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

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TRANSCRIPT OF TELEPHONIC PROCEEDINGS

4-22-09

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

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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, 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.

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

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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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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

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

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

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

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

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

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

So on behalf of the debtor, we have

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

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

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

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

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

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

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

MS. RICHARD: That would be me,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

highest or best -- is the best offer.

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

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

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

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

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

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

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

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

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

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

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

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

MS. RICHARD: It is, Your Honor.

THE COURT: All right. Go ahead.

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

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

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

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

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

Second of all, and we cited a plethora of

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

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

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

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

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

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

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

Before moving on, Your Honor, and just

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

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

Patriarch to bring this appeal.

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

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

I think it's very important.

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

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

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

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

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

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

I'll ask counsel to just --

MR. CHESLEY: I apologize, Your Honor.

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

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

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

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

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

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

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

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

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

judgment is just way off the mark here.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

prevailing bidder.

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

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

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

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

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

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

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

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

argument on the Acorn Capital motion.

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

THE COURT: Okay. Go ahead.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So I'll turn the floor over to the

creditors committee's counsel first.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. BOYD: Nothing to add, Your Honor.

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

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

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

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

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

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

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

contentions of Acorn on this issue.

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

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

THE COURT: Okay.

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

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

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

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

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

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

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

So it ends up that the process is quite

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

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

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

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

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

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

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

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

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

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

Now, the argument, of course, that is

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Moving on to the other factors, the case

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

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

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

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

In terms of most substantial harm, I

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

record?

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

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

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

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

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

* * *

STATE OF MINNESOTA)
) ss.
COUNTY OF WASHINGTON)

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

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

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

IN EVIDENCE HEREOF, WITNESS MY HAND.

s:/ Lisa M.Thorsgaard