

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:	Jointly Administered under Case No. 08-46617
Polaroid Corporation, et al.,	Court Files No.'s:
Debtors.	08-46617 (GFK)
(includes:	
Polaroid Holding Company;	08-46621 (GFK)
Polaroid Consumer Electronics, LLC;	08-46620 (GFK)
Polaroid Capital, LLC;	08-46623 (GFK)
Polaroid Latin America I Corporation;	08-46624 (GFK)
Polaroid Asia Pacific LLC;	08-46625 (GFK)
Polaroid International Holding LLC;	08-46626 (GFK)
Polaroid New Bedford Real Estate, LLC;	08-46627 (GFK)
Polaroid Norwood Real Estate, LLC;	08-46628 (GFK)
Polaroid Waltham Real Estate, LLC)	08-46629 (GFK)
	Chapter 11 Cases Judge Gregory F. Kishel

**POLAROID'S STATUS REPORT ON AUCTION AND SUPPLEMENTAL REPLY TO
THE OBJECTIONS TO THE SALE OF SUBSTANTIALLY ALL OF ITS ASSETS FREE
AND CLEAR OF LIENS, CLAIMS AND INTERESTS**

TO: The entities specified in Local Rule 9013-3

Polaroid Holding Company, Polaroid Corporation, Polaroid Consumer Electronics, LLC, Polaroid Capital, LLC, Polaroid Latin America I Corporation, Polaroid Asia Pacific, LLC, Polaroid International Holding, LLC, Polaroid New Bedford Real Estate, LLC, Polaroid Norwood Real Estate, LLC and Polaroid Waltham Real Estate, LLC (collectively "Debtors" or "Polaroid"), through their legal counsel, Lindquist & Vennum P.L.L.P., file this verified reply in support of its Motion for an 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 Buyer Protections; (3) Approving Form and Manner of 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 in Connection with the Sale; and (6) Granting Related Relief in the above-referenced jointly-administered cases (the “Motion”). Because the various objections raise many common concerns, Polaroid is filing one consolidated reply. All capitalized terms not defined herein are as defined in the Sale Motion.

I. BACKGROUND AND STATUS

Despite having one of the most recognized brand names in the world, Polaroid has seen a decline in net sales over the past several years, coupled with increasing operational and product development costs. PGW acquired Polaroid in 2005 for \$426 million in a leveraged buy-out that attributed significant value to income projections from a growing consumer electronics business that never materialized. Polaroid’s net sales are less than half of what they were in FY 2005 and the company has sustained substantial aggregate net losses in excess of \$250 million since the business was acquired by PGW in April of 2005. In FY 2008 alone, Polaroid incurred an operating loss in excess of \$121 million. The company funded these losses primarily through the use of existing cash resources, favorable one-time cash flow impacts from the wind-down of the instant film business and the sale of other assets. Since the PGW acquisition, Polaroid has received approximately \$87 million from the sale of its Waltham headquarters building and the Enschede instant film and sunglass factory, sold its New Bedford film coating operations for \$5 million, sold the Eyewear business for \$40 million, shut down the China operations and repatriated approximately \$2 million, and sold certain intellectual property for approximately \$8 million, which totals \$140 million. The sell-off of these assets has contributed to a reduced value of the corporation since the Petters acquisition. In addition, Polaroid saw the demise of its most

profitable portion of its business by shutting down its instant film business due to the emergence and new dominance of digital camera technology.

Prior to the commencement of the bankruptcy cases, Polaroid implemented cost-saving measures aimed at reducing overhead and increasing operational efficiencies, which efforts have continued to the present. Nevertheless, the company's cash resources have been strained and the company will require substantial additional capital in order to pursue business plans and return the company to profitability. Despite the efforts the company made to obtain additional financing, Polaroid has been unsuccessful in securing this critically needed financing.

On December 18, 2008 (the "Petition Date"), the above-captioned Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. Since the Petition Date, Polaroid has been funding business operations and the administration of these cases primarily with commercial tort claim settlement proceeds in the amount of \$21 million ("Settlement Proceeds") that represent unencumbered assets. Approximately \$6-7 million of this \$21 million remain, which, absent a sale, are projected to be entirely depleted by mid-June, 2009. At that time, Polaroid would be without available cash unless it were authorized to use the approximately \$27 million generated pre and post-petition from the sale of inventory, collection of accounts and the receipt of licensee fees. These proceeds are subject to the disputed asserted security interests of the Chapter 7 Estate of RWB Services, LLC, Acorn Capital Group, LLC, and Ritchie (as defined in its objection to the sale of Debtor under Section 363), along with disputed interests of various affiliates of PGW. Consensual use of these funds would not be anticipated to fund ongoing losses of Polaroid, and Polaroid would likely be without funds to operate and administer these cases in the next several months if a sale does not promptly occur. Polaroid's current Weekly Cash Forecast is attached hereto as **Exhibit A**. Also attached, as

Exhibit B, is a preliminary form of the same cash flow forecast through year end, reflecting an assumed net cash sale of \$44 million and reduced operational costs post closing, and various assumptions relating to the sale.

Polaroid has determined, after extensive consultation and evaluation with its legal and financial advisors and in the exercise of its reasonable business judgment, and after careful consideration of the current financial condition of the company, its near term capital requirements, the current worldwide economic and financial crisis, the substantial contraction of credit markets and consumer spending, its business prospects, the effect of the alleged Petters fraud on its financing and operation and all reasonable and viable alternatives, including liquidation under Chapter 7, that a prompt and orderly sale of the Debtors' assets at this time is necessary and in the best interests of all creditors and stakeholders. No other reasonable alternative exists. A public sale or auction process has been selected by the Debtors and their professionals as the best format for maximizing the value of Polaroid's assets and providing a true market test of that value.

On January 24, 2009, Polaroid entered into an agreement with PHC Acquisitions, LLC ("PHC Acquisitions"), a Delaware limited liability company, to acquire substantially all of Polaroid's assets ("Asset Sale"). PHC Acquisitions is also expected, but not obligated, to offer continued employment to some of the company's employees. Further, sale as a going concern will ensure that customers continue to receive innovative high quality products, preserve the historic value of the Polaroid brand and provide an opportunity for customers and vendors to maintain business relationships. Such sale provides benefit to Polaroid's creditors and the estate in cash funds available for distribution to creditors and being able to fund estate administration.

II. RESULTS OF AUCTION

Polaroid and its financial advisors conducted an open, robust, competitive and flexible sale and auction process. Offers for all or portions of the assets have been solicited and a total of seven bids were submitted as part of the auction process. Some constituted offers to purchase all or substantially all of the assets of Polaroid, and others constituted offers for specific assets. The material terms of the proposed successful bidder are set forth in the Summary of Sale Proposal [Doc. 225] filed by the Debtors yesterday. This supplements that proposal, and provides additional background regarding the auction. A transcript of the auction is also attached as **Exhibit C**.

A Section 363 auction is a fluid procedure. Parties bid with cash, they bid with equity and they bid by excluding assets that have value to the estate. This is why the bidding procedures negotiated by the parties and approved by the Court allow maximum flexibility by the Debtors and advisors conducting an auction in determining the auction procedure, process, rules and the highest and best bid. Pursuant to the bid procedures “the Debtors, in consultation with the committee, may conduct the Auction in any manner that they determine will achieve the maximum value for the Assets.” Under the bidding procedures, the Debtors, in the exercise of their business judgment (after consultation with the committee), have the discretion to determine which bid represents the highest and best offer and provides the estate with the greatest net value.

The auction was successful, generating approximately \$16 million of additional value for the estate above that provided by the stalking horse bid. It commenced at 10:05 a.m. Monday, March 30, 2009. Approximately 50 people were in attendance, comprised of counsel and business representatives of four qualified bidders, including Genii, Patriarch, Hilco-Gordon Brothers, and Edison Pharmaceutical. Copies of each bid package were made available to all in

attendance. The Debtors' counsel and financial advisor (Houlihan Lokey) worked exhaustively with Hilco-Gordon Brothers to finalize their bid package the night before the auction, including meeting from 7:00 p.m. through 5:00 a.m. and later for certain of the respective deal team members. In addition, Houlihan Lokey representatives were in attendance and conducted the auction. Counsel and representatives of the Debtors, counsel for the Polaroid creditors committee, counsel and financial advisors to the PGW-PCI creditors committee, Ron Peterson, Trustee for Lancelot, and Michael Ridgway of the United States Trustee's office were also in attendance. Representatives and counsel for the Ritchie Group and Acorn Capital, who submitted a combined bid, but which bid was not deemed a qualified bid, were also in attendance.

Representative groups had their own separate conference rooms and met regularly throughout the two days as questions were addressed, negotiations occurred, concerns and complaints were fielded, equity component bids were valued and the process continued. Patriarch's principal advised early on Monday that she needed to leave by 3:00 p.m. on Monday in order to accommodate a speaking engagement on the east coast that evening and for that reason wanted the auction to proceed quickly. Patriarch and Hilco-Gordon Brothers were the only two bidders throughout the two-day auction, with the exception of Genii, who submitted a bid for selected assets. Patriarch and Hilco-Gordon Brothers are well-known and sophisticated investors with substantial experience acquiring distressed assets and participating successfully in bankruptcy auctions in a variety of industries.

Counsel for the Ritchie Group expressed concern mid-day on March 30, 2009 that equity was not being considered in the bid process, and requested that the estate implement an equity component. Significant breaks between bidding occurred, and the auction adjourned at 2:57 p.m.

on Monday, March 30, 2009. About that time, the Debtors and their advisors were asked to reconsider not allowing equity as bid consideration, and Hilco-Gordon Brothers included a bid with 20% equity. The non-bidding parties remained for a management presentation by Hilco-Gordon Brothers which included their business plan, ideas for using the Polaroid assets and financial projections in part to determine the value to attribute to the equity interests they offered as part of their bid. The Debtors, Houlihan Lokey and the Polaroid creditors committee consulted with each other, analyzed various valuation methodologies, and agreed to attribute \$650,000 of value for each 1% share of equity offered as part of the bid. Patriarch made a similar presentation the following day, and the same parties agreed, after analyzing similar valuation methodologies, to attribute \$650,000 of value for each 1% share of equity offered as part of the bid by them as well. The parties generally departed at approximately 7:00 p.m. on Monday, March 30, 2009.

The auction was scheduled to resume at 8:00 a.m. Tuesday, March 31, 2009, but pre-auction discussions, negotiations and delays caused it to resume at 9:15 a.m. Shortly after the auction opened, Hilco-Gordon Brothers' previous bid of 20% equity was rejected for insufficient cash consideration, and they submitted a new bid which included \$4 million of additional cash, 15% equity, and introduced an auction-related break-up fee request of \$1 million for submitting the bid. Throughout the two-day auction significant tension existed between the two bidders, with numerous verbal exchanges. In one of the many ongoing meetings between bidders, the Debtors, Houlihan Lokey and the Polaroid creditors committee occurring throughout the day, sometimes separately and sometimes collectively, Patriarch inquired as to the maximum amount of equity that would be accepted by the Debtors and insisted there be a response prior to bidding with equity. Houlihan Lokey, after consultation with the Polaroid creditors committee's counsel,

Polaroid's counsel and counsel and advisors to the PGW/PCI creditors committee, and after obtaining a consensus as to the equity limit, advised Patriarch that the Debtors would not accept more than 20% equity, and advised that they would confirm this on the record if requested to do so, whereupon several more rounds of bidding ensued. Later in the day, as equity being bid was approaching but not yet at 20%, Patriarch requested that Houlihan Lokey stipulate on the record that the estate would not consider bids comprised of more than 20% in equity. At that point, Hilco-Gordon Brothers became upset that they had not been told earlier about the Debtors' position with respect to the equity cap. Hilco-Gordon Brothers then retracted their bid, and submitted a bid including a 20.5% equity component, which was ½ of one percent above the amount of equity that had been disclosed would be accepted. The bid was premised on the consent of both the Polaroid creditors committee and the Debtors, and absent acceptance by both it was deemed withdrawn. This bid was not accepted by the Debtors. Houlihan Lokey asked if there were any other bids, and hearing none, the auction ended pursuant to the bid procedures with Houlihan Lokey in conjunction with the Debtors' declaring Patriarch the prevailing bidder.

The Debtors anticipate objections to the sale process due to the equity cap, and because Hilco-Gordon Brothers did not learn about the cap at the time Patriarch inquired what the cap would be. Hilco-Gordon Brothers may attempt to submit a new bid, despite being offered the opportunity to submit a new bid prior to the auction closing that included more cash and 2% more equity.

The Debtors firmly stand behind Patriarch as the prevailing bidder. Patriarch's bid includes more cash and less equity than the Hilco-Gordon Brothers bid, includes fewer assets for the Debtors to sell and turn into cash, which has execution risk, and includes higher total consideration than Hilco-Gordon Brothers' previous qualified bid. Patriarch's business plan also

contemplates retaining a significant number of employees and taking over the post-petition lease in Minnetonka. Hilco-Gordon Brothers' business plan does not. Auctions are a fluid process. Once parties move from bidding with cash to also including equity, judgments need to be made as to the value attributed to that equity and how much equity will be allowed. Obviously, if equity is capped then parties need to bid with more cash if they wish to be the successful bidder. Both parties, throughout the long, two-day process, had a level playing field. Cash is cash, and equity was valued at \$650,000 for each percentage point of equity. A 20% equity cap was determined to be appropriate, based on preferences expressed in several discussions between and among Houlihan Lokey, representatives of the two committees in attendance, and the Debtors. Hilco-Gordon Brothers had the right to bid 2% more equity to reach the cap but elected not to do so, instead bidding ½ percent above the cap.

Patriarch should be held to have submitted the highest and best bid within the rules of the auction and the determination of the Debtors and its advisors. Patriarch bid promptly, regularly and with no delay. The auction accomplished its objective. Competitive tension developed. Value increased. Equity currency was valued equally for both bidders. The estate now has \$16 million more in value for its creditors.

III. DEBTORS ARE AFFORDED CONSIDERABLE DEFERENCE WHEN EVALUTATING PROPOSED SALE TRANSACTIONS

In pertinent part, § 363(b) provides that “[t]he trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). In determining whether to authorize the use, sale or lease of property of the estate under this section, debtors are given great deference and need only show that the transaction reflects an exercise of reasonable business judgment. *See, e.g., In re Food Barn Stores, Inc.*, 107 F.3d 558, 567 n.16 (8th Cir. 1997); *In re Crystalin LLC*, 293 B.R. 455, 463-64 (8th Cir. B.A.P.

2003); *In re Lionel Corp.*, 722 F.2d 1063(2d Cir. 1983); *In re Schipper*, 933 F.2d 513, 515 (7th Cir. 1991); *Accord* Collier on Bankruptcy ¶ 363.02 (15th rev. ed. 2008). The mere fact that someone may disagree with the transaction, that alternatives exist, or some specified terms relating to the transaction create a disagreement are not determinative of whether or not the transaction should be approved. Rather, the standard to be applied in approving such a sale as is proposed here is whether Polaroid exercised reasonable business judgment under the circumstances. When objectively viewed, the sale of the assets of these Debtors, in this financial condition and with dwindling unencumbered cash resources to continue operations is eminently a reasonable exercise of its business judgment. The Auction has provided significant value to the estate, is in the best interest of the creditors, and should be approved.

IV. RESPONSES TO THE SEVERAL OBJECTIONS

A. Polaroid Has Been Extensively Marketed and the Sale Process Has Achieved the Highest and Best Value for Polaroid's Assets

With its current rate of consumption of cash resources, Polaroid lacks the financial resources to continue operating on its unencumbered assets alone. If Polaroid is to remain a viable and valuable brand, it must remain in the marketplace as a going concern to maintain customer and consumer relationships. The suggestion to put the Polaroid brand on a shelf and dust it off in a few years will not ensure greater value and will likely introduce more risk to the brand and increase costs to the estate. A brand's value is based on reputation and favorable opinions by consumers and retailers. Suspending the brand will create significant ill-will due to un-met commitments to retailers and poor customer support. If the Polaroid name vanishes from the shelves, consumers will find alternative brands to fulfill their needs that will further diminish the value of the Polaroid Brand.

Despite intense efforts by the company over the past year, Polaroid has been unable to obtain the working capital it needs. Both before and since the Petition Date, Polaroid, in consultation with its legal and financial advisors and with an eye toward effectively utilizing Polaroid's limited financial resources, has actively, aggressively and strategically marketed its assets through an open process with the goal of achieving the highest and best value for those assets, whether by selling substantially all or subsets of its assets. Polaroid has been, and continues to be, willing to accept the highest and best offer for any or all of its assets, which has been demonstrated by the various bids received in advance of the auction. It is exactly this process that the Bankruptcy Code is designed to foster.

1. Polaroid Has Been Adequately and Extensively Marketed

On October 8, 2008, Polaroid engaged Houlihan Lokey Howard & Zukin Capital, Inc. ("Houlihan Lokey") as its financial advisor and investment banker. Houlihan Lokey has one of the largest worldwide financial restructuring practices of any investment bank. The firm is also a recognized leader in business valuations and effectuating merger and acquisition transactions for distressed companies. In 2007, Houlihan Lokey was ranked the number one restructuring investment banking firm by TheDeal.com's Bankruptcy Insider and the number one M&A advisor for U.S. transactions under \$1.25 billion by Thomson Financial. The firm was engaged by Polaroid to, among other things, evaluate various strategic and financial alternatives to maximize the value of the Debtors' business for the benefit of all constituents. The Houlihan Lokey team conducted a comprehensive strategic, operational and financial assessment of Polaroid, which included numerous due diligence sessions with management and key personnel. Polaroid and Houlihan Lokey determined, after extensive analysis and consideration, that the Debtors' best opportunity to maximize value for the benefit of the bankruptcy estates is to sell the Polaroid brand, businesses and related assets in a prompt and orderly manner.

Continuing on the efforts of the company over the past year, the Debtors, with the assistance of Houlihan Lokey and other professionals, have been actively engaged in marketing efforts that included soliciting interest in a purchase of Polaroid. As part of an exhaustive marketing process, the Debtors and Houlihan Lokey contacted in excess of 200 prospective parties, including strategic and financial buyers, both domestic and international. The company and Houlihan Lokey developed an electronic due diligence data room which includes material contracts, financial statements, intellectual property documents and other information believed necessary for a third party to evaluate the businesses and assets of Polaroid in connection with a possible investment, financing or acquisition transaction. In addition, the Debtors and Houlihan Lokey prepared marketing materials (the “Marketing Materials”) designed to elicit interest from potential candidates.

Houlihan Lokey identified potential investors, financiers and purchasers and distributed Marketing Materials to those who expressed interest and executed a confidentiality agreement. Houlihan Lokey distributed the Marketing Materials to prospective investors, lenders, purchasers and other parties in interest and made presentations to many interested parties. The company and Houlihan Lokey marketed asset in parts (i.e., 20 x 24, Polaroid ID Systems, etc...). Executive officers and employees of Polaroid participated in numerous meetings and conference calls with potential investors, lenders and purchasers, and in certain instances obtained independent assessments from liquidators and appraisers. As a result of these efforts, a substantial number of interested parties conducted due diligence and discussed the Polaroid business opportunity with Houlihan Lokey.

During this process, Polaroid and Houlihan Lokey have actively marketed the assets of Polaroid in an extremely flexible process. In spite of its cash burn rate, Polaroid extended the

due diligence period to allow additional parties to conduct due diligence and prepare bids. The bid procedure and auction process has been conducted to allow parties to submit bids for all assets as well as specific subsets of assets whole, and in parts, and allowed bids to be in cash, equity and other creative financing methods. Because of the efforts of both Polaroid and Houlihan Lokey, bids were received that included all cash transactions as well as those that included stock in the reorganized entity, bids were received for substantially all assets, as well as for specific and strategic components of Polaroid's assets. The efforts of both Polaroid and Houlihan Lokey have been more than sufficient to overrule all objections of critics as to the adequacy of the marketing of Polaroid and its assets.

2. The Sale Price Is the Highest and Best Value for Polaroid's Assets

Objections raised to the adequacy of the current purchase price, as compared to some hypothetical, speculative or hopeful opinion of the value of Polaroid's assets must be overruled. Generally, "the best way to determine the market value of property is to expose the property to the marketplace." *In re Mama's Original Foods, Inc.*, 234 B.R. 500, 504 (Bankr. C.D. Cal. 1999) (citing *Bank of America v. 203 North LaSalle Street Partnership*, 526 U.S. 434 (1999)); see also *United States v. Edgar*, 971 F.2d 89, 94 (8th Cir. 1992) (quoting *Albrecht v. Herald Co.*, 452 F.2d 124, 131 (8th Cir. 1971) ("It is well established that the 'fair market value would be that price a willing seller could secure from a willing buyer.'"); *Malley-Duff & Assocs. v. Crown Life Ins. Co.*, 734 F.2d 133, 148 (3d Cir.), cert. denied, 469 U.S. 1072 (1984). The "market value of estate property ... is the highest price that an informed buyer is willing to pay after the property has been appropriately exposed to the marketplace for a reasonable period of time." *In re Mama's Original Foods, Inc.*, 234 B.R. at 504.

Several objectors rely on valuations prepared at a different time, for a dramatically different company, under dramatically different global economic times, and based on overly

optimistic sales and revenue projections that were never achieved. Indeed, results from operations to date represent extraordinarily negative material variances from projected results and previously-established assumptions regarding revenues, cash flows and profitability. With all due respect to the various objecting parties, what someone opined or guessed the value of Polaroid and its assets was years ago has little resemblance to the value of those assets today. Ultimately, creditors don't get their claims paid with opinions. Polaroid can only satisfy its creditors' claims with funds it actually realizes from the value of its assets at a sale. Polaroid finds it telling that no entity has made an offer anywhere near these historical valuations these objectors rely upon, including the objectors themselves.

After a robust and open auction process, with multiple bidders vying for all, as well as portions of, Polaroid's assets, Patriarch was the Successful Bidder. The auction process was designed to, and has achieved Polaroid's goal of obtaining the maximum value for its assets for its estates estate and their creditors. Accordingly, such objections to the marketing efforts of Polaroid and Houlihan Lokey does not comport with reality, and must be overruled.

B. The Sale Does Not Benefit Insiders and Polaroid Conducted the Sale Process in Good Faith

One objector asserted the proposed sale to Genii Capital ("Genii"), as Stalking Horse, was to an insider and in bad faith. Debtor asserts that such objections do not rise to a credible argument that this sale, after an open and transparent auction with multiple bidders, was to an insider or done in bad faith.¹ In fact, just the opposite. Neither Ms. Jeffries nor other Polaroid

¹Zink is an integrated design, development and manufacturing center with expertise in digital photo printing and is an important supplier of products to Polaroid. Zink and Polaroid operate under an exclusive agreement for the sale and delivery of Zink's products and technology to, and for use by, Polaroid. Zinc is a former Polaroid division that was subsequently spun-off through a buyout in January of 2006. In addition to cash consideration, Polaroid sold Zink certain intellectual property around the Zink technology for \$8 million, taking a note and security interest in the transferred IP (the "IP Note"). To secure the exclusivity for the 3x4

officers or employees have any type of formal or informal agreement or arrangement for employment, equity sharing or any other consideration from Genii or any other potential buyer.

Accordingly, the objection that this sale has been conducted in bad faith should be overruled.

C. The Proposed Sale Free and Clear of Liens, Claims and Interests Is Proper and Necessary to Achieve the Highest and Best Value for Polaroid's Assets

A number of affiliated entities claim interests in specific assets of Polaroid, including Petters Company, Inc., Petters Capital, LLC, Petters Company, LLC and PAC Funding, LLC (the "Affiliated Entities"), as well as Acorn Capital, LLC ("Acorn"), Ritchie Capital

format technology being developed by Zink for upcoming Polaroid products, Polaroid and Zink entered into an exclusivity agreement whereby Polaroid maintained exclusive rights to the Zink 3x4 technology and in exchange \$7 million of the IP Note was converted into shares of Zink stock. Because competitors of Polaroid were also Zink customers, these customers did not want the shares held by Polaroid so they were issued to PGW Holdings, Inc. ("PGW Holdings"), a non-debtor affiliate of Polaroid subject to a court ordered receivership, and Polaroid recorded an inter-company receivable from PGW Holdings in the same amount. PGW Holdings currently controls approximately only 8% of the outstanding voting shares of Zink.

The fact that a major investor Gerard Lopez in the owner ("Mangrove") of a technology (Zero ink printing) is a board member of, but not an investor in, the buyer (Genii), who desires to acquire a business to potentially assure or create a demand for its product in the marketplace (Polaroid Products) does not imply any nefarious purpose in acquiring Polaroid. To the contrary, even assuming that Genii and Mangrove were the same entities, strategic acquisitions are quite common, make good business sense, and often create win-win scenarios for both the buyer and seller. In this instance, and even if Genii and Mangrove were the same entity, to acquire Polaroid's assets to be able to integratively market its inkless paper products as well as devices that use such products, they must prevail at an open and transparent auction. As such, there could be no 'sweet-heart' deal that is possible. Polaroid's reliance on Zink products, and the need for any purchaser to ensure continued access to Zink technology, has been made available to all interested bidders in the electronic Due Diligence Room and all interested parties have had the full opportunity to conduct their own due diligence on this issue.

As a shareholder in Zink, PGW Holdings has a seat on Zink's board of directors currently held and voted by the Court Appointed Receiver over the assets of PGW Holdings. Polaroid's CEO, Mary Jeffries, currently sits on the board of Zink as an uncompensated member and monitor for the Receiver. Zink has been experiencing its own financial challenges and its equity appears to currently be of little value. Ms. Jeffries indirectly owns 7,380 shares of Zink stock, or currently approximately 0.0068% of the outstanding shares, and further dilution is anticipated. Of note, Marlon Quan, the Chief Executive Officer of Acorn Capital Group, LLC, who joined with Ritchie Group to submit a bid, holds directly and indirectly shares of Zink.

Management, LLC et al. (“Ritchie”) and the trustee for RWB Services, LLC (“RWB”). Each of the above liens, claims and interests are disputed.

Only Acorn and Ritchie have raised objections to the sale of Polaroid’s assets being free and clear of all liens, claims and interest therein, particularly the interest each asserts (directly or indirectly) in certain assets of Polaroid, albeit avoidable. Because Polaroid can establish at least one of the elements of § 363(f), the sale of Polaroid’s assets free and clear of these liens, claims and interests is authorized by the Bankruptcy Code and these objections should be overruled. *In re Elliot*, 94 B.R. 343, 345 (E.D. Pa. 1988). Polaroid acknowledges that to the extent any such liens, claims and interests are not avoided, subordinated, recharacterized or otherwise disallowed, such liens, claims and interests will attach to the net proceeds of this sale with the same validity, priority, dignity and effect as existed prior to the sale.

1. Section 363(f)

Section 363(f) of the Bankruptcy Code provides that the trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if:

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f). Because it can do so, the sale of assets free and clear of liens, claims and interests is authorized pursuant to § 363(f) of the Bankruptcy Code.

a. Consent under Section 363(f)(2)

It is clear from the objections that neither Acorn nor Ritchie consent to the sale free and clear of their purported liens, claims and interests. The remaining insider entities that have been granted security interests in certain of Polaroid's assets have affirmatively consented to a sale free and clear of their interests under 11 U.S.C. § 363(f)(2) as the best prospect for realizing value on their claims. In addition, their claims are scheduled as disputed. In the event that the Court finds that any affiliated entity has not affirmatively consented, such entities have not objected to the sale free and clear of such liens and, as such, they are deemed to have consented to such sale. *See, e.g., Veltman v. Whetzal*, 93 F.3d 517, 521 n.5 (8th Cir. 1996) (in a Chapter 7 case, stating that "some courts have found implied consent, however, when a party with an interest in the bankruptcy estate fails to object after receiving notice of the sale under subsection 363(f)(2)") (citing *In re Tabone, Inc.*, 175 B.R. 855, 858 (Bankr. D.N.J. 1994); *In re Elliot*, 94 B.R. 343, 345 (E.D. Pa. 1988); *In re Shary*, 152 B.R. 724, 725-26 (Bankr. N.D. Ohio 1993); *In re Sherrill*, 78 B.R. 804, 809 (Bankr. W.D. Tex. 1987) (finding implied consent when the FDIC failed to object to a sale free and clear of liens under 11 U.S.C. § 363(f)); *In re James*, 203 B.R. 449, 453 (Bankr. W.D. Mo. 1997) (a bank failed to object to a sale free and clear of liens under 11 U.S.C. § 363(f), by failing to object to the sale the bank implicitly conveyed its consent to the sale for purposes of satisfying section 363(f)(2)); *In re Allegheny Health, Education and Research Foundation*, 383 F.3d 169, 177-78 (3d Cir. 2004) (holding that a creditor was bound by the terms of the asset purchase agreement where the creditor failed to object). *Contra In re Roberts*, 249 B.R. 152, 155-56 (Bankr. W.D. Mich. 2000).

Acorn wears two hats in these cases: One as a direct claimant; the other as an indirect claimant as a creditor of a creditor of Polaroid, PAC Funding. PAC Funding is a wholly-owned subsidiary of Petters Company, Inc. and integrally involved in the Petters Ponzi scheme. Acorn

is a creditor of PAC Funding owed in excess of \$250 million. As a creditor of Polaroid's creditor, Acorn, as a third party, does not have standing to object or withhold the consent of PAC Funding under 11 U.S.C. § 363(f)(2) in these cases. Under 11 U.S.C. § 1109, "[a]n entity may be [a] real party in interest and have standing in one respect while he [sic] may lack standing in another respect." *In re A.P.I. Inc.*, 331 B.R. 828, 857 (Bankr. D. Minn. 2005). See *In re South State Street Bldg. Corp.*, 140 F.2d 363 (7th Cir. 1944); *In the Matter of Ofty Corp.*, 44 B.R. 479 (Bankr. D. Del. 1984). "[S]tanding to object must be determined on a particularized basis." *Id.* at 857. "A judgment creditor of a creditor of the bankrupt is not a 'party in interest' because the judgment creditor was not itself a direct creditor of the bankrupt." *In re Comcoach Corp.*, 698 F.2d 571, 574 (2d Cir. 1983) (citing *In re Toar Train Partnership*, 15 B.R. 401 (Bankr. D. Vt. 1981)). While it certainly may withhold consent as to its direct claim, it has no standing to object under 11 U.S.C. § 363(f)(2), to PAC Funding's consent to a sale free and clear of its interests.

Acorn has asserted that certain affiliated entities may not consent by operation of Section 9-607(a)(3) of the Uniform Commercial Code. Generally, Article 9 of the Uniform Commercial Code, through Chapter 6, instructs parties on the default and enforcement of security interests. In particular, U.C.C. § 9-607 deals with "Collection and Enforcement by Secured Party." Acorn asserts that PAC Funding has defaulted and U.C.C. § 9-607 permits it to pursue its remedies under the PAC Security Agreement in this proceeding. PAC Funding and Polaroid have both filed for protection under the Bankruptcy Code. The automatic stay provisions of the Bankruptcy Code provide broad protections to debtors and because Acorn has not been granted relief from the automatic stay, the stay operates to prevent Acorn from asserting a state law collection claim, allegedly founded upon U.C.C. § 9-607, against the bankruptcy estate of PAC

Funding directly, and as Acorn alleges, indirectly against Polaroid. Acorn cannot act under U.C.C. § 9-607 to enforce its security interest against PAC Funding in these cases. Acorn asserts that it steps directly into the shoes of PAC Funding under U.C.C. § 9-607, but it is precisely this step that the automatic stay does not permit.

The assets of Polaroid's may be sold free and clear of liens, claims and interests as to those entities that have either affirmatively consented, or have not directly objected to such sale.

2. Bona Fide Disputes Exist, Satisfying Section 363(f)(4)

The purpose of § 363(f)(4) is to allow the sale of property of the estate free and clear of disputed interests so the liquidation of the assets is not unnecessarily delayed while such disputes are litigated. *Moldo v. Clark (In re Clark)*, 266 B.R. 163, 171 (9th Cir. B.A.P. 2001); *In re Durango Georgia Paper Co.*, 336 B.R. 594, 597 (Bankr. S.D. Ga. 2005); *In re Robotic Vision Systems, Inc.*, 322 B.R. 502, 506 (Bankr 2005). The Bankruptcy Code does not define “bona fide dispute,” however, many courts, including the Eighth Circuit Bankruptcy Appellate Panel, have stated that the court must determine “whether there is an objective basis for either a factual or legal dispute as to the validity of the debt.” *In re Gaylord Grain, L.L.C.*, 306 B.R. 624, 627 (8th Cir. B.A.P. 2004) (Kressel, C.J.) (*quoting In re Busick*, 831 F.2d 745, 750 (7th Cir. 1987) and *also citing In re Octagon Roofing*, 123 B.R. 583, 590 (Bankr. N.D. Ill. 1991)). “Clearly this standard does not require the court to resolve the underlying dispute, just to determine its existence.” *Id.* at 627.

In determining whether a bona fide dispute exists, however, the propriety of the lien does not have to be the subject of an immediate or concurrent adversary proceeding. *In re Gaylord Grain, L.L.C.*, 306 B.R. at 628; *In re Collins*, 180 B.R. at 452, n.8; *In re Oneida Lake Dev., Inc.*, 114 B.R. at 357-58; *In re Bedford Square Assoc., L.P.*, 247 B.R. 140, 145 (Bankr. E.D. Pa. 2000). It is not even necessary that the bona fide dispute even be between the debtor and the lien

holder. See *In re Gulf States Steel, Inc.*, 285 B.R. 497, 507 (Bankr. N.D. Ala. 2002) (citing *In re Gerwer*, 898 F.2d 790, 733 (9th Cir. 1990) (a bona fide dispute need not be between the debtor or trustee and lienholder, but rather, if the outcome of dispute over interest will affect value of estate, statutory language of 363(f)(4) is sufficient to embrace interest)). Rather, as correctly acknowledged, even by Acorn in its pleadings, “a party must articulate in a pleading or in an argument an objective basis sufficient under the facts and circumstances of the case for the court to determine that a bona fide dispute exists.” (quoting *In re Robotics Vision Systems, Inc.*, 322 B.R. at 506).

While the above courts have found a bona fide dispute to exist without having a pending adversary proceeding, in this case, the liens, claims and interests of Acorn and Ritchie are the subject of pending adversary proceedings that clearly articulate an objective basis to avoid, subordinate, recharacterize and/or disallow any and all asserted liens, claims and interests (whether directly or indirectly). The pleadings’ clearly-articulated basis for disputes more than satisfies the requirements of § 363(f)(4) as being in a bona fide dispute. It is important to note that neither Acorn nor Ritchie filed motions to dismiss these complaints under Fed. R. Civ. P. 12(b)(6), made applicable to adversary proceedings through Fed. R. Bankr. P. 7012. Instead, they each answered the complaint asserting direct and indirect counter claims.

a. Affiliated Liens and Claims Are Subject to Bona Fide Disputes

Not only have the affiliated lienholders affirmatively consented to the sale, but the liens, claims and interests of the affiliated entities (the “Affiliated Interests”) are the subject of bona fide disputes. As affiliates, each is an “insider” of Polaroid under 11 U.S.C. § 101(31). Each was a beneficiary of, and/or actively involved in, the Petters Ponzi scheme and freely transferred funds within the Petters empire to keep the Petters empire afloat and shore-up, conceal and cover substantial losses. Several co-conspirators have pled guilty to participating in, and facilitating

this fraudulent scheme. The affiliated entities' participation in, and or benefiting from, the fraudulent Ponzi scheme resulted in lenders and investors allegedly having claims in excess of \$3 billion. Any Affiliated Interests were obtained as part of the fraudulent Petters Ponzi scheme or to an insolvent or non-bankable entity, and as such, such Affiliated Interests in the assets of Polaroid should be equitably subordinated and/or recharacterized as an equity investment for the benefit of legitimate creditors of Polaroid. The claims are also disputed in Polaroid's schedules. As a result of such bona fide dispute as to the character of such Affiliated Interests, the sale should proceed free and clear of such liens pursuant to § 363(f)(4).

b. RWB Liens and Claims Are Subject to Bona Fide Dispute

As stated in the objection of Ronald R. Peterson, RWB purportedly made loans in the aggregate original principal amount of \$10 million to Petters Capital, which loans were secured by possessory liens on notes payable by Polaroid Corporation to Petters Capital. Prior to Polaroid's bankruptcy filing, RWB alleges to have taken ownership of such notes. RWB is a creditor of Polaroid's creditor, Petters Capital, not of Polaroid, and has no greater interest than did Petters Capital, whose lien is scheduled as disputed in Polaroid's schedules and subject to bona fide dispute for the same reasons stated above.² Therefore, the priority and validity of RWB's purported lien is subject to a bona fide dispute, and the sale should proceed free and clear of such lien pursuant to § 363(f)(4).

² In addition, it appears that the actions of RWB taken on October 16, 2008, to purportedly obtain ownership of such Petters Capital notes were in violation of an order entered by Judge Ann D. Montgomery, United States District Court for the District of Minnesota on October 6, 2008 in the case of *U.S. vs. Petters, et al.*, Case No. 08-CV-5348 (the "Receivership Order") and incorporated by reference herein.

c. **Acorn's Liens and Claims Are Subject to Bona Fide Dispute**

As alleged in *Polaroid Corporation and Polaroid Consumer Electronics, LLC v. Acorn Capital Group, LLC*, Docket No. 1, Adv. Proc. No. 09-4031 (the “Acorn Complaint”)³ Acorn and Thomas Petters (“Petters”) collectively engaged in a series of transactions through Petters Company, Inc. and its wholly-owned subsidiary PAC Funding, as part and parcel of a continuing scheme and conspiracy to extract value from Polaroid through a series of overreaching agreements and avoidable transfers made to or for the benefit of Acorn and to the detriment of legitimate creditors and investors of Polaroid. The nature of Acorn’s asserted interests are outlined in the Acorn Complaint with relevant loan documents attached. Polaroid alleges in the complaint that upon discovery of breaches by Petters and PAC Funding of representations and warranties regarding the existence, amount, nature and quality of collateral pledged by PAC Funding to secure financing by Acorn, Petters, Acorn and PAC Funding orchestrated a plan of transactions, agreements and transfers to secure the obligations of PAC Funding in an attempt to shore up, conceal and cover approximately \$275,000,000 in Acorn losses. The complaint further alleges that such transactions, agreements and transfers were made in furtherance of the fraudulent scheme, for no or less than fair value to Polaroid, and which resulted in substantial injury to Polaroid and its legitimate creditors. The interest of Acorn in the assets of Polaroid, to state the obvious, is the subject of a bona fide dispute and the sale should proceed free and clear of Acorn’s purported lien pursuant to § 363(f).

Additionally, while not making any admission as to the validity or existence of an interest in Polaroid, Acorn contends it has at least an interest in Polaroid’s US Inventory and Accounts to

³ Due to their voluminous nature, the complaint and exhibits to the complaint are not being submitted to the Court again with this motion, but such documents are incorporated by reference herein.

the extent of a \$10 million advance it made to PAC Funding, an insider who is a debtor in a pending bankruptcy proceeding, who in turn advanced the money to Polaroid. Acorn appears to readily acknowledge, as it should, that it has no other outstanding sums that it at any time advanced, directly or indirectly, to Polaroid despite the fact that it contends that all amounts owed under a third-party credit facility are secured by Polaroid assets. This claim, however, is that of PAC Funding, and not Acorn, who is, at best, a creditor of PAC Funding. Such interest would not preclude such sale free and clear of liens even if this interest were not disputed. Additionally, this Court has ordered, pursuant to the most recent cash collateral order, that cash proceeds from the sale of inventory be segregated to adequately protect such interests, which amount is currently approximately \$19.5 million, which exceeds Acorn's purported interest via the \$10 million PAC Funding loan.

d. The Ritchie Liens and Claims Are Subject to Bona Fide Dispute

As alleged in *Polaroid Corporation v Ritchie Capital Management, LLC et al.*, Docket No. 1, Adv. Proc. No. 09-4032 (the "Ritchie Complaint"),⁴ and as also shown in the *Appointed Trustee's Response to Objection to Appointment of Douglas A. Kelley as Trustee for all of the Debtor in these Jointly Administered Proceedings*, filed in the PGW case, No. 08-45257, Docket No. 132, in February of 2008 and incorporated by reference herein, Ritchie invested at least \$146,000,000 into PCI as part of the fraudulent Ponzi scheme, with those funds immediately disbursed to other investors. Although Ritchie invested in PCI, PGW 'papered' a series of notes to Ritchie in return that had extremely high stated annual rates of return (denominated as "interest") equal to either "67%" for one, "362.10%" for two and "80%" for the remaining notes.

⁴ Due to their voluminous nature, the complaint and exhibits to the complaint are not being submitted to the Court again with this motion, but such documents are incorporated by reference herein.

At no time did Ritchie invest in, loan or advance any funds to Polaroid or to PGW for that matter. Zero.

On or about September 19, 2008, literally days before or after the Ponzi scheme collapsed, Ritchie and Petters orchestrated a series of transactions that were completed in a final-hour attempt to keep the Petters empire afloat and shore-up and cover millions of dollars in Ritchie's losses. Despite having no interest in, or relationship to, Polaroid, Ritchie and Tom Petters made a series of overreaching agreements and otherwise avoidable transfers for the benefit of Ritchie and to the substantial detriment of Polaroid's creditors, including the pledge of certain Polaroid trademarks. Ritchie filed a proof of claim in the amount of \$250 million, but failed to provide any documentation in support of its claim.

In addition to the preferential transfer of certain Polaroid Trademarks, as part of this scheme to cover millions of dollars in Ritchie's losses, Petters also purportedly pledged to Ritchie certain notes issued by Polaroid Corporation in favor of PCI, Petters Capital, and Thomas Petters, Inc., which are also alleged to be avoidable in their own right, or potentially through substantive consolidation. Through these notes, Ritchie is merely a creditor of Polaroid's creditor.

These transfers resulted in substantial injury to Polaroid and its legitimate creditors. Based on the facts alleged in the Ritchie Complaint, Polaroid seeks to avoid all such transfers, subordinate any interest of Ritchie, and recharacterize any alleged interest Ritchie asserts in the assets of Polaroid.

e. Summary

Because Polaroid does not have the cash resources to continue to operate, and it has been unable to obtain third-party financing, time is of the essence with respect to this sale of Polaroid's assets. The value of Polaroid's assets, particularly in the current economic conditions,

is likely to erode quickly, however, if the sale is not conducted promptly. As a result, the Debtors contend that a sale free and clear of all liens under § 363(f) is appropriate in this case, particularly where the arguments articulated in the Motion and the filed Acorn and Ritchie Complaints clearly establish that bona fide disputes do indeed exist with respect to all such liens and claims. As a result of such bona fide disputes and other statutory bases for permitting sales of estate property, the proposed sale(s) should proceed free and clear of all liens pursuant to § 363(f).⁵

3. Acorn and Ritchie Can Be Compelled, in a “Legal or Equitable Proceeding,” to Accept a Money Satisfaction of their Interests.

A sale under 11 U.S.C. § 363 may be free and clear of any lien, claim or interest in the property if “such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.” 11 U.S.C. § 363(f)(5). It is firmly established that since Acorn and Ritchie may be compelled in a cram-down proceeding under 11 U.S.C § 1129(b) to accept monetary satisfaction of their interest, such existence of a cram-down proceeding satisfies a sale free and clear under 11 U.S.C. § 363(f)(5).

“By its express terms, Section 363(f)(5) permits a sale free and clear if the trustee can demonstrate the existence of another legal mechanism by which a lien could be extinguished without full satisfaction of the secured debt.” *In re Gulf States Steel, Inc. of Alabama*, 285 B.R. 497, 508 (Bankr. N.D. Ala. 2002). “Cases requiring full payment under Section 363(f)(5) are obsolete, inasmuch as they are inconsistent with the bankruptcy code.” *Id.* at 508. *See also In re*

⁵ Polaroid asserts that the proposed sale is additionally authorized free and clear in accordance with 11 U.S.C. § 363(f)(5), which allows lien extinguishment if any party asserting an interest in the assets could be compelled to accept money satisfaction of such interest in a legal or equitable proceeding without full satisfaction of the debt. *See In re James*, 203 B.R. 449, 454 (Bankr. W.D. Mo. 1997) (finding a potential cause of action under § 547 to qualify as a “legal or equitable proceeding” that can force a sale free and clear).

Grand Slam, U.S.A., Inc., 178 B.R. 460, 462 (E.D. Mich. 1995); *In re Healthco Intern., Inc.*, 174 B.R. 174, 176 (Bankr. D. Mass. 1994) (since any lien can be discharged by full payment of the underlying debt pursuant to § 363(f)(3), it makes no sense that § 363(f)(5) requires full payment). “The phrase ‘could be compelled’ only requires that the interest in question be subject to final satisfaction on a hypothetical basis, not that there be an actual payment of the sale in question.” *In re Gulf States Steel*, 285 B.R. at 508. See also *In re WBQ Partnership*, 189 B.R. 97, 107 (Bankr. E.D. Va. 1995). Under § 1129(b)(2)(A) of the Bankruptcy Code, a Chapter 11 plan proponent can satisfy a secured claim, over the objection of the claimant, by cash payments having a present value equal to the value of the allowed secured claims. See 11 U.S.C. § 1129. See also 11 U.S.C. § 506(a). “Such a cram-down proceeding complies with the description of proceedings referred to in subparagraph (f)(5).” *In re Healthco Intern., Inc.*, 174 B.R. at 176. See also *In re Grand Slam*, 178 B.R. at 462; *In re Gulf States Steel*, 285 B.R. at 508; *In re Oglesby*, 196 B.R. 938, 944 (Bankr. E.D. Va. 1996); *In re WBQ Partnership*, 189 B.R. 97, 107 (Bankr. E.D. Va. 1995); *In re Hunt Energy Co., Inc.*, 48 B.R. 472, 485 (Bankr. N.D. Ohio 1985); *contra Clear Channel Outdoor, Inc. v. Knupfer, Chapter 11 Trustee (In re PW, LLC)*, 391 B.R. 25 (9th Cir. B.A.P. 2008) (“*Clear Channel*”).

Courts have also found potential causes of action under Chapter 5 of the Bankruptcy Code to qualify as such a legal proceeding that permits a sale free and clear of liens and interests under § 363(f)(5). See, e.g., *In re James*, 203 B.R. 449, 454 (Bankr. W.D. Mo. 1997) (finding a potential cause of action under § 547 to qualify as a “legal or equitable proceeding” that can force a sale free and clear); *In re Heine*, 141 B.R. 185, 189-90 (Bankr. S.D. 1992) (a preference action under § 547 was held to be a “legal or equitable proceeding” that satisfied lien extinguishment under § 363(f)(5)).

Ritchie asserts that *Clear Channel* holds that a “legal or equitable proceeding” under 11 U.S.C. § 363(f)(5) must arise under nonbankruptcy law to satisfy this section. However, the *Clear Channel* court found that “so long as the breadth of [§ 363(f)(5)] complements the other four paragraphs consistent with congressional intent, without overlap, our narrow view is justified.” 391 B.R. at 43. Congress clearly knows when it intends for bankruptcy and non-bankruptcy law to apply. In § 363(f)(1), Congress clearly limited applicability of this particular provision to non-bankruptcy law by stating “*applicable nonbankruptcy law* permits sale of such property free and clear of such interest.” 11 U.S.C. § 363(f)(1) (emphasis added). Section 365(f)(5), however, which is in the same subsection as subparagraph 1, does not contain such limiting language, merely stating “such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.” 11 U.S.C. § 363(f)(5). In two paragraphs of § 363(f), Congress intended only nonbankruptcy law to apply in subparagraph 1 and did not so limit subparagraph 5 to only nonbankruptcy law. As such, a plain language reading of the statutory text does not limit § 363(f)(5) to only nonbankruptcy law. An interpretation that requires subparagraph 5 to only apply nonbankruptcy law effectively writes subparagraph 1 out of § 363(f).

Here, cramdown under § 1129(b)(2)(A), as well as avoidance actions pursuant to chapter 5, are proceedings that would compel Acorn and Ritchie to accept a money satisfaction of their alleged interest. The existence of such proceedings satisfy the requirement of § 363(f)(5) to sell Polaroid free and clear of all asserted interests. Approval of the sale free and clear of all interests, liens, claims and encumbrances in these bankruptcy cases is in the best interests of the estate and all of its constituents. The relief requested is appropriate and is consistent with both the letter and spirit of § 363(f).

D. Parties without Liens Secured by Allowed Claims Should Not be Permitted to Credit Bid under Section 363(k)

Polaroid is uncertain if Ritchie is objecting to the pending sale because this Court ruled that such parties without liens secured by allowed claims do not fall within the statutory language of § 365(k), as well as finding cause for not permitting credit bidding. By limiting credit bidding to only those parties having liens secured by allowed claims, Congress sought to protect the estate and legitimate creditors from creditors with legitimately disputed claims taking assets from the estate and later having that disputed claim avoided, which is precisely the situation presented in these cases. Polaroid thoroughly responded to this objection in its Consolidated Reply to the Objections raised at the Bidding Procedures Hearing filed February 17, 2009, at Docket # 114, and incorporated by reference herein.

E. A Good Faith Buyer of Polaroid May Rely upon Section 363(m) for Both a Sale under Section 363(b) and Section 363(f).

A good faith buyer of property under Section 363 has certain protections under Section 363(m). This section provides that:

“The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.”

11 U.S.C. § 363(m). In the event that the authorization to sell Polaroid is not stayed pending appeal of such authorization, a potential good faith buyer of Polaroid is protected from parties interfering with its good faith purchase.

While Acorn relies on *Clear Channel*, non-binding Ninth Circuit law, this Court must apply the prevailing Eighth Circuit law. The finality rule “is premised upon the two complementary policies of (1) encouraging finality in bankruptcy sales; and (2) respecting the

jurisdictional prohibition against allowing the court to decide cases in which it cannot provide a remedy.” *In re Wintz Companies*, 230 B.R. 840, 845 (8th Cir. B.A.P. 1999). “Courts in the Eighth Circuit have repeatedly stated this principle.” *Id.* (citing *Prasil v. Dietz*, 215 B.R. 582, 584 (8th Cir. B.A.P. 1998)); *Forbes v. Forbes*, 215 B.R. 183, 192-93 (8th Cir. B.A.P. 1998). “When a debtor sells property with the approval of the court, the buyer acquires titles *clear of all claims* in the bankruptcy. The property may not be hauled back into the estate, and the terms of the sale are inviolate in the absence of fraud or collusion.” *In re Wintz*, 230 B.R. at 845. (emphasis added).

As recently as March 30, 2009 the Eighth Circuit Bankruptcy Appellate Panel upheld these sale closure mootness principles. In *In re Reagan*, -- B.R. --, 2009 WL 805144 (8th Cir. B.A.P. March 30, 2009), after having her motion to stay pending appeal denied, the Appellant sought to appeal the sale order and have the closed sale of her company overturned. The court dismissed her appeal as moot. “If, while an appeal is pending, an event occurs that eliminates the court’s ability to provide any effectual relief whatever, the appeal must be dismissed as moot.” *Reagan v. Wetzel* (citing *In re Rodriguez*, 258 F.3d 757, 759 (8th Cir. 2001); *In re Security Life Ins. Co.*, 228 F.3d 865, 870 (8th Cir. 2000)). “Consequently, courts of review are unable to supply a remedy after a sale under 11 U.S.C. § 363 (b) or (c) has occurred.” *Id.* (citing *In re Wintz Co.*, 219 F.3d at 811). The *Reagan* Court ultimately held that “[b]ecause the sale of [the company] to a third party has already occurred, we must dismiss [Appellant’s] appeal from the sale order as moot.” *Id.* See *United States v. Fitzgerald*, 109 F.3d 1339, 1342 (8th Cir. 1997) (“a debtor who fails to obtain a stay has no remedy on appeal and the appeal is moot”). Accordingly, if a stay pending an appeal is not granted in this case, any appeal taken to challenge the sale order should be dismissed entirely upon closing on a court-authorized § 363 sale.

Acorn cannot prevent the sale of Polaroid free and clear of its interests under § 363(f). Accordingly, Acorn seeks to rely on law from a Bankruptcy Appellate Panel in the Ninth Circuit as part of an apparent strategy aimed at injecting unnecessary uncertainty and unfounded risk into the sale of Polaroid by threatening prospective purchasers that their liens will potentially attach to Polaroid after a sale, hardly a step consistent with a purported concern about maximizing value in a sale process. The statements of Acorn are not based on the law in the Eighth Circuit and appear designed to rob value from the sale of Polaroid by recklessly injecting doubt into the sale that certainly does not currently exist.

“What the BAP [in the Ninth Circuit case *Clear Channel*] seemingly failed to recognize is that sale closure mootness principles, including under § 363(m), are specifically designed to avoid these sorts of extremely unfair results. Initially, the BAP read 363(m) too narrowly and ignored the reality that virtually no buyer would purchase assets out of bankruptcy, certainly not at the highest price, if . . . liens potentially remained on the assets.” (emphasis added)

J. Levitin, et. al, *Ninth Circuit BAP Dresses Down Lienstripping, Could this be the Last Dance for 363 Sales*, 27-OCT Am. Bankr. Inst. J. 1.

An order authorizing a sale of property contains at least two important authorizations, the (1) granting of authorization to sell the property; and (2) the granting of authority to sell the property free and clear of interests under § 363(f). Without citing any controlling authority, Acorn asserts that § 363(m) applies only to one integral part of a sale order and not another. “If parties are to be encouraged to bid at judicial sales there must be stability in such sales and a time must come when a fair bid is accepted and the proceedings are ended.” *In re Chung King, Inc.*, 753 F.2d 547, 550 (7th Cir. 1985). Good faith purchasers of Polaroid’s assets must have the benefit of sale closure mootness in the event a stay pending appeal of the authorization to sell the property is not granted.

F. Richard Hettler Has No Standing to Object and Does Not Articulate a Legal Basis for Objecting to the Sale

Richard Hettler has filed a proof of claim form asserting that Polaroid is indebted to Mr. Hettler in an amount in excess of \$41 million. The promissory notes that make up the basis for Mr. Hettler's claim in these cases were seven promissory notes issued by Petters Company, Inc. in favor of either Mr. Hettler or Capital Asset Mgmt. Group in 1997 and 1998. Mr. Hettler's interest in these notes has been addressed, multiple times in multiple proceedings in the Bankruptcy Court, the District Court for the District of Minnesota and the Eighth Circuit Court of Appeals, with each such courts finding in each case that Mr. Hettler has no interest in such notes.⁶

Mr. Hettler cannot revive and re-litigate resolved matters by filing claims and objection to motions in these proceedings. Under the preclusion doctrines of collateral estoppel and res

⁶ On February 4, 2000, in the Adversary Proceeding *Premier Bank Metro South v. Ruth D. Kahn, et al*, 99-4250, which defendants included Richard J. Hettler, in his individual capacity and as Trustee of the Amadeus Irrevocable Trust, as well as Capital Asset Mgmt. Group, the Honorable Judge Dreher ruled, in an order granting summary judgment in favor of Premier Bank Metro South, that "Richard Hettler and/or the Amadeus Irrevocable Trust have no lien or interest in the Petters Notes...". A true and correct copy of the Order is attached hereto as **Exhibit D**. On February 24, 2000, Judge Dreher ruled, also in an order granting summary judgment in favor of Premier Bank Metro South, that "Capital Asset Mgmt. Group has no lien or interest in the Petters Notes...". A true and correct copy of the Order is attached hereto as **Exhibit E**. As a result, the "Petters Notes" that serve as the basis for Mr. Hettler's claim in these cases were assigned to, and fully administered in, the bankruptcy case of Ruth D. Kahn, 99-42419. Pursuant to a settlement agreement approved by the Bankruptcy Court in the main Kahn bankruptcy case on July 27, 2000, the maker of the Petters Notes, Petters Company, Inc. paid \$1,450,000 in satisfaction of its obligations under the Notes. A true and correct copy of the Order is attached hereto as **Exhibit F**.

On July 26, 2002, in response to multiple appeals from various orders of the bankruptcy court, Judge Montgomery denied and dismissed all appeals and specifically enjoined Mr. Hettler "from bringing any additional pleadings, motions, claims or appeals before the United States Bankruptcy Court where ... Hettler's claims in any relate to the bankruptcy estate of INA Manufacturing Corporation or the subject matter of the litigation before this Court to date." A true and correct copy of the Order is attached hereto as **Exhibit G**. Later, On December 10, 2002, Judge Montgomery directed the Clerk of Court for the District of Minnesota to refuse for filing any pleadings for a new lawsuit submitted by Richard J. Hettler...". A true and correct copy of the Order is attached hereto as **Exhibit H**.

judicata, Mr. Hettler appears to have no valid claim in these cases as he is asserting a claim in which it has been adjudicate he holds no interest. Under the doctrine of collateral estoppel, “once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.” *Iowa Elec. Light & Power Co., v. Motile Aerial Towers, Inc.*, 723 F. 2d 50, 52 (8th Cir. 1983) (citing *Montana v. United States*, 440 U.S. 147, 153 (1979)). Collateral estoppel applies when (1) the issue is identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) this estopped party was given a full and fair opportunity to be heard on the adjudicated issue. *Tarutis v. Commissioner of Revenue*, 393 N.W. 2d 667, 669 (Minn. 1986). Under the doctrine of res judicata, “a final judgment on the merits bars further claims by parties or their privies based on the same causes of action. *Iowa Elec. Light & Power*, 723 F.2d at 52.

As Judge Montgomery ruled in her July 26, 2002 Memorandum Opinion and Order, “The issues and claims Hettler raised in the settlements of previous bankruptcy proceedings have been fully and fairly litigated and adjudicated on the merits by the U.S. Bankruptcy Court, the U.S. District Court, and the Eighth Circuit Court of appeals. Hettler had his day in court and now the sun has set. There must be repose.” Therefore, Polaroid respectfully requests the objection of Mr. Hettler be overruled.

V. OBJECTIONS TO CURE AND ASSUMPTION AND ASSIGNMENT

Several parties filed objections to the assumption and assignment of their contract. For those parties that did not file objections, Debtors request the court approve the scheduled cure amount in the filed Initial Notice of Cure and Assumption and Assignment. Obviously, Debtors

will file a Notice of Change, allowing parties to acquired executory contracts to object on the basis of adequate assurance of performance with the prevailing bidder.

A. Target Corporation

Target Corporation (“Target”) objects to the assumption and assignment of the Target Chip Ganassi Racing Sponsorship Agreement (“Ganassi Agreement”) without first paying all necessary cure costs. Debtor mistakenly scheduled the Ganassi Agreement with a cure amount of \$0. However, a post-petition default does exist under the Ganassi Agreement, and such amounts must be cured prior to assumption and assignment. The Prevailing Bidder does not wish to be assigned this contract. Therefore, Debtor withdraws its request to assume and assign the Ganassi Agreement at this time.

B. Axis Design

Axis Design (“Axis”) objects to the assumption and assignment of its agreement without paying all necessary cure costs. The agreement proposed to be assigned is a Mutual Confidentiality Agreement dated February 20, 2007, a true and correct copy of which is attached hereto as **Exhibit I**. As clearly provided in term 11 to such agreement, the parties themselves contemplated a separate agreement relating to transactions between Polaroid and Axis. Polaroid is not seeking to assume and assign any transactional agreement that may be in force between Polaroid and Axis, merely assigning the Mutual Confidentiality agreement which has no economic terms, conditions, or provisions that can be cured. Counsel for Axis Design has agreed to continue this objection to a later hearing specifically addressing objections to the assumption and assignment of contracts. Accordingly, Debtor requests this objection to the assumption and assignment of this Mutual Confidentiality Agreement be continued to a later date.

C. ArcSoft

ArcSoft, Inc., (“ArcSoft”) objected to the assumption of a Software License Agreement by and between Polaroid and ArcSoft, Inc. dated as of March 15, 2008. ArcSoft contends that such agreement cannot be assumed and assigned without ArcSoft’s consent, and that ArcSoft does not consent to such transfer. However, such consent is provided by the contractual language in the Software License Agreement itself, at paragraph 18.8, a true and correct copy of the agreement is attached hereto as **Exhibit J**. After communication with counsel for ArcSoft, Debtor has been informed that ArcSoft intends to withdraw its objection. To the extent such objection is not withdrawn, the Debtor requests the Court overrule this objection.

D. Oracle

Oracle USA, Inc., successor in interest to Oracle Corporation and Hyperion Software (“Oracle”) is licensor of software for use by Polaroid. The Oracle license is a perpetual, royalty free license and is not scheduled for assumption and assignment. However, Oracle objects to certain ambiguities in the proposed Asset Purchase Agreement on the basis that Polaroid proposes to sell as an Acquired Asset “all computer hardware used by any Transferred Employee (and, to the extent assignable, software loaded on such computer hardware).” Such provision in section 1.1(w) refers to personal computers to be transferred to the Prevailing Bidder, not server hardware on which the Oracle licensed software is used. To the extent any Oracle software was loaded on any personal computer being transferred, Polaroid will remove such software prior to such transfer. In addition, Oracle objects to any potential shared use of the Oracle License during the anticipated Transition Service period following closing on the sale. Debtors intend to comply with the terms of the Oracle License, and do not intend to share or split the Oracle License with a Prevailing Bidder. Therefore, objection to the sale should be overruled, with each party reserving their rights to ensure compliance with the Oracle License and its limitations.

E. Summit Technology Group, LLC, Global Industrial Services Limited, Harmer Holdings, LLC, Lorence Harmer, and Flextronics Sales and Marketing Consumer Digital, LTD

Summit Technology Group, LLC (“Summit”), Global Industrial Services Limited (“Global”), Harmer Holdings, LLC (“Holdings”), Lorence Harmer (“Harmer”), and Flextronics Sales and Marketing Consumer Digital, LTD (“Flextronics”) (collectively “Summit Lockbox Objectors”) filed several objections to the proposed sale. Polaroid and the Summit Lockbox Objectors are parties to a series of agreements that permit Polaroid Licensed products to be sold to retail customers and the allocation of retail customer payments into the lockbox. In October, 2008, Polaroid and Summit entered a Manufacturing License and Support Services Agreement (“October MLSSA”). At that same time, Polaroid, Flextronics, Summit and Harmer entered into a Revenue Allocation Agreement (“October RAA”) that confirmed the allocation and distribution of proceeds held in certain lockbox arrangements. Both the October MLSSA and the October RAA expired March 31, 2009. Polaroid also entered a second Manufacturing License and Support Service Agreement (“December MLSSA”) and a second Revenue Allocation Agreement (“December RAA”), with both of these agreements dated December 19, 2008. Such postpetition agreements were authorized by this court’s January 29, 2009 Order Authorizing Debtors to Honor Pre-Petition Obligations to Customers and to Continue Customer Programs in the Ordinary Course of Business and Authorizing Debtors to Enter Manufacturing and Licensing Contracts in the Ordinary Course of Business, Docket No. 74.

In the Stalking Horse Asset Purchase Agreement, Polaroid proposed to assume and assign both the October MLSSA and the October RAA to the prospective purchaser. However, as such agreements have expired under their own terms, they cannot be assumed and assigned at this point in time. As postpetition agreements, the December MLSSA and the December RAA

are not assignable pursuant to § 365. Therefore, Polaroid withdraws its request to assume and assign these contracts at this time.

The Summit Lockbox Objectors also object based on a tortured reading of the draft APA, asserting that Polaroid is somehow attempting to assign benefit but reject obligations under assigned contracts. Pursuant to the APA, Debtors propose to sell, and purchaser proposes to acquire, “all rights to receive amounts payable to Sellers with Respect to the conduct of the Business under lockbox arrangement included in any of the Acquired Contracts.” Included in Schedule 1.1(u) are the Lockbox Payment Rights, as that term is defined in the APA that specifically includes both the expired October RAA and the postpetition December RAA. What the Debtors have proposed to transfer to the Prevailing Bidder are the Debtor’s rights and obligations under such contracts. As such, what the Debtor is transferring is the Acquired Contracts, and all rights and obligations pursuant to those Acquired Contracts. Accordingly, Debtors request this objection be overruled.

F. Nikon Corporation

Nikon Corporation (“Nikon”) objects to the assumption of the license agreement between Polaroid Corporation and Nikon Corporation dated July 15, 1996 (“Nikon License”). The Nikon License was already rejected in the prior bankruptcy case of Polaroid in the United States Bankruptcy Court for the District of Delaware, Case No. 01-10864). As such, the Nikon license may not be assigned, and Polaroid withdraws its request to assume and assign this license.

G. Apple

Polaroid received communication from Apple regarding assumption and assignment of Apple’s Made for iPod license relating to patented technology. The license specifically prohibits such transfer absent Apple’s consent, Apple does not provide that consent and asserts this agreement is not assignable. The Debtor withdraws its request to assume and assign this license.

VI. CONCLUSION

Polaroid has entered an agreement with Lithograph Legends, LLC to acquire substantially all of its assets. This sale to Patriarch has occurred after an expansive, inclusive and strategic marketing effort by Polaroid and Houlihan Lokey. This sale is for the highest and best value that can be obtained for Polaroid's assets, after an open auction and process that encouraged multiple bids, in different forms, for different configurations of assets. Polaroid cannot continue to operate on its limited resources, and authorizing this sale is the best for Polaroid, its estate, and its creditors. Such sale should be approved as being free and clear of all liens, claims, interests and encumbrances pursuant to § 363(f)(2), (f)(3), and (f)(5).

DATED: April 3, 2009

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ATTORNEYS FOR DEBTORS

VERIFICATION

Dated: April 3, 2009

Signed: Mary L Jeffries

Mary Jeffries

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re

**JOINTLY ADMINISTERED UNDER
CASE NO. 08-46617:**

POLAROID CORPORATION, ET AL.,

Debtors.

08-46617 (GFK)

(includes:

Polaroid Holding Company;	08-46621 (GFK)
Polaroid Consumer Electronics, LLC;	08-46620 (GFK)
Polaroid Capital, LLC;	08-46623 (GFK)
Polaroid Latin America I Corporation;	08-46624 (GFK)
Polaroid Asia Pacific LLC;	08-46625 (GFK)
Polaroid International Holding LLC;	08-46626 (GFK)
Polaroid New Bedford Real Estate, LLC;	08-46627 (GFK)
Polaroid Norwood Real Estate, LLC;	08-46628 (GFK)
Polaroid Waltham Real Estate, LLC)	08-46629 (GFK)

Chapter 11 Cases
Judge Gregory F. Kishel

CERTIFICATE OF SERVICE

Gretchen Luessenheide of the City of New Hope, County of Hennepin, State of Minnesota, being first duly sworn on oath, states that on April 3, 2009 she served the following document:

Polaroid's Status Report on Auction and Supplemental Reply to the Objections to the Sale of Substantially all of its Assets Free and Clear of Liens, Claims and Interests

upon

Chad Cooley WCD Property LLC 60 Columbus Circle 18 th Floor New York, NY 10023	Richard Chesley Greg Otsuka Paul, Hastings, Janofsky & Walker, LLP 191 N. Wacker Drive, 30 th Floor Chicago, IL 60606
Data Exchange Corporation William E. Winfield, Esq. Nordman, Cormany, Hair & Compton, LLP 1000 Town Center Drive, 6 th Floor PO Box 9100 Oxnard, CA 93031-9100	Faegre & Benson LLP 90 South Seventh Street 2200 Wells Fargo Center Minneapolis, MN 55402-3901
Houlihan, Lokey Howard & Zukin Capital, Inc. 225 S. 6 th Street, Suite 4950 Minneapolis, MN 55402	E. J. Harris Marketstar Corporation 2475 Washington Blvd. Ogden, UT 84401

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PHC Acquisitions, LLC Willkie Farr & Gallagher LLP Attn: Rachel C. Strickland, Esq. 787 Seventh Avenue New York, NY 10019	Daniel Phipps Axis Design 106 West Bagdad Avenue Round Rock, TX 78664
Martin Croyle Croyle & Associates PC 220 Broadway Suite 204 Lynnfield, MA 01940	Alps Electric Co., Ltd. Attn: Junichi Umehara 1-7, Yukigay-otsukamachi Ota-ku, 145-8501 Tokyo, Japan
TW Telecom, Inc. c/o Linda Boyle 10475 Park Meadows Dr. Ste. 400 Littleton, CO 80124	Kelly Mundorff Thule Organization Solutions, Inc. 6303 Dry Creek Pkwy Longmont, CO 80503
Iron Mountain Information Management, Inc. c/o Frank F. McGinn, Esq. Bartlett Hackett Feinberg P.C. 155 Federal Street, 9th Floor Boston, MA 02110	Bryan Krakauer on Behalf of Rhone Holdings II, Ltd. Sidley Austin LLP One South Dearborn Chicago, IL 60603
Covington & Burling, LLP Diane Coffino The New York Times Building 620 Eighth Avenue New York, NY 10018	Sotheby's, Inc. 1334 York Ave. New York, NY 10021

via U.S. Mail to the addresses listed above, and electronically by Notice of Electronic Filing upon all parties who have requested electronic service in these cases by filing the same via ECF with the Bankruptcy Court in the District of Minnesota.

/e/Gretchen Luessenheide
Gretchen Luessenheide