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UNITED STATES BANKRUPTCY COURT

DISTRICT OF MINNESOTA

In Re: BKY No: 08-46617
Polaroid Corporation,
Debtor.

BEFORE THE HONORABLE GREGORY F. KISHEL

United States Bankruptcy Judge

* * *

TRANSCRIPT OF PROCEEDINGS

3-26-09

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Six West 5th Street, Suite 700
St. Paul, MN 55102
LISA M. THORSGAARD, RPR

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APPEARANCES

MR. GEORGE SINGER AND MR. TERRY FLEMING, Attorneys at Law, Suite 4200, 80 South Eighth Street, Minneapolis, Minnesota 55402, appeared on behalf of Debtor.

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.

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

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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

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3 THE COURT: We're on the
4 record. This afternoon's hearing is in the
5 Chapter 11 case of Polaroid Corporation. File
6 08-64417. There are two motions related to
7 discovery issues that have been put onto the
8 calendar, both with requests for expedited
9 hearing, one by the debtor and one by David
10 Baer, both seeking protective orders and
11 relief in relation to subpoenas served on
12 those parties late last week.

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

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

25 THE COURT: Okay.

1 MR. FLEMING: Good afternoon,
2 Your Honor.

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

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

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

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

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

22 Go ahead, Mr. Fleming.

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

1 Mary Jeffries, David Baer, and Rule 30(b)(6)

2 notice of deposition of Polaroid officers.

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

25 The same request relating to court

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

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

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

25 Now, that gets us just up to a couple

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

9 I contacted counsel, personal counsel
10 for Mary Jeffries and David Baer and learned
11 that both counsel were unavailable.

12 Mr. Peterson I believe was in Mexico and was
13 not coming back into town until this past
14 Monday evening. And Mr. Birrell, personal
15 counsel for Mary Jeffries, started a trial up
16 in Brainerd on Tuesday but was going up on
17 Monday to prepare the witnesses and get set up
18 basically.

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

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

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

7 THE COURT: Exhibit I you say?

8 MR. FLEMING: Yes.

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

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

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

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

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

21 MR. FLEMING: All right.

22 THE COURT: Go ahead.

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

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

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

14 MR. FLEMING: Yes.

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

24 MR. FLEMING: The last
25 paragraph.

1 THE COURT: All right.

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

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

25 Now, this newest issue is a little bit

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 What I read into the Ritchie submission

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

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

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

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

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

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

19 So unless the Court has any questions.

20 THE COURT: I don't think so.

21 MR. PETERSON: Thank you.

22 THE COURT: All right.

23 Mr. Leonard?

24 MR. LEONARD: Thank you, Your

25 Honor. Brian Leonard on behalf of Ritchie

1 Capital Management.

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

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

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

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

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

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

1 group. That's never been disclosed --
2 Polaroid management as a group owns some
3 20 percent or so of the shares of Zink
4 Imaging. So we've got a commonality of
5 ownership and certainly a commonality of
6 governance.

7 Now, why is that important? It's
8 important, Your Honor, for two reasons. One,
9 we understand that Genii Capital, the stalking
10 horse bidder, either by itself or through the
11 owners of Genii Capital, intend to infuse
12 \$20 million into Zink Imaging if Genii Capital
13 is the successful acquirer of the assets of
14 Polaroid. Now, that infusion of capital would
15 certainly benefit Zink Imaging and its owners.

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

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

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

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

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

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

1 couple years. We just want two simple
2 depositions.

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

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

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

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

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

25 Now, Mr. Fleming says well, if we would

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

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

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

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

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

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

7 THE COURT: You mean for the
8 earlier hearing.

9 MR. LEONARD: Correct.

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

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

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

16 MR. LEONARD: I did not. I
17 did not.

18 THE COURT: In any event.

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

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

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

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

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

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

25 And to sum up, Your Honor, it seems to

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

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

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

11 Thank you, Your Honor.

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

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

25 Acorn believes that in connection with

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 would suggest otherwise.

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

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

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

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

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

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

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

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

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

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

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

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

1 about.

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

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

13 THE COURT: Okay.

14 MR. OTSUKA: Thank you.

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

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

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

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

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

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

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

3 You know, I think they're raising some
4 issues about Mary Jeffries and so forth.

5 Admittedly every piece of information about
6 Zink is not in the data room because we don't
7 have access to everything. This is a Polaroid
8 sale. But certainly the relationships about
9 stock transfers and consideration exclusivity
10 agreements, all of which are one of Polaroid's
11 most valuable assets in relationships, there's
12 no secret about that. And the relationship
13 between Genii and Zink was set forth in our
14 sale motion pleadings.

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

25 The first 11 things that they seek

1 deposition about have nothing to do with the
2 sale. Nothing. The requested -- the
3 communications from Mr. Rosow to our firm is
4 consistent with that. They wanted to have a
5 26(f) conference which we accommodated this
6 morning. They wanted to take discovery in
7 connection with the adversary proceeding.
8 They want to talk about their liens. They
9 want to talk about their debts and so forth.
10 It's all about the adversary proceeding.
11 That's what this is about. And I find that
12 particularly troubling particularly at the
13 final hour.

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

1 THE COURT: I think so, yeah.

2 Thank you. Okay. One more opportunity for
3 comment here.

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

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

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

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

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

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

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

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

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

21 Thank you, Your Honor.

22 THE COURT: Okay. Thank you.

23 And Mr. Rosow?

24 MR. ROSOW: Nothing further,

25 Your Honor.

1 THE COURT: Okay. Anything
2 else from the committee?

3 MR. OTSUKA: No thanks, Your
4 Honor.

5 THE COURT: All right. I'm
6 going to ask the parties to come back in about
7 45 minutes and, unfortunately, I probably
8 can't even offer you the availability of a
9 good cup of coffee in the building or even at
10 this end of the skywalk at this hour of the
11 afternoon in downtown St. Paul. But I want to
12 consider what has been said on the record in
13 argument which often, as is the case here,
14 puts a different spin on things before I try
15 to give you a ruling. Maybe one point here,
16 however, to address as long as it's fresh in
17 mind.

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

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

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

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

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

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

25 So now what I've got before me is what

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

8 Mr. Singer?

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

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

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

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

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

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

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

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

1 in this way?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21
22 (A break was had in the proceedings)

23
24 THE COURT: On the record in
25 Polaroid Company. My apologies to everybody

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

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

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

1 for judicial relief that's not covered by part
2 7 of the Bankruptcy Rules, in other words,
3 adversary proceedings, or that is authorized
4 to be presented to a judge by a purely ex
5 parte request. The federal rules don't seem
6 to really have too much by way of examples of
7 the latter. Our local rules try to define it
8 and isolate the notion of an ex parte request
9 in the category of application. But a
10 contested matter is sort of, as limbed in
11 Rule 9014(A), any sort of request for judicial
12 relief that's made in the context of a main
13 case in which there exists the potential for
14 opposition by another party in interest to the
15 case. That's what I glean out of the
16 structure of the first sentence of
17 Rule 9014(A).

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

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

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

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

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

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

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

25 Now, the record of my ruling in the

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

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

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

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

1 here, it gets a lot more complicated.

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

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

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

1 actual motion for sale filed on January 28,
2 2009 made it unequivocal that that was the
3 actual election by the steward of the estate
4 here, the debtor in possession, to administer
5 the value that was inherent in this debtor
6 when the case was commenced. It was no secret
7 that this debtor had and through its
8 professional persons, counsel, investment
9 banker and the like had thoroughly evaluated
10 the prospects of trying to operate its way out
11 of Chapter 11 towards some end of paying
12 creditors through future revenues and have
13 rejected that in favor of a sale.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 today.

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

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

1 brought on next week.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 Now, of course, what that means, then,
10 is there's always a risk inherent that if I
11 did conclude that there weren't enough on the
12 complaint to withstand a motion for dismissal,
13 maybe I'd have to deny the motion for Section
14 363 sale. I can't say anything about that at
15 this point.

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

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

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

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

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

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

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

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

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

24 * * *

25

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

3

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

7

8

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

14

15

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

19

20

21 IN EVIDENCE HEREOF, WITNESS MY HAND.

22

23

24

s:/ Lisa M.Thorsgaard

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