

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

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In re

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

POLAROID CORPORATION, ET AL.,

08-46617 (GFK)

Debtors.

(includes:

Polaroid Holding Company;

08-46621 (GFK)

Polaroid Consumer Electronics, LLC;

08-46620 (GFK)

Polaroid Capital, LLC;

08-46623 (GFK)

Polaroid Capital, LLC;

08-46624 (GFK)

Polaroid Latin America I Corporation;

08-46625 (GFK)

Polaroid Asia Pacific LLC;

08-46626 (GFK)

Polaroid International Holding LLC;

08-46627 (GFK)

Polaroid New Bedford Real Estate, LLC;

08-46628 (GFK)

Polaroid Norwood Real Estate, LLC;

08-46629 (GFK)

Polaroid Waltham Real Estate, LLC)

Chapter 11 Cases  
Judge Gregory F. Kishel

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**NOTICE OF HEARING AND MOTION FOR AN ORDER (I) GRANTING EXPEDITED  
RELIEF, AND (II) FOR A PROTECTIVE ORDER STAYING THE DEPOSITION, OR  
AN ORDER QUASHING OR MODIFYING SUBPOENAS ISSUED  
TO THIRD-PARTY DAVID BAER**

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To: The entities specified in Local Rule 9013-3.

1. David Baer moves the Court for the relief requested below and gives notice of hearing.

2. The Court will hold a hearing on this Motion at 1:30 p.m. on Thursday, March 26, 2009, at 238 Warren E. Burger Federal Building and U.S. Courthouse, 316 North Robert Street, St. Paul, Minnesota 55101.

3. Any response to this Motion must be filed and served not later than twenty four hours before the hearing. **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1134, Fed. R. Bankr. P. 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petitions commencing these chapter 11 cases were filed on December 12, 2008. These jointly administered cases are now pending in this Court.

5. This Motion arises under Fed. R. Bankr. P. 7026, 7030, 9013, and 9016. This Motion is filed under Fed. R. Bankr. P. 9014 and Local Rule 9013-1. Expedited relief is sought under Local rule 9006-1(e).

6. Polaroid Corporation (“Polaroid”) and affiliated Polaroid debtors filed for bankruptcy on December 18, 2008.

7. On February 12, 2009, Polaroid initiated an adversary proceeding against Acorn Capital Group, LLC (“Acorn Capital”) disputing liens and claims asserted by Acorn Capital against Polaroid.

8. On February 12, 2009, Polaroid initiated an adversary proceeding against Ritchie Capital Management, LLC (“Ritchie Capital”) disputing liens and claims asserted by Ritchie Capital against Polaroid.

9. In its Complaint against Acorn Capital, Polaroid has alleged that liens and other assets of Polaroid were fraudulently and preferentially transferred by Acorn Capital and Tom Petters prior to the commencement of the above-referenced bankruptcy cases.

10. In its Complaint against Ritchie Capital, Polaroid has similarly alleged that liens and other assets of Polaroid were fraudulently and preferentially transferred by Ritchie Capital and Tom Petters prior to the commencement of the above-referenced bankruptcy cases.

11. On March 16, 2009, at approximately 10:00 p.m., David Baer (“Baer”) was personally served with a Subpoena and Notice of Deposition from counsel for Acorn Capital.<sup>1</sup>

12. Ritchie Capital served a Subpoena and Notice of Deposition on Baer on March 19, 2009. Service was accepted on Friday, March 20, 2009.

13. Both subpoenas command Baer to appear for deposition on March 24, 2009, at 9:00 a.m., seven days after service of the Acorn Capital subpoena, and four days after service of the Ritchie Capital subpoena.

14. Before his resignation in 2008, Baer served as General Counsel for Petters Group Worldwide, LLC (“PGW”).

15. Baer’s attorney is presently travelling outside of the country and will not return to the United States until the evening of March 23, 2009.

16. We have attempted to confer with opposing counsel to seek an extension of the pending deposition.

17. Baer requests that this Court enter a protective order staying the deposition to provide Baer with additional time needed to effectively prepare for the deposition. In the alternative, Baer requests that this Court quash or modify the subpoenas.

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<sup>1</sup> This was the first time Baer or his counsel learned that Acorn Capital sought a deposition.

**WHEREFORE**, David Baer moves this Court for a protective order staying the deposition to provide Baer with additional time needed to effectively prepare for the deposition, or alternatively, to quash or modify the subpoenas, and for such other and further relief as the Court deems just and equitable.

Dated: March 20, 2009

/e/ James C. Brand

Todd Noteboom (#240047)

James Brand (#387362 )

Andrew Davis (#386634)

**LEONARD, STREET AND DEINARD**

Professional Association

150 South Fifth Street, Suite 2300

Minneapolis, Minnesota 55402

Telephone: 612-335-1500

Facsimile: 612-335-1657

**ATTORNEYS FOR DAVID BAER**

**VERIFICATION**

I, James Brand, Attorney, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Dated: March 20, 2009

/e/ James C. Brand\_\_\_\_\_

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Chapter 11 Cases  
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**MEMORANDUM OF FACTS AND LAW IN SUPPORT OF MOTION FOR AN ORDER  
(I) GRANTING EXPEDITED RELIEF, AND (II) ENTERING A PROTECTIVE ORDER  
STAYING THE DEPOSITION, OR QUASHING OR MODIFYING SUBPOENAS  
ISSUED TO THIRD-PARTY DAVID BAER**

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This Memorandum is submitted in support of David Baer's ("Baer") motion for an order (I) granting expedited relief, and (II) entering a protective order staying the deposition or quashing or modifying the subpoenas issued to Baer to allow a reasonable time to comply. The facts supporting the requested relief are stated in the accompanying verified motion.

## ARGUMENT

### **I. EXPEDITED RELIEF**

The deposition of David Baer is currently noticed for 9:00 a.m. on Tuesday, March 24, 2009, which makes it necessary for this relief to be sought on an expedited basis.

### **II. MOTION FOR A PROTECTIVE ORDER OR TO QUASH THE SUBPOENAS**

Under Rule 26(c) of the Federal Rules of Civil Procedure,<sup>2</sup> “the court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Under Rule 45(c)(3)(A) of the Federal Rules of Civil Procedure,<sup>3</sup> the Court must quash or modify a subpoena if the subpoena “fails to allow a reasonable time to comply.” Fed. R. Civ. P. 45(c)(3)(A)(i). Baer requests that this Court issue a protective order or, alternatively, quash or modify the subpoenas, for two reasons. First, Baer’s counsel is presently out of the country and will not return to Minneapolis until March 23, 2009. As a result, Baer and his counsel will not have adequate time to prepare for the deposition on March 24, particularly in light of the complex legal issues arising from the Polaroid bankruptcy and its adversary proceedings against Acorn Capital and Ritchie Capital. Second, the nature of the allegations in the adversary proceeding, and Baer’s past role as General Counsel of PGW, create a number of issues that strongly mitigate in favor of additional time for Baer and his counsel to adequately prepare for the deposition.

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<sup>2</sup> Rule 26 is incorporated in these proceedings pursuant to Federal Rule of Bankruptcy Procedure 7026.

<sup>3</sup> Rule 45 is incorporated in these proceedings pursuant to Federal Rule of Bankruptcy Procedure 9016.

**A. Unavailability of Counsel**

Baer's counsel is presently out of the country and will not return to the United States until late evening on March 23, 2009.<sup>4</sup> The Subpoenas in question command Baer's presence at the deposition at 9:00 a.m. on March 24, 2009. This amount of time is simply insufficient to allow Baer and his attorney to effectively prepare for and, if necessary, defend against the deposition. *See Vaughan Furniture Co. v. Featureline Mfg.*, 156 F.R.D. 123, 126 (M.D.N.C. 1994) (finding that a subpoena providing only two days to comply was insufficient and should be modified to extend the time for compliance to 20 days). Thus, even if a period of seven days (in the case of Acorn Capital), or four days (in the case of Ritchie Capital), between service of the subpoenas and the March 24 deposition date was deemed reasonable, the unavailability of Baer's counsel for most of this time has deprived Baer and his counsel of a reasonable time to comply with the subpoena.

The timing of the deposition appears to be driven by a pending sales hearing in the above referenced bankruptcy matter, scheduled for March 31, 2009. It is unclear why Acorn Capital or Ritchie Capital did not seek this deposition earlier. Acorn Capital has known of Polaroid's position since at least February 12, 2009, when the adversary proceeding was commenced against it. Ritchie Capital knew of Polaroid's position since at least February 12, 2009, when Polaroid commenced its adversary proceeding against Ritchie Capital. And both Acorn Capital and Ritchie Capital have known the date of the sale hearing since February 12, 2009, when this Court entered an order approving bidding procedures. Whatever the reason, Baer should not be compelled to submit to a last minute deposition without adequate time to prepare with his counsel. For these reasons, Baer respectfully requests that this Court enter a protective order to allow Baer additional time to prepare with his counsel for the deposition. Alternatively, Baer

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<sup>4</sup> Baer's counsel, Doug Peterson, is travelling in Mexico with his family.

requests that the Court quash or modify the subpoenas so as to provide Baer with additional time to work with counsel and prepare for the deposition.

**B. Nature of the Proceedings**

The nature of the proceedings in this case also support Baer's motion for a protective order or to quash or modify the subpoenas. Polaroid's adversary complaints against Acorn Capital and Ritchie Capital allege multiple counts of actual fraud, constructive fraud, insider fraud, and preferential transfer between Polaroid and Acorn Capital, and between Polaroid and Ritchie Capital. The subpoenas from Acorn Capital and Ritchie Capital seek to thrust Baer into the crossfire of allegations between Polaroid, Acorn Capital, and Ritchie Capital. As the former General Counsel of PGW, this deposition is likely to raise many complicated issues of attorney-client privilege.

The nature of these proceedings also requires Baer and his counsel to make a careful determination of whether, and to what extent, Baer must protect his constitutional rights in the upcoming deposition. These concerns are tantamount here, as one of the "basic functions" of the Fifth Amendment "is to protect innocent men who otherwise might be ensnared by ambiguous circumstances." *See Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (quoting *Grunewald v. United States*, 353 U.S. 391, 421 (1957) (internal quotations omitted)).<sup>5</sup> Indeed, in situations where there are parallel civil and criminal proceedings, courts have recognized their inherent discretion to stay the civil proceedings where the denial of a stay might impair a party's Fifth Amendment privilege against self-incrimination, and when the interests of justice require such action. *See SEC v. Brown*, No. 06-1213 (JRT/FLN), 2007 WL 4191998, at \*1 (D. Minn. Nov. 21, 2007);

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<sup>5</sup> As the United States Supreme Court made clear in *Reiner*, those who claim innocence are not precluded from relying on an assertion of Fifth Amendment privilege. This is so because "truthful responses from innocent witnesses, as well as those of a wrongdoer, may provide the government with incriminating evidence from the speaker's own mouth." *Reiner*, 532 U.S. at 21.

*Trustees of the Plumbers & Pipefitters Nat'l Pension Fund v. Transworld Mech., Inc.*, 886 F. Supp. 1134, 1138-39 (S.D.N.Y. 1995) (“Courts are afforded this discretion because the denial of a stay could impair a party’s Fifth Amendment privilege against self-incrimination, extend criminal discovery beyond the limits set forth in Federal Rule of Criminal Procedure 16(b), expose the defense’s theory to the prosecution in advance of trial, or otherwise prejudice the criminal case.”).

While Baer is not seeking a wholesale stay of these civil proceedings, these cases support the more general proposition that judicial intervention is appropriate where impending discovery or other proceedings may impair a party’s constitutional rights. Here, the limited time provided in the deposition notices, and the unavailability of Baer’s attorney until the day before the deposition, render it all but impossible for Baer to confer with counsel and adequately prepare for his deposition. These circumstances render the period for compliance commanded in the subpoenas both oppressive and unreasonable, and support Baer’s motion for a protective order or to quash or modify the subpoenas.

### **CONCLUSION**

For all of the foregoing reasons, Baer respectfully moves this Court for a protective order staying the deposition to provide Baer with additional time needed to effectively prepare for the deposition, or alternatively, to quash or modify the subpoenas, and for such other and further relief as the Court deems just and equitable.

Dated: March 20, 2009

/e/ James C. Brand

James Brand (#387362)

Todd Noteboom (#240047)

Andrew Davis (#386634)

**LEONARD, STREET AND DEINARD**

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Chapter 11 Cases  
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**CERTIFICATE OF SERVICE**

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I, Callie Sanford, declare, under penalty of perjury, that on March 20, 2009, I filed:

1. Notice of Hearing and Motion for an Order (I) Granting Expedited Relief, and (II) for a Protective Order Staying the Deposition, or an Order Quashing or Modifying Subpoenas Issued to Third-Party David Baer;
2. Verification of Attorney James C. Brand;
3. Memorandum of Facts and Law in Support of Motion for an Order (I) Granting Expedited Relief, and (II) for a Protective Order Staying the Deposition, or an Order Quashing or Modifying Subpoenas Issued to Third-Party David Baer; and
4. Proposed Order

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

**Robert J. Brown**; Lexbankruptcy@wyattfirm.com  
**Covington & Burling LLP**; jmcneil@cov.com  
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I further certify that I caused a copy of the foregoing documents and Notice of Electronic Filing to be mailed by First Class Mail, postage prepaid, to the following:

**Chad Cooley**  
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Minneapolis, MN 55402-3901

Dated: March 20, 2009

/e/ Callie M. Sanford  
Callie M. Sanford

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Chapter 11 Cases  
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**ORDER**

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This matter came on for hearing on the motion of David Baer on March 26, 2009. Based upon the evidence presented at this hearing, the arguments of counsel, and the Court being fully advised, **IT IS HEREBY ORDERED**, that

1. A protective order is hereby entered staying the deposition to allow David Baer and his counsel additional time to prepare for the deposition in above-referenced proceeding.

Dated: March \_\_\_\_, 2009

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Judge Gregory F. Kishel  
US Bankruptcy Judge