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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 TELEPHONIC PROCEEDINGS

4-22-09

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Proceedings recorded by electronic sound recording,
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APPEARANCES

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

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.

MR. CHRIS LENHART and MR. MARK KALLA, Attorneys at Law, Dorsey & Whitney, Suite 1500, 50 South Sixth Street, Minneapolis, Minnesota 55402, appeared on behalf of PLR Acquisitions.

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

MR. GREGG A. LOWRY, Attorney at Law,
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MR. DAVID RUNCK, Attorney at Law,
Suite 400, 775 Prairie Center Drive, Eden Prairie,
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unsecured creditors.

MR. BRYAN KRAKAUER, Attorney at Law,
One South Dearborn, Chicago, Illinois 60603,
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 Summit
Technology.

MR. VAN C. DURRER, Attorney at Law,
300 Suite 3400, 300 South Grand Avenue, Los Angeles,
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MR. MICHAEL ROSOW and MR. THOMAS BOYD,
Attorneys at Law, Winthrop & Weinstine, Suite 3500,
225 South Sixth Street, Minneapolis, Minnesota
55402-4629, appeared on behalf of Acorn Capital.

MS. HILLARY RICHARD, Attorney at Law,
80 Broad Street, New York, New York 10004, appeared
on behalf of Lithographic Legends.

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APPEARANCES (Cont'd)

MR. GREGORY GORDON, Attorney at Law,
2727 North Harwood Street, Dallas, Texas 75201,
appeared on behalf of Lithographic Legends.

MR. ROBERT KUGLER, Attorney at Law,
Suite 2300, 150 South Fifth Street, Minneapolis,
Minnesota 55402, appeared on behalf of Lithographic
Legends.

MR. MICHAEL E. RIDGWAY and MR. ROBERT
RASCHKE, Attorney at Law, 1015 U.S. Courthouse, 300
South Fourth Street Minneapolis, Minnesota 55415,
appeared on behalf of Trustee.

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

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APPEARANCES (Cont'd)

MR. MICHAEL TERRIEN, Attorney at Law, One IBM Plaza, Chicago, Illinois 60611, appeared on behalf of Lancelot and Ronald Peterson.

MR. RAFAEL KLOTZ and MR. ERIC KAUP, Attorneys at Law, 10th Floor, 101 Huntington Avenue, Boston, Massachusetts 02199, appeared on behalf of PLR Acquisitions.

Also present: Mr. David Phelps, Minneapolis Star Tribune.

P R O C E E D I N G S

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3 THE COURT: All right. Very
4 good. We will go on the record, then. The
5 matter at bar this afternoon is the group of
6 related cases in which the lead case is the
7 Polaroid Corporation, all of them pending under
8 Chapter 11 file 08-46617. Today's hearing is
9 being conducted via telephonic conference call.

10 I am physically in a faculty office at
11 Harvard Law School having just finished a
12 three-day seminar hosted by the Federal Judicial
13 Center and Harvard Law School and was able to
14 set up these arrangements to hear this matter,
15 which I had a feeling would be coming on, by a
16 request for some sort of relief attendant to the
17 entry of the order last Friday at about quarter
18 after five which authorized the sale of certain
19 assets of the Debtors in these Chapter 11 cases
20 free and clear of liens pursuant to a sale
21 process that had taken place over the preceding
22 several weeks.

23 The matters that are before me this
24 afternoon are the motions of two parties for a
25 stay pending appeal of that order entered last

1 Friday. The movants there being Lithographic
2 Legends, one of the two very active bidders in
3 the sale process, and Acorn Capital Group, LLC,
4 a scheduled creditor in these cases.

5 The request for hearing on a motion for
6 stay pending appeal came in on Monday. I had
7 anticipated that such a request would be made.
8 As I noted at our hearing last Thursday, I had
9 had this seminar on my calendar for nine to ten
10 months before we actually had the hearing and I
11 was not about to cancel the trip just in
12 anticipation of it but we were able to make
13 arrangements here so that I could preside over a
14 hearing. And, thanks to modern technology, I
15 have my laptop with the electronic record
16 accessible right in front of me and we are
17 handling this via telephonic conference call
18 which one of the movants facilitated.

19 I am going to, first of all, recite the
20 appearances as I took them before we formally
21 went on the record. At the conclusion of that,
22 if anybody else is present and has patched into
23 the call, they should certainly chime up and let
24 me know.

25 So on behalf of the debtor, we have

1 George Singer and James Lodoen. On behalf of
2 the creditors committee, Messrs. Chesley, Otsuka
3 and Ryan. On behalf of Lithographic Legends, we
4 have Messrs. Kugler and Gordon and Ms. Richard.
5 On behalf of Acorn, Messrs. Rosow and Boyd. On
6 behalf of the Petters creditors -- the creditors
7 committee in the Petters Company cases, David
8 Runck.

9 On behalf of Ronald Peterson who's the
10 trustee in bankruptcy for the Lancelot entities,
11 Mr. Terrien and Mr. Dove. On behalf of Summit
12 Technology Group and various related entities,
13 creditors that initially objected to the sale,
14 we have Ms. Swedberg and Mr. Durrer. On behalf
15 of Stylemark, a party in contractual privities
16 with the Debtors, we have Mr. Meyer and
17 Mr. Lowry. On behalf of Ritchie Capital
18 Management and related entities, Brian Krakauer.

19 On behalf of PLR Acquisitions we have
20 Mr. Kalla and Mr. Lenhart as well as Mr. Kaup
21 and Mr. Klotz. And on behalf of the office of
22 the United States Trustee, Mr. Raschke and
23 Mr. Ridgway.

24 I will also note for the record that
25 David Phelps, a reporter for the Minneapolis

1 Star Tribune is also on the line listening in.
2 He did request on Monday that he be allowed to
3 participate -- or excuse me, to listen in on the
4 telephonic conference, and after consulting with
5 me, my staff gave him approval to do that. As
6 is obvious, Mr. Phelps could have been present
7 in open court and we've been doing this through
8 the traditional means but because of the various
9 urgency of the situation, this is being
10 conducted by a non-traditional means. But I
11 simply decided that in light of the public
12 interest and the newsworthiness of this general
13 sale process and the reportage that went in the
14 media after the sale order was entered, that it
15 was not inappropriate to allow him to listen in.

16 Is anybody else on the line that would be
17 noting an appearance for the record at this
18 point?

19 Very good. Hearing nothing, then I'm
20 going to turn the floor over to movant's
21 counsel. And the motion from Lithographic
22 Legends came in first so I'll turn the floor
23 over to counsel for that party, whichever of you
24 is going to handle the matter.

25 MS. RICHARD: That would be me,

1 Your Honor. This is Hillary Richard of Brune &
2 Richard. And obviously we moved -- what we were
3 asking for, Your Honor, is simply a stay so the
4 district court can review and have an
5 opportunity to opine on Your Honor's order of
6 Friday.

7 This was obviously a very complex auction
8 and there are very important, indeed critical,
9 legal issues at stake not only with regard to
10 the jobs in Minnesota but the chilling effect
11 that we believe Your Honor's order will have on
12 future bidders in 363 sales. So because the
13 parties seem to certainly agree on what the
14 standards are for a stay, I'd like to turn first
15 to the likelihood of our success on the merits.

16 As we put forth in our papers, it's our
17 position that this was a highly unfair and
18 fundamentally flawed process, and we believe
19 there were numerous abuses of the Court's
20 discretion as well as clear legal error that
21 will lead to our prevailing on our appeal.

22 And I want to turn first to the point
23 that I think is the most important point here,
24 Your Honor, and that is this was and remains a
25 Chapter 11 proceeding. And under the rules

1 surrounding such a proceeding, it's the debtor
2 in possession, not Polaroid and only the debtor
3 who has the right to sell the assets of the
4 estate. And as I think you opined at some
5 length at the April 9 hearing, certainly it was
6 Congress' intent to take the administration of
7 bankruptcy estates outside and away from the
8 court and vest exclusively in either the debtor
9 or, in those instances unlike here where there
10 was a trustee, in the trustee the obligation or
11 responsibility for the administering of the
12 estate. And this is true and we've cited cases
13 to this effect even when it's Chapter 11 heading
14 into liquidation.

15 Now, the rules are clear that under such
16 a circumstance as this where there's a
17 Chapter 11, that the debtor is to use its
18 business judgment in a 363 auction to select the
19 highest and best bid. And indeed, Your Honor,
20 your order of February 18 in paragraph 9 you
21 specifically directed and empowered the debtor
22 here to select in its best business judgment the
23 highest and the best bid.

24 As you're more profoundly aware than I
25 who was not involved in the underlying

1 proceeding, there was a substantial amount of
2 work performed to put in effect procedures and
3 valuations that were established with the input
4 and agreement of all the constituencies, the
5 debtor, the creditors, the financial advisor and
6 even the bidders. And I'm not going to belabor
7 the point here unless you want me to address
8 this in greater depth, but the creditors
9 committee admitted in a court pleading that it
10 filed in this proceeding in connection with its
11 objections to Patriarch's first highest and best
12 winning bid that it was satisfied, they were all
13 satisfied with the values that were arrived at
14 and used for the auction process for the bidding
15 of equity and that they believe that those
16 values which were \$650,000 per point, per bidder
17 were appropriate.

18 And at the conclusion of this very
19 lengthy auction I think in Polaroid's papers
20 filed today they say there were 27 bids, the
21 debtor selected in the exercise of its best
22 business judgment Patriarch as the highest and
23 best bidder. And it did this in consultation
24 with its financial advisor. It did this using
25 its best business judgment. And as they

1 reiterate in their papers filed today, the
2 factors that they considered in arriving at that
3 business judgment were this was the highest net
4 amount, it was the highest cash amount which
5 both the debtor and the creditors said in
6 testimony or pleadings submitted in this
7 proceeding had a qualitative benefit. It had
8 the least execution risk which, again, both the
9 debtor and the creditors committee said, either
10 in evidence before Your Honor or in a pleading,
11 was a qualitative value, an important -- and had
12 retention of jobs that, again, was something
13 that both the debtor -- that the debtor was
14 entitled to and did consider.

15 And once the debtor chose Patriarch as
16 the highest and best bid using its best business
17 judgment, the standard for Your Honor in going
18 forward on the sale hearing to approve the sale
19 to Patriarch was the selection an abuse of the
20 debtor's discretion. That was the analysis that
21 was to be engaged in. The record clearly
22 reflects that this was not an abuse of
23 Polaroid's discretion to choose Patriarch. But
24 I think most important, Your Honor, to this stay
25 motion to give the district court an opportunity

1 to take a look at what happened here was this
2 Court never performed that inquiry. What
3 happened here was Your Honor said first of all,
4 I'm deferring to the creditors. They're the
5 real parties in interest here. That's simply
6 contrary to the well established law. It is
7 clear error. Unless it's a Chapter 7, unless
8 there's a trustee, it's the debtor and the
9 debtor alone whose best business judgment gets
10 analyzed.

11 Second, you said Hilco is the highest and
12 the best. In essence, in fact clearly and
13 unequivocally what you did, Your Honor, with all
14 due respect, is you substituted your discretion
15 for that of the debtor and that's expressly
16 disallowed. It's grounds for reversal. We've
17 cited you two cases that are squarely on point
18 on all fours here. There's the After Six case
19 and there's the United Healthcare case, and in
20 both of those instances, the Court has said
21 unequivocally, bankruptcy court judge, you can't
22 do that.

23 Now, the objectors, all of them, cite
24 absolutely no case that's on point that hold to
25 the contrary. They cite a lot of cases saying

1 in a Chapter 7 case you defer the trustee, true.
2 You defer to the creditors, true. That's not
3 this case. They cite a lot of cases that talk
4 about the unremarkable proposition that when a
5 court is overseeing a settlement, it takes
6 everyone's interests into account. That's true.
7 We don't dispute that. That's not the case
8 here. These are two cases directly on point.

9 I also need to point out, Your Honor, and
10 I believe this constitutes clearly an abuse of
11 discretion, that there is no testimony in the
12 record that the Hilco offer was the highest and
13 the best. The creditors in their papers they
14 filed an objection last night say oh, yes, there
15 was testimony from Houlihan Lokey. They don't
16 cite to a portion of the transcript because
17 there is no such testimony there. What Houlihan
18 Lokey said and the only testimony that was
19 adduced during the hearing, Your Honor, was that
20 Patriarch was the highest and best bidder.
21 Mr. Spencer said it at page 110. He said it
22 again on page 115. And despite what he said
23 about preferring transparency in the business
24 plan, he never retracted that. There was no
25 testimony from anyone that says Hilco is the

1 highest or best -- is the best offer.

2 So there's abuse of discretion for the
3 Court substituting the Court's discretion for
4 that of the debtor. There's clear error in
5 failing to apply or analyze or discuss in any
6 way the best business judgment standard. And
7 then in our opinion, Your Honor, there's clearly
8 erroneous factual conclusion that Hilco's offer
9 was the highest and best.

10 There's absolutely no evidence in the
11 record that the qualitative factors outweigh any
12 of the qualitative factors that the debtor
13 considered in choosing Patriarch's offer which
14 had not only more cash but other qualitative
15 factors that the debtor considered important
16 such as less execution risk and the saving of
17 jobs. And there is case law on this, Your
18 Honor, where you have somebody with the highest
19 bid and, you know, the highest cash bid and
20 somebody who's promising to save jobs. That's
21 the best offer.

22 Now, there's a second argument, Your
23 Honor, although I think that first one really
24 provides the basis for our stay application and
25 that is that the process in total was inherently

1 unfair because the procedures that you set down
2 in two separate orders were not followed and as
3 a result, the Court failed to maximize the value
4 to the estate. The record evidence --

5 THE COURT: Ma'am, I am going to
6 remind you that when your client burst in after
7 the submission of the closed bids, there
8 arguably was created a basis for concluding that
9 I sundered the earlier established procedures
10 that had been established in two successive
11 rounds of procedure setting at that point. So
12 that's sort of a two edged sword, is it not?

13 MS. RICHARD: Well, Your Honor,
14 at that point you had already told Patriarch
15 unequivocally that you were not going to allow
16 them to adduce evidence, testimony, or in any
17 other way participate in the hearing which is,
18 of course, the third ground on which we believe
19 we'll prevail on appeal.

20 But let me say this, Your Honor. There's
21 ample, ample case law support for the
22 proposition that at the moment that Patriarch
23 offered in the -- because all of this was raised
24 after Patriarch's bid was accepted by the debtor
25 as the highest and best and then the approval

1 process started, that at that moment in time
2 when the Hilco -- the argument was that the
3 Hilco LLC provided greater protection even
4 though Houlihan Lokey valued that at zero, that
5 at the moment Patriarch said I'll take it, the
6 Court should have exercised its discretion and
7 accepted that because that would have brought
8 better value to the estate in the -- to the
9 extent of an extra almost a half a million
10 dollars as well as the saving of jobs and the
11 other qualitative things that the debtor itself
12 found were important. And all that's -- that
13 happened by the Court rejecting that before it
14 had issued its order approving the sale to Hilco
15 was it deprived the estate of almost a half of a
16 million dollars and these other qualitative
17 benefits.

18 So in summary, Your Honor, there's ample
19 support that would have allowed you to accept
20 that offer. There is no support in favor of
21 your rejecting that and disallowing the
22 acceptance of that which was really an effort to
23 moot the issue that got raised not during the
24 course of the auction, not in negotiation or the
25 briefings before the Court's April 9 order

1 setting down the value of the equity, not in any
2 of those things but after a bid, a bid that was
3 tendered in reliance on paragraph 4 of your
4 April 9 order which expressly said that the
5 value of equity was going to be \$650,000 per
6 point, that when questions were raised to say
7 maybe it's worth more, although I will point out
8 that the record never says how much more, it's
9 never quantified, Patriarch offered to moot that
10 and it was an abuse of discretion not to allow
11 it to do so.

12 Finally, I want to address the standing
13 point, Your Honor.

14 THE COURT: All right. Is that
15 the last point you're going to make because we
16 do have to move on here. I don't have forever.

17 MS. RICHARD: It is, Your Honor.

18 THE COURT: All right. Go
19 ahead.

20 MS. RICHARD: It's the last
21 point on likelihood of success. I have four
22 sentences on the remainder of the test.

23 THE COURT: All right. Then I'm
24 going to ask you to go more quickly through your
25 other points than you have so far because, as I

1 say, you know, I'm here on the good graces of
2 other people who occupy these facilities and,
3 you know, I can't entertain you for 20 or 25
4 minutes on your argument alone. All right.

5 MS. RICHARD: The other point is
6 much shorter. Under Section 1109(b), Your
7 Honor, of the Bankruptcy Code, a party in
8 interest can raise, appear, and be heard on any
9 issue. We have provided you with ample case law
10 that says that a bidder is a party in interest.
11 The other side quibbled with these cases but at
12 the end of the day they don't change the
13 substantive holding. If a party is entitled to
14 get notice because it's a bidder, certainly it
15 would violate all fundamental notions of due
16 process without being entitled to notice but not
17 to be heard.

18 And also, Your Honor, under your order of
19 February 18, the initial bidding process order,
20 you wrote, and this is binding, that the bidding
21 procedures bind and inure to the benefit of a
22 highest bidder and the backup bidder. Clearly
23 that gives Patriarch standing. It had standing
24 to participate in that hearing.

25 Second of all, and we cited a plethora of

1 cases to this, the objectors all acknowledge,
2 that there's an exception to this sort of
3 disgruntled bidder rule and that is that a party
4 has standing to challenge on appeal the
5 bankruptcy court's ruling when fundamental
6 fairness is at issue and that's the case here.

7 Finally, with regard to irreparable harm,
8 I want to speak, if you'd like me to, to the
9 issue of whether or not a bond should be posted
10 or in what amount. The amounts that have been
11 requested are clearly preposterous because they
12 include the amount of the Hilco bid. There's
13 been nothing suggested that Hilco can or will
14 withdraw its bid. And in any event, Patriarch
15 stands ready to close on its, you know,
16 previously determine highest and best bid. With
17 regard to that, at most a bond should be no more
18 than the \$3 million burn rate that's identified
19 in Exhibit A to the debtor's objection which is
20 the affidavit of Mr. Spencer. That's what he
21 identified. We seek to expedite this appeal.
22 And all we're asking is that we be allowed to
23 have this very, very important decision which
24 has effect way beyond this 363 sale reviewed by
25 a district court. Thank you, Your Honor.

1 THE COURT: All right. Very
2 good. We've got a number of responses in
3 objection to this motion, and I believe the
4 Polaroid creditors committee's objection was
5 first filed so I'll turn the floor over to
6 counsel there.

7 MR. CHESLEY: Thank you, Your
8 Honor. I will be brief and confine my points to
9 two and I'll let the other parties deal with the
10 other issues so as to not duplicate or take any
11 unnecessary time.

12 The first issue we want to address, Your
13 Honor, is standing. And it's interesting that
14 Patriarch put that last because the question is
15 if they -- do they have even standing to lodge
16 this appeal and we believe the answer is
17 unequivocally no. There is a long line of cases
18 that we have cited that make clear that an
19 unsuccessful bidder in an asset sale under 363
20 lacks standing to challenge the bankruptcy
21 court's order. And I think the Court need look
22 no further than the case Colony Hill upon which
23 Patriarch places nearly wholesale reliance. In
24 Colony Hill neither the bankruptcy court nor the
25 district court gave the unsuccessful bidder --

1 actually, disqualified bidder any standing to
2 proceed in the appeal and the Second Circuit
3 only gave the bidder standing to participate
4 where they alleged that the buyer's actions
5 destroyed the intrinsic fairness of the sale
6 transaction during the auction. In that case
7 and in its progeny, to come within the very
8 narrow standing exception, the disappointed
9 buyer must demonstrate bad faith, collusion,
10 fraud, mistake, or comparable grounds
11 questioning the intrinsic fairness of the sale
12 process.

13 Your Honor, Patriarch did not nor could
14 they present any such evidence. And this case
15 is virtually identical to the case of Murphy v.
16 Howison which we cited to where, in fact, all
17 the bidder did was simply try and cloak or
18 clothe their claims of fraud, bad faith in one
19 of simply being unhappy with the results of the
20 auction. There and in every case to decide this
21 the courts have made it abundantly clear that in
22 fact there is no standing for the disappointed
23 buyer to appeal that decision of the bankruptcy
24 court.

25 Before moving on, Your Honor, and just

1 briefly, two points from that case are very
2 important as relates to this appeal and, more
3 importantly, the motion to stay. In looking at
4 the intrinsic fairness of the sale, the Second
5 Circuit in Colony Hill was struck by two
6 factors. One, the cash consideration in that
7 case was four percent different. The Court was
8 also struck by the other non-economic factors
9 including the industry reputation of the winning
10 bidder regarding similar deals. Unfortunately,
11 Patriarch, in its zeal to simply look at nothing
12 but cash consideration overlooks these very
13 important issues which are not confined to
14 Colony Hill which are presented in virtually
15 every case that deals with this.

16 Also in Colony Hill, all the relevant
17 facts regarding the parties' respective bids and
18 positions were disclosed to the court. That was
19 one of the principal bases upon which the Second
20 Circuit denied the appeal. Here they were not
21 only disclosed in open court but they were part
22 of an open process that this Court led. So I
23 think, Your Honor, if you look at the case that
24 they rely upon for standing, it certainly
25 confirms that, in fact, there is no standing for

1 Patriarch to bring this appeal.

2 Which leads to the second point I want to
3 address briefly and that relates, Your Honor, to
4 the first tranche under whether Patriarch is
5 likely to succeed on appeal. It's curious that
6 in claiming that it will succeed on appeal,
7 Patriarch chose in its brief not to discuss the
8 applicable standard of review that would govern
9 that appeal and that, of course, is the abuse of
10 discretion standard.

11 In the Eighth Circuit citing the Food
12 Barn case, the BAP confirmed that when a court
13 enters the sale order, the expectations in that
14 order should not be set aside absent grossly
15 inadequate price or fraud in conduct of the
16 proceeding. That comes from the Eighth
17 Circuit's case, the Eighth Circuit BAP in
18 Payless Shoes. Of course, neither of those
19 factors is applicable here. Rather, Patriarch's
20 position is merely that the rules governing the
21 auction somehow precluded the Court from
22 considering any factor other than the highest
23 monetary consideration. It is nowhere in the
24 order. It is nowhere in the law and it is
25 nowhere in the record. And in fact, Your Honor,

1 I think it's very important.

2 We cite the case but In Re: Bakalis, the
3 Eastern District of New York Bankruptcy Court
4 said these following words. A trustee's duty to
5 maximize the return to a bankruptcy estate often
6 does require recommendation of the highest
7 monetary bid. On the other hand, overemphasis
8 of this usual outcome overlooks a fundamental
9 truism. A highest bid is not always the highest
10 and best bid. And that is exactly what the
11 record in this case stood for. That is exactly
12 why every creditor constituency in this case
13 supported the Hilco Gordon Brothers bid. And
14 for Patriarch to now argue that in fact the
15 creditors are to sit silent on this and this is
16 what the overwhelming weight of the law is is
17 simply a fallacy, Your Honor.

18 We have cited cases and I think the
19 S.N.A. Nut Company case out of Northern District
20 of Illinois is very compelling when it goes to
21 the point that no particular deference should be
22 given to the debtor's business decision in a
23 situation where there's a sale in a liquidating
24 plan, in a liquidating Chapter 11. More
25 deference should be shown to the unsecured's

1 view point because, as Your Honor noted, this is
2 our money and at the end of the day, part of
3 this consideration is our equity. So for
4 Patriarch to argue now that we have no say and
5 we're to sit there idly by I think ignores not
6 only the facts but it ignored the law.

7 Finally, Your Honor, while Patriarch and
8 Patriarch alone now suggests that the Court
9 should overlook the creditors, the law on the
10 record, we think based upon the totality of the
11 circumstances presented to the Court under the
12 four part test that the court must analyze, even
13 were Patriarch to have any standing to bring
14 this appeal, they have fallen woefully short of
15 at least meeting the first and I would say most
16 important element under the four part test their
17 likelihood to succeed on appeal.

18 With that, Your Honor, we can turn it
19 over to any of the other parties that want to
20 deal with the other tranches of the relief,
21 including the debtors on the issue of harm.

22 THE COURT: All right. Very
23 good. Let me see, then. I'll turn the floor
24 over to Ronald Peterson's counsel, then. And
25 for the record, that was Mr. Chesley speaking.

1 I'll ask counsel to just --

2 MR. CHESLEY: I apologize, Your
3 Honor.

4 THE COURT: Okay. I'll turn the
5 floor over, then, to Mr. Peterson's counsel. Go
6 ahead.

7 MR. TERRIEN: Good morning, Your
8 Honor, or good afternoon. Mike Terrien on
9 behalf of Mr. Peterson.

10 I'll just adopt Mr. Chesley's counsel --
11 comments with respect to standing and with
12 respect to likelihood of success on the merits.

13 With respect to likelihood of success, I
14 want to add the concept that continually strikes
15 me from both Patriarch's pleadings and from
16 their arguments, they seem to take the view that
17 the sale process ended when the debtor made a
18 determination. And I think the cases that we
19 cited have made very clear that up until the
20 point where the Court enters an order, the
21 question of who's the winning bidder, who's the
22 highest and best bidder remains an open
23 question, and the Court has not only the ability
24 but the responsibility to evaluate the answer to
25 that question.

1 I noticed Patriarch's counsel said that
2 there were no citations to the record with
3 respect to that question. Our brief is full of
4 them. There were all sorts of reasons that we
5 cited and that we brought out in Mr. Spencer's
6 testimony and that other counsel brought out in
7 Mr. Spencer's testimony explaining why we
8 believed the Hilco bid was, in fact, higher and
9 better. And to adopt Patriarch's view of the
10 363 process would negate the role for the
11 creditors and the Court and that is not how the
12 process is intended to be conducted.

13 Lastly, and I know the debtors will
14 probably address this more fulsomely than I
15 will, but we think that the harm here associated
16 with the stay is very significant. This debtor
17 is burning cash every month, it's a limited
18 period of time. We all know appellate
19 processes, even when expedited, do not tend to
20 move all that quickly. And in addition to the
21 loss of cash associated with what's likely to be
22 months of delay candidly if this sale isn't
23 allowed to close, there's a -- the idea that
24 these two bidders having been through this
25 process and having gotten themselves up to

1 double the original stalking horse bid, the idea
2 that we can rely on one or both of them being
3 there at the end of an appellate process is
4 just -- it's not something that we should have
5 to count on. It's not a risk that we should
6 have to take and especially on behalf of a
7 bidder that doesn't have an legally cognizable
8 economic interest in the outcome of this. The
9 creditors of these estates should be entitled to
10 get some recovery out of these assets. And at a
11 minimum, if the Court has any inkling to enter a
12 stay, the protection afforded by Patriarch to
13 the estate and the creditors should be
14 commensurate with the risk that they're asking
15 you to impose on us and that risk is in the nine
16 figures. That's it. Thanks.

17 THE COURT: All right. Thank
18 you. All right. Then on behalf of Summit
19 Technology Group, Lorence Harmer, et al.
20 Counsel?

21 MR. DURRER: This is Van Durrer,
22 Your Honor, and I'll speak briefly. There are
23 really just three points that I want to raise.
24 First, I think that Patriarch's contention that
25 the Court somehow replace the debtor's business

1 judgment is just way off the mark here.

2 What happened was that the Court made a
3 ruling as to the Court's view as to what the
4 highest and best bid is. After hearing various
5 arguments, including the wish of creditors, it
6 made that determination. At that point in time
7 the debtor then revised its business judgment,
8 requested specifically that the Court approve
9 the Hilco Gordon Brothers bid, and the Court did
10 so on that basis. So the Court absolutely did
11 approve a business judgment articulated by the
12 debtor. And I think that from that conclusion,
13 then, any success, any likelihood of success on
14 the merits by Patriarch simply falls away.

15 Second, there is substantial risk to the
16 estate because, as the APA that the Court did
17 approve with Hilco and Gordon Brothers says, the
18 buyer can terminate the transaction if it hasn't
19 closed by May 14 which is really just a few days
20 away. And there's no indication that an appeal
21 could conclude that quickly and so the estate
22 risks losing the entire sale proceeds.

23 And that's the third point that I wanted
24 to raise which is that just merely posting a
25 bond to satisfy the burn rate of the estate is

1 not sufficient. Not only do you need to protect
2 against the burn rate but you also need to
3 protect against the sale transaction itself
4 going away.

5 And then lastly, there is other harm to
6 other parties such as the Summit Group parties
7 that are involved in the supply chain of the
8 debtor and are involved in protecting the brand
9 and the underlying value of these assets and
10 there's value well beyond the purchase price
11 there as well. Thank you, Your Honor.

12 THE COURT: Okay. Very good.
13 Let's see, then. The next filed was that of the
14 Petters committee which was basically just a
15 joinder to the arguments raised by Mr. Peterson.

16 Mr. Runck, is there anything else you
17 want to say?

18 MR. RUNCK: No, Your Honor. As
19 we said in our very brief paper, we do join in
20 the objections that have been filed to this
21 motion.

22 Your Honor, I would just briefly
23 reiterate that under the clear Eighth Circuit
24 case law, and I'm referring to the Food Barn
25 case, the Farmland Industry case, and the

1 Payless Cash Ways case, Your Honor, the Court
2 clearly had wide discretion to consider all
3 facts and circumstances in determining what
4 constitutes the highest and otherwise best bid
5 under the circumstances. Your Honor, we believe
6 that the moving parties have little success or
7 little likelihood of success on the merits, and
8 based on the statements and the debtor's
9 objection and statements by counsel and also the
10 testimony during the trial, Your Honor, the
11 debtor has clearly indicated that they have a
12 substantial cash burn rate here that does not
13 justify a stay pending appeal.

14 THE COURT: All right. And for
15 the debtor, then?

16 MR. SINGER: Yes, Your Honor.
17 George Singer for the debtor. And I think it's
18 important to start off to inform the Court of
19 where exactly we are in the process from the
20 debtor's perspective at least since the entry of
21 the Court's order on April 17.

22 Now, the debtors have filed and given
23 notice to parties that the bid of the Hilco
24 Gordon Brothers was the successful bid. They
25 published a revised notice of prevailing bidder

1 and have filed the asset purchase agreement
2 executed by the debtors and the parties with the
3 Court.

4 Since that time, the debtors have been
5 working earnestly with the prevailing bidder in
6 working through a closing schedule and closing
7 documents and moving this transaction forward as
8 expeditiously as possible in order to minimize
9 the financial burn and capitalize on the sale
10 and bring finality to a process that has gone on
11 far too long.

12 The -- in fact, you know, the debtors
13 believe that the transaction is set to close as
14 early as next week and are working towards that
15 end. The debtors intend to file today, give
16 notice, absent the Court's imposition of a stay,
17 a notice to -- a supplemental notice to
18 contracting and parties who have been left in
19 abeyance for a number of months not knowing or
20 have any certainty or visibility about the
21 process and what's going to happen. The debtors
22 feel that they have to move this process forward
23 and simply do not have the luxury to sit around
24 and watch Rome burn while appeals are being
25 argued about the process and who is the

1 prevailing bidder.

2 The debtors, you know, have provided and
3 concentrated its brief on focusing the inquiry
4 from our perspective on the fundamental notion
5 that time is money in our view that the debtors
6 and the bankruptcy estate will be substantially
7 harmed by the imposition of a stay on anyone's
8 behalf. You know, we do not believe that any
9 stay related to Acorn or this particular issue
10 is capable of being resolved in a short amount
11 of time. We simply cannot have a situation
12 where the estate loses \$3 million a month or
13 more. Employees, vendors, contracting parties
14 are couched with uncertainty and risk losing a
15 current bid in hand that is determined and
16 ready, willing and able to close today.

17 And we have filed an affidavit of
18 Houlihan Lokey and have discussed at length
19 additional factors that we believe are
20 absolutely critical of why this sale needs to go
21 forward now unabated by a stay.

22 And I think with that, unless the Court
23 has any further questions, I will -- the only
24 remaining comment I will make is that to the
25 extent that the Court is inclined to impose a

1 stay of any kind, we disagree with that the
2 adequacy of a stay can be determined by posting
3 a \$3 million bond. The debtors need access to
4 funds. The debtors' funds will be exhausted, by
5 current estimates, no later than 45 days. So a
6 bond does not even do the trick in that amount.
7 And certainly I share Mr. -- I believe the
8 sentiments of Mr. Peterson's counsel that any
9 bond or any economic protection that the estate
10 would need would have to protect against the
11 loss of the transaction in addition to providing
12 immediate access to committed capital to enable
13 the debtors to maintain the status quo and that
14 is what's required by Rule 8005.

15 THE COURT: All right. Very
16 good. I think that's all of the parties that
17 put in formal objections or other responses to
18 the Lithographic Legends' motion.

19 I will just ask does anybody else have
20 anything else to note on that one?

21 MS. RICHARD: I would like to
22 briefly respond, Your Honor.

23 THE COURT: No. I'm not going
24 to hear any more argument on this motion. All
25 right. We will go on, then. I'm going to hear

1 argument on the Acorn Capital motion.

2 MR. BOYD: Your Honor, this is
3 Tom Boyd. I'll argue that motion.

4 THE COURT: Okay. Go ahead.

5 MR. BOYD: Just for the record,
6 we recognize we filed our moving papers
7 yesterday, but I wanted to clarify that Acorn's
8 motion was set on for hearing at this time in
9 this hearing as is our understanding that's the
10 Court's preference and desire.

11 THE COURT: Yes. And the
12 considerations are certainly not identical but
13 it's the same sort of relief sought and it would
14 profit nobody to not go ahead and address the
15 motions. So let's go ahead.

16 MR. BOYD: Thank you, Your
17 Honor. Acorn respectfully requests the Court to
18 stay the closing of the sale of Polaroid's
19 assets to Hilco Gordon pending appeal by Acorn
20 from the Court's order, specifically the aspects
21 of the Court's order to sell those assets free
22 and clear of Acorn and PACT Funding's liens and
23 claims.

24 Acorn has, in fact, appealed the order
25 challenging the Court's approval of the sale on

1 those terms. Specifically, we're appealing the
2 Court's determination that these assets can be
3 sold free and clear of its liens based on an
4 alleged bona fide dispute with respect to these
5 liens and they further appeal the Court's order
6 that these assets may be sold free and clear of
7 PACT Funding's liens in which Acorn has both a
8 direct and indirect interest.

9 With great respect, Your Honor, Acorn
10 does not believe the Court provided it with a
11 sufficient opportunity to present arguments,
12 evidence on this matter or on these issues.
13 Acorn does not believe the Court provided these
14 issues with sufficient time and attention. And
15 finally, Acorn believes the Court clearly erred
16 in its findings of fact and conclusions of law
17 on these issues.

18 Addressing the four factors that you need
19 to consider, Your Honor, very briefly. First,
20 Acorn believes it meets the likelihood of
21 success on appeal requirement with respect to
22 both of these issues. To establish a likelihood
23 of success on appeal Acorn does not have to
24 demonstrate a probability of success but simply
25 that it has a substantial case. We believe that

1 we do meet that standard. And that standard is
2 particularly applicable here with respect to
3 questions of law. And we believe that the
4 issues we've raised reflect errors on questions
5 of law by the Court. So we believe we meet that
6 first element.

7 Second, Acorn will suffer irreparable
8 harm if the closing on the sale of the assets is
9 not stayed pending appeal. By definition,
10 stripping Acorn and PACT Funding's liens from
11 the assets in question constitutes irreparable
12 harm to their Constitutionally protected
13 property rights. There's an inherent difference
14 in the value between the assets themselves and
15 the cash proceeds that would be paid for the
16 assets. And further, Acorn believes the assets
17 are more valuable than the cash and have been,
18 at least it's proposed, that they be sold for
19 less than their value.

20 Third, Acorn does not believe that the
21 debtors or Hilco Gordon will suffer irreparable
22 harm to stay on the closing of the sales of
23 these assets -- excuse me, if the sale is stayed
24 pending the exhaustion or at least the
25 furtherance of our appeals. Hilco Gordon is now

1 committed to purchase the assets and Polaroid
2 can continue to operate during the time that we
3 pursue our appeal rights.

4 Finally, Acorn believes the public
5 interest favors the granting of the motion to
6 stay pending appeal. Acorn, as I've indicated,
7 has raised significant issues that are important
8 to all creditors with legitimate liens. And
9 issuing a stay pending appeal would also protect
10 third parties who might otherwise rely upon this
11 court's order to their detriment in the event
12 it's reversed on appeal.

13 For these reasons we respectfully request
14 the Court to stay the closing of the sale of
15 these assets free and clear of Acorn and PACT
16 Funding's liens and claims pending Acorn's
17 appeal from the order. Thank you, Your Honor.

18 THE COURT: All right. Thank
19 you. I'm just going to go down in same order of
20 response here recognizing that I believe only
21 the debtor filed a response to the Acorn motion,
22 at least as I am aware of from links on my
23 calendar which I last checked just before we
24 went on the record here.

25 So I'll turn the floor over to the

1 creditors committee's counsel first.

2 Mr. Chesley, do you want to address the
3 Acorn motion?

4 MR. CHESLEY: Your Honor,
5 Mr. Ryan's going to address this. Unfortunately
6 because we didn't get this until late yesterday,
7 we did not have the opportunity to prepare a
8 full response. We obviously join in the
9 debtor's objection to this motion. And Mr. Ryan
10 may have a couple of other points just to add
11 quickly.

12 THE COURT: All right. Good
13 enough. Mr. Ryan.

14 MR. RYAN: Yes. Thank you, Your
15 Honor. I think the one point that's really
16 striking in the Acorn request for the stay and
17 going through and obviously we disagree on the
18 likelihood of success and I think the Court did
19 certainly have sufficient briefing in front of
20 it and heard arguments on Thursday night and
21 made that decision and does not have a
22 substantial likelihood of prevailing on the
23 merits. But I think what's really telling here
24 is the argument that somehow Acorn is going to
25 be harmed if the sale closes. And they're

1 basically just arguing harm by definition
2 somehow having the assets sold free of their
3 liens automatically harms them. And it's all
4 based on this premise that the sale doesn't
5 maximize the value of these assets.

6 Well, the Court very clearly and
7 specifically found particularly in responding to
8 the Ritchie objection last Thursday and
9 certainly based on the testimony of Ms. Jeffries
10 and of Mr. Spencer, that, in fact, this sale
11 does maximize the value of the assets. And the
12 liens that Acorn purports to have whether they
13 have them or not, are simply not worth anything
14 more than what their collateral is worth.

15 And we have maximized the value here. I
16 think it's interesting that we're still arguing
17 over this. But clearly the process, as messy as
18 it was, brought great increases in the amounts
19 which were bid and I think everyone believes
20 that we have reached the maximum amount that
21 could be had for these assets.

22 So we don't think that there's really any
23 harm to Acorn and certainly not commensurate
24 with the harm to the estate. And I won't repeat
25 the arguments that have already been made but I

1 think the same arguments that were made in
2 response to the Patriarch motion stands here.
3 The debtor simply can't operate. Its burn rate
4 may be \$3 million but it doesn't have money to
5 continue to operate perpetually. They're going
6 to be out of money very soon as has been pointed
7 out. And Hilco will not be hanging around.
8 They're not required to stay and close under the
9 agreements after May. So you simply cannot
10 maintain the status quo here. It won't happen.
11 Thank you.

12 THE COURT: All right. Let's
13 see. I'll turn the floor over to Mr. Peterson's
14 counsel. Is there anything you want to note in
15 response to the Acorn motion?

16 MR. TERRIEN: Just a couple of
17 things. There are two threads to it on the
18 likelihood of success and I agree that the harm
19 issue is essentially identical to with respect
20 to the Patriarch motion. But on likelihood of
21 success, Acorn goes out of its way to attempt to
22 claim that the Court didn't have sufficient
23 information in front of it to determine that
24 there was a bona fide dispute about its liens.
25 I submit that Acorn's motion on its face is

1 sufficient to conclude that there is a bona fide
2 dispute about at least some of its liens.

3 I haven't been following this particular
4 thread of this case very closely but was shocked
5 to find the lack of any explanation for how the
6 value of its liens went from 25 million to
7 \$281 million set forth in that motion. When it
8 gets to that critical question, the motion gets
9 unbelievably vague.

10 In addition to that, Acorn is concerned
11 about an ability to exercise the rights of PACT
12 Funding. And when I read that, the first thing
13 that jumped out at me is PACT Funding's a debtor
14 and whether or not Acorn is a legitimate
15 creditor or a legitimate secured creditor and
16 what rights it has as a secured creditor
17 vis-a-vis PACT Funding it seems to me painfully
18 clear that in the absence of lifting the stay,
19 it has no ability to exercise the right -- any
20 rights in the property of PACT Funding.

21 And so with those two threads out of
22 Acorn's motion, the entire premise of any
23 likelihood of success it seems to me vanishes.

24 THE COURT: All right. From
25 Summit Technology Group, Harmer, et al.?

1 MR. BOYD: Nothing to add, Your
2 Honor.

3 THE COURT: All right. Very
4 good. And from the committee in the Petters
5 company cases?

6 MR. RUNCK: Your Honor, this is
7 David Runck. I would just note for the record
8 that we too object to this motion by Acorn for
9 the grounds previously stated. We don't believe
10 there's a likelihood of success on the merits.
11 A bona fide dispute clearly exists based on the
12 adversary proceedings that were filed, based on
13 the disputed nature of the claims set forth in
14 Polaroid's schedules, and based on the parties'
15 various papers that have been filed in these
16 cases. And we also agree with the comments that
17 have been previously stated that say that Acorn
18 will suffer no irreparable harm through this
19 appeal. I mean, I'm sorry, through this sale,
20 because they can assert an interest in the sale
21 proceeds.

22 THE COURT: All right. Very
23 good. And for the debtor, then.

24 MR. SINGER: Finally, Your
25 Honor, I certainly embrace all those remarks

1 that have been made. The debtors have briefed
2 this issue on a number of occasions and we did
3 so again and direct the Court to adopt the
4 arguments raised in our briefs but a couple
5 points I do want to highlight.

6 I'm finding it absolutely incredible that
7 we are having a dispute about whether there's a
8 dispute. I find it unfathomable. And the idea
9 that our complaint which is replete in detail
10 that does not set a bona fide dispute, flies in
11 the face of the standards articulated by the
12 Eighth Circuit on when and how to determine
13 whether a bona fide dispute exists. I think you
14 heard the remark that was made by Acorn's
15 counsel was they intend to exhaust their
16 appellate rights.

17 So again, I'm absolutely puzzled by the
18 notion, particularly in light of our previous
19 comments and the evidence regarding the
20 irreparable harm to the estate, that the debtors
21 somehow will not be harmed by maintaining the
22 status quo. The irreparable harm is present.
23 It's paramount and it's critical and we would,
24 you know, adopt all the arguments that we made
25 in connection with Patriarch in response to the

1 contentions of Acorn on this issue.

2 THE COURT: All right. Very
3 good. Anybody else, then, to be heard on the
4 Acorn matter?

5 MR. LOWRY: Your Honor, Greg
6 Lowry for Stylemark and Eyewear. Just very
7 briefly for the record we oppose both of the
8 motions for a stay. Thank you.

9 THE COURT: Okay.

10 MR. KRAKAUER: Your Honor, Brian
11 Krakauer on behalf of Ritchie. We do support
12 Acorn's statements. We've made those
13 substantive arguments before you obviously at
14 the time of the hearing. I don't think I have
15 anything further to add to what they said.

16 THE COURT: All right. So
17 noted. Very good. Anybody else, then?

18 All right. Well, first of all, the
19 delegation that Rule 8005 makes to the
20 bankruptcy court of the duty to hear a motion to
21 stay pending appeal in the first instance is I
22 guess in my mind a little unfortunate. And I do
23 know that other trial courts are generally
24 required to hear motions for stay pending appeal
25 in the first instance as well. But given the

1 articulation of a standard which actually
2 goes -- the articulation goes all the way up to
3 the United States Supreme Court, Hilton v.
4 Braunskill, 481 U.S. 770, specifically page 776,
5 a 1987 decision.

6 The articulation that the standard
7 ultimately ends up requiring the trial court
8 that just rendered a decision to turn around and
9 pass judgment on just how sound its own decision
10 was and as a prerequisite of staying the effect
11 of its own decision requires the Court, in
12 essence, to say that there's a sound case for
13 reversal. Every once in a while, of course, the
14 courts will get an issue that is new, quite
15 unsettled and as to which there may be both
16 intrinsic specific reasons inherent in the case
17 itself and larger reasons in public policy for
18 acknowledging that there are really two sides to
19 the dispute and it could come out differently if
20 a different court reviewed it on the record
21 presented to the trial court. That, frankly,
22 doesn't happen all that often. And generally,
23 as a matter of course, about the furthest I will
24 end up going in passing on a motion for a stay
25 pending appeal is to say that there's a reason

1 for disagreement here that can't be rejected out
2 of hand. Essentially this factor is equivocal
3 insofar as the grant of a stay pending appeal is
4 concerned and ultimately I pass on to the other
5 reasons.

6 Now, this almost always comes in the
7 context of denying a motion for stay pending
8 appeal simply because of the weighing of the
9 harms ends up so heavily weighted in favor of
10 the appellee, the respondent to the appeal and
11 the matter simply has to go forward. And to a
12 great extent this ends up being a much more
13 heightened consideration in bankruptcy where, as
14 I said several times on the record before in
15 this case and has been quoted in the public
16 media, in bankruptcy, the old adage that time is
17 money is much stronger than in most other
18 contexts because we are dealing here with trying
19 to preserve and ideally to enhance value for the
20 recovery of creditors. And unfortunately, when
21 things remain indeterminate as to legal status
22 of assets, claims, causes of action and the
23 like, the outside market recognizes this and
24 value rapidly erodes.

25 So it ends up that the process is quite

1 loaded towards achieving finality a lot more, at
2 a lot more early stage in the potential
3 availability of the legal process than it is,
4 for instance, in tort law where you're dealing
5 with frozen facts, the consequences of a one
6 time event, an accident or the like. It's much
7 more comparable to the question of issuing after
8 injunction, for instance, where you're actually
9 restraining behavior and affecting ongoing
10 conduct. And there, I think, you know, the
11 whole question of the impact of delay on the
12 parties pending appellate review is heightened.

13 Well, in bankruptcy it's all a matter of
14 money. I mean, it really is about the recovery
15 of value for creditors and not seeing that the
16 process of dispute resolution goes on so
17 inordinately long so as to erode the value
18 recoverable for the parties that under
19 bankruptcy law are deemed to be the first ones
20 entitled to receive it, the creditors first and
21 foremost.

22 So I'm always uncomfortable with applying
23 this factor, trying to determine whether the
24 movant is likely to succeed on the merits of the
25 appeal. And yet, going all the way up to the

1 U.S. Supreme Court and certainly on the level of
2 the circuit courts, the Eighth Circuit has
3 framed up this standard in James River Flood
4 Control Association v. Watt, 680 F.2d 543 back
5 in 1982. It's also been adopted by the
6 Bankruptcy Appellate Panel in the Ross opinion,
7 223 B.R. 702. The appellate courts say that we
8 have to look at this. And it's true. It's sort
9 of a reality check on the process and is at
10 least designed to weed out patently frivolous
11 appeals on that very first factor. I mean, I
12 can't say that either of these appeals is
13 patently frivolous, quite frankly, in terms of
14 the issues that they're raising. Everybody has
15 a right to stake out a position in a case as
16 unique as this.

17 But the question is really whether the
18 movants here are likely to succeed on the merits
19 of the appeal. And even if you accept that
20 lesser formulation that Mr. Boyd made reference
21 to, having a substantial argument for reversal,
22 that still imposes a pretty heavy burden
23 substantively in terms of the strength of the
24 substantive argument for reversal as presented
25 to me in the first instance. So I have to set

1 aside my sense of disquietude in even addressing
2 the question and go ahead and address it in
3 connection with both of the motions at bar here.

4 Then you move on to the weighing of the
5 harms. The second factor requires, requires a
6 showing that the movant will suffer irreparable
7 injury. And the third factor requires a showing
8 that no substantial harm will come to the other
9 parties. In other words, the risk of execution,
10 of implementation of the relief ordered in the
11 order or decision that appeal would be taken
12 from. The burden of that has to fall
13 permanently and irreparably on the movant in
14 order to pass that second factor. And then the
15 movant also has to show that it's really no big
16 deal to the other parties if the delay is
17 occasioned by staying the effectiveness of it.

18 In bankruptcy, that fourth factor, that
19 the stay will not harm the public interest, is
20 usually subordinated. One can see in instances
21 where constitutional rights, voting rights, the
22 right to education and the like, really
23 important national interests in individual
24 rights are affected that the public interest is
25 implicated. In bankruptcy it's basically the

1 private interests of the parties. There's been
2 a lot of argument here about some sort of
3 broader interest in an integrity of a bidding
4 process here but that's argued most loudly by
5 the party that did not prevail ultimately in the
6 sale process even as it prevailed in the bidding
7 process that arrived at a dollar value component
8 for a sale offer. And, frankly, I am not
9 persuaded that the public interest is implicated
10 at all given the fact that this process got
11 continually refined and continually sharpened as
12 time went on in large part, frankly, due to the
13 fact that both parties held the cards back and
14 didn't bid up by very large increments despite
15 some rather grueling processes until we actually
16 got to an auction process that was supervised in
17 open court.

18 So we get back to the whole question of
19 whether either of these movants are "likely to
20 succeed on the merits" on their appeals here. I
21 will note for the record that I'm setting aside
22 the question of Lithographic Legends' standing
23 in the first instance here for the time being
24 and I will get back to that later here.

25 Now, the argument, of course, that is

1 advanced by Lithographic Legends as a part of an
2 argument, I really don't take it personally.
3 After you've been on the bench as long as I
4 have, you get kind of a hardened skin to
5 accusations that somehow you are fostering a
6 process that is arbitrary, capricious and leads
7 to an irrational result. I think, frankly, the
8 implication that somehow -- that there was
9 something so grossly anomalous about my
10 determination here in light of the bidding
11 process but my determination of a highest and
12 best offer is given to lie by the fact that the
13 parties in interest, the creditors, were the
14 ones that, in fact, argued most strongly for the
15 result that I ended up reaching here.

16 Lithographic Legends, of course, has an
17 interest in acquiring these assets as a
18 purchaser but it's not a creditor in this case.
19 Insofar as being a party in interest in terms of
20 actual dollars and sense, in terms of
21 constitutional standing, not the grant of
22 standing under the bankruptcy rules given to a
23 "party in interest" but in terms of
24 constitutional standing, the issue is quite
25 different as to Lithographic Legends.

1 But let's get down to the likelihood of
2 success on the merits a little more pointedly
3 because the whole argument here is that the
4 process was so flawed that it has to be
5 determined to have been an abuse of discretion
6 fundamental judicial error in the way I
7 basically approved the structuring of it going
8 forward.

9 Now, the ultimate determination that was
10 to be presented to me which was going to be what
11 was the highest and best offer for these assets.
12 That's what the case law establishes is the
13 court's obligation to determine when it approves
14 a disposition of estate assets under Section
15 363. I'm going to note highest and best is
16 phrased in the conjunctive. Both of those are
17 characteristics and they are distinct
18 characteristics.

19 As I noted, perhaps not in as articulated
20 a fashion as I would have liked at the hearing
21 in light of the lateness of the hour and
22 everybody's fatigue, highest is not the same
23 thing as best. They are distinctive
24 characteristics and a bidding process is
25 designed to arrive at a highest bid in terms of

1 dollar value. But to the extent that there is
2 non-cash consideration thrown into the mix, as
3 was the case here and as was the case full well
4 with Lithographic's knowledge, then the question
5 then becomes a different sort of inquiry what is
6 best as well.

7 And, frankly, you know, I'm going to
8 conclude that, and trying to set aside by own
9 vested interests as author of the rationale
10 there, I'm going to conclude that there is not a
11 sufficient likelihood of success on the merits
12 as to Lithographic Legends' argument that the
13 outcome of the sale process was basically
14 perverse. That's the argument that's being made
15 here, that somehow just the bidding should
16 control, that the characteristics, the
17 individual incidence of the individual aspects,
18 the characteristics of the equity offering that
19 was made which were going to be fixed by the
20 so-called LLC agreement, the limited liability
21 company agreements which amounted to covenants
22 with whoever would take that minority
23 shareholding, that somehow that was really kind
24 of irrelevant and that only the dollar value
25 consideration should be considered.

1 The argument that the affixing of the
2 \$650,000 per point share of valuation for the
3 purposes of the quantification took care of all
4 questions as to what was best in terms of an
5 equity component simply doesn't make any sense.
6 There was enough presented both by way of
7 testimony and legal argument that established
8 that in what asset sales have become,
9 particularly since economic conditions became
10 dire a year ago, is that the equity -- an offer
11 of an equity position in a successor entity to
12 own assets has become a rather important part of
13 the sale process under Chapter 11 simply because
14 people -- bidders don't have the amount of cash,
15 interested parties don't have the amount of cash
16 that they did in the more free wheeling years up
17 to a couple of years ago. So the equity stake
18 and the characteristics of it and in particular
19 the characteristics as they would go to a
20 minority shareholder's interests are crucial.

21 I am -- I did not hold and I'm not going
22 to second guess myself at this point in the
23 context of determining a likelihood of success
24 on appeal, I did not hold that the process by
25 which the LLC agreement's terms, broad or

1 specific, were banged out with input from the
2 creditors committee, funneled to the debtor, out
3 to the two interested purchasers, that there was
4 anything wrong with that process. And under the
5 circumstances, the creditors committee, as
6 representative of the unsecured creditors who
7 ultimately stand to be the beneficiaries of any
8 value to be attributed to that minority
9 shareholding in the successor entity, their
10 evaluation as to what would be most beneficial
11 is not only to be given some deference, it was
12 also articulated with every bit of legal sense.

13 What we are talking about here is the
14 possibility of oppression of a minority
15 shareholder. A 25 percent equity stake in a
16 company does not carry the control of that
17 company with it. And the majority shareholder
18 or shareholders can take many actions to ice out
19 that minority shareholder by way of refusal to
20 disclose operating information, refusal to
21 consider, or to disburse dividends or other
22 incidence, other shares of ongoing revenues and
23 taking various other actions and all of this is
24 quite familiar from the law of corporations to
25 oppress a minority shareholder which then has a

1 direct impact on the dollar value, the resale
2 value of that shareholding. As fiduciaries
3 here, the unsecured creditors committee and
4 acting in their own interests, those unsecured
5 creditors and various other parties that chimed
6 in on the matter had a definite opinion on that
7 based upon their evaluation of the LLC
8 agreements that were provided.

9 And given the fact that that equity stake
10 was going to be more than 20 percent of -- ended
11 up being I should say, more than 20 percent of
12 the value of both final offers by the two, this
13 was not a consideration that was chump change.
14 This was worth real dollars. The \$650,000 per
15 point value to be attributed to the initial
16 share issuance would have nothing to do even ten
17 minutes later if a process of minority
18 shareholder oppression commenced.

19 So what they were looking for was
20 protections against that and they were more
21 satisfied with what was forthcoming from Hilco
22 and Gordon Brothers and far more satisfied. And
23 the record is full of citations to the
24 protections of the minority -- the holder of
25 those minority shares that were given in the LLC

1 agreement that Hilco and Gordon Brothers
2 proffered. And that ultimately was the basis of
3 my determination.

4 In the creditors committee and the other
5 parties' view, because of the fact that the
6 final bid while admittedly half a million
7 dollars in cash but measured against 80 plus
8 million in an aggregate bid, was not that much
9 of a margin. It was their view that the
10 protections to be given to that \$16 million
11 component in initial value via the equity
12 offering, the protections to be given to that
13 under Hilco and Gordon Brothers more than offset
14 that \$488,000 final increment in the cash
15 bidding. And, frankly, I was persuaded by it
16 and I'm equally persuaded by it now. Too much
17 under the Patriarch Litho Legends LLC agreement
18 was left to the discretion of the manager of
19 that new entity and there were not enough
20 inbuilt protections to the minority
21 shareholding. And, frankly, the argument was
22 made and it was established by testimony from
23 Mr. Spencer that the sort of transparency and
24 the sort of inbuilt provision for what I believe
25 is called the cascade, the prioritization of

1 entitlement to profit going forward were more --
2 were more attractive and would inure more to the
3 future value of that shareholding for further
4 disposition by the creditors committee or the
5 post-creditors committee entity that would hold
6 it under a liquidating plan of reorganization
7 like a liquidating trust or some form of trustee
8 or disbursing agent, and that's ultimately what
9 it really came down to.

10 The process that led up to that was
11 tumultuous but both sides made it so. And
12 Lithographic Legends cannot complain of a
13 fundamentally flawed process here because this
14 was hammered out both outside the purview of the
15 Court and with my involvement leading to what
16 ended up being what everybody concluded was a
17 robust bidding process that more than doubled
18 the stalking horse bid and finally brought out
19 what everybody deemed to be an adequate amount
20 of sale proceeds for these assets.

21 So I have to conclude, and this goes to
22 the likelihood of success for Lithographic
23 Legends, that they have not made their case on
24 this factor under the four factor test.

25 Moving on to the other factors, the case

1 has been amply made, and I'm going to speak and
2 jump forward to the Acorn motion as well on
3 this, the case has been amply made and has not
4 been rebutted with any kind of detail that there
5 will be irreparable harm to these estates'
6 interests if the sale does not go forward to be
7 closed and these assets are not reduced to
8 value. Some portion of their value is being
9 carried by a going concern operation which is
10 going to sputter out given the fact that current
11 revenues from whatever products and services
12 this debtor, these debtors have out in the
13 market place are insufficient to maintain
14 current operating expenses. So the cash burn on
15 these entities is going forward at a rate that,
16 as the debtors have pointed out, the only cash
17 that is known with any certainty to be not
18 subject to a claim of lien in favor of one
19 entity or another will be gone within six to
20 eight weeks. There would be termination of
21 operations after that. And under the
22 circumstance, the brands during the course of an
23 ongoing appellate process are going to be
24 subjected to some severe battering in the
25 marketplace because of their withdrawal from the

1 marketplace which is going to reduce the value
2 of the assets here. And as amply noted, the
3 Hilco Gordon Brothers entity as purchaser does
4 have the right to unilaterally withdraw if this
5 sale is not closed by mid-May.

6 Now, the Lithographic Legends people can
7 say all very well that they would stand ready to
8 go ahead, but in point of fact, the delay
9 occasioned by an appellate process could
10 conceivably lead to just starving the other side
11 out and that's not a principled way to go
12 forward on an appellate process. It's
13 exploiting it for the purposes of gain in a
14 financial transaction which is just
15 inappropriate.

16 So the irreparable harm here would
17 unquestionably fall on the estate and their
18 beneficiaries, the creditors by a significant
19 diminution in value and, at the very least, a
20 very substantial increase in risk to that value
21 by an ongoing appellate process. And in terms
22 of substantial harm -- and that consideration
23 falls equally as against both Acorn and against
24 Lithographic Legends.

25 In terms of most substantial harm, I

1 think it's been pointed out in the case law as
2 cited by various parties, substantial harm as to
3 a frustrated second tier bidder really isn't
4 recognized in this context. A lot of that case
5 law went, of course, to the standing issue but
6 it also falls right here. This party won't go
7 ahead with a deal if the other side closes on
8 its deal, but it's not going to be out anything
9 more than the transactional costs of its
10 participation in the sale process which it would
11 have incurred anyway even if it hadn't had
12 contention with the process or the substantive
13 result.

14 As to Acorn, of course, the question of
15 substantial harm kind of devolves around the
16 question of the value of its security interests
17 as lifted from the assets themselves and as
18 attached to the proceeds of sale. Now, Acorn's
19 counsel kind of beat around the bush at it
20 trying to make it into a Constitutionally
21 protected property right sort of dispute which,
22 frankly, is an illusory argument in the context
23 of bankruptcy given the operation of Section 506
24 and the fact that as a general broad brush
25 principle, the value of a secured party's claim

1 as secured party is limited to the value of its
2 lateral as determined in the bankruptcy process.

3 Now, what Acorn is all about here, of
4 course, is its protestation that these assets
5 could have gotten more through some other
6 process. And as debtor made enough of a record
7 that all avenues were investigated and the
8 reason why no further value or no better process
9 for the recovery of value came forward is a
10 hundred percent obvious. You just have to read
11 the financial pages every day. The
12 opportunities aren't out there. The money isn't
13 out there as free flowing as it was for a decade
14 or more previous to last spring and the market
15 has contracted. Parties are much less willing
16 to put money at risk into ventures that they
17 deem speculative.

18 These debtors had to go into Chapter 11
19 at a real crucial point in the recasting and
20 restructuring of their operations, particularly
21 given the fact that their capital infusions
22 previously, previous to the Ritchie and -- or
23 excuse me, previous to the Acorn transaction had
24 come through the Petters entities and there is
25 simply not another alternative out there. The

1 debtors and their financial experts established
2 that by way of testimony.

3 So the question is what would be the
4 substantial harm. Well, I suspect what Acorn is
5 really driving at is if the sale didn't take
6 place and this case floundered, we would
7 foreclose -- we'd get relief from stay, we'd
8 foreclose on our security interests, we'd grab
9 these trademark rights and intellectual property
10 rights and then we could do something better
11 with them ourselves. That is not responsive to
12 the bankruptcy process which looks at that value
13 consideration and that recovery consideration in
14 a global fashion. That seems to me to be where
15 Acorn is driving at here and that's not really,
16 you know, what we're talking about here because
17 other parties have to be considered as parties
18 other than Acorn as well as Acorn.

19 If Acorn's liens and Ritchie's liens for
20 that matter are valid and enforceable and not
21 subject to avoidance via the two pending
22 adversary proceedings, they will -- they have
23 already attached to the proceeds of sale or will
24 attach to the proceeds of sale on the
25 consummation of the sale pursuant to the order I

1 entered last Friday in whatever parity they have
2 and whatever priority they have, and they will
3 be recoverable after the adjudication of the
4 validity of their liens. Adequate protection
5 has been assured after the value determination
6 that was basically made through a marketplace
7 process, the sale process. But the substantial
8 harm that would come about to other parties, of
9 course, under the circumstances and is obviously
10 the loss of the value and the irreparable harm
11 is not cognizable for Acorn under that
12 rationale.

13 So as to Acorn's likelihood of success on
14 the merits, it's all been outlined before. I
15 did indeed cut Mr. Rosow short on argument after
16 7:00 and after a rather grueling close to ten
17 hours worth of hearings during the course of the
18 day, but I had reviewed all of the arguments and
19 I passed on them as I saw fit after the close of
20 argument there, particularly given the
21 refinement of the arguments that have been made
22 in opposition here by the debtor and the
23 arguments that other parties made in response to
24 the objection to the sale motion that Acorn
25 made.

1 I am going to conclude that Acorn did not
2 meet its burden here to show that it had a
3 likelihood of success on the merits in getting
4 me overturned on my determination going to the
5 ability of these debtors to sell these assets
6 free and clear of Acorn's liens. So going to
7 all of those issues and going to all of those
8 elements, then, I'm going to conclude that these
9 motions should not be granted.

10 Now, the question of standing has been
11 raised as to Lithographic Legends and, quite
12 frankly, you know, that's one that I've only had
13 a chance to look into being away from a law
14 library and not really having very good access
15 to legal research and the like. Now, I can see
16 an argument here where the issue of standing may
17 not even properly be before the bankruptcy court
18 because a notice of appeal having been filed,
19 that may well operate in and of itself to shift
20 the jurisdiction over that issue to the
21 appellate forum because if anybody is to be
22 knocking out an appellant from an appeal process
23 on the grounds that it doesn't have standing, it
24 doesn't have a constitutionally or legally
25 cognizable stake in the dispute resolved by the

1 order from which it would take an appeal. If a
2 trial court could do that, it could knock out an
3 appeal from its own order and thereby be accused
4 of being, shall we say, arbitrary and
5 self-protective while at the same time defeating
6 a party's rights of appellate review. So
7 frankly, I'm not convinced I should even take
8 cognizance of the argument.

9 Apparently, per counsel's summary of the
10 Second Circuit's decision in the Colony Hill
11 case, the bankruptcy court there did address the
12 issue and concluded that an unsuccessful
13 prospective purchaser of assets in a Section 363
14 sale did not have standing to appeal from the
15 sale order if it was not a creditor, would not
16 stand to share in the distribution out of the
17 proceeds. All of this makes sense to me just
18 from general principles of standing, both
19 constitutional and prudential and
20 notwithstanding the rather broader and rather
21 more abstractly defined definition of party in
22 interest in the grant of the right to appear and
23 be heard in the bankruptcy rules.

24 So to the extent that I have to reach
25 this issue, I would have to agree with the

1 Second Circuit in Colony Hill. I, frankly,
2 don't think I need to in light of my disposition
3 of the other elements that have been outlined in
4 the case law so I'm -- I guess what I'm going to
5 say is in the exercise of some judicial
6 restraint here, I'm not going to make a ruling
7 on the standing issue. That would be one for
8 the district court to address in the appellate
9 context, and the district court unquestionably
10 would have standing to address that issue there.

11 So that is my disposition on the merits
12 of both of these motions. I am going to see
13 that orders are put together embodying the
14 outcome which is a denial of both motions. And
15 those in all likelihood will not get docketed
16 until early tomorrow. It may happen yet today.
17 I will be able to electronically access the
18 content of orders that I'll direct for
19 preparation and direct their electronic
20 signature under my name. So those orders will
21 go out in due course by tomorrow morning at
22 latest here.

23 I will note for the record here that any
24 party has the right under Rule 8005 to renew
25 this motion to the district court which, of

1 course, will be the forum in which the appeal
2 will be undertaken. I, frankly, wish that the
3 framers of Rule 8005 had set it up so that the
4 appellate form would be the first one to have to
5 undertake a motion like this simply because of
6 the way in which the standard has been framed up
7 and the sort of tension that that then puts the
8 original trial court under. And the parties are
9 already aware that they can renew the motion
10 there.

11 But for my part and looking at the
12 results of a long, hard fought process and an
13 effort to try to recover value under very
14 pressing and ever changing circumstances,
15 circumstances are not changing for the better
16 for this debtor's fortunes or these assets'
17 value, I do not deem it appropriate to prime the
18 abstract value of appellate review and the
19 access to it given the record that was made to
20 support my original conclusion that the sale
21 process should be concluded consistent with the
22 findings and conclusions I made on the record
23 last Thursday.

24 So that's my disposition. Does anybody
25 have anything further they want to note for the

1 record?

2 MS. RICHARD: I do, Your Honor.
3 This is Hillary Richard. I would just ask that
4 you grant us an interim stay of a few days to
5 seek a stay from the district court. All of the
6 irreparable harm that's been articulated by the
7 debtor and the creditors and other objector all
8 centers around this closing at some point past
9 the middle of May and the debtor made it clear
10 in its papers that it's not intending and will
11 not be able to close until sometime after a
12 hearing is going to be held before Your Honor
13 next week. We would like to just have the
14 benefit of that from Your Honor allowing us to
15 go and at least argue before the district court
16 for a stay.

17 THE COURT: Okay. I'm denying
18 that request. All right. Anybody else have
19 anything else to note for the record? All
20 right. That should about take care of it.

21 So I would just note for the record my
22 thanks to Professor Mary Ann Glendon of the
23 Harvard Law School for making use or allowing me
24 to make use of her office and her staff for the
25 purposes of this hearing. I worked for

1 Professor Glendon as a research assistant for
2 two years over three decades ago when she was at
3 Boston College Law School. She is most recently
4 ambassador of the United States to the Vatican
5 but is now back at Harvard and she was very
6 accommodating in making the facilities available
7 to me so we could get this heard and give the
8 parties their day in court on these motions
9 quickly.

10 So that should take care of it, then.
11 With that, we're going to stand adjourned.

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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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