOWRY: We need to have

1 you move down south.

2 Your Honor, as announced at the
3 commencement of the day, my clients Eyewear
4 and Stylemark, entered into an agreement on
5 April 15, yesterday actually, with the -- I
6 guess it's called PLR Acquisition LLC. The
7 new bidder, the winning Hilco bidder. That in
8 part resolved the objection that Stylemark had
9 and Eyewear had, create various terms and
10 conditions related to payment of royalties and
11 alters relationship and creates first options
12 as mentioned before by Hilco's counsel.

13 And that agreement also, as far as the
14 bankruptcy estate goes, results in the
15 so-called Eyewear license agreement being
16 assumed and assigned the purchaser the various
17 consents given by Polaroid to sublicenses and
18 other licenses being, if it's the right word,
19 assumed and assigned or ratified and brought
20 forward by the purchaser. There's a
21 membership agreement and bylaws related to the
22 Eyewear -- or the company we talked about,
23 Eyewear (unintelligible) that will be assumed
24 by Polaroid and assigned to the Hilco
25 purchaser.

1 And with that agreement being
2 effectuated, Your Honor, our objection to the
3 sale will be resolved. So I'm pleased to
4 announce that to the Court. I have the
5 agreement here. I have a copy if the Court
6 wants it but it's available but that's the
7 consensus of it. And I defer to other counsel
8 to correct me -- and of course, we would want
9 to see the order and counsel for Hilco agree
10 that we can make sure the sale order
11 incorporates these terms.

12 THE COURT: All right. So
13 noted. Okay. Anybody else have a mind to
14 make things simpler before we go forward?

15 MR. TERRIEN: I hope to God
16 I'm not making them more complex. I just
17 wanted to note what I believe are two
18 reservations that have been agreed in the
19 record. One is that the transfer of the
20 domain names to Polaroid, the question of
21 whether there's any value to that and what the
22 value is, I believe, has been reserved.

23 And in addition, I believe that the
24 question of which Polaroid estate of the
25 beneficiary of the proceeds of the sale has

1 been reserved. And if anybody wants to
2 correct me, please do but I believe that's the
3 understanding that everyone has.

4 MR. SINGER: Your Honor, I can
5 perhaps help. It was my expectation after the
6 sale motion to quickly move through the
7 remaining motions and address -- that is a
8 motion brought in connection with PGW
9 bankruptcy case in conjunction with the sale.
10 It's my plan to do that motion next, reconfirm
11 what I believe he said is accurate and
12 (unintelligible) I believe accomplishes what
13 he seeks.

14 MR. TERRIEN: That was only
15 one of the two items. The other item was
16 reservation on which of the Polaroid entities
17 will receive the proceeds or how they'll be
18 divided up.

19 THE COURT: And I don't know
20 that anything, at least to my awareness, has
21 really been specified as to that. And these
22 are jointly administered cases, not
23 substantively consolidated.

24 MR. SINGER: That's correct,
25 Your Honor. There's complete preservation for

1 later date to deal with who gets what.

2 MR. LOWRY: Your Honor, just
3 so I can understand because I don't want to
4 leave confused. The domain names that are
5 attributable to our license I understand are
6 going to be coming to us through this license.
7 I'm not sure what the reservation is. Is it
8 just on the proceeds of the sale? Is that
9 what we're talking about?

10 MR. TERRIEN: It's on whether
11 the PCI entities have a group to some specific
12 component of the proceeds because of the value
13 of those that's been transferred to them.

14 MR. LOWRY: So it's really the
15 reservation of the proceeds?

16 MR. TERRIEN: It doesn't
17 prevent you from getting them.

18 MR. LOWRY: Thank you.

19 THE COURT: Your client will
20 still get them fully and finally.

21 MR. LOWRY: Fight over the
22 money.

23 THE COURT: Right.

24 MR. LOWRY: Thank you.

25 THE COURT: All right. Let's

1 see, Mr. Krakauer.

2 MR. KRAKAUER: Your Honor, I
3 can't say I'm going to make it easier for you
4 but I'm going to make it brief. Last time the
5 hearing before this obviously made some
6 arguments on behalf of Ritchie about the fact
7 that the sale should not be -- take place at
8 all, that there are alternatives. I just want
9 to say we still are of that belief, frankly.
10 We think that there are alternatives that in
11 bankruptcy sale, 363 sale should not be
12 approved to this context unless you have
13 explored all the alternatives and the
14 alternatives in terms of the plan are not
15 doable. The testimony by Mr. Spencer today
16 was that there is a possibility and it is
17 achievable to do a branding alternative for
18 this company and our position is that it
19 should have been done, first point.

20 Second point, simply we've made the
21 point last time our credit bid that it should
22 have been allowed and it should have been a
23 process for us to prove up our claims and have
24 our credit -- have the ability to credit
25 bid -- we did submit a bid together with Acorn

1 and Lancelot and that was not accepted as
2 qualified by the debtor and we think that was
3 inappropriate or wrong.

4 And then third, I think that there's no
5 terms of the way this done, made the point
6 before about the various conflicts in these
7 cases. We don't think -- continue to don't
8 think they've been appropriately handled.
9 There were some -- a little bit of testimony
10 today about the notes and who was really
11 representing those notes and I think the
12 unclarity of that is also indicative of an
13 inherent problem.

14 There is a trustee election in the PGW
15 case scheduled for next week. There's also a
16 motion that's going to be argued tomorrow in
17 the receivership case as to whether or not
18 Mr. Kelly should continue as receiver for
19 entities. Our view is that those issues
20 should have been worked out first before a
21 sale was also approached.

22 And finally, on WCD, the real estate
23 venture, I don't need to address that because
24 at the last hearing was made clear that that
25 asset is not included in the sale and there

1 were, as I indicated last time,
2 representations made to us previously about
3 that being a considerable value and it is
4 something we do intend to try and find out
5 what the status is after the sale. So it's
6 not really (unintelligible). So I tried to be
7 brief, Your Honor, but those are my points.

8 THE COURT: All right. So
9 noted.

10 MR. KRAKAUER: Thank you.

11 THE COURT: Get to them in due
12 course. All right. Mr. Singer?

13 MR. SINGER: Your Honor, I'll
14 move expeditiously. It seems to me that where
15 we're at, as I understand things relative to
16 the sale motion, is Mr. Krakauer has proffered
17 an objection dealing with 363 credit bidding
18 and I believe there's some objections by Acorn
19 and Mr. Krakauer also addressing the bona fide
20 dispute issue.

21 You know, as this Court's fully aware,
22 that issue has been argued on a number of
23 occasions. Our papers are very detailed and
24 thorough about a response to that and unless
25 the Court wants to hear some additional

1 argument, and I'm suspecting that it doesn't,
2 you know, I want to reiterate and incorporate
3 all of the comments and arguments that we made
4 in response to the objections.

5 With that, I think the remaining
6 objections to the sale have or will be
7 resolved through a final sale order. I think
8 there is an objection from Michael O'Shaunessy
9 that has been resolved through language that
10 has been agreed upon in a sale order that will
11 be submitted to the Court tomorrow.

12 Mr. Hettler has no standing objection.

13 Mr. Hettler has not been in these proceedings
14 to advance that objection and, in fact, it is
15 written in submissions as indicated that he
16 does not intend to.

17 Briefly, Your Honor, Mr. Hettler has
18 been determined by two courts to not even hold
19 a claim in these estates or have any interest
20 in the notes that form the basis for his
21 objection. And particularly in light of his
22 presence here, we would request the Court
23 overrule those objections.

24 THE COURT: I'm going to rule
25 on that right out of the gate and I will

1 overrule Mr. Hettler's objections on just the
2 bases that Mr. Singer referred to that were
3 developed fully in connection with the
4 Debtor's responses to the objections. Go
5 ahead.

6 MR. SINGER: Nikon and Oracle
7 as I think were present and Mr. Meyer is also
8 here, we've reached agreed upon language in a
9 court -- for the -- that form the basis for an
10 order. Again, I will circulate it to
11 Mr. Meyer and counsel for Oracle who I believe
12 have already signed off on the language but
13 before submitting the order, I will once again
14 circulate it to them again to make sure that
15 those are adequately addressed.

16 There are several objections from
17 Summit parties, essentially a consolidated
18 objection. I believe those objections have
19 been resolved completely with agreed upon
20 language between Hilco and the objecting
21 parties that have been -- language has been
22 circulated again which I anticipate to
23 incorporate into the Court's order.

24 With that, Your Honor, I think that
25 resolves, if I'm not mistaken, all of the

1 objections, you know, but for the persisting
2 objections to the extent they are relative to
3 Acorn and Ritchie. I'm sorry. I think those
4 are the only two ones that require the Court's
5 attention. And, you know, I'm prepared to
6 deal with other motions unless this court
7 wants further discussion on that.

8 THE COURT: All right. Let me
9 see. Let me ask Mr. Rosow what he wants to
10 put on the record in relation to any current
11 status of Acorn Capital's objections.

12 MR. ROSOW: Thank you, Your
13 Honor. As Mr. Singer noted, Acorn continues
14 its objection on the issue of whether the sale
15 can be conducted free and clear of Acorn's
16 liens. Contrary to Mr. Singer's suggestion,
17 however, this issue has not been argued to the
18 Court. This issue has been presented to the
19 Court in written submissions over two months
20 ago and it has been continually delayed.

21 The Court has articulated at prior
22 hearings, most notably the March 26 hearing on
23 the motion for a protective order in
24 connection with the deposition schedule for
25 Mary Jeffries and David Baer, a standard to be

1 applied. And it's my intention today or at
2 the time that the Court feels appropriate to
3 analyze the issue of whether a bona fide
4 dispute exists under the standard that the
5 Court has articulated.

6 Moreover, there are new arguments that
7 were raised in Polaroid's responsive
8 memorandum, the responsive memorandum that was
9 filed on April 3 after we had filed our
10 objection to the motion. There are also
11 issues related to PACT Funding and the consent
12 that is required in order for the sale to go
13 forward.

14 Finally, there are issues related to
15 the language in the proposed sale order under
16 363(m) and whether that language is
17 appropriate. All of those issues have been
18 raised by our moving papers. I'm prepared to
19 deal with those issues now.

20 THE COURT: Deal with them now
21 and quickly.

22 MR. ROSOW: Well, Your Honor,
23 the Court on the -- at the March 26 hearing
24 articulated a standard for determining whether
25 or not a bona fide dispute would exist. It

1 said that it would consider the complaints
2 under a 12(b)(6) analysis. The Court came to
3 this conclusion after reviewing the Gaylord
4 Grains decision and specifically the language
5 in the Gaylord Grains decision that focuses on
6 the issue becomes whether there's bona fide
7 dispute.

8 Focusing on that language, the Court
9 noted that the filing of an adversary
10 complaint would not necessarily create a bona
11 fide dispute but concluded that the standard
12 to be applied in determining whether a bona
13 fide dispute would be the 12(b)(6) standard.
14 The Court cited to the Bell Atlantic v.
15 Twombly case, a recent Supreme Court
16 decision, which rejected the heavily
17 criticized prior standard that used the no set
18 of facts language. Instead, the Bell Atlantic
19 court said that the complaint must contain
20 factual allegations that show a right to
21 relief above a speculative level and stated
22 that a -- to state a claim the relief must be
23 plausible on its face.

24 In addition to the standard set forth
25 in Bell Atlantic, the Court also needs to

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 We believe that in this context the

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

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

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

1 Funding's creditors which Acorn is the sole
2 significant creditor to permit the sale to go
3 forward unless PACT Funding is paid.
4 Lindquist & Vennum acting for Polaroid
5 attempts to avoid this issue by arguing that
6 PACT Funding has not objected and, hence, has
7 consented to the sale. PACT Funding, however,
8 at this time cannot object without exposing
9 Lindquist & Vennum's current and actual
10 conflict of interest.

11 At the hearing on the objection to
12 Lindquist & Vennum's retention as counsel for
13 Polaroid, Lindquist & Vennum stated they will
14 report to the Court any current conflicts of
15 interest that arose with representation of
16 Polaroid. The Court further commented that
17 other parties could bring such issues to the
18 attention of the court.

19 I take this opportunity at this point
20 to bring this issue to the attention of the
21 Court and ask that the Court not permit the
22 sale to go forward without PACT Funding's
23 consent which can only be attained by also --
24 by having PACT Funding represented by
25 independent counsel that evaluates the

1 interest of PACT Funding.

2 Finally, moving to two specific
3 provisions of the Court's -- of the proposed
4 order. And I refer to paragraph 0 on page 6
5 and paragraph 32 on page 22 of the proposed
6 order. Those provisions improperly attempt to
7 expand the meaning of 363(m). And it
8 improperly attempts to provide protection for
9 Hilco in this context in the connection with
10 the sale here.

11 The good faith finding under 363(m)
12 protects the sale itself and that's the Clear
13 Channel decision. It does not protect the
14 lien stripping under 363(f). The good faith
15 finding is not a rubber stamp. It doesn't
16 insulate all aspects of the sale from
17 appellate review.

18 The language that the proposed order
19 submits seeks to expand the terms and the
20 protection provided by 363(m) inappropriately.
21 It seeks to preclude appellate review. It
22 seeks to preclude appellate review of the lien
23 stripping provisions that the debtor has
24 sought and it is inappropriate under the Clear
25 Channel decision.

1 We provided the Court and other parties
2 to this case with language that we do not
3 oppose in place of those paragraphs but we
4 strongly urge the Court to reject the -- to
5 modify those provisions.

6 Your Honor, I'll follow the Court's
7 instructions with respect to the issues that
8 are raised here. I think the issues with
9 respect to the sale of Polaroid's assets free
10 and clear of Acorn's liens deserve further
11 attention. They deserve a more thorough
12 evaluation than is being provided at this
13 time.

14 We respectfully request that the Court
15 deny the motion to sell free and clear unless
16 Acorn were to consent to such a sale. We
17 think it's inappropriate to rush this process
18 through. We think that the debtor has had
19 ample opportunities to provide the parties and
20 the Court with more evidence and has failed to
21 do so and we don't think that the Court should
22 simply rubber stamp the conclusions drawn by
23 counsel for Polaroid as to whether or not a
24 bona fide dispute exists. We believe that
25 that decision as to whether a bona fide

1 dispute exists is a decision that the Court
2 must make and the Court must make that
3 decision after listening and reviewing
4 evidence submitted by the parties.

5 THE COURT: All right. I
6 don't have any questions.

7 MR. SINGER: Your Honor, I'll
8 be brief.

9 THE COURT: Take as much time
10 as you need.

11 MR. SINGER: As this Court is
12 well aware and as Mr. Rosow is well aware, the
13 Debtors have filed complaints against and
14 commence adversary proceedings against Ritchie
15 Capital and Acorn Capital that go on that
16 have -- that are -- whose counts exceed 100 in
17 length. Very, very detailed allegations and
18 factual allegations and. I find it quite
19 telling and if not remarkable here that there
20 was no -- in response to the motion, there
21 wasn't a motion to dismiss -- I'm sorry,
22 response to the complaint there was not a
23 motion to dismiss brought. They answered the
24 complaint disputing the factual allegations.
25 Those complaints are thorough. They are far

1 reaching and they are very, very detailed in
2 terms of the factual allegations.

3 Now, Mr. Rosow directs the Court's
4 attention to the decision in In Re: Robotic
5 Vision Systems, Inc. And I reference that
6 because he also references it in one of his
7 pleadings and he even quotes it. He even
8 quotes the standard. And he seems to be
9 missing the mark in argument even though he
10 gets it right in his papers. A party must
11 articulate in the adversary pleading or in an
12 argument an objective basis sufficient under
13 the facts and circumstances of the case for
14 the Court to determine that a bona fide
15 dispute exists. I would submit that the
16 adversary proceeding is more than just an
17 argument. It details in very, as I indicated,
18 in very detailed fashion the issues and
19 allegations and challenges to the liens of
20 Acorn Capital.

21 Again, our papers set forth in great
22 detail the other bases under 363(f) for
23 avoidance as well, specifically with respect
24 to PACT. However, I would also let the Court,
25 you know, signal to the Court that they seem

1 to be making a creditor of a creditor
2 argument, that for some reason the sale free
3 and clear isn't appropriate and they're
4 seeking to invoke arguments on behalf of PACT.
5 PACT is part of the -- is part of one of the
6 Petters estate's affiliates, a part of a Ponzi
7 scheme as well, and in any event, there's no
8 dispute that a maximum of \$10 million of
9 funds are at stake for which there's adequate
10 protection under any circumstances anyway.
11 Their liens would permit avoidance. We think
12 that the consent has been given and that the
13 other bases under 363(f) support the free and
14 clear finding as well.

15 The Court has pointed out in its
16 previous rulings the standard set forth in
17 Gaylord Grain and I think I won't go into that
18 again. I think our pleadings do that and I
19 think the Court had those arguments before.
20 And I would ask the Court to overrule the
21 objections of Acorn Capital and authorize the
22 sale free and clear and not allow what Acorn
23 seems to be intent on doing and has been
24 intent on doing from the start to simply act
25 and proffer arguments to operate as a wedge to

1 disrupt the sale.

2 THE COURT: All right.

3 Mr. Chesley.

4 MR. CHESLEY: Just for the
5 record, the Committee supports the Debtor's
6 position on this, Your Honor.

7 THE COURT: As I see it from
8 the content of the record made in argument
9 now, I have yet, then, to address the points
10 that Mr. Krakauer made and Mr. Rosow made on
11 behalf of Ritchie Capital and Acorn Capital
12 and all of the other objections have been
13 resolved and will have their memorializations
14 resolved in the order.

15 I'm just going to ask any attorney out
16 there who's representing any other party am I
17 correct in that regard? Not hearing anybody
18 else, all right. Good enough.

19 All right. I'm going to overrule the
20 objections of both Ritchie Capital and Acorn
21 Capital to the motion for sale free and clear
22 of liens. Addressing those that Mr. Krakauer
23 articulated in his argument just now, I think
24 the record bears out, and I'm talking about
25 the evidence, specifically Mr. Spencer's

1 evidence, the record bears out the soundness
2 of the Debtor's election to proceed with a
3 Section 363 sale of assets rather than going
4 through the considerably more risky
5 alternative of an operating plan that would
6 recast the strategy of this debtor or these
7 debtors in their own right through these
8 entities, recast their entire mode of
9 operation, their business plan and their
10 strategy for their engagement with the
11 marketplace the second time in five years.
12 That simply is not in prospect and would not
13 be a responsible use of the estate's resources
14 nor would it be carrying out the fiduciary
15 obligation of a debtor in possession. It was
16 considered but it is not to be considered
17 judicially as an objection to the prima facie
18 showing that the debtor has made for the sale,
19 and I'm speaking of a sale under Section
20 363(a) in the first instance here.

21 As to the objections going to a sale
22 process that excluded the participation of a
23 bidder based upon the credit bids of creditors
24 of these debtors as members, participants,
25 partners or whatever in that bidder, I'm going

1 to overrule that objection. Again, I think
2 that goes to Section 363(a) rather than
3 Section 363(f). Basically on the rationale
4 that I telegraphed in earlier hearings which
5 will lock step with my conclusions that in
6 fact the interests of Ritchie Capital and
7 related entities and Acorn Capital in the
8 assets that would be the subject of the sale
9 here are in fact in bona fide dispute and,
10 hence, credit bidding is not available as a
11 platform for a bid for the assets. I am going
12 to overrule the objections founded on the
13 allegations of continuing and ongoing
14 conflicts on the rationales voiced by the
15 Debtor's counsel in the briefings submitted to
16 me.

17 Going on to Mr. Rosow's objections --
18 oh, and also speaking to Mr. Krakauer's
19 objection that somehow consideration of a sale
20 is premature because of the possibility of
21 trustee election going forward in the Petters
22 general case and the motion for termination or
23 alteration of the receivership that Judge
24 Montgomery I believe is to hear tomorrow,
25 because those make consideration premature,

1 I'm just overruling that one out of hand. I'm
2 rejecting that one flatly out of hand.
3 Testimony is uncontroverted that the burn on
4 these estate assets is ongoing. These debtors
5 are hobbled at this point. It's
6 appropriate -- it was appropriate to make use
7 of a bidding process to get a one-time
8 realization in full of their value at this
9 point that happened. I am not going to upset
10 that in deference to the possibility of
11 further dithering around on these other
12 issues. And I don't mean to demean the
13 substantive seriousness of any of those
14 matters but this process sale is not going to
15 get sidetracked on those issues.

16 Going on to Mr. Rosow's points, I am
17 going to conclude as a matter of law that the
18 content of the complaints in the adversary
19 proceedings and the content of the answers
20 interposed as a response rather than a motion
21 for dismissal, which, as Mr. Singer does know,
22 would have been available others an alternate
23 response under Rule 12(c), I believe,
24 demonstrates fully that within the meaning of
25 Section 363(f)(4) those interests are in bona

1 fide dispute. The debtors have, through
2 lengthy complaints, articulated a basis for
3 challenging the attachment of these liens.
4 Fundamentally, I guess, as I read it, other
5 than as to a fairly small, and I'm just going
6 to say that in a comparative way, other than
7 as to a fairly small components of Acorn's
8 claim which it rather tenaciously insists was
9 based on a direct loan to Polaroid, but other
10 than that, I think the theory of the whole
11 fraudulent transfer, constructively fraudulent
12 transfer allegations here is that Tom Petters
13 induced Polaroid to pledge its assets for the
14 debts of another entity or entities in his
15 business structure. That always gives rise to
16 the prospect that there's a constructively
17 fraudulent transfer. The theory has been used
18 to challenge leverage buyouts on the ground
19 that the pledge of an acquired company's
20 assets for the debt that's incurred by an
21 acquiring company that's a holding company, is
22 a constructively fraudulent transfer, a
23 transfer for less than reasonably equivalent
24 value out of that estate or out of that
25 debtor, out of that entity, excuse me. The

1 same theory prevails here. I think there's
2 sufficient pleading going to the various other
3 elements, going to avoidability of the liens
4 to make out a bona fide dispute here and,
5 hence, the prospect -- the remedy of a sale
6 free and clear of liens, the expedient under
7 Section 363(f)(4) is available to these
8 estates and, hence, it will permit the sale
9 free and clear of the liens of Ritchie Capital
10 and Acorn with the liens to attach to the
11 proceeds and there to repose until such time
12 as the question of the survival of those liens
13 is addressed through the litigation. And if
14 it should turn out through the litigation that
15 the liens remain attached, so be it. But
16 under the circumstances, the promotion of the
17 reduction to value here through a process that
18 aired these assets to the marketplace resulted
19 in vigorous bidding and I would have to
20 conclude and already have concluded resulted
21 in a highest and best offer for them should
22 not be held up and held hostage to liens that
23 are in bona fide dispute. That's the whole
24 purpose of a sale free and clear.

25 And I'm not even going to speak to the

1 actual fraud allegations of the complaints
2 other than to note the overarching pall of the
3 Thomas Petters difficulties over all of the
4 assets that were involved in his business
5 empire, all of the allegations that went to
6 the cross-pledging of assets for debts of
7 others within. There have been enough
8 allegations here made that this was done with
9 actual fraudulent intent towards this Debtor's
10 creditors and it's going to be the estate's
11 burden but under the circumstances I can't
12 dismiss those out of hand.

13 And I'm further going to make an
14 observation here as to Mr. Rosow's
15 preoccupation with the fact that the debtor
16 here voiced so many of its factual allegations
17 as being on information and belief.
18 Mr. Petters is the obvious source of
19 validation or verification as to many of the
20 factual allegations. He's not talking and for
21 particularly good reasons. The Debtor's
22 management here could not possibly have spoken
23 to all of the factual elements, particularly
24 going to actual fraud. And given the backdrop
25 to the Polaroid cases, emerging as they did in

1 the downfall of Thomas Petters' whole business
2 combine, I cannot reject out of hand the
3 making of any factual allegation that's stated
4 to be on information and belief. The one best
5 source, as I say, isn't available as a result
6 of the current pall over his future occasioned
7 by the pendency of rather large federal
8 criminal charges here.

9 And going on to the various other
10 points that Mr. Rosow made, I'm going to
11 conclude that the arguments presented in the
12 Debtor's briefing in response to the
13 objections are -- make out a sufficient basis,
14 and I'm going to adopt the legal and factual
15 rationales posed there, to overrule Acorn's
16 objections on their merits as well. The sale
17 free and clear can go forward with liens to
18 attach same dignity, priority, validity, and
19 affect. And the value, then, will be reduced
20 to a liquid form and -- not quite liquid form
21 based upon the equity component with the liens
22 to attach, that affords adequate protection
23 and it affords adequate protection as to that
24 core component of Acorn Capital's asserted
25 secured statutes and founded on the assertion

1 that there was a direct loan from Acorn
2 Capital to Polaroid that is not subject to the
3 possible avoidance as a constructively
4 fraudulent transfer, a pledge of assets made
5 for the debt of a third party.

6 Acorn Capital has made allegations but
7 in a fairly summary way that indirect benefits
8 exist even as to the pledge of assets for the
9 benefit of a third party. Eighth Circuit
10 precedent basically says, and I'm thinking of
11 the Barkfriedy (phonetic) decision in which I
12 was reversed and hence took the Eighth
13 Circuit's rationale very much to heart and its
14 surrounding decisions as well as its citation
15 of my own decision in the Jolly's, Inc.
16 matter. They cited me in reversing me which
17 was sort of an interesting turn of events.
18 The consideration of indirect benefit,
19 particularly benefit to a third party, must be
20 really quite concrete, identifiable,
21 measurable, and cognizable. And that's, among
22 other things, if the debtors or their
23 successors in interest make out that the debt
24 that would be the foundation of these liens
25 was in fact the debt of a third party, then

1 that's going to operate to shift the burden
2 over which is another over to the proponents
3 of those liens to show that that indirect
4 benefit is cognizable under that rather broad
5 but fairly demanding standard. That's just
6 another reason why these liens are in bona
7 fide dispute.

8 I think that disposes of all of the
9 issues going to Section 363(f) and whether the
10 sale should go forward, then, free and clear
11 of liens. I am ready to make a finding based
12 upon the lack of any other objections that the
13 requisites for the sale itself have been made
14 based upon a manifest record that's been made
15 here. So I will make that finding now.

16 Unless there's any other issue relating to the
17 application of Section 363(f), I'll go ahead
18 on that. I'll just offer the opportunity to
19 anybody else.

20 MR. CHESLEY: There are none
21 to our knowledge, Your Honor.

22 THE COURT: All right. There
23 being no other objections, I will in
24 accordance with the tenor of the various
25 understandings summarized and referred to very

1 much in the abstract on the record by
2 Mr. Singer, those going to those various other
3 objections and pursuant to the rulings I've
4 made, my conclusions that the debtor as
5 proponent of a sale and a sale free and clear
6 has met its burden under Section 363(a) and
7 Section 363(f). I'm going to go ahead and
8 grant the motion as qualified by those various
9 understandings and I would look forward to
10 entering an order at some point in the day
11 tomorrow to that effect.

12 MR. SINGER: We will finalize
13 the -- put the purchase agreements with Hilco
14 and get the purchase agreements as well as the
15 proposal or as circulated and as reflected in
16 my remarks earlier to the Court promptly
17 tomorrow, Your Honor.

18 THE COURT: Don't stay up all
19 night doing it because I want it to be
20 perfect.

21 MR. SINGER: As do I, Your
22 Honor. The next motion, Your Honor, unless
23 the Court has a particular order in mind.

24 THE COURT: I'll defer to you.

25 MR. SINGER: Okay. I would at

1 the risk of bouncing to a different case, I
2 think the related motion dealing with the
3 domain transfer that is in the PGW case is the
4 one I'd like to take up next. And that motion
5 briefly seeks to transfer as part of the sale
6 domain names that are not only registered in
7 the name of PGW rather than Polaroid. We've
8 provided a verified motion that details the
9 factual counts for the basis for that request
10 for relief. I do have an amended order for
11 consideration. I believe it may have been
12 attached to an earlier pleading but it only is
13 designed -- amended to the extent it adds
14 additional domain names that were uncovered
15 that were in Polaroid's name that are subject
16 to the sale and attached. And it's not part
17 of the electronic record and I have a hard
18 copy or I could send that to the Court's
19 attention electronically tomorrow, whatever
20 the Court's preference is.

21 THE COURT: What I'd like you
22 to do is give me a hard copy just so we know
23 what we'll be looking at here but I want you
24 to transmit it to me electronically tomorrow
25 morning.

1 MR. SINGER: Okay.

2 THE COURT: All right. You're
3 still on that motion, right?

4 MR. SINGER: Yes. I'm just
5 trying to -- I think one -- the concerns that
6 were expressed in early remarks related to the
7 domain name motion I just wanted to clarify
8 because in paragraph 4 of the order, the
9 proposed order, it makes it pretty clear that
10 PGW and Polaroid reserve their rights as to
11 what consideration, if any, should be
12 ascribed. And the idea is that these will be
13 sold free and clear and that the parties
14 reserve their rights to allocate or to argue
15 at a later date what consideration, if any,
16 belongs to the respective estates.

17 THE COURT: All right. Is
18 there anything else that you wanted to put on
19 the record as to that motion?

20 MR. SINGER: Not that motion,
21 Your Honor.

22 THE COURT: All right. Good.
23 All right. I'll hear any input on that.

24 MR. CHESLEY: That was the
25 agreement, Your Honor.

1 THE COURT: Okay. All right.

2 Anybody else? Mr. Runck?

3 MR. RUNCK: Your Honor, for
4 the record, we filed an objection but the
5 reservation of rights language that Mr. Singer
6 referenced resolves our objection.

7 THE COURT: All right. Very
8 good. All right. Hearing nothing else, I
9 will grant that motion as modified pursuant to
10 the terms of the final form of order that's
11 been presented here which I will look forward
12 to entering when it's submitted in electronic
13 format tomorrow.

14 MR. SINGER: The next motion,
15 Your Honor, is the Debtor's motion to extend
16 the exclusivity period. The Debtor's sale
17 efforts have obviously been consuming and the
18 direction of the company relative to a plan
19 and in future courses of action all hinged
20 upon the outcome of the sale hearing today.
21 The exclusivity period expires tomorrow and
22 the Debtors have requested their motion and I
23 believe the Committee supports the motion to
24 extend the exclusivity period by 30 days in
25 order to enable what we contemplate to be a

1 joint plan between the Committee and the
2 Debtors dealing with the disposition of
3 claims, assets, and the like. No objections
4 have been filed, although that -- it was filed
5 on an expedited basis.

6 THE COURT: Right.

7 MR. CHESLEY: Your Honor, just
8 very briefly. We spoke to the Office of the
9 United States Trustee with respect to the
10 relief which was actually a joint motion
11 recognizing that this will be a joint plan of
12 liquidation along with a creditor trust
13 mechanism which the Court recognized earlier.
14 So we fully expect to meet those deadlines.
15 Now that the sale has closed, we would ask for
16 the entry of this relief seeking just the 30
17 days to conclude these matters.

18 THE COURT: Okay. And my only
19 question was going to be is 30 days going to
20 be enough. I would rather not hear another
21 motion but if -- as I understand it, things
22 have been blocked out already to some degree.

23 MR. CHESLEY: They have, Your
24 Honor. Plans have been drafted, disclosure
25 statement's been drafted, the creditor trust

1 has been drafted so we're ready to go and we
2 will not be back asking for more time.

3 THE COURT: All right. Very
4 good. Anybody have any input on that? Very
5 good. I will grant that motion, then, and I
6 think I've got an order and I would just as
7 soon enter that one before my staff and I --

8 MR. SINGER: You do have an
9 electronic version of that order, Your Honor.

10 THE COURT: Pardon?

11 MR. SINGER: You do have an
12 electronic version of that order.

13 THE COURT: Right. Yeah.
14 I'll see that that's entered tonight.

15 MR. SINGER: Thank you, Your
16 Honor.

17 THE COURT: I always want to
18 be careful about that.

19 MR. SINGER: Another -- the
20 final -- the next motion, Your Honor, is the
21 Debtor's motion for extension of time to
22 assume or reject leases. That is similarly
23 time sensitive as that period also expires
24 tomorrow, April 17. The debtor has five real
25 estate leases and Debtor is requesting

1 similarly a short extension of 90 days so that
2 the plan -- the sale can be consummated and
3 the plan can be confirmed and we'd request the
4 Court enter an order as well that's been
5 submitted extending the time for assumption or
6 rejection as well. I think there was one
7 objection that was initially filed. That
8 objection has since been withdrawn.

9 THE COURT: And that was the
10 objection that I think came in just a couple
11 of days ago.

12 MR. SINGER: Yeah. The
13 objection was -- wasn't really so much to the
14 extension itself. That particular lease, the
15 lease expires by its own terms by the end of
16 May.

17 There was some issue relative to
18 whether an administrative expense claim should
19 accrue because of pre-petition rent true-up
20 issues and I think we reconciled a process for
21 trying to resolve that issue and get to the
22 facts. And it really didn't deal with the
23 merits of the motion to extend and on that
24 basis they withdrew their motion.

25 THE COURT: I do recall it was

1 called a limited objection.

2 MR. SINGER: Yes.

3 THE COURT: And the objection
4 has been withdrawn. All right. Does anybody
5 have anything they want to note as to that
6 motion? All right. Hearing nothing, I will
7 grant that motion and I probably have an order
8 for that already.

9 MR. SINGER: Yes. Yes, you
10 do, Your Honor.

11 THE COURT: There's nothing
12 else to be added to that.

13 MR. SINGER: Nothing else.
14 But again, that's equally time sensitive so if
15 the Court could do that --

16 THE COURT: Right. Well, I'll
17 get that one entered yet today as well.

18 MR. SINGER: In bringing this
19 matter to conclusion, Your Honor, the final
20 motion I would make is an oral motion and I
21 hope the Court forgives that. As you know,
22 we've had a robust auction process that has
23 been unparalleled in a -- for a number of
24 professionals I would suspect. And it has
25 been remarkably productive. The stalking

1 horse bid was started off at 42 million.
2 We're ending north of 88 million if my
3 calculations, recollection about that are
4 correct. We've provided, through this
5 demonstrable benefit to the estate, the estate
6 is currently sitting on cash of approximately
7 \$30 million. So we have a -- and hope to have
8 a plan that deals with those funds in a way as
9 a result of this process that has -- will
10 hopefully yield a tremendous amount of value
11 to these estates.

12 This auction process would not have
13 been what it was, it would not have been as
14 robust as it was if it wasn't for these two
15 bidders agreeing to serve as bidder and backup
16 bidder and what everyone undisputedly
17 acknowledges to them a very tumultuous process
18 to get to the end of the day here.

19 Both parties have requested in
20 connection with one other -- with each of
21 their bids a million dollar breakup fee for
22 the value that they brought to the table in
23 connection with their bids. The debtor
24 support -- as you know, the debtor has
25 supported the Patriarch bid and firmly

1 believes that without Patriarch's presence in
2 this auction process, that we would be -- we
3 do not believe that the estate's would have
4 yielded the values that they have garnered
5 today as a result of this auction.

6 And Patriarch, as this Court knows, has
7 been selected by the Debtors on two different
8 occasions in connection with the auction and
9 has fallen up short yet has still agreed to
10 serve as part of this process with an
11 irrevocable offer and as backup bidder.

12 I think it is only fair and appropriate
13 that I make a motion orally this time to honor
14 the commitments on the basis in which the
15 Debtor accepted their offers throughout the
16 day on the million dollar breakup fee and
17 request the Court allow us to, as part of the
18 sale or to authorize the breakup fee of a
19 million dollars as accepted in connection with
20 the Debtor's bids in the sale motion perhaps
21 or in a separate order to that effect to give
22 them -- to recognize the benefit that they've
23 conferred in this process.

24 THE COURT: All right. That
25 request hasn't been put up the flagpole,

1 right? Nobody other than the people in this
2 room right at this moment who are aware of it?

3 MR. SINGER: That's correct,
4 Your Honor. That is absolutely correct.

5 THE COURT: All right. Okay.
6 Thank you.

7 MR. CHESLEY: Your Honor,
8 Richard Chesley on behalf of the Committee.
9 We had lodged on objection when Hilco had
10 raised that issue with respect to a one
11 million dollar breakup fee with respect to
12 their bid several -- feels like several weeks
13 ago. We obviously raised another objection
14 today to a secondary breakup fee.

15 If you look at the purpose of a breakup
16 fee, Your Honor, it's obviously to make sure
17 you have a floor and you got -- you bring
18 people to the table. These two bidders fought
19 it out long and hard and certainly may even
20 defied the viability of the original breakup
21 fee of a million seven which now has to be
22 paid to Genii which hasn't been seen for
23 weeks. But we've already been there and the
24 Court's already approved that. We understand
25 it. We respect it. But we think a secondary

1 breakup fee in light of the fact that we had
2 two very, very eager bidders who were not here
3 to collect the breakup fee but were here to
4 vigorously bid for these assets is not
5 appropriate in these cases.

6 We're happy, if the Court wants, to
7 have this put up on motion and to file a very
8 short response but that would be the
9 Committee's position. Thank you.

10 THE COURT: All right. Good
11 enough. Anybody else want to be heard on
12 that? Mr. Runck?

13 MR. RUNCK: Your Honor, the
14 Petters committee would just like to second
15 the Polaroid committee's objection to the
16 secondary breakup fee. We also objected to
17 the secondary breakup fee at a prior time when
18 it was asserted by Hilco. Like Mr. Chesley
19 said, Your Honor, there already is a payment
20 of a breakup fee here. Neither of these
21 bidders were the stalking horse bidder so we
22 don't believe a payment of the secondary
23 breakup fee is authorized or appropriate in
24 this case. Thank you, Your Honor.

25 THE COURT: All right.

1 Anybody else want to be heard on that?

2 MR. ROSOW: Your Honor, Mike
3 Rosow from Acorn Capital. We'd just reiterate
4 positions taken by both committees.

5 THE COURT: Okay. I'm going
6 to deny that motion, number one, because
7 there's been no notice whatsoever. And number
8 two, if I'm hearing Mr. Chesley correctly,
9 he's objecting, I think, across the board to
10 the notion of a secondary breakup fee under
11 circumstances like were generated at the one
12 at bar sort of in the absolute.

13 And Mr. Chesley, is that correct?

14 MR. CHESLEY: That's correct,
15 Your Honor. We already lodged that with our
16 initial objection.

17 THE COURT: Right. And I have
18 to agree with that. I really do have to agree
19 with that. As I understand the nature of a
20 breakup fee, and I've done a little reading on
21 the case law, I had to for this case, among a
22 couple of others, the whole purpose is to
23 ensure that somebody comes forward and
24 advances that first bid and has some incentive
25 for putting itself that much at risk for the

1 up-front costs. After that, I suppose it's
2 incorrect to say all bets are off but all bets
3 are off insofar as a breakup fee is concerned
4 because those who come forward after that are
5 the motivated ones. They're the ones that
6 really want the asset and are willing to come
7 forward on their own merits as a business risk
8 to bid against that stalking horse. Yes, the
9 stalking horse here disappeared. And I did
10 note with a small amount of humor that they
11 sort of poked their nose in a couple of times
12 during the course of the auction at Lindquist
13 and Vennum and just insisted that they sort of
14 wanted part of the stuff. And people from
15 Houlihan and Lokey sort of shunted them off
16 without really saying anything but they really
17 haven't been an active part of the process
18 once it was ascertained that there were
19 interested parties who wanted to take the bulk
20 of the assets.

21 Now, a deal is a deal. Genii had the
22 right to their breakup fee. That was part of
23 the consideration for them coming forward in
24 the first instance and getting this process
25 going. After that the bidders were on their

1 own on their own business judgment and
2 according to their own risk of the
3 transactional expenses involved in pushing
4 their bid forward.

5 So I'm not only denying the motion on a
6 procedural basis, I'm denying it on its
7 merits. I, frankly, don't want to see it
8 renewed. That's not what a breakup fee is all
9 about. And what little case law we've got
10 within the Eighth Circuit I think would back
11 me up on that. So that's the way it stands.

12 Does anybody have anything else they
13 want to note for the record here? All right.
14 I will go and enter both of those orders
15 before leaving in another 15, 20 minutes. I
16 look forward to getting the other orders
17 entered tomorrow. It's late. I thank
18 everybody for their interest.

19 I will again say that after almost
20 exactly 25 years on this job, I hadn't seen
21 one like this before and I think maybe
22 everybody else here can say the same thing.

23 So with that, anybody else have
24 anything to note on the record? All right.
25 Good enough. You're all welcome. Thank you.

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Stand adjourned.

* * *

1 STATE OF MINNESOTA)
) ss.
2 COUNTY OF WASHINGTON)

3

4 BE IT KNOWN, that I transcribed the
5 electronic recording relative to the matter
6 contained herein;

7

8

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

14

15

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

19

20

21 IN EVIDENCE HEREOF, WITNESS MY HAND.

22

23

24

s:/ Lisa M.Thorsgaard

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