UNITED STATES BANKRUPTCY COURT

DISTRICT OF MINNESOTA

In Re: BKY No: 08-46617

Polaroid Corporation,

Debtor.

BEFORE THE HONORABLE GREGORY F. KISHEL

United States Bankruptcy Judge

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TRANSCRIPT OF PROCEEDINGS

3-26-09

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

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

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

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APPEARANCES (Cont'd)

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

MR. DOUGLAS R. PETERSON and MR. ANDREW W. DAVIS, Attorneys at Law, Suite 2300, 150 South Fifth Street, Minneapolis, Minnesota 55402, appeared on behalf of David Baer.

MR. BRIAN F. LEONARD, Attorney at Law, 100 South Fifth Street, Suite 2500, Minneapolis, Minnesota 55402, appeared on behalf of Ritchie.

P R O C E E D I N G S

THE COURT: We're on the record. This afternoon's hearing is in the Chapter 11 case of Polaroid Corporation. File 08-64417. There are two motions related to discovery issues that have been put onto the calendar, both with requests for expedited hearing, one by the debtor and one by David Baer, both seeking protective orders and relief in relation to subpoenas served on those parties late last week.

Let's note appearances for the record here, counsel.

MR. SINGER: Good afternoon, Your Honor. George Singer from Lindquist & Vennum appearing on behalf of Polaroid. And I'd like to introduce to the Court, my partner, Terry Fleming, who will be handling the motion before the Court. But to the extent the matters involve the sale or questions that the Court has about sale issues that maybe come up, I'm here and available as well.

THE COURT: Okay.

MR. FLEMING: Good afternoon, Your Honor.

MR. PETERSON: Judge, with the Court's permission, Doug Peterson and Andy Davis. We are with Leonard, Street and Deinard here to represent David Baer.

MR. LEONARD: Your Honor, Brian Leonard appearing on behalf of Ritchie Capital Management and its affiliates.

MR. ROSOW: Your Honor, Michael Rosow from Winthrop & Weinstine appearing on behalf of Acorn Capital.

MS. DYKOSCHAK: Good afternoon, Your Honor. Teresa Dykoschak for the committee of unsecured creditors in the Polaroid cases and I'd like to introduce Greg Otsuka also for the committee.

THE COURT: All right. Appearances are as noted, then. I think I'll hear the debtor on its motion first and then we'll get to Mr. Baer's motion.

Go ahead, Mr. Fleming.

MR. FLEMING: Thank you, Your Honor. This is Polaroid's motion for protective order quashing the depositions of

Mary Jeffries, David Baer, and Rule 30(b)(6) notice of deposition of Polaroid officers.

Your Honor, there's three reasons why the protective order should be granted. First of all, this Court has, by and large, rejected the arguments that expedited discovery is necessary. To set the tables for this just very briefly, Polaroid filed its motion for an order approving the sale process back on January 28 of this year. Acorn and Ritchie objected. And Ritchie in particular, on February 13 in its memorandum requesting expedited discovery, asked specifically for discovery concerning any analyses by the debtor's financial professionals with regard to alternatives to the sale. Second, communications between the debtor's financial professionals and prospective bidders. Three, information relating to the debtor's organization, financial condition, and ability to reorganize as an alternative to the sale. And finally, circumstances relating to any dispute as to Ritchie's status as a secured creditor.

The same request relating to court

permission to engage in this precise discovery was made at oral argument. And at the hearing on February 18 this Court, in granting Polaroid's motion relating to the sale process, expressly overruled the objections and did not grant the request for expedited discovery. And I think the paragraph that we've cited in our memorandum is pretty much on point and specifically where you stated that "I will make just a side observation but I think the last thing in the world this process needs is to get bogged down for however many days, hours or days it might be in the discovery process."

So many of the precise discovery requests that I repeated today were already presented to this Court and expressly denied.

Now, at the hearing today Acorn is only seeking information and discovery relating to the status as a secured creditor. Ritchie, however, I think correctly states that that issue has been presented to this court and rejected. They are repeating that argument simply for purposes of appeal.

Now, that gets us just up to a couple

weeks ago. Then Ritchie and Acorn waited about a month and then without consulting with counsel in advance or having any discussion about the availability of witnesses, sent out deposition notices on March 16 for the deposition of Mary Jeffries and a subpoena for David Baer for their depositions the following week, Monday and Tuesday of this past week.

I contacted counsel, personal counsel for Mary Jeffries and David Baer and learned that both counsel were unavailable. Mr. Peterson I believe was in Mexico and was not coming back into town until this past Monday evening. And Mr. Birrell, personal counsel for Mary Jeffries, started a trial up in Brainerd on Tuesday but was going up on Monday to prepare the witnesses and get set up basically.

I brought this to the attention of Acorn and Ritchie. They were not agreeable to continuing the deposition so we moved for this protective order.

Now, when you look at the precise information, the precise discovery request that is being requested now, you can see that

it's somewhat of a moving target. If you look at Exhibit I to the papers that we submitted which is a copy of the Rule 30(b)(6) deposition, there are 16 different categories or topics that would be the subject of deposition but --

THE COURT: Exhibit I you say?

MR. FLEMING: Yes.

THE COURT: Okay. This finally came up on the screen here.

MR. FLEMING: If I could approach, I have a copy --

THE COURT: I've got it here. It's just that they weren't tabbed so it's necessary to toggle up and down.

MR. ROSOW: It's page 37, Your Honor.

THE COURT: Okay. Right. Page 37 of the document as filed which is headed up by Mr. Jorissen's letter. Okay.

MR. FLEMING: All right.

THE COURT: Go ahead.

MR. FLEMING: And if you compare that with the motion filed I think it was just this morning at 10 a.m. objecting to

the sale on page 16, at the very bottom Ritchie states -- they're asking for alternatives in lieu of discovery. One of those alternatives is delaying the sales hearing on the 31st. And they say, The sale hearing should be postponed to permit Ritchie a limited inquiry into two key matters. Bottom of page 16.

THE COURT: All right. Now, you're talking now about the document that was put into the in box this morning, the electronic in box I'm speaking, headed up by a motion for filing under seal.

MR. FLEMING: Yes.

THE COURT: Right? Okay. There's going to be more words about that to Mr. Leonard but I have a copy of it printed out here. The actual document that was requested be put under seal is not part of the official record yet because of the way in which it came in which is contrary to the local rule. But I've got it right in front of me here. Okay. Page 16 and you're talking --

MR. FLEMING: The last paragraph.

THE COURT: All right.

MR. FLEMING: It says, The sale hearing should be postponed to permit Ritchie a limited inquiry into two key matters, the relationships among Zink, Polaroid, Genii, Lopez and Jeffries and the analysis of and consideration of alternatives to an immediate sale of Polaroid. So what we have is a change in position in terms of what discovery is being sought at this late date.

One of the two areas is something that was expressly presented to this court at the prior hearing but then there's a new inquiry and that relates to the relationships between Zink, Polaroid, Genii, Lopez, and Jeffries. And up until 10 a.m. this morning, I would have said that every bit of discovery that they are seeking has previously been considered but they have presented a new category of discovery and a new argument that says that, you know, basically looks at whether the insiders are getting benefitted from the sale and how that relates to the issue of good faith in the sales process.

Now, this newest issue is a little bit

surprising in lieu of the fact that both Ritchie certainly has had full access to the due diligence room. In fact, I believe had been there four times. Mr. Singer has entertained at least four phone conversations with representatives of the Ritchie Group. The Ritchie Group has made, I believe, three or four presentations to Houlihan Lokey. I don't know of any information that they did not actually have access to or certainly if they had asked specifically for that information as part of the regular sales process, they would have been provided with that.

So in sum, we have requests for discovery that have been expressly considered and rejected by this court and then a new request made at the very last moment where there's no reason why it could not have sought the information on a voluntary basis prior to this. There simply isn't any need for depositions at this late point to address those very issues.

Now, that's the first reason related to the fact that these issues have by and large

been considered by this court and the only new issue is something that's raised at the very last moment. And it's unclear why, given their full access to the data in the due diligence room and to the professionals who are involved in this case, why they could not have sought this information long before this as opposed to going through a discovery process on the very eve of the auction process.

Now, the second issue related to reasonable notice under the rules. The fact that these depositions were noted just last week that this is a very -- it's an unusual situation where the government has accused individual and companies of a massive Ponzi scheme and it is simply prudent for any employees having substantive roles during that time period to employ personal counsel to advise them as to, among other things, their rights under the Fifth Amendment because counsel for Polaroid is not going to be advising the individuals on that issue. So there is a need both to accommodate just a number of people and to expect that

depositions can be noted with about one week's advance notice without advance consultation simply isn't reasonable.

Mr. Peterson is back in town today. He'll present his argument shortly. I wanted to update the Court with respect to Birrell because I did speak with him last evening and he was still in trial at that time. But I heard literally on my way over here and from his partner who may be present in the courtroom and I understand that they have settled that state court matter but I don't know about the availability of Mr. Birrell besides that. The message said he was not going -- he was not going to be in town until Monday. So that's the most updated information I have about him.

And, Your Honor, the final point is one that I believe Ritchie has finally objected to the sale so there is a contested proceeding as to them. Of course, their deposition notices preceded there being a contested proceeding. As to them, I don't consider it a technicality. Just following the rules. But certainly at the time we brought this motion,

that was a third reason why these depositions should not be forward.

That's the summary of our position at this point, Your Honor.

THE COURT: All right. Thank you. All right. Mr. Peterson.

MR. PETERSON: Thank you, Judge. Judge, first off, I certainly recognize that I'm a fish out of water here in bankruptcy court and I very much appreciate the assistance that the court staff proceed to allow us to lodge notices of appearance and the like to make sure that we were handling things properly this morning.

As far as the position of David Baer goes, Mr. Baer is in a situation where he is an individual, a former employee who has quite a large number of forces of nature swirling about here and I'd like to share with the Court some of the factors that need to be considered on my part and I hope would be taken into account by the Court as it assesses whether or not a deposition of Mr. Baer should go forward because it certainly reaches beyond my availability last week and the fact that

when this all rose, I happened to be out of the country.

The more significant concerns are threefold. First, there's the general concern to make sure that my client is prepared when they are an individual caught in the crossfire. And from my point of view that involves two issues that we've lodged with the receiver. One is the issue of indemnification, but more importantly, is the issue of making sure Mr. Baer would have an opportunity to review the pertinent documents that would allow both Mr. Baer and myself to be adequately prepared for any deposition. And as I understand it from Mr. Fleming, the process of the receiver to pull together the necessary documents sounds to me like it's a situation where they might be ready 30 days from now. But even so, that may be an optimistic schedule and I'll certainly defer to Mr. Fleming on that score.

Second consideration for us is that deposition questions of the broad scope that have been raised by at least Acorn's submission is that the deposition would

clearly walk Mr. Baer into a number of difficult issues concerning the attorney-client privilege. Not only here do we have issues of when does the privilege need to be asserted given Mr. Baer's role as former general counsel of Petters Group Worldwide, but in addition, Mr. Baer and I are facing a situation where there are two parties who are claiming the ability to control that privilege. The receiver would do so. As I understand it, there is some order in connection with the receivership that extends the control of the privilege to the receiver.

But in addition to that, we've been placed on notice by Mr. Petters and Mr. Petters counsel that Mr. Petters believes that he is either in control of that privilege or may share control of that privilege with the receiver and that is going to present us yet another complicated issue that we need to sort through before Mr. Baer speaks at a deposition.

Third, and this too is a difficult issue in the circumstance that Mr. Baer would be facing if deposed, is our assessment of

what assertion or consideration should be made of Fifth Amendment issues following the reasoning of Ohio v. Reiner, one of the cases that we cited in our submission. To me this deposition request, particularly on short notice, but this deposition request whenever lodged is going to pose for Mr. Baer some issues that Ohio v. Reiner points out are fitting for somebody who is innocent but, nevertheless, ensnared in ambiguous circumstances. And to me the issues presented here are classic issues that fall within the scope of Ohio v. Reiner and would compel us to try to sort that through as questions are being posed during the course of any depositions.

So what we feel is at issue for the Court is the balancing of those concerns with Mr. Baer against the need for this testimony, the need for this testimony immediately instead of on a presale basis as Mr. Fleming has addressed, ultimately the need for the testimony in connection with the underlying adversary proceeding.

What I read into the Ritchie submission

and apparently what's highlighted in the submission that was made today even though we have not seen it or had access to it as far as I know and it may be that, you know, notice was given to my office and I'm not aware of that, but as far as I know, I'm not familiar with the submission that Mr. Fleming was referencing when he spoke. But as Mr. Fleming points out, the Ritchie focus seems to be whether or not there are insider benefits connected with the pending stalking horse bid transaction proposed on behalf of Genii Capital. And to my knowledge, Mr. Baer who left the company at the time the search warrant was executed was not involved in the structure of the pending stalking horse bid that's at issue. So to me the Ritchie need for the testimony of at least Mr. Baer is limited and I would argue not meaningful particularly at this stage of the process.

To the extent Acorn wants to reach far broader than that and talk about Mr. Baer's role as a lawyer at the company more generally, I hear Mr. Fleming and the receiver's argument that that's already been

foreclosed by the Court's earlier conclusion and I obviously don't have standing to speak to that. But in addition to that, I don't see any need for that type of inquiry in connection with any presale inquiries as I understand the sale issue that's before the bankruptcy court.

So where that leads Mr. Baer is that our request today is twofold. First, as to any request to take Mr. Baer's deposition prior to the sale, we ask that the subpoena be quashed, both for the arguments proposed by the receiver that it's out of bounds presale, and secondly, for the notion that that would be forcing Mr. Baer into a situation that would carry a lot of ambiguous circumstances and a lot of difficult issues that Mr. Baer as an individual would ask the Court save Mr. Baer from, similar to what's done to parties in connection with stays of civil litigation or what have you, that type of a balancing analysis.

The second request we would have is that to the extent that there's a scheduling conference in the underlying adversary

proceeding and some assessment as to when these deposition notices might revive, that whatever the conclusion is today that it be a conclusion that's reached without prejudice to Mr. Baer's rights to return to the court for relief at a later time to the extent the subpoena is revived because as I envision the circumstances, privilege issues, Ohio v. Reiner issues, document review issues, there are a lot of moving parts. And so I just envision that, you know, what the situation today may compel a different degree of advice on my part than maybe the case 60 days from now versus six months from now. And I would just ask that there be some avenue for Mr. Baer to address the Court at a later time depending on what the circumstances may be at that point.

So unless the Court has any questions.

THE COURT: I don't think so.

MR. PETERSON: Thank you.

THE COURT: All right.

Mr. Leonard?

MR. LEONARD: Thank you, Your Honor. Brian Leonard on behalf of Ritchie

Capital Management.

Your Honor, there's two real important reasons why discovery needs to be conducted in this matter.

First reason is that this court and perhaps the overriding reason is that this court is going to be required or be asked by the debtor to make specific findings of fact based upon evidence duly admitted into the record that the sale that will be on the docket next Tuesday is in the best interests of the estate and its creditors, number one. That the sale is made in good faith by its proponents and that all proper disclosures have been made. And three, whether a bona fide dispute exists concerning Ritchie's liens or liens that they assert and the liens of Acorn.

Your Honor, our objection to the protective motion deals with the first two of those issues. Just so that there's no doubt and for the record, we do and would like to take discovery relative to the existence of a bona fide dispute as to whether a -- that is whether a bona fide dispute exists with

respect to Ritchie's lien. But to the extent the Court feels that that issue has been dealt with by this court, I'm not going to plow that ground again. I just wanted to make that statement for the record.

Your Honor, with respect to the first two points, what we would like to inquire of the witnesses about are whether or not adequate analysis of alternatives to the proposed sale were actually made and considered and on what basis they were rejected.

With respect to the second point, Your Honor, whether the sale is made in good faith, that gets to whether or not there's insider entanglements with respect to the sale and what those entanglements are. We understand that there is a commonality of governance with respect to Polaroid Corporation and a company called Zink Imaging. That commonality, Your Honor, is with respect to Ms. Jeffries who is the CEO of Polaroid but we understand is also on the board of directors of Zink Imaging. We also understand that as a group -- and we don't know who the individuals are in this

group. That's never been disclosed -- Polaroid management as a group owns some 20 percent or so of the shares of Zink Imaging. So we've got a commonality of ownership and certainly a commonality of governance.

Now, why is that important? It's important, Your Honor, for two reasons. One, we understand that Genii Capital, the stalking horse bidder, either by itself or through the owners of Genii Capital, intend to infuse $20 million into Zink Imaging if Genii Capital is the successful acquirer of the assets of Polaroid. Now, that infusion of capital would certainly benefit Zink Imaging and its owners.

So that raises the question that needs to be answered. I don't have the answer. We're simply asking for discovery so we can find out the answer. That raises the question that needs to be answered as to whether or not the current management of Polaroid has attempted to steer the sale to Genii Capital or otherwise has an incentive to not consider alternatives to this sale. It seems to me, and despite what Mr. Fleming has stated, the

information made available under -- through this due diligence room, by the way which we were allowed to see only after signing a secrecy agreement, does not state and does not identify, at least from what we've been able to see, how much of Zink Imaging the Polaroid management people really own and who those people are. It seems to me that that's a matter that should have been disclosed and needs to be disclosed so that the issues regarding that can be put on the table for all to see and all determine.

Now, the second point or the second reason why this whole entanglement is important is that a very curious transaction took place between Polaroid and Zink Imaging within a few months of the filing of the bankruptcy case. That transaction, and I don't know that it's been disclosed, concerned a forgiveness by Polaroid of an $8 million debt that Zink Imaging owed Polaroid. Now, in return for that forgiveness, Polaroid was supposed to get $7 million worth of stock of Zink Imaging as part of an overall transaction. We believe that Polaroid never

did receive that stock. Never got anything for its $8 million of debt forgiveness that it gave to Zink Imaging. We understand we don't have all the facts and that's why we need some discovery here.

We understand that those shares went to PGW, the parent of Polaroid and one of the affiliated debtors in this whole amalgam of cases. Now, that's a very curious transaction for $8 million of debt denominated in dollars should be forgiven in exchange for stock, the value of which is very difficult to ascertain even if it has any value. But it highlights, Your Honor, an insider entanglement, an insider transaction and a potential insider incentive to act in the sale matter, in the matter that is not entirely objective or with regard to a fiduciary duty that's owed to the creditors in the case.

Now, all we're asking for, Your Honor, is two depositions. That's not a lot of discovery. We're not asking for truck loads of documents. We're not asking to depose every manager of the debtor or of Zink Imaging that these entities have had in the last

couple years. We just want two simple depositions.

We think, Your Honor, that the hearing on Tuesday is, of course, headed towards a contested hearing. I think the Court and I think everybody in this room and everyone who's had any association with this case would agree and understand that that was going to be a contested hearing from day one. The -- we think that due process, Your Honor, requires that discovery be made available in advance of a contested evidentiary hearing. We think the parties have a right to discovery.

But in addition to the due process right, Your Honor, I'd like to simply make a pragmatic point. Discovery allows the attorneys to focus on information to distill information from the whole body of evidence that might be obtained in discovery so that that distillation will result in a streamlined process at the evidentiary hearing before this court. If discovery is denied and the parties are required to do discovery on the fly during the course of the evidentiary hearing, it seems to me that is going to prolong the

evidentiary hearing unnecessarily. It would be an unnecessary use of judicial resources and it seems to me that two depositions would more than likely streamline any evidentiary -- any contested evidentiary hearing immeasurably.

THE COURT: I'm going to make an observation here. It seems to me ironic that you're talking about doing discovery on the fly when the identity of the proposed stalking horse bidder will have been out there for 60 days as of the date of the hearing and the discovery responses didn't come in until as late or discovery requests did not come in until as late as they did. I mean, that's the big question I've got for you in terms of your pragmatic side of the consideration.

MR. LEONARD: Well, Your Honor, we did ask for discovery back in February and it -- and it was opposed by the debtor. We've asked for discovery prior to that in a request for a 2004 examination, I believe. We've been before this tribunal asking for discovery and it's been denied.

Now, Mr. Fleming says well, if we would

have asked for this information, we could have gotten it informally. It seems to me that that offer has never been made until the argument this afternoon. No one has ever telephoned our office or I believe Mr. Rosow's office and said you don't need depositions, we'll give you this information informally, come on over and see it and we'll give it to you. That's never been offered to us. Now, we wanted the deposition --

THE COURT: Well, I'm going to submit to you that the whole discovery issue at the earlier hearing was shunted off in a very different direction from the merits of the sale that you're talking about now in question of issues more central to the status of the proposed sale as bona fide, and even the mode of administering this asset liquidation versus operating its way out or deferring liquidation or whatever really didn't come up. They weren't brought into central focus earlier on.

MR. LEONARD: Well, I would respectfully disagree, Your Honor. I reviewed our motion prior to today's hearing and we did

point out in our filings that alternatives to the sale --

THE COURT: I don't think you were at that hearing, were you?

MR. LEONARD: Well, I'm talking about our written submissions.

THE COURT: You mean for the earlier hearing.

MR. LEONARD: Correct.

THE COURT: Yeah. But you weren't at that hearing, were you?

MR. LEONARD: I think I was, Your Honor. I think I was.

THE COURT: I don't remember you even noting an appearance --

MR. LEONARD: I did not. I did not.

THE COURT: In any event.

MR. LEONARD: Anyway, I guess, Your Honor, but we have been I guess before the Court asking for some discovery and been denied. We've never been offered information that we, you know, on an informal basis. If that had been done, maybe we could have avoided this hearing.

I would also suggest, Your Honor, that those depositions could have been taken I suppose prior to today's date and a lot less resources utilized than are being brought to bear at the hearing this afternoon.

I would say, Your Honor, it's interesting, with all due respect to the parties, that the first reaction of Polaroid to the request for discovery was not that it's too late, was not that it was untimely but the attorneys weren't available. I understand that Mr. Rosow said and we were following those conversations, okay, well, let's reschedule these depositions when counsel is available. The response to that was simply to file for a protective motion.

But prior to that filing, Your Honor, the rationale for not undergoing discovery was changed by the debtor. That rationale now becomes Rule 9014. And the debtor then took the position, well, since that doesn't work, Rule 9014 bars discovery. My point, Your Honor, is that Rule 9014 doesn't prohibit discovery in any way, shape, or form. It simply says that many of the rules of civil

procedure will kick in if there's a contested hearing. And the debtor's position was that since there had not been a filing specific to next Tuesday's motion that joined the issues, that it was not a contested matter. It seems to me, Your Honor, that given the particular history of this case and the resources that all of the parties have brought to bear in staking out their positions that everyone knew that the ultimate hearing on the sale of Polaroid's assets was going to be a contested hearing.

This court, it's been my experience and it's been my experience with the courts, other bankruptcy courts in this district, usually takes a dim view of parties taking refuge in Rule 9014 given that anomaly that's perceived there that no one can do any discovery until, you know, a specific pleading has been filed, particularly when there's compressed time frames involved. I would submit, Your Honor, if the parties are laboring under a compressed time frame, it's because the debtor did not want to engage in discovery to weeks ago.

And to sum up, Your Honor, it seems to

me that we have a situation where a person has protested too much. What is it that the debtor does not want to see the light of day? Why is it that we can't depose the CEO of Polaroid who's obviously a central person in not only the management of the company but in the pending sale and in all the transactions that the company has engaged in in the last couple of years? We don't know that. It's very puzzling. But it seems to me that the debtor has not made the argument that Ms. Jeffries is not a material witness. And I would expect her to be the person that is called by the debtor at the sale hearing to give evidence.

So, Your Honor, in sum, I guess we feel that if there's a timing issue, that fault is not ours or certainly not entirely ours because those depositions could have easily been taken and completed by now. And we feel that we've offered, and Mr. Rosow I believe will state that he's offered to make themselves available for these depositions on a weekend, on the evening, whenever people can get together.

So it seems to me, Your Honor, since the sale of Polaroid is really the seminal and dispositive event in the case, it's the most important thing that's going to happen in these cases in my opinion, it's the crown jewel of the assets of whatever organization Mr. Petters had that discovery and access to information on the issues that the Court is going to be required to make findings on should be allowed.

Thank you, Your Honor.

THE COURT: Okay. Thank you. All right. Mr. Rosow?

MR. ROSOW: Thank you, Your Honor. In argument today I am going to try to avoid getting into the detail of the arguments that I will raise on March 31. Needless to say, however, Acorn has objected to the sale of substantially all of Polaroid's assets. And it's further argued that at that March 31 hearing Polaroid will be required to produce evidence for the Court to make a determination as to whether a bona fide dispute exists as to the validity of Acorn's liens.

Acorn believes that in connection with

that hearing that in order to prevail on its sale motion, Polaroid will need to call Mary Jeffries, David Baer, or possibly even Tom Petters to provide the testimonial evidence necessary to support the allegations contained in its adversary proceeding. With that understanding in connection with that hearing and to prepare for our supplemental objection to that motion, Acorn sought to depose Jeffries and Baer.

In response to those deposition notices, Polaroid does not argue that Jeffries and Baer are not material witnesses. They do not argue that those two individuals do not have relevant information to the issues that will be considered on March 31. Rather, they make a series of procedural arguments.

This Court's determination on March 31 will be the seminal event in this case. The Court's ruling on the sale of substantially all of Polaroid's assets will be the most significant decision this court is likely to make in connection with the Polaroid bankruptcy. The Court and the parties should be provided with complete information in

connection with that motion. The parties should be provided an opportunity to fully and comprehensively investigate facts in connection with that motion. Bluntly stated, the Court and the parties should resolve the issues that will be presented on the March 31 hearing on the merits and not on procedural technicalities. For that reason we believe that it's appropriate to let these depositions go forward. But let me discuss the procedural arguments that I believe have been raised here today.

Mr. Fleming discusses extensively as his first argument the Court's prior ruling on discovery. At the bid procedures hearing Acorn and Ritchie both sought discovery in connection with -- and I will limit this to Acorn's position at that hearing. Acorn sought discovery in connection with its argument that credit bidding should be allowed. The Court certainly denied and rejected that argument. I believe the Court's statements, if you read the full text of the statement that's in the transcript, says that the Court was denying the discovery process

and some sort of preliminary hearing as to the whole question of availability of credit bidding. And as such, we have not sought information as to the issue of credit bidding. But we at least read Your Honor's prior ruling to be limited to the issue of credit bidding and not to the broader issues that were reserved and not ruled on at the prior hearing.

Since that hearing we have been seeking and discussing with Polaroid's counsel getting information. We have requested that information be provided and at each step we've been refused. Ultimately that resulted in us serving out deposition notices. That prior ruling I don't think is applicable to the issues that we seek discovery on and should not be used as a reason to prevent us from obtaining discovery here.

The second procedural argument that has been raised is the availability of parties and their counsel. As I discussed, we made prior attempts to get discovery both before the sales -- or the bidding procedure hearing and subsequent to the bidding procedures hearing.

THE COURT: I'm not seeing either you or Mr. Leonard as saying that you called counsel in advance and tried to coordinate the scheduling. The debtor's and Baer's responses seem to profess some surprise that this was being banged on as quickly as it was which sort of, all of which sort of causes me to infer that you didn't call, give a heads up and say look, we're going to depose them if we don't get what we want and we're not getting it. Let's see if we can make sure that they're around. They have lawyers, everybody in the Petters universe is understandably a little anxious about protecting their Fifth Amendment rights and you're not going to get me to do anything other than defer to that. I'm not seeing that there was any attempt to try to coordinate this so it didn't have to be dumped on me now.

MR. ROSOW: Well, a couple of things with respect to that. A call as you just summarized did not occur. At no point in time did I call Mr. Singer or Mr. Fleming and say if you don't give me what I want, I'm going to send out a deposition notice. Given

the attempts that we made to set up a time to get together and even discuss how we were going to proceed with discovery, how we were even going to proceed with getting information and the refusal on behalf of Polaroid's counsel to have even that preliminary meeting, frankly, Your Honor, I thought the kind of discussion that you just articulated would have been meaningless given the resistance we were facing.

As to the issues with respect to the Fifth Amendment issues, the attorney-client privilege issues that were I believe primarily raised by David Baer's counsel, those issues, the attorney-client privilege issues, the Fifth Amendment issues are going to have to be dealt with in this case at some point in time. And to simply say we need more time and even if this motion is granted here today that we'll need more time with an adversary proceeding seems disingenuous. Those issues will need to be addressed. Those issues are most capably addressed based on the specific questions that are asked. And dealing with those issues at a deposition, if Mr. Baer

invokes the attorney-client privilege, we'll deal with those issues on a case by case basis. It may be that we don't need to invoke the Court's assistance in dealing with those issues. But if we do, it would be far better for us to be invoking the Court's assistance on those issues with specific questions and specific answers in mind as opposed to amorphously discussing the contours of the Fifth Amendment and the attorney-client privilege while intellectually entertaining, are incredibly difficult to do. With specific context it may be much easier.

The same thing is true with the Fifth Amendment. Should any of the parties choose to assert the Fifth Amendment, we'll deal with that as they assert the Fifth Amendment and the chips will fall as they may. But to simply say we're not going to allow a deposition to go forward because we may choose to take the Fifth Amendment precludes us from being able to make any sort of determination and present any sort of evidence to the Court.

THE COURT: I don't think that's what they're saying. I think they're

saying that the notices of deposition and subpoena were served under circumstances that there simply wasn't enough turnaround time to anticipate Fifth Amendment issues, to evaluate them and to try to prepare their clients, the witnesses to, number one, protect their own Fifth Amendment rights but, number two, be as forthcoming as possible in the discovery process. That's certainly what I'm reading Mr. Peterson as saying. The question is the turnaround time. Not stopping it dead but the turnaround time and the reasonableness and timeliness of the notice of deposition as it was actually given here.

MR. ROSOW: Well, if that were truly the intent of Mr. Baer's counsel and of Polaroid's counsel to obtain more turnaround time, there are a couple of things they could have done as opposed to filing a motion to quash the subpoenas and the deposition notices. They could have filed a motion to postpone, to provide them with additional time, to take the depositions tomorrow or to take the depositions next week. They didn't do that. They chose to seek to quash the

depositions and I think that's telling that they're not seeking more time. They're seeking to avoid being required to provide testimony.

The final, I think, procedural argument that was raised by Polaroid's counsel deals with whether an existing conflict -- contested matter exists in this case. Rather quickly, we believe that our objection that was filed prior to the February 18 bid procedures hearing clearly objected to issues not only related to the bid procedures but also to the eventual sale. We communicated with Polaroid's counsel that we would be continuing that objection so we think it's disingenuous to rely on that. Moreover, we think it elevates form over function to a truly profound degree.

Courts take a broad view of what constitutes a contested matter for obvious reasons. By noticing a deposition, by communicating in the fashion that we have, by taking the positions that we have taken, Polaroid was certainly aware that this was a contested matter and I don't think anyone

would suggest otherwise.

One last issue on kind of client preparation and this was raised by Mr. Baer's counsel. He suggested that he needed time to prepare his client, to review documents and the like and suggested that there was no way to do that because Polaroid had informed them that they would not have documents available for us for a month. No one asked us to produce documents. Mr. Baer's counsel did not ask us if we would provide him with copies of the relevant loan documents. Mr. Baer's counsel did not ask us if we would provide copies of the exhibits that we intended to use at the deposition prior to the deposition. All of those things would have been things that we would have considered, evaluated and most likely have been willing to do.

I had extensive conversations with one of Mr. Peterson's colleagues, Todd Noteboom in which I endeavored to provide him with as much information about where we were headed and what we were trying to do with these depositions. And I believe if there was really an intent to simply obtain more time

and proper information, that those conversations could have continued and could have resulted in not requiring our being here today. But I think the real desire on behalf of Mr. Baer and on behalf of Polaroid is that these depositions never occur, that Acorn never have the opportunity to do these things.

And I think in connection with what, going back to my introductory marks, will be the most significant decision that this Court is likely to make in connection with the Polaroid case that it would be a travesty if Acorn were not permitted an opportunity to conduct some minimal and reasonable discovery.

THE COURT: Okay. Thank you. Let's see, Ms. Dykoschak, I think you pitched in or folks in Chicago pitched in something on behalf of the committee.

MR. OTSUKA: Thank you, Your Honor. Greg Otsuka, Paul, Hastings on behalf of the official committee of unsecured creditors.

You're correct, Your Honor. The committee filed a brief joiner with the debtor's motion and I certainly don't want to

repeat the points in the papers or that Mr. Fleming just made. I just do want to highlight a couple of concerns that the committee has.

First of all, as is obvious to anyone, the committee has the same objective as the debtors in this process and that is to maximize the value of return to the estate through the sale. And the committee has concerns that the discovery sought by Ritchie and Acorn will frustrate that objective. At a minimum, at this 11th hour, it will detract valuable resources of company employees as well as the debtor's professionals responding to this discovery as it already has.

And I also want to point out that in Ritchie or Acorn's papers, and I don't remember where it came up, if it was in connection to the response to this motion or in the objection that Ritchie filed this morning I looked at for about two minutes before the hearing, but the suggestion was, well, we can just postpone the hearing to allow us time for this discovery. From the committee's perspective, delaying the sale is

certainly not a viable option. The auction schedule has been in place for well over a month and was approved by this court. It was implemented by the debtors after consulting with the committee. It was a careful balancing to allow all interested parties sufficient time for due diligence while also balancing the burn that the debtors will go through. So in effect, any delay in the sale costs the estate money. And given the circumstances of how this discovery dispute came about, that delay and that cost is certainly not warranted.

From our perspective, just taking a step back and looking at this, Ritchie and Acorn have had access to the due diligence materials for several months and I have yet to hear an explanation either in the papers or today of why they waited until, as I counted, three business days before the auction to first raise this issue of an insider sale, the Zink issues that we heard a little about. Until yesterday that was the first, at least to me, had heard that this was -- that was an issue that Acorn and Ritchie had any concerns

about.

As Mr. Leonard said at least once or twice, something to the effect of everyone understood from day one that this was going to be a contested sale hearing, well, I think that begs the question then why did Ritchie and Acorn wait until later than the 11th hour to seek this discovery and to raise these issues.

So in sum, the committee then joins in the debtor's request for a protective order and the relief sought by the debtors.

THE COURT: Okay.

MR. OTSUKA: Thank you.

THE COURT: Thank you. All right. Mr. Singer, I'm just going to ask you to comment on the issues that Mr. Otsuka just raised as going specifically to the suggestion by the two respondents here that maybe we could just defer the sale hearing for a while to allow them to do their discovery and muster whatever they care to muster. They didn't really pitch that in their oral argument but they did raise it in their written submissions. So I just want to have the

debtor's take on that as well as the committee's.

MR. SINGER: Well, Your Honor, as the Court observed at the last hearing and it's true today, the debtors, its employees, and its professionals have been working night and day trying to have an auction and trying to maximize value and do all the things that were contemplated to bring in bidders and establish a process and respond to ongoing due diligence requests. It is a tough job. It is a tough job for this company under these circumstances. And we have tried to be -- have an open process for both prospective bidders and parties in this case.

As Mr. Otsuka outlined and Mr. Fleming outlined, the data room was set up at the end of October and November and everything has been in there and everything has been open. And you know, so in terms of process, Your Honor, as you're well aware, we've noticed out the sale for the 31st. We have buyers and bidders hopefully flying to town for an auction. Bids are due at the end of the day today. I'm not too -- hopefully at the end of

the day today we'll know what the auction will bring. But, you know, people are flying to town with the idea of having an auction and a sale hearing the very next day. Creditors have been noticed up what's going to happen on the 31st. And, you know, I'm particularly troubled by some of the comments, you know, from Acorn and Ritchie about professing not to have access to information.

As this Court heard me say on the record and I said no less than four times individually, that if they have a better idea, if they want information, we don't have an agenda. Their money, their proposals, if they have a plan proposal, I'm happy to give information to do that. Houlihan has met with them, met with Ritchie no less than three or four times with Mary Jeffries there to discuss options. So I'm a little bit disturbed by, you know, the famed last minute well, gee, we didn't have time and something just came up. Information about Zink which is what they're pointing to has been in the data room for a long time. The stock transfer referenced, all which we, you know, has been in the data room.

It's been the subject of an attachment to the purchase agreement.

You know, I think they're raising some issues about Mary Jeffries and so forth. Admittedly every piece of information about Zink is not in the data room because we don't have access to everything. This is a Polaroid sale. But certainly the relationships about stock transfers and consideration exclusivity agreements, all of which are one of Polaroid's most valuable assets in relationships, there's no secret about that. And the relationship between Genii and Zink was set forth in our sale motion pleadings.

And again, you know, Your Honor, what really troubles me is what this really is about. If you look at the letters in the exhibits and the 30(b)(6), what they're after is they want to -- they desperately want to have the adversary proceeding litigated as quickly and as fast as possible and that's what, in my view, these depositions are all about and that's what the information sought in the 30(b)(6) is all about.

The first 11 things that they seek

deposition about have nothing to do with the sale. Nothing. The requested -- the communications from Mr. Rosow to our firm is consistent with that. They wanted to have a 26(f) conference which we accommodated this morning. They wanted to take discovery in connection with the adversary proceeding. They want to talk about their liens. They want to talk about their debts and so forth. It's all about the adversary proceeding. That's what this is about. And I find that particularly troubling particularly at the final hour.

But in direct answer to your question, Your Honor, you know, Polaroid has been working tirelessly and that work is not yet done and that work is ongoing and more heated and more desperate throughout the week and this weekend and we'll be working I would -- all weekend long in order to try and prepare for the sale hearing and prepare for an auction that I hope will yield positive results notwithstanding contentiousness and objections by Ritchie and Acorn to everything that happens in this case. Did I address --

THE COURT: I think so, yeah. Thank you. Okay. One more opportunity for comment here.

Mr. Fleming, did you have anything else you wanted to add?

MR. FLEMING: No, Your Honor. It was covered by Mr. Singer right now.

THE COURT: Okay. All right. Mr. Peterson?

MR. PETERSON: No, Judge. I believe you understand our position.

THE COURT: Okay. All right. Mr. Leonard?

MR. LEONARD: Just two quick points, Your Honor. Thank you.

In response to Mr. Singer's comments about the -- in answer to your specific question, I think the answer that he did not give is most telling. He did not say the sale would be jeopardized or would fall through if it were postponed for a handful of days to allow the depositions to go through. Indeed, given the relationship, the strong relationship that the stalking horse bidder seems to have to the parties in this case, I

doubt that they're going to go away and there's been no demonstration that that's the case.

With respect to the comment, and this is my final comment, Your Honor, of counsel for the committee he asks why did we wait so long. Well, we didn't wait so long. We've been trying to get information for a while and these deposition notices went out a couple weeks ago. But to the point, we wanted this discovery to aid us in filing our objections to the sale. We thought discovery would help focus the objections and would -- with the discovery maybe some of the issues we're raising would fall by the wayside. Maybe other issues would come up. We don't know. But we were hoping to get those depositions done in time to include whatever information from that discovery would be appropriate and the objections.

Thank you, Your Honor.

THE COURT: Okay. Thank you. And Mr. Rosow?

MR. ROSOW: Nothing further, Your Honor.

THE COURT: Okay. Anything else from the committee?

MR. OTSUKA: No thanks, Your Honor.

THE COURT: All right. I'm going to ask the parties to come back in about 45 minutes and, unfortunately, I probably can't even offer you the availability of a good cup of coffee in the building or even at this end of the skywalk at this hour of the afternoon in downtown St. Paul. But I want to consider what has been said on the record in argument which often, as is the case here, puts a different spin on things before I try to give you a ruling. Maybe one point here, however, to address as long as it's fresh in mind.

Mr. Leonard's office submitted to the Court's electronic in box this morning a document entitled motion by Ritchie Capital, LLC and its affiliates for order authorizing the filing of documents under seal. But as part of that same unitary document submission, one PDF file was also the document that they would have filed under seal which is the

Ritchie party's objection to the sale of the debtor. Now, that was just shipped into the in box all as one document. That's simply the wrong way to go about obtaining a sealing of documents.

Under the Court's local rules, local Rule 9013-2G provides that the motion to file the documents shall be filed electronically through the electronic case filing system. In other words, filed directly as an open and fully accessible document. The documents that the movant seeks to file under seal are to be filed to the in box filing option and shall remain sealed until further order of the court. In other words, until a disposition of the request to seal the documents.

Then there was all a dither of conversations between Mr. Leonard, people from his office, my calendar clerk, my secretary ended up becoming involved, the clerk of our court was involved at one point along the way over what was to be done here. I'm just going to harken back to Mesaba Aviation where the debtor's counsel brought on a motion early on for authority to seal certain sorts of

documents in connection with the Section 113 proceedings that went to the costing of various proposals by the debtor for reduction of labor costs. We had a hearing on that motion. The unions opposed it. I considered everything very thoroughly, issued a ruling. Then there was an order going forward that allowed certain documents to be filed.

Now, just plopping in something by way of what really is a unilateral request to seal something that otherwise is presumptively a matter of public record without any notice to anybody else and accompanied by the document itself just all slammed into the in box is the wrong way to do it, Mr. Leonard. Now, I gave a direction that was passed on to your staff and I think it's been taken care of already that the two pages of the motion itself were to be filed properly under the local rule and the rest of it I think actually was taken out of the Court's electronic in box and put over into some sort of sequestered file so nobody in the clerk's office would inadvertently go ahead and docket it.

So now what I've got before me is what

purports to be a motion which really comes in as an ex parte application. There's a representation at the end of it that the subject documents are being filed under seal at the request of the debtor. And I guess the reason why I'm bringing this up right now is to make sure that that's the case.

Mr. Singer?

MR. SINGER: Your Honor, every party that has had access to confidential information of the company was requested to sign nondisclosure agreement which Mr. Leonard characterizes as a secrecy agreement. And I got -- received a call from an attorney at Mr. Leonard's office indicating that they intended to file an objection and attached to that objection information that they obtained for no other source other than through access to confidential information of the company. And I asked for an explanation of what information are you intending to file. And the response was well, I'm not exactly sure yet. We're working on a response. I'll have to check with the local -- our local lawyer in Chicago who was handling this but if we file

it under seal, are you okay with that. We don't want to be violating our confidentiality agreement. And my response was well, I don't know what you're filing and how I really feel about it but if you want to handle it that way, I've got no objection to having it handled under seal and then you can file whatever it is that you see fit that you've obtained from confidential sources. I had no idea what they were filing.

THE COURT: What I've got here is what's pretty clearly counsel's work product, the objection itself, standard legal and factual theories and so forth, all very well and good, 17 pages long. And then there's an attached affidavit by one James E. Wordamon, consultant for Ritchie Risk Limited, LLC, setting forth various factual matters which, frankly, I haven't had the time to even cross my eyes at the content of this affidavit five pages in length since it came in. And I am -- Mr. Leonard is the one to ask about this but I'm assuming that whatever is summarized in this affidavit probably in fairly conclusory fashion is what is to be deemed the

fruits of the access to the due diligence room but -- and I don't know if you know anything about that.

MR. SINGER: It's my assumption that is the case and I, like you, Your Honor, received it an hour before the hearing. I quickly scanned it. It was focusing on the discovery issues and not really the merits of all that much of what's being discussed other than some issues about Zink and Ritchie but I haven't had much chance to digest the information there, if that's the question.

THE COURT: Okay. So I take it you've stated about as much as you care to state in relation to this request that is -- that I seal this document or some portion of it.

MR. SINGER: Yeah. At this point without looking at it further, Your Honor, that would be a correct statement, yes.

THE COURT: All right. But in any event, you on behalf of the debtor weren't requesting that it be sealed. You stated that you had no objection to this being submitted

in this way?

MR. SINGER: I think that's right. I expressed some initial concern over it because I had no idea what -- you know, there are various pieces of information that I would regard more sensitive than others and at the time when I have the conversation with Mr. Jorissen, I had no idea what it was they were going to attach. And I think they were trying to be respectful of the confidentiality agreement and respectful in communicating with me about what their intentions were but I had no idea at the time it was. So it wasn't initially a request but it was certainly something that, you know, in a blanket sense if they're saying, hey, I want to file whatever we got, I certainly supported that approach.

THE COURT: Okay. All right. Thank you. All right. Mr. Leonard, I want you to speak to all this.

MR. LEONARD: Your Honor, if the question that the Court wishes me to address is whether or not it's the debtor that requested that it be under seal, the answer is

absolutely yes. There's no reason for us to file it under seal. It's not our confidential information. We wouldn't have done that but for the request of the debtor. I spoke to Mr. Singer shortly after I received a call from your calendar clerk and Mr. Singer repeated his -- the word that he used in our conversation a couple hours ago was he'd prefer that we file it under seal. I said well, the Court may have an issue with the manner in which that was done this morning. Mr. Singer said well, you know, I'm here to take a telephone call if anybody wants to call me until 12:30. Prior to that time, Your Honor, the position of the debtor was most certainly file it under seal because we don't want any confidential information to be disclosed and we, on our end, did not want to be put into a position of being vulnerable to some claim by the debtor of having breached a confidentiality agreement.

We have no motivation to file it under seal. That's more trouble than it's worth. And obviously, in my mind, no good deed is going unrewarded here because we did it all

because we thought that's what the debtor wanted us to do. And that's what we did.

THE COURT: Again, I'm going to submit to you, you know, it would have been a little more -- it would have been a little easier on me and my composure heading into what otherwise was going to be a contentious hearing not to have to square off with having this thing plopped on me an hour before the hearing. All right?

MR. LEONARD: Well, I understand that, Your Honor.

THE COURT: This could -- this request could even -- could have been filed yesterday and at least then something could have been done to put the issue of whether I should seal this before me in a little more thoughtful manner and a little more measured pace. Okay?

MR. LEONARD: I understand. I agree. You know, best of both worlds, we would have done that yesterday or even the day before. It's no excuse and I'll take responsibility for it. There's a press of time, Your Honor and, frankly, we were dealing

with this motion today, this -- and the objection and everything else all at once with a lot of balls in the air and, you know, I will -- I think your comments are well taken. We should have done the sealing motion, you know, a couple days ago.

THE COURT: I don't even know if you have that refined an opinion as to what in the affidavit or in your own work product would violate the confidentiality agreement. And I'm not asking you to say anything on the record about it right now obviously.

MR. LEONARD: I'm not sure, Your Honor.

THE COURT: Was this out of an abundance of caution or what?

MR. LEONARD: Very much so. I mean, the confidentiality agreement, Your Honor, says that any information that's obtained out of that data room, you know, at least the way I understood it, you know, is confidential subject to the terms of the agreement. It can't be disclosed, et cetera, et cetera. So there is information that was gleaned out of that, whatever it is.

And, frankly, the Court is correct and I think Mr. Singer told me on the phone that he had had time to scan it. It all has to do with this insider entanglement that I described earlier on. That's the only issue. That's the only information that is gleaned out of that. There's no product information. There's no patent information. There's no proprietary software information or anything like that that most companies feel has some value.

Once again, if the debtor would say unseal it, we're okay with that, that solves the problem but I don't hear the debtor saying that. Yet the debtor is really kind of waffling when they say well, we didn't really request it but we told them we wanted them to do it that way. So, you know, we're kind of stuck between a rock and a hard place there.

THE COURT: All right. I've heard enough. Mr. Singer, was there anything else you wanted to add in reference to this?

MR. SINGER: Well, again, Your Honor, you know, I just hadn't had a chance to look at what they were filing so I had no idea

what it was and I still don't know that I've had enough time to digest what it is. I'm not --

THE COURT: All right. I've had some input on the issue anyway. I'm not going to say what I'm going to do with the request to seal at this point obviously.

All right. I'll ask you to come back, then, at quarter to 4 in light of the fact that we've just burned up 15 minutes on another peripheral issue. And I'm just going to say for the record, you know, I get very vexed when we get off on to these peripheral issues rather than sticking to the merits of what bankruptcy is all about which is the maximization of value for recovery for creditors and parties in interest.

All right. I will be back out at quarter to 4, then, and I will see how much of a ruling I can give you. We're in recess.

(A break was had in the proceedings)

THE COURT: On the record in Polaroid Company. My apologies to everybody

here for being late. One of many flaws of my judicial character is I consistently underestimate the amount of time it's going to take me to dispose of something under these circumstances by 10 to 15 minutes. But I am prepared to give everybody a ruling on the two motions at bar here and the rationale is as follows: I'm going to address the several aspects of the motions and the responses by the Ritchie and Acorn parties separately here.

First, I just want to address what I would consider to be the sort of broadest and most abstract plane of the dispute. And I will start that off by observing that the debtors were not well founded in resisting a discovery process under the argument that the sale motion was not a contested matter within the scope of Rule 9014(A) when the notices of deposition were served.

Now, the phrase contested matter is not a defined term under the Bankruptcy Code. I don't even believe it appears there or the Federal Rules of Bankruptcy Procedure. Rather, 9014(A) establishes it as a sort of catch-all repository for any sort of request

for judicial relief that's not covered by part 7 of the Bankruptcy Rules, in other words, adversary proceedings, or that is authorized to be presented to a judge by a purely ex parte request. The federal rules don't seem to really have too much by way of examples of the latter. Our local rules try to define it and isolate the notion of an ex parte request in the category of application. But a contested matter is sort of, as limbed in Rule 9014(A), any sort of request for judicial relief that's made in the context of a main case in which there exists the potential for opposition by another party in interest to the case. That's what I glean out of the structure of the first sentence of Rule 9014(A).

So the upshot here is that a given proceeding in a bankruptcy case, that proceeding having already been commenced by filing and service of a request for judicial relief, does not have to be actually formally contested of record with a response on file with a real opponent respondent for it to qualify as a contested matter. Now, the

reason why that's important, of course, is that you go on to Rule 9014(C), and Rule 9014(C) makes various other provisions of part 7 of the bankruptcy rules including discovery procedures which in turn incorporate discovery governance from the Federal Rules of Civil Procedure, make them applicable to contested matters.

Now, I think that this conclusion is bolstered by the character of the first sentence of 9014(A). It creates the concept of a contested matter. And that sentence is prescriptive as to form. Relief is to be sought "requested by motion" and that sentence is also prospective, the verb is shall be. That's both mandatory and oriented toward the future.

So a contested matter is a contested matter. It's started by the making of a motion, the filing and service of a motion but it does not await an actual contest to become a contested matter. So the use of the word contested is a little illusory in that context. But I think when you read the whole sentence and all of Rule 9014 together, that

makes a lot of sense. So as soon as a contested matter is commenced, Rule 9014(C) makes various discovery procedures available under the cited rules in rule 9014(C).

So the debtors opposition here on that ground really was fussy. It was overly technical and yes, I will agree with the characterizational word that Ritchie's and Acorn's counsel used, it was somewhat disingenuous. There was no basis for opposing discovery requests on the ground that an objection to the sale motion had not yet been filed. The two parties were not out of bounds in seeking to conduct discovery, they were not put out of bounds by the structure of Rule 9014.

All right. Number two, as another sort of broad consider -- another broader consideration I should say here and that was the argument by the debtor that any further discovery generally or as to certain broadly identified subject matter was precluded based upon my denial of the earlier request for leave to conduct discovery procedures.

Now, the record of my ruling in the

earlier hearing, and I'm not going to really cite it in any detail here, there wasn't time over the course of about an hour there to get into it in any detail, but the reading of the ruling that I made there did not expressly preclude appropriately conducted discovery into the merits of the debtor's sale proposal.

Now, I did basically shunt off and stop any -- the possibility of any discovery at that point into any factual issue related to credit bidding, but it was not my intention and certainly not my express directive to bar appropriately conducted discovery into the merits of the debtor's sale proposal. I did, however, and maybe I didn't make this clear enough on the record but I shouldn't have had to, I expected the parties to move with dispatch. There was no question they were going to have to if this train was going to stay on time. And I expected them to move forward in a measured fashion that made both appropriate use of available formal discovery procedures and sort of supplied with the local prevailing culture of handling things in bankruptcy cases which is generally to try to

make information available informally, to recognize time is money. And there's not a lot of value properly put into wheel spinning into contested discovery procedures since that will only erode the estate by the accrual of administrative expenses and by the loss and value that might be intendant to delay. So I expected the parties to sort of balance those two values against one another, the absolute right to engage in formal discovery processes if you had to but also some deference to the prevailing local understanding that parties in bankruptcy cases can generally trust one another to be forthcoming on an informal basis until they could no longer be in the best interests of their clients.

Now, when we get down to the actual conduct of the parties to the contested matter in question here, the sale motion, it's not as all clear-cut as both of those things. I just ruled that the debtor really did not have a basis for resisting discovery in general in the abstract starting way back when the motion was filed on those two bases, but when we get down to the actual conduct of the parties

here, it gets a lot more complicated.

Now, no argument that the Ritchie and Acorn parties can make can get around the fact that the two major focuses of their objections to the sale motion have been a matter of public record for two months or will have been a matter of public record for a little over two months by the time the sale motion comes on next week and that they have been fully on notice of those two major sources of the focus of their objection.

Number one, the debtors announced from the get go, practically from the first hearings in the case that I had in very late December, I believe it was over that swing period between the Christmas and New Year's holidays, that the near certain outcome for the administration in this case would be a sale of assets under Section 363 to be conducted sometime this spring as early as possible but in a fashion so as to try to maximize value.

A major investment banker was hired early on to evaluate and to start preparing for such a sale process and then the debtor's

actual motion for sale filed on January 28, 2009 made it unequivocal that that was the actual election by the steward of the estate here, the debtor in possession, to administer the value that was inherent in this debtor when the case was commenced. It was no secret that this debtor had and through its professional persons, counsel, investment banker and the like had thoroughly evaluated the prospects of trying to operate its way out of Chapter 11 towards some end of paying creditors through future revenues and have rejected that in favor of a sale.

Now, that put all potential opponents of that specific strategy to try to sell the assets this spring on notice. And it fully enabled them to evaluate and formulate their responses to that general mode of administration of assets early on.

I'm going to observe as an aside, you know, we've got very special circumstances in this case. All professional persons in the case really in some sense or another maybe only metaphysical for some of them, actual for others, all of them have to be responsive not

only to the goals of the bankruptcy process and to the bankruptcy court as a forum, there's also the presence of the United States District Court through the receivership proceedings commenced in connection with the Tom Petters criminal cases as well. The receiver in that case, Douglas Kelly who doesn't have standing in this case, there is a debtor in possession here with active management represented by counsel, but ultimately the receiver in that case one way or another is a party perhaps at several levels removed as successor in interest through the control that he had to take as receiver of the shareholding in this debtor whether it be through several levels of holding companies but ultimately he had to take the position there. And he in turn is responsible for the U.S. District Court and responsible in turn through that receivership for maximizing value. There is a sort of concatenation of motivations here.

Finally, you know, this case simply by the currency of this debtor's brand name, its historic status as sort of an American success

story of the post World War II era, having been very much on the scene while everybody here in this courtroom was growing up with its products and as an ancillary to the very notorious Petters case and cases both in the district court and in bankruptcy is very much in the public eye. You know, there has been much incineration here that somehow there could be a sweetheart deal here. There's much by way of engrained, in-built loyalty to abstract obligations, fiduciary duties here that would tend to militate against, to shift perhaps a burden of persuasion in the last instance against any such impugnment. There are stacked fiduciary duties here.

So the question then is, you know, what effect does that have. And I'll just say I don't know that it formally shifts a burden of production of evidence on anyone who doesn't support a particular election for administration of the assets in the first instance. The debtor here is going to have to make a prima facie case. But those who argue that some sort of difference means of working this debtor, these debtors or their assets or

the inherent complex of value that ultimately has to be chargeable over to distribution under the bankruptcy process, that a different means of doing that would be more in the best interests of creditors in the estate, any such opponent will ultimately have to bring forward some evidence of its own. This is not just going to be a matter of attempting to shoot a bunch of holes in the case of the debtor and then saying they didn't meet their burden because if the debtors here come forward with enough evidence going to the thoughtfulness of the process under which the conclusion for this election of administration was reached, then that's going to carry prima facie weight in and of itself. We'll see what comes forward at the hearing next week.

But what I'm trying to say here is I haven't had any intimation yet from the Ritchie or Acorn parties that they intend to bring forward any evidence to backup their demand that something different should have been done or should be done yet to maximize value in this case. I'll be very interested to see whether they bring it forward.

So going on here, the identity of the prospective stalking horse bidder and at least the broad contours of relationships through stock ownership, post, past or present employment or officer or director status were disclosed to these two objectors, two parties that would take the discovery now through at least three instrumentalities. There was the content of the motion regarding the sale procedures filed back on January 28. They were filed earlier than that and the motion for authority to sell. There were the materials posted in the due diligence room and the statement has been made that those were always accessible to these parties and were, in fact, accessed. And then there was the dissemination of information to interested bidders which the Ritchie parties by representation actively participated in on multiple occasions by interaction with Houlihan Lokey.

Now, in my estimation, the fact that all of this was out there put a significant onus on anyone who might question the aspects of the debtor's proposal for administration,

and specifically, the identity of the stalking horse bidder, the structure of the sale, the amount of the consideration and the like put an onus on those parties to commence discovery early in that two-month span that started in January 28. It will also put an onus on them to formally push any discovery spawned issues before the Court if there was resistance on the part of the debtor. And the reasons for that are manifest. And everybody who practices bankruptcy knows this. Things move quickly here.

I've had more than one general civil litigation practitioner come in and say gee, things work differently here in bankruptcy court. And the explanation always is here more than anywhere else time is money. Everybody's in an impaired posture. Debtors are gasping. Businesses are failing. They have faltered. They lack capital. Creditors have made bad investments in enterprises that failed. Individuals need a fresh start. Time is money and the mere presence of assets in a bankruptcy estate is often a significant drag on value. Whether they would have been more

of a drag on value by creditors picking apart the assets in enforcement of rights as judgment creditors or secured parties is another question.

But the fact of the matter is, things move forward quickly in bankruptcy to stanch the erosion of value, both the external erosion from market conditions, from lack of capitalization and any internal erosion that might happen simply by the bankruptcy process dragging on and parties out there, prospective bidders think, ah, we have a wounded animal here that's vulnerable. Let's see if we can scoop up a bargain. So time is money. Things move forward quickly.

There's been full representation by the debtor and its counsel joined in by the committees and its counsel that there's an ongoing drain on estate resources here. There's the possibility of an operational deficit administration due to operational and administrative expenses dictating that a sale be accomplished quickly. There are the uncertainties of value in general current economic conditions, the possibility of

further erosion if the recession deepens. And that's something none of us really know here yet. There is the sort of more vague and more distant taint here due to the connection with the ongoing Petters cases, although Polaroid certainly at this point by representations seems to be more distant from that taint than those other several cases on my docket, Petters Company and Petters General Worldwide may have. And obviously going to the value of these assets. There is a manifest need to hold and bolster a market position in a very competitive economy that's probably become quite dog eat dog as individual consumers means tightened over the last year and the market for the sort of consumer products that this company purveys in the open marketplace has temporarily contracted in recession circumstances.

But a raid along with that need to hold and bolster a market position is, of course, a relative lack of current funding and certainly a lack of availability of capital both generally and that that automatically comes with status in Chapter 11 that prevents any

sort of large market launch or considerable development. All this affects value and it's going to affect it on a mounting basis as time goes on.

So it's absolutely clear that this process was going to go ahead. The timetable was fixed and there was a certain amount of horse trading that went into the fixing of that timetable back at the hearing on the motion for fixing of bidding procedures and the sale motion. The committee actually prevailed on the debtor to extend out by a number of weeks the hearing on sale and the sale procedures with an idea toward balancing that versus the erosion prospects but balancing an extension with the idea of exposing the goods to the marketplace longer and enabling the investment banker through efforts to try to drum up more interest in bidding.

Now, the proof will be in the pudding when we get to that next week and I'm always the last one to hear about something like that. And nobody's really heard the last word as yet because today's the deadline for the

bids. But there was no question whatsoever this process was going to go forward and nobody came forward to challenge that track for the case until very recently. It could have been challenged a lot earlier.

Now, there are other simpler and proper practical but nearly as cogent reasons for pushing forward on a discovery process earlier after January 28 rather than only in the week and a half or two weeks before the sale hearing.

Number one would have been trimming out the dead wood, getting rid of false issues like the debtor's opposition based upon the preclusion from the earlier ruling or the technical insistence on Rule 9014. And that could have been brought to me if necessary pretty early on.

Number two, it's always better to try to get your discovery scheduled up early rather than later because you can't always assume witnesses or attorneys would be available at the last minute. And guess what, that one hit with a vengeance here. Witnesses can be otherwise engaged, attorneys might well

have scheduling conflicts professionally, and this time of year most people in this climate who can afford to do so, I won't say most, but some people in this climate who can afford to do so will take a vacation in someplace warm. And March is often a popular time because it's not quite as expensive to do it as it is in December, January or February. And as it turned out, you know, you had all three of those things sort of crop up here, scheduling conflicts, a long scheduled vacation by one of the attorneys involved, witnesses otherwise engaged. And as, say, the preparation for a hearing on the sale motion went on, it was by far much more likely that people in-house currently employed by the debtor were going to have a much more credible colorable claim to being engaged, being very busy than it would have been had this been done back in February. So it's just generally prudent to avoid the jam at the end to obviate the risk of just what happened here but that wasn't done.

And then, of course, there's the imposition on the process in general. It sort of creates the specter that what's -- what

it's all about is stalling tactics, trying to gum things up. The dynamic that's attendant to the Chapter 11 process, particularly where there's a Section 363 sale in the offing, is sort of presumptive. It's a dynamic. It presumes that these matters will go ahead fairly quickly for the reasons that I've cited earlier.

And as I noted earlier, you know, the debtor's original proposal to really slam it on was actually stretched out at several weeks, for several weeks at the committee's instance. And all of this is, you know, borne forward by considerations of recovering as much value as quickly as possible and by a balancing of those several considerations.

So yes, secured parties' interests are to be considered in all of this process and I don't question about it. But they can't drive the process and they can't be considered in isolation. They're only one of several variables. And those interests in terms of their professed need to develop evidence were not interjected into this until literally the very last minute, the motion that came on

today.

Now, the upshot here is that in the specific circumstances of this case, given the ample notice of what the debtors were going to request from the Court along a specified and long notice time line, the conduct of the Ritchie and Acorn parties in failing to initiate the specific deposition procedures here in question of these two witnesses here was not appropriate. Their professed interests in inquiring generally into this proposed subject matter were and are now outweighed by the manifest need to continue the process towards seeking court authority, putting that issue before the Court, and for the debtor to prepare for the proposed sale according to the original time line.

I am going to hold that it would have imposed undue burden and expense on the estates and on Mr. Baer for that matter as well to have to have undergone the depositions when originally noticed two days ago and it will do so now, even more so now, given the fact that we're every day more in the pinches toward preparing for the procedures to be

brought on next week.

The availability of counsel was an issue, then, obviously. I mean, I have to defer to the fact that one -- number one, the attorney for one of the proposed deponents was out of the country. And number two, the attorney for the other one had a trial commitment presumably long scheduled. There's nothing to be done for that, quite frankly. And by now there really only are a few days remaining for the hearing and really only one working day next Monday other than tomorrow. And I would not be ordering a deposition to be held on less than 24 hours notice with the gravity of the issues that have been developed here in response to the notice of deposition.

And I do want to note I'm giving specific deference to the concerns regarding the issues that Mr. Peterson brought out here. The manifest questions of attorney-client privilege, including the complications that Mr. Peterson identified. I mean, if you've got Mr. Thomas J. Petters saying that he would be able to assert the attorney-client privilege and Mr. Kelly as receiver is

asserting that he could, and then of course you got the debtor in possession here which could as well, you've got legal issues there. And those legal issues are better, by far better dealt with with a little thought upfront rather than just by blanket assertion.

And further, you've got the Fifth Amendment privilege of the deponents and I can't dismiss that out of hand. Had these lawyers known that their clients were going to be deposed a month or six weeks ago, had they been put on notice, that would have been an issue that could have been prepared for and I wouldn't have to give quite as much deference to it now.

But I have no reason to doubt but that Mr. Peterson's position as taken and the debtor's position here as to the debtor's CEO is taken both with a due regard for their obligation to respond, but on the other hand, their right to protect their own privileges. And it's easy for creditor's counsel to elide the complexity of the possible issues there but it's very difficult to adequately protect an individual deponent from the risks that

might be posed by questioning made to them when you have almost no notice of it.

So as a general proposition, which I think is fully contemplated by Rule 26(C)(1)(a), I may quash the subpoena that was served here and forbid the taking of the depositions and I am going to do that.

One other issue -- two other issues I want to just note here in passing. Again, there's been the raising of the issue I believe by Acorn and sort of in passing by the Ritchie parties the question of an evidentiary burden regarding their client's -- their interests in the assets being in bona fide dispute. And I just wanted to expand upon it because that's another reason basically for barring inquiry into that issue as late in coming as it is. And under, again, as precipitous circumstances as it is, you know, I have to hold that any such discovery inquiry would not be calculated to lead to the discovery of admissible evidence.

Again, we've got two adversary proceedings complaints filed here. I reviewed those again this morning and I again am going

to hold here that the Bankruptcy Appellate Panel decision in Gaylord Grain can be distinguished from the situation at bar. There the trustee in question presenting a motion for sale free and clear had not filed an adversary proceeding and yet was saying that a sale free and clear was appropriate because he contended that the lienors positions, the secured parties liens were avoidable and would take action to do that at some point in the future. And the Bankruptcy Appellate Panel opinion, which I think Judge Kressel authored, made reference to some amount of evidence being brought forward, an evidentiary burden of some sort to prove up that there would be a bona fide dispute over it.

But expressly as I noted the last time around when I ruled on this issue, the discussion in Gaylord Grain opens with a recognition of the fact that proceedings, adversary proceedings had not been commenced yet. So, therefore, the issue became, a transitive verb there, the issue became whether there was a bona fide dispute.

Now, I'm not going to make too much of that observation and say that it has to be given substantive effect toward the end that if a complaint in adversary proceedings is commenced, there automatically is a bona fide dispute. But it strikes me that at that point what you do is take a look at the complaint and subject it to a Rule 12(b)(6) analysis. And maybe this one came to mind, certainly came to mind since the last hearing which I held forth on this issue because I have been laboring with my chamber staff over a decision disposing of a Rule 12(b)(6) motion and have had to look rather deeply into the Supreme Court's opinion in Twonbly v. Bell Atlantic, but I think you look at that complaint with a Rule 12(b)(6) analysis and if it looks like it would withstand a motion for dismissal for failure to state a claim, in other words if it contains enough of a factual narrative there that if true would make out a prima facie case for the relief, then there's a bona fide dispute.

But there's no way anybody can convince me that Section 363 requires any sort of

evidentiary inquiry when there is a pending proceeding to challenge the opponent's interest in the property in question and that pending proceeding says what it has to to go forward on its merits against a motion to dismiss. There's no basis for taking evidence at that point. And there's never really been a suggestion here from Acorn, which has sort of taken the lead on this issue, or Ritchie as to just how much evidence I would have to demand and what I do with it then. I mean, am I supposed to take a look at it from sort of a probable cause analysis as would be applicable in criminal cases and if there's sort of enough there that maybe there's enough to kind of go forward on, maybe well then I let it go. Or should it be a summary judgment analysis? Should I be applying a preponderance of the evidence burden? Should I be applying a burden of persuasion as well as production? What should I do with it? No. When you got an adversary complaint, proceeding complaint on file and it says enough to carry the matter forward, pass a motion to dismiss, there's enough specific recitation of facts that would

make out elements under which the lien could be avoided, then there's a bona fide dispute. And there's no way I'm going to be pulled into prejudging the merits of the two complaints at this point. As evidenced by the pleaded facts, they're pretty complex matters. Lots of historical fact, lots of transactional fact, lots of documentary fact and probably some real facts going to parties' intentions and transactions that would have occurred that aren't evidenced by transactional documents.

So it simply isn't appropriate when you've got two complaints in adversary proceedings that contain the degree of factual development in their allegations on their face that the two here are to allow discovery into the underlying factual merits, the evidentiary basis for those allegations heading into the hearing on a Section 363 sale.

Now, that's not to say that I have adjudged these complaints sufficient at this date to withstand a motion for dismissal. I'll take a look at it next week. But that's the standard I'm going to apply. And the reason why it's important to annunciate that

at this point is that otherwise, arguably, other things being equal and full this were not being raised at this late date in a fashion that merited the denial of the motion generally as I'd just done, maybe discovery might be appropriate. But not when you've got a complaint on file. Not when it has some meat to it and is worthy of looking at.

Now, of course, what that means, then, is there's always a risk inherent that if I did conclude that there weren't enough on the complaint to withstand a motion for dismissal, maybe I'd have to deny the motion for Section 363 sale. I can't say anything about that at this point.

But I am going to say that's the standard that I do intend to apply here. I don't think it's inconsistent with Gaylord Grain at all. I think I have to reach that issue because it does go to whether discovery is permissible in pursuit of certain evidence. That evidence I'm going to conclude simply because of the paper record before the Court in the commencement of the adversary proceedings is not necessary. It's not

relevant given what the debtor is going to rely upon to make out a bona fide dispute.

So one other matter here and I'm just going to note it for the record without resolving it. This whole question of sealing what was put into the in box this morning, I'm not prepared at this hour to get into that. I will take that up probably this evening and tomorrow morning and I'll get into some sort of -- I'll get out some sort of order on that tomorrow morning.

One way or another it sounds to me like everybody who -- I won't say everybody. It sounds to me like at least the parties here are aware of what the content of the objection is. What I may well do is provide that just because I'm not going to -- I'm not going to engage in any sort of analysis of what exceeds the confidentiality and what doesn't. I can't do that in isolation and in a vacuum. I may well just provide that that document is sealed until after the disposition of the sale motion and then unseal it. And, you know, I'm going to do all that basically based upon the fact that this has to be kind of done on the fly.

The due diligence room was set up with confidentiality requirements for very specific purposes relating to the, ultimately to the extent that the information would and disclosure of it would give an unfair advantage to competitors and thereby diminish the value of the assets. That's the general reason why commercial information is held under seal in court proceedings.

And while it rarely comes up around here, I certainly had the issue in Mesaba and I can see where it's appropriate here. I'm not going to -- since I don't even know exactly what is confidential and what isn't, I can't get into weighing what is there. Obviously, though, if I do end up granting the sale motion and approving a sale, the need to maintain that material in secret will probably no longer be there and we'll take that issue up at that point.

And the whole reason why I view this as being a rather important issue is that I feel very powerfully that this being a public institution and what goes on here being at least potentially a matter of public interest

in an open society, this court should not be readily sealing anything too much. I have watched over the years judges on the U.S. District Court seal an awful lot of material and I know it's routinely done in the state courts too, but the judges of this court feel fairly strongly that it should be done only when warranted. I'm willing to play ball here just because it's not worth getting into the issue and I don't want to do anything that would upset the dynamic of the sale process, but I'll reserve the right to unseal the content of that material fairly shortly depending upon the outcome of the sale process.

So that's my disposition. Counsel have anything further to note here? I intend to just enter the submitted orders because, frankly, I'm too tired to do anything else at this point today. And I'll look into the issue of sealing later. Anybody have anything else? All right. That's enough, then. Stand adjourned.

* * *

STATE OF MINNESOTA)
) ss.
COUNTY OF WASHINGTON)

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

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

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

IN EVIDENCE HEREOF, WITNESS MY HAND.

s:/ Lisa M.Thorsgaard