

1 UNITED STATES BANKRUPTCY COURT

2 DISTRICT OF MINNESOTA

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4 In Re: Polaroid Corporation

5 Chapter 11 Bankruptcy

6 No. 08-46617

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9 BEFORE THE HONORABLE GREGORY F. KISHEL

10 United States Bankruptcy Judge

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13 TRANSCRIPT OF PROCEEDINGS

14 February 18, 2009

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17 Proceedings recorded by electronic sound recording,  
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1 APPEARANCES

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

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10 MS. RACHEL C. STRICKLAND, Attorney at Law,  
11 787 Seventh Avenue, New York, New York 10019-6099  
12 appeared on behalf of the Polaroid Corporation.

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

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MR. BRYAN KRAKAUER, Attorney at Law,  
One South Dearborn, Chicago, Illinois 60603 appeared on  
behalf of Ritchie Special Credit Investments.

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1 APPEARANCES (Cont'd)

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4 MR. MICHAEL A. ROSOW and MR. DANIEL C.  
5 BECK, Attorneys at Law, 225 South Sixth Street, Suite  
6 3500, Minneapolis, Minnesota 55402 appeared on behalf  
7 of Acorn Capital.

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10 MR. RICHARD C. CHESLEY, Attorney at Law,  
11 191 North Wacker Drive, 30th Floor, Chicago, Illinois  
12 60606 appeared on behalf of the Polaroid Committee of  
13 Unsecured Creditors.

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15 MS. THERESA H. DYKOSCHAK, Attorney at Law,  
16 90 South Seventh Street, Suite 2200, Minneapolis,  
17 Minnesota 55402 appeared on behalf of the Polaroid  
18 Committee of Unsecured Creditors.

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21 MR. DAVID E. RUNCK and MS. CONNIE LAHN,  
22 Attorneys at Law, 775 Prairie Center Drive, Suite 400,

23 Eden Prairie, Minnesota 55344 appeared on behalf  
24 Petters Committee of Unsecured Creditors.  
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1 APPEARANCES (Cont'd)

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4 MR. DAVID A ORENSTEIN, Attorney at Law,  
5 100 South Fifth Street, Suite 1100, Minneapolis,  
6 Minnesota 55402 appeared on behalf of Sovereign Bank.

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9 MR. RONALD R. PETERSON, Attorney at Law,  
10 330 North Wabash Avenue, Chicago, Illinois 60611  
11 appeared on behalf of Lancelot.

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1 P R O C E E D I N G S

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THE COURT: The matter at bar is the group of related Chapter 11 cases. Presently being maintained under the lead case of Polaroid Corporation, 08-46617 being the case number there.

Today's matter is a motion by the Debtor's for orders establishing procedures in relation to sale of the Debtor's assets. A number of objections were filed to the motion.

Let's note appearances all around here. Counsel.

MR. SINGER: Good afternoon, Your Honor. George Singer from Lindquist & Vennum on behalf of Polaroid. At counsel table with me is Jim Lodoen and also I would like to introduce to the Court Rachel Strickland from Willkie Farry

19 who's here on behalf of the proposed purchaser  
20 (Unintelligible) stalking horse. Excuse me, we  
21 also have representatives from Houlihan & Lokey  
22 and the Debtor here as well.

23 THE COURT: All right.

24 MR. JORISSEN: Good afternoon, Your  
25 Honor. James Jorissen on behalf of Ritchie

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1 Special Credit Investments, LTD. and the  
2 affiliated companies. Also in court with me  
3 today, Your Honor, is Brian Krakauer from Sidley  
4 & Austin in Chicago.

5 MR. ROSOW: Michael Rosow from  
6 Winthrop & Weinstein on behalf of Acorn Capital  
7 Group and also with me here today is Daniel Beck,  
8 also from Winthrop & Weinstein.

9 MR. CHESLEY: Your Honor, Richard  
10 Chesley, Paul Hastings Janofsky & Walker, and  
11 Theresa Dykoschak from Faegre & Benson on behalf  
12 of the Committee of Unsecured Creditors in the  
13 Polaroid cases.

14 MR. RUNCK: Your Honor, David Runck  
15 and Connie Lahn on behalf of the Petters  
16 Unsecured Creditor's Committee.

17 MR. ORENSTEIN: Your Honor, David  
18 Orenstein on behalf of Sovereign Bank.

19 MR. PETERSON: Good afternoon, Your  
20 Honor. Ronald R. Peterson, Trustee of Lancelot.

21 THE COURT: Okay. Any others to  
22 note? All right. Good enough. All right. I  
23 will turn the file over to Debtor's Counsel,  
24 Mr. Singer.

25 MR. SINGER: Your Honor, may it

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1 please the Court, as the Court will law from  
2 early year hearings in this matter, the Debtor  
3 has been funding operations today primarily with  
4 the use of settlement proceeds that represent  
5 unencumbered assets. It has been using that  
6 proceeds to administer the bankruptcy estate for  
7 the benefit all case constituencies and at a  
8 rapidly deteriorating rate and the Debtor  
9 believes it's absolutely essential to have a  
10 process in place and has considered a number of  
11 alternatives and strategic alternatives and the  
12 motion before the Court seeks to establish a  
13 process to put the assets and the business in an  
14 environment that it believes is the most optimal

15 for maximizing value.

16 The Debtors and Houlihan Lokey and the  
17 employees of the Debtors have been working night  
18 and day and invested thousands of hours exploring  
19 various alternatives and engaging in a process to  
20 try and maximize value for all concerned.

21 On January 28th the Debtor filed it's  
22 motion to approve bid procedures and disclose the  
23 terms of sale, an arrangement that it tentatively  
24 reached with the stalking horse bidder, PHC  
25 Acquisitions, LLC.

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1 I think it's important, Your Honor, to  
2 talk about what this hearing today is and is not  
3 about. We're not here before the Court asking to  
4 approve a sale of specific assets to a specific  
5 person at this time. What we're here to do is to  
6 establish bidding procedures and a process that  
7 is open and fair for maximizing value for the  
8 estate.

9 As a side bar, Your Honor, I can tell you  
10 that we have worked very hard with our  
11 professionals and Debtor's management to have a  
12 very open and participatory process. Houlihan

13 Lokey has done, as we have outlined in our  
14 motion, an exhaustive effort and sale process and  
15 has reached out and worked very hard with the  
16 constituencies in this case. Their professionals  
17 has invited their professionals and all the  
18 constituencies in this case into the company's  
19 database room to perform independent due  
20 diligence issues and valuation issues in a very  
21 open and frank manner. We have worked --  
22 invested a lot of time to make sure that everyone  
23 had access, unfettered, access to information.

24 Houlihan Lokey began that process at the  
25 end of October and early November and has had a

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1 number of management presentations with potential  
2 bidders and -- including Ritchie Capital and  
3 Acorn Capital.

4 Ritchie Capital in particular has had  
5 extensive opportunities to do due diligence and  
6 meet with presentations, has -- is about as fully  
7 informed as any person, any prospective bidder is  
8 in this process and indeed was involved in the  
9 process and the review and performance of due  
10 diligence well in advance of the buyer or

11 prospective buyer in this case, PHC Acquisitions.

12 As the Court is well aware, there have  
13 been a number of objections filed. The motion --  
14 some of which raised issues that are for a later  
15 day, concerns about the value of the bid,  
16 concerns that I think are best addressed -- best  
17 addressed at the sale hearing if appropriate at  
18 that time.

19 The -- I do, however, believe even though  
20 we are not asking the Court to approve the terms  
21 of the asset purchase agreement today, I do think  
22 it's important to give the Court some color on  
23 what the economics of the proposed transaction  
24 are today so that the Court can have an  
25 understanding of what we believe is a very

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1 valuable bid to this estate.

2 The cash purchase price proposed, Your  
3 Honor, is 42 million dollars. The debtor's  
4 estate has cash in the approximate amount of 28  
5 million dollars. That's the amount that will be  
6 anticipated at closing.

7 The proposed purchaser is expected to  
8 assume a substantial number of contracts. There

9 are a number of assets that we believe have  
10 incremental value that are excluded assets, a  
11 number of causes of action and preference actions  
12 are included in that as well as inventory and  
13 other items that we believe have significant  
14 incremental value beyond the 42 million dollar  
15 cash bid.

16 THE COURT: Your reference you just  
17 made then is to so-called excluded assets, assets  
18 that the estates would retain --

19 MR. SINGER: Exactly, Your Honor.  
20 Exactly.

21 THE COURT: -- and would not be  
22 sold?

23 MR. SINGER: So the -- a component  
24 of the bid as well contemplates a transition  
25 services arrangement between the prospective

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1 purchaser and Polaroid. Polaroid maintains an  
2 elaborate computer center that has cost the  
3 estate approximately, I believe, \$500,000.00 a  
4 month or thereabouts to maintain, so it's not a  
5 matter of being able to transition that on to a  
6 disk in my narrow view of the world. In trying

7 to cut cost, my question was can't you just put  
8 this on a CD ROM for me and that unfortunately  
9 is not possible, so the incremental value of  
10 having a prompt sale process and minimizing  
11 expenses and claims against the estate are  
12 extremely important.

13 There's a motion for an application  
14 pending before the Court or will be soon that --  
15 where the debtor intends to retain the assistance  
16 of an expert in order to cut those costs way  
17 back, but the net effect of how that impacts the  
18 purchase agreement is that the transition  
19 services as well has contemplated that the  
20 proposed purchaser will be -- will be using  
21 transition services for a period of six months  
22 that will enable the Debtor to further wind down  
23 the costs and they will be paying for those  
24 services and we believe, even though that was  
25 arranged and are still being negotiated, there is

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1 substantial incremental value there in the way of  
2 minimizing the expenses of this estate.

3 The Polaroid hardware and information  
4 system will be absolutely necessary and essential

5 to prosecute claims, object to claims,  
6 investigate various causes of action and I'll  
7 particularly note the PGW estate -- all  
8 information the PGW state that they will need to  
9 pursue similar causes of action, similar  
10 investigations are housed on the Polaroid servers  
11 and warehouse, so those are significant issues  
12 and a significant benefit to the contemplated  
13 transaction.

14 The status of the objections, Your Honor,  
15 I believe that we have -- and I am confident to  
16 say that we have resolved the objections of the  
17 Polaroid Creditor's Committee, the Trustee for  
18 Lancelot, the PGW and PCI Creditor's Committee.  
19 Once we received those objections we worked very  
20 hard to reach out to all parties to try and have  
21 a dialogue about how best, if possible, to  
22 address those concerns.

23 That process involved the proposed  
24 purchaser. A number of the objections you may  
25 saw related to different aspects associated with

1 the break up fee, different aspects associated  
2 with the bid process and how best to run that

3 process and I can tell you we worked the entire  
4 weekend trying to negotiate an arrangement that  
5 we believe is in the best interest of the estate,  
6 so based upon those discussions and negotiations,  
7 I can tell you what the resolution of those are.

8 With respect to -- to the process itself,  
9 it was central to the objective -- most of the  
10 objecting parties that we have a process that is  
11 more expansive and more open to considering  
12 various combinations of alternatives, to consider  
13 something other than a format where someone has  
14 to come in and buy all or substantially all the  
15 assets.

16 So we have revised the bidding procedures  
17 in a way that accomplishes just that. It permits  
18 different forms of consideration, not just cash  
19 components, securities, any other forms of  
20 consideration that the Debtors and the Committee  
21 and the estates believe are significant, yet  
22 allows for partial bidding and -- on assets. If  
23 someone has a proposal that includes bidding on  
24 one segment and lots, we drafted the bidding  
25 procedures and revised them in a way that's a

1 very expansive process so that at the end of the  
2 day everyone can get comfortable that every stone  
3 has been turned and every option for this company  
4 has been explored in an open way and in a process  
5 that effectively markets this company.

6 We are very confident, however, and it's  
7 our view that a going concern sale is one of the  
8 ways or is the way that would best maximize the  
9 value of the assets, but I understand there are  
10 different opinions on that subject and so we have  
11 modified the bidding procedures in a way and  
12 Houlihan is going to endeavor to re-engage, even  
13 though they have done some of that work ahead of  
14 time, is going to re-engage and market these  
15 process and not in a narrow fashion, but in a  
16 very extensive and open fashion.

17 Also significantly what the Court may  
18 note is that we worked very hard again to keep  
19 the process open and to keep things transparent,  
20 not to have this motion set on for an expedited  
21 hearing.

22 We wanted to make sure that all the  
23 parties and all the case constituencies weren't  
24 running into Court feeling that -- that the  
25 debtor had some pre-conceived notion of jamming a

1 process down people's neck and so we  
2 intentionally set this out on a normal hearing  
3 process and date so that parties could adequately  
4 review the stalking horse purchase agreement, the  
5 bid procedures and the process.

6 Further revisions to the bid process and  
7 procedures include extending the dates. The bid  
8 procedures contemplate a sale hearing for  
9 March 31st and an auction the day before,  
10 March 30th and the bid deadline March 26th. That  
11 is well over 30 days and particularly in light of  
12 the extensive marketing efforts undertaken by  
13 Houlihan prior to the commencement or prior to  
14 the filing of these motions or during the course  
15 of these cases we think will provide a  
16 significant opportunities to have any potential  
17 bidders and interested parties do sufficient due  
18 diligence to enable -- to form their decisions  
19 about making a bid for some or all of the assets.

20 The order has been revised as well, Your  
21 Honor, in a couple of material respects. The  
22 order has been revised to make it clear that the  
23 stalking horse bidder is not entitled to a  
24 break-up fee to the extent that the purchase  
25 agreement is terminated in the event after breach

1 by the Debtor of it's representations and  
2 warranties or covenants under the agreements,  
3 that was a concern to a number of parties. The  
4 proposed purchaser agreed to make accommodation  
5 in that regard.

6 Additionally, the incremental bid amount  
7 has been reduced as well significantly to make  
8 sure that there's -- there's no impediments to  
9 people making a legitimate -- legitimate bid.

10 With those changes and I have sent to the  
11 Court and sent to all parties a redline of a  
12 bidding procedures, we believe it's essential  
13 that those bidding procedures be entered --  
14 entered and the Court approve those promptly.

15 The bidding procedures and process, of  
16 course, contemplate a break-up fee that we think  
17 is fair and reasonable and certainly and  
18 particularly in light of the concessions that the  
19 stalking horse bidder made in connection with the  
20 process and the legitimate concern of not having  
21 an apples to apples bid here by accommodating a  
22 very flexible and open and a varied auction  
23 process, I think the constituents in this case  
24 have agreed that the compromises and the process

25 and the break-up fee and other provisions

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1 contemplated by bid procedures motion are fair  
2 and reasonable and in the best interest of the  
3 estate.

4 Now, at this juncture, Your Honor, I'm  
5 happy -- I'm happy to take your lead. Obviously  
6 Ritchie and Acorn and Sovereign Bank have  
7 objections, I believe the vast majority of which  
8 revolve around the issue of credit bidding and  
9 related issues and I am happy to address those  
10 now.

11 I am also happy if the Court's  
12 pleasure -- if it would like to hear something  
13 more about -- anything about the bid procedures,  
14 I am happy to discuss those with you as well. I  
15 look for the Court's guidance how you want me to  
16 proceed from this point.

17 THE COURT: This may be jumping the  
18 gun over to the substance of the sale itself, but  
19 exactly what avoidance causes of action would be  
20 transferred over and what other rights of action  
21 are transferred over? There was a lot of  
22 cross-referencing by way of definitions in there,

23 but if you can just kind of give me in broad  
24 brush exactly what was going to the prospective  
25 purchaser. I know they relate to customers, for

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1 instance, and so on and on and so forth, so if  
2 you can give me a little more why and where for  
3 there.

4 MR. SINGER: Yes. Let me explain  
5 that. The purchasers acquiring all assets other  
6 than that which are excluded, so they are  
7 requiring all causes of action except those which  
8 have been identified and excluded.

9 In the schedules to the purchase  
10 agreement, there are a number of causes of action  
11 and rights that are specifically identified and  
12 that are reserved, but importantly the avoidance  
13 actions by and large are preserved with the  
14 exception of a small window of folks that are  
15 customers. I shouldn't say not all customers,  
16 top 20 customers, top 20 are identified vendors,  
17 employees that they intend to hire and do, in  
18 fact, hire.

19 And by the way, Your Honor, I guess one  
20 of the other benefits I didn't mention about the

21 purchase agreement. This particular purchase  
22 agreement contemplates the retention of many of  
23 the Polaroid employees. We think that's  
24 significant. That's consistent with the purposes  
25 of Chapter 11 and also impacts the claims

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1 against -- against the estate and the value of  
2 the business, so the universe has really been  
3 limited to those -- those causes of action.  
4 We're reserving all avoidance actions except a  
5 narrow subset of avoidance actions that any  
6 purchaser, including this particular purchaser,  
7 would normally request in order to further it's  
8 business interests and pursue it's business  
9 claims.

10 I can tell the Court quite candidly that  
11 we have been negotiating another purchase  
12 agreement with another bidder and the similar  
13 request was made.

14 Now, the Debtor has certainly evaluated  
15 those. I can't represent to the Court that we  
16 have thought every -- every defense that may be  
17 conceivable. It was the Debtor's assessment and  
18 Houlihan's assessment that the benefits of this

19 transaction out weight the causes of action that  
20 are being waived and at the sale -- at the sale  
21 hearing certainly we're going to prepare as part  
22 of our liquidation analysis to address that issue  
23 in further detail, but we've considered the  
24 waiver there. We understand that in order to  
25 have a going concern sale here that it was our

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1 judgement and we agreed that the amounts would  
2 not provide significant incremental value to the  
3 estate and we also agreed that most legitimate  
4 purchasers that are interested in buying a going  
5 concern would make a similar demand and we have  
6 proof of that by a request that was made in  
7 connection with other negotiations.

8 THE COURT: As far as from the  
9 prospective purchaser's perspective having that  
10 cause of action might help in laying the terrain  
11 for continuing relationship, is that sort of the  
12 idea?

13 MR. SINGER: Yes, absolutely, Your  
14 Honor, and let's face it, what they are buying is  
15 the brand. They are buying Polaroid.

16 THE COURT: Right.

17 MR. SINGER: And certainly after a  
18 sale transaction happens Polaroid will be  
19 changing it's name, but us suing the customers  
20 that they are trying to redevelop and rekindle  
21 relationships with is not something that enhances  
22 value here. It would be our fear and legitimate  
23 concern that that -- that this purchaser would  
24 not consummate the transaction and we believe  
25 that any similar purchaser would not consummate a

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1 transaction if that were the outcome of that  
2 litigation.

3 Usually in a lot of these cases like  
4 Northwest Airlines and larger cases it isn't as  
5 significant, but this is significant. The brand  
6 has been damaged through operational issues in  
7 the mere filing of the bankruptcy and it's going  
8 to take a substantial investment and PR from any  
9 purchaser, including this one, to try and  
10 preserve and rebuild those relationships in order  
11 to get the value it's anticipating getting out of  
12 the transaction.

13 THE COURT: So at least by way of  
14 general motivation the idea, the idea is not so

15 much for the purchaser apparently to exercise the  
16 causes of action. It's just to keep them in it's  
17 control so they aren't exercised by the estates.

18 MR. SINGER: That's exactly it, Your  
19 Honor, and in good lawyering fashion, they tied  
20 it up three ways. Do they have a covenant not to  
21 sue and they acquired those specifically in order  
22 to assure that, but I can represent to the Court  
23 two things. First of all, the Debtor, mindful of  
24 it's obligations and an aggressively negotiated  
25 those provisions, aggressively was involved in

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1 talking to management about the appropriateness  
2 of the list of people and entities that would not  
3 be subject to the suit and feel very comfortable  
4 that that is a necessary evil and you are exactly  
5 right, they have no intention whatsoever of  
6 pursuing those causes of action.

7 THE COURT: Okay. All right. I  
8 think that was the only question I had heading  
9 into my review of the Debtor's response early  
10 this morning and my review of the response I  
11 think answered most of the other questions I have  
12 got, so I don't think I have got anything else

13 for you bit at this point.

14 MR. SINGER: Okay. And if you are,  
15 Your Honor, again, I am happy to discuss any  
16 other issues relative to the motion and the whole  
17 contemplated orders if you would like as well.

18 Do you want me to address now the  
19 objections or do you want to let the objecting  
20 parties --

21 THE COURT: I am going to let the  
22 Objectors speak to that first, although maybe  
23 just to clear the decks I will call upon the  
24 Committee's Counsel and the Lancelot Trustees's  
25 Counsel.

23

1 MR. SINGER: Thank you, Your Honor.

2 THE COURT: Mr. Chesley.

3 MR. CHESLEY: Just briefly. The  
4 accounts for the Debtors was clear with respect  
5 to the Committee's position that we are satisfied  
6 with the need to sell, very satisfied with the  
7 need to sell it quickly and fully satisfied by  
8 Houlihan Lokey's efforts to arrive at a stalking  
9 horse contract.

10 Our concern was and our limited objection

11 focused upon creating an environment that will  
12 allow for as frothy an auction process as is  
13 possible and maximize the recovery to the  
14 creditors in whatever form is possible. We  
15 believe the Debtors have done an excellent job at  
16 arriving at least at compromises that allow that  
17 to happen, although again we remained concerned  
18 about balancing the need to restart the diligence  
19 process for a number of other potential buyers  
20 because they have effectively been frozen out of  
21 the process for about a month and balancing that  
22 against the cash burn that these estates will  
23 continue to incur.

24 We have looked at trying to move the  
25 dates out a week after consultation with the

24

1 Debtors and Houlihan Lokey. We're satisfied that  
2 the dates put forth by the Debtors in their  
3 response filed this morning are adequate,  
4 recognizing however that a lot has to be done  
5 between now and then and we have to get these  
6 assets sold within that time frame or else  
7 obviously we'll inert to the significant  
8 detriment of the creditors.

9 Thank you.

10 THE COURT: All right.

11 Mr. Peterson.

12 MR. PETERSON: Your Honor, I endorse  
13 what Mr. Chesley said about what we believe to be  
14 an efficient and good faith process by the  
15 Debtor.

16 Our concern, Your Honor, was that both  
17 the Petters' Committee's financial advisors as  
18 well as my own had suggested very strongly that  
19 this company might be worth more broken up and  
20 sold in piecemeal than sold in bulk and so we  
21 have negotiated in good faith with the Debtor and  
22 they have agreed to modify their bid procedures  
23 to allow not only piecemeal bidding and we hope  
24 that they give more than lip service, but make a  
25 real all out try to do that, but also to come up

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1 with -- creative solutions such as maybe a joint  
2 venture to use the trademarks, retail marketing  
3 type operation and entertain global settlements  
4 of all the different party's interests.

5 So it is our view, Your Honor, that they  
6 have fairly addressed our objections. The only

7 thing we really didn't get our way on was the  
8 break up fee, but in any bargain sometimes you  
9 have to give in order to get, so we endorse the  
10 motion as presently drafted.

11 THE COURT: All right. And  
12 Mr. Runck.

13 MR. RUNCK: Good afternoon, Your  
14 Honor.

15 Your Honor, the Petters' Committee has  
16 reviewed the revised bidding procedure submitted  
17 by the Debtors and we too do agree with these  
18 revised procedures, Your Honor. We believe that  
19 the revisions that have been made to these  
20 procedures encourage the most competitive bidding  
21 possible under the circumstances. They have been  
22 revised to encourage bidding for all the assets  
23 collectively or for individual assets or for  
24 individual groups or subsets of those assets. We  
25 think that flexibility is important in this

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1 process going forward.

2 They also extend the deadlines for  
3 submitting competing bids and we think that also  
4 favors a more competitive bidding environment, so

5 in light of these revised procedures, Your Honor,  
6 we believe that our objection for today's  
7 purposes have been fully addressed.

8 I do want to make the one caveat for the  
9 record, of course, is that we reserve our right  
10 to examine the sufficiency of the ultimate sale  
11 price that is received at the sale hearing on  
12 March 31st and we, of course, want to put the  
13 Debtor to their burden of proof that the ultimate  
14 sales price is reasonable and in the best  
15 interest of the estate, but for purposes of  
16 today's hearing we're happy with the revised  
17 bidding procedures and we support that.

18 THE COURT: Okay. Very good.

19 MR. RUNCK: Thank you.

20 THE COURT: All right. Mr. Jorissen  
21 or Mr. Krakauer.

22 MR. JORISSEN: Your Honor,  
23 Mr. Krakauer will be arguing.

24 THE COURT: All right. Very good.

25 MR. KRAKAUER: Your Honor, thank

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1 you. Bryan Krakauer on behalf of the Ritchie  
2 Funds.

3                   We're here today in our capacity as a  
4                   creditor and party of interest in this  
5                   proceeding. We do have a very large client and  
6                   we have also looked at the process that's gone on  
7                   to try and come up with the best offer.

8                   We do believe that it makes sense to have  
9                   a resolution to this case over the next five or  
10                  six weeks. We -- we think that some things could  
11                  have been done to address the cash burden of the  
12                  Debtor. Unfortunately they weren't done and the  
13                  situation is that there is a need to get  
14                  something done, that we are in agreement with.

15                  The actual bid that is currently before  
16                  the Court, we don't believe is in the best  
17                  interest of the estate. Our concerns are first  
18                  the values that are being offered. We don't  
19                  think that they appropriately reflect what could  
20                  be had in terms of a recovery to the various  
21                  creditors in this proceeding.

22                  And second, the way this is setup is a  
23                  363 process with a cash bid. It's essentially an  
24                  invitation for -- prolong the litigation over who  
25                  gets what proceeds come out of this estate.

1 Both those are concerns and I realize  
2 that those are issues ultimately that are to be  
3 heard at the sale hearing, not at today's  
4 hearing, so I wanted to explain just the  
5 background of what our concerns are.

6 We think a much better resolution would  
7 be the possibility of having a consensual  
8 resolution among at least -- most -- under ideal  
9 circumstances all of the different constituencies  
10 in case over -- over a processor bid.

11 There have been discussions over the last  
12 week or two weeks on that -- on that basis. I am  
13 hopeful that something may come out of them. I  
14 think if we can get that kind of resolution among  
15 the major constituencies, it would be a benefit  
16 to everybody. I think there could be enhanced  
17 values, significant enhanced value, for the  
18 various parties asserting claims in this  
19 proceeding.

20 I think it also may not good -- it would  
21 be good for clients to avoid protracted  
22 litigation if we could get there. I think that  
23 it's worth a shot.

24 The concern I have principally with  
25 regard to what's being proposed is that we don't

1 do anything today to preclude this Court from  
2 considering whatever may be proposed at the final  
3 hearing, at the sale hearing, that there are  
4 different structures, some which would involve  
5 credit bidding that are worthy of consideration  
6 and I don't think based on the record that's here  
7 today and based on the facts that are presented,  
8 and we haven't had a lot of facts, we have had a  
9 lot of discussion of what people think, but not a  
10 lot of the underlying facts, there's no reason to  
11 conclude anything. I think that this is -- it's  
12 an unusual case. It's an unusual case because of  
13 the different constituencies. It's an unusual  
14 case in terms of what's been alleged to have  
15 occurred by Mr. Petter.

16 But you have a lot of creditors with a  
17 lot of money at stake in this proceeding who  
18 took -- in Ritchie's case we have a lot of our  
19 investor's money that we have loaned and I think  
20 there is -- and there are certainly other  
21 constituencies who were in the same basic  
22 position. We need to search for something that  
23 works that holds together a little bit better  
24 than what's currently before the Court.

25 And what -- what's been proposed in terms

1 of the bid procedures, for all the discussion of  
2 it being open and flexible, the Debtor's  
3 attorney, perhaps being debtor's attorneys, are  
4 trying to do a good job for their client, have  
5 set it up in a way where they have essentially  
6 given themselves a veto over what this Court can  
7 consider and there are words in the post bidding  
8 proceedings saying that you, Your Honor, are not  
9 entitled to consider certain proposals at the  
10 final hearing, that you are not entitled to  
11 consider whether credit bidding is appropriate at  
12 the final hearing. We just think that that is  
13 manifestly improper and inappropriate.

14 We need to keep an open process here and  
15 we need to keep a process that allows for any  
16 party in interest to be able to present something  
17 to this Court and for you ultimately to decide  
18 what's in the best interest and I think that if  
19 we could get there it probably is going to be  
20 something I would say that's probably not a  
21 cookie cutter, that is something that you see  
22 every day, but I think it maybe something that  
23 works hopefully for at least most of the major  
24 constituencies in this case and I would urge you  
25 not to enter something that precludes us from

1 bringing that before you.

2 In connection with credit bidding,  
3 there's been an objection filed by the Debtor and  
4 bid procedures which would preclude credit  
5 bidding by -- by my client, by Acorn's client and  
6 I guess also by Lancelot. The argument is that  
7 there is -- the argument that's been made by the  
8 Debtor's counsel is that there is a bona fide  
9 dispute as to these claims.

10 In support of that, they filed an  
11 adversary action a few days ago with regard to  
12 what I would refer to as -- which is Ritchie's  
13 claims as being our direct claims. We have a  
14 lien in trademarks to secure our claims from  
15 Polaroid and certain trademarks, intellectual  
16 property.

17 Then, at least for me, the first time I  
18 saw it was a couple of hours ago there was a  
19 reply filed by the Debtor and there's a couple  
20 paragraphs in there that say, oh, by the way,  
21 they meant to also include if there were  
22 assignments of notes that were issued by Polaroid  
23 to Ritchie and to others. They also meant to say

24 that those were in bona fide dispute too and  
25 those notes in some cases are -- are secured.

32

1           There's probably from a secured creditor  
2 point of view no more fundamental right in  
3 connection with the 363 process than the ability  
4 to credit bid. It's fundamentally the way that  
5 you protect yourself as a secured creditor. If  
6 you don't have a right to credit bid, you  
7 essentially are being denied an interest in  
8 property and you are being denied the interest  
9 and ability to protect yourself at the -- at a  
10 sale process except to the extent that you  
11 essentially double down and come up with more  
12 cash and you essentially are losing your rights  
13 as a secured creditor.

14           If you look at, for instance, some of the  
15 Cramdown cases, New Value cases, the Supreme  
16 Court has addressed -- like in the La Salle case  
17 it talks about the fact that fundamentally the  
18 protection for secured creditors, for instance,  
19 Cramdown, is the ability to come back and credit  
20 bid more and that's how you protect yourselves,  
21 so you don't get more fundamental than trying to

22 take away somebody's right to credit bid.

23 Now, they say -- the Debtor says a few  
24 things. One is that there's a bona fide dispute  
25 here. My belief is the law does not allow for

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1 bona fide dispute merely by filing a pleading.  
2 If there is a bona fide dispute and they are  
3 saying there are factual allegations out there  
4 which would have preclude a credit bid, then  
5 that's something that we ought to be able to find  
6 out exactly what those factual allegations are,  
7 take some discovery and understand what they are  
8 asserting so that we have the ability to make an  
9 evidentiary showing and rebut their evidence in  
10 front of this Court and then you can decide,  
11 because it's the Court at the end of the day who  
12 makes the decision based on the facts before  
13 whether or not there is enough of a bona fide  
14 dispute or whether the dispute is really bona  
15 fide such that credit bidding is or is not  
16 appropriate.

17 Now, let me address a few things. One  
18 is -- because obviously, as Mr. Singer said,  
19 these points were raised in our objection. They

20 have gone out and tried to resolve them and we  
21 have had discussions to see if we could resolve  
22 them. Now, I will anticipate a few of the things  
23 that he's going to say, just so you know what our  
24 response is.

25 One is the concern that discovery may get

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1 out of hand. It may push things in a direction  
2 where people are all focused on discovery over  
3 this litigation of the claims and will differ --  
4 divert attention from a sale.

5 We, as I started this, agree that there  
6 ought to be some sort of finality to this process  
7 and we don't have a desire to divert a lot of  
8 attention from trying to come up with a solution  
9 and trying to get things done. What discovery we  
10 would propose we think we could make focused. We  
11 don't have any problem propounding it by Monday.  
12 If we have an issue on scope, we would not have a  
13 problem with this Court holding a telephonic  
14 hearing later in the week next week to make  
15 determinations on what's an appropriate scope and  
16 our view is we should not get diverted from the  
17 main tasks, but lawyers can do two things at once

18 and we ought to have an ability to get a  
19 determination and investigate what's really being  
20 asserted on that basis so that we can present it  
21 to this Court.

22 Second, the issue has been raised about  
23 whether or not having the spector of a large  
24 credit bid might some how chill the process or  
25 chill the bidding from other parties in interest,

35

1 that somebody may not come in -- may not come in  
2 if they think that there's a possibility of  
3 credit bid because they essentially won't want to  
4 bid and go forward with that and waste their  
5 time.

6 I would say two things. First, I don't  
7 believe it. I think that parties will bid  
8 irrespective of whether there's a possibility of  
9 credit bidding, but to accommodate that we would  
10 be willing to agree to a process where if the  
11 Court set a mid-March date for an interim  
12 hearing, assuming we can't otherwise reach some  
13 sort of resolution, you can determine in  
14 mid-March whether or not credit bids should go  
15 forward so that come the auction at the end of

16 March, and they have scheduled that for  
17 March 30th, that issue is -- is out on the table  
18 resolved.

19 We understand that it's incumbent upon  
20 everybody to get a process that works and we're  
21 very much willing to do some things and work on  
22 an expedited basis trying to accommodate that  
23 process.

24 This is probably the fundamental  
25 important time in this case. I mean what happens

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1 over the next six weeks is going to determine  
2 what the future of these assets, the future of  
3 this business. It's going to largely drive what  
4 recovery is available.

5 We think -- we need to keep things open.  
6 One of the things, you know, that motivates this  
7 also is the Polaroid brand is something which  
8 potentially has much, much more value than is  
9 being offered in connection with these -- the  
10 present offer and this, again, I realize is an  
11 issue for the final hearing, but again I think  
12 it's important for you to know kind of what  
13 motivates concerns.

14                   There have been discussions of that brand  
15                   being worth hundreds of millions of dollars as  
16                   recently as several months ago. There also is a  
17                   view, at least among some of us that a  
18                   deterioration of the business which has occurred,  
19                   there's no question about that over the last --  
20                   the last few months, doesn't inherently over this  
21                   period of time really deteriorate or diminish the  
22                   inherent value of the brand.

23                   There are other solutions here and I am  
24                   happy to open myself up to Your Honor's  
25                   questions, but I really our fundamental point is

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1                   to keep this process open and to leave it for  
2                   yourself to decide when you are faced with what  
3                   the true alternatives are and look at this with  
4                   an open mind going forward rather than close  
5                   things down today.

6                   THE COURT: I don't think I have got  
7                   any questions at the moment. There may be some  
8                   later, so thank you.

9                   MALE SPEAKER: Sure.

10                   THE COURT: All right. Then for  
11                   Acorn, Mr. Rosow.

12 MR. ROSOW: Thank you, Your Honor.

13 On behalf of Acorn, I would like to touch  
14 on three of the issues that we have raised in  
15 our -- in our written papers. The first being  
16 the issue of a bona fide dispute as to Acorn's  
17 security interest. I will get into the detail on  
18 why I think Acorn is different than some of the  
19 other parties here in connection with it's  
20 security interests in a moment, but I would like  
21 to take a moment to talk about the standard on  
22 what the debtors's obligation is in connection  
23 with establishing a bona fide dispute.

24 It's -- it's clear from the case law in  
25 this Circuit that to establish a bona fide

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1 dispute is not merely to mouth the words that  
2 there is a dispute or to make allegations, but  
3 that it requires the Debtor to meet an  
4 evidentiary standard, that it requires that the  
5 Debtor provide specific evidence to show a  
6 factual grounds for finding that an objective  
7 basis exists for that dispute.

8 To date --

9 THE COURT: What does that mean in

10 practice, meeting an evidentiary standard? You  
11 mean a burden of production of evidence under  
12 oath documentary, whatever.

13 MR. ROSOW: Yes, Your Honor.

14 THE COURT: Okay. Where's your  
15 authority for that again?

16 MR. ROSOW: That's the In Re:  
17 Gaylord Grains case, it's an 8th Circuit BAP  
18 opinion, 306 BKY Reporter 624. The quote from  
19 that is evidence must be provided to show a  
20 factual basis that there's an objective basis for  
21 the dispute.

22 It's not enough to simply say we believe  
23 that there was actual intent to hinder, delay and  
24 defraud. We believe that the Debtor was  
25 insolvent at the time and I note for the Court

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1 that --

2 THE COURT: Well, what's talked about  
3 here is really more of a constructively  
4 fraudulent transfer rather than actual intent to  
5 hinder or delay, right?

6 MR. ROSOW: I believe so. I believe  
7 so.

8 THE COURT: So the question is -- the  
9 evidence going to that really is much more  
10 structural than it is subjective.

11 MR. ROSOW: Solvency and reasonable  
12 equivalent value. Things that would be within  
13 the Debtor's control. I mean the Debtor is the  
14 party that entered into these transactions. The  
15 Debtor is the party that would have the  
16 information about whether it was solvent at the  
17 time. The Debtor is the party that would have  
18 information that would be relevant to  
19 establishing these things and it has failed  
20 completely to come forward with that evidence.

21 Instead the debtor --

22 THE COURT: What would you -- what  
23 burden would you put on a debtor in a context  
24 like the one at bar, where everything has just  
25 sort of come in all in a tumble, has everybody

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1 acknowledges it has to?

2 MR. ROSOW: Yes.

3 THE COURT: Are you saying a debtor  
4 has to come forward with a mass of evidence that  
5 constitutes prima facie case? That can't

6 possibly be what the people in the Bankruptcy  
7 Appellate Panel contemplated.

8 MR. ROSOW: I don't think it is a  
9 massive burden. I don't think it's a burden that  
10 they have to prove it beyond a reasonable doubt  
11 or even preponderance of the evidence. I don't  
12 even think it's a summary judgment standard, but  
13 I think they need to at least produce some sort  
14 of evidence that there's insolvency. They need  
15 to produce some sort of evidence that there are  
16 bona fide disputes and issues on the elements  
17 that are relevant, so simply saying we believe  
18 that the Debtor was insolvent at the time without  
19 any evidence or any factual background to support  
20 such a conclusionary legal statement is  
21 insufficient.

22 Now, do they need to have -- if they  
23 produce evidence that leads the Court to believe  
24 that there's an actual probable -- that there  
25 could be a determination that they are insolvent,

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1 if we simply come forward with contradictory  
2 evidence, does that somehow push -- push the ball  
3 back. I don't think so. I think if they come

4 forward with evidence it's a burden of production  
5 more than it is a burden of persuasion, but there  
6 is some burden there and I think at a minimum  
7 level they have the burden of producing evidence  
8 to suggest that there is insolvency, that there  
9 was not reasonably equivalent value and that  
10 Acorn did not take the security interest that it  
11 did in good faith, but they have failed  
12 completely to -- to meet that burden.

13 On that issue, there's a subsidiary issue  
14 which is kind of the indirect security interest  
15 through Pact Funding.

16 Pact Funding had a security interest in  
17 Polaroid's trademarks, Polaroid's inventory and  
18 accounts to the extent of ten million dollars.  
19 Acorn in turn had a security interest in that  
20 obligation through Pact Funding, had a security  
21 interest in Pact Funding's instruments.

22 It was not until last night at 11:00 that  
23 the Debtor ever put anyone on notice that it was  
24 challenging that transaction and so the  
25 suggestion here that the Debtor has been

1 providing everyone with all of this information

2 and providing everyone with sufficient  
3 opportunities to respond is simply not accurate.

4 The Debtor has failed to provide the  
5 Court with a -- any sort of analysis as to why  
6 these transactions would be fraudulent.

7 Now, if you look at that in contrast to  
8 the evidence that Acorn has put forward, I think  
9 that's where this argument really starts to  
10 become persuasive. Acorn has put forward  
11 evidence talking about what happened in  
12 connection with each of these transactions. In  
13 February of 2008 Acorn wired \$15 million to  
14 Polaroid Consumer Electronics. In connection  
15 with that transaction Polaroid Consumer  
16 Electronics and Polaroid Corporation granted  
17 Acorn a security in in the U.S. inventory,  
18 accounts and proceeds of those items.

19 At the same time Pact Funding and the two  
20 Polaroid entities entered into a loan agreement  
21 and a security agreement. Those transactions  
22 are -- are clear. Those transactions are in the  
23 record and there's evidence of those transactions  
24 and there's evidence of the wire. There's  
25 evidence of the money flowing from Acorn to

1 Polaroid.

2 In connection with that, there's no  
3 evidence of fraudulent intent. There's no  
4 evidence that the Debtors were insolvent at that  
5 time and there's been no attempt by the Debtors  
6 to perform a reasonable equivalent value analysis  
7 in connection with that transaction. Polaroid  
8 received funds, received 15 million dollars of  
9 funds in connection with that transaction from  
10 Acorn and Polaroid today wants to pretend that  
11 that didn't happened happen.

12 The same thing happened -- a very similar  
13 thing happened in April. In April Acorn again  
14 wired ten million dollars to Polaroid Consumer  
15 Electronics, got a security interest in inventory  
16 and accounts and proceeds of those amounts and  
17 again the loan was documented from Acorn to Pact  
18 Funding to Polaroid.

19 THE COURT: I am not sure I  
20 understand why you are making a closing argument  
21 at this point in an adversary proceeding that was  
22 just started a week or two ago.

23 MR. ROSOW: Because in order for  
24 them to sell free and clear they need to  
25 establish that there's a bona fide dispute.

1 THE COURT: Indeed.

2 MR. ROSOW: And they have not met  
3 that burden. We, however, I think have done more  
4 than meet our burden and have shown --

5 THE COURT: I am not weighing  
6 evidence. You know, I don't see how I can  
7 possibly weigh evidence, which is basically what  
8 you're trying to pitch to me.

9 MR. ROSOW: Well, the standard from  
10 the Gaylord Grains decision, which is a case that  
11 the Debtor cites in support of their motion tells  
12 the Court that it needs to evaluate the evidence  
13 and needs to consider whether evidence exists to  
14 create a bona fide dispute.

15 They haven't come forward with that  
16 evidence. Until they do, they haven't created a  
17 bona fide dispute and the Court can't sell free  
18 and clear of our lien without our consent.

19 THE COURT: Doesn't that -- aren't  
20 you really arguing to the merits of the motion  
21 that would be heard six weeks from now?

22 MR. ROSOW: I don't think so. The  
23 procedures motion asks the Court to determine  
24 that following these procedures the Debtor can  
25 sell free and clear of Acorn's interests and if

1 the Court enters that order than it has decided  
2 that issue.

3 Moreover, it seems from the debtor's --

4 THE COURT: Well, guess what, I am  
5 not going to be doing that by entering an order  
6 establishing procedures. Get on to a point  
7 that's before me today.

8 Mr. Singer already identified the issues  
9 that would be reserved on the merits under  
10 Section 363. We're talking about procedures to  
11 establish a level playing field for the making of  
12 bids.

13 MR. ROSOW: Well, respectfully, Your  
14 Honor, I believe this issue does go to that. I  
15 will move on.

16 THE COURT: Move on.

17 MR. ROSOW: My second issue, and I  
18 ask for the Court's instruction on this, deals  
19 with the consent issue. My argument very  
20 briefly, and I will ask if the Court wants --

21 THE COURT: Go ahead make your record  
22 if you wish.

23 MR. ROSOW: -- me to address this

24 here today or if the Court wants me to reserve  
25 this for the final hearing is that Pact Funding

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1 has not consented and is not in a position to  
2 consent in connection with this sale. I believe  
3 that's an issue that needs to be resolved here  
4 today.

5 THE COURT: You're wrong. Move on.

6 MR. ROSOW: Okay.

7 The final issue that I would like to  
8 touch on and address is to join in Mr. Krakauer's  
9 statements regarding the credit bidding.

10 Although the procedures have been  
11 adjusted and modified to provide that alternative  
12 forms of bidding can be accepted and will be  
13 considered, the procedures motion still provides  
14 that the Debtor in it's sole discretion has the  
15 ability to determine which bids to bring before  
16 the Court. We believe that that's inappropriate.  
17 We believe that the Court should have the ability  
18 to consider credit bids that are made by the  
19 various parties and we believe that it -- we join  
20 in Ritchie's proposal that there be an interim  
21 hearing prior to the sale hearing to evaluate

22 those credit bidding issues if that's necessary  
23 in light of the Debtor's concerns over chilling  
24 bidding and the inability of parties to make  
25 credit bids.

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1 Unless the Court has anything further.

2 THE COURT: No, I don't. Thank you.

3 All right. Back to the Debtors then. I  
4 think -- I don't believe there's anybody else who  
5 hasn't weighed in.

6 MR. SINGER: Your Honor, I think on  
7 the issue of credit being in process what  
8 certainly has the two people that purport and  
9 claim to have liens in this case exacerbated is  
10 certainly our process and bid procedures  
11 contemplate that we will not be entertaining  
12 credits bids for the assets.

13 That being said, Your Honor, I think it's  
14 very important to understand two things.  
15 Factually we have told Acorn and I want to tell  
16 them again today with the Court listening and  
17 I've told Ritchie, again both of these parties  
18 are free to come up with a proposal that the  
19 Debtors and it's constituents and in the exercise

20 of our fiduciary duties we will consider.

21 We have invited Ritchie -- since  
22 November, Your Honor, we have explored with them  
23 potential plan possibilities. We have explored  
24 with them different alternative structures. If  
25 they want to proceed in those fashions and want

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1 to develop a plan of reorganization, for  
2 instance, that involves dealing with their claims  
3 and trying to sell it and trying to have a  
4 resolution that the Debtors and it's constituents  
5 believe is a better alternative to the  
6 contemplated auction process, the Debtors as  
7 fiduciaries have a right to withdraw the sale  
8 motion certainly subject to the break up fees and  
9 the buyer protections that they have. The Debtor  
10 is trying to create a process that maximizes  
11 value.

12 We have the ability to certainly, if they  
13 come forward with a proposal that involves some  
14 type of settlement of their claims or something  
15 else that maximizes values for all  
16 constituencies, we're not precluded under the law  
17 or in this process we're not precluded from

18 retracting the process that they can submit a bid  
19 of some sort that's inherently flexible in  
20 accordance with the bid procedures. They can do  
21 it sooner. They can do it later. We have been  
22 asking them for months and inviting them to do  
23 that and trying to make sure they have enough  
24 information to form a purchase decision. We're  
25 delighted with that.

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1 THE COURT: Let me just ask you then,  
2 I mean ultimately here the Debtor -- the Debtor  
3 as the stewards of the estates here have to be  
4 concerned with realizing some cash, right, to pay  
5 creditors.

6 MR. SINGER: Absolutely.

7 THE COURT: Credit bidding doesn't  
8 necessarily entail cash and, as I understand it,  
9 it might not entail it at all. It entails  
10 bidding in to the amount of the debt and  
11 presumably in the exercise of rationale self  
12 interest the credit bidding secured party would  
13 bid up to what it thought was the reasonable  
14 value of it's collateral, but if that didn't  
15 exceed the amount of it's debt then that's all

16 she wrote.

17 MR. SINGER: That's exactly right,

18 Your Honor.

19 THE COURT: Am I reading that all

20 correctly?

21 MR. SINGER: You're reading that all

22 correct and I think I want to amplify that.

23 THE COURT: Which results in no cash

24 and nobody else gets paid?

25 MR. SINGER: That's exactly right.

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1 THE COURT: An asset exits the  
2 estate, the lien is satisfied, the secured party  
3 gets it and nobody else gets anything?

4 MR. SINGER: That's exactly right,  
5 Your Honor, and I guess what I would like to  
6 focus the Court's attention on and I think both  
7 Ritchie and Acorn, with all due respect, have it  
8 wrong. They have got the issues sort of right,  
9 but they are not starting where you need to start  
10 and that's with the statute. 363(k) and the idea  
11 that the most valuable right of a secured  
12 creditor is to credit bid and you can't do that,  
13 my gosh. The Bankruptcy Code itself addresses a

14 secured party's right to credit bid expressly in  
15 363(k) and 363(k) says that only the holder of an  
16 allowed secured claim can credit bid. It's not  
17 the Debtor's burden to show that they are  
18 allowed. It's not the Debtor's burden to have  
19 some evidentiary hearing that goes on for two  
20 years to be looking at the merits of fraudulent  
21 transfer actions. Only the holder of an allowed  
22 secured claim can bid.

23 THE COURT: Well, that's not quite  
24 what it says. It's the sale of property that's  
25 subject to a lien that secures an allowed claim.

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1 Now, that doesn't say allowed secured claim and I  
2 think judge -- I remember a conversation with  
3 Judge Kressel some years back in which we sort of  
4 went around in circles about whether that equates  
5 to an allowed secured claim or not and as is  
6 usually the case with our discussions we sort of  
7 went around in circles and had many interesting  
8 talks but didn't reach any conclusions, so you  
9 can't say it just applies to an allowed secured  
10 claim. That's not the language of the statute,  
11 but that might be what the statute --

12 MR. ROSOW: In effect and  
13 particularly in this circumstance is you end up  
14 getting to the same place, it secures an allowed  
15 claim, okay, and in order to do that -- and I  
16 don't want to debate the point that you and Judge  
17 Kressel had been debating, but you need to have  
18 something that secures an allowed claim in the  
19 first instance, so let's -- let's just stop there  
20 and pass there for a minute.

21 Acorn Capital hasn't even filed a proof  
22 of claim. The schedules have been filed where we  
23 have disputed Acorn's claims, Pact claims that  
24 they are trying to derivatively now claim an  
25 interest and argue about consent and all kinds of

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1 things that are not quite accurate. They have  
2 not even filed a proof of claim at this point.

3 Ritchie an hour ago filed a one-page  
4 proof of claim 250 million dollars. That's a  
5 one-page document that doesn't have any documents  
6 or instruments attached, but just merely asserts  
7 for monies loaned.

8 Now, I think it's fair to say, Your  
9 Honor, a couple of points, make a couple

10 observations, neither Ritchie nor Acorn -- let's  
11 start with Ritchie. Ritchie Capital and it's  
12 affiliates and investors have not loaned dollar  
13 one to Polaroid. Of all the millions of dollars,  
14 the 250 million dollars that supports their proof  
15 of claim that they say money loaned and there's  
16 not one dollar that went to Polaroid and I  
17 believe -- I don't believe that they would  
18 contend otherwise.

19 And with respect to Acorn's claim, I  
20 believe, if you inquired of Mr. Rosow, he would  
21 tell you that Pact -- that Ritchie Capital  
22 through Pact Funding is now owed at most ten  
23 million dollars period and certainly any sale  
24 that is authorized would attach to the proceeds  
25 and the offer on the table and the Debtors's

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1 available cash, they would be adequately  
2 protected certainly to that extent.

3 I don't think that they will tell you  
4 that beyond that amount that any other dollars  
5 that they have advanced to secure at least 250  
6 million dollars they claim in debt made it's way  
7 to the estate.

8                   Now to the arguments and contentions  
9                   about bona fide dispute and because I think that  
10                  becomes -- implicates somewhat where you have the  
11                  got the predicate that only a claim that is  
12                  secured by -- that is a secured credit bid the  
13                  Court also has the discretion, even if they have  
14                  such a claim, the Court for cause can preclude  
15                  credit bidding and in this case certainly should  
16                  if -- and the issue of bona fide dispute comes up  
17                  in that context, but they are entirely incorrect  
18                  about the idea of what needs to happen.

19                  What they want to have is they want to  
20                  litigate the adversary proceeding. They want to  
21                  do it now in a truncated process. Both  
22                  acknowledge as the Debtors and it's professionals  
23                  acknowledge, as every other constituent in this  
24                  acknowledges that this company cannot sit around  
25                  for the next two years litigating fraudulent

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1                  transfer claims, objection to claims. There will  
2                  be a day to do all that. What needs to happen is  
3                  to maximize value of this estate for their  
4                  benefit, for every constituent's benefit in this  
5                  case.

6                   They are certainly free to object to the  
7                   process. They are certainly to advance their own  
8                   bid. They are certainly free to -- if they have  
9                   got a plan that works, there's nothing that stops  
10                  the Debtor other than the economic constraints  
11                  opposed by the bidding procedures order from  
12                  withdrawing a plan if that is an appropriate  
13                  avenue.

14                  I am not too sure if the Court has had  
15                  the opportunity to glance at the complaints that  
16                  were filed in this matter.

17                  I would suggest to the Court that the  
18                  idea that the claims that are filed under Rule 11  
19                  by these Debtors and it's counsel extend far  
20                  beyond just a insolvency analysis or reasonably  
21                  equivalent analysis. They are -- each probably  
22                  has nine counts in there that are very detailed  
23                  and facts that are supported with documents that  
24                  don't -- that aren't conclusionary in nature,  
25                  that allege actual fraud, that discuss in great

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1                  detail grounds for which this Debtor believes  
2                  that -- the claims -- any claim that they have  
3                  either directly or derivatively through some

4 other instrument that they have are both  
5 avoidable as fraudulent transfers, that are  
6 subject to subordination and recharacterization  
7 and disallowance.

8 There are -- those complaints are very,  
9 very specific and detailed factually. It's not  
10 just something that has been thrown up in bad  
11 faith.

12 Finally in closing, Your Honor, and I am  
13 happy to address any questions that you have, but  
14 those complaints are very, very specific. They  
15 are not -- there was no surprise. I mean you may  
16 recall Acorn inviting us early on in the process,  
17 we would like to see that happen sooner rather  
18 than later. These claims and these allegations  
19 and these issues with respect to their claims,  
20 this isn't some surprise or sneak attack and the  
21 suggestion that while they got to reply at 11:00  
22 last night, admittedly true, but that reply was  
23 in response to objections that we received on  
24 Friday despite the fact that we've had the motion  
25 pending for three weeks and involved trying to

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1 reach out and resolve those things. There are no

2 surprises with respect to the disputes in these  
3 claims.

4 Both -- Ritchie in particular, their  
5 claim on it's face if you look at the attachments  
6 of their document, they obtain whatever security  
7 interest they have that secures their 250 million  
8 dollars, which maybe the reason why they didn't  
9 attach it here were obtained seven days before  
10 the Federal raid. Both were signed by Tom  
11 Petters on three sides of the fence and that is  
12 the basis for their lien and they are going to be  
13 arguing about credit bidding and doing things  
14 that we believe were destructive to the sale  
15 process.

16 I don't know how you would expect to have  
17 a sale process that -- where they have the right  
18 to credit at 500 million dollars worth of  
19 combined claims over assets that they don't have  
20 an entire hook in and expect to have a robust  
21 sale process.

22 They complain on the one hand about not  
23 having a process, that the value was too low.  
24 Nothing will depress value more than -- us  
25 spending the next month or whatever period that

1 they are proposing engaged in discovery to try  
2 and try their adversary proceeding.

3 The standard isn't look, are -- is the  
4 Debtor going to win. The standard is did we  
5 present sufficient facts to support a basis that  
6 the cause should exist for a bona fide dispute or  
7 that there's a sufficient facts in the record  
8 that merits the fact that they do not have -- let  
9 me make sure I get the language that the Court  
10 read, that they do not have a -- they don't have  
11 a lien on property that secures an allowed claim  
12 and I think it is quite clear or even a cursory  
13 review of those complaints and an appreciation  
14 for the facts that securing 250 million dollars  
15 worth of debt at 80 percent interest rate notes  
16 and 362 percent interest rate notes on the eve of  
17 bankruptcy proceedings, if that doesn't  
18 create -- again, noone's here asking the Court  
19 to -- that's for the adversary proceeding. That  
20 has been commenced. There's a process and  
21 discovery available for that.

22 What the Debtors need to do is work with  
23 the constituents to try and sell the property and  
24 maximize the value of the estate.

25 Alternatively -- there's an alternative.

1 If the Debtors want to credit bid, the case law  
2 that we have cited suggested in a parenthetical,  
3 they can post a bond, letter of credit, cash on  
4 deposit and bid like any other bidder can bid and  
5 they make their credit bid but secure that credit  
6 bid.

7 These are equity funds that were well  
8 healed enough to loan 250 million dollars in  
9 investment capital at 362 percent interest,  
10 presumably if they feel very strongly about their  
11 credit bid right they can post a bond or fashion  
12 escrow to secure that credit bid so at the end of  
13 the adjudication they become the winner at the  
14 bid, but the bond serves as collateral if the  
15 Debtor is right. You don't need to go on and  
16 have discovery about facts and whether or not  
17 there's reasonable equivalent value and  
18 insolvency.

19 This debtor, everyone agrees, even these  
20 two constituents, that this asset needs to be  
21 sold, needs to be marketed in a robust way, in a  
22 way that benefits everybody. Allowing credit  
23 bids in that context would be disastrous is our  
24 fear.

25 Now, I leave the Court with a citation

1 from our memorandum that the Court -- that is in  
2 there, that the Debtor didn't reference and by  
3 the way, I don't believe the Gaylord decision  
4 that they cite and that we cite in our papers  
5 supports the contentions that they suggest, but  
6 to focus the Court in on a bit, we have Coulter  
7 vs. Blieden which is an Arkansas decision that  
8 was affirmed by the Eighth Circuit Court of  
9 Appeals and it says and I quote, it would be an  
10 error to accept or consider a bid on behalf of a  
11 secured claim which is in litigation.

12 Now, if we were here talking about there  
13 was no good faith basis, there wasn't enough  
14 factual development in the record of those  
15 complaints, that this was just a way to try and  
16 deprive them some right, I don't think that  
17 anyone could say that having read those  
18 complaints.

19 In closing, Your Honor, I would suggest  
20 the Court approve the bidding procedures which  
21 certainly do not contemplate credit bidding, but  
22 we believe are fair and equitable under the  
23 circumstances and the best way to deal with the  
24 issues at hand and save a company that needs to

25 be saved to generate value for all

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1 constituencies.

2 Thank you.

3 THE COURT: All right. Mr. Krakauer.

4 MR. KRAKAUER: Your Honor, let me go  
5 back to my fundamental point. We're basically  
6 talking about a process that allows all parties,  
7 including the Ritchie family, to be able to  
8 present something for you to consider ultimately  
9 in connection with determining what should happen  
10 to this company.

11 I am just listening to Mr. Singer testify  
12 as to what he believes the facts are. If the  
13 facts are as strong as he believes, presumably  
14 we'll take a couple of depositions, we will get  
15 them out and we will determine whether or not  
16 there is -- whether or not these claims really  
17 are in bona fide dispute and either we will  
18 resolve it or we will have a mini hearing before  
19 Your Honor and Your Honor will determine it.

20 It can happen very rapidly and we're  
21 entitled to it. As a matter of due process we're  
22 entitled to it. The fact that he files a

23 pleading does not make it so or entitled to know  
24 what the underlying facts are and to present  
25 something in -- to Your Honor on what can happen

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1 and there is no basis whatsoever to believe that  
2 anything in that process is going to chill  
3 anything that this Court ultimately decides in  
4 connection with the disposition of the assets of  
5 the company come the end of March.

6 I don't know what they are afraid of by  
7 having somebody actually appear under oath to  
8 testify as to what he asserts is, quote, the  
9 facts, but my experience is maybe sometimes find  
10 facts different when people are actually put  
11 under oath to testify to them and I think we have  
12 that right.

13 I also come back to the fact we are a  
14 party in interest in this proceeding. We have an  
15 interest in making sure that recoveries are  
16 maximized and that's the reason we're here to try  
17 and do that and I don't know any basis for the  
18 process to be truncated in the way they are  
19 suggesting.

20 I'm not sure if I understand -- I

21 appreciated all Your Honor's comments to Mr.  
22 Rosow, but I think the proper way for you to  
23 proceed is to keep this Court's options open to  
24 see where we could get to on this. We have --  
25 that's all we're asking for, let us explore

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1 alternatives. Let us have the ability to present  
2 those alternatives and if one of those  
3 alternatives is in the context of the credit bid,  
4 let us have the opportunity to present that to  
5 you so you can decide whether that is  
6 appropriate, that's really all we're talking  
7 about, don't truncate the process as we're  
8 sitting here because we don't think that's  
9 appropriate. That's our basic position.

10 THE COURT: Okay. Thank you. All  
11 right. Mr. Rosow.

12 MR. ROSOW: Very briefly, Your  
13 Honor.

14 My understanding is the Court is holding  
15 off the bona fide dispute and consent issues and  
16 not determining those today, so I am --

17 THE COURT: On their merits, no, I am  
18 not going to determine those on their merits. I

19 can't. They are not ripe.

20 MR. ROSOW: I won't get into that.

21 I do want to however just note that at  
22 the appropriate time Acorn believes that it is in  
23 a unique position, that it's different from  
24 Ritchie and Lancelot and we'll present evidence  
25 on that and we'll deal with that at that time.

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1 The credit bidding and the bona fide  
2 dispute issues as argued by the Debtor I believe  
3 conflated the two issues. They are separate  
4 issues. They are separate standards. The bona  
5 fide dispute issue is an evidentiary standard.  
6 The credit bidding talks about a cause standard.

7 In connection with the credit bidding,  
8 which I think is the only issue of the three that  
9 I had presented to the Court that the Court is  
10 going to rule on here today, we simply point out  
11 that we believe it's appropriate for the Court  
12 and not the Debtor to make the ultimate decision  
13 on whether a credit bid that's made and offered  
14 is in the best interest of the estate and is  
15 appropriate.

16 I note that the Court commented that a

17 credit bid does not create cash for the estate.  
18 However, if there were a bid on, for instance,  
19 the North American trademarks which are one of  
20 the items, one of the assets that Acorn has a  
21 security interest in, if there were a monetary  
22 bid on simply the North America trademarks and  
23 that bid were an amount less than the amount of  
24 Acorn's secured debt, that too would not create  
25 any cash for the estate, because all of that

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1 money, assuming that Acorn's security interest is  
2 found to be valid, would be delivered to Acorn as  
3 a secured creditor, so it's not a unique  
4 situation that credit bidding creates no cash for  
5 the estate. It's simply the amount of the  
6 security interest, the value of the asset, that  
7 creates the situation that there's no cash for  
8 the estate. It's not the fact that it's a credit  
9 bid.

10 With that, unless the Court has any  
11 further questions.

12 THE COURT: I don't think so. Thank  
13 you all. Right. Anybody else have anything else  
14 to pitch in?

15 MR. CHESLEY: Your Honor, if I  
16 could?

17 THE COURT: Sure.

18 MR. CHESLEY: Richard Chesley on  
19 behalf of the Committee. I could not pass up  
20 when I heard cash for the creditors. One more  
21 comment for the Court, and that is, again, this  
22 is a bid procedures hearing and we have been in  
23 discussions with all of the stakeholders here  
24 that there's flexibility in this process.  
25 There's nothing to stop Ritchie, nothing to stop

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1 Acorn from working with a us, the Debtors and the  
2 stakeholders here to come up with some solution.

3 It may involve the use of their claims.  
4 It may not and what we wanted to do and I believe  
5 the Debtors did that in conjunction with the  
6 concessions made by Jeannie was to create a  
7 mechanism so we can begin this process, foster  
8 the competitive bidding process and get everybody  
9 thinking about what they can do to maximize the  
10 value for the return to the creditors.

11 There's nothing in the order that we see  
12 that precludes that and many of the issues, as I

13 think the Court has acknowledged today, are not  
14 ripe for determination today.

15 What's ripe for today is it's time to  
16 begin this process in earnest with a very strict  
17 timeline, get everybody to work and see what they  
18 can come up with, sharpen those pencils and we'll  
19 be back to the Court hopefully with the best deal  
20 that is possible for all the stakeholders here  
21 and I think that's all the Debtors are asking and  
22 certainly all the committee would ask for today.

23 Thank you.

24 THE COURT: As I would read the  
25 Debtor's position at this point, and I think the

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1 committee does not disagree with it, however, it  
2 -- under the Debtor's proposal today it would not  
3 be open to Acorn or Ritchie to force the issue of  
4 credit bidding if the Debtor did not -- with the  
5 committee did not wish to embody it as part of an  
6 overall disposition of the assets, right?

7 MR. CHESLEY: Correct, Your Honor.  
8 And corollary to that is as part of this process  
9 there may be a scenario with respect to IP or  
10 other assets where we may look to do those types

11 of things to maximize value and we have tried to  
12 preserve that flexibility.

13 All the Debtors are seeking, and we  
14 completely agree with this, is based upon the law  
15 and the facts that had been presented through the  
16 two complaints that have been filed and which we  
17 have sought to intervene in as to a strict credit  
18 bid to come in and throw a 500 million dollar  
19 number on the table and take these assets with no  
20 return to the credits is absolutely not only  
21 unacceptable, but it's flat wrong.

22 THE COURT: All right. As part of a  
23 response or objection to the sale proposal that's  
24 going to be brought before me, right?

25 MR. CHESLEY: Exactly.

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1 THE COURT: That's how it would cue  
2 up procedurally.

3 MR. CHESLEY: Exactly.

4 THE COURT: All right. Thank you.  
5 Good enough. Anybody else?

6 MR. SINGER: The only thing I would  
7 add, Your Honor, is that there's another asset in  
8 the motion, some approval of notices that I

9 haven't addressed and when appropriate I will do  
10 so. I am not sure if you wanted me to do that  
11 now or if you wanted --

12 THE COURT: Let's go ahead and make  
13 a record as to that now. Frankly, my intention  
14 here is to break for 20 minutes or half an hour.  
15 I need to review some of the arguments that have  
16 sort of been a moving target and give everybody a  
17 decision yet today, but let's go ahead and take  
18 care of the notices and the other matters at this  
19 point and that way at least I won't forget about  
20 them, although I'm sure you wouldn't let me.

21 MR. SINGER: As an aside, Your  
22 Honor, as a preliminary matter, I would like --  
23 this document represents the purchase agreement  
24 and schedules. I am surprised that we didn't  
25 clog up the entire court's electronic system when

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1 we filed it. It's absolutely extensive and the  
2 benefit of that, it wasn't done out of just over  
3 lawyering. It was done hand in hand with a  
4 proposed purchaser in Houlihan to develop a very  
5 easy road map and path for due diligence by  
6 designating contracts, listing cure amounts and

7 it's very comprehensive and again that's one of  
8 the reasons why we really value the stalking  
9 horse bid is because it does provide a nice  
10 catalyst and nice road map for competing bids.

11 The representations are thorough. The  
12 schedules are detailed. That however as a  
13 benefit and something that we believe is positive  
14 for the sale process creates the problem of  
15 dealing with notice issues. Certainly serving a  
16 document that looks -- that is probably 500 or  
17 600 pages in length on the parties as part of the  
18 sale motion that we estimate to be close to about  
19 1,200 parties would create an administrative and  
20 a burden on cost and as such we have developed  
21 two separate notices and a way to handle that.

22 We have submitted to the Court a revised,  
23 more truncated five or six page document we  
24 believe provides adequate notice and describes  
25 the essential elements of the -- of the bidding

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1 process, the time tables to commit bids, the  
2 purchase price and other material terms of the  
3 transaction that sets forth in quite detail --  
4 the process directs folks to what the bidding

5 procedures are and where they can obtain them if  
6 they wanted a complete copy of the agreement.

7 I think our Local Rules contemplate, you  
8 know, that type of process as being proposed  
9 here, sets forth with clarity the deadlines for  
10 objecting to the sale motion in very clear  
11 fashion and so that's the first notice that we  
12 would like the Court to bless is a form of giving  
13 notice of the sale itself.

14 The second notice is one that we intend  
15 to give by publication and the publication notice  
16 is a much shorter notice. We intend to publish  
17 notice in the Minneapolis Star Tribune and I  
18 believe our moving papers suggest the New York  
19 Times Daily Edition. We're working with a  
20 proposed purchaser to, you know, conserve cost,  
21 but we do believe that national notice is  
22 appropriate so we intend to file a notice in a  
23 national journal at least once to -- given the  
24 broad nature of the -- give publication notice in  
25 that regard, but obviously cost is an issue and

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1 having something that goes on for four pages  
2 would be cost prohibited so we developed a more

3 truncated notice as well. We would ask the Court  
4 to approve both.

5 The only thing I would want to draw to  
6 the Court's attention I believe in the version  
7 that I sent you there was a reference to the  
8 final sale and approval hearing to be at 9:00 in  
9 the morning versus 1:30 p.m. which is the correct  
10 time and that -- if that shows up in your  
11 version, that's an error. We corrected that to  
12 be 1:30.

13 THE COURT: Which one are you talking  
14 about?

15 MR. SINGER: The longer --

16 THE COURT: And you're talking about  
17 the first really full text paragraph there. The  
18 version that came through to chambers. Which I  
19 understand was circulated electronically to all  
20 counsel, says March 19th, so that one would  
21 require the date of the sale hearing to be  
22 updated as well?

23 MR. SINGER: To the extent that  
24 there are dates where I thought that I -- had  
25 said that that date wasn't a problem, I thought

1           there was a timing problem with March 31, but  
2           certainly the dates are March 26th, March 30th,  
3           and 31st.

4                         THE COURT: 31st, right.

5                         MR. SINGER: Yes, and I think there  
6           was a timing error in the one that I sent to the  
7           chambers. It should be 1:30 p.m. is the time  
8           that I've got scheduled for the sale hearing, so  
9           I intend to make that correction.

10                        THE COURT: Well, it's just -- I am  
11           looking at the very first page though right  
12           up-front there's a notice of the sale hearing.

13                        MR. SINGER: On the 19th, that  
14           should be changed a well.

15                        THE COURT: That should be changed,  
16           both date and time?

17                        MR. SINGER: Yes, Your Honor, so I  
18           don't think there are any objections to that.

19                        The only changes that have been made,  
20           other than the dates, have been to reflect the  
21           more robust bidding process and making sure that  
22           the parties in interest know that we're accepting  
23           different forms of bids. That's the purpose for  
24           the change.

25                        THE COURT: All right.

1 MR. SINGER: So we would press the  
2 Court to approve the forms of both notices and I  
3 don't believe anyone has an objection, but I can  
4 let them speak to that.

5 THE COURT: Okay. Well, I am not  
6 going to jump the gun on any ruling I am going to  
7 make, because as I said, as to the broader motion  
8 here, because I want to take a few minutes to  
9 ponder some of the arguments, but let me just  
10 ask, assuming that I were to grant the Debtor's  
11 motion, I have not received any objections as to  
12 the revised forms of notice in both versions  
13 here.

14 Does anybody have any input on those,  
15 just so that we can get that issue --

16 MR. CHESLEY: No objection from the  
17 Committee, Your Honor.

18 THE COURT: Mr. Chesley is indicating  
19 no objection from the committee. Anybody else?

20 All right. I am just going to preserve  
21 the record on that because I really do want to  
22 take a look at a couple of the authorities that  
23 turned out to be more heavily relied upon in the  
24 oral argument today. All right.

25 Well, I see by the courtroom clock it's

1 3:30 just about exactly. To try to be realistic,  
2 I am going to ask the parties to come back at  
3 4:00 and I will be out then and I will give you a  
4 decision on the issues that have been presented  
5 to me as boiled down after the resolutions here,  
6 so half an hour.

7

8 (A recess was had in the proceedings)

9

10 THE COURT: All right. We are back  
11 on the record then in Polaroid Corporation and  
12 during the recess I did review arguments  
13 presented, those arguments that survived the  
14 various accords made between the Debtors and  
15 various constituencies as well as the arguments  
16 as they have boiled down ultimately presented to  
17 me for decision.

18 I just want to make sure I understand  
19 exactly what we're talking about by way of the  
20 proposed order here when we're talking about the  
21 credit bidding controversy and that it appears to  
22 me looking at the terms of the proposed order,  
23 we're talking about Term No. 9, the provision  
24 that the Debtors may A, select in their business

25 judgment the highest or otherwise best offers,

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1 the successful bidder or bidders, the next  
2 highest and best offers, the back up bidders, et  
3 cetera, and reject any bid that in the Debtor's  
4 business judgment is inadequate or insufficient  
5 or not in conformity with the requirements of  
6 Bankruptcy Code, et cetera or contrary to the  
7 best interest the Debtors there states creditors,  
8 interest holders or parties in interest.

9 I think it would be -- as I read the  
10 terms of this last iteration of the propped order  
11 filed with the Debtors's response, last night at  
12 11:19 p.m., I think that's where the controversy  
13 lies as to the question of credit bidding, am I  
14 correct in that regard, because it does not  
15 expressly preserve the right to credit bid and  
16 this question is probably more specifically  
17 addressed to Acorn's and the Ritchie party's  
18 counsel then it is to the Debtor's counsel, but  
19 am I correct in reading it that way?

20 MR. KRAKAUER: Your Honor, there's a  
21 few different provisions, but in terms of  
22 satisfying it from our point of view a provision

23 which made clear that the Court could consider  
24 any proposal at the final hearing would probably  
25 do it. That's the -- that's the thrust of it.

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1 THE COURT: All right. And that was  
2 basically the tenor, I think, the structuring  
3 theme of your argument today.

4 MR. KRAKAUER: It goes through a few  
5 different reports here.

6 THE COURT: All right. Mr. Rosow?

7 MR. ROSOW: I completely agree.

8 THE COURT: All right. Good enough.

9 Mr. Singer, did you have any --

10 MR. SINGER: Yes, just a point of  
11 clarification, Your Honor, to make sure that  
12 we're all on the same page.

13 Certainly this order and other provisions  
14 adopts that the bid procedures and there's a  
15 specific provision in the bid procedures that  
16 talks about from the Debtor's perspective the  
17 credit bidding. It's not permitted. That's not  
18 to say that we can't, as I indicated, explore  
19 other alternatives and all possibilities in our  
20 business judgment to maximize value as they are

21 presented. We're certainly affirmably in the bid  
22 procedures addressing that issue.

23 THE COURT: Right, but I guess as I  
24 indicated in my last colloquy with Mr. Chesley,  
25 the point is that no party would be permitted to

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1 force the issue of credit bidding as an objection  
2 to any sale proposal that the Debtor would be  
3 presenting for court approval.

4 MR. SINGER: Yes, Your Honor.

5 THE COURT: Okay. All right. I just  
6 wanted to make sure that I was understanding what  
7 we were talking about here and the source -- the  
8 point source where this controversy is coming  
9 from.

10 All right. Good enough. I am first  
11 going to observe that today's controversies as  
12 they boiled down are really once again what I  
13 would call a matter of positioning. The parties  
14 attempting to position themselves in an ongoing  
15 dynamic within a bankruptcy case to gain a  
16 position of relative strength or power versus  
17 opponents to position themselves to what they  
18 think is best advantage in a bidding or sale

19 process or control of litigation going forward or  
20 whatever.

21 An awful lot of what happens in the early  
22 stages of a Chapter 11 case, whether it's a  
23 little one or a big one, is a matter of  
24 positioning. The parties joust around seeking to  
25 get substantive rulings by the Court or

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1 procedural directives that they perceive would be  
2 to their client's best advantage in the process  
3 as it goes forward which becomes then a matter of  
4 negotiation.

5 Chapter 11 works best as a matter of  
6 negotiation or as a matter of exposure to the  
7 market for sale allowing rationale self interest  
8 to go forward but, of course, Court's early  
9 rulings end up giving one party or another or  
10 could give one party or another an advantage.

11 The point I guess to be made here is that  
12 the Debtor's proposal in the first instance, at  
13 least as voiced by Counsel, is to try to keep  
14 everybody on the same level playing field to  
15 establish an open and transparent process, but in  
16 turn to kind of give the Debtor and it's allies

17 among it's constituents the maximum latitude to  
18 determine what's in the best interest here toward  
19 a realization of as much cash as possible and  
20 toward preserving relative strength in a process  
21 that would go forward after the sale.

22 That's really kind of much of what the  
23 Debtor is about in terms of rejecting the notion  
24 of being forced to accept a credit bid out of  
25 hand or as the debtor has put forth through

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1 Mr. Singer's remarks today asking the Court to  
2 condition any credit bid on the posting of  
3 adequate security to make the estate whole if, in  
4 fact, a credit bidding process were forced  
5 through court determination and then ultimately  
6 were determined that that credit bidder, whether  
7 it be the Ritchie parties or Acorn, didn't have  
8 an allowed claim and hence didn't have the rights  
9 of a secured party that was entitled to credit  
10 bid against assets that were on the block as part  
11 of the overall disposition.

12 So it's, as I say, I can see the parties  
13 vying for respective positions here and I don't  
14 fault either the Ritchie entities or Acorn

15 Capital for trying to joust their way through to  
16 a position of relative advantage, preserving that  
17 power or the presumptive operation of that power  
18 under Section 363(k).

19 The question here is whether the Debtor's  
20 proposal, which ultimately gives the Debtors  
21 fairly broad discretion to elect among purchase  
22 offers and hence which would fundamentally  
23 nullify, I think, the presumptive preservation of  
24 the right to credit bid under Section 363(k) is  
25 legally proper whether it's legally sustainable

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1 at this point.

2 And I mean I think what you have to get  
3 back to and what ends up being, I think, decisive  
4 of it at this point in large part, not  
5 exclusively, but in large part is whether credit  
6 bidding is indeed available or whether the  
7 presumptive preservation of credit bidding is  
8 available to either of these parties at this  
9 point.

10 As to the Ritchie Capital entities, they  
11 are not the holders of allowed claims secured by  
12 property that would be subjected to the sale

13 process at this point, so they don't qualify for  
14 the preservation of a right to credit bid under  
15 Section 363(k) at this point. The Debtors  
16 scheduled their claims as disputed, et cetera,  
17 et cetera. Therefore -- there by defeating the  
18 status of allowed claims that is given to claims  
19 that are scheduled in a Chapter 11 case by a  
20 Debtor, which has a fiduciary obligation to be  
21 straight up, to be accurate and honest and only  
22 to schedule claims as disputed if, in fact,  
23 there's a basis to dispute them. That  
24 provision -- the provision -- giving that prima  
25 facie allowed status to claims as scheduled in a

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1 Chapter 11 case doesn't apply here because the  
2 debtor's scheduled these claims as disputed.  
3 There is a proof of claim on file, but  
4 that proof of claim came in after the  
5 commencement of the adversary proceeding and the  
6 adversary proceeding is fundamentally an  
7 objection both to the claim itself and to the  
8 secured status of the claim and Section 502(a)  
9 provides that a claim as to which a proof of  
10 claim is filed is deemed allowed unless a party

11 in interest objects and that language is  
12 interpreted across the board as -- by the Courts  
13 as providing that once an objection is filed,  
14 once the objection process is put in motion then  
15 the claim is not to be deemed allowed at that  
16 point.

17 The question of it's allowance is  
18 preserved for the disposition on it's merits of  
19 the objection.

20 Acorn Capital is not the holder of an  
21 allowed claim within the contemplation of Section  
22 363(k) either. The Debtor again scheduled this  
23 claim or these claims as disputed. There's no  
24 proof of claim on file, at least as represented  
25 to me today and the adversary proceeding is

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1 pending. Acorn did not take the expedient of  
2 filing a proof of claim before now. As a result  
3 it didn't establish a claim that would be  
4 entitled to the initial status, the deeming of  
5 allowance by operation of Section 502(a) and in  
6 any event the Debtor's adversary proceeding makes  
7 an objection to the claim and to it's secured  
8 status.

9                   Now, to the extent that Acorn Capital  
10                   might try to make out an arguable basis for  
11                   gaining that status, to the extent of at least a  
12                   portion of it's claim, because there's been  
13                   argument presented today that there can be no  
14                   dispute that an advance was made to one or more  
15                   of these debtor entities in such and such of  
16                   amount by Acorn, et cetera, et cetera, et cetera.

17                   To the extent that it would attempt to  
18                   gain that status by later filing such a proof of  
19                   claim, I am going to hold now that there is cause  
20                   at this point within the meaning of  
21                   Section 363(k) to bar it from forcing a credit  
22                   bid before the Court on it's merits as an  
23                   objection to any sale that would be presented for  
24                   approval, absent the Debtor's acceptance of such  
25                   a bid as part of an overall disposition of the

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1                   assets and within the structure that the Debtor  
2                   is now bringing forward for a sale process in  
3                   this last iteration of a proposed order.

4                   That cause is basically, and I will agree  
5                   with the Debtors here and the Committee and the  
6                   newly found allies that now consent to this

7 process, even though they earlier objected, it's  
8 the need to avoid a chilling of the process to  
9 put everybody on the same page in terms of their  
10 participation in a broad bidding process that  
11 would in turn result in the generation of cash  
12 for this estate with liens to attach as adequate  
13 protection of any lien claims and to remain  
14 attached to that cash pending ultimate  
15 determination of the adversary proceedings and  
16 any other claim objections by -- brought  
17 against -- asserted lien claimants.

18 This -- the Debtor's proposal here,  
19 ultimately the result of an awfully intense  
20 process as has been represented to me, I think,  
21 does indeed give a large amount of flexibility  
22 for the sale process in which the participants  
23 would be the Debtors, the Committee or the  
24 Committee's and participating bidder, the idea  
25 being that the cash realization should be

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1 maximized here.

2 And I am going to say that -- I am going  
3 to disagree with Mr. Krakauer. I think that the  
4 chilling affect from a credit bid potentially

5 snatching a portion of these -- this block of  
6 assets out of the overall offering is palpable  
7 enough here that I can take cognizance of it.

8 I took a look at this classic of the law,  
9 which is what I call any decision that was  
10 rendered by a court at least before I was born,  
11 Coulter vs. Blieden, the Eighth Circuit decision  
12 under the Bankruptcy Act of 1898, a 1939 decision  
13 104 F.2d 29 and specifically at Page 32 of that  
14 decision the Court noted that a sale free and  
15 clear is ordinarily not to be ordered over the  
16 objection of a lien holder who may desire to bid  
17 and use the ascertained value of his lien in  
18 payment of the purchase price, but the Court  
19 there noted it's not a Rule of Law. This is not  
20 a Rule of Law. It was a matter of practice under  
21 the Bankruptcy Act and even then so much of  
22 bankruptcy, the law of bankruptcy, law with a  
23 small L I guess is the way I would put it, was a  
24 matter of practice, practice being a lot more  
25 informally done in bankruptcy cases than it is

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1 under the current law, but it says there it's not  
2 a rule of law and in special cases as where the

3           lien itself is in litigation, it's a matter  
4           within the discretion of the Court to sell the  
5           property and save expense.

6                       Now, I think the fundamental structure of  
7           the law of bankruptcy, the statutes as between  
8           the 1898 Act and the 1978 code that we work with  
9           now is basically as carried forward and this  
10          consideration is still perfectly applicable here  
11          under the current wording of Section 363(k) which  
12          talks about cause. In Coulter vs. Blieden it  
13          talks about a matter within the discretion of the  
14          court. Cause is maybe a little more hard and  
15          fast concept and not quite as discretionary, but  
16          one way or the other there's an override to the  
17          presumptive preservation of credit bidding here  
18          and among other things it says here to sell the  
19          property and save expense.

20                       The prospect of maximizing realization  
21          and giving under the final iteration here, the  
22          final proposal, giving the Debtors with the  
23          participation of other constituencies sort of the  
24          maximum leeway in splitting up these assets or  
25          selling it as a package, I think, gives the cause

1 under the special sensitivities of this case and  
2 as special sensitivities, I don't think a soul  
3 here can ignore the fact that we are in pretty  
4 desperate economic times right now, there isn't a  
5 day that goes by that we don't have worse news  
6 about the U.S. economy and bad prognostications  
7 for the next six months, year, two years or more.

8           Everybody here has now acknowledged that  
9 something needs to be done with these assets  
10 promptly and I think clearing the deck to  
11 basically put everybody on the same footing in  
12 terms of their participation and the sale process  
13 overriding any presumptive preservation, whatever  
14 residual presumptive preservation of the right to  
15 credit bidding there maybe here is the  
16 appropriate way to handle this because if the  
17 Debtor should come up with the best offer being  
18 for a package for going concern, allowing credit  
19 bidding and it's uncontroverted, at least as far  
20 as I can see from the record before me, that  
21 neither of these parties holds a blanket lien  
22 against the whole works, so allowing credit  
23 bidding to nose it's way into the process and  
24 pluck out certain assets could throw all of that  
25 off the tracks and that's where the cause lies

1 here.

2 I ultimately ended up concluding,  
3 notwithstanding the rather sharp kind of colloquy  
4 that I had with Mr. Rosow, that in a way I don't  
5 need to reach the very specific discreet  
6 statutory issue on it's merits of whether there  
7 is a bona fide dispute over Acorn Capital's claim  
8 within the meaning of Section 363(f)(4). I don't  
9 really need to reach that. I mean that's  
10 technically not ripe. The application of Section  
11 363(f)(4) on it's merits is technically not ripe  
12 until a sale is actually presented to the Court  
13 for approval.

14 Now, so I think perhaps there was a  
15 conflation there in the way that argument was  
16 structured up of the question of bona fide  
17 dispute with the whole question of allowance of a  
18 claim and whether there's an objection pending.

19 Now, the interesting thing I want to note  
20 here is that I do think that the citation made to  
21 Gaylord Grains, LLC, the Bankruptcy Appellate  
22 Panel Decision, 2004 306 B.R. 624 was inapposite  
23 and Judge Kressel was the author of that one,  
24 this one that came out of the Eastern District of  
25 Missouri, the bankruptcy court there, and if you

1 go to Page 627 in the discussion section on bona  
2 fide dispute it's -- I think one has to avoid  
3 reading too much into this, but there's some  
4 illumination here.

5 It starts off with saying in this case  
6 the Trustee did not file an adversary proceeding  
7 seeking to avoid the creditor's liens before he  
8 sought to sell the property free and clear of  
9 interests. Thus the issue becomes whether  
10 there's a bona fide dispute for the purposes of  
11 Section 363(f)(4). He doesn't say the issue is.  
12 He says whether the issue becomes, which sort of  
13 suggests to me that may be the mentality behind  
14 it, and I am only speculating here, because this  
15 would only be dicta anyway and I don't know if  
16 that it's specifically worded enough for dicta,  
17 but I think the whole tenor of the references  
18 made here including the reference on the  
19 following page, Page 628, stating that although  
20 the Trustee didn't file an adversary proceeding  
21 he may nevertheless sell free and clear if he can  
22 show an objective basis for avoiding liens, et  
23 cetera, et cetera.

24 It's sort -- it seems to be premised upon  
25 a bed rock assumption that if an adversary

1 proceeding were pending there is a bona fide  
2 dispute. I think this is reinforced by the fact  
3 that the commencement of an adversary proceeding,  
4 as I think Mr. Singer promptly noted, triggers  
5 Rule 11 considerations and any attorney,  
6 particularly in a high stakes matter like this  
7 one, should be doing a very comprehensive factual  
8 investigation before launching litigation or  
9 there's a violation of Rule 11, Bankruptcy Rule  
10 9011 here and so while this talks about evidence  
11 being brought forward and it just says evidence  
12 must be provided to show factual grounds, there  
13 is an objective basis for the dispute, it says  
14 that and nothing more. I mean there's no  
15 speaking. There's no discussion here of weighing  
16 of evidence at all and the point being that if  
17 litigation hasn't been commenced, you're lacking,  
18 I think, the indicium of bona fide status for an  
19 objection that Rule 11, counsel's duties to the  
20 Court, potential liability for abuse of process  
21 and the like, otherwise give to the question of a  
22 bona fide dispute.

23 So I think the citation and the heavy

24 reliance to Gaylord Grain, whether it was sort of  
25 in an attempt to advance the question of the

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1 availability of a sale free and clear to a point  
2 now when it isn't even ripe or whether it's by  
3 way of analogy to the question of whether there's  
4 an allowed claim here is simply inapposite.

5 I don't think this case can be read for  
6 the prospect that under the current procedural  
7 posture here with an adversary proceeding  
8 complaint filed with all the implications that  
9 has and with the deemed certification of merit  
10 based upon an adequate investigation of facts and  
11 law that Rule 11 applies to the mere fact of  
12 subscribing and filing that adversary proceeding.  
13 I don't think that the analysis that's made here  
14 requiring the production or the providing of  
15 evidence, not even production, but providing,  
16 whatever that means, is applicable at all.

17 So the upshot here is that I am going to  
18 overrule the persisting objections that have been  
19 argued today and any others that haven't been  
20 brought forward by way of oral argument made by  
21 the Ritchie entities and Acorn Capital.

22 I do not believe that it is at all  
23 warranted to preserve with a shunting through a  
24 discovery process and some sort of preliminary  
25 hearing the whole question of the availability of

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1 credit bidding. I think the issue is properly  
2 put to the Court here today on the record as  
3 made.

4 I will just make aside observation that I  
5 think the last thing in the world this process  
6 needs is to get bogged down for however many  
7 hours or days it might be in a discovery process.  
8 With luck and I think it's the expressed hope of  
9 several of the constituencies, the Debtors and  
10 committee in particular, things are going to be  
11 extremely busy and I think every constituency  
12 here hopes that there will be a lively interest,  
13 but the way the process has been opened up by the  
14 Debtors in concession to the Committees and the  
15 Lancelot Trustee to breaking up the package of  
16 assets here, if it looks like that's worth  
17 pursuing for maximization of value, there's just  
18 going to be way too much. If anybody comes  
19 forward, there's going to be an awful lot of

20 horse trading going on here, an awful lot of  
21 evaluation and it's really unwarranted simply as  
22 the appropriate mechanism to maximize valuation  
23 to shunt that whole process of credit bidding  
24 over into a discovery process and a preliminary  
25 determination.

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1 It's ripe for disposition now. I don't  
2 think that the final proposal that the Debtors  
3 have made here really offends either the general  
4 policy goals or any of the applicable substantive  
5 provisions, so as a result I am going to go ahead  
6 and grant the motion as it has been finally  
7 presented to the tenor of the relief that is in,  
8 and I am going to take a risk here by just saying  
9 already, in the form of the order that was  
10 presented with the Debtor's last documentation  
11 submitted last night.

12 I guess I will ask Mr. Singer, there's no  
13 further revision of that text that's  
14 contemplated, right?

15 MR. SINGER: That's correct.

16 THE COURT: Okay. So I can just go  
17 ahead and I think what I will -- to the extent --

18 and I don't know whether you have sent an  
19 e-format copy of that into chambers or not, but I  
20 can have my judicial assistant extract out those  
21 pages if you haven't.

22 MR. SINGER: I am certainly happy to  
23 go back tonight and forward it just to make sure  
24 you have it, Your Honor.

25 THE COURT: I would be more

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1 interested in just getting darn thing on the  
2 docket right away.

3 MR. SINGER: I have a manual,  
4 whatever you need, let me know.

5 THE COURT: Judge O'Brien wouldn't  
6 like it if I had her scan in something like that,  
7 so we can extract it out.

8 So that's my disposition. Frankly, you  
9 know, until I got into chambers this morning and  
10 saw the Debtor's responses and got the first  
11 intimation that at least three constituencies  
12 objections were resolved, I wasn't really very  
13 sure at all that I would be in a position to give  
14 the parties a final resolution today of this  
15 motion which I don't think would have profited

16 anybody because there was an awful lot thrown up  
17 in the air.

18 As it happens, it ended up being boiled  
19 down to a package that could be dealt with based  
20 upon the review of the materials that I have  
21 started looking over after they were filed on  
22 Friday and I am happy that I can go ahead and  
23 enter this order and that the process can go  
24 ahead on it's own merits outside the purview of  
25 the Court and ultimately toward the end of

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1 getting the sale hearing on March 31st, so I will  
2 -- we'll take a look at the form of order and  
3 extract it and to the extent that it needs to  
4 have any extraction of the notices attached to it  
5 by way of the reference, I don't recall quite  
6 frankly.

7 MR. SINGER: Your Honor, the order  
8 itself just references the notices as presented  
9 at the hearing, it doesn't attach as exhibits.  
10 It's just the order itself and the attached  
11 bidding procedures.

12 THE COURT: So upon service then you  
13 will be filing those -- a form of those notices.

14 I just wanted to make sure that they are of  
15 record.

16 MR. SINGER: Absolutely, Your Honor.

17 THE COURT: We will have them.

18 THE COURT: All right. Good. Does  
19 anybody have anything else they want to note for  
20 the record here?

21 All right. Good enough. I want to get  
22 that order entered at some point yet today, so we  
23 will get to work on it in chambers. That should  
24 take care of it then. All right. Thank you.

25 MALE SPEAKER: Thank you, Your

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1 Honor.

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

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

7

8 That the proceedings were recorded  
9 electronically and stenographically transcribed into

10 typewriting, that the transcript is a true record of  
11 the proceedings, to the best of my ability;

12

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

16

17 WITNESS MY HAND AND SEAL:

18

19

20 S/ LESLIE PINGLEY

21

---

22 Leslie Pingley

23 Notary Public

24

25