

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:	Chapter 11
Polaroid Corporation <u>et al.</u> ,	08-46617 (GFK)
Debtors.	Jointly Administered

**NOTICE OF HEARING AND MOTION FOR RELIEF FROM ORDER DATED APRIL
16, 2009 GRANTING JOINT MOTION BY DEBTORS AND THE OFFICIAL
COMMITTEE OF UNOFFICIAL CREDITORS TO FILE CERTAIN DOCUMENTS
UNDER SEAL AND MAINTAIN THE CONFIDENTIALITY OF SUCH NON-PUBLIC
INFORMATION**

TO: The entities specified in Local Rule 9013-3

1. Eyewear Brand Limited (“Eyewear”), StyleMark, Inc, StyleMark AB, StyleMark B.V., StyleMark S.p.A, and Stylemark, A.G. (collectively, “StyleMark” and collectively with Eyewear, the “Moving Parties”) hereby file this Motion seeking relief from the Court’s April 16, 2009 Order granting the Joint Motion of the Debtors and Official Committee of Unsecured Creditors to File Certain Documents Under Seal and Maintain the Confidentiality of Such Non-Public Information (the “Order”). The moving parties request relief from the Order to permit them to review at least those portions of the sealed documents related to rejection of the Moving Parties’ intellectual property license rights under a contemplated sale of the assets to Lithograph Legends, LLC (the “Back-Up Bidder”), particularly the portions of the sealed documents which apparently contain contractual provisions governing the treatment of the Moving Parties’ claim against the estate in the event sale to the Back-Up Bidder is consummated and the Moving Parties’ contracts are rejected.

2. The Court will hold a hearing on this Motion on May 13, 2009 at 10:00 a.m. before the Honorable Gregory F. Kishel, in Courtroom No. 2A, at the United States Courthouse, 316 North Robert Street, St. Paul, Minnesota 55101.

3. Any response to this motion must be filed and served by delivery not later than May 8, 2009, which is three days before the time set for the hearing (excluding Saturdays, Sundays, and holidays), or filed and served by mail no later than May 4, 2009, which is seven days before the time set for the hearing (excluding Saturdays, Sundays, and holidays). UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.

4. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334, and Federal Rule of Bankruptcy Procedure 5005 and Local Rule 1070-1. This is a core proceeding. The Debtors filed its petition for relief under Chapter 11 of Title 11 of the United States Code on December 18, 2008. The case is now pending in this Court.

5. This Motion arises under Federal Rule of Bankruptcy Procedure 9024. The Moving Parties respectfully request relief from the Order at least broad enough to permit the Moving Parties to review those portions of the sealed documents related to rejection of the Moving Parties' intellectual property license rights and resulting claim against the estate under a contemplated sale of the assets to the Back-Up Bidder and claims it may have with respect thereto. The Moving Parties do not require access to any materials related to the prevailing bid, nor to any documents or portions of documents connected to the Back-Up Bid other than those addressing the Moving Parties' intellectual property rights. The Moving Parties bring this motion solely to protect their position in the event Debtors seek to consummate a transaction with the Back-Up Bidder. If the contemplated sale to the prevailing bidder closes, the Moving

Parties would voluntarily withdraw this motion. However, given the apparently critical importance of terms contained within the sealed documents to resolving the Moving Parties' Limited Objection to the contemplated sale to the Back-Up Bidder filed on April 13, 2009 (the "Objection"), the Moving Parties must bring this motion now to preserve their right to review this information in the event the Court will, in the future, seek to rule upon the Objection.

BACKGROUND

6. By its order on February 18, 2009, the Court approved procedures for an auction permitting Debtors to sell certain assets outside the ordinary course of business. The Court conducted a Sale Hearing on April 16, 2009 and, in its Order Authorizing Sale of Certain of the Debtors' Assets ("Sale Order"), approved the purchase agreement for sale of the assets to PLR Acquisition, LLC, a joint venture composed of Hilco Consumer Capital, L.P. and Gordon Brothers Brands, LLC (the "Buyer") and established the Back-Up Bidder as the alternative purchaser in the event the sale of the assets to Buyer is not consummated.

7. Prior to the Sale Hearing, on the afternoon of April 14, 2009, Debtors and the Official Committee of Unsecured Creditors ("Committee") filed a motion seeking leave to file certain documents relating to bids of the Buyer and Back-Up Bidder under seal. No parties filed objections prior to the proceedings two days later and the Court considered the motion prior to the Sale Hearing.

8. Speaking in support of the motion on behalf of the Committee, attorney Dennis Ryan stated:

The debtor must eventually file appropriate motions seeking authority to either assume and assign or to reject. At that point the counter-parties will certainly be entitled to know all of the terms of that arrangement [the sealed documents]. They will have their rights to contest the assignability, to contest the cure amounts, to contest adequate assurance of future performance if the agreements are being assumed and assigned.

Conversely, if they're being rejected, they have their rights to contest the bidders – the debtor's business judgment and any damages that may arise from the rejection.

(4-16-09 Hearing Transcript at 9-10.)

9. The Court considered objections to the motion and the following exchange occurred on the record between attorney Steven Meyer representing the moving parties, the Court, and Mr. Ryan:

MR. MEYER: Your Honor, on behalf of Stylemark, I don't believe that we object to the motion to file the assignment information and agreements under seal. We don't think that that necessarily disposes of the objection that Stylemark has with respect to the sale free and clear of interest and I just want to make that clear. I don't know if this – the motion was intended to do, you know, void that issue. We think it's still on the table. Thank you, Your Honor.

THE COURT: I don't think I read the joint motion as affecting Stylemark's objection. Mr. Ryan, that's correct?

MR. RYAN: That is not our intention.

(4-16-09 Hearing Transcript at 12.)

10. After ruling on the motion to file certain documents relating to bids of the Buyer and Back-Up bidder under seal, the Debtor conducted an auction in the courtroom. At the conclusion of the auction, the Court considered the Debtors' motion to sell substantially all of its assets free and clear of interest and, as part thereof, took testimony and heard argument regarding the Moving Parties' Objection. As is fully set forth in the Objection, the Moving Parties objected to the contemplated sale to the Back-Up Bidder, which would include the rejection of certain licenses for intellectual property rights of great value to the Moving Parties.

11. During those proceedings, attorney Steven Meyer attempted to elicit testimony from Stephen Spencer, the Debtors' Financial Professional, to support the Moving Parties' Objection. Specifically, Mr. Meyer sought to elicit testimony stating that rejection of Moving

Parties' licenses for intellectual property rights as part of the contemplated sale to the Back-Up Bidder would make the Moving Parties a significant unsecured creditor against the estate and dilute the distributions available for other unsecured creditors. However, testimony at the hearing suggests that unidentified contractual provisions within the sealed documents – about which the witness could not testify in detail because of the Order – directly addresses the contemplated claim by the Moving Parties against the estate:

[MR. MEYER]: And I think we're getting some testimony that that is, in fact, not the case here because perhaps of an agreement that's under seal, so I guess we just have to understand why if our contract is not assumed by Patriarch and it's a successful bidder why that wouldn't be – have a dilutive affect against the unsecured creditors, that's my question?

[MR. SPENCER]: It gets to the substance of the agreement that has been filed under seal. We are – the Debtor believes that there are – I want to be very careful, because it's a sensitive matter. Patriarch has the ability to reach a negotiated settlement.

[MR. MEYER]: With whom?

[MR. SPENCER]: With Stylemark and – whereby the Debtor would be indifferent. It would not cause a dilutive impact.

MR. MEYER: Your Honor, I don't know if – I think this is important for the Court to know and for the parties to know and I don't know if I can ask him any further questions, if I have gone too far. We don't know what's sealed. I think it's a fair inquiry.

(4-16-09 Hearing Transcript at 175-176.)

12. On April 17, 2009, the Court issued its Sale Order. The Sale Order specifically provides that: “The proponents of the StyleMark Objection and the Back-Up Bidder reserve, and would reserve, all of their rights with respect to the StyleMark Objection in connection with any Sale to the Back-Up Bidder.” (Sale Order at 18.)

ARGUMENT

13. Federal Rule of Bankruptcy Procedure 9024, which incorporates Federal Rule of Civil Procedure 60, permits parties to move the Court for relief from orders previously entered by the Court. Under Fed. R. Civ. P. 60(b), parties may obtain relief from orders on such bases as: (1) mistake, inadvertence, surprise, or excusable neglect; or (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b).

14. 11 U.S.C. § 107(a) provides that: “Except as provided in subsection (b) of this section, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.” “There is a strong presumption of public access to court records.” In re Farmland Indus., Inc., 290 B.R. 364, 367 (Bankr. W.D. Mo. 2003). “This policy of open inspection, codified generally in § 107(a) of the Bankruptcy Code, evidences congress’s strong desire to preserve the public’s right of access to judicial records in bankruptcy proceedings.” In re Orion Pictures Corp., 21 F.3d 24, 26 (2d. Cir. 1994). “Disposition of Rule 60(b) motions is within the discretion of the district court and such rulings will not be overturned absent an abuse of that discretion.” McLawhorn v. John W. Daniel & Co., Inc., 924 F.2d 535, 538 (4th Cir. 1991).

15. A limited exception to the general policy that documents filed in bankruptcy proceedings are to be open for public inspection is provided in 11 U.S.C. § 107(b), which permits parties upon motion, or courts on their own initiative, to “protect an entity with respect to a trade secret or confidential research, development, or commercial information.”

16. In their Memorandum of Law supporting their Motion to File Certain Documents Under Seal (“Motion to Seal”), Debtors and the Committee presented two distinct arguments

supporting their claims that the sealed documents were entitled to be protected under 11 U.S.C. § 107(b) as “confidential commercial information.” First, they argued that “public disclosure will be detrimental to the value that each party is willing to offer as part of the pending 363 sale, which will result in serious damage to the estate, its creditors and other stakeholders.” (Motion to Seal at 4.) This basis for sealing the documents no longer applies, since the proceedings on April 16, 2009 and this Court’s Sale Order have now resolved the issue of how much a party would bid as part of the 363 sale. The absence of any reason for continued treatment of these documents as confidential on this basis supports the granting of the requested relief.

17. The second basis for sealing the documents asserted in the Motion to Seal was that disclosure would provide an unfair advantage to competitors. No details regarding how competitive injury might occur were provided. Instead, the Motion to Seal generally suggested that the documents contain “business plans and strategies of each of the bidders.” (Motion to Seal at 4.) It was because of this very general description of the documents at issue that the Moving Parties did not know, and had no reason to know, that Debtors and the Committee were moving to seal documents which apparently include contractual provisions that dramatically affect treatment of the Moving Parties’ license rights and resulting claims from rejection of contracts as part of a contemplated sale to the Back-Up Bidder. These contractual terms have nothing to do with competitive injury or “business plans and strategies.” Instead, they are contractual terms used to gain an advantage over the Moving Parties in the event a sale to the Back-Up Bidder is consummated. This information cannot appropriately be sealed in light of the absence of a basis to maintain it as confidential under 11 U.S.C. § 107(b) and the Moving Parties’ substantial need to review the material as part of their Objection.

18. Based on statements made during the proceedings on April 16, 2009, it appears counsel for the Committee *agrees* that parties would “certainly be entitled to know all of the terms” of the documents filed under seal as necessary for purposes including allowing parties whose contracts are being rejected to contest the Debtors’ business judgment. (4-16-09 Hearing Transcript at 12.) Further proceedings on that day demonstrated that the Moving Parties’ lack of access to the sealed documents prevented the Moving Parties from fully and fairly eliciting testimony and making arguments supporting their Objection.

19. Because the Motion to Seal contained only a broad, non-specific description of the documents it sought to file under seal and failed to provide any indication that the sealed documents contain contractual provisions critical to the treatment of the Moving Parties’ claim against the estate after rejection of their license rights as part of a contemplated sale to the Back-Up Bidder, the adverse impact of the Motion to Seal on the Moving Parties could not have been known until after the Order was entered on the morning of April 16, 2009. Only after further proceedings that day, when testimony revealed the critical importance to the Moving Parties of contractual terms contained within the sealed documents (as well as the absence of any “competitive” significance to those contractual terms) did the Moving Parties have the opportunity to fully understand and object to the Motion to Seal and the Order. Whether framed as mistake, inadvertence, surprise, or newly discovered evidence, relief from the Order under B.R. 9024 and Fed. R. Civ. P. 60(b) is warranted to permit the Moving Parties access to these documents.

20. As an alternative basis for awarding the relief the Moving Parties request, B.R. 9018 provides that where an order sealing documents upon a party’s request is entered “without notice, an entity affected thereby may move to vacate or modify the order, and after a hearing on

notice the court shall determine the motion.” While the Moving Parties did receive notice that a Motion to Seal had been filed two days before the proceedings on April 16, 2009, they had no notice and no way of telling from the language of the Motion to Seal that the documents subject to the motion contained contractual provisions affecting the Moving Parties’ rights in the event a sale of assets is consummated with the Back-Up Bidder. The Court has the discretion under B.R. 9018 to modify or vacate the Order to provide the relief requested by the Moving Parties based on this constructive lack of notice regarding the content of the sealed documents.

WHEREFORE, StyleMark and Eyewear respectfully request that the Court grant relief from the Order, in the event Debtors seek to consummate a transaction with the Back-Up Bidder, providing that those materials filed under seal relating to the Moving Parties’ intellectual property rights and the treatment of claims resulting from rejection of those rights as part of a contemplated sale to the Back-Up Bidder, are not confidential.

Dated: April 27, 2009

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