

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Chapter 11

Polaroid Corporation, et al.,

Court File No. 08-46617

Debtors.

Jointly Administered

**OBJECTION OF GLOBAL INDUSTRIAL
SERVICES LIMITED, HARMER HOLDINGS, LLC AND LORENCE HARMER TO
NOTICE OF CHANGE REGARDING ASSUMPTION AND ASSIGNMENT OF
CONTRACTS TO BE ASSUMED AND ASSIGNED TO SUCCESSFUL BIDDER**

TO: The entities specified in Local Rule 9013-3(b)

Global Industrial Services Limited ("Global"), Harmer Holdings, LLC ("Harmer Holdings") and Lorence A. Harmer ("Mr. Harmer," and collectively with Global and Harmer Holdings, the "Harmer Group")¹ hereby file this Objection ("Objection") to the Debtors² Notice of Change Regarding Assumption and Assignment of Contracts to be Assumed and Assigned to Successful Bidder (the "Notice") filed by the above-captioned debtors (collectively, the "Debtors"). In support of this Objection, the Harmer Group alleges as follows:

1. The Court will hold a hearing on the Notice at 10:00 a.m. on April 30, 2009, before the Honorable Gregory F. Kishel, Courtroom 2A, 316 North Robert Street, St. Paul, Minnesota 55102.

¹ Mr. Harmer controls Global and Harmer Holdings.

² The other Debtors are Polaroid Holding Company, No. 08-46621; Polaroid Consumer Electronics, LLC No. 08-46620; Polaroid Capital, LLC, No. 08-46623; Polaroid Latin America I Corporation, No. 08-46624; Polaroid Asia Pacific, LLC, No. 08-46625; Polaroid International Holding, LLC, No. 08-46626; Polaroid New Bedford Real Estate, LLC, No. 08-46627; Polaroid Norwood Real Estate, LLC, No. 08-46628; and Polaroid Waltham Real Estate, LLC), No. 08-46629.

2. Any reply to the Harmer Group's Objection must be filed and served before the time of the hearing.

3. On December 18, 2008, the above-referenced Debtors each filed voluntary petitions for relief under chapter 11, title 11, United States Code, 11 U.S.C. §§ 101, et. seq. (the "Bankruptcy Code"). The Debtors' bankruptcy cases have been procedurally consolidated for administrative purposes only, they have not been substantively consolidated. The Debtors continue to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

4. On January 28, 2009, the Debtors filed a Motion for Order Pursuant to 11 U.S.C. §§ 105(a), 363, and 365 (1) Approving Auction and Bidding Procedures; (2) Approving Break-Up Fee, Expense Reimbursement and Other Protections; (3) Approving Notice; (4) Authorizing Sale of Assets Free and Clear of Liens, Claims and Encumbrances, Subject to Higher or Better Offers; (5) Approving Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (6) Granting Related Relief, (the "Sale Motion").

5. On March 26, 2009, the Harmer Group timely filed its Limited Objection of Global Industrial Services Limited, Harmer Holdings, LLC and Lorence Harmer to Sale of Debtors' Assets Free and Clear of Liens, Claims and Encumbrances (the "Limited Objection") in response to the Sale Motion. The Harmer Group did not object to the sale of the Debtors assets, but only to the Debtors failing to honor its credit support arrangements with the Harmer Group and thereby unjustly enriching their estates at the expense of the Harmer Group insofar as the Debtors proposed to assign the benefits of the credit support arrangements to the successful bidder but not to assign the Debtors' duties and responsibilities thereunder.

6. On April 17, 2009, the Court entered an Order approving the Debtors' sale of assets to PLR Acquisition, LLC, a joint venture between Hilco Consumer Capital Corp. and Gordon Brothers Brands, LLC (the "Sale Order").

PRELIMINARY STATEMENT

7. The Harmer Group are creditors and parties in interest by virtue of a series of agreements whereby the Harmer Group provided credit support to allow the Debtors to continue to market their products globally during and after the fourth quarter of 2008. Such credit support was critical to the success of the Debtors' operations as well as to its going concern value, as it is being realized during the sale envisioned by the Sale Order (the "Sale"). The Harmer Group objects to the Debtors failing to honor its credit support arrangements with the Harmer Group and unjustly enriching their estates at the expense of the Harmer Group. The Bankruptcy Code does not authorize the Debtors to transfer its rights under various lockbox arrangements before final reconciliation and absent the assumption of the underlying credit support arrangements.

BACKGROUND

8. In September 2008, through December 2008, the Debtors' estate called upon the Harmer Group to preserve the Debtors' going concern value following the indictment of Tom Petters, Petters Group Worldwide ("Petters Worldwide") and Petters Company, Inc. (the "Petters Company"), and the bankruptcies of Petters Worldwide, Petters Company and the Debtors. During that time period and beyond, the Harmer Group has been instrumental in preserving the Debtor's going concern value from a supply chain meltdown. Specifically, the estate called upon the Harmer Group to put Mr. Hamer's networks, resources and reputation at risk to create a bridge arrangement that allowed the Debtors' products frozen in several Asian factories to flow into U.S. and European retailers, thus preserving the Debtors' retailer shelf space and thereby its overall value.

9. For example, Polaroid Corporation ("Polaroid"), Flextronics Sales and Marketing Consumer Digital, Ltd. ("Flextronics"), Summit Technology Group L.L.C. ("Summit") and Harmer Holdings entered into that certain Revenue Allocation Agreement, dated as of October 16, 2008 (the "RAA").³ The RAA confirmed the allocation and distribution methodology of proceeds held in certain lockbox arrangements. Those proceeds were generated in part pursuant to a Manufacturing License and Support Services Agreement between Polaroid and Summit as of the same date (the "MLSSA")⁴ and a Manufacturing and Sales Agreement between Flextronics, Summit and Harmer Holdings, again as of the same date (the "Sales Agreement").⁵ But for these triangular series of agreements, Summit and Flextronics would not have done business with Polaroid, and Polaroid would have been unable to continue to market its retail products. It would have forfeited shelf space with key domestic and foreign retailers and consequently lost market share and going concern value.

10. These bridge arrangements that the Harmer Group implemented and supported caused Flextronics and Summit to continue to do business with Polaroid during a critical time. In fact, these arrangements were so effective in preserving Polaroid's value and global supply chain that Polaroid approached the Harmer Group again in November of 2008 to continue such arrangements into 2009. This resulted in another RAA, dated as of December 19, 2008 (the "Second RAA").⁶ The Second RAA, and the related triangular transaction, were a continuation of the earlier credit support arrangements.

11. Pursuant to the Notice, the Debtors intend to assume and assign some of the

³ A true and correct copy of the RAA is attached as Exhibit A to the Harmer Group's Limited Objection.

⁴ A true and correct copy of the MLSSA is attached as Exhibit B to the Harmer Group's Limited Objection.

⁵ A true and correct copy of the Sales Agreement is attached as Exhibit C to the Harmer Group's Limited Objection.

⁶ A true and correct copy of the Second RAA is attached as Exhibit D to the Harmer Group's Limited Objection.

agreements, namely the Second RAA and related triangular transaction, "by consent of the parties." Notice, pages 19-20 of Exhibit A. Contrary to the Debtors' assertion, the Harmer Group has not consented to such assumption and assignment. Further, the Debtors assert that the RAA and related agreements dated as of October 16, 2008, expired as of March 31, 2009. It is the Harmer Groups position that the various credit support agreements are related, and each is a continuation of the others, and therefore none of the agreements have expired, and the Debtors cannot assume one part of the entire agreement and not another. Additionally, the Debtors indicate their intent to assume that certain Customer Support Agreement by and between PCE and Summit Technology Group, LLC dated as of July 7, 2008, and propose a cure amount of \$307,284.41, but fail to indicate how they arrived at that amount as a cure.

12. Finally, the Harmer Group would not have entered into the credit support arrangements but for Petters and Polaroid agreeing and acting consistent with their agreements not to pursue Mr. Harmer for certain fraudulent obligations that Petters had orchestrated earlier in their relationship. On information and belief, the Trustee for the Debtors' estates presently intends to enforce such fraudulent obligations.⁷

ARGUMENT

13. Section 365 of the Bankruptcy Code is a powerful tool that permits a debtor to assume and assign contracts to proposed purchasers of assets. With those privileges, come the requirement that such contracts must be assumed "cum onere" or subject to all of their burdens.

⁷ Beginning in late September 2007 and culminating in agreements executed January 2008, Tom Petters, acting through Petters Group Worldwide LLP and Polaroid, forced Mr. Harmer (through threats, false imprisonment, duress and coercion) to surrender his equity stake in Polaroid and execute fraudulent obligations to Polaroid. Approximately one year later, in July 2008, in the presence of Polaroid executives, Tom Petters admitted his wrongdoing and cancelled the fraudulent obligations. Mr. Harmer has communicated this information to the Trustee's counsel and transmitted evidence supporting his position. The Harmer Group files this Limited Objection in part to preserve his rights and claims of, *inter alia*, fraud, recoupment, set off and estoppel, against Polaroid for events related to these fraudulent obligations and the actions of the estate in securing the assistance of the Harmer Group to preserve Polaroid's value under false pretences.

United States v. Gerth, 991 F.2d 1428, 1432 (8th Cir. 1993) (holding that Section 365 and case law "establish[] that when assuming a contract, the debtor assumes all the benefits and burdens of the contract.") (citing NLRB v. Bildisco & Bildisco, 465 U.S. 513, 531 (1984); In re Steelship Corp., 576 F.2d 128 (8th Cir. 1978); Public Serv. Co. of N.H. v. New Hampshire elec. Coop., Inc. (In re Public Serv. Co. of N.H.), 884 F.2d 11, 14 (1st Cir. 1989)). The proposed Sale violates section 365 in at least three ways.

14. As noted above, the Debtors cannot assume the lockbox arrangement "rights" without also assuming the burdens. The Acquired Lockbox Payment Rights and related credit support arrangements are financial accommodations that simply cannot be assumed and assigned by virtue of 11 U.S.C. § 365(c)(1). See Transamerica Comm. Finance Corp. v. Citibank, N.A. (In re Sun Runner Marine, Inc.), 945 F.2d 1089, 1092 (9th Cir. 1991) (financial accommodations are the extension of money or credit for the benefit of the debtor, even if the money or credit is actually extended to a third party); GNMC v. Adana Mortgage Bankers, Inc. (In re Adana Mortgage Bankers); 12 B.R. 977, 985 (Bankr. N.D. Ga. 1980). At best, the Debtors must work out some other form of arrangement with the Harmer Group to transfer these accommodations.

15. Finally, the RAA and the Second RAA represented only one aspect of a single integrated transaction that provided the foundation for most of the value preservation that is being generated by the Sale. The Debtors should not be entitled to receive the benefits of the Sale without honoring those obligations. At a minimum, the Sale must be conditioned on the rights of the Harmer Group not being prejudiced. As certain of the agreements contain arbitration provisions, the Harmer Group may be entitled to pursue arbitration to resolve any underlying disputes, notwithstanding these bankruptcy cases. In re Farmland Indus., Inc., 309 B.R. 14, (Bankr. W.D. Mo. 2004) ("[C]ourts widely accept that the bankruptcy court must stay its own proceedings to allow arbitration to continue in non-core matters.") (citing Crysen/Montenay

energy Co. v. Shell Oil Co. (In re Crysen/Montenay Energy Co.), 226 F.3d 160, 165-66 (2nd Cir. 2000); Slipped Disc, Inc. v. CD Warehouse, Inc. (In re Slipped Disc, Inc.), 245 B.R. 342, 345 (Bankr. N.D. Iowa 2000) ("Enforcement of arbitration clauses is appropriate in disputes involving non-core bankruptcy issues."). Thus, the Bankruptcy Court does not have the power to resolve the disputes in the context of resolving the Sale Motion.

16. Finally, the Debtors have failed to provide the Harmer Group the information necessary to reconcile the amounts due under these agreements. In the absence of such reconciliation, which is a requirement of the contracts, the proper cure amount cannot be determined. As a condition to assumption and assignment, the Court should compel the Debtors to honor the reconciliation process required by the contracts.

WHEREFORE, for the reasons stated, the Harmer Group objects to the Notice on the bases described herein.

Dated: April 29, 2009

MASLON, EDELMAN, BORMAN & BRAND,
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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Chapter 11

Polaroid Corporation, et al.,

Court File No. 08-46617

Jointly Administered

Debtors.

CERTIFICATE OF SERVICE

I, Amy J. Swedberg, declare under penalty of perjury that on March 26, 2009, I caused the following document:

Objection of Global Industrial Services Limited, Harmer Holdings, LLC and Lorence harmer to Notice of Change Regarding Assumption and Assignment of Contracts to be Assumed and Assigned to Successful Bidder

to be filed electronically with the Clerk of Court through ECF, and that ECF will send an e-notice of the electronic filing to the following:

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I further certify that I caused a copy of the foregoing documents to be mailed by first class mail, postage paid, to the following non-ECF participants:

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**Official Committee of Unsecured
Creditors of Polaroid Corporation**
c/o Richard A. Chesley
Paul, Hastings, Janofsky & Walker LLP
191 N. Wacker Drive, 30th Floor
Chicago, IL 60606

Dated: April 28, 2009

/e/ Amy J. Swedberg
Amy J. Swedberg