DELAWARE BANKRUPTCY

AMERICAN INN OF COURT

TUESDAY

APRIL 20, 2010

DECIPHERING SALES ISSUES

Bankruptcy American Inn of Courts Meeting
Tuesday, April 20, 2010

PRESENTATION AGENDA

1. **Introduction**
   Cory Falgowski and Tom Francella

2. **Mock *En Banc* Argument** (40 minutes total; 20 minutes for each side)
   Appellant: Courtney Hamilton and Adam Hiller
   Appellee: Kim Brown and Bruce Grohsgal
   Judges: John Demmy will be our "Chief Judge."
   Our Masters and Barristers will also be Judges

3. **Philadelphia News**: Case "Brief" (Widener Law Student)
   Ryan Cicoski

4. **Impact of the Philadelphia News Decision**
   Bill Chipman and Victoria Counihan

5. **Ensuring the Highest and Best Offer and Philadelphia News**
   Zeke Allinson and Robert Mallard

6. **Understanding "Indubitable Equivalent"**
   Tom Horan

ADDITIONAL SALE ISSUES:

7. **Assumption and Assignment of Government Contracts**
   Sanjay Bhatnagar and Chris Griffiths

8. **Ethics issues**
   Leslie Heilman

MATERIALS INDEX

- VACCINE CORPORATION FACT PATTERN & **SUPPLEMENTAL FACTS** TO VACCINE CORPORATION FACT PATTERN

- MATERIALS RELATING TO: IN RE PHILADELPHIA NEWSPAPERS LLC, ---F.3d---, 2010 WL 106647 (3d Cir. 2010)

    - SUMMARIES OF CASES CITED IN THE OPINION

    - TRANSCRIPT OF THIRD CIRCUIT ORAL ARGUMENT

- SUMMARY OF INDUBITABLE EQUIVALENT

- ASSUMPTION AND ASSIGNMENT OF GOVERNMENT CONTRACTS – COPY OF WEST ELECTRONICS' OPINION

Vaccine Corporation Fact Pattern

Vaccine Corporation, ("VC") is a privately held company that develops and manufactures vaccines. VC has two lines of business: (i) the development and manufacture of vaccines and (ii) the development of new technology (the "IP") which permits production of new vaccines, at an accelerated rate. VC is an operating company, with 100 employees, many customers and many trade suppliers. Its original capitalization (a combination of debt and equity) was the result of investment by its current Chief Executive Officer ("CEO") and current Chief Operating Officer ("COO"), but since that time many other investors, both individual and institutional have provided equity investment in VC.

VC has been developing a promising new swine flu vaccine ("Vaccine"), which is currently in the clinical trials phase and showing excellent results. While both the Vaccine and the IP are promising, VC has been having financial trouble for the past two years due to unexpected costs and delay in obtaining FDA approval for the Vaccine as well as unexpected costs of developing the IP. While these investments appear to be on the verge of paying off, VC has been unable to pay a number of debts that recently became due, and certain of its creditors are losing patience.

Due to VC's difficulty paying its debts, VC entered into negotiations and signed a letter of intent, subject to shareholder approval, to sell all of its assets to Medical Organization Incorporated ("MOI"). In anticipation of the potential sale and it order to aid cash flow, MOI loaned VC $50 million evidenced by a promissory note (the "Note") secured by a lien on substantially all of VC's assets.

Unfortunately, the VC shareholders did not approve the proposed asset purchase of VC. MOI subsequently sued VC in state court alleging that the CEO and COO had fraudulently

obtained shareholder disapproval. For its part, VC accused MOI of disavowing critical portions of its LOI. Needless to say, there was no love lost between VC and MOI, and VC did not pay the Note when it became due. VC attempted to line up several investors willing to purchase MOI's debt at full price, but MOI refused to cooperate with any of the potential investors.

While that action was pending, VC signed a multi-million dollar contract with the U.S. government for the development of the Vaccine (the "Government Contract"). The Government Contract has a base value of $37M, and may be worth a total of $147 Million to VC.

The next day, MOI filed an involuntary petition (the "Involuntary Petition) under chapter 7 of the Bankruptcy Code naming VC as the alleged debtor. MOI was joined by in its petition by CR1 and CR2. VC alleges that it is owed $51.5 million based on the Note. CR1 is owed $1,200,000 in connection with some clinical testing services it provided to VC, and CR2 is owed $300,000 in connection with consulting services it provided to VC in connection with the potential sale to MOI.

VC moved to dismiss the Involuntary Petition and extensive discovery ensued. At the hearing regarding the motion to dismiss, the court determined that MOI had satisfied its burden of proof under § 303. However, the court dismissed the Involuntary Petition under § 305 because it found that MOI was using bankruptcy as a vehicle for obtaining VC's assets, particularly the Government Contract and the IP, at a discount price.

After the dismissal, VC continued its business as usual for almost one year, but it was unable to generate enough cash to begin paying its debts. Worse, while the Vaccine was finally FDA approved, an R&D problem set the development of the IP back several years. The potential investors, concerned over the setback, were not as willing to fund into potential losses. And, the litigation was ready to go to trial. As a result, VC filed its own chapter 11 petition (the

"Petition") and VC remains a debtor in possession. At the time of the Petition, VC owed a total of $75 million to its creditors (including the CEO and COO), $51.5 million of which was owed to MOI and secured by all the VC assets.

The Office of the United States Trustee formed a creditors committee consisting of the seven largest creditors, including VC's distributor, trade creditors, landlords, CRI and CR2. Because of both the potential need for DIP financing and the possibility of a sale, the Committee has retained a financial advisor and is reviewing weekly reports, budgets and projections, and is performing a recovery analysis.

VC has no real exit strategy. VC believes that it can survive in standalone mode, but simply needs time. At the urging of the Committee, however, VC is considering a sale of some or all of the company. If it does entertain a sale, VC has not yet determined whether to sell the company in a private sale or a public auction. VC's current management would be interested in purchasing VC, and the Committee suspects that MOI may be interested as well. Further, some interest has been expressed by those investors who, several months back, had shown an interest in buying MOI's Note.

SUPPLEMENTAL FACTS

VC ultimately decided to pursue a sale of substantially all of its assets pursuant to a plan. The proposed plan provides that all of VC's assets will be sold at a public auction free and clear of liens. On the same day that the plan was filed, VC executed a stalking horse asset purchase agreement with H1N1 Acquisition, LLC, an acquisition vehicle formed by VC's current management. The stalking horse agreement provides for a purchase price of $52 million in cash.

A week later, VC filed a motion for approval of bid procedures. As part of the motion, VC sought to preclude MOI from credit bidding for the assets, arguing that the plan sale to be conducted under Section 1123(a) and (b) did not run afoul of Section 363(k). MOI and the Committee objected. At the hearing, MOI's counsel indicated that MOI would certainly bid in excess of $52 million at the auction, but only if MOI were permitted to credit bid.

The Bankruptcy Court denied approval of the credit bidding restriction and the Debtors appealed. The District Court reversed, holding that Section 1129(b)(2)(A) provided three distinct avenues to confirmation, and although Section 1129(b)(2)(A)(ii) expressly provides for a right to credit bid in a plan sale, that subsection (iii) merely required that the secured creditor be provided with the "indubitable equivalent" of its claim, which potentially could be satisfied by a plan sale.

A divided panel of the Third Circuit affirmed the District Court. MOI has now filed a petition for rehearing *en banc*, which has been granted.

Indubitable Equivalence

In re Sun Country Development, Inc.

On page *10 of the *Philadelphia Newspapers* opinion, the Third Circuit cites *In re Sun Country Development Inc.*, 764 F.2d 409 (5th Cir. 1985) where the Fifth Circuit held that 21 notes secured by 21 lots of land was the "indubitable equivalent" of a first lien on a 200 acre lot. In *Sun Country*, the sole secured creditor, Brite, retained a first lien on 200 acres of land owned by the debtors. *Id.* at 408. Debtors listed the debt owed to Brite at $153,520.87. *Id.* The plan of reorganization proposed a cram down: Brite's first lien on the 200 acres would be released in exchange for twenty-one specific notes secured by twenty-one separate lots, which debtor had originally purchased from Brite and sold to various individual purchasers. *Id.* The bankruptcy court and district court approved the plan. Brite appealed on the grounds that twenty-one notes from twenty-one obligors secured by twenty-one lots is not the indubitable equivalent of his first lien on 200 acres as required by 11 U.S.C. § 1129(b)(2)(A)(iii). *Id.* at 409.

In determining whether the Debtors provided the "indubitable equivalent", the Fifth Circuit adopted the test employed by Judge Hand in *In re Murel Holding Corp.*, 75 F.2d 941, 942 (2d Cir. 1935). 746 F.2d at 409. Judge Hand "considered whether the substituted security was completely compensatory, and the likelihood that the secured party would be paid, in determining whether the plan of reorganization provided the secured creditor with the indubitable equivalent of his original security." *Id.* At a hearing before the bankruptcy court, the Debtor presented evidence that: (1) the present value of the notes was $153,777.06 and (2) the value of the lots securing the notes was $287,500. *Id.* Brite presented evidence that the notes could only be sold for thirty to fifty percent of their face value because of the debtors' poor payment histories. *Id.* Based on the facts, the bankruptcy court held that the notes were the indubitable equivalent of the first lien on the 200 acres. *Id.* In affirming, the Fifth Circuit held that the bankruptcy court's findings were supported by evidence, and since Brite took over collection of the notes, the Debtors have generally kept payment on the notes current. *Id.* The Fifth Circuit further held that if the Debtors defaulted on the notes, the value of the land securing the notes was sufficient to cover the additional expense of foreclosure. 746 F.2d at 409. The plan was confirmable because Brite was provided the "indubitable equivalent" of its security interest.

In re Criimi Mae, Inc.

The Third Circuit also cited *In re Criimi Mae, Inc.*, 251 B.R. 796 (Bankr. D. MD 796) for principals concerning indubitable equivalence. In *Criimi Mae*, creditor Citicorp Securities, Inc./Solomon Smith Barney ("SSB") objected to approval of the disclosure statement because it claimed to be either the owner[1] or holder of a security interest in certain securities (the "Disputed Securities") which the debtor intended to sell under the plan before the confirmation date. *Id.* at 798. SSB asserted that if the court determined that it held a security interest in the Disputed Securities, the sale by debtor without

[1] After some discussion, the District Court that there was a dispute as to material fact regarding ownership of the Disputed Securities, and that SSB did not necessarily "own" the securities.

affording SSB a right to credit bid could not constitute fair and equitable treatment. *Id.* It further stated that no plan that contemplates the sale of collateral of a dissenting class of secured creditors can be found "fair and equitable" unless it complies with section 1129(b)(2)(A)(ii). *Id.* at 806. In its analysis of the subsections of 1129(b)(2)(A), the Court held that a plan can meet the fair and equitable test by complying with any of the three enumerated subsections. 251 B.R. at 806. Subsections (i), (ii), and (iii) are alternative paths to meeting the fair and equitable test. *Id.* SSB acknowledged that both subsections (ii) and (iii) are applicable to the sale of the Disputed Securities, but subsection (ii) should govern because it deals specifically with the "sale...of property...free and clear of liens," and subsection (iii) merely provides for the "realization...of the indubitable equivalent" of the claim. *Id.* The court rejected this argument and stated that the subsections are to be treated as distinct alternatives and are not in conflict. *Id.* The Court held that if the debtors could meet the test of indubitable equivalence[2], the plan could be confirmed under subsection (ii). *Id.*

Credit Bidding under Subsections (i) and (ii)

In re California Hancock

On page *10 of the *Philadelphia Newspapers* opinion, the Third Circuit cited *In re California Hancock*, 88 B.R. 226, 230 (9th Cir. BAP 1988), where the court held that credit bidding was required under subsection (i). In *California Hancock*, the debtor purchased property (the "Property") from John Hancock Mutual Life Insurance Company ("John Hancock"). The Property was the only asset in the estate. *Id.* at 227. The debtor issued a non-recourse promissory note payable to John Hancock secured by a first deed of trust and an assignment of rents on the Property. *Id.* The debtor filed a disclosure statement and plan that listed John Hancock as a creditor with an allowed secured claim of $400,000 and provided that a third party would purchase the property subject to the allowed secured claim. *Id.* The plan further provided that the debtor and third party would share in any future profits from a subsequent resale of the property. *Id.* The bankruptcy court held: (1) the proposed plan was not confirmable because the proposed transfer was not a *bona fide* sale to a third party but rather a joint venture; (2) even if the transfer was characterized as a sale, the plan was not confirmable because John Hancock was entitled to all the consideration from the transfer of the property including "future profits"; and (3) John Hancock would be entitled to a "credit bid" under § 363(k) to the full amount if its allowed claim at any sale of the collateral. *Id.*

The Appellate Panel affirmed the bankruptcy court's determination that the plan could not be confirmed because it did not allow John Hancock the right to credit bid. 88 B.R. at 228. In so holding, the court analyzed the three subsections of §§ 1129(b)(2)(A), 363(k), and 1111(b). The court noted that although the language to subsection (ii) specifically provides for the right to credit bid, subsections (i) and (iii) are unclear on the issue. The court cited another bankruptcy court that relied on the legislative history of § 363(k) to support the conclusion that the right to credit bid attaches to the sale of the property under the plan. *Id. citing In re Realty Investments*, Ltd. V, 72 B.R. 143, 146

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(Bankr. C.D. Cal. 1987). The legislative history specifically provides that 'Sale of property under section 363 or under the plan is excluded from treatment under section 1111(b) because of the secured party's right to bid in the full amount of his allowed claim at any sale of collateral under section 363(k) of the House amendment.' *Id. quoting* 124 Cong.Rec. H 11104 (Daily Ed. Sept. 28, 1978); 124 Cong.Rec. S 17420 (Daily Ed. Oct. 6, 1978). Additionally, the court cited *In re Woodridge North Apts.*, 71 B.R. 189, 192 (Bankr. N.D. Cal. 1987) where the court adopted the language from *Collier on Bankruptcy* concluding that "the sale exception to section 1111(b)(1)(A) applies only where the lien holder is allowed to credit bid." The court held that John Hancock should be protected from the consequences of the loss of recourse treatment as set forth in § 1111(b)(1)(A), and the legislative history of § 363(k) contemplates such protection. *Id.* at 231. Cram-down under subsection (i) requires credit bidding.

In re Kent Terminal Corp.

On page *10 of its decision, the Third Circuit cited *In re Kent Terminal Corp.*, 166 B.R. 555 (Bankr. S.D.N.Y. 1994) for the principal that a lien holder has the absolute right to bid its lien under subsection (ii). In *Kent Terminal Corp.*, debtor's single asset was undeveloped real estate (the "Property"). *Id.* at 558. Prior to purchasing the property, debtor obtained mortgage financing from Friesch-Groningesche Hypotheehbank Realty Credit Corp. ("FGH"). *Id.* According to its proposed plan, debtor would pay its creditors with proceeds derived from the sale of the Property free and clear of liens. *Id.* Under the plan, FGH will receive a portion of the sale proceeds, and its liens will not attach to the proceeds of the sales to the full allowed amounts of claims. *Id.* If the Property is sold, the plan denies FGH the opportunity to credit bid or to seek fully secured treatment under § 1111(b)(2). *Id.* at 559. The debtor proposed two methods to confirm its plan over FGH's anticipated objection: (1) the plan is fair and equitable under 1129(b)(2)(A)(ii) even though it denies FGH the right to credit bid because credit bidding is one of three disjunctive examples of fair and equitable treatment and (2) the plan is fair and equitable if FGH retains its lien in the Property and receives cash payments equaling at least the allowed amount of its claim, even if it has no right to elect fully secured treatment under § 1111(b)(2). 166 B.R. at 559.

The court ultimately held that the plan could not be confirmed because the plan is not "fair and equitable" under § 1129(b)(2)(A)(ii) unless FGH is entitled to credit bid if its collateral is sold free and clear of liens. *Id.* at 567. In so holding, the court considered sections 1129(b)(2)(A) and 1111(b)(2). The court noted that subsection § 1129(b)(2)(A) does not contain the specific reference to § 363(k) found in subsection (ii). *Id.* at 563. However, the court acknowledged that Congress arguably intended to create an absolute right to credit bid in all liquidating plans when it formulated the relationship among §§ 363(k), 1111(b), and 1129(b). *Id.* at 565. Although it is true that a creditor cannot bid in its lien and make the § 1111(b) election, the lien holder is nevertheless entitled to do one or the other to protect the benefit of its pre-petition bargain. *Id.* at 566. The court determined that if a plan proposes the sale of a creditor's collateral free and clear of liens, the lien holder has the unconditional right to bid in its lien. *Id.* at 567. The court held that a plan is not "fair and equitable" under § 1129(b)(2)(A)(ii) unless a creditor is

entitled to bid its entire lien if its collateral is sold free and clear of liens under the plan. 166 B.R. at 567.

In re River Village Associates

The Third Circuit also cited *In re River Village Associates*, 181 B.R. 795, 805 (E.D. Pa. 1995) where the court permitted credit bidding in a § 363(b) pre-confirmation sale and confirmed the reorganization under subsection (i). In *River Village Associates*, the debtor owned a single principal asset (the "Property"). *Id.* at 798. In purchasing the Property, debtor assumed a promissory note to General Electric Capital Corporation ("GECC") secured by a mortgage to GECC that constituted a first lien on the Property. *Id.* After the debtor filed its petition as well as a plan of reorganization, GECC subsequently proposed a chapter 11 plan of reorganization that entitled it to credit-bid the full amount of its allowed claim. *Id.* at 801. The proposed plan did not allow debtor or others to bid subject to the mortgagee's lien, but did allow debtor or others to enter a bid in excess of GECC's credit bid. *Id.* The bankruptcy court confirmed the plan and the debtor appealed. *Id.* The debtor asserted the court erred in finding GECC's plan confirmable, and in choosing to confirm GECC's plan over debtor's own reorganization plan. 181 B.R. at 801. The District Court held that GECC was properly permitted to credit-bid the aggregate amount of its allowed claim under the terms of its plan. *Id.* at 805. In so holding, the court reasoned that courts and commentators have concluded that Congress did not intend to deprive creditors of the right to bid their full claim under a plan of reorganization. *Id.*

The Pacific Lumber Co. v. Official Unsecured Creditors' Committee, 584 F.3d 299 (5th Cir. 2009) (holding that the three subsections of section 1129(b)(2)(A) were alternatives and not even exhaustive of the ways in which a debtor might satisfy the "fair and equitable" requirement.)

The bankruptcy court confirmed the debtor's Chapter 11 reorganization plan that provided the secured lenders the full cash equivalent of their undersecured claims but denied them the right to credit bid. The secured lenders challenged confirmation on that basis, and the United States Court of Appeals for the Fifth Circuit heard the case on direct appeal from the bankruptcy court.

The Fifth Circuit first rejected the claim that the case was equitably moot. In analyzing whether the plan was fair and equitable, the court noted that the reorganization plan involved a transfer of assets to the reorganized entities. The court concluded that this transfer was a sale under the Code and that section 1129(b)(2)(A)(ii) could have applied. However, the court held that the creditors had to "do more than show that Clause (ii) theoretically applied to this transaction. They have to demonstrate its exclusive applicability." *Id.* at 245. The court held that the three subsections of 1129(b)(2)(A) are alternatives because they "are joined by the disjunctive 'or'". *Id.* Thus, even though the asset transfer was a "sale" under the code, the plan could be confirmed under 1129(b)(2)(A)(iii). The court noted that "[a]lthough a credit bid option might render clause (ii) imperative in some cases, it is unnecessary here because the plan offered a cash payment to the Noteholders. Clause (iii) thus affords a distinct basis for confirming a plan. *Id.* at 246.

In analyzing the requirements of subsection (iii), the court held that the plan was confirmable because it paid the secured creditors the value of the collateral, providing them with the "indubitable equivalent" of their claims. The court explained that the focus is on "what is really at stake in secured credit: repayment of principal and the time value of money." *Id.* The court concluded that "whatever uncertainties exist about indubitable equivalent, paying off secured creditors in cash can hardly be improper if the plan accurately reflected the value of the . . . collateral." *Id.* at 247. The court also dismissed the creditors' argument that depriving them of the right to credit bid forced them to forfeit the potential for the property to appreciate. The court stated that the Bankruptcy Code "does not protect a secured creditor's upside potential; it protects the 'allowed secured claim.'" *Id.*

Wade v. Bradford, 39 F.3d 1126 (10th Cir. 1994) (holding that a plan does not have to satisfy 1129(b)(2)(A)(iii) where it satisfies 1129(b)(2)(A)(i)).

The debtors first filed for bankruptcy under Chapter 13, and the court denied confirmation of the plan on the basis that Chapter 13 prohibits lien stripping on claims secured by a principal residence. The debtors then converted the case to Chapter 11 and submitted a reorganization plan that again bifurcated the creditor's claim, stripping the lien from the unsecured portion of the claim. The bankruptcy court confirmed the Chapter 11 reorganization plan, and the district court affirmed.

The Tenth Circuit affirmed, holding that Chapter 11 allows the debtors to bifurcate the creditors' claim. Section 1129(b)(2)(A)(i) authorizes the debtors to reduce the creditor's lien to the secured collateral's value. The debtors' plan was confirmable

over the creditor's objection since the amount of the creditor's secured lien was preserved as required by section 1129(b)(2)(A)(i). The court rejected the creditor's argument that the plan was not confirmable because the creditor did not receive the "indubitable equivalent" of its claim. The plan was confirmable under subsection (i), and the "requirements are written in the disjunctive, requiring the plan to satisfy only one before it could be confirmed." *Id.* at 1130.

In re Briscoe Enters. Ltd. II, 994 F.2d 1160 (5th Cir. 1993) (holding that a plan does not have to satisfy subsection 1129(b)(2)(A)(iii) where it satisfies subsection 1129(b)(2)(A)(i)).

The bankruptcy court confirmed the debtor's plan of reorganization that divided a secured creditor's claim into secured and unsecured portions based on the depreciated value of the property securing the claim. The bankruptcy court valued the property at $8.2 million, and this became the amount of the creditor's secured claim. The remaining $10 million of the creditor's claim becoming an unsecured claim. The bankruptcy court confirmed the plan, finding it was fair and equitable under section 1129(b)(2)(A)(i). The district court reversed, holding: "'Fair and equitable' as used in the context of a cramdown means that, at a minimum, the secured creditor must receive the indubitable equivalent of his secured claim. *Id.* at 1168.

The Fifth Circuit reversed the district court. In discussing whether the plan was fair and equitable, the court held that the district court had misinterpreted section 1129(b)(2)(A). "While this Court has held that simple technical compliance with one of the three options in 1129(b)(2)(A) may not necessarily satisfy the fair and equitable

requirement, it has not transformed the 'or' in section 1129(b)(2)(A) into an 'and'". *Id.* At 1168. The court held that the plan satisfies section 1129(b)(2)(A)(i), and that it "need not attempt to decipher the meaning of 'indubitable equivalent'". *Id.* at 1168. Therefore, the court reversed the district court and affirmed the bankruptcy court's confirmation of the plan.

Corestates Bank, N.A. v. United Chem Techs., Inc., 202 B.R. 33, 50 (E.D. Pa. 1996) (holding that the requirements of section 1129(b)(2)(A) are written in the disjunctive, and a plan need not satisfy subsection (i) where it satisfies subsection (iii)).

The debtor sought Chapter 11 protection and filed a plan for reorganization. The bankruptcy court confirmed the debtor's plan of reorganization over a creditor's objections that the plan was not fair and equitable, among other things. The bankruptcy court found that the plan satisfied section 1129(b)(2)(A)(i). The district court reversed confirmation of the plan, holding that section 1129(b)(2)(A)(i)(I) should be strictly interpreted, and that its requirements were not satisfied because the plan released, without authorization or negotiation, the creditor's liens arising out of the cross-collateralization. The creditor did not "retain" all its liens, and the plan could not be confirmed under that subsection.

The district court then explained that the three requirements contained in section 1129(b)(2)(A) are disjunctive, and that the "failure to satisfy subsection (i)(I) (requiring retention of liens) will not defeat a plan so long as it satisfies subsection (iii) (requiring indubitable equivalent." *Id.* at 51. The district court remanded the case for a

determination of, among other things, whether the plan provides the creditor the indubitable equivalent of its claims.

Indubitable Equivalence Cases

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hearing before the bankruptcy court, the Debtor presented evidence that: (1) the present value of the notes was $153,777.06 and (2) the value of the lots securing the notes was $287,500. *Id.* Brite presented evidence that the notes could only be sold for thirty to fifty percent of their face value because of the debtors' poor payment histories. *Id.* Based on the facts, the bankruptcy court held that the notes were the indubitable equivalent of the first lien on the 200 acres. *Id.* In affirming, the Fifth Circuit held that the bankruptcy court's findings were supported by evidence, and since Brite took over collection of the notes, the Debtors have generally kept payment on the notes current. *Id.* The Fifth Circuit further held that if the Debtors defaulted on the notes, the value of the land securing the notes was sufficient to cover the additional expense of foreclosure. 746 F.2d at 409. The plan was confirmable because Brite was provided the "indubitable equivalent" of its security interest.

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"fair and equitable" unless it complies with section 1129(b)(2)(A)(ii). *Id.* at 806. In its analysis of the subsections of 1129(b)(2)(A), the Court held that a plan can meet the fair and equitable test by complying with any of the three enumerated subsections. 251 B.R. at 806. Subsections (i), (ii), and (iii) are alternative paths to meeting the fair and equitable test. *Id.* SSB acknowledged that both subsections (ii) and (iii) are applicable to the sale of the Disputed Securities, but subsection (ii) should govern because it deals specifically with the "sale...of property...free and clear of liens," and subsection (iii) merely provides for the "realization...of the indubitable equivalent" of the claim. *Id.* The court rejected this argument and stated that the subsections are to be treated as distinct alternatives and are not in conflict. *Id.* The Court held that if the debtors could meet the test of indubitable equivalence[2], the plan could be confirmed under subsection (ii). *Id.*

Credit Bidding under Subsections (i) and (ii)

In re California Hancock, 88 B.R. 226, 230 (9th Cir. BAP 1988)

On page *10 of the *Philadelphia Newspapers* opinion, the Third Circuit cited *In re California Hancock*, where the court held that credit bidding was required under subsection (i). In *California Hancock*, the debtor purchased property (the "Property") from John Hancock Mutual Life Insurance Company ("John Hancock"). The Property was the only asset in the estate. *Id.* at 227. The debtor issued a non-recourse promissory note payable to John Hancock secured by a first deed of trust and an assignment of rents on the Property. *Id.* The debtor filed a disclosure statement and plan that listed John

[2] The Court noted that the issue of whether the plan provided the "indubitable equivalent" of SSB's claim could not be determined without an evidentiary hearing.

Hancock as a creditor with an allowed secured claim of $400,000 and provided that a third party would purchase the property subject to the allowed secured claim. *Id.* The plan further provided that the debtor and third party would share in any future profits from a subsequent resale of the property. *Id.* The bankruptcy court held: (1) the proposed plan was not confirmable because the proposed transfer was not a *bona fide* sale to a third party but rather a joint venture; (2) even if the transfer was characterized as a sale, the plan was not confirmable because John Hancock was entitled to all the consideration from the transfer of the property including "future profits"; and (3) John Hancock would be entitled to a "credit bid" under § 363(k) to the full amount if its allowed claim at any sale of the collateral. *Id.*

The Appellate Panel affirmed the bankruptcy court's determination that the plan could not be confirmed because it did not allow John Hancock the right to credit bid. 88 B.R. at 228. In so holding, the court analyzed the three subsections of §§ 1129(b)(2)(A), 363(k), and 1111(b). The court noted that although the language to subsection (ii) specifically provides for the right to credit bid, subsections (i) and (iii) are unclear on the issue. The court cited another bankruptcy court that relied on the legislative history of § 363(k) to support the conclusion that the right to credit bid attaches to the sale of the property under the plan. *Id. citing In re Realty Investments*, Ltd. V, 72 B.R. 143, 146 (Bankr. C.D. Cal. 1987). The legislative history specifically provides that 'Sale of property under section 363 or under the plan is excluded from treatment under section 1111(b) because of the secured party's right to bid in the full amount of his allowed claim at any sale of collateral under section 363(k) of the House amendment.' *Id. quoting* 124 Cong.Rec. H.11104 (Daily Ed. Sept. 28, 1978); 124 Cong.Rec. S 17420 (Daily Ed. Oct.

6, 1978). Additionally, the court cited *In re Woodridge North Apts.*, 71 B.R. 189, 192 (Bankr. N.D. Cal. 1987) where the court adopted the language from *Collier on Bankruptcy* concluding that "the sale exception to section 1111(b)(1)(A) applies only where the lien holder is allowed to credit bid." The court held that John Hancock should be protected from the consequences of the loss of recourse treatment as set forth in § 1111(b)(1)(A), and the legislative history of § 363(k) contemplates such protection. *Id.* at 231. Cram-down under subsection (i) requires credit bidding.

In re Kent Terminal Corp., 166 B.R. 555 (Bankr. S.D.N.Y. 1994)

On page *10 of its decision, the Third Circuit cited *In re Kent Terminal Corp.* for the principal that a lien holder has the absolute right to bid its lien under subsection (ii). In *Kent Terminal Corp.*, debtor's single asset was undeveloped real estate (the "Property"). *Id.* at 558. Prior to purchasing the property, debtor obtained mortgage financing from Friesch-Groningesche Hypotheehbank Realty Credit Corp. ("FGH"). *Id.* According to its proposed plan, debtor would pay its creditors with proceeds derived from the sale of the Property free and clear of liens. *Id.* Under the plan, FGH will receive a portion of the sale proceeds, and its liens will not attach to the proceeds of the sales to the full allowed amounts of claims. *Id.* If the Property is sold, the plan denies FGH the opportunity to credit bid or to seek fully secured treatment under § 1111(b)(2). *Id.* at 559. The debtor proposed two methods to confirm its plan over FGH's anticipated objection: (1) the plan is fair and equitable under 1129(b)(2)(A)(ii) even though it denies FGH the right to credit bid because credit bidding is one of three disjunctive examples of fair and equitable treatment and (2) the plan is fair and equitable if FGH retains its lien in the Property and receives cash payments equaling at least the allowed amount of its

claim, even if it has no right to elect fully secured treatment under § 1111(b)(2). 166 B.R. at 559.

The court ultimately held that the plan could not be confirmed because the plan is not "fair and equitable" under § 1129(b)(2)(A)(ii) unless FGH is entitled to credit bid if its collateral is sold free and clear of liens. *Id.* at 567. In so holding, the court considered sections 1129(b)(2)(A) and 1111(b)(2). The court noted that subsection § 1129(b)(2)(A) does not contain the specific reference to § 363(k) found in subsection (ii). *Id.* at 563. However, the court acknowledged that Congress arguably intended to create an absolute right to credit bid in all liquidating plans when it formulated the relationship among §§ 363(k), 1111(b), and 1129(b). *Id.* at 565. Although it is true that a creditor cannot bid in its lien and make the § 1111(b) election, the lien holder is nevertheless entitled to do one or the other to protect the benefit of its pre-petition bargain. *Id.* at 566. The court determined that if a plan proposes the sale of a creditor's collateral free and clear of liens, the lien holder has the unconditional right to bid in its lien. *Id.* at 567. The court held that a plan is not "fair and equitable" under § 1129(b)(2)(A)(ii) unless a creditor is entitled to bid its entire lien if its collateral is sold free and clear of liens under the plan. 166 B.R. at 567.

In re River Village Associates, 181 B.R. 795, 805 (E.D. Pa. 1995)

The Third Circuit also cited *In re River Village Associates* where the court permitted credit bidding in a § 363(b) pre-confirmation sale and confirmed the reorganization under subsection (i). In *River Village Associates*, the debtor owned a single principal asset (the "Property"). *Id.* at 798. In purchasing the Property, debtor assumed a promissory note to General Electric Capital Corporation ("GECC") secured by

a mortgage to GECC that constituted a first lien on the Property. *Id.* After the debtor filed its petition as well as a plan of reorganization, GECC subsequently proposed a chapter 11 plan of reorganization that entitled it to credit-bid the full amount of its allowed claim. *Id.* at 801. The proposed plan did not allow debtor or others to bid subject to the mortgagee's lien, but did allow debtor or others to enter a bid in excess of GECC's credit bid. *Id.* The bankruptcy court confirmed the plan and the debtor appealed. *Id.* The debtor asserted the court erred in finding GECC's plan confirmable, and in choosing to confirm GECC's plan over debtor's own reorganization plan. 181 B.R. at 801. The District Court held that GECC was properly permitted to credit-bid the aggregate amount of its allowed claim under the terms of its plan. *Id.* at 805. In so holding, the court reasoned that courts and commentators have concluded that Congress did not intend to deprive creditors of the right to bid their full claim under a plan of reorganization. *Id.*

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Greenblatt v. Steinberg, 339 B.R. 458 (Bankr. N.D. Ill. 2006)

Facts: After the Debtor, Resource Technology Corporation ("RTC") unsuccessfully attempted to reorganize its business under Chapter 11 the case was converted to a Chapter 7. The Trustee moved for approval of a sale procedures order for turbines used to collect methane gas from garbage landfills. The sale procedure order required bidders to submit bids no less than $6.3 million and allowed secured creditors with first priority the ability to credit bid. Network Electric Company ("NEC") was listed in the sale procedures order as the first priority lien holder and any objections to that were due by January 17, 2006 and an appearance by the objecting party was also required to dispute

the validity of the lien at the January 26, 2006 hearing. On January 17, 2006, the secured creditors filed an adversary complaint against NEC which sought to revoke NEC's status as first priority lien holders. On the same say, the secured creditors also served numerous discovery requests on NEC which required responses within two days. When NEC failed to respond within the two day period the secured creditors filed a motion to compel discovery, which the Court denied. The secured creditor then placed three bids on the turbines, two of which were credit bids and one cash bid, which was less than the required minimum bid. The Court invalidated all of the secured creditors' bids as they were not the first priority lien holders and as such were not allowed to credit bid and their cash bid was below the minimum bid amount. The Court entered order approving sale. Secured creditors appealed based on (1) the Court failing to recognize secured creditors valid credit bid; (2) the trustee not exercising proper business judgment in approving the sale; and (3) RTC should not have been able to sell its assets free and clear of liens, claims and encumbrances.

Reasoning: (1) Secured creditors argued that the Court denied their credit bid on the misconception that they did not file an objection to NEC's priority lien holder status. Secured creditors maintain that their adversary complaint was a valid objection. Regardless of whether the secured creditors' complaint was considered an objection by the Court, the sale procedures order required presentation of evidence at the January 26, 2006 to dispute the validity of NEC's priority lien status, which SC never did. Since the SC failed to dispute NEC's first priority lien status in accordance with the sale procedures order, the Court did not err in refusing to allow appellants to credit bid. (2) Appellants contest the Court's findings regarding the environmental risks associated with the sale of

the turbines and the future profits of the site of operations as speculative. Court gave deference to the factual findings of the Bankruptcy Court which were supported by the record. (3) Appellants argue that RTC should not have been allowed to sell its assets free and clear of liens, claims and encumbrances. Appellants did not raise this argument in the Bankruptcy Court nor preserve this argument for appeal and as such it was forfeited. Holdings: (1) secured creditors were not entitled, under order, to enter credit bid for turbines; (2) the record supported bankruptcy court's factual findings respecting proposed sale; and (3) secured creditors' forfeited argument that debtor should not have been allowed to sell its assets free and clear of all liens, claims, and encumbrances.

In re Aloha Airlines, 2009 WL 1371950 (Bankr. D. Haw. May 14, 2009)

Facts: Debtors, Aloha Airlines, filed voluntary petitions under Chapter 11. The case was converted to Chapter 7 shortly after filing. The Debtor was an airline company which provided both passenger and air cargo services out of Hawaii. Just days after filing the voluntary petitions, the Debtors terminated their passenger services. The Debtors mainly attributed their business problems to the predatory behavior of Mesa Air Group ("Mesa"). Mesa obtained valuable information from the Debtors and another Hawaiian airline subject to confidentiality agreements. Mesa used this information in deciding to enter into the Hawaiian market. The Debtors filed suit against Mesa for improper use and retention of valuable trade secrets and information to compete unfairly in the market and predatory pricing designed to drive Debtors out of business. The Debtors litigation with Mesa was still ongoing when the case converted to a Chapter 7 and at that point the Trustee elected to sell the lawsuit rather than continue to litigate the matter. The lawsuit

was sold to Yucaipa. Yucaipa and Mesa entered into a settlement and release agreement which contained a release by Yucaipa to Mesa of all claims related to the lawsuit and also gives Mesa a 10 year licenses to the Debtors IP. Prior to the settlement, the Court entered an unopposed bidding procedures order which required an auction sale of the Debtors IP. The auction sale in which Yucaipa was the highest bidder occurred just days after the settlement with Mesa. The auction was later declared invalid because it was not "public." The Trustee then filed a renewed motion for approval of the Asset Purchase Agreement between the Trustee and Yucaipa for the Debtors IP. The renewed motion was contested due to the license agreement between Yucaipa and Mesa which would result in Mesa being able to operate as Aloha Airlines for 10 years.

Issue: Can the past misconduct of a prospective purchaser of property of a bankruptcy estate disqualify that entity from acquiring that property?

Reasoning: Due to the settlement agreement between Yucaipa and Mesa in which Mesa receives a very substantial interest in the Debtors IP, Mesa becomes a co-purchaser with Yucaipa for the purposes of evaluating the bidding procedures. Since Mesa is a co-purchaser their prior conduct must be considered when approving the bid. There was much evidence showing that Mesa actively intended to force the Debtors out of business and also tried to conceal its misbehavior by destroying evidence and false statements. The Court has an independent duty to examine the proposed sale of estate property to determine if the sale is in the best interest of the estate. The Court must use its equity powers to thwart any misconduct while not denying any rights specifically granted under the Bankruptcy Code.

Holding: In this case, the Court cannot allow its authority to be misused to reward the misconduct of Mesa and as such the renewed motion is denied.

In re Theroux, 169 B.R. 498 (Bankr. D. R.I. 1994)

Facts: Chapter 7 Trustee sought approval of notice of intent to sell liquor license to secured creditor free and clear of all liens for $3,000. Multiple parties objected to the proposed sale on the grounds that (1) the price was unreasonably low and (2) sale benefited a secured party to the detriment of superior lien holders.

Reasoning: The sale of the liquor license to the secured creditor can only benefit that party to the determinant of the rest of the creditors and the estate. The fact that the selling price in the notice of intent is only a fraction of the fair market value does not allow the Court to approve the sale. The trustee is required to sell the license to a qualified buyer at a fair and reasonable price.

Holding: The notice of intended sale is denied.

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CORRECTED TRANSCRIPT

PHILADELPHIA NEWSPAPERS, INC., et al.,

Appellees,

vs.

CITIZENS BANK OF AMERICA, et al.,

Appellants.

Nos.09-4266
09-4349

December 15, 2009

TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE THOMAS L. AMBRO
THE HONORABLE D. BROOKS SMITH
AND THE HONORABLE D. MICHAEL FISHER
UNITED STATES CIRCUIT JUDGES

APPEARANCES:

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Proceedings recorded by electronic sound recording.

I N D E X

(Audio begins mid-sentence)

JUDGE AMBRO: -- who has come in late to this case and he was asked to be involved in this case on the very day he had rotator cuff surgery so that's why you see him not here with us today. But I'm sure he's going to ask a number of questions despite that.

JUDGE SMITH: Don't take too much for granted, Judge Ambro.

JUDGE AMBRO: And just jump in at any time.

JUDGE SMITH: Thank you.

JUDGE AMBRO: Do you wish to be heard at any time for rebuttal?

MR. QURESHI: Your Honor, what we propose is that the appellants collectively reserve one minute from each of our allotted time for rebuttal, so three minutes in total. And the plan would be for one person on our side to be determined to address rebuttal to the extent it's necessary.

JUDGE AMBRO: The only thing I can say to you is what the immortal Judge Becker used to say, one minute, what can you say in one minute. But if --

MR. QURESHI: It'll be three minutes in total and just one of us will --

JUDGE AMBRO: Fine. That's fine.

MR. QURESHI: Thank you, Your Honor. May I begin?

JUDGE AMBRO: Sure.

MR. QURESHI: Your Honor, the Court concluded, the District Court concluded, based on a plain meaning analysis of the third prong of Section 1129 of the code that it does not entitle a secured creditor with the right to credit bid at a public auction.

Now, in concluding that the phrase indubitable equivalent has a plain meaning the Court made, we believe, three errors --

JUDGE AMBRO: Well, I think what they're saying is, in essence, when you look at this cram down provision, (b)(2)(A), that it uses the word or in terms of how you can denote fair and equitable.

MR. QURESHI: That is absolutely correct. And Your Honor, the District Court started with that uncontroversial proposition, that it does set forth, in the disjunctive, three different ways to cram down a secured creditor and we certainly don't disagree with that. But Your Honor, this Court and the Supreme Court have repeatedly instructed that statutory construction is a holistic endeavor.

JUDGE SMITH: But Mr. Qureshi, does that mean then or do you concede that from an analytical standpoint we should begin our statutory interpretation here with 1129?

MR. QURESHI: Your Honor, I do believe that 1129 is a starting point. However, this was the debtor's motion on a motion to approve bid procedures. Section 1129 of the

Bankruptcy Code is the section that deals with plan confirmation. The result of that, Your Honor, is that we think it was error for the Court to rely exclusively on Section 1129. There are other provisions of the Bankruptcy Code that provide procedural protections to secured creditors during the pendency of the case; those include Section 1111(b) and Section 363 which the District Court disregarded.

THE COURT: But you didn't make the 111(b) election, correct?

MR. QURESHI: We did not. In fact, Your Honor, under the clear terms of 1111(b) itself we did not have that option. What 1111(b) says is that when a debtor elects to sell the secured creditor's collateral, whether pursuant to a plan of reorganization or outside of a plan, we do not have the ability to make that 1111(b) election.

JUDGE FISHER: So what does it mean to take a holistic view of the Bankruptcy Code?

MR. QURESHI: Well Your Honor, we think the starting point for the District Court was the correct one here, which was to start with the third prong of indubitable equivalent, which is what the debtors were moving under.

However, the very word indubitable equivalent we don't think is susceptible to a plain meaning. And indeed Judge Robreno, in his opinion, referred to the very vagueness of that phrase. And so having conceded, in effect, that that

phrase is vague, the proper next step in statutory construction would have been to go to the second prong of 1129 which specifically addresses these --

THE COURT: It's interesting that a hallmark of many opinions of Learned Hand were words that we weren't normally used to hearing and you almost wonder if this wasn't one of those examples of just showing his learned experience.

MR. QURESHI: Indeed, which is precisely why it's just not susceptible to a plain meaning.

THE COURT: But none the less, it made it into the '78 code.

MR. QURESHI: It did indeed make it into the Code and we think, Your Honor, that the only way to interpret what indubitable equivalent actually means is to interpret that language in the context of the Code as a whole.

So the next stop should have been the second prong of 1129, which has, as I said, specifically addresses these circumstances.

JUDGE FISHER: Well, the legislative history --

JUDGE AMBRO: Why do you go to the second prong? Why is that your next stop?

MR. QURESHI: Well, because first of all it is part of the same section that the District Court relied on for its opinion. But Your Honor --

JUDGE FISHER: Yeah, but the sections are

disjunctive. You don't disagree that the sections in 1129 are disjunctive, do you?

MR. QURESHI: I don't disagree that the sections are disjunctive.

JUDGE FISHER: Okay.

MR. QURESHI: However, Your Honor, I think the error that the District Court made was to conclude that what that disjunctive presents is a choice to the debtor to proceed as it wishes. The correct approach, Your Honor, should be to look at the treatment that is being provided to the secured creditor. And on that basis, determine which of the three disjunctive alternatives of 1129 properly apply to that circumstance.

Here, there is an alternative that very specifically addresses precisely what the debtors were proposing to do here and that was the second prong. And so we think it was error to completely disregard that prong.

JUDGE SMITH: Mr. Qureshi, one difficulty I have had in trying to understand application of a holistic approach here is the import of Section 1111. Can you help me with that?

MR. QURESHI: I certainly can, Your Honor. The import is that the Bankruptcy Code provides two procedural protections to secured creditors to prevent secured creditors from being cashed out of their position at what they believe to be an

unfairly low valuation. One of those is Section 363 and the other is Section 1111.

Now Your Honor, what Section 1111 does is allows a secured creditor to elect to have their claim treated as fully secured. So that, as an example, if I have a face amount of a loan that's one hundred dollars but the present value of the collateral securing that loan is fifty dollars, I can make, as a secured creditor, an election under 1111(b) to have the full amount of my claim, all one hundred dollars, treated as fully secured.

And this, Your Honor, leads to the error the Court made in disregarding the legislative history. And that is --

JUDGE SMITH: The legislative history of 1111?

MR. QURESHI: The legislative history of 1111. Your Honor --

JUDGE SMITH: How does the legislative history of 1111 help us to understand the meaning of 1129?

MR. QURESHI: Your Honor, it helps in this way. First of all, the drafters of the Code specifically said that when looking at 1129 it is instructive to also consider Section 1111. But the reason it is so critical to look at that history, Your Honor, is that 1111(b), on its face, takes away the ability to make the election in a sale context. The statute does not say on its face why that election is being taken away. That is something that is made abundantly and

crystally clear in the legislative history.

What that history says --

JUDGE SMITH: But you are assuming, of course, that 1129(b)(2)(A) is ambiguous because we have no -- really no ability, no authority, to consider the legislative history at all, much less the legislative history of 1111 unless there's ambiguity here in the other section, correct?

MR. QURESHI: That is correct. As Your Honor ruled earlier this year in the Kaufman v. Allstate decision --

JUDGE SMITH: Right.

MR. QURESHI: -- when the plain meaning of a specific provision cannot be derived, the provision has to be interpreted in the context of the statute as a whole.

We start from the proposition that the provision the District Court relied on, the third prong, the indubitable equivalent prong, is not susceptible to a plain --

JUDGE AMBRO: If you can't make -- you cannot make an 1111(b) election if there's a sale, is that correct?

MR. QURESHI: That is correct.

JUDGE AMBRO: So then you go to the particular provision and that particular provision, your opponent would argue, is in the disjunctive. So you're saying, look I have two protections, I lose one therefore I must get the other. But when you go to that particular provision what necessarily leads us to conclude that you must get the other credit

bidding in this case?

MR. QURESHI: Your Honor, we think that the Code is clear that, and the legislative history clearly spells this out, that we must have one or the other protection; either credit bidding or the ability to make that election.

JUDGE FISHER: But even 363(k) allows the Court to deny a secured creditor credit bidding.

MR. QURESHI: That is absolutely right. 363(k) has a for cause exception, that is correct Your Honor.

JUDGE FISHER: Right.

MR. QURESHI: And that is simply not at issue here. There has been no case that we are aware of that suggests that the inability to credit bid because it might chill bidding at an auction or any such argument falls within the for cause exception. The for cause exception case law, under 363 is really meant to address situations where there has been some sort of inequitable conduct by the secured lenders. So again, that's not at issue here. But yes, that is a safeguard built into it.

But Your Honor, we start from the proposition that because the code is so clear that secured creditors must have one or the other of these protections, that when one then gets back to 1129 the starting point for interpreting 1129 is not that the debtor can choose which section to proceed under. It's that one must, instead, look at what is the proposed

treatment that the debtor is giving to secured lenders. If that treatment is selling collateral pursuant to a sale in the context of a plan then the second prong must apply.

I see my light is red, unless the Court has any other questions I will turn it over to Mr. Putnam.

JUDGE AMBRO: Thank you very much.

MR. QURESHI: Thank you.

MR. PUTNAM: Good morning.

JUDGE AMBRO: Good morning.

MR. PUTNAM: Alfred Putnam for Citizens Bank.

JUDGE AMBRO: You're not going to start with footnote 16, are you?

MR. PUTNAM: I'm actually -- I'm going to get to footnote 16.

JUDGE AMBRO: You are?

MR. PUTNAM: Yes, I am. But I don't have to start there.

JUDGE AMBRO: If you're going to quote Fowler, at least you quoted the second edition. You could have gone to the Holy Grail in the first edition, you know.

MR. PUTNAM: I could have. I did not quote the third edition.

JUDGE AMBRO: Thank goodness you didn't quote the third edition.

MR. PUTNAM: It was a form of pornography, so --

JUDGE AMBRO: Although I think, just off the top of my head, you put it as 1968, isn't the second edition in '65?

MR. PUTNAM: Mine said '68. Now it may have been an English edition, I'll go look. If I'm wrong, I'm wrong but -- and I'll send a letter of correction if need be.

But actually to draw the distinction, I think a little bit, between what we're arguing here, it's true that if you conclude that the statute could be -- there are two reasonable readings to the statute. And if there are two reasonable readings there's an ambiguity though, consult legislative history. I think everybody agrees with that. And I think my colleagues are suggesting that there are two reasonable readings and I don't necessarily want to fight with them, except for --

JUDGE AMBRO: But their reading is not implausible, is it? Is it?

MR. PUTNAM: Their reading --

JUDGE AMBRO: Yeah.

MR. PUTNAM: -- is what you're saying. Actually, that's what I'm here to suggest to you. I'm here to suggest that in fact the only correct, proper reading under the rules of statutory construction and actually on the way it's written is the reading of the Bankruptcy Court and not the reading of the District Court.

JUDGE AMBRO: I mean, it may be that that's the

correct reading but their reading of it isn't implausible, is it?

MR. PUTNAM: Their reading --

JUDGE AMBRO: I mean, actually it may play into -- this may be a softball question because it may mean that you then go to canons of construction, you then go to legislative history, you then go to the holistic looking at other provisions of the code and how they interrelate.

MR. PUTNAM: Yes. I think that's right. But I think -- and so if you come to the conclusion that their reading is not implausible just because it's the disjunctive, we ought to go do these things. But I think you have to stop first and say, before you get there, is it in fact a reasonable reading? And by that I mean the debtor's reading. And I respectfully suggest to you that when in fact you have a very specific clause that said -- that covers sales of properties subject to the liens to be sold free and clear of the liens -- i.e., includes a clause in there that says those sales will be subject to 363(k) of this title -- to advance a construction of that, this subsection of the statute, to say yes but there is another option available and the option available is a sale of any property subject to the liens free and clear of those liens but not subject to 363(k). And that's what the debtors are advancing.

JUDGE AMBRO: What fits within 1129(b)(2)(A)(iii), paragraph 3, the indubitable equivalent paragraph?

MR. PUTNAM: I think that is there for the swap of collateral, is what I'd say, as opposed to a sale. In other words, I think the first, just in a very general sense, (i) is --

JUDGE AMBRO: So you mean a replacement lien situation?

MR. PUTNAM: Well yeah, right. The first one is -- right; I'm sorry. The first one is if you're trying to stretch out but you're leaving the liens in place. The second one is if you're selling the property but you want to sell it free and clear of such liens and Congress has put something in there in order to provide the protection, as Mr. Qureshi suggested there's a reason for that and the whole code balances. But I'm going to stay away from the whole code, he's already made that argument.

And the third is a catch-all. I agree that it's there but it's there if in fact the first or the second are not -- neither one of those two things are proposed. There's no mention of a sale of property free and clear --

JUDGE FISHER: Why can't cash be the indubitable equivalent?

MR. PUTNAM: Well, actually --

JUDGE FISHER: Cash and property here.

MR. PUTNAM: It is conceivable that cash and property will add up to whatever it adds up to. But what the -- under this Court's opinion in Sub-Micron -- cash without credit bidding isn't going to be the indubitable equivalent because the credit bidding is going to set the fair market value. The curious thing is that's what the Court already said as a rationale as to why a simple cash bid, without credit bidding, isn't going to --

JUDGE FISHER: I mean, aren't you a step ahead here? I mean the sale goes forward, let's assume the sale goes forward and there's no credit bid and there's a sum of money realized. Let's assume there's only one bidder and it's a stalking horse bidder whose bid is there. You still have the opportunity, at plan approval; to make a determination as to whether or not the amount of cash and property was the indubitable equivalent, do you not? In other words, fair and equitable.

MR. PUTNAM: I would argue that in fact -- that there's no point in doing that because it cannot be. But yes, this --

JUDGE SMITH: Why? Why? Why, is that, as Judge Fisher's question clearly suggests, always an option here an ultimate option. I don't understand.

MR. PUTNAM: Well, I argue that it's foreclosed by the statutory language. But in this particular instance, if

you go ahead with the credit bid -- I mean, as your question, Judge Fisher, goes to the temporal aspect.

JUDGE FISHER: Right.

MR. PUTNAM: You can do this and --

JUDGE FISHER: Yes.

MR. PUTNAM: -- you can decide it all later, which is what I think Judge Robreno was suggesting he might decide it all later. But the fact of the matter is, if you conclude when you get to the end of the day that that proposition simply doesn't work, that this is a motion to come forward to approve the bidding procedures. It's been teed up for that purpose.

You go through this proposition and in point of fact the proposed credit bid -- non-credit bid option is giving us less then what we're entitled to under the statute.

JDUDGE FISHER: Okay. All right.

MR. PUTNAM: So that cannot be the indubitable equivalent of what I would -- it's not a substitution of my rights.

JUDGE FISHER: All right.

MR. PUTNAM: It's a diminution of my rights.

JUDGE FISHER: So what's wrong with that process?

MR. PUTNAM: Well --

JUDGE FISHER: We are -- in fact you could make the argument, it's not been made here, but we are here on,

perhaps, a matter that's premature. The issue was a credit bid process. There's some who -- I don't know who would have argued it but before the District Court there was some question as to jurisdiction. Okay. Now clearly we have jurisdiction because we're reviewing what the District Court did. But some could argue that this whole process of us looking at this bid procedure is really premature in the scope of this bankruptcy.

MR. PUTNAM: I respectfully differ. I think that you have the jurisdiction to look at it.

JUDGE FISHER: We do now.

MR. PUTNAM: Yes. And if you allow it to go forward and allow the expense of all of that, at the end of the day, with a clear understanding that in fact it can never measure up because it's giving the secured creditors less then they are entitled to under the statute. And so it's not going to -- their definition of what it's going to be is to say the cash that's going to be available in an auction without credit bidding, could be the indubitable equivalent. But in fact, if I'm entitled to the credit bid as the hypo that you used in the Sub-Micron case goes, the real market value includes that credit bid. You've dealt that out so it can't possibly be the indubitable equivalent.

I'd also like to make one point, because the comments --

JUDGE AMBRO: But basically Sub-Micron is what does it mean to credit bid.

MR. PUTNAM: Yes. Well, I think that's right but the --

JUDGE AMBRO: The question here is credit bidding even allowed in the door under the way it's been -- under the plan that will be proposed for the auction and the bid procedures that are proposed by the debtor.

MR. PUTNAM: I'm not going to argue with Your Honor about what Sub-Micron says because I think that would be a losing argument. But I respectfully suggest that if you --

JUDGE AMBRO: Although back in the '70s, Tony Amsterdam who used to argue a lot of the death penalty cases, I think he was at Penn at the time, he one time stood up before the Supreme Court and said here's what you said. Here's what you meant to say and here's how others have interpreted it. And they actually listened.

MR. PUTNAM: I think the hypo Your Honor used would apply equally here. And if I may just briefly hit on --

JUDGE SMITH: Mr. Putnam?

MR. PUTNAM: Yeah.

JUDGE SMITH: May I return, please, to the repartee that you had with Judge Ambro at the beginning of your argument, because I don't want to make any assumptions about footnote 16 that might be inaccurate. I suppose one could

intuit that because the comma argument was relegated to a footnote that it is not a primary part of your position, perhaps that it's a make weight. But I happened to be somewhat taken by the argument, I don't mean to say persuaded, but I did think that it was an argument worthy of some further explication here regardless of whether we pursue Judge Ambro's preferred authority or whatever edition of it happens to be or mine which is based on my childhood reading of E.B. White. But surely there is some reason for Congress' use of these commas. What part of that argument, as it appears, albeit relegated to footnote 16.

MR. PUTNAM: Well, I'm sorry that I was obliged to relegate it to footnote 16. I think the argument's quite serious and I thought I said to Judge Ambro I think it's quite serious.

The fact is that that clause -- "subject to Section 363(k) of this title" -- is what, in essence, is being deleted here. They're proposing something and they say well, I'm going to do it not subject to Section 363(k).

If you're going to make that argument you have to say that (ii) applies only to sales that are subject to 363(k), that other sales are possible but they're not subject to 363(k). If that's right, that's a defining clause. It's a restrictive clause. Those commas shouldn't be there. The commas are there and the reason the commas are there, I would

argue, is that in point of fact it's a nonrestrictive clause. And that, in fact, they're talking about sales of property subject to the lien securing such liens, free and clear of such liens. That applies to all such sales. And this is a nonrestrictive clause put in commas. It's the same distinction that would have applied if it was a which or a that. I'm not going to go into that, there's even more -- because a which and a that are not there.

But if you take those commas out, then I think Mr. McMichael could argue that in point of fact that's what it reads. It's only -- it's defining in that sense. But the commas are there and so you have to come up with an answer, I respectfully submit, as to why they're there. And I understand Mr. McMichael, in footnote 12, to have come up with the answer that in point of fact it doesn't really matter so the commas are wrong, I'll turn to that in a minute.

But the alternative answer is that while 363(k) refers to sales pursuant to 363(b) and that couldn't possibly apply. But that argument would apply altogether and 363(k) shouldn't be in this portion of the statute at all.

And let me then return to the central point, which is that if you take -- if the commas are decisive, am I really arguing to you that punctuation, in fact, controls? I actually don't think that in every case punctuation can be said to control but I do think it can be said to matter. And

when you are in a case, when in point of fact the district judge has taken the position that it's clear on its face and no other interpretation is possible and that the argument that Mr. Qureshi's putting forward is not plausible.

If it turns out that in point of fact the commas suggest that Mr. Qureshi is right, that at least you ought to give him the benefit of saying I'm making a plausible argument here because I'm arguing that Congress did know how to punctuate. Mr. McMichael's arguing that it doesn't really matter, that they might get it wrong. I would submit it's possible that they might get it wrong; I don't think they got it wrong here.

Thank you.

JUDGE AMBRO: Thank you very much. Mr. Logan.

(Pause)

MR. LOGAN: Thank you, Your Honor. Ben Logan of O'Melveny & Myers LLP on behalf of the Official Creditors' Committee.

JUDGE AMBRO: Let me ask you at the outset, where is it in the opinion that there's actual finding made by Judge Raslavitch with regard to the motivation for the proposal that you not have credit bidding?

MR. LOGAN: Well Your Honor, Judge -- where in his opinion?

JUDGE AMBRO: Yeah.

MR. LOGAN: Judge Raslavitch --

JUDGE AMBRO: Yeah. I mean, I'm looking -- for example on page 21 he says the lenders maintain the sole motivation, the lenders argue. Then it says, "The Court is constrained to observe that the debtors have offered little but points to a different conclusion." Well, that's comment. And it does somewhat the same thing on the next page. The debtor's explanation is unpersuasive. But where is there an actual finding?

MR. LOGAN: Well Your Honor, the next paragraph he says "Giving the debtors the benefit of the doubt as to their motives the Court nevertheless can discern no plausible business justification for the restriction," etcetera, etcetera.

JUDGE SMITH: Excuse me. For clarification are we at page 21 of the opinion or page 21 of the appendix.

MR. LOGAN: Page 22 of the opinion, Your Honor. And I think Judge Ambro was on page 21.

JUDGE AMBRO: Yeah. It's on 21 and 22.

MR. LOGAN: Yes.

JUDGE SMITH: Thank you.

MR. LOGAN: I think elsewhere, right at the outset --

JUDGE AMBRO: But basically what he's -- again, that's a comment. I can't discern any plausible business justification for the restriction which the debtors seek to

include in the bid procedures. But I'm not sure that's a finding.

MR. LOGAN: Well Your Honor, he says it in various places. On page 19 he says, "To put it differently, it appears to this Court that the facts before it represent the case where the right to tender a credit bid should be an imperative."

Later on he says, in the next paragraph, he summarizes his conclusion regarding the legal issue that's already been argued. He said, "In sum, therefore, the Court rejects the debtor's contention," etcetera. Then he goes on to say, "Even if it were otherwise, however, it is far from clear that it would be appropriate for the Court to approve such a tactic as a legitimate exercise of the debtor's business judgment. Bankruptcy Courts typically accord a degree of deference to decisions by a debtor in possession. This is not, however, without limit." And he goes on. He goes on to describe the various facts that lead him to conclude that this is not the case where the debtors should be afforded the right to prohibit credit bidding.

And Your Honor, that brings me back to what I wanted to start with which was this was a motion filed before Judge Raslavich. In order for it to be sustained it had to establish that as a matter of law and fact that there should be a prohibition on credit bidding. It was not seeking an

advisory opinion, it would be inappropriate to seek an advisory opinion on whether or not it's theoretically possible for some plan of reorganization or some set of facts to disapprove of credit bidding.

JUDGE AMBRO: In effect are you saying that the presumption goes your way unless for cause shown under 363(k) the credit bidding is taken away?

MR. LOGAN: I'd say it slightly differently, Your Honor. Although one could either get to that point under 363(k) or under indubitable equivalent or under fair and equitable, after all the subdivisions of 1129(b)(2)(A) require that a plan be fair and equitable.

JUDGE AMBRO: How do you get to that endpoint, by talking about indubitable equivalence?

MR. LOGAN: Or indubitable equivalence. All of those --

JUDGE AMBRO: How do you get there?

MR. LOGAN: Your Honor, because I think all of them and in all the case law on asset sales and indeed the debtor's moving papers, Judge Raslavich's questions during the hearing on October 1st all start with the premise that a plan, any sale, must be fair. And as the debtors argued in their moving papers, and they argued before Judge Raslavich, for Judge Raslavich to put his imprimatur on these bid procedures they must establish that as a matter of their business judgment it

was appropriate to disallow credit bidding. We argued that that was not the right test because it was an insider transaction. The appropriate test was a heightened degree of scrutiny, which Judge Raslavich also agreed with in his opinion.

And that brought into play a number of factual issues. Factual issues such as whether or not this really was an insider transaction. Something that the debtors quite frankly waffle -- they waffle on occasionally although during the oral argument on October 1st, Mr. McMichael admitted that this was an insider transaction. And during various cross examination questions of Mr. Baker it came out crystal clear that this was very much an insider transaction. That Mr. Tierney had arranged with people who largely held the equity in the existing debtor. So basically it's a new value plan dressed up.

Beyond that they have to establish that it's a fair process. Judge Raslavich questioned the debtors at length about the PR campaign that they launched at the outset of filing their plan.

There was evidence presented on that, but beyond that Mr. McMichael made a statement, and this was all in response to Mr. McMichael's argument, that it was a proper exercise of their business judgment to eliminate credit bidding because he argued that would chill the bidding process. Judge Raslavich

asked Mr. McMichael a series of questions about how that could chill the bidding process any more than the PR campaign that they had launched. And his response --

JUDGE AMBRO: But in the end, it looks as if he's dubious about the rationale given by the debtor. But I don't see where he's actually made a finding of fact. And he's basically saying I don't find what you say to be persuasive and he leaves it at that. But that's a leap of faith to say that's a finding of fact.

MR. LOGAN: Your Honor, he does say it, in two places, that this is an insider transaction. Towards the end of --

JUDGE AMBRO: I understand that.

MR. LOGAN: -- he calls it a manifestly insider transaction. And he concludes that once it's an insider transaction the business judgment rule, which is what the debtors argued, is inapplicable, and they must establish as a matter of fact and law --

JUDGE AMBRO: But the implication of what you're saying is that he made a finding of fact, in effect, of bad faith and therefore they should not be able to, and maybe it's just an alternative holding that they cannot attempt to go forward by barring -- to bar credit bidding.

MR. LOGAN: Your Honor, I wouldn't quite call it bad faith. But I think what he concluded was that because it's an

insider transaction coupled with a campaign to dissuade any other competitive bids, he said --

JUDGE AMBRO: And I wouldn't call it that either. I don't think he even -- I don't think those words were ever used or even implied in the opinion. He just didn't -- he doesn't buy the reasoning.

MR. LOGAN: What words were never used?

JUDGE AMBRO: Bad -- he doesn't use the words bad faith.

MR. LOGAN: No, he doesn't.

JUDGE AMBRO: I'm just saying doesn't buy their reasoning.

MR. LOGAN: That's right.

JUDGE SMITH: So Mr. Logan, would you help me explain how the business judgment rule plays out in this case and why, from your standpoint, it's necessary for us to rule on it at this time?

MR. LOGAN: Your Honor, I think that gets back to two points. One is for the debtors to prevail in their motion they had to sustain their burden, and it's a very substantial burden, as courts in most circuits, I don't think the Third Circuit has addressed this yet, but if they brought it under 1129 they have the burden of establishing every element of confirmation of the plan. It's either by clear and convincing evidence or by a preponderance of the evidence. There's a

split of authority on that but they clearly have the burden.

They decided to tee up a confirmation issue prior to the confirmation hearing much like in Owens Corning, the debtors filed a motion for substantive consolidation before the confirmation hearing. Once they did that it's their burden, as a matter of fact and law, to establish that Judge Raslavich should have approved their motion.

JUDGE SMITH: But why can't it wait, returning to the inquiry pursued earlier, why can't this issue be one that is adjudicated at the confirmation hearing?

MR. LOGAN: Two reasons, Your Honor. First off, if they are going to defer that determination until the confirmation hearing, they haven't sustained their burden to approve the motion.

Second thing, the reason that these are typically -- these issues are typically brought up by motion is so -- that would lead it an auction process that would be frankly unmanageable. When bidders submit their bids, display what they're willing to pay for the assets and then we revisit the rules after the fact it is pure chaos. And that is why, I think, it was appropriate for the debtors to bring this as a motion to be heard before the confirmation hearing. But as a pure --

JUDGE SMITH: So economic terms, you're suggesting that this would result in some kind of distortion of this

mini market by permitting this to wait?

MR. LOGAN: Yes, Your Honor. I think it would and I think it would also establish that if you conclude that it ought to wait, you also ought to conclude that the debtors did not sustain their burden in bringing the motion.

My red light's on, any further questions?

JUDGE AMBRO: Thank you.

MR. LOGAN: Thank you.

JUDGE AMBRO: Mr. McMichael.

(Pause)

JUDGE AMBRO: Good morning. Just take the mic and just put it up. Thank you. That'll work.

MR. MCMICHAEL: May it please the Court, I'm Lawrence McMichael. I represent the appellees in this case and the debtors below, Philadelphia Newspapers LLC.

The only issue --

JUDGE AMBRO: It looks, at the outset, just in getting this matter before us, that this is a case of a lot of bad blood and some real hardball being played here. If you take a look at the statute, at least in the past prior to the Pacific Lumber opinion of the Fifth Circuit written by a very reputable judge, I concede, extremely reputable. And also the Krimee May (ph.) case, almost all of the cases have pretty much said that if you wish to sell assets free and clear you've got to look at 1129(b)(2)(A)(ii), isn't that correct?

MR. MCMICHAEL: In different contexts different courts have said that, different Bankruptcy Courts have said that. No court has specifically addressed the issue, other than the cases Your Honor mentioned, Krimee May and Pacific Lumber, in this case no Court has specifically addressed the issue of how (iii) plays into that equation.

JUDGE AMBRO: To what does (iii) apply, normally?

MR. MCMICHAEL: It applies -- here's what (iii) means, I think that we need to start with what the statute was intended to do. The guiding principle that this Court ought to look to comes from many, many cases. It's in the Supreme Court Opinion in Bildisco, that Congress crafted Chapter 11 to be a flexible tool to allow debtors to craft a plan that was specific to their business, to their industry, to their environment and to their time. It's supposed to be flexible. It created three alternative paths to confirm a plan over the dissent of secured creditors, any one of which would allow you to get there.

JUDGE AMBRO: Over the -- it could be secured creditors, that's correct, in this case.

MR. MCMICHAEL: Right. Okay. So let's look at those three alternatives. Alternative one and alternative two define a structure; they define a type of deal. They don't require

JUDGE AMBRO: They define a sale subject to a lien, a

sale free of a lien and something called indubitable equivalent which, according to the congressional record and I assume that was put in there by Professor Klee (ph.) on behalf of Representative Edwards, usually it's for abandonment or a replacement lien.

MR. MCMICHAEL: Your Honor, I disagree with that. I think that that -- I think if you look at the structure what Congress did --

JUDGE AMBRO: Well, is there anything in the congressional record or Klee's article that came out shortly after that that disputes what I just said?

MR. MCMICHAEL: Several things. First of all, in the congressional record there are repeated references to the fact that these are disjunctive requirements and that the Court shall confirm the plan if any one of them is met.

Secondly, in Klee's article if you look at the end of Klee's article, he said we didn't even think about what would happen if some of the collateral was sold, not all of it, which is exactly what we're doing here. So Klee's article doesn't really quite get you there either.

What Congress did, keeping the flexibility principle in mind, what Congress did was say you can create -- you can create a specific path to confirmation by looking -- by going through two --

JUDGE AMBRO: But Klee's article says, in footnote

143, "A sale of collateral must be made under Section 363(k), which permits the lien holders to bid for the collateral and offset their allowed claims that are secured by the collateral against the purchase price. This includes both the secured claim and the unsecured claim."

MR. MCMICHAEL: It does say that. It does say that. But if you look at the end of the article there's a provision where he says we didn't consider what happens if part of the collateral was sold and part wasn't sold.

JUDGE AMBRO: And in the congressional record what he has is -- it's interesting, he has one, two, three, four paragraphs that explain clause one, that is a sale subject to the lien, he has one, two, three, at least three paragraphs that explain clause three. And he says, "Clause two is self explanatory." That's all it says, one sentence. And so why shouldn't we adopt what your opponents say and say look, any time that you specifically have the sale free and clear, you have to look to the specific provision?

MR. MCMICHAEL: Because that's not what the statute says and that's not what Congress intended. Congress crafted two ways to structure a deal, looking at the deal structure not the result. One is not necessarily a sale, one is retain the asset, give them their liens, give them a cash flow stream. Two is sell the asset, give them a credit bid right. Three doesn't look at the means. Three looks at the result.

And three is actually more specific than one and two.

JUDGE AMBRO: But if you've got, for three, the congressional record saying abandonment of the collateral to the creditor would clearly satisfy indubitable equivalence as would a lien on similar collateral.

MR. MCMICHAEL: Sure.

JUDGE AMBRO: It looks as if -- I mean, we don't have a whole lot but the little bit we do have appears to be at least a directional arrow saying in effect what's on page 26 of the Citizens Bank brief, which is that when you have the specific, that rules. That's what you deal with.

MR. MCMICHAEL: Only if there's a conflict and there's no conflict here. Because (iii) looks at the result. It's the highest burden that a debtor has to confirmation. We have to show that the result of the process yields the indubitable equivalent of the secured claim. We don't have to show that under one, we don't have to show that under two.

JUDGE AMBRO: You, despite the fact that you're talking about a particular -- you're saying the statute is clear on its face, we don't have to look at canons of construction, we don't have to look at the holistic approach, we don't have to look at congressional history or legislative history. And yet, you do use a canon that the expressio unius est exclusio alterias, to express one is to exclude the others, can't you flip that and just say here to express in

(ii) what you do when you want to sell free and clear is to exclude anything else with respect to the sale of an asset free and clear?

MR. MCMICHAEL: No. You can't. It doesn't work in reverse.

JUDGE AMBRO: It doesn't? Why?

MR. MCMICHAEL: The reason why it doesn't work in reverse is because it's contrary to what Congress tried to do when it created three. Three is -- three looks at the result of the process. There are several cases that actually bear upon this. There's some case law out there which would be helpful to the Court, some of it is cited -- I think all if it is cited in our briefs.

But if you go back to a decision by Judge Padova in the District Court here ten years ago, there was a case where the debtor wasn't selling anything. The debtor was keeping the asset, keeping liens in place giving a cash flow stream but he wasn't giving the liens -- he wasn't keeping all of the liens in place.

What Judge Padova says, okay, your plan structure looks like (i) but it doesn't quite get there because you're not giving the lender all of the liens they had prepetition. But you can still confirm under (iii). You can go to (iii) because if you can provide the indubitable equivalent that's an alternate path and it provides

flexibility to the debtor in structuring a plan that meets its specific circumstances.

If one were to do what Your Honor suggested, you would be eliminating that flexibility from (iii), which Congress absolutely intended.

JUDGE SMITH: Counsel, let me return to words you used a few moments ago and probably some of your subsequent comments have been intended to explain this but I'm still having some difficulty with (iii). And you said a few moments ago (iii) is actually more specific. Can you help me with that because I've had some difficulty seeing it that way. Just what does indubitable equivalent even mean?

MR. MCMICHAEL: Okay. What it means is exactly what the words say. The way to look at it is to look at the result of the plan process, not the means. (i) and (ii) define means, (iii) defines the result. And what it means is that the result of the plan must yield to the secured creditor a value that is, without doubt, equal or greater than --

JUDGE FISHER: Let me stop you right there then. The means is value? I mean in economic terms the means -- this is all about value. Is that what you're saying?

MR. MCMICHAEL: (iii) is all about value. (i) and (ii) are not about value.

JUDGE FISHER: Yes, I understand.

MR. MCMICHAEL: You don't need to -- (iii) is all

about value and what we have to show in (iii) is that the plan results in a value to the secured creditors that is equal to or greater than the amount of the secured claim. That's precisely what it means. And by the way, that answers the question posed by Mr. Qureshi. The question being why would Congress have taken away an 1111(b) election here if we don't get to credit bid. We must have one or the other.

Well, that's not necessarily true. Because if a secured claim is satisfied in full, in cash on the effective date, that is a pretty powerful protection. And Congress could well have said and thought, and the language is completely consistent with this, in fact that's the only reasonable reading of the language. That if you're getting the indubitable equivalent you're really not entitled to anything else.

If the debtor can meet that high threshold, which is a threshold we've created for ourselves in this case, if we can meet that threshold the secured creditors really aren't entitled to anything else.

JUDGE AMBRO: Mr. Qureshi also argues that those mere terms, by themselves, are ambiguous, indubitable equivalent.

MR. MCMICHAEL: They're not.

JUDGE AMBRO: And why are they not?

MR. MCMICHAEL: They're not because indubitable equivalent means equal to or greater than. That's not

ambiguous. And indubitable means generally without doubt or with little doubt. I don't think there's anything ambiguous at all. If we can establish as a matter of fact at the confirmation hearing that the secured claim is worth a number, whatever the number is --

JUDGE FISHER: At what juncture?

MR. MCMICHAEL: On the effective date of the plan, as of the effective date of the plan which is where everything is measured, just like in Pacific Lumber, okay. There was a judicial valuation there and perhaps there'll be one here too. We haven't quite decided what we're doing at confirmation. We'll see what happens at the auction. But we -- our burden is to value the claim, value the secured claim. And then to show that without doubt that cash that we give them on the effective date is equal to or greater than that claim. If we can satisfy that we have provided all of the protection that Congress intended. And that's what indubitable equivalent means, it's a straightforward reading of it.

Now, it is a mistake by the appellants to confuse ambiguity with breadth. The fact is that indubitable equivalent does not dictate a particular form of transaction. (i) and (ii) dictate the form.

JUDGE AMBRO: What they're saying is you read it one way and it may be plausible, they argue it's not correct and they read it another way that also is plausible and it may not

be correct. So why not, then, look at legislative history? Why not look at how the other provisions of the Code come into play and affect the holistic approach? Why not?

MR. MCMICHAEL: Well, there -- we have no problem with the holistic approach. I'm all in favor of looking at the Code as a whole. And if you do that, you'll reach the conclusion that we have reached. Let me walk you through that, if I may. Unless you --

JUDGE AMBRO: Go ahead. No, go ahead.

MR. MCMICHAEL: The starting point is Section 363 which creates a credit bid right for sales under section (b) of 363, that's what it says. That's what (k) says. It says under (b) you have a credit bid right. Okay.

Look at the very next subsection of 363, 363(l), something that no one's mention yet because 363(l) is a provision that deals with ipso facto clauses. And what it says is 363(l) applies, it applies to sales under sub (b), to sales under sub (c) and to sales under plans under Chapter 11, 12 and 13.

If Congress intended the credit bid right in (k) to apply to sales under plan sales, 11, 12 and 13, it would simply have used the exact same language that it used in the very next subsection of 363.

JUDGE AMBRO: But when you have a sale free and clear you have a specific reference to 363(k). What it appears to

be is that you can get rid of Section -- of credit bidding under 363(k) if you show cause. The ball is in your court. The presumption -- the arrow goes their way unless you can somehow turn it around. And what you are attempting to do, it would seem, here is take that away merely by proposing it and saying we're fitting it under another provision, not 1129(b)(2)(A)(ii). We're fitting it under 1129(b)(2)(A)(iii).

MR. MCMICHAEL: Precisely. Because under (iii) they get the indubitable equivalent and that's better protection than credit bidding.

JUDGE AMBRO: But if they don't have the 1111(b) election, they're precluded from that when it's a sale under a plan --

MR. MCMICHAEL: Right.

JUDGE AMBRO: -- they still should -- it looks, one could argue, that what's being done is making it clear that if you're going to sell my collateral free and clear, the other protection that I do get, which is credit bidding, stays. And the only way it doesn't stay is if for some reason you show cause that it shouldn't be that way.

MR. MCMICHAEL: That's not what Congress said. That's not what the statute says.

Let me give you an example, let's use a truck.

JUDGE AMBRO: You tell me why you don't think that works.

MR. MCMICHAEL: Okay. Here's why it doesn't work. Let's say a debtor has two trucks, a more valuable one and a less valuable one. The lien is on the less valuable truck. The more valuable truck is free and clear. The debtor wants to sell the less valuable truck in a plan sale. It does not want to give a credit bid right because it wants the cash; it needs the cash to fund its plan. It's not going to give a lien on proceeds, it's not going to give a credit bid right but it's going to sell the truck and it's going to sell it free and clear under the plan.

Under the rationale that Your Honor articulated, which basically says that credit bidding is always required under (iii) if there's a sale anywhere in the process --

JUDGE AMBRO: No, that credit bidding when you sell a property that is subject to a lien free and clear, you don't look to (iii) because the express provision is (ii). But (ii) even that allows you, by reference to 363(k) to prevail and to bar credit bidding if you can show cause.

MR. MCMICHAEL: That's one alternative but the other alternative is to provide the indubitable equivalent. Because my example is suppose we sell the truck, the less valuable truck.

JUDGE AMBRO: Wouldn't it be easier here if you just attempted to show cause?

MR. MCMICHAEL: We could but that's a confirmation

issue. That's a factual issue. That wasn't teed up. The only thing that was teed up was the legal question whether we can get to the gate or not. We haven't yet had a trial on anything, there's been no evidence, no testimony, no record has been made on any of this. And we have very sound reasons for doing what we're doing and, you know, I don't want to go into them because they're not a matter of record. I'm happy to address them if the Court's interested but we intend to --

JUDGE AMBRO: I assume what you want, in having done this --

JUDGE SMITH: I'm actually interested in something from a practical standpoint and I do not mean it, by any means, to turn from the overriding statutory interpretation question or questions that loom here. But as -- it's probably not a good thing for a judge to admit to ignorance so I guess I'll call agnosticism, but as my colleagues know I was not a bankruptcy practitioner and I'm curious as to the import of permitting and not permitting credit bidding to go on in an auction, let's say in an auction in the abstract. From a micro-economic standpoint, what's the import of permitting credit bidding on this small market itself as opposed to not permitting?

MR. MCMICHAEL: What we will show at the confirmation hearing is that the debtors need fresh capital. That fresh capital is best obtained in the marketplace for print media,

which is a troubled industry, this is a newspaper and it's hard to attract capital to newspapers these days, putting credit bidding in front of potential bidders scares them away.

Now that's a question of fact, that's an issue of fact. And we will show that at the confirmation hearing. It hasn't been shown yet.

JUDGE SMITH: Would that matter of fact apply in just about any market other than the print media market that is specific to this case?

MR. MCMICHAEL: No, not necessarily. There is actually some academic literature on this Judge, and I can -- some of it is referenced in, actually, Judge Raslavich's opinion. Some of it is referenced in the article that was submitted by the appellants as 28(j) authority by Professor Brubaker, where you have lenders who are interested in owning the asset. Sometimes these are called loan-to-own transactions but they can be much broader than that and we have lenders like that in this case. We have funds that are interested in owning this asset.

JUDGE AMBRO: This loan was made, what, in '06?

MR. MCMICHAEL: The loan was made in '06.

JUDGE AMBRO: And do you really -- was there any inkling that you had -- that you think you could show that the loan dated in '06 was somehow made with the idea in mind that if this didn't work there would be a loan to own situation

here?

MR. MCMICHAEL: None whatsoever.

JUDGE AMBRO: Okay. Well then it seems like even if that were the case it's an argument you probably should address to Congress but not us.

MR. MCMICHAEL: No, no. The debt has traded. There's been a lot of trading in this debt. And the holders of the debt today, some of them not all of them, are in that business and would like to be in that business and that's a matter of proof at the confirmation hearing. That's why we believe it is not sound to allow them to credit bid. I mean, we're not trying to prevent anybody from bidding. If they want to bid, they can bid. But there's nothing unfair about putting everybody on the same footing. That will bring more bidders to the table and result in a better price for everybody.

JUDGE AMBRO: One of the big problems I have is that it appears that your argument is that Congress was really just attempting to legislate a tiny slice of sales free of liens in (ii). It didn't mean all sales; it just meant a little slice of sales. And you can have a sale free of liens elsewhere, even though obviously it doesn't fit in (i) because that's a sale subject to a lien. But somehow you're saying it fits within (iii) when at least some people thought, for quite some time, I mean darn close to three decades, that (iii) maybe it's not a catchall but -- maybe it is. It picks up those

things that aren't covered expressly.

How is it that Congress -- you believe Congress was attempting when it said sales free and clear of liens you get credit bidding that only meant to do a tiny slice of free and clear sales?

MR. MCMICHAEL: The perfect setup for my conclusion. I have thirteen seconds and I'll try to get it done.

JUDGE AMBRO: We'll give you more time.

MR. MCMICHAEL: The answer is, we are not arguing that by enacting (ii) Congress was only picking out certain sales. What it was doing was it said --

JUDGE AMBRO: Linda, why don't you add about five more minutes, please?

MR. MCMICHAEL: Thank you, Your Honor. What Congress was saying there is if the debtor chooses to structure its plan under (ii) then all it needs to do is sell the asset, give them a credit bid right and give them a lien on proceeds. You do those three things, you can confirm a plan under (ii). That's all you have to do.

If you can't do that, you can always go to (iii) and propose a different structure as long as the result of the structure is indubitable equivalence. Which is, as I said, a higher and actually more specific standard. Because under (i) and (ii) we don't need to show indubitable equivalence. The Tenth Circuit held that more than ten years ago in Wade vs.

Bradford in 1994.

JUDGE AMBRO: But what's the evidence supporting that Congress meant to only deal with a segment in (ii) of sales free and clear?

MR. MCMICHAEL: It didn't. It intended to deal with any plan that the debtor proposes that it wants to confirm under (ii). That's what (ii) --

JUDGE AMBRO: It almost means -- the lead in to 1129(b)(2)(A), it talks about fair and equitable but it also talks about not discriminating. If you have a right under 1111(b) that's taken away if you have a plan sale and the only thing left is credit bidding, might there not be an argument that this would be discriminating against secured lenders?

MR. MCMICHAEL: No, because it's not the only thing that's left. The other thing that's left is indubitable equivalence. That means something. It's a very important provision because it focuses on the result.

Let's look at how you apply these statutes. If you look at the lead-ins to 1129(b)(2)(A) it says the plan provides, okay. So this is keyed on how the debtor determines to structure its plan. We're within our exclusivity period. The plan was proposed within our exclusivity period. We are -- my clients are the only parties eligible by law to propose a plan. So if we propose a plan, it goes under --

JUDGE AMBRO: You're saying something a little

different. I think it's more nuanced. You're saying that I, the debtor, get to choose the prong of 1129(b)(2)(A) we go under when the plain text of the law seems to tell you which prong applies.

MR. MCMICHAEL: That's exactly what I'm saying. The plain text doesn't say that. The plain text triggers which prong based on what the plan provides. The debtor chooses what the -- if the plan provides the indubitable equivalent we say we're going to provide the indubitable equivalent, then that's what we're going to do and that's what our plan provides.

JUDGE AMBRO: But how can you pick something that overrides what the text of statute says?

MR. MCMICHAEL: It doesn't override the text. The reason why it doesn't override the text and the key to congressional intent is exactly what Judge Robreno did below. You look at what the statute says. The statute uses the word or, it's plainly disjunctive. It's one, two or three. That means if we can use (iii), we can use (iii). And if the plan provides indubitable equivalence and we have the right to go to confirmation regardless of the structure of that plan --

JUDGE FISHER: Mr. McMichael --

MR. MCMICHAEL: Sorry.

JUDGE FISHER: -- one other practical question. Why wasn't Judge Raslavich in the best position to evaluate what

should apply here at the time of your motion when he determined that this plan should proceed with credit bidding? Why wasn't he in the better position between the two courts?

MR. MCMICHAEL: The reason is because the issue of credit bidding was posed to Judge Raslavich by agreement of the parties as a question of law. It was a threshold issue whether we could do, under the statute, what we were proposing to do. If not raised in the context of a bid procedures motion, it could have been raised in the disclosure statement hearing. Either way the issue can be teed up, it's a perfectly proper thing to do and no one is suggesting otherwise.

So what Judge Raslavich was looking at was purely a question of law. His view of the law is entitled to some weight, he's a bankruptcy judge. But Judge Robreno looked at his view of the law, subject to a plenary review. And your view of the law is ultimately controlling unless the Supreme Court weighs in on the issue. But what is before this Court, what was before Judge Raslavich and what was before Judge Robreno is only a question of law. It's whether the Bankruptcy Code requires credit bidding any time a sale of assets occurs under a plan. And the answer to that question is no, it does not. That's what Judge Robreno found because the statutory language doesn't get you there.

JUDGE FISHER: But doesn't his ultimate decision also

tie in to his finding on the business judgment question? That under this proposed sale credit bidding should be permitted?

MR. MCMICHAEL: Right. There was absolutely no basis for him to make that finding because there was no record. It was submitted as a question of law. I represented the agreement of the parties on the record at the outset of the hearing. We made no record. We called no witnesses, we introduced no evidence.

JUDGE FISHER: Do you disagree that there was no -- do you believe there was no factual finding?

MR. MCMICHAEL: There was no factual finding. What there was was commentary by Judge Raslavich. He hasn't had a trial on anything yet. All he's listened to is colloquy of lawyers. There's been no evidence submitted to Judge Raslavich. What was before him was simply a question of law and that's what he decided. That's what Judge Robreno decided. And it's the only thing that you should decide.

JUDGE AMBRO: If we were to go your way what would be the consequences of that? The argument made is that you will see the death knell of plans proposing sales free and clear under (ii).

MR. MCMICHAEL: Yeah. That won't happen. The consequence of your going our way and deciding consistently with the Fifth Circuit so there's no circuit split, the consequence has already occurred because the consequence

happened after the Fifth Circuit decision. What's happening is that lenders are accommodating this issue. They're looking at it and in every filing you're going to see, whether it's in the Southern District or in Delaware or the occasional filing in the Eastern District of Pennsylvania, you're going to see lenders dealing with this issue up front either in DIP loan documents or in their cash collateral stipulations. So that debtors will be restricted from doing what we're doing here, that didn't happen in this case. But it will have, I think, little effect.

And by the way, (ii) is a much easier standard. If I'm just selling assets in a Chapter 11 plan I'd much rather go under (ii) because I don't need to show indubitable equivalence. That's a lot of work to show indubitable equivalence, I might not be able to get there.

So it doesn't rule out (ii) at all.

JUDGE AMBRO: So it really goes back to your point, the practical point that you answered in response to Judge Smith's question is you need money desperately and you need to go under something that allows you at least the opportunity to attempt to get it.

MR. MCMICHAEL: That's right. We have the flexibility to do that as long as we can show indubitable equivalence. You go to my truck example, if I can sell a truck free and clear, even though it's subject to liens with

no credit bid, I want the cash, I'm going to keep the cash but I can put the lien on something else that's equal to or greater, I should be able to do that without imposing a credit bid requirement on it. That is a substitute collateral doctrine. But you could look at our plan to substitute collateral; we could just say this big pot of cash is substitute collateral that's equal to or greater than the value of the collateral they started with. Which, by the way, and I'll close with this I know I'm out of time again, if I may, one last point.

JUDGE AMBRO: As Judge Becker would say, you're on our time.

MR. MCMICHAEL: Thank you, Your Honor, and I really appreciate your indulgence. But let's not underestimate the impact of cash. You know, some people would say well you're buying them out in a low point in the market. And this collateral might appreciate and you're giving them cash at a low point in the market. Well that cash is actually more valuable because the cash gives lenders optionality. They can redeploy it; they can relend it to a more profitable business. If they really like newspapers they can invest it in a public newspaper. There's lots of things you can do with cash to achieve the same appreciation.

We could look at our plan as substituting our pot of cash as collateral, just like my example of the two trucks.

And if that works, if that gets us to indubitable equivalence then that's all Congress required. And this Court shouldn't write in a new requirement that Congress didn't put there.

JUDGE AMBRO: So you're saying that whatever somebody -- in effect you're forcing -- if you get your way the secured lenders have to come in and they have to -- they have to put up cash if they want to bid which in effect they're not going to do.

MR. MCMICHAEL: Oh no, that's not true. They may well do that and I hope they would do it. Because they get it back the same day. Our sale closes on the effective date, the same day they get the --

JUDGE AMBRO: If somebody's put out 275 million, which is now with interest equals 318 million and counting, why in the world would they want to put out cash, throw good money on top of that?

MR. MCMICHAEL: Only if they want to own the asset. And they get it right back the same day. I mean, remember, credit bidding is.

JUDGE AMBRO: Do they get it all back or is there some, according to Brubaker, leakage?

MR. MCMICHAEL: You know, it depends on how they structure it. That's up to them. There's very simple structure. If they're going to credit bid their thirty-eight lenders, the credit bid rights are going to be assigned to a

new entity. They could create a new entity. Citizens Bank could loan it money, pay itself back.

JUDGE AMBRO: What would the plan propose -- what comes out? Would dollar for dollar go to them or what?

MR. MCMICHAEL: It would go to them. It would if they structured it properly. I mean, I could tell them how to structure it, it's not that hard. As I said, you could structure it the same way they structure a credit bid and just have Citizen's Bank lend whatever the cash bid is on the day of closing to that entity. They'd wire it in and then the wire would come back in an equal to or greater amount if we've proven indubitable equivalence. Because remember, the plan requires us to pay them equal to or greater than the value of that bid.

So they will get the cash back the same day. And that's why I think to some degree this is all much ado about nothing. It's very important, from our standpoint, to try to craft an auction on a level playing field to bring bidders into an industry where it's hard to get bidders involved.

JUDGE AMBRO: But it's a level playing field consonant with the Code and we're trying to figure out what the Code requires and does not require.

MR. MCMICHAEL: That's absolutely right. And that's -- the key to that is the word or and the meaning of indubitable equivalence.

JUDGE AMBRO: Thank you very much.

MR. MCMICHAEL: Thank you.

JUDGE AMBRO: Yeah, absolutely you can caucus.

(Pause)

MR. QURESHI: Your Honor, may I proceed?

JUDGE AMBRO: Yes.

MR. QURESHI: I have three very quick points to make on rebuttal, all of which are in response to questions raised by the panel. The first I'll address is, Your Honor, the last point that was made with respect to does the cash come back. And in fact, the way the plan is structured is that the cash would be distributed if there is a cash option, pro rata to the secured lenders. We are talking about a syndicate of lenders, thirty-eight lenders in total, so that to the extent that less than one hundred percent of the lenders choose to --

JUDGE AMBRO: How much trading has there been among those thirty-eight, do you know?

MR. QURESHI: I do not know, Your Honor.

JUDGE AMBRO: Has there been any significant trading?

MR. QURESHI: I don't believe that's it has been terribly significant, no. I think there's been some movement within existing lenders but in terms of new lenders coming in, I don't think it's been very significant. But Your Honor, to the extent any of those lenders decide whether for structural reasons they are not able to credit bid, which is certainly

the case with some of the funds, then those that do participate in a cash bid would in fact be putting more cash at risk. So it is not simply a question of layout cash on one day and get it back the next.

Your Honor, the second point I would like to address is Judge Smith's question, what is the impact of credit bidding here. And there's a three-part answer to that. First, we have a constitutionally protected property interest in this --

JUDGE AMBRO: By the way, I don't think Fowler on language would allow impact as a contact but that's okay. Maybe the third edition would, which is maybe why I don't like it.

MR. QURESHI: Your Honor, we have a constitutionally protected interest in our collateral and simply cannot be required to put up more cash in addition to the 275 million and counting that has already been put up in order to protect that collateral.

The second part of that answer, Mr. McMichael talked about the need that the debtor has for fresh capital. To be clear, a requirement in these bid procedures to even have a qualified bid is to have an exit facility of I believe it's at least twenty-five million dollars. And so we, the secured lenders, if we are able to credit bid, we'll have to provide evidence to the debtor to even get a seat at the table in the

auction that we can put up that twenty-five million dollar exit facility.

The third part to that question, which is the suggestion by Mr. McMichael that a credit bid would chill the bidding. That is simply nowhere to be found in the for cause exceptions to credit bidding under 363(k). There is not a case that stands for the proposition that a credit bid will chill bidding and should, for that reason, be disallowed. And indeed we think that such a holding would be directly contrary to this Court's ruling in Sub-Micron.

The last point, Your Honor, which is in response to the question of why should the Court decide this issue now and not at confirmation. And again, a three-part answer.

First, the debtors chose this path. It is their motion to approve bid procedures. This was -- it's ripe for the Court to rule on it now. We are not at plan confirmation.

Second, considerations of judicial efficiency we think weigh heavily in favor of deciding the issue now. The bid procedures, as drafted, we think will lead to a patently unconfirmable plan.

Just as there is well-established juris prudence for the proposition that a disclosure statement that describes a patently unconfirmable plan will not be approved because it would be a waste to go try to confirm that plan, so to should it be the case here that bid procedures that describe a

patently unconfirmable sale in a plan should not be approved.

Third point, the secured lenders will suffer irreparable harm if the auction proceeds without credit bidding. This is the argument that we made in our motion to this Court to stay the auction. We argued that once bids are unsealed, that is simply not something that can be repeated for a bidder, assuming that third parties are indeed attracted to the auction to reveal the increments in which they are prepared to bid, to reveal how high they are prepared to go in the auction. That's like replaying a hand of poker with one's cards face up. It simply can't be done and the result will be, if we try to do it again, a diminution in value that will come into the estate.

And in fact, the argument about chilling the bid is exactly the opposite. Nothing would chill bidding more than conducting an auction where anybody who shows up knows with one hundred percent certainty that the result of that auction is going to be litigated (ph.).

Thank you.

JUDGE AMBRO: Thank you. And I thank, on behalf of the panel, all counsel for an extremely well presented briefs and oral argument. We would ask that after oral argument that you get together with the clerk's office and have a transcript ordered of this oral argument. Split the costs; half to the debtor, half to the appellants. And also, if we could within

the next few minutes have the courtroom cleared because we're going to be conferring with Judge Smith shortly via videoconference. So with that, again, thank you very much for appearing.

JUDGE FISHER: Thank you.

(End of Proceeding)

CERTIFICATION

I, Pnina Eilberg, the court approved transcriber, do hereby certify the foregoing is a true and correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Pnina Eilberg

PNINA EILBERG

AAERT Certified Electronic Transcriber

(CET**D-488)

December 23, 2009

DATE

CERTIFICATION OF ACCURACY

On behalf of all parties, I certify that this transcript has been reviewed by all parties for accuracy. Errata sheets have been submitted to the transcriber, Veritext, and all corrections have been made.

/s/ Lawrence G. McMichael
Lawrence G. McMichael

Inn of Court – Indubitable Equivalent

Question: What does "Indubitable Equivalent" mean?

Webster's Third New International Dictionary (1971)

- Indubitable – "not open to question or doubt"
- Equivalent – "equal in force or amount" or "equal in value"

Bankruptcy Code Sections 361 and 1129

The term *indubitable equivalent* is referenced in section 361 of the Bankruptcy Code dealing with adequate protection and section 1129 dealing with confirmation of a plan. Section 361 states that adequate protection may be provided by permitting such other relief " as will result in the realization by such entity of the *indubitable equivalent* of such entity's interest in property." 11 U.S.C. § 361. Section 1129(b)(2) of the Bankruptcy Code requires that a plan of reorganization be "fair and equitable" and provides three alternative ways by which this standard could be satisfied when a secured lender is subject to a cramdown. 11 U.S.C. § 1129. The third alternative listed (1129(b)(2)(A)(iii)) provides that such a cramdown can occur when a secured creditor receives the *indubitable equivalent* of its claim.

History of Indubitable Equivalent

The indubitable equivalent is a judicially-created concept derived from Judge Learned Hand's decision in *In re Murel Holding Corp.*, which referred to the "most indubitable equivalence." The Judge wrote:

> In construing so vague a grant [that the judge have power to "equitably and fairly" provide "adequate protection"], we are to remember not only the underlying purposes of the section, but the constitutional limitations to which it must conform. It is plain that "adequate protection" must be completely compensatory; and that payment ten years hence is not generally the equivalent of payment now. Interest is indeed the common measure of the difference, but a creditor who fears the safety of his principal will scarcely be content with that; he wishes to get his money or at least the property. We see no reason to suppose that the statute was intended to deprive him of that in the interest of junior holders, unless by a substitute of the most indubitable equivalence.

In re Murel Holding Corp., 75 F.2d 941, 942 (2d Cir. 1935). Indubitable equivalent is not defined in the Bankruptcy Code, but it is "intended to follow the strict approach taken by Judge Learned Hand" in *Murel*. S.Rep. No. 989 at 127 (1978). The legislative history further provides:

> Indubitable equivalent gives the parties and the courts flexibility by allowing such other relief as will result in the realization by the protected entity of the value of its interest in the property involved. Under this provision, the courts will be able to adapt to new

> methods of financing and to formulate protection that is appropriate to the circumstances of the case if none of the other methods would accomplish the desired result.

H.R. Rep. No. 95-595, at 340 (1977). The indubitable equivalent is ordinarily used where a debtor needs to free a particular piece of collateral from existing liens. The Debtor will provide substitute or replacement collateral to the secured lenders that is substantially similar to the original collateral, and the lender will maintain the same rights and the same prior position on the substitute collateral. However, collateral need not be replaced with an identical type of collateral. 10 COLLIER ON BANKRUPTCY 15th Ed. Rev., 361.03[4] (L. King, 15th rev. ed. 1988). It is intended to be a flexible concept that permits formulation of protection appropriate to the particular circumstances of the case. A trustee or debtor in possession may substitute tangible collateral for cash collateral or provide a stream of payments to compensate an entity for the declining value of its collateral. The adequacy of protection must be determined on a case by case basis. *Id.*

Judicial Interpretation of Indubitable Equivalent

The Third Circuit in *Philadelphia Newspapers* recently stated that the indubitable equivalent under 1129(b)(2)(A)(iii) is the "unquestionable value of a lender's secured interest in the collateral." *In re Philadelphia Newspapers, LLC*, 2010 WL 1006647 at *9 (3d Cir. 2010). The scope of the indubitable equivalent prong is circumscribed by the protection of a fair return to secured lenders. *Id.* at 10. One court, citing Webster's Third New International Dictionary (1981), defined indubitable equivalent as follows:

> The analysis begins with an examination of the ordinary meaning of the language chosen by Congress. Something is dubitable if it is open to doubt or question and, conversely, is indubitable if it is not open to any doubt. One might say, therefore, that the evidence of the requisite indubitable equivalent is present if, under the treatment proposed in the plan, there is no reasonable doubt but that the bank will receive the full value of what it bargained for.... In other words, is there any real doubt but that, as a matter of fact, the bank will be paid in full? It goes without say that, since we are operating in a court of law, the interrogatory can be answered only by an examination of the evidence in the record. What, then, does the evidence show that the bank will be owed in six months and what does it show the property will be worth?

In re Freymiller Trucking, Inc., 190 B.R. 913, 915-16 (Bankr. W.D. Okla. 1996) (citations omitted). The key to indubitable equivalence is that the substituted treatment of the creditor be indubitably equivalent to the creditor's secured claim. *In re Investment Company of the Southwest, Inc.*, 341 B.R. 298, 319 (10th Cir. 2006). An indubitable equivalent is when, under the treatment proposed in the plan, there is not reasonable doubt that the secured creditor will receive when it bargained for when it made its contract with the debtor. *Id.* When a plan proposes to substitute or alter collateral, a secured creditor receives the indubitable equivalent of its claim only if the substituted collateral does not increase the creditor's exposure to risk.

Where collateral is to be substituted, two attributes of the substituted collateral – its value and the degree of risk that it imposes on the secured creditor – determine whether the new collateral is sufficiently "safe" and "completely compensatory." *Id.*

Discussing "indubitable equivalent" in the context of section 1129(b)(2)(A), the Fifth Circuit has recently said:

> Congress did not adopt indubitable equivalent as a capacious but empty semantic vessel. Quite the contrary, these examples focus on what is really at stake in secured credit: repayment of principal and the time value of money. Clauses (i) and (ii) explicitly protect repayment to the extent of the secured creditors' collateral value and the time value compensating for the risk and delay of repayment. Indubitable equivalence is therefore no less demanding a standard than its companions.

In re Pacific Lumber Co., 584 F.3d 229 (5th Cir. 2009). The court found that paying off secured creditors in cash is not improper if the plan accurate reflected the value of the creditor's collateral. *Id.*

Courts generally will find the indubitable equivalent requirement satisfied where a plan both protects the creditor's principal and provides for the present value of the creditor's claim. *In re DBSD North America, Inc.*, 419 B.R. 170, 207 (Bankr. S.D.N.Y. 2009). In doing so, courts usually focus on the value of the collateral relative to the secured claim, and the proposed interest rate of the facility providing the indubitable equivalent. *Id.* In order to determine whether a debtor has provided a secured creditor with the indubitable equivalent of its claim, the court must be satisfied that the secured creditor's principal is protected to the same extent that it is now. *Id.* at 208.

The circuit courts in *Pacific Lumber* and *Philadelphia Newspaper* dealt with, at least in part, the ability of the secured creditor to credit bid. Both courts contemplated that, in some instances, credit bidding may be required. A secured creditor can still argue that the absence of a credit bid did not provide the creditor with the benefits of its bargain (and thus not the indubitable equivalent), because among other reasons the secured creditor was stripped of the ability to participate in the upside of its collateral. The two decisions did not address what specifically would constitute the indubitable equivalent of the secured claims under the particular facts of each case. However, other courts have found the indubitable equivalent in a variety of forms:

- *Travelers Ins. Co. v. Pikes Peak Water Co. (In re Pikes Peak Water Co.)*, 779 F.2d 1456, 1461 (10th Cir. 1985) (affirming confirmation of a chapter 11 plan on grounds that the secured creditor would receive the indubitable equivalent of its claim where the value of the collateral was 34% greater than the $2.9 million claim)

- *In re James Wilson Assocs.*, 965 F.2d 160, 172-73 (7th Cir. 1992) (affirming confirmation of a chapter 11 plan that provided a creditor with a 7-year note bearing interest at a rate of the 7-year Treasury note rate plus 2.5% where the $3.2 million note was secured by collateral with a market value of approximately $6 million)

- *In re Pine Mountain, Ltd.*, 80 B.R. 171, 174-75 (9th Cir. BAP 1987) (affirming the trial court's determination that the creditor would receive the indubitable equivalent of its claim where (a) the chapter 11 plan provided a first lien creditor with a second priority note bearing interest at the higher of 12% or the prime rate plus 1.5% and (b) the collateral was worth at least twice the value of the claim and the new first lien debt together was likely to appreciate)

- *In re Mulberry Phosphates, Inc.*, 149 B.R. 702, 711-12 (Bankr. M.D. Fla. 1993) (holding that the creditor received the indubitable equivalent of its $14 million claim where the plan provided it with a 6-year replacement note secured by collateral valued at $23.2 million and bearing interest at the prime rate plus 1.5%)

- *In re Sun Country*, 764 F.2d 406, 409 (5th Cir. 1985) (holding 21 notes secured by 21 lots of land was the indubitable equivalent of a first lien on a 200 acre lot)

852 F.2d 79, 57 USLW 2059, 18 Bankr.Ct.Dec. 287, Bankr. L. Rep. P 72,351, 34 Cont.Cas.Fed. (CCH) P 75,526
(Cite as: 852 F.2d 79)

United States Court of Appeals,
Third Circuit.
In the Matter of WEST ELECTRONICS INC.
Appeal of UNITED STATES of America, by the UNITED STATES AIR FORCE.
No. 87-5782.

Argued May 5, 1988.
Decided July 19, 1988.

United States moved to lift an automatic stay in order to terminate defense contract with Chapter 11 debtor. The United States District Court for the District of New Jersey, Clarkson S. Fisher, J., affirmed bankruptcy judge's denial of government's motion, and appeal was taken. The Court of Appeals, Greenberg, Circuit Judge, held that Chapter 11 debtor could not assume prepetition contract with federal government calling for production of military equipment, in that federal law prohibited debtor's assignment of contract without government's consent, and thus government was entitled to lifting of automatic stay in order to terminate contract.

Reversed and remanded.

A. Leon Higginbotham, Jr., Circuit Judge, concurred in part and dissented in part and filed opinion.

West Headnotes

[1] Bankruptcy 51 ⇐3769

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3766 Decisions Reviewable
51k3769 k. Relief from Automatic Stay. Most Cited Cases
Bankruptcy court's denial of government's application to lift stay in order to terminate defense contract was final, appealable order, though application was denied without prejudice, where consequence of bankruptcy court's decision was to reject government's legal position. 28 U.S.C.A. § 158(d).

[2] Bankruptcy 51 ⇐2422.5(4.1)

51 Bankruptcy
51IV Effect of Bankruptcy Relief; Injunction and Stay
51IV(C) Relief from Stay
51k2422 Cause; Grounds and Objections
51k2422.5 In General
51k2422.5(4) Particular Cases
51k2422.5(4.1) k. In General. Most Cited Cases
(Formerly 51k2422.5(4))

Bankruptcy 51 ⇐3105.1

51 Bankruptcy
51IX Administration
51IX(C) Debtor's Contracts and Leases
51k3105 Contracts Assumable; Assignability
51k3105.1 k. In General. Most Cited Cases
(Formerly 51k3105)
Chapter 11 debtor could not assume prepetition contract with federal government calling for production of military equipment, in that federal law prohibited debtor's assignment of contract without government's consent, and thus government was entitled to lifting of automatic stay in order to terminate contract. Bankr.Code, 11 U.S.C.A. §§ 362, 365(c)(1); 41 U.S.C.A. § 15.

***80** Dorothy Donnelly, Asst. U.S. Atty., Trenton, N.J., Dwight G. Rabuse (argued), Appellate Staff, Civil Div., U.S. Dept. of Justice, Washington, D.C., for appellant.

Kathryn Ferguson (argued), Michael Zindler, Markowitz and Zindler, Lawrenceville, N.J., for appellee West Electronics, Inc.

Before HIGGINBOTHAM, STAPLETON and GREENBERG, Circuit Judges.

OPINION OF THE COURT

GREENBERG, Circuit Judge.

This matter before the court on appeal from an order of the district court entered September 8, 1987 in a bankruptcy case presents the question of whether the automatic stay provisions of 11 U.S.C. § 362 should be lifted so that the government may terminate a contract entered into with a defense contractor before it sought relief under Chapter 11 of the Bankruptcy Code. The facts germane to the disposition of this appeal are not in dispute and thus our review is of legal precepts and is plenary. *United States v. Adams,* 759 F.2d 1099, 1106 (3d Cir.1985), *cert. denied,* 474 U.S. 906, 971, 106 S.Ct. 275, 336, 88 L.Ed.2d 236, 321 (1985). For the reasons stated below, we hold that the automatic stay should have been lifted so that the contract could be terminated.

I

In 1986 the United States entered into a contract with West Electronics, Inc., under which West was to supply a substantial number of AIM-9 missile launcher power supply units to the Air Force. While West expected this contract to be very profitable, it contends that its ability to perform was impaired by the government's failure to make inspectors available. Nevertheless, West did from time to time receive progress payments under the contract.

In October 1986 West suffered a computer malfunction which destroyed its accounting records, a misfortune which it does not attribute to the government. On November 14, 1986 the government suspended progress payments on the contract pending a review of West's financial status. At that time West had not made its first deliveries under the contract, though it asserts that in late November its first delivery of 60 units passed final inspection. West indicates that the suspension of the progress payments compelled it to deliver some of the power units to another customer willing to pay cash immediately.

The government's review revealed what it considered to be serious irregularities in West's accounting procedures. Overall the contracting officer concluded that because of West's delinquency in delivering the power supply units, the failure of its accounting systems, its delinquency in paying costs attributable to the contract and the excess of unliquidated progress payments to work in progress, the contract should be suspended.

On December 9, 1986 the government served an administrative notice on West requiring it to show cause why the contract should not be terminated. West responded on December 19, 1986 by explaining the impact of the limited availability of government inspectors. On December 18, 1986 the Internal Revenue Service seized West's assets to satisfy a lien of $779,449.40.

On December 19, 1986 West filed a petition for relief under Chapter 11 of the Bankruptcy Code and became a debtor in possession. At that time it obtained an order from the bankruptcy court temporarily restraining the Internal Revenue Service from seizing or removing property from its premises. At a subsequent hearing a consent order was entered which permitted West to regain possession of its premises. Of course, the automatic stay provisions of 11 U.S.C. § 362 were triggered when the petition was filed.

On January 9, 1987 West moved in the bankruptcy court for an order compelling the government to make progress payments on the contract. On February 5, 1987 the government filed a cross-motion seeking an order permitting it to terminate the contract either by the court lifting the automatic stay or in some other appropriate*81 manner. In addition, the government sought an order permitting it to take absolute possession of the parts and work in

progress identifiable to the contract.

The bankruptcy judge denied both motions as premature. The judge concluded that he should not compel progress payments until West had first applied for the payments in accordance with the terms of the contract. The judge also indicated that West had the capacity to cure the default and should be given the opportunity to establish it could perform. The judge further ruled that there were no exigent circumstances arising from national defense considerations requiring lifting of the stay. An order reflecting this decision was entered April 9, 1987. The government appealed to the district court. The district judge in a memorandum opinion dated July 20, 1987 affirmed the bankruptcy judge's order. He reasoned that the contract, while executory, could be assumed by West and that because West represented that it had the capacity and intention to cure the default, the bankruptcy court had not erred. On September 8, 1987 the district judge entered an order reflecting this decision. The government has appealed from that order.

II

As happens often in bankruptcy cases, we are preliminarily presented with a significant jurisdictional question. Under 28 U.S.C. § 158(a) the district courts have jurisdiction to hear appeals from final judgments, orders and decrees and, with leave of court, interlocutory orders and decrees of bankruptcy judges. The courts of appeal have jurisdiction over appeals from final decisions, judgments, orders, and decrees of district judges under 28 U.S.C. § 158(d). Here the government appealed from the bankruptcy judge's order to the district court without leave and the district judge apparently ruled on the case without making any statement as to the finality of the order he was reviewing. Thus, it is obvious that the parties and the district judge treated the bankruptcy order as final.

It is therefore not surprising that on the appeal to us neither party originally questioned our jurisdiction. Nevertheless the possibly tentative nature of the bankruptcy judge's order which denied the government's motion as premature and the conceivably interlocutory character of an order denying relief from a stay raised jurisdictional problems which we cannot overlook. *See In re White Beauty View, Inc.*, 841 F.2d 524 (3d Cir.1988).

The general approach to finality in bankruptcy matters was set forth in *In re Meyertech Corp.*, 831 F.2d 410, 414 (3d Cir.1987), in which we indicated that:

> In the context of bankruptcy cases, the definition of a final order is less than crystalline. Analysis of finality in these proceedings differs from litigation in an ordinary civil matter. In bankruptcy matters we have consistently considered finality in a more pragmatic and less technical sense than in other matters and the concept, for purposes of appellate jurisdiction, should be viewed functionally. *Matter of Marin Oil, Inc.*, 689 F.2d 445 (3d Cir.1982), *In re Amatex*, 755 F.2d 1034 (3d Cir.1985).
>
> In *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98 (3d Cir.1981), we enunciated a finding of finality in bankruptcy matters when 'nothing remains for the district court to do.' *Also, Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975).

There have been a substantial number of cases dealing with the finality of orders granting or denying motions to lift stays. In *In re Comer*, 716 F.2d 168 (3d Cir.1983), we held that an order lifting a stay blocking foreclosure of a debtor's property was final because litigation on the question was completed and the property was subject to foreclosure in a state court. Thus the particular matter in controversy was ended. *Id.* at 172. We indicated, however, that it was conceivable that an order denying relief from the automatic stay might be interlocutory. *Id.* at 174 n. 11. In *In re American Mariner Industries, Inc.*, 734 F.2d 426, 429, (9th Cir.1984), the court broadly *82 held that an order

denying relief from the automatic stay is final. *See also In re Kemble,* 776 F.2d 802, 805 (9th Cir.1985). In *In re Leimer,* 724 F.2d 744 (8th Cir.1984), the court held that an appeal from a bankruptcy court to a district court was from a final order when the order denied a creditor relief from the automatic stay and in so doing conclusively established that the creditor was not the owner of property which it claimed adversely to the debtor's estate. The court pointed out that from the perspective of the creditor there was nothing further for the bankruptcy court to do. *Id.* at 745.

[1] From our study of the cases we are satisfied that in some instances an order denying relief from the automatic stay may not be final and thus may not be appealable as of right to the district court. Accordingly, if the order is affirmed on interlocutory appeal, a subsequent appeal to the court of appeals will not then be permitted under 28 U.S.C. § 158(d) . Further, we recognize that the bankruptcy court denied the government's application to lift the stay without prejudice, thus suggesting that its order was not final.

Nevertheless on the unusual facts here we are convinced that the pragmatic approach of *Meyertech* requires that we hold that the bankruptcy judge's order was final and that we thus have jurisdiction. The government's asserted bases for relief are that the Nonassignment Act, 41 U.S.C. § 15, bars West as a debtor in possession from assuming the contract without its consent and that as a matter of contract and administrative regulation the government has the right to terminate the contract for its convenience. *See* 48 C.F.R. § 52.249-1, *et seq.;* 48 C.F.R. § 217.7104(a); 48 C.F.R. § 252.217-7120. If the government is correct West should not be permitted to cure its default even if it is capable of doing so. Thus, the consequence of the bankruptcy court's decision was to reject the government's legal positions as the passage of time would not have made them more tenable.

By filing the petition under Chapter 11 West became a debtor in possession and this change in its status either did or did not entitle the government to relief by reason of 41 U.S.C. § 15. Further, the circumstances which the government believed justified terminating the contract for convenience existed when the government filed its motion to lift the stay. Thus, this is not a case in which an application for relief from the stay was denied without prejudice because the record was incomplete, discovery was ongoing or the court required further research on the issue before it. The government was denied relief because in the bankruptcy court's view it was not entitled to it when it filed its motion. In these circumstances we regard the bankruptcy court as having rejected the government's legal positions. Accordingly, we hold that the district court had jurisdiction in this matter as an appeal from a final order under 28 U.S.C. § 158(a) and we have jurisdiction under 28 U.S.C. § 158(d).

III

[2] We hold that the bankruptcy and district court should have lifted the stay and allowed the government to terminate the contract. In this regard we will assume without deciding that the government was barred by 11 U.S.C. § 362(a) from terminating the contract without obtaining an order pursuant to 11 U.S.C. § 362(d). *See* 11 U.S.C. § 541(a)(1); *In re Computer Communications, Inc.,* 824 F.2d 725, 728-31 (9th Cir.1987); *In re Minoco Group of Companies, Ltd.,* 799 F.2d 517 (9th Cir.1986). Further, we acknowledge in general that under 11 U.S.C. § 365 West as a debtor in possession could assume an executory contract with court approval. But 11 U.S.C. § 365(c)(1) provides that:

> (c) The trustee [which includes the debtor in possession [FN1]] may not assume ... any executory contract ... if ... (1)(A) applicable law excuses a party, other than the debtor, to such contract ... from accepting performance from ... an entity other than the debtor or the debtor *83 in possession ... and (B) such party does not consent to such assumption....

FN1. *See* 11 U.S.C. § 1107; *In re Pioneer Ford Sales, Inc.*, 729 F.2d 27, 28 (1st Cir.1984).

Thus, if non-bankruptcy law provides that the government would have to consent to an assignment of the West contract to a third party, *i.e.*, someone "other than the debtor or the debtor in possession," then West, as the debtor in possession, cannot assume that contract. This provision limiting assumption of contracts is applicable to any contract subject to a legal prohibition against assignment. *See In re Pioneer Ford Sales, Inc.*, 729 F.2d 27 (1st Cir.1984); *In re Braniff Airways, Inc.*, 700 F.2d 935, 943 (5th Cir.1983).

Section 15 of Title 41 of the United States Code is a law requiring the government's consent to the assignment. It provides in relevant part:

> No [government] contract ... or any interest therein, shall be transferred by the party to whom such contract ... is given to any other party, and any such transfer shall cause the annulment of the contract ... transferred, so far as the United States are concerned.

As this court noted in *Thompson v. Comm'r of Internal Revenue*, 205 F.2d 73 (3d Cir.1953):

> It has been held that the statute was meant to secure to the government the personal attention and services of the contractor; to render him liable to punishment for fraud or neglect of duty; and to prevent parties from acquiring mere speculative interests.... [*Id.* at 76].

We conclude that assignment of a contract calling for the production of military equipment is precisely what Congress intended to prevent when it prohibited assignments in 41 U.S.C. § 15. Thus, West could not force the government to accept the "personal attention and services" of a third party without its consent. It therefore necessarily follows that under 11 U.S.C. § 365(c)(1) West, as a debtor in possession, cannot assume this contract.

West argues that 41 U.S.C. § 15 should not be construed to foreclose an assignment of a contract from a debtor to a debtor in possession since they are such closely related entities. West's argument misses the point, however, for 11 U.S.C. § 365(c)(1) creates a hypothetical test-*i.e.*, under the applicable law, could the government refuse performance from "an entity *other* than the debtor or the debtor in possession." [Emphasis added]. Thus, the relevant inquiry is not whether 41 U.S.C. § 15 would preclude an assignment from West as a debtor to West as a debtor in possession, but whether it would foreclose an assignment by West to another defense contractor.

The literal meaning of the words chosen by Congress clearly requires the analysis and conclusion we have just articulated and we are confident that it is what Congress intended. We think that by including the words "or the debtor in possession" in 11 U.S.C. § 365(c)(1) Congress anticipated an argument like the one here made and wanted that section to reflect its judgment that in the context of the assumption and assignment of executory contracts, a solvent contractor and an insolvent debtor in possession going through bankruptcy are materially distinct entities.[FN2] While the relevant case law is very sparse, it supports our understanding of the interplay between 11 U.S.C. § 365(c)(1) and 41 U.S.C. § 15. *See In re Adana Mortgage Bankers, Inc.*, 12 B.R. 977 (Bankr.N.D.Ga.1980); *see also In re Pennsylvania Peer Review Organization, Inc.*, 50 B.R. 640 (Bankr.M.D.Pa.1985).

FN2. 11 U.S.C. § 365(c)(1) was amended by Congress and given its current wording in 1986. *See* Pub.L. 99-554, § 283, 100 Stat. 3088, 3117 (1986). While the section previously was arguably somewhat ambiguous on the point decided herein, we are persuaded that the 1986 amendment merely clarified Congress' original intent and that, in any event, there can be no doubt about the meaning of the section in the present form.

The bankruptcy court was, therefore, confronted with a situation in which the debtor in possession was not entitled to assume the contract without the government's consent and the government was unwilling to give that consent. In that situation, the debtor in possession did not *84 have a legally cognizable interest in the contract and it was an abuse of discretion for the court to decline to lift the stay. In view of our conclusion we need not address the government's contention that it has the right as a matter of contract and administrative regulation to terminate the contract for its convenience.

IV

We will reverse the judgment of the district court and will remand with instructions to lift the stay imposed pursuant to 11 U.S.C. § 362 as it relates to the government and this contract.

A. LEON HIGGINBOTHAM, Jr., Circuit Judge, concurring in part and dissenting in part.

I join in all parts of Judge Greenberg's thoughtful opinion except as to Part III because I do not believe that a "solvent contractor and an insolvent debtor in possession going through bankruptcy," at 83, are *different* entities for the purposes of the Non-Assignment Clause. The interpretation of the *Adana* court notwithstanding, I think that that provision really meant to avoid having the U.S. government contractually bound to a wholly separate entity that received an assignment from the actual contracting party. I do not believe that when it enacted Section 15 of Title 41, Congress considered the issue of whether a debtor in possession should be viewed as a party different than the debtor.

The government may well have the right to terminate the contract in issue on other grounds, but I am not convinced that 41 U.S.C. § 15 is the appropriate vehicle for the severance of West Electronics' rights under the contract.

C.A.3 (N.J.),1988.
Matter of West Electronics Inc.
852 F.2d 79, 57 USLW 2059, 18 Bankr.Ct.Dec. 287, Bankr. L. Rep. P 72,351, 34 Cont.Cas.Fed. (CCH) P 75,526

END OF DOCUMENT

STATUTORY EXTRACTS

§ 363(k).

At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

§ 1129(b)(1) & 1129(b)(2)(A).

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides—

(i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

§ 1111(b)(1).

(A) A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse, unless—

(i) the class of which such claim is a part elects, by at least two-thirds in amount and more than half in number of allowed claims of such class, application of paragraph (2) of this subsection; or

(ii) such holder does not have such recourse and such property is sold under section 363 of this title or is to be sold under the plan.

(B) A class of claims may not elect application of paragraph (2) of this subsection if—

(i) the interest on account of such claims of the holders of such claims in such property is of inconsequential value; or

(ii) the holder of a claim of such class has recourse against the debtor on account of such claim and such property is sold under section 363 of this title or is to be sold under the plan.

Highest and Best?

Or, is the standard really Highest or Otherwise Best?

Highest and/or Best?

- The bankruptcy court noticed that, "the debtors' strategies were designed 'not to produce the highest and best offer. . . .'"

In re Philadelphia Newspapers, LLC, No. 09-4349, Judge Ambro, dissent at 3 (3d Cir. Mar. 22, 2010).

Sound Business Judgment

- In this Circuit, "Sound Business Judgment" is the standard for sale of assets outside of ordinary course of business.

- *See In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143 (3d Cir. 1986); *see also Myers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996); *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983); *Dai-Ichi Kangyo Bank, Ltd. v. Montgomery Ward Holding Corp., (In re Montgomery Ward Holding Corp.)* 242 B.R. 147, 153 (D. Del. 1999).

Sound Business Judgment Test

- Factors include:

(a) that a "sound business purpose" justifies the sale of assets outside the ordinary course of business,
(b) that adequate and reasonable notice has been provided to interested persons,
(c) that the debtors have obtained a fair and reasonable price, and
(d) that the sale was negotiated in good faith.

Abbotts Dairies, 788 F.2d 143.

"Fair and Reasonable Price"

- Most often analyzed as the "Highest and Best" offer.

See In re Phoenix Steel Corp., 82 B.R. 334 (Bankr. D. Del. 1987); *In re Summit Global Logistics, Inc.*, 2008 WL 819934 (Bankr. D.N.J. Mar. 26, 2008).

Bid Procedures

- Court approved bid procedures are designed, or supposed to be designed, to maximize value for creditors of the debtor's estate.

- Footnote 2 in Judge Ambro's dissent highlights the danger of bid procedures that chill the process:

- "[K]eeping willing buyers from casting bids is the most effective means for management to steer the debtor's assets to a favored, low-value purchaser."

Bid Procedures

- Bid Procedures will require bids to be "Higher and/or Better Offers" than the Stalking Horse or prior bid.

- "Immediately at the conclusion of the Auction, the Debtors shall, in consultation with the Agent and Creditors Committee (a) determine, consistent with the Bidding Procedures, which bid *constitutes highest and best* bid (such bid, the "Successful Bid") and (b) communicate to the Purchasers and the other Qualified Bidders the identity of the Successful Bidder and the details of the Successful Bid."

In re Spheris, Inc., Case No. 10-10352 (KG).

Not always Highest and Best

Factors a court may consider:

- Contingent Financing
- Value of Non-Monetary Elements
- Ability of a Bidder to Close Within Allotted Time
- Is Bid for Portion or all of Assets

Case study – *In re Polaroid Corp.*, Case No. 08-46617 (Bankr. D. Minn.)

- 2 day auction – resulted in two bids with mix of cash, augmented by the value of assets left behind for the debtor, as well as a pledge of equity in bidders' companies.
- Irregularity in auction process prompted the Court to set a sealed bid process, and then set a court monitored third phase auction.
- Debtor selected what it considered the highest bid.
- At sale hearing creditors let by creditors' committee objected and court ultimately selected the "best" bid which was not the auction winner.

In re Polaroid

- Court calls it "Highest or Otherwise Best" Tr. 233:3-6.
- Court notes the highest bid is not necessarily the winner. Tr. 264:12-25.
- Highest and Best may = "most bang for the buck." Tr. 274:14-19.
- And this does not always equate to pure $$.
- Court's ruling. Tr. 285:14-25.

POLAROID AUCTION - 04/16/2009

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

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 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 AUCTION

APRIL 16, 2009

9:46 a.m.

REPORTED BY: DEBORAH A. GREBIN, COURT REPORTER
Depo International, Inc.
1330 Jersey Avenue South
Minneapolis, Minnesota 55426
(763) 591-0535

POLAROID AUCTION - 04/16/2009

PROCEEDINGS

Whereupon, the Auction was commenced at 9:46 a.m. as follows:

HOULIHAN LOKEY: We will open up the auction. Let me start by laying the ground rules for purposes of transparency and to ensure that we advance the bidding at a reasonable pace. We will open the auction with the bid from Patriarch, our current lead bidder.

For the record, our Patriarch bid is comprised of a $57,425,000 of cash consideration; 15 points of equity consideration, which we are valuing at $9,750,000 or 650,000 point; and 8,325,000 of excluded assets. In total, the Patriarch bid is valued at $75,500,000.

For purposes of clarity, this yields proceeds to the estate of $73,800,000 net of the $1,700,000 breakup fee and expense reimbursement.

The current backup bid is the bid from Hilco/Gordon Brothers. For the record, Hilco/Gordon Brothers bid comprised of $40 million cash consideration; 25 points of equity consideration, which we are valuing equivalently at $650,000 a point

POLAROID AUCTION - 04/16/2009

or $16,250,000; and $16,362,000 of excluded assets.

Again, for clarity, the total of the Hilco/Gordon bid is valued at $72,612,000, which yields proceeds to the estate net of the $1,700,000 breakup fee and expense reimbursement of $70,912,000.

The minimum bid increments going forward will be as they were previously. $150,000 consideration. Equity consideration will be capped at 25 percent. Bids that reduce the amount of cash consideration below the amounts currently offered in either bid structure will not be considered by the estate.

Bidders will have five minutes to consider making a competing offer. Houlihan Lokey will maintain the bid clock.

And we now turn to Hilco/Gordon Brothers as the current backup bidder to ask if you wish to make a competing bid. I would also remind both parties that bids made here are irrevocable.

THE COURT: Before we enter into the auction proceedings here, let me just speak to a mechanical matter here. The Court's electronic court recording facility is not set up real well for reading back anything that folks may have to have read back.

POLAROID AUCTION - 04/16/2009

I'm hoping that the ground rules are now sufficiently clear and simplified that that won't be required.

However, the debtors did bring in a court reporter, who should be in a position then to read back if that's necessary. And that in turn, whatever she says on the record, will be taken as part of the official record. The Court will continue to make an official record of these proceedings, even though they're technically outside the judicial purview.

I determined after the April 9th proceedings that we'd convene the auction in open court one last time. My role here is basically just going to be to observe, maintain order and decorum, and I believe one of the local newspapers said that I -- said I was going to supervise it. Well, not supervise it per se because I do not really participate in the administration of the assets of the estate. But I'm here basically for the purpose of ensuring that things go forward at an appropriate pace.

I do not anticipate any legal disputes, which is basically my job to resolve any disputes of law and fact. But if any such arise, then I will

POLAROID AUCTION - 04/16/2009

chime in. So I intend to stay back at a remove from what goes on here. And that's another part of the ground rules.

So Mr. Spencer, then you called for a response.

HOULIHAN LOKEY: Yes. I'll turn it over to the Hilco/Gordon Brothers team to counter the current lead bid for Patriarch.

HILCO: Okay. Eric Kaup, K-a-u-p, on behalf of the joint venture of Hilco Consumer Capital and Gordon Brothers brands, which I'll refer to as the Hilco/Gordon Brothers joint venture, submits the following bid. It's the bid as was submitted at the sealed bid auction deadline with all the accompanying schedules and the LLC agreement and other agreements with the following clarifications and conditions and modifications.

The first is the cash purchase price delivered at closing will be increased by $3,038,000 increasing the total cash consideration at closing to $43,038,000, which by our math increases the total gross value of our bid -- or I'm sorry. The gross -- the net value of our bid, net of the breakup fee payable to the first stalking horse, to $73,950,000.

Our bid has the following clarifications. First off, it's conditioned on the continuing support of the debtors for the breakup fee, which was agreed to on March 31st in that auction. No. 2, we are incorporating the identical language contained in the Lithograph asset purchase agreement regarding the inclusion of the Zinc equity as an acquired asset under our asset purchase agreement. We've worked out that language with the debtors. And as I understand, the debtors do not have any disagreement with that.

Finally, I have a list of contracts here relating to the StyleMark membership agreement, licenses, permissions, etc., that the Hilco/Gordon joint venture is designated as definitively acquired contracts under our asset purchase agreement. Which means that they are to be assumed and assigned to our joint venture at closing and may not be rejected at any time by the joint venture.

We are able to do this as a result of negotiations and agreement with StyleMark regarding assumption assignment of their agreement. It includes modified royalty terms, the purchase option, etc.

It's our belief that by giving the

debtors the assurance that these contracts will not be rejected, if the debtors accept the Hilco/Gordon Brothers bid as higher and better, that the estate avoids tens of millions of dollars in rejection damage claims.

HOULIHAN LOKEY: We will break for just a minute. We'll back on the record shortly.

(Off the record at 9:57.)

(Back on the record at 9:58.)

THE COURT: We will go back on the record.

HOULIHAN LOKEY: We will resume at this point. We accept the revised Hilco/Gordon Brothers bid which exceeds the -- which meets the required $150,000 bid increment. We are valuing. We accept your valuation of that bid at $73,950,000 of net proceeds to the estate.

And I will say that we'll reserve the right to confer with the committee and their professionals at that point when we receive the bid to make any clarifications that's necessary and debate the merits of the bid and come back on record. We'll start the five-minute clock at that point in time.

We'll turn at this point, Lynn, to

Patriarch to submit a competing bid, and we'll start the clock.

PATRIARCH: In the interest of keeping the playing field even and raising our bid, we are going to add the breakup fee, the same breakup fee as a condition to our bid. Not something I would have normally thought of, but I don't want it to be an added expense to the estate only if we win. And then we will add $500,000 to our bid, which would be a total bid of $76 million less the 1.7 which would get us to $74,300,000.

HOULIHAN LOKEY: We'll break for a few minutes and we'll come back.

THE COURT: All right. We'll go off the record now.

(Off the record at 10:00.)

(Back on the record at 10:04.)

THE COURT: Back on the record.

HOULIHAN LOKEY: The estate accepts the revised Patriarch bid, which we are valuing on a net basis, and the breakup fee and the expense reimbursement at $74,300,000. For purposes of clarity, we value that as $350,000 higher than the Hilco/Gordon Brothers bid.

At this point we would turn it back over -- actually, Rick --

POLAROID COMMITTEE: Before doing that, Your Honor, Richard Chesley on behalf of the unsecured creditors' Committee. We would observe the right to object to any attempt to seek a secondary or alternative breakup fee, as we have with Hilco as well.

With that being said, the bid has been accepted by the estate.

THE COURT: All right. So noted.

HOULIHAN LOKEY: Eric, we'll turn it back over to the Hilco/Gordon Brothers.

HILCO: Thank you. The Hilco/Gordon Brothers JV will increase the cash consideration of its bid to $43,538,000, increasing the gross value of our bid by my math to $76,150,000 net of the breakup fee to Genii totaling $74,450,000.

HOULIHAN LOKEY: The debtor accepts the revised Hilco/Gordon Brothers bid, which we are valuing at seventy-four thousand -- $74,150,000 -- $450,000. Let me clarify that again. $74,450,000, which is $150,000 higher than the Patriarch bid.

Lynn, we would turn it back over to

you.

PATRIARCH: Patriarch will raise its bid, its last bid, previous bid, by 400,000 to what we would calculate net of the breakup fee at $74,700,000.

POLAROID COMMITTEE: What was the cash increase?

PATRIARCH: The cash increase is $400,000.

POLAROID COMMITTEE: Thank you.

HOULIHAN LOKEY: Lynn, for the record, could you go back and recite the constituent elements of your bid.

PATRIARCH: Okay. So we have 8,325,000 of excluded assets. We have 9,750,000 of equity. And now you're going to make me do math in front of the judge, which was really mean. $56,625,000 of cash post breakup. That's net number. If you add the 1,700,000 to it, that would take you to 58,325,000.

HOULIHAN LOKEY: Okay. Thank you very much.

The debtor accepts the revised Patriarch bid, which we are valuing at $74,700,000 net, on a net basis, and a breakup fee and expense reimbursement for the stalking horse bidder. That is

$250,000 higher than the Hilco/Gordon Brothers preceding bid.

Eric, we will turn it back over to Hilco/Gordon Brothers for response.

(Off the record at 10:08.)

(Back on the record at 10:12.)

PATRIARCH: Your Honor, I would like to interrupt for a second, if I could. It's Greg Gordon on behalf of Patriarch. I would just like the record of the auction to reflect that during the break a representative of Hilco/Gordon Brothers exited the room and had a meeting with Mr. Chesley. I'd just like to note that for the record. Mr. Chesley, counsel for the Polaroid Committee.

HILCO: Okay. So the Hilco/Gordon Brothers joint venture is willing to -- will increase the cash component of its bid to $43,938,000. By my math that's a gross value of our bid of $76,550,000 and net of the Genii breakup fee $74,850,000.

HOULIHAN LOKEY: The debtor accepts the revised Hilco/Gordon Brothers bid which we are valuing on the net basis of $74,850,000, which is the required $150,000 bid increment higher than the preceding Patriarch bid of $74,700,000.

At this point we turn it over to Lynn to Patriarch.

PATRIARCH: I need a second to do my math before you make me calculate in public. Okay?

HOULIHAN LOKEY: Sure. That's fine.

PATRIARCH: Patriarch will raise its bid by $500,000 of cash, which raises our total cash consideration to $58,825,000, which less the breakup fee and expense fee would take you to 57,125,000 in cash. The excluded assets and the equity would stay the same for a total bid of 76,900,000 and less the 1.7 million of fees, 75,200,000.

HOULIHAN LOKEY: Lynn, the debtor confirms your math.

PATRIARCH: Thank you.

HOULIHAN LOKEY: The bid is valued at $75,200,000 on a net basis.

Eric, I turn it back over to the Hilco/Gordon Brothers.

THE COURT: Okay. So the debtor has accepted the revised Patriarch bid?

HOULIHAN LOKEY: For the record, the debtor has accepted the revised Patriarch bid.

THE COURT: Confirming the math is

different from accepting the bid.

PATRIARCH: But it was important to me.

HILCO: So the Hilco/Gordon Brothers JV is prepared to raise the cash purchase price at closing to $45 million, which provides a gross value of our bid to 77,612,000 and net to the estate of the Genii breakup fee, 75,912,000.

HOULIHAN LOKEY: Eric, the debtor accepts the revised Hilco/Gordon Brothers bid, which we value at $75,912,000 on a net basis, net of the $1.7 million breakup fee and expense reimbursement to the stalking horse bidder.

At this point we would turn it over to Lynn, to Patriarch, for a competing bid.

PATRIARCH: All right. Patriarch is prepared to revise its bid. And the total bid amount will be 77,800,000, which minus the breakup fee would be 76,100,000. It's an increase of cash of 900,000, which would take us to 59,725,000 in cash, which less the breakup fees is 58,025,000 of cash.

HOULIHAN LOKEY: Lynn, the debtor accepts the revised Patriarch bid, which we value also on a net basis at $76 million -- $76,100,000, which clears the required Hilco/Gordon Brothers bid by

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188,000, which is above the 150,000 required bid increment. We are now bidding off the Patriarch lead bid of $76,100,000 on a net basis.

Eric, I would turn it back over to you and to Hilco/Gordon Brothers to submit a revised bid.

HILCO: Okay. The Hilco/Gordon Brothers joint venture is prepared to increase the cash component of its bid by $500,000 increasing the cash at closing to 45,500,000, which we believe is a gross value of 78,112 -- $78,112,000 in net of the breakup fee and expenses paid to Genli of $76,412,000.

HOULIHAN LOKEY: Eric, the debtor accepts the revised Hilco/Gordon Brothers bid, which on a net basis we value at $76,412,000. That is now the lead bid.

Lynn, we turn it over to you at this point for a competing bid.

PATRIARCH: I just need a couple of minutes.

HOULIHAN LOKEY: Lynn, I'll offer a 60 second warning at this point.

PATRIARCH: Well, I'm going to raise my bid by $400,000. I'm just trying to figure out where I left off on the cash. I apologize.

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My total bid would be raised to 78,200,000 with my net bid to 76,500,000 with total cash, I believe, to 60,175,000. I might ask you to check me there. Excuse me, 60,125,000 is correct, less the 1.7 million would get me to net cash of 58,425,000.

HOULIHAN LOKEY: Lynn, just --

PATRIARCH: I may have done the math wrong.

HOULIHAN LOKEY: Yeah. I think you did. You're $62,000 light to meet the -- at 76,500 on the net basis, your bid would need to be at 76,562.

PATRIARCH: So I raise my bid by 500,000 then, which would take my bid to 76,600,000. It's 76,600,000 plus 1.7 million would get you to 78,300,000.

HOULIHAN LOKEY: The debtor accepts the revised bid from Patriarch Partners, which we are valuing at a net basis at $76,600,000, which exceeds the prior Hilco/Gordon Brothers bid of $76,412,000 by the requisite amount.

At this point I'll turn it over, Eric, to Hilco/Gordon Brothers to contemplate a competing bid.

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HILCO: Okay. So the Hilco/Gordon Brothers group will increase the cash component of its bid by an additional $500,000, which brings the total cash at closing under our APA to $46 million. It's a gross value to our bid of 78,612,000. And net of the Genii breakup fee and expenses, it's a value of 76,912,000.

HOULIHAN LOKEY: The debtor accepts the revised Hilco/Gordon Brothers bid, which we do value on a net basis of $76,912,000.

At this point I'll turn it back over to Lynn and Patriarch.

PATRIARCH: Patriarch's going to increase its bid to one point of equity equal to $650,000 which raises its total bid to 78,950,000. Net of fees 77,250,000. Cash remains -- total cash remains at 60,225,000, less of fees 58,525,000.

HOULIHAN LOKEY: We'd like to take a two-minute break.

THE COURT: Okay. We'll go off the record then.

(Off the record at 10:42.)

(Back on the record at 10:48.)

THE COURT: We will go back on the

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record.

HOULIHAN LOKEY: Lynn, the debtor accepts the revised Patriarch bid, which we are valuing on a net basis at 77,250,000, which exceeds the preceding Hilco/Gordon Brothers bid by $338,000, which is in excess of the required bid increment of 150.

Eric, we'll turn it back over to Hilco/Gordon Brothers.

HILCO: Okay. Hilco/Gordon Brothers joint venture is prepared to increase the cash portion of our purchase price to $46,500,000 providing a net value to the estate, as we've been calling it, of 77,412,000 and a gross value of 79,112,000.

HOULIHAN LOKEY: The debtor accepts the revised Hilco/Gordon Brothers bid, which we value on a net basis at $77,415,000, which exceeds the required bid increment. I'm sorry, 412,000 net, which exceeds the required bid increment.

Again, for the record and for clarity, Lynn, we are valuing the revised Hilco/Gordon Brothers bid at $77,412,000. We turn it over to Lynn and Patriarch.

PATRIARCH: Patriarch's prepared to

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increase its bid by another percent of equity valued at $650,000. You know, a net bid of 77,900,000. Keeping the cash the same at 60,225,000 or a net cash bid of 58,225,000.

HOULIHAN LOKEY: Lynn, could you recite the components again?

PATRIARCH: Okay. Increasing to 17 percent equity, which increases our bid amount by $650,000 to a gross bid of 79,600,000, a net bid of 77,900,000. The cash component remains the same at 60,225,000 or a net cash bid to the estate of 58,525,000.

HILCO: Can I just ask for the record what the equity stake is right now. I don't know if anybody recited --

PATRIARCH: I just said 17 percent.

HILCO: I'm sorry. I didn't hear you. Thank you.

HOULIHAN LOKEY: The debtor accepts the revised Patriarch bid, which we are valuing on a net basis at $77,900,000.

At this point I'll turn it back over to you, Eric.

AUDIENCE: We need five minutes.

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HILCO: Thanks. I think he means we need -- we'd like to have an extra five minutes. A ten-minute break. Is that what you meant?

THE COURT: Shall we take a mid-morning break here. Maybe everybody could use it. All right. Let's break until -- let's make it five after.

(Off the record at 10:53.)

(Back on the record at 11:06.)

THE COURT: All right. We are back on the record here. I'll go so far as to say that I believe the last thing I have noted in my notebook anyway is the debtor had accepted the revised Patriarch bid valued net at $77,900,000.

HOULIHAN LOKEY: That's correct.

THE COURT: Mr. Spencer, is that correct?

HOULIHAN LOKEY: Yes.

THE COURT: Okay. Back to you then.

HOULIHAN LOKEY: Okay. And for everybody's benefit, the composition of that bid, which we agree is 77,900,000 on a net basis, is net cash of $58,525,000, 17 points of equity which is being valued at $11,050,000, and excluded assets of 8,325,000, which again totals $77,900,000 on a net

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basis. That is currently the lead bid.

We'll turn it back over to Hilco/Gordon Brothers for a competing bid.

HILCO: The Hilco/Gordon Brothers joint venture would increase the cash at closing $650,000 so that the cash component of our APA will be $47,150,000, which brings us to a gross bid of 79,762,000 and a net value of the Genii breakup fee and expenses of $78,062,000.

HOULIHAN LOKEY: The debtor accepts the revised Hilco/Gordon Brothers bid, which we value at $78,062,000 net. It exceeds the $150,000 increment. The Hilco/Gordon Brothers bid is now our lead bid.

I turn it back over to Patriarch for a competing bid.

HILCO: Steve, if you could, I would like to have the same sort of components of our bid read out like Patriarch just so at this point in the bidding we all know where we are.

HOULIHAN LOKEY: Eric, why don't you recite them for the benefit. I can read them to you if you'd like.

HILCO: If you could read them.

HOULIHAN LOKEY: Sure. Our net cash

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figure is $45,450,000. The value of the equity which is 25 points is $16,250,000. The excluded assets are valued at $16,362,000.

HILCO: We agree.

HOULIHAN LOKEY: The total net of $78,062,000.

HILCO: Thank you.

HOULIHAN LOKEY: We accept that bid. We'll turn it over to Patriarch for a revised bid.

PATRIARCH: All right. Patriarch is ready to revise its bid. The equity percentage will be increased by one point to 18 percent, which is an additional 650,000 to the bid, which takes the total bid to 80,250,000 and the net bid to 78,550,000. Should take the equity component to 11,700,000, and the total cash would remain at 60,225,000, the net cash at 58,525,000 and the excluded assets stay the same at 8,325,000.

HOULIHAN LOKEY: The debtor accepts the revised Patriarch bid, which we are valuing at $78,550,000.

We turn it over to Hilco/Gordon Brothers for a competing bid.

HILCO: So the Hilco/Gordon Brothers

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joint venture will increase its bid by $2 million of cash. Our total cash at closing is $49,150,000 bringing our net value of our bid, net of the Genii breakup fee and expenses, to 80,062,000 and the gross value of our bid to 81,762,000.

HOULIHAN LOKEY: Eric, for the record, would you recite the components of the constituent elements of the bid.

HILCO: So the gross cash of our bid would be -- gross cash paid at closing is 49,150,000. The net number there is 1.7 million less of cash. We have 25 percent equity in newco valued at $16,250,000. We have excluded assets left with the estate valued at $16,362,000. The gross value of that bid by my math is $81,762,000, net of the Genii breakup fee and expenses that's a value of $80,062,000.

HOULIHAN LOKEY: The debtor accepts the revised Hilco/Gordon Brothers bid, which we value on a net basis at $80,062,000. The Hilco/Gordon Brothers bid is now our lead bid.

We turn it back over to Patriarch to contemplate a competing bid.

PATRIARCH: Patriarch's new bid will be for a total of $82,800,000. That will be comprised of

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an increase of equity up to 20 percent, which gives you $1.3 million of that increase and an additional $1,250,000 of cash. To my calculation, and I would appreciate confirmation, that takes our total cash up to 61,475,000 and a net cash of 59,775,000. The excluded assets would remain the same at 8,325,000, and the 20 percent equity would now be worth $13 million.

HOULIHAN LOKEY: Lynn, to clarify, your gross you calculated 82,800,000 and the net would then be 81,100,000?

PATRIARCH: Correct.

HOULIHAN LOKEY: The debtor accepts the revised Patriarch bid. We are valuing on a net basis at 81,100,000.

Eric, would you like us to recite the constituent components?

HILCO: We would respectfully request a 20-minute break at this point. We're at a point here where among our group we need to caucus and continue to talk.

POLAROID COMMITTEE: Your Honor, we're also -- from the committee's standpoint, we're at a point where I would actually appreciate the

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opportunity to convey this to my committee at a very short meeting. We can probably do it in 15 minutes. Hopefully Hilco can do it in 15 minutes.

HOULIHAN LOKEY: Eric, is 15 --

HILCO: We'll live with 15, sure. Thank you.

THE COURT: Does anybody have any problem with that? All right. Let's reconvene then at 22 by the courtroom clock. 11:40 a.m. All right. We're in recess.

(Off the record at 11:23.)

(Back on the record at 11:43.)

THE COURT: We are back on the record then. And the break was requested by the people from Hilco Gordon. So I'm going to go back over to Mr. Spencer.

HOULIHAN LOKEY: Should we wait for Rick?

HILCO: We're missing one guy too.

THE COURT: All right. We'll go back off the record then.

(Off the record at 11:44.)

(Back on the record at 11:45.)

THE COURT: We'll go back on the record

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then. Go ahead, Mr. Spencer.

HOULIHAN LOKEY: For the benefit of all the parties, I'll go back and recite what is -- the constituent elements of what is currently our lead bid, the bid from Patriarch.

That bid is $81,100,000 net. It is comprised of 59,775,000 cash consideration, net cash consideration, $13 million of equity, and $8 million -- $8,325,000 of assets, excluded assets. That is our current lead bid.

I will go over to you, Eric, to Hilco/Gordon Brothers to contemplate a competing bid.

HILCO: The Hilco/Gordon Brothers joint venture will raise its bid by an additional $2,850,000. Total cash at closing would be $52 million. Our net -- the net value of our bid net of the Genii breakup fee and expense reimbursement, by my math, is 82,912,000 and the gross value of our bid is 84,612,000.

HOULIHAN LOKEY: The debtor accepts the revised Hilco/Gordon Brothers bid, which we also value on a net basis at $82,912,000.

We turn to Patriarch Partners to submit a competing bid.

PATRIARCH: Okay. Patriarch's ready to revise its bid by $2 million to $84,800,000. That rise in $2 million will be comprised of two points of equity equivalent to $1.3 million and $700,000 of cash.

I believe that takes the gross cash to 62,125,000, the net cash to 60,475,000, the total equity value to 14,300,000, and the excluded assets to 8,325,000.

HOULIHAN LOKEY: Lynn, would you recite the constituent elements of the bid one more time for the record.

PATRIARCH: Yeah. And I'd appreciate if you'd correct me if I'm wrong.

I have excluded assets of 8,325,000, the equity which is now at 22 percent at 14,300,000, and net cash of 60,475,000 with gross cash at 62,125,000.

AUDIENCE: I get 175.

PATRIARCH: 175. I apologize. Okay.

AUDIENCE: What is the gross cash?

PATRIARCH: I believe it's 62,175,000.

HOULIHAN LOKEY: That's correct.

PATRIARCH: Thank you.

HOULIHAN LOKEY: Net cash of 60,475.

PATRIARCH: Correct.

HOULIHAN LOKEY: For a total net consideration of $83,100,000.

THE COURT: 83 or 84?

HOULIHAN LOKEY: Net consideration, Your Honor, of $83,100,000.

THE COURT: I'm sorry, yes.

HOULIHAN LOKEY: Your Honor, we request for a two-minute break.

THE COURT: Okay. We'll go off the record.

(Off the record at 11:53.)

(Back on the record at 11:56.)

THE COURT: Back on the record. Go ahead, Mr. Spencer.

HOULIHAN LOKEY: The debtor accepts the revised Patriarch bid, which we are valuing on a net basis at $83,100,000. The constituent elements for the benefit of all are $14,300,000 in equity consideration, $60,475,000 in cash consideration, and 8,325,000 in excluded assets, which totals 83,100,000.

Eric, turn it back over to you.

POLAROID COMMITTEE: For the record,

however, Your Honor, let me just state the committee is reserving its rights with respect to whether or not that bid is highest and otherwise best, taking into account all of the considerations and subjective and qualitative facts. We will continue to review that, but we understand the debtors's position and we concur with the debtor's calculation of the numbers.

MR. GORDON: Your Honor, may I?

THE COURT: You may.

MR. GORDON: Greg Gordon or behalf of Patriarch. We obviously will reserve on that. We object to that. If there's now going to be an argument after all this back and forth that the rules should not be applied the way the Court set them out in the order and the items should be revalued or considered in a different way, we will vehemently object to that, Your Honor.

THE COURT: I guess I'm not sure where the committee is coming from.

POLAROID COMMITTEE: Where the committees' coming from, Your Honor, this was the issue that was raised with respect to the LLC agreement and our ability to object to certain of the qualitative factors comparing the two agreements. It

cannot quantify those numerically, Your Honor. We're simply reserving the right if the debtor goes forward with this as the highest and otherwise best, to object to that if the committee makes that decision. That's all.

MR. GORDON: Your Honor, with respect to the LLC agreement, they did reserve on the record a couple of hearings ago on that point. We then came back to the hearing the other day, and counsel for creditors' committee advised that there had been an exchange where the committee had put in some comments. We responded.

I do want Your Honor to know that we've never had a direct discussion with the committee about the LLC agreement. The committee has refused to talk to us about it. The comments have only been made through the debtor. They've come through e-mails that were forward by the debtor to us. We responded. We moved on a number of points. In terms of other points, we indicated why we thought the points were cosmetic or didn't have any meaning, and why in our view the LLC agreements are basically identical in all material respects.

We've never been able to have a dialog

with the committee about that. From our perspective -- and the debtor can weigh in -- there's no material difference between the agreements. And we can take that up at some point if Your Honor would like.

But I did want Your honor to know notwithstanding this reservation of rights, we've never had a single conversation with the committee over the last week regarding the LLC agreement. Not one.

POLAROID COMMITTEE: Your Honor, just for point of clarification, we filtered all of our comments to both parties back through the debtors to make sure we don't have the back and forth side to side that led to where we were last week.

THE COURT: Understood.

POLAROID COMMITTEE: Thank you, Your Honor.

THE COURT: Okay.

HILCO: Your Honor, I'd like to put our point of view on the record as well. You know, which is that we've now negotiated two LLC agreements with the debtors and with the committee. We signed them both. We have debtors' signature on our documents. We have an APA with schedules that we've negotiated on

two separate occasions with this estate and this committee. We signed them twice. The estate signed the one after the sealed bid auction.

For the record, I've never seen filed anywhere in this record a signed document between Patriarch and the debtors. They were highest and best at an auction that ended on the 31st of March. There hasn't been a signature page filed with the record between the debtor and Patriarch. Ours are on the record. They're done. There are significant differences in the LLC agreements between Lithograph Legends and the Hilco/Gordon Brothers JV.

To say that they are identical or is cosmetic is not -- is not accurate in any way. In order to capitalize the -- our company or Lithograph Legends, you can either put debt or equity into either company.

In our case if we put in capital as opposed to debt, the estate has never diluted beyond the 25 percent that they're diluted. Our capital comes out first that we put into the debtor, but they are never -- to the newco, but we are never diluted. Therefore, if we put money in, we got to know we get it back. But the estate always remains at 25 percent

interest.

Under the Lithograph Legend's LLC agreement, Your Honor, if capital is put into the newco, the estate must have cash to exercise preemptive rights to retain its 22 percent stake in the debtor.

So for example, if they were to put $10 million into the new company to capitalize it to pay for the employees that Patriarch claims that they're taking, even though they're not bound to do so under their agreement, the estate would have to come up with $2.2 million or they would be diluted down in terms of their equity. I don't know many bankruptcy estates that keep cash aside to exercise preemptive rights.

So that's the difference, Your Honor, between the LLC agreement of the Hilco JV and Lithograph Legends. So there are significant differences, Your Honor.

Right now as it stands, Lithograph is 160 -- $188,000 higher than ours. There's not a whole lot of dilution that needs to go on here for that bid to in the end -- six months, a year from now -- not actually be higher and better than our bid.

So I know it's the debtor's judgment.

I know everybody thinks I'm biased, just like Lithograph Legends is biased about who is higher and better. But I do want to make on the record there are differences between the JV agreements, and they are significant and they're worth value. And it's not something that we should say it's too late in the day or we've done too much already. We've come very far and the debtor should be allowed to make the right decision here.

POLAROID COMMITTEE: If I may, Your Honor, by point of clarification.

THE COURT: Yeah. Are you really sure that you wanted to get into this?

POLAROID COMMITTEE: No, I didn't. I just --

THE COURT: I thought we were kicking along here.

POLAROID COMMITTEE: We were doing fine. The debtors accepted a bid --

THE COURT: And I also would have thought that the whole matter of the LLC agreement as a floor to each party's bidding participation was pretty much settled.

POLAROID COMMITTEE: It is settled,

Your Honor. They are done. They are both executed. I'm not sure if they're executed, but both parties have completed their documents. They are different. That's the only issue.

And the point we raise, Your Honor, is as we look at the total package of consideration, we have conferred with Ritchie, with Acorn, with the Petters committees to obviously get their input because they are stakeholders and at the end of a day, Your Honor, a critical component in the ability to wrap these estates up quickly as opposed to winding our way through several years of litigation.

So we did take -- we have taken their counsel in looking at these issues, and all we wanted to do at this point is note the differences, reserve the rights, and obviously open it up for Hilco/Gordon Brothers to make another bid based upon the debtor's determination.

THE COURT: Reserve what rights? I mean, it's good to be lawyerly and reserve some wiggle room, but I don't know what rights you're reserving if we've already reached final terms as to both of these parties.

POLAROID COMMITTEE: The debtors will

present to Your Honor a sale motion as soon as we wrap here that this is highest and otherwise best. We simply are reserving whether or not that, in light of all the criteria, meets that standard. That's all. It's the debtor's business judgment. It's the debtor's burden.

MR. GORDON: My I speak, Your Honor?

THE COURT: Yeah.

MR. GORDON: First of all, Your Honor, we came back here today with a clear understanding that we were going to follow rules that were very explicitly laid out in Your Honor's order. And we can't begin to tell you how much we appreciated the fact that you laid out the specifics in the order. Because as Your Honor knows from having read the transcript from the hearing, we were highly critical of the fact that we felt that the auction as was initially run didn't have a concrete set of rules making it very chaotic in terms of trying to pick a winning bid, in terms of trying to make further bids.

We came back with a clear understanding we were working off of your order, which was very clear how bids were to be evaluated. They were to be evaluated based on that comparison of all the assets

with the Houlihan values, with the equity values laid out by Houlihan. It was made very clear that we were talking about cash bidding only with respect to Hilco, cash in equity from Patriarch.

We've done nothing but follow the rules. With respect to the LLC agreement, it's the same thing. I mean, we negotiated that. We can talk about negotiations and signed documents. I'm sure we negotiated just as much as Hilco did. We've signed it at least twice as for as I know. As well, we've had to revisit those documents. We've made concessions. If we need to, and I don't think Your Honor would want to do this, we can go through the LLC agreement point by point. But, you know, what counsel's not telling you is yes, they put new capital in. They're entitled to get $34 1/2 million back at 10 percent in front of the equity.

We can stack them up side by side. But I think the way we looked at it was if you think of it on an economic basis, they're basically the same. They've got some differences, which again, in my view are cosmetic. I think the debtor has to present its own view because it negotiated with both sets of parties.

But to suggest that we've now come back today, gone through an entire auction process according to the rules, and now the creditors can stand up and say we reserve on that and can now argue to Your Honor that the winning bid isn't the winning bid, we're just back to where we were before. And to me that means we were proceeding under false pretenses here today. That's not what we signed up for today.

We need to roll it back and start all over again and renegotiate the LLC agreements? I mean, that's what we're opening up here, Your Honor.

HILCO: I'll be brief, Your Honor. It's absurd for a bidder that submitted a bid after the sealed bid auction to complain about not following rules. Absurd. I'm not going to complain about it. What I'm saying, Your Honor, is that you cannot let a bidder somehow object and prevent the debtors and the committee from deciding which is the highest and best bid.

They've got two bids in front of them. They've accepted both bids, and they can go decide which one is higher and better. But that's all that the debtor's saying. That's all that the committee's saying. There have been lots of rules, there have

been lots of rules broken, and we are at the end of this road and the debtor's allowed to make a choice.

MR. RUNCK: Your Honor, David Runck on behalf of the Petters Committee. And just briefly I would like to note for the record the Petters Committee support for the Polaroid Committee's reservation of rights.

Your Honor, I agree that the debtors in this case certainly have the business judgment to determine for the auction process what is the highest and best bid. But, Your Honor, I'm aware of no authority at this point that says that the creditors at this stage of the game need to be bound by that determination.

And I think all that Mr. Chesley is saying, Your Honor, is that we reserve our rights to look at the highest and best bid and determine whether or not it truly is the highest and best bid. Evaluate the competing LLC agreements, Your Honor. That is the debtor's burden of proof at the later stage of this hearing, and we want to reserve our rights at that time.

THE COURT: Okay. Thank you.

MR. RUNCK: Thank you, Your Honor.

THE COURT: All right. Well, I basically said in the order I entered on April 9th that I did not anticipate having to get into legal issues at this point, and I'm not going to. I'm only here as an observer for the purpose of keeping order, and I'm not going to come in and referee this.

I will say, No. 1, that this bidding process is not a court proceeding. It's not a judicial proceeding. I'm just here because I felt I had to be to make sure things went forward as an orderly process.

So Mr. Chesley can say whatever he wants about reserving rights. The process of administering these assets has to go through this bidding process to arrive at a proposed sale which then the debtor can evaluate. And in turn, I guess it is correct, the question of which is the highest and best may ultimately become an issue that is presented judicially here. And I'll take that in due course at that time.

I'm going to have some problems just at a gut level with unceding the result of a competitive bidding process. But on the other hand, I think the question of which is the highest and best isn't

judicially ripe at this point. So I can't cut the committee off at its knees.

I'm really outside of my sphere of authority sitting here anyway, because we are only going through a bidding process. I tried to set up rules, yes, but I didn't set up rules ultimately, and I certainly did not make an advisory opinion as to what I was going to consider or not consider when we got to the point of actually convening the sale hearing. And I passed on the debtor's determination as to which party to sell these assets to under which circumstances.

So I'll let Mr. Chesley's notation of the committee's reservation of its rights stand for the record just as a memorialization of a position. I can get into this issue later on frankly. The more I talk my way through this, the more I think it's probably not even ripe at this point.

The parties can go through a bidding process here. I will say, you know, I am to the extent that I can -- I really have the issue framed up at all in front of me. And I'm going to have a hard time listening to any objection that the highest dollar value net bid is not the one that should be

approved, but the issue isn't ripe.

All right. Let's go forward.

HOULIHAN LOKEY: Speaking on behalf of the debtor, we did not give an opinion on the Patriarch bid. We merely recited the constituent elements.

THE COURT: Right.

HOULIHAN LOKEY: I'll review those again for everybody's benefit. They are in equity $14,300,000 in cash, $60,475,000 in excluded assets, 8,325,000. These are net numbers. The net consideration under the Patriarch revised bid is $83,100,000. The debtor accepts that bid as the lead bid right now.

We would go back to Hilco/Gordon Brothers and ask if you wish to provide a revised bid.

HILCO: We need another -- we need 15 minutes. We'll be back in 15 minutes. 11:30. This gives us three extra minutes. I'm sorry, 12:30.

THE COURT: All right. I'm going to remind everybody here I did specify in the order that parties were to come into this courtroom with authority. And it sounds to me like you're going back to get more authority, and I'm not going to have a lot

of patience with this ongoing.

HILCO: Your Honor, we brought principals from Gordon Brothers and Hilco with us. We have two parties that we need to confer outside the courtroom to cover our bid. The CEO and chairman of Hilco is in the courtroom. Principals from Gordon Brothers are in the courtroom. We brought our authority with us. We just can't have these conversations in open court.

THE COURT: All right. Understood. All right. Well, 15 minutes then. And let's get on with it.

(Off the record at 12:32.)

(Back on the record at 12:32.)

THE COURT: All right. We are back on the record. Mr. Spencer.

HOULIHAN LOKEY: We accepted the revised Patriarch bid which we value at $83,100,000 on a net basis. We turn over the bidding to Hilco/Gordon Brothers. Eric, I'll turn it over to you to respond.

HILCO: Thank you. The Hilco/Gordon Brothers JV, in light of the comments that were made on the record, will increase the cash component of our bid by $338,000. So cash at closing would be

$52,338,000. That's a gross bid value of $84,950,000. Net value of $83,250,000.

HOULIHAN LOKEY: Eric, could you repeat the net number? I'll repeat it for you. $83,250,000 net?

HILCO: Correct.

HOULIHAN LOKEY: Eric, just to clarify, please go through the constituent elements of your bid again.

HILCO: Sure. The gross value of the cash at closing is $52,338,000. The net of the breakup fee payable to Genii and expense reimbursement, the net cash, as we've been calling it, would be $50,638,000. The value of the equity that we're providing is $16,250,000. The value of the excluded assets is $16,362,000.

HOULIHAN LOKEY: The debtor accepts the revised Hilco/Gordon Brothers bid, which we value at $83,250,000 net.

We turn the bidding over to Patriarch at this time.

PATRIARCH: All right. Patriarch will increase its equity stake to 23 percent, which is increasing its bid by 650,000. Takes the equity

component to 14,950,000. Everything else would remain the same. I can go through it if you'd like. 60,475,000 of net cash, 8,325,000 of excluded assets. That would take the gross bid to 85,450,000 and the net bid to 83,750,000.

HOULIHAN LOKEY: The debtor accepts the revised Patriarch bid, which we value on a net basis at 83,750,000.

We turn the bidding over to Hilco/Gordon Brothers if you wish to submit a competing bid.

HILCO: Thank you. The Hilco joint venture will increase our bid by $650,000 in cash, so the gross value of the cash will be $52,988,000. The net cash of breakup fee is 51,288,000. The net value of our bid is 83,900,000 and the gross is 85,600,000.

HOULIHAN LOKEY: Eric, we accept -- the debtor accepts the revised Hilco/Gordon Brothers bid, which we value on a net basis at $83,900,000, which clears the Patriarch bid by $150,000.

We turn the bidding back over to Patriarch again if you wish to submit a competing bid.

PATRIARCH: I need a little bit of time to look at numbers here.

Patriarch's prepared to increase its bid by $950,000, an increase of one point of equity, and $300,000 in cash, which takes its gross bid to $86,400,000, its net bid to $84,700,000, its gross cash bid to $62,475,000, its net cash bid to $60,775,000.

HOULIHAN LOKEY: For everybody's benefit, would you just go through the --

PATRIARCH: Does that mean I added wrong?

HOULIHAN LOKEY: No. Just check the math.

PATRIARCH: You want me to go through it again?

HOULIHAN LOKEY: Yeah, please.

PATRIARCH: I believe that I've increased my bid by $950,000 to include one point of equity and 300,000 of cash. It takes the gross bid to 86,400,000, the net bid to 84,700,000, the gross cash to 62,475,000, the net cash to 60,775,000. The equity value is now 15,600,000 and the excluded assets it 8,325,000.

HOULIHAN LOKEY: The debtor accepts the revised Patriarch bid, which we value on a net basis

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of $84,700,000.

Turn to you, Eric, to ask if Hilco wishes to submit a competing bid.

HILCO: Okay. So the Hilco/Gordon Brothers joint venture is prepared to increase its bid $950,000, which would increase the gross value of the cash paid at closing to 53,938,000. The cash net of the breakup fee would be 52,238,000, it's a gross value of our bid with the equity and the excluded assets of 86,550,000, and a net value to the estate after payment of the Genii breakup fee of $84,850,000.

HOULIHAN LOKEY: The debtor confirms and accepts the Hilco/Gordon Brothers revised bid, which we value $84,850,000, which tops the prior Patriarch bid of $84,700,000 by the required 150,000 increment.

We turn the auction back over -- or the bidding back over to Patriarch. Lynn, do you wish to make a competing bid?

PATRIARCH: I need a few minutes.

Patriarch will raise its bid by 700,000, which is an additional 650,000 of equity which takes us up to the limit of 25 percent, and an additional $50,000 of cash. That should take the

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total bid to 87,100,000, the net bid to 85,400,000, gross cash to 62,525,000, net cash to 60,825,000. Equity is now at the $16,250,000 level, and excluded assets are now at 8,325,000.

HOULIHAN LOKEY: The debtor confirms and accepts the revised Patriarch bid, which we value at $85,400,000 net.

Turn the bidding back over to you, Eric, to contemplate a competing bid.

HILCO: I'm sorry. Could you just give me the net and the gross numbers again?

HOULIHAN LOKEY: Sure. Lynn, would you mind reciting the components of your bid?

PATRIARCH: The gross number is 87,100,000 and the net number is 85,400,000. The cash is --

HILCO: That's okay. So you raised your bid 700,000 or 750?

PATRIARCH: No, 700,000.

HILCO: Okay. Thank you.

PATRIARCH: 650 of equity and 50,000 of cash.

HILCO: Okay. Hilco/Gordon Brothers joint venture is prepared to -- it will raise its bid

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by an additional $1,062,000. It means the gross cash at closing is $55 million, cash net of breakup fee is 53,300,000. The gross value of the bid when you include equity valued at 16,250,000 and excluded assets at 16,362,000 totals 87,612,000 leaving net cash after payment of the breakup fee to the estate of $85,912,000.

In addition, the Hilco/Gordon Brothers joint venture will modify one term of our LLC agreement, which is to eliminate the preferred return payable on our initial capital contributed to the -- to the newco.

I'm happy to expound upon that if anybody needs further clarification, but I think we all know what we're talking about there. We believe that the final concession does have a monetary value.

HOULIHAN LOKEY: The debtor accepts the revised Hilco/Gordon Brothers bid, which we value at $85,912,000.

We turn the bidding back over to Patriarch Partners.

PATRIARCH: Patriarch's going to raise its bid by a million dollars in cash, which takes the gross amount of the bid to 88,100,000, the net bid to

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86,400,000, the gross cash to 63,525,000, and the net cash to 61,825,000.

HOULIHAN LOKEY: We agree with the calculations. We accept -- the debtor accepts the revised Patriarch bid, which we value on a net basis at $86,400,000.

Eric, we would turn it back over to you to get your competing bid.

HILCO: The Hilco/Gordon Brothers JV declines to bid any further, and we look forward to the creditors' and debtor's determination of which bid is higher and better.

HOULIHAN LOKEY: The debtor accepts the Patriarch bid as the winning bid, which we value on a net basis again at $86,400,000. This concludes the auction.

(Auction Adjourned at 12:55.)

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CERTIFICATE

STATE OF MINNESOTA)
) ss.
COUNTY OF FILLMORE)

I, DEBORAH ANN GREBIN, NOTARY PUBLIC IN AND FOR THE STATE OF MINNESOTA, RESIDING AT PRESTON IN SAID COUNTY AND STATE, DO HEREBY CERTIFY:

THAT THE FOREGOING IS A FULL, TRUE, AND CORRECT TRANSCRIPT OF THE AUCTION TAKEN IN THE ABOVE-ENTITLE CAUSE;

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND AFFIXED MY OFFICIAL SEAL THIS _____ DAY OF _____, 2009.

_____
NOTARY PUBLIC IN AND FOR THE STATE OF MINNESOTA RESIDING AT PRESTON -
CCR #2080

UNITED STATES BANKRUPTCY COURT

DISTRICT OF MINNESOTA

In Re: BKY No: 08-46617

Polaroid Corporation,

Debtor.

BEFORE THE HONORABLE GREGORY F. KISHEL

United States Bankruptcy Judge

* * *

TRANSCRIPT OF PROCEEDINGS

4-16-09

VOLUME III

* * *

Proceedings recorded by electronic sound recording, transcript prepared by transcription service.

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MR. JASON PRICE AND MR. STEPHEN SPENCER, Attorney at Law, Fourth Floor, 123 North Wacker Drive, Chicago, Illinois 60606-1700, appeared on behalf of Debtor.

MR. DENNIS RYAN, Attorney at Law, Suite 2200, 90 South Seventh Street, Minneapolis, Minnesota 55402-3901, appeared on behalf of unsecured creditors.

MR. RICHARD CHESLEY and MR. GREGORY OTSUKA, Attorneys at Law, 13th Floor, 191 North Wacker Drive, Chicago, Illinois 60606, appeared on behalf of unsecured creditors.

APPEARANCES (Cont'd)

MR. CHRIS LENHART AND MR. MARK KALLA, Attorneys at Law, Dorsey & Whitney, Suite 1500, 50 South Sixth Street, Minneapolis, Minnesota 55402-1498, appeared on behalf of Hilco Gordon Brothers.

MR. ADAM MAIER, Attorney at Law, Suite 2300, 150 South Fifth Street, Minneapolis, Minnesota 55402, appeared on behalf of Patriarch.

MS. LYNN TILTON AND MR. GREGORY GORDON, Attorney at Law, 2727 North Harwood Street, Dallas, Texas 75201, appeared on behalf of Patriarch.

MR. STEVE MEYER, Attorney at Law, 3300 Plaza VII Building, 45 South Seventh Street, Minneapolis, Minnesota 55402, appeared on behalf of Stylemark.

APPEARANCES (Cont'd)

MR. GREGG A. LOWRY, Attorney at Law, Suite 2200, 2200 Ross Avenue, Dallas, Texas 75201, appeared on behalf of Stylemark.

MR. DAVID RUNCK, Attorney at Law, Suite 400, 775 Prairie Center Drive, Eden Prairie, Minnesota 55344, appeared on behalf of Potters unsecured creditors.

MR. BRYAN KRAKAUER, Attorney at Law, One South Dearborn, Chicago, Illinois 60603, appeared on behalf of Ritchie Capital.

MR. JAMES M. JORISSEN, Attorney at Law, Suite 2500, 100 South Fifth Street, Minneapolis, Minnesota 55402, appeared on behalf of Ritchie Capital.

APPEARANCES (Cont'd)

MS. AMY SWEDBERG, Attorney at Law, Suite 3300, 90 South Seventh Street, Minneapolis, Minnesota 55402-4140, appeared on behalf of Flextronics.

MR. PETER KREBS, Attorney at Law, Suite 2100, 333 W. Wacker Drive, Chicago, Illinois 60606, appeared on behalf of Harmer Group.

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

MR. MICHAEL DOVE, Attorney at Law, P.O. Box 458, 2700 South Broadway, New Ulm, Minnesota 56073-0458, appeared on behalf of Trustee.

PROCEEDINGS

THE COURT: All right. Counsel.

MR. FLEMING: Your Honor, Terry Fleming on behalf of Polaroid. We've discussed the issues that have been raised in the motion in limine and I'm finally -- or with the understanding that there will be no inquiry at this time about the lien issue and that the testimony will be limited to questions relating to the sales process and other possible sales alternatives that she considered. There's no need to have the motion heard at this time.

THE COURT: All right.

MR. KRAKAUER: And, Your Honor, with respect to the lien issue, talked to Acorn and they're expecting to argue that later so we'll just put that off until later.

THE COURT: Expecting to argue what?

MR. KRAKAUER: Well, Acorn is here. The issue of whether or not it's appropriate to hear evidence on the liens that

Acorn had and Ritchie.

THE COURT: All right.

MR. KRAKAUER: So it's being put off. And otherwise not agreeing to limit my testimony but if Polaroid has an objection to it, they can raise that. I'm not intending to limit the things that I'll ask but I will say that I expect this examination to last five minutes or less.

THE COURT: Okay.

MR. KRAKAUER: And if there's an objection to something, they can raise it. Ms. Joffries.

UNKNOWN SPEAKER: I mean, we will object. I'm not sure if he was saying that's something other than the understanding I stated.

MR. KRAKAUER: Well, I believe if -- it's our understanding. But let me ask my questions. If he has an objection to my question as we're going, he'll state it.

THE COURT: And believe me, I'll deal with that objection.

MR. KRAKAUER: I understand.

THE COURT: All right. Ma'am,

come forward if you would, please.

MR. KRAKAUER: And I would say the questions I have go to alternatives considered as well as valuation issues.

THE COURT: Raise your right hand, ma'am.

MARY JEFFRIES

A witness in the above-entitled action, after having been first duly sworn, testifies and says as follows:

THE WITNESS: I do.

THE COURT: Thank you. Please take the witness stand.

EXAMINATION

BY MR. KRAKAUER:

Q Ms. Jeffries, in terms of alternatives to pursuing a sale, did you look at possibility of licensing agreements overseas, the company entering into licensing agreements overseas to generate revenue and build a reorganization

around that?
A Yes. We looked at licensing opportunities.
Q And did you solicit -- did you solicit any parties in Europe or the Middle East or the far east to possibly enter into licensing agreements with Polaroid as a way to possibly fund a reorganization plan?
A Since the bankruptcy?
Q In this last -- I'm asking first in terms of this process.
A In this process?
Q This sale process?
A No, we haven't.
Q Isn't it true that previously there was an interest expressed by some parties -- in the parties in India particularly with respect to licensing of the Polaroid brand?
A Yes.
Q And didn't you represent to Ritchie this past summer that, in fact, there was parties in India who were -- who you believed were very interested in licensing the brand in India for down payment of $200 million additional royalties in excess of that?
A We had a letter of intent, a non-binding

letter of intent, yes.
Q For that amount?
A Uh-huh.
Q And did you believe that at the time that that represented a real offer?
A Yes.
Q And do you believe at the time that reflected then of the value of the Polaroid brand in India?
A Yes.
Q And you had every reason to think that and still have reason to think that that was reflective of what the brand was worth this past summer?
A Based upon that letter of intent, yes.
Q And then to the fall as well?
A Uh-huh.
Q Is that a yes?
A Yes.

MR. KRAKAUER: That was it. Thank you.

THE COURT: All right.

MR. KRAKAUER: I'm sorry.

BY MR. KRAKAUER:
Q Did you go back to that party or any other

parties now and seek offers like that?
A Yes, we did. Yes.
Q And who did you go to over the last two or three months?
A Back to the Spice Group who was the non-binding letter of intent.
Q And they told you at this point they're not interested?
A Yes.
Q Thank you. Did you go to anybody else in Asia?
A The Gomay Group.
Q And they said?
A No, they weren't interested.
Q Okay.

MR. KRAKAUER: Thank you.

THE COURT: Mr. Chesley?

MR. CHESLEY: Two questions, Your Honor.

EXAMINATION

BY MR. CHESLEY:
Q Ms. Jeffries. The transaction Mr. Krakauer asked you about, that never closed, did it?

A No.
Q And in fact, based upon your experience with the company, do you believe that the process that was led by Houlihan Lokey with your active participation yielded the highest and best value for the assets of Polaroid?
A Yes, I did.

MR. CHESLEY: Thank you. I have nothing further, Your Honor.

THE COURT: All right. Anybody else? Very good. Thank you, ma'am. You may step down. All right. Other proof? Any other witnesses?

MR. UPHOFF: Your Honor, can I call a rebuttal witness, please?

THE COURT: Going to?

MR. UPHOFF: The issues that have been raised about the LLCs.

MR. CHESLEY: We would object to that, Your Honor. There was no direct -- there was no contrary testimony put into the record. The only testimony that was represented in the Debtor's case in chief, the only evidence put in in response to that was the evidence with respect to Stylemark and

whatever that was from Mr. Krekauer.

MR. UPHOFF: (Unintelligible) should have the right to express her opinions about the LLCs as she has --

THE COURT: Who would you be calling?

MR. UPHOFF: The head of Patriarch.

MR. CHESLEY: Your Honor, she testified. They had every opportunity to ask every one of those questions. At some point it has to end.

MR. UPHOFF: Well, I think it was rebuttal to the later testimony.

MR. CHESLEY: That testimony was before she took the stand.

THE COURT: Mr. Uphoff, I'm just going to ask you to have a seat for a minute here. I'm going to -- I'm going to sustain the objection. Ms. Tilton was called in the first instance as the Debtor's second witness. The inquiry of her was relatively brief and then really we've only had two other witnesses since then, Mr. Landorf as Stylemark's witness and Ms. Jeffries as the

Ritchie Group's witness. So she would not be at this point a rebuttal witness to any evidence that came in after the Debtor rested its case in chief. So that's technical but I guess to use Mr. Chesley's words, it does have to end sometime. And while we sometimes do give a little greater latitude than you would in a jury trial in the context of bankruptcy cases, I'm not convinced that I should exercise any sort of discretion in favor of giving that latitude at this point.

MR. UPHOFF: Your Honor, at this point I would like to call Jed Stewart as a rebuttal witness.

THE COURT: Okay. As to?

MR. UPHOFF: As to the LLC agreements.

MR. CHESLEY: Same objection, Your Honor. There's been nothing presented since the testimony was presented in the case in chief. It controverts the same exact issue. Different person, same issue.

THE COURT: And that is correct. The objection is sustained. You can't call a rebuttal witness to reopen your

case in chief and that's essentially what that would be doing. You can only call a rebuttal witness as to proof that came in at the behest of other parties after you have concluded your case in chief.

All right. Anything else? I don't know where that leaves us, quite frankly, but counsel will have a lot more ideas about that than me. All right. Am I going to conclude, then, that the evidentiary record is completed here such as it is?

MR. CHESLEY: From the Committee, yes, Your Honor.

THE COURT: And I don't hear anybody else offering anything. All right. The evidentiary record is complete.

Now where do we go?

MR. CHESLEY: Since no one's standing and I am, I'll just proffer something, Your Honor. We've been here a long time. I think the issues have been very fully vetted before the Court. We are happy to rest on the record. If the Court wants a very brief summation to close this today, we're happy to do that. But I think for myself, and

obviously I'll let the other creditors who have spoken today speak their mind on this, but we think the issues are relatively clear. We're happy to sort of bring it all together if the Court would like.

If the Court wants to review any supplemental documents, any legal authority, we're happy to provide that to the Court, you know, almost instantaneously if that would help the Court. We'd like to end this today if we could.

THE COURT: Well, I certainly would too but the question is just what I'm going to be given to do my job after the parties -- what I have been given I should say to do my job after the parties have finished their presentations here. I need to have more structure on this imposed here as to how the content of the LLC agreements factor into this determination. I mean, I think I've identified at least one of the issues and that would go to the question of which is the highest and best offer at this point. And then, of course, we've got a whole bunch of other issues that have been raised by

objections that have not been resolved as yet on the record.

MR. CHESLEY: Your Honor, may I? If we could potentially segregate this into resolving effectively highest and otherwise best, maybe we could then move to what are the other objections that are out there may be the best -- at least as I'm looking at Debtor's counsel, certainly argue with respect to the other documents you need to look at, Your Honor, actually it is our view that you don't need to look at any other documents. You've heard the testimony of the Debtor's financial advisors and you've heard -- well, you will hear and you probably gleaned the positions of the other creditor stakeholders here which is they believe, and again it's their money, it's their equity, they believe is highest and otherwise best. So we don't believe you need to make a side by side. I think you've gotten the testimony. If you want to review them, obviously they're here. We're happy to walk you through them, summarize them in writing or otherwise. But we think in light of the positions of the

creditors committee, the other creditors and most importantly the testimony of Mr. Spencer, you have everything you need to make the decision.

THE COURT: Well, you're not going to be walking me through anything that has yet to be submitted under seal assuming that ends up being relevant.

MR. CHESLEY: Yeah.

THE COURT: And I only have sort of a hazy understanding at this point as to how relevant --

MR. CHESLEY: Yeah. I sort of put that issue aside, Your Honor, because from -- and again, I'm sort of back where I didn't want to go before on this issue. We understand the issue that's been presented. We understand where Patriarch is on this. I don't want to prejudice their position in any way, but we think the sealed process that is in place addresses many of those issues. We have that document if the Court would like to see it in the context of the argument and the testimony that's been presented.

But again, it's just one of the

factors, the qualitative factors that are out there that go to highest and otherwise best. And again, we come back to, you know, obviously we uphold our committee extensively. The others have as well and at the end of the day this is sort of where we came out.

MR. UPHOFF: Your Honor, may I suggest that we have a post-hearing brief of some kind to put structure on this. And I'm not thinking that this will take very long.

THE COURT: All right. Listen to me here. I'm out of the state next week and I think I told people that was the case and I structured this thing up starting back in early March knowing darn well I had this commitment to a seminar through the Federal Judicial Center that's been on my calendar for nine months. I tried to structure this thing up in early March to make sure that we were working against that and there's been constant slippage and I've allowed that with the hope that I wouldn't get dropped with something just before I left. So I am not going to bleed this out over beyond next week to have to pick it up when I get back. That's not

going to happen. So I'm not taking any briefing here. The question is how this is going to be structured up now and conceivably tomorrow to give me something so I can give you a decision.

MR. CHESLEY: And, again, I come back to I think it's all there, Your Honor. I don't believe there's anything outside what you have heard today that you need to consider for the purposes of making this first decision. There are other issues that come up with respect to certain other parties. I respect their rights and that we can resolve hopefully consensually, if not, you know, very quickly tomorrow I would assume with everybody. But we need to get past sort of this threshold issue. And it's at least the Committee's view and I would certainly welcome anybody else to jump in here, that you have everything at this point you need to make that decision.

MR. SINGER: Your Honor, I don't want to -- the one exception to that, of course, is Patriarch documents have not been filed with the Court and the modification to

the LLC agreement that we intend to file would be part of the filing. So the LLC agreements that are in issue now have not been file yet with the Court.

THE COURT: Well, I know. And that's been sort of the problem all along and I really thought that the process was going to result in certainty as to that heading into this hearing but it didn't.

MR. LOWRY: Your Honor, we're delighted with whatever process the Court chooses. We simply want an opportunity to argue our limited objection which does go beyond just highest and best. It goes to the ability to sell the assets under 363(f).

MR. CHESLEY: Your Honor, clarification. Is that issue moot if Hilco is chosen?

MR. LOWRY: I'm so sorry. Yes. It is an issue because we've got a resolution with Hilco on the assumption of our licenses and consents that it wouldn't be an issue with Hilco. So I apologize for not clarifying that. And perhaps we could find some other resolution with the other bidder.

THE COURT: All right. Well, I think I'd like to hear the parties out on the question that's the threshold issue here which is which is the highest and best offer considering all of the circumstances including the outcome to that auction process that took a good chunk of time today here. And I need each contending side here to identify just how those documents that would be put under seal play or don't play into that consideration. I've taken testimony but I need to know how that would factor in because we've got that logistical issue there as to whether I can give you a decision yet today or not.

So all right. Go forward on that. I'm going to hear from the Debtor first.

MR. CHESLEY: Your Honor, the only sealed document is the issue with respect to Stylemark.

THE COURT: Right.

MR. CHESLEY: That's the only —

THE COURT: Okay.

MR. SINGER: That's correct, Your Honor. I guess with the Court's

permission, I would like to, you know, offer up the document, and I do have a manual version here if that's acceptable to the Court for consideration. This was -- what our intention was after today they -- they started as -- file this electronically connected to the entire bid package.

THE COURT: All right. Okay.

MR. SINGER: May I approach?

THE COURT: You may. Sure. I'm going to take cognizance of this on the representation that this will be filed under seal later. And filing under seal as we do it through our iteration of CM/ECF it would be filed to the in-box. And since we're after close of business, the case administrator will not be looking at this until first thing tomorrow morning anyway. So it will not be formally docketed or sealed until first thing in the morning even if it goes in through CM/ECF tonight. So I'm going to consider this printout hard copy here for whatever relevancy it has when the time comes. All right. Okay.

MR. UPHOFF: Thank you, Your Honor. Your Honor, we would urge the Court to

accept the Patriarch offer. We have had perhaps the most extraordinary auction process in the history of 363. And I don't think any of us wants to go through the chronology but it has lasted for nearly three weeks. That process has been robust and spirited. It has resulted in a bid by Patriarch that is nearly half a million dollars greater than the Hilco bid. Not only is it a half a million dollars greater, it has over eight and a half million dollars more of cash. We consider that to be significant in this estate.

There was an agreement reached on March 31 on the value of the equity and it was agreed to be $650,000 a point. Each bidder has maxed out on that equity portion.

The difference between the bids in addition to the substantial cash is the excluded assets. The Hilco bid leaves more assets with the estate, and with that, Your Honor, the execution risk that comes with that and the Debtor does not wish to take that execution risk. It is not, in the Debtor's judgment, similar to cash. It would require effort and money to execute on that and it is

impossible to say whether or not those values would be realized.

In addition to the greater cash, in addition to being a higher bid, in addition to the testimony of the professionals retained by the Debtor, Houlihan Lokey, whose, I believe, credentials cannot be questioned here, this bidder, the winning bidder, Patriarch, has indicated that it desires to affirm the lease that the Debtor presently has at the Baker Road facility and to retain a number of the Debtor's employees. That is an important factor. It's not a financial factor but it is a factor in our judgment.

The creditors committee has, for whatever reason, determined that there are a number of so-called qualitative factors that result in their support of the Hilco Gordon Brothers bid. Your Honor, these LLC agreements were negotiated with the Debtor's counsel. Admittedly there are differences between them but these differences are not a difference which you can put a quantitative number on. Some are better or one might be better in one respect or one might be better

in the other respect, but the fact of all of this remains that we had a bidding process, we had an auction, we had the rules set up and to determine the winner we looked to the highest dollar amount. The Patriarch bid is clearly the better bid from a financial standpoint and we would urge this Court to approve the Debtors entering into that and we do not leave that whatever so-called qualitative differences that the creditors or others may see in these LLC agreements can justify the financial differences to this estate, particularly the cash that is coming to this Debtor and the elimination of the execution risk that is presented by the Hilco Gordon Brothers bid. Thank you.

THE COURT: All right. Very good. Thank you.

MR. CHESLEY: Thank you, Your Honor.

THE COURT: Go ahead, Mr. Chesley.

MR. CHESLEY: Thank you. Please the Court, counsel. At the outset I do want to thank the Court for its time today and

obviously both of those participants who actively participated in a very vibrant process and a very difficult market. At the end of the day, Your Honor, the issue is highest and otherwise best. We know that.

When I wrote my comments out, I had originally written out that we don't dispute that the Patriarch bid, according to the rules, was higher. In fact, based upon Mr. Spencer's testimony, Your Honor, we actually take exception to that as well based upon the calculation of the change made to the LLC agreement and the reduction of the preferred return of a $5 million a year difference. These are substantial amounts.

And with all due respect to the Debtor's counsel, Your Honor, this is return to the estate. The estate is the creditors in this case and we cannot lose sight of the fact that at the end of the day, as Mr. Spencer testified and everyone knows, this return goes to the creditors.

So let me talk briefly, Your Honor, because the creditors did consider all of these factors despite counsel's statement that

apparently we did not. We considered these issues with a very sophisticated creditors committee and with the insight of Mr. Spencer because, as the Court knows, we chose not to retain a separate financial advisor to preserve the estate's resources. So we're relying upon Mr. Spencer and talking to our committee and all of the other significant stakeholders who you have heard from today and potential stakeholders because that's an issue that will have to be resolved. All of those believe that the Hilco Gordon Brothers bid is highest now and otherwise best.

Let me talk for a minute, Your Honor, about why we believe that based upon the evidence. First of all, the cash difference is not as enormous as counsel indicates. The cash difference with cash and cash equivalents is $488,000. We heard argument about execution risk with respect to the lone excluded asset, the art. But Mr. Spencer didn't testify about execution risk. To the contrary. While Houlihan Lokey used a base of $6.5 million for every bidder on that asset, he testified that the Sotheby's valuation puts

that art at the between 7.3 and $11.3 million. The creditors committee did consider that value in making its qualitative determinations that this is the highest and otherwise best bid.

A number of other factors lead to this, Your Honor. The subjective or the qualitative differences in the LLC, these are not of the Committee's imagination. This is of Mr. Spencer's testimony as a very experienced financial advisor who has done deal after deal in this space. While the debtors may believe and Patriarch may believe that these are comparable provisions or comparable documents, the evidence doesn't support that and at the end of the day, Your Honor, that is of no moment here. This is, as Mr. Spencer acknowledged and the Court is well aware, the creditors' equity. And the creditors have, as they have stated today, a strong preference for all of the reasons we have articulated for the Hilco Gordon Brothers equity.

We've already talked about the elimination of the 10 percent preferred stake and the true monetary value that likely will

bring to the estate.

Also, there was undisputed evidence about Hilco's track record in this space. Sharper Image, Linens & Things, Bombay, large cases where they have done this. Their experience, their track record in identical deals was a significant issue that the Committee relied upon in making this determination that on an equity basis if cash got close, which it did today, the Hilco Gordon Brothers' equity was preferred.

And finally, Your Honor -- before I do that, there was another factor the debtors talked about and that is employees. We are a big proponent and we actually think there is economic value if employees are hired. The problem is Patriarch had every opportunity to make that abundantly clear in their document time and time again and it is not there. So statements that decide the Debtor's position on that recognize cannot be quantified we believe again is not supported by anything before the Court.

The last issue, Your Honor, is, at least for the creditors committee and some of

the other stakeholders of the creditors, perhaps the 800-pound gorilla in this room. The Court is well aware that this estate and those creditors, there may be a long road before we can distribute what has been reaped from the sale by virtue of litigation that may exist, claims that may exist and the process to get those resolved. We understand it will be contentious. We understand it will be costly. We understand it will be time consuming. Obviously, Your Honor, one of the factors that our committee did consider is the currency that would be available to deal with these various claims and these various pieces of litigation. Our committee deliberated on this long and hard and determined that the currency that they wanted to use based upon the stated preferences of those we have to deal with in the coming weeks and months and hopefully not years is the Hilco Gordon Brothers equity.

I asked Mr. Spencer, Your Honor, has he ever seen a case similar to this where the wishes of the creditors committee whose assets these are was not respected by the debtors in

a sale process like this. He's not aware of it, Your Honor. We're not aware of it. And we believe, based upon the enormous stake that these creditors have and all creditors have in this process, that the Court should deny the motion to approve the Patriarch deal and approve Hilco Gordon Brothers as the winning bidder.

Thank you, Your Honor.

THE COURT: All right. Mr. Runck?

MR. RUNCK: Thank you, Your Honor. Your Honor, as Mr. Chesley stated, in the creditors' view, Your Honor, the creditors are the entities that make up the estate in this case. This, the sale proceeds and all the components thereof, Your Honor, are the consideration for the benefit of the creditors, Your Honor. This is, in short, our money and we feel this should be our choice. And for the first time, Your Honor, in these cases the creditors have spoken and are speaking in a uniform voice. And to my knowledge, that's the first time this has happened in this case. I haven't seen the

creditors agreeing on anything, but today we agree that we prefer the Hilco bid over the Patriarch bid. The Polaroid committee feels that way. My committee feels that way.

Your Honor, we agree that valuing equity is a highly uncertain process. There's a lot of factors to be considered, both quantitative and qualitative. There's a lot of risks involved. There are substantial risks involved. And as a result of those risks, you have to take into account the form of the LLC agreement, the risks that may be involved and may be incumbent in being a minority holder in the new company.

And, Your Honor, you heard Mr. Spencer testify that he, too, like us, he prefers the qualitative factors in the LLC agreement provided by Hilco. The testimony is in the record that supports our judgment on this point, Your Honor.

The issues that were brought out during the testimony, Your Honor, is that in the Patriarch LLC agreement there's a higher risk of dilution in reduction of the minority interest.

Your Honor, in the Hilco agreement there's greater transparency. We get invited to meetings. We get to know what's going on. We receive audited financials. Your Honor, there was testimony that showed that Hilco has a lower need for operating capital in future capital infusions. That also reduces, Your Honor, the risk of dilution of our minority interest.

And very importantly to me, Your Honor, in the Hilco agreement there is a clear exit strategy. The LLC agreement itself provides a waterfall that tells us how the money will be distributed. It sets forth a priority structure that says every year there's going to be a distribution of income to the following people in the following amounts. The Patriarch agreement has no such provision. It says distributions will be made by the manager in the manager's sole discretion. Your Honor, that's just simply an unworkable provision and it requires us to have blind faith. And it's just something that we can't deal with.

With respect to, Your Honor, the

valuation of the equity, I would also point out, as has been pointed out many times before you today, that Hilco, as part of their last bid, they removed the preferred return on their initial capital contribution. And you've heard testimony that that increases the value to the company in the amount of $5 million per year. That's a substantial factor.

But, Your Honor, stepping back from the equity determination for a minute, just to simplify things from our perspective, even if you were to value both equity interests equally, even if Hilco and Patriarch's equity interests were valued exactly the same, the record before you, Your Honor, shows that the scales here still tip in favor of Hilco. And what I'm referring to is specifically the art collection.

The difference here, Your Honor, between the two bids is a net amount of $488,000. Under the Hilco bid the estate gets to keep the art. They've been given a credit in exchange for that in the amount of $6,500,000. You heard testimony today that

that art has been appraised within the range of 7.3 million to 11.3 million. Your Honor, even under the most pessimistic view under the appraisal -- and that appraisal, by the way, was conducted by Sotheby's. They know a lot better than I do what the value of that art is. Sotheby's is telling us the art is worth 7.3 to $11.3 million. Even under the low end range of that, Your Honor, if the art only takes in $7.3 million, that means the value of the Hilco bid goes up by 800,000 right there. That offsets the difference between the two bids in our view.

So, Your Honor, taking into -- well, then finally, Your Honor, then there's this issue regarding Stylemark. And I haven't seen whatever was filed under seal so I'm not going to comment on it, but clearly from the sound of people's comments today, that also tips in favor of Hilco.

So there are a number of factors, Your Honor, that aren't listed on the Debtor's Exhibit H. There are a number factors here that have been brought out in testimony that clearly tip the scales in favor of Hilco. And

like the Polaroid committee, Your Honor, our committee also favors the bid by Hilco and we believe that represents the highest and best value to our estate. Thank you, Your Honor.

THE COURT: Thank you. Give me just a second. Others, creditors first.

MR. LOWRY: Thank you, Your Honor. Gregg Lowry for Eyewear Brand and Stylemark. Your Honor, we filed a limited objection that raised some legal points dealing with the ability to sell the trademarks under 363(f).

THE COURT: Now, is this going to impact on the highest and best offer issue because that's what I want to hear?

MR. LOWRY: I'm so sorry. I don't think it really does, Your Honor.

THE COURT: Okay. Don't worry. You'll be heard on that --

MR. LOWRY: Okay. I didn't realize that. My apology, Your Honor.

THE COURT: -- when your time comes.

MR. LOWRY: Thank you, Your Honor. It usually does.

THE COURT: I'm trying to deal with this one thing at a time. All right. Mr. Krakauer?

MR. KRAKAUER: Your Honor, first, before on why we thought a sale was not appropriate, I take it you don't want me to repeat that right at this moment?

THE COURT: Not at this moment.

MR. KRAKAUER: Okay. That's fine.

THE COURT: I'm just trying to determine in isolation and maybe in the abstract the highest and best.

MR. KRAKAUER: I understand. So I'll make it brief. I'll address it in a hypothetical if you were to approve a sale today.

THE COURT: Right.

MR. KRAKAUER: Our view also is that the Hilco bid is much superior for all the reasons the creditors committees from both cases have said. I've been practicing a little more than 25 years. I don't think I've ever seen a case before where you've had every

single creditor constituency come down on an issue about valuing two bids and saying one is better than the other and a debtor go off in a separate direction.

And in this case in particular we're dealing with essentially a liquidation. This particular debtor, no matter which bid goes through, is not going to be around very much longer in present form. And I don't know what interest they're pursuing but it does not appear to be the creditors' interest as articulated by the creditors. And I think that is inconsistent with what is intended by the Bankruptcy Code.

As to the particulars on the various agreements, I think you've heard them before but I think you could also -- Mr. Chesley's statement that the value of the Patriarch equity is not viewed as highly as articulated by the debtor is a correct one. There are too many issues with it and one simply would not value it.

There are reasons, a number of reasons to value the Hilco equity much, much higher. And in essence, what you're doing so much is

not -- the important thing is not determining whether the point estimate is right so much of whether $650,000 is the right number in this particular circumstance. The issue is the relative benefits of each equity bid. And I think in this particular case there's no question that the Hilco one is superior on the equity component.

I will come back and speak later on the issue whether a sale should go forward. Thank you, Your Honor.

THE COURT: Okay. Thank you. All right. Hearing from creditors first here.

MR. TERRIEN: Good evening, Your Honor. Mike Terrien on behalf of Ron Peterson as trustee for Lancelot and Klosses (phonetic). I would adopt everything that my three predecessors have said about why the Hilco bid is a higher and better bid.

And just wanted to give you some perspective on why Mr. Peterson made the business judgment that he did that the Hilco bid is higher and better. And it really does boil down in large part to different -- to what have been described as the qualitative

differences. In the Patriarch agreement it's really a nonmarket agreement in a lot -- in many ways.

THE COURT: I'm sorry, it's a what?

MR. TERRIEN: A nonmarket agreement. It's an agreement that you wouldn't see -- well, I've never seen anything like that. I'll just put it that way. There are no checks. We're a minority shareholder with no rights and no checks under that agreement. There's not even a -- there's not even a requirement that we be delivered audited financial statements. There's not a third party overseeing how the financial statements are going to be prepared and ensuring us that we can rely on them. There's no participation rights in meetings or decisions. There's no oversight rights. There's no -- Hilco at least gives us the opportunity to observe what's going on. Patriarch expressly excludes us from any opportunity to observe what's going on.

With respect to dilution, we have 25 percent of the equity. But you heard the

testimony that on day two for essentially zero dollars that 25 percent of the equity can be diluted to, in effect, nothing. You have to divide by zero in order to work through the formula to determine what they can do to our equity. And when you divide by zero, you get nothing left. And I don't know what Patriarch intends to do. I can't speak to their subjective intent. But as a rational economic actor having reserved the right to buy this company one day and wipe us out the next, I don't know why they wouldn't. And I don't have any confidence that they won't and I wouldn't blame them if they did. Patriarch has its own investors to answer to. Why should it not exercise rights that it has to enhance its own value. I would expect that it would and I'm concerned that it will. And if it does, $16 million worth of the bid that was offered to this Polaroid estate will, in effect, evaporate. And even if they're not cavalier enough to do it to the point of completely eliminating our equity, the choice is theirs and we have nothing to say about it. That's not a position we're comfortable with.

Patriarch also has ability to control transactions with its own affiliates under this agreement. It's disclaimed that the business opportunity -- any duty in connection with the business opportunity doctrine in the document. It's made clear that it can enter into affiliate transactions. We've got no ability to see the economics of them, to see if they're fair, to see if they're market, to see if money that's coming into this new entity is being funneled off to Patriarch affiliates. We've got no way of overseeing that. There are express rights to keep that information from us in the document, give us no way to oversee that and no way to know that we're being treated fairly.

At the end of the day they have kept such complete control over both the ability to manipulate our economic interest and over the information that they have to provide us that they can do whatever they want to us and they don't even have to tell us about it. So that's $16 million we have real trouble ascribing any value to.

THE COURT: All right. Any

other creditor wish to be heard on this?

Mr. Rosow, I'm going to ask you. Does Acorn want to be heard on this?

MR. ROSOW: Not on this issue, Your Honor.

THE COURT: All right. Okay. Mr. Gordon, now, I ruled earlier there's a standing issue here. What do you think you want today?

MR. GORDON: Well, Your Honor, now I think what's happened -- this all goes now to the integrity of the auction process. I mean, we've just gone through an auction and now Your Honor's being asked to change all the rules of the game after the fact. There's no question that we have standing.

I would cite to Your Honor the In Re: Hat case where the Court made very clear if a bidder has issues with the way the auction is handled, which is what this directly goes to now, that we have a right to be heard on that issue. And I'd ask to be heard on that basis, Your Honor.

I will tell Your Honor as well that statements are being made about the LLC

agreements. They are simply not true and you're not being walked through the agreements. And I'm very concerned that -- and I know Your Honor's very careful but I think you're being put in a very difficult position of generalized statements are being made about documents but nobody's actually comparing them and giving you the fact that you can say one thing about the Patriarch document but it's in the Hilco document too where this $5 million thing, that's all a red herring. We never had the $5 million item to begin with. So all that did was bring that agreement back closer to our agreement. They're making it sound like it's a big sea change that should affect valuations. But fundamentally this now goes to the integrity of the process. It's, frankly, in my view, making a mockery out of the auction process we just spent the last several hours going through.

THE COURT: All right. That's all the more I'm going to hear from you right now. Okay? I'll ask you to take a seat before I determine whether I'm going to hear

you on anything else. Okay? All right.

Mr. Chesley, was there something you wanted to --

MR. CHESLEY: Well, I was going to respond to that but I don't believe it's probably necessary.

THE COURT: Mr. Uphoff?

MR. UPHOFF: Do I get an opportunity to come back to the podium?

THE COURT: Yeah, one more. Should have my head examined but I'm going to allow you to do that. And it has nothing to do with you personally. It just has to do --

MR. UPHOFF: I get tired of myself.

THE COURT: -- the amount of input at this hour.

MR. UPHOFF: I feel compelled to respond to a number of remarks that were made here today, Your Honor.

One, which troubles me greatly, is the statement that the Debtor has gone off in a separate direction. That, unfortunately, from their perspective is not the case here. The Debtor --

THE COURT: From whose perspective? You're saying they.

MR. UPHOFF: From their perspective I do not believe that they are right. I believe that we, the Debtor, has held true to the course. We set up the rules. The rules were clear. The creditors committee and their counsel and their consultants all agreed on the rules and now we are really in a totally different scenario as far as I'm concerned. And I will just say one comment from --

THE COURT: Let me ask you about this. I mean, I'm starting to develop a few thoughts about this here. We had a bidding process here today that was designed to quantify consideration that had monetary value and to ascertain what each party wanted to come forward and to furnish by way of monetary value. But then we had this separate and parallel process that the Debtor undertook to put the legal infrastructure attendant to receiving equity as part of that consideration into place, right?

MR. UPHOFF: That's correct.

THE COURT: And that consisted of, in the first instance, the asset purchase agreements but, more importantly, the LLC agreements because that would structure up the legal incidence of being a minority shareholder in the successor entity, the purchaser of the assets. Now, the Debtor did that with both sides but didn't smash the two bidders against one another to arrive at the very same incidence of ownership.

MR. UPHOFF: That is correct.

THE COURT: The LLC agreements are different in terms of the legal attributes in the various ways that have been identified here by the creditor constituencies, the legal attributes to being a minority shareholder. Now, given the fact that this really did not end up being a complete apples to apples arrangement in terms of that array of legal incidence to being a minority shareholder, I'm not sure that there was a rule per se that would say that the prevailing bid that arrived at just the dollar value had to be the winner that I had to approve. I mean, if you can tell me to the contrary in any of the

operating rules of this, if you can point to me something specific, fine. But I am being pitched here the argument by the creditors constituencies that I should consider, number one, their wishes since they are going to be the goat here. Their successor, a liquidating trust, some type of post-confirmation entity if a plan is confirmed in this case is going to be the successor in interest to that minority shareholding and is going to have to live with that and at this point wants to reap maximum benefit to that shareholder. And they're saying that benefit is to be considered not just in terms of the raw $650,000 per unit valuation that Houlihan Lokey quantified for it, it's also to be considered on an ongoing basis in terms of the right to participate and basically, to put it sort of bluntly and dirtily, the right to minimize the likelihood of being iced out, frozen out, oppressed as a minority shareholder in this new entity and that's formed through a legal infrastructure.

Now, the Debtor went ahead with both of these parties and negotiated out those terms

but they aren't the same. So I'm not sure how I can be told that I can't consider that and consider their wishes in connection with that as part of the calculus in determining what the highest and best offer is that's at bar here.

That's sort of where I'm coming to after hearing this whole thing out over the course of the day.

MR. UPHOFF: I think that's correct, Your Honor. Let me tell you what bothers me a great deal and I think you heard Mr. Gordon earlier today. For whatever reason the creditors committee has never bothered to speak directly with Mr. Gordon about Patriarch's LLC. That would lead me to believe that this hullabaloo, if you will, about we are so in love with this LLC but we can't live under this LLC is, frankly, a red herring. If it was so important, it would have merited one phone call. And Mr. Gordon, and I believed him when he said today that not one word, and that's what bothers me again about the rules.

The rules were from my perspective,

$650,000 per equity. Houlihan Lokey arrived at that in consultation with all of the constituents. The debtor I think has been a tremendous steward for these creditors. We've driven this from 42 million to 88 million. But the suggestion that we're going off in a separate direction is one that, frankly, I resent. If anyone's going off in a separate direction here, Your Honor, it is the creditors committee.

I will use as an another example the art. During the auction process everyone agreed the art is going to be assessed at this value. Now we have coming up here well, maybe it's worth 7 million, maybe it's worth 11 million. Your Honor, maybe it's worth 2 million when you got done with the commissions and the costs of preserving this art until it's sold. Maybe. But everyone agreed. We put a number on it, six million five. I do not appreciate people coming up here and saying, well, now we're going to put a different number on it.

And, frankly, I feel that way about the LLC issue. I really honestly believe that the

creditors committee is making this an issue that really doesn't belong here.

THE COURT: You say it's a red herring but, you know, red herring, going back to the classic analogy, is supposed to lead the bloodhound off in a different direction.

MR. UPHOFF: Yeah.

THE COURT: Right?

MR. UPHOFF: True. You're right.

THE COURT: Because it is a rather distinctive smell. But where are we leading them away from and where are we leading them to --

MR. UPHOFF: Here's an example --

THE COURT: Your imputing your opponents with something but I don't know what it is.

MR. UPHOFF: They made a big issue out of eliminating the preferred today and this is $5 million more to the estate. Well, the reality is until they did that, it was $5 million worse than the Patriarch LLC.

THE COURT: But they both

still ended up cashing out the way they did up to that point.

MR. UPHOFF: I understand. But the reality is this did not change this auction process one bit. Houlihan Lokey isn't putting a penny on that as an addition. If anything, it brings them in line with Patriarch.

Your Honor, the Debtor has run this auction with as much vigor as it possibly could summon. We have gotten the highest value, so much higher than anyone anticipated. And as far as I'm concerned, from the rules of the game here injecting the LLC because it has some provision here or some provision there that we like better than this one or don't like as well as that one, if that were really an issue, if that were really an issue, one person from the creditors committee would have, sometime in the last ten days, made one call to Patriarch. That did not happen and that's why I do not believe that it is an issue here which should drive this decision. Thank you.

THE COURT: All right.

MR. CHESLEY: May I, Your Honor?

THE COURT: You may.

MR. CHESLEY: One point and one point only.

THE COURT: Calmly.

MR. CHESLEY: I will try.

THE COURT: You've been straining at the bit.

MR. CHESLEY: I have, Your Honor.

THE COURT: Take a deep breath.

MR. CHESLEY: Because of the aspersions that have been cast. Had counsel talked to his partner, he would have learned that, in fact, what we did in lieu of staying away from talking to the specific parties, we used the Debtor as the conduit with respect to our comments repeatedly to the LLC agreement. I have the string of e-mails, Your Honor, where we forwarded our e-mails to Mr. Singer who forwarded those on to Patriarch who did exactly what we asked in some occasions, some they did not. They responded to comments. We

review those and use the Debtors as a conduit so we would not be dragged in the middle.

THE COURT: This isn't the first time that's been said, for the record.

MR. CHESLEY: I would like counsel, please, who was involved in that process to confirm that.

MR. UPHOFF: I'm aware of that and I will confirm that. It's just that there was no direct contact between the creditors and this bidder which, under a normal circumstance, Your Honor, I would say I would.

THE COURT: I think everybody wanted a little more orderliness going through this process, among other reasons because of the way in which the auction went forward.

MR. CHESLEY: Exactly. We had no contacts with the Hilco Gordon Brothers team either, Your Honor. We ran this process exactly how we said we would do it. So I do resent that aspersion that the Committee did not consider this, the Committee did not think this was important. Far to the contrary. We have had meeting after meeting where we had analyzed these issues and discussed these

issues. And for the Debtors to say that they're right because they're right and the creditors are off on their own because they don't agree with the debtors, Your Honor, simply ignores what this is about. The creditors have made a decision and they stand in unison before the Court.

This is not an issue, Your Honor, of looking at a provision to a provision. It is the totality of the experience and the deliberation of everybody from Mr. Peterson to our committee to the Petters committee to Ritchie as to which we believe is the highest and otherwise best.

Let me just make a final comment with respect to the art. I didn't bring the art up. Counsel brought the art up when they raised the issue of execution risk. There was no testimony of execution risk. The only testimony was Mr. Spencer. He was the witness, Your Honor. He was the witness who talked about qualitative differences, differences that are in two bids that are very, very close on a dollars to dollars basis. If this is an issue where the LLC

didn't matter as counsel seems to allude, then why did everybody spend so much time working through it, negotiating it and trying to reach a conclusion? The answer is everybody thought it was important because, as counsel indicated, Mr. Terrien said this is $16 million. This is real consideration, real currency of the stakeholders. We take it very seriously. We resent any aspersions that we have not and it is the reasoned decision of the creditors committee whose equity this will be perhaps to be shared with others, that is the highest and otherwise best bid. Thank you, Your Honor.

THE COURT: All right. Anybody else want to be heard on a second round? All right. I'm not going to hear either of the two bidders out as to the incidence of their bid here and as to the legal incidence of the LLC agreements going forward.

In considering this I am, first of all, mindful of the fact that the creditors' interests are in the driver's seat here. There's no question about it. The debtor, as

debtor in possession vested with the powers of a trustee and the fiduciary obligations of a trustee, brought the process forward and it ended up in the last instance leading to a rather powerful engine for the augmentation of value recovery for the estate. As measured against the original stalking horse bid, the amount of dollar value to be attributed to either these bids is very close to or slightly more than on a net basis the original -- twice the original amount of the original stalking horse bid. So the process was definitely worth it going through.

Now, the real question here that's put at bar, and this is the issue I'm addressing here, is what is to be considered as the highest and best offer. The case law makes that sort of the driving consideration here. What gives the most bang for the buck.

Now, when you're talking about a pure liquidation, reduction solely to cash or even reduction to cash equivalence that can be objectively quantified as to value, that's relatively easy. I'm going to hold that that's not the sole consideration here in the

calculus as to highest and best offer. The reason being, of course, because of the structure of the bids that have been made by both sides and really brought up to the designated maximum in terms of significance in the structure of the bids by both sides, we're talking about the equity.

The successor to these debtors going forward after confirmation of a plan, whatever that successor is going to be under a plan, some kind of post-confirmation trust, liquidating agent or whatever, this is generally done where a debtor in possession going through Chapter 11 does not carry forward on an operating basis and does a liquidation of its operating assets but then has additional legal business to be done or additional financial business to be done, collection, realization on future revenue streams and the like or has to go through litigation to collect on intangible assets in the form of causes of action. That all ends up being vested in an independent third party that in some respects functions as a successor to an unsecured creditors committee, in some

respects as analogized to a trustee in bankruptcy, has some kind of independent specific duty to maximize realization, to vigorously reduce everything down to cash, and eventually to make a distribution to those who are entitled to it by way of creditors claims and then down to equity in the debtor if there is any surplus.

Now, that entity going forward under both of these offers is going to have a piece of the rock in the successor entity. It's going to have, at the outset, a 25 percent minority equity share, shareholding of some sort in the entity that would buy these assets and then go forward in some form of business operation.

Now, the form of business operation has already been vetted and I'm not even going to get into that. And I know there have been some rather fervent pleas that one bidder proposes to maintain some kind of local infrastructure in Minnesota to continue to employ Minnesotans. And then there's been the accusation that the other one doesn't intend to do anything of the sort and will run a

fundamentally different operation.

Those considerations aren't really at play here since we're not looking at 100 percent realization from the sale of these assets in distribution on account of the universe of claims here, at least insofar as I understand it at this point. Those considerations, the community considerations are powerful ones but they don't drive the process.

Contrary to what those in the media say, the bottom line in Chapter 11 is the interests of creditors, those who have made the original investment in the business that then has failed, has gone through severe distress. They are the stakeholders in the process first and foremost with the primed right to consideration here.

So analogizing this, among other things, and this is a thought that popped into my head actually during counsel's closing argument, the Eighth Circuit almost a hundred years ago in passing on approval of settlements by bankruptcy estates in Drexel v. Loomis and an even earlier decision, the name

escapes me at the moment, said that in terms of comprising down a dispute in which a bankruptcy estate has a right of realization, a claim against a third party or whatever, the Court is to consider the paramount interests of creditors and their reasonable wishes under the circumstances. Well, any settlement of a cause of action is a disposition of property of the estate. And taking into mind that same general consideration, the interests of creditors and their reasonable wishes under the circumstances, I think that's a very close approximation of the language that the Eighth Circuit used in the days of our grandparents in Drexel v. Loomis. I think you can take consideration of that and certainly have the right to not only in terms of their participation as parties in interest in a more abstract way but you also, in a situation like the one at bar, the Court has to take into consideration those creditors' wishes as to the nature of the risk that they're going to be carrying going forward as minority shareholders in a successor entity that holds these assets.

As a minority shareholder, the successor in interest to the creditors, a trustee, liquidating trust, whatever, is going to hold a piece of the rock in that new entity which is another asset that has to have both a current fixed value and obviously has certain future rights. Equity in a business entity produces not only the possibility of selling that equity, that shareholding, that piece of the rock for a lump sum to somebody else, it also holds the prospect of sharing in distributions from the profits. Just as any shareholder in a corporation has that right, the equity in any latter days form of business organization, limited liability companies and the whole array that the legislatures have created over the last 20 years, has the right to that and the question is the risk to that going forward. And that's where the hard headed evaluation by creditors constituencies should be considered. And under the circumstances, that's a rather powerful factor in the case at bar.

All of the creditors that have arrayed themselves behind the Hilco Gordon bid here

are hard headed. They're all sophisticated parties, the membership of the creditors committee, as well as an experienced trustee in bankruptcy who I believe is chair of the committee in the Petters group case at least, and they all have arrayed out as to one position on this question of which is the highest and best offer.

Now, the question that's presented to me here is in the first instance am I to consider only the quantified dollar value of the bidding going into the question of what's the highest and best offer or should I be considering those alternate separate attributes going to one component of the consideration. And it's my conclusion that I can't ignore them. I can't ignore the fact that this is I'm going to be a minority shareholding in a privately-held company. It's not going to be readily fungible, salable on an open market. So the attributes, the protections to that minority shareholding have to be a very powerful factor for consideration here.

I am going to conclude that it's not

necessary for me to do a point by point, blow by blow, provision by provision review of the two LLC agreements. This is not really completely an issue of law. I am content with deferring to the judgment of all of these creditor constituencies that the equivalent 25 percent at the outset shareholding to be given in the successor entity to be formed by Hilco Gordon has more attractiveness from the standpoint of the protections to be given to a minority shareholder up front legally speaking as set forth in the form of the LLC agreement. And I am content with giving deference to the ones whose money it is after all that we're dealing with here.

This is not going to be the Debtor's money. I am not going to impugn in any way what the Debtor has done going through the process here. The Debtor has dealt with an extremely fluid situation in very trying economic times. I've already made my remarks about what happened at the auction and how I am not faulting the Debtor for the fact that the auction conducted at the Lindquist & Vennum offices was rather tumultuous. I think

there were reasons why more hard and fast rules weren't established in the first instance, and as it came out, there weren't going to be all cash offers which I suspect is what the debtor was really trying to ferret in the first instance and to channel the bidding that way was going to end up involving equity which, yes, does end up involving a risk. But there's already been testimony here from Mr. Spencer and as well as representations by lawyers that that is the way it's going nowadays. Cash is more scarce than it was a few years ago in part because that cash wasn't really quite real to very many people as real as it is right now. So equity stakes are coming forward and that's the way it came forward here.

And over the course of long hard bidding today, both of those equity stakes bumped their way up to the maximum and they sort of locked out there and I don't blame at all the Debtor or the Committee for wanting to put that kind of cap on it at this point in an effort to ferret out as much of a cash component of as high a value as possible.

But so you came forward with this kind of equity stake proffered. So the real question is, then, what is the future value, the future attractiveness of that equity stake. And it follows as sure as the sun comes up in the morning that if there are more protections afforded up front to that equity stake, that it's going to be more attractive to a future purchaser if the successor on behalf of the creditors decides to sell that in the future. And on an ongoing basis there's more protection by way of guaranteed access to relevant information, guaranteed access at least by way of observation to decision making processes, and what has been identified, I believe, as the waterfall, if I'm remembering the metaphor correctly, the identified and specified future, contemplated future distributions out of future revenues.

I can only take the way that this has been structured completely outside my purview and necessarily so. I could have no part in demanding of anybody that these LLC agreements be structured in a specific way and I certainly couldn't demand of anybody that they

be negotiated out to be identical.

MR. GORDON: Your Honor, I'm sorry to interrupt. To make it easier for you, Patriarch will accept the Hilco LLC agreement. We'll just accept it because we don't see them as materially different. We'll sign it.

THE COURT: I'm making my decision. It's a little late to be forthcoming with that. I closed my record.

So the upshot of all of this, what we have here is bids that vary by $488,000 in terms of raw cash value but we have all of these other attributes that are at issue here. The constituencies that really are far more in the driver's seat in terms of protecting their own interests and protecting their own future interests attach significantly more value to the structure of attributes that was forthcoming from Hilco and Gordon. And under the circumstances, they opine and argue that that outweighs the raw dollar value there even if without consideration of the several other factors.

And you've got the factor of the

concession that was late coming, yes, going to the distribution rights on account of any preferred equity generating potentially $5 million toward the bottom line in the successor entity in the first year as well as the various other factors that have been quantified in here, the estate's reservation of the art collection. And I full well, you know, see that this one cuts both ways. We're at a low ebb in terms, I'm sure, of marketability of art, but on the other hand, the attribution of value to it is something that's been done already.

All factors considered here, I am going to hold that as presented, when I closed the record and heard all argument here, taking into consideration the reasonable wishes of the creditors under the circumstances and quantifying everything tangible, the tangible values and taking into consideration the opinions of the stakeholders here as to the enhanced value of the LLC agreement attributes, I'm going to hold that the highest and best offer is that made by Hilco and Gordon Brothers. And that will be the basis

from which we go forward here to resolve the rest of this motion.

So that's my ruling based on that rationale. All right. Yeah, Mr. Singer.

MR. SINGER: I saw you looking at the clock and we obviously have this motion we need to deal with and there are several other pressing ones that are time sensitive but I'm hoping the Court will indulge us to get through but I hope that can happen rather quickly. But if the Court will indulge us for further two minutes to confer with our client and talk to the creditors committee, I think that would be productive as well.

THE COURT: Yeah. I was going to say I guess I'd like an idea here as to where we're going to go from here. I know for sure you're going to want me to hear the motion for extension of the exclusivity period and I don't want to forget that but we need to kind of determine what else. I've already made arrangements with building security to make sure that we are protected and secure until at least 7:30 and we'll go beyond that if necessary but I do hope we don't have to.

All right. Let's take five minutes here.

(A break was had in the proceedings)

THE COURT: All right. Let's get on with the remainder of the business here, then. Mr. Uphoff?

MR. UPHOFF: Your Honor, at this time the Debtor will move the approval of the Hilco Gordon Brothers bid.

THE COURT: Very good. Based on the ruling I just made, I'm going to approve that bid without reaching other issues and specifically the whole Stylemark issue.

MR. UPHOFF: Thank you, Your Honor.

THE COURT: But in terms of highest and best offer, that is what I am going to -- I made that determination already so I will approve that bid. I'm not authorizing the Debtor to carry forward quite yet.

MR. UPHOFF: I understand, Your Honor.

THE COURT: It comes with the

motion. Okay. Let's see. Who's on first here?

MR. LOWRY: I was going to come -- go on for the sale. Is that what the Court wants to take up now?

THE COURT: Yes. Do you have something to say that's going to make it a little easier?

MR. LOWRY: Yes, sir.

THE COURT: That would be a first. Not from you. Not from you. Not from you.

MR. LOWRY: Come up here otherwise.

THE COURT: That would be a first in this case.

MR. LOWRY: Yes, sir. I understand. Your Honor, as an --

THE COURT: I really don't -- I try not to be nasty to lawyers, you know.

MR. LOWRY: Thank you, Your Honor.

THE COURT: We're all playing in the same band.

MR. LOWRY: We need to have

you move down south.

Your Honor, as announced at the commencement of the day, my clients Eyewear and Stylemark, entered into an agreement on April 15, yesterday actually, with the -- I guess it's called PLR Acquisition LLC. The new bidder, the winning Hilco bidder. That in part resolved the objection that Stylemark had and Eyewear had, create various terms and conditions related to payment of royalties and alters relationship and creates first options as mentioned before by Hilco's counsel.

And that agreement also, as far as the bankruptcy estate goes, results in the so-called Eyewear license agreement being assumed and assigned the purchaser the various consents given by Polaroid to sublicenses and other licenses being, if it's the right word, assumed and assigned or ratified and brought forward by the purchaser. There's a membership agreement and bylaws related to the Eyewear -- or the company we talked about, Eyewear (unintelligible) that will be assumed by Polaroid and assigned to the Hilco purchaser.

And with that agreement being effectuated, Your Honor, our objection to the sale will be resolved. So I'm pleased to announce that to the Court. I have the agreement here. I have a copy if the Court wants it but it's available but that's the consensus of it. And I defer to other counsel to correct me -- and of course, we would want to see the order and counsel for Hilco agree that we can make sure the sale order incorporates those terms.

THE COURT: All right. So noted. Okay. Anybody else have a mind to make things simpler before we go forward?

MR. TERRIEN: I hope to God I'm not making them more complex. I just wanted to note what I believe are two reservations that have been agreed in the record. One is that the transfer of the domain names to Polaroid, the question of whether there's any value to that and what the value is, I believe, has been reserved.

And in addition, I believe that the question of which Polaroid estate of the beneficiary of the proceeds of the sale has

been reserved. And if anybody wants to correct me, please do but I believe that's the understanding that everyone has.

MR. SINGER: Your Honor, I can perhaps help. It was my expectation after the sale motion to quickly move through the remaining motions and address -- that is a motion brought in connection with PGW bankruptcy case in conjunction with the sale. It's my plan to do that motion next, reconfirm what I believe he said is accurate and (unintelligible) I believe accomplishes what he seeks.

MR. TERRIEN: That was only one of the two items. The other item was reservation on which of the Polaroid entities will receive the proceeds or how they'll be divied up.

THE COURT: And I don't know that anything, at least to my awareness, has really been specified as to that. And these are jointly administered cases, not substantively consolidated.

MR. SINGER: That's correct, Your Honor. There's complete preservation for

later date to deal with who gets what.

MR. LOWRY: Your Honor, just so I can understand because I don't want to leave confused. The domain names that are attributable to our license I understand are going to be coming to us through this license. I'm not sure what the reservation is. Is it just on the proceeds of the sale? Is that what we're talking about?

MR. TERRIEN: It's on whether the PCI entities have a group to some specific component of the proceeds because of the value of those that's been transferred to them.

MR. LOWRY: So it's really the reservation of the proceeds?

MR. TERRIEN: It doesn't prevent you from getting them.

MR. LOWRY: Thank you.

THE COURT: Your client will still get them fully and finally.

MR. LOWRY: Fight over the money.

THE COURT: Right.

MR. LOWRY: Thank you.

THE COURT: All right. Let's

see, Mr. Krakauer.

MR. KRAKAUER: Your Honor, I can't say I'm going to make it easier for you but I'm going to make it brief. Last time the hearing before this obviously made some arguments on behalf of Ritchie about the fact that the sale should not be -- take place at all, that there are alternatives. I just want to say we still are of that belief, frankly. We think that there are alternatives that in bankruptcy sale, 363 sale should not be approved to this context unless you have explored all the alternatives and the alternatives in terms of the plan are not doable. The testimony by Mr. Spencer today was that there is a possibility and it is achievable to do a branding alternative for this company and our position is that it should have been done, first point.

Second point, simply we've made the point last time our credit bid that it should have been allowed and it should have been a process for us to prove up our claims and have our credit -- have the ability to credit bid -- we did submit a bid together with Acorn

and Lancelot and that was not accepted as qualified by the debtor and we think that was inappropriate or wrong.

And then third, I think that there's no terms of the way this done, made the point before about the various conflicts in those cases. We don't think -- continue to don't think they've been appropriately handled. There were some -- a little bit of testimony today about the notes and who was really representing those notes and I think the unclarity of that is also indicative of an inherent problem.

There is a trustee election in the PGW case scheduled for next week. There's also a motion that's going to be argued tomorrow in the receivership case as to whether or not Mr. Kelly should continue as receiver for entities. Our view is that those issues should have been worked out first before a sale was also approached.

And finally, on WCD, the real estate venture, I don't need to address that because at the last hearing was made clear that that asset is not included in the sale and there

were, as I indicated last time, representations made to us previously about that being a considerable value and it is something we do intend to try and find out what the status is after the sale. So it's not really (unintelligible). So I tried to be brief, Your Honor, but those are my points.

THE COURT: All right. So noted.

MR. KRAKAUER: Thank you.

THE COURT: Get to them in due course. All right. Mr. Singer?

MR. SINGER: Your Honor, I'll move expeditiously. It seems to me that where we're at, as I understand things relative to the sale motion, is Mr. Krakauer has proffered an objection dealing with 363 credit bidding and I believe there's some objections by Acorn and Mr. Krakauer also addressing the bona fide dispute issue.

You know, as this Court's fully aware, that issue has been argued on a number of occasions. Our papers are very detailed and thorough about a response to that and unless the Court wants to hear some additional

argument, and I'm suspecting that it doesn't, you know, I want to reiterate and incorporate all of the comments and arguments that we made in response to the objections.

With that, I think the remaining objections to the sale have or will be resolved through a final sale order. I think there is an objection from Michael O'Shaunessy that has been resolved through language that has been agreed upon in a sale order that will be submitted to the Court tomorrow. Mr. Hettler has no standing objection. Mr. Hettler has not been in these proceedings to advance that objection and, in fact, it is written in submissions as indicated that he does not intend to.

Briefly, Your Honor, Mr. Hettler has been determined by two courts to not even hold a claim in these estates or have any interest in the notes that form the basis for his objection. And particularly in light of his presence here, we would request the Court overrule those objections.

THE COURT: I'm going to rule on that right out of the gate and I will

overrule Mr. Hettler's objections on just the bases that Mr. Singer referred to that were developed fully in connection with the Debtor's responses to the objections. Go ahead.

MR. SINGER: Nikon and Oracle as I think were present and Mr. Moyer is also here, we've reached agreed upon language in a court -- for the -- that form the basis for an order. Again, I will circulate it to Mr. Moyer and counsel for Oracle who I believe have already signed off on the language but before submitting the order, I will once again circulate it to them again to make sure that those are adequately addressed.

There are several objections from Summit parties, essentially a consolidated objection. I believe those objections have been resolved completely with agreed upon language between Hilco and the objecting parties that have been -- language has been circulated again which I anticipate to incorporate into the Court's order.

With that, Your Honor, I think that resolves, if I'm not mistaken, all of the

objections, you know, but for the persisting objections to the extent they are relative to Acora and Ritchie. I'm sorry. I think those are the only two ones that require the Court's attention. And, you know, I'm prepared to deal with other motions unless this court wants further discussion on that.

THE COURT: All right. Let me see. Let me ask Mr. Rosow what he wants to put on the record in relation to any current status of Acorn Capital's objections.

MR. ROSOW: Thank you, Your Honor. As Mr. Singer noted, Acorn continues its objection on the issue of whether the sale can be conducted free and clear of Acorn's liens. Contrary to Mr. Singer's suggestion, however, this issue has not been argued to the Court. This issue has been presented to the Court in written submissions over two months ago and it has been continually delayed.

The Court has articulated at prior hearings, most notably the March 26 hearing on the motion for a protective order in connection with the deposition schedule for Mary Joffries and David Baer, a standard to be

applied. And it's my intention today or at the time that the Court feels appropriate to analyze the issue of whether a bona fide dispute exists under the standard that the Court has articulated.

Moreover, there are new arguments that were raised in Polaroid's responsive memorandum, the responsive memorandum that was filed on April 3 after we had filed our objection to the motion. There are also issues related to PACT Funding and the consent that is required in order for the sale to go forward.

Finally, there are issues related to the language in the proposed sale order under 363(m) and whether that language is appropriate. All of those issues have been raised by our moving papers. I'm prepared to deal with those issues now.

THE COURT: Deal with them now and quickly.

MR. ROSOW: Well, Your Honor, the Court on the -- at the March 26 hearing articulated a standard for determining whether or not a bona fide dispute would exist. It

said that it would consider the complaints under a 12(b)(6) analysis. The Court came to this conclusion after reviewing the Gaylord Grains decision and specifically the language in the Gaylord Grains decision that focuses on the issue becomes whether there's bona fide dispute.

Focusing on that language, the Court noted that the filing of an adversary complaint would not necessarily create a bona fide dispute but concluded that the standard to be applied in determining whether a bona fide dispute would be the 12(b)(6) standard. The Court cited to the Bell Atlantic v. Twombley case, a recent Supreme Court decision, which rejected the heavily criticized prior standard that used the no set of facts language. Instead, the Bell Atlantic court said that the complaint must contain factual allegations that show a right to relief above a speculative level and stated that a -- to state a claim the relief must be plausible on its face.

In addition to the standard set forth in Bell Atlantic, the Court also needs to

consider the 9(b) standard from the Federal Rules of Civil Procedure incorporated in through Rule 7009 into the bankruptcy rules. That rule requires that averments of fraud be stated with particularity. That ensures that the defendant, Acorn in this example, has fair notice of the grounds and claims and has an ample opportunity to respond to those.

Moreover, the complaint, and this comes from the Bell Atlantic line of cases and the Reshold Associates in Northern District of Illinois case cited in our pleadings, say that there must be more than conclusions and formulaic recitations of the element of cause of action. In other words, the complaints must articulate the who, what, where, when and why of the allegations.

Finally, allegations that are made on information and belief do not comply with the specificity requirement unless they're accompanied by statement of facts providing the basis for that belief. That's the Interlease Aviation Investors case, 257 F.Supp.2d, 1028, a Northern District of Illinois case.

Applying those standards to the case at bar we have to look at two claims, a claim for actual fraud and a claim for constructive fraud. Under the actual fraud claim, the debtor must show facts that Polaroid engaged in the relevant transactions with the actual intent to hinder, delay and defraud.

If we look at the paragraphs of the complaint, we first turn to paragraphs 54 through 57. Those are the actual fraud claim complaints. Those paragraphs are merely a formulaic recitation of the elements of the cause of action. They state no actual facts. They state things like the debtor's engaged in the following transactions with the intent to hinder, delay, and defraud. That is not a factual allegation. That's a legal conclusion. It's a more recitation of the facts. On those paragraphs the complaint fails to state a claim. And under the Court's articulated standard, there's not a bona fide dispute.

The closest the complaint comes to making a factual allegation on the actual fraud issue is in paragraph 45. Paragraph 45

of the complaint starts out by saying on information and belief, the Acorn Capital collateral documents executed and delivered by Thomas J. Potters on behalf of Polaroid's Acorn Capital prior to or in connection with the PACT Funding transactions were part and parcel of a continuing scheme and conspiracy to defraud legitimate --

THE COURT: I'm going to warn you, Mr. Rosow, you're going to be on sudden death overtime here. You're not arguing a motion for dismissal under Rule 12(b)(6).

MR. ROSOW: That is correct, Your Honor. But we are arguing that no bona fide dispute exists. And a standard that the Court has articulated is --

THE COURT: Go on. Stop wasting time haggling with me over whether I'm going to cut you off or I will right now and just rule on the basis of your written submissions. It's been a long day.

MR. ROSOW: It has been a long day, Your Honor. And we've waited two months to make these arguments. We've waited patiently --

THE COURT: Stop. Get on with your argument right now.

MR. ROSOW: We believe that the allegations that are made on information and belief as set forth in the complaint are insufficient to form the basis to find that there's an actual bona fide dispute. We believe that the analysis, and I'm prepared to go through it, applies both to the actual fraud and to the constructive fraud claims.

Other courts considering such allegations in this context have ruled that when you're making fraud claims based on information and belief, that you cannot make those claims unless you can point to actual facts giving rise to a valid claim. That's the Interlease Aviation case. The Polaroid defendants have not done that in their complaint, and because they have not done that in their complaint, they have not stated a claim and they cannot survive under the standard that's been articulated in this case.

We believe the same analysis applies to the constructive fraud claims. The allegations made are mere recitations of the

facts. They have not analyzed reasonably equivalent value. They have done no comparison of the value that was provided to Polaroid and the value that Polaroid gave in connection with these transactions. There are no factual allegations on those issues and because they haven't done that, they have failed to meet and provide the factual allegations for that element of the cause of action.

Additionally, they have failed to allege any facts that would support the insolvency allegation that is required under a constructive fraud analysis.

This viewed in particularly in the context of the evidence that's in front of the Court in the form of the affidavits supplied by Marlin Quan which states that at the time these transactions were entered into, Polaroid provided financial statements that showed that it was solvent requires the Court to find that there's not a bona fide dispute here.

There are new arguments that were raised by Polaroid in connection with its responsive memorandum under 365(f). I have

not had an opportunity to in writing to respond to these arguments but I think they're both procedurally and substantively inappropriate. It's procedurally inappropriate to raise new arguments about selling free and clear of a $275 million lien the day before the hearing on the sale hearing is scheduled. It's inappropriate to make that argument seven weeks after you initially made your proposal to sell free and clear of Acorn's lien.

Substantively, it's inappropriate because the courts in the Clear Channel case, the courts in General Hearing Corporation, the court in In Re: Becker Industries, I can provide the Court with cites to all of these cases, reject the analysis provided by and the position provided by the Debtor in this case that 363(f) permits the sale free and clear if a cram down is permitted and says that that reading of 365(f)(5) would swallow up the rest of the provisions of 365(f) and cannot be permitted.

Moreover, the courts that have considered this have said that if you -- the

Congress wanted to include that kind of broad sweeping language, it could have simply referred to 1129(b) but chose not to do so. And having chose not to do so the Court should reject any attempt to justify the sale of assets free and clear under 365(f)(5).

We've argued on the standard and we've argued about the standard to be applied here in the context of this motion. We've argued that an evidentiary showing needs to be made. The Court has rejected that position at prior hearings.

We ask the Court to look at the In Re: Octagon Roofing case. It's cited in our papers and in the In Re: Robotic Systems cases cited in our papers. In both cases, adversary proceedings had been commenced prior to the bringing of a 363 sale and the Court in both of those cases held evidentiary hearings. It sought the testimony of witnesses. It looked at evidence. It looked at documents and only after considering those evidentiary submissions did the court authorize sales in those cases.

We believe that in this context the

Court should permit testimony. We would encourage the Court to do so. We would encourage the Court to permit us to call Mary Jeffries to the stand to ask her questions about what evidence she has for the allegations made in the complaints. We expected that the Court is going to deny that request but we make it nonetheless.

Turning to the issue of PACT Funding's consent. PACT Funding has an Article 9 security interest in Polaroid's assets. That sale, the sale that's being proposed here today, cannot be made free and clear of PACT's lien without PACT's consent, without the other showing under 363(f). PACT has not affirmatively consented to this sale and it cannot consent to this sale for reasons that are set forth and explained in our written objections. I.

want to touch on one of those issues and that's the issue of conflicts of interest. In connection with this proceeding Lindquist & Vennum represents both Polaroid and PACT Funding. It is PACT's -- not in PACT Funding's interest or in the interest of PACT

Funding's creditors which Acorn is the sole significant creditor to permit the sale to go forward unless PACT Funding is paid. Lindquist & Vennum acting for Polaroid attempts to avoid this issue by arguing that PACT Funding has not objected and, hence, has consented to the sale. PACT Funding, however, at this time cannot object without exposing Lindquist & Vennum's current and actual conflict of interest.

At the hearing on the objection to Lindquist & Vennum's retention as counsel for Polaroid, Lindquist & Vennum stated they will report to the Court any current conflicts of interest that arose with representation of Polaroid. The Court further commented that other parties could bring such issues to the attention of the court.

I take this opportunity at this point to bring this issue to the attention of the Court and ask that the Court not permit the sale to go forward without PACT Funding's consent which can only be attained by also -- by having PACT Funding represented by independent counsel that evaluates the

interest of PACT Funding.

Finally, moving to two specific provisions of the Court's -- of the proposed order. And I refer to paragraph O on page 6 and paragraph 32 on page 22 of the proposed order. Those provisions improperly attempt to expand the meaning of 363(m). And it improperly attempts to provide protection for Hilco in this context in the connection with the sale here.

The good faith finding under 363(m) protects the sale itself and that's the Clear Channel decision. It does not protect the lien stripping under 363(f). The good faith finding is not a rubber stamp. It doesn't insulate all aspects of the sale from appellate review.

The language that the proposed order submits seeks to expand the terms and the protection provided by 363(m) inappropriately. It seeks to preclude appellate review. It seeks to preclude appellate review of the lien stripping provisions that the debtor has sought and it is inappropriate under the Clear Channel decision.

We provided the Court and other parties to this case with language that we do not oppose in place of those paragraphs but we strongly urge the Court to reject the -- to modify those provisions.

Your Honor, I'll follow the Court's instructions with respect to the issues that are raised here. I think the issues with respect to the sale of Polaroid's assets free and clear of Acorn's liens deserve further attention. They deserve a more thorough evaluation than is being provided at this time.

We respectfully request that the Court deny the motion to sell free and clear unless Acorn were to consent to such a sale. We think it's inappropriate to rush this process through. We think that the debtor has had ample opportunities to provide the parties and the Court with more evidence and has failed to do so and we don't think that the Court should simply rubber stamp the conclusions drawn by counsel for Polaroid as to whether or not a bona fide dispute exists. We believe that that decision as to whether a bona fide

dispute exists is a decision that the Court must make and the Court must make that decision after listening and reviewing evidence submitted by the parties.

THE COURT: All right. I don't have any questions.

MR. SINGER: Your Honor, I'll be brief.

THE COURT: Take as much time as you need.

MR. SINGER: As this Court is well aware and as Mr. Rosow is well aware, the Debtors have filed complaints against and commence adversary proceedings against Ritchie Capital and Acorn Capital that go on that have -- that are -- whose counts exceed 100 in length. Very, very detailed allegations and factual allegations and. I find it quite telling and if not remarkable here that there was no -- in response to the motion, there wasn't a motion to dismiss -- I'm sorry, response to the complaint there was not a motion to dismiss brought. They answered the complaint disputing the factual allegations. Those complaints are thorough. They are far

reaching and they are very, very detailed in terms of the factual allegations.

Now, Mr. Rosow directs the Court's attention to the decision in In Re: Robotic Vision Systems, Inc. And I reference that because he also references it in one of his pleadings and he even quotes it. He even quotes the standard. And he seems to be missing the mark in argument even though he gets it right in his papers. A party must articulate in the adversary 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. I would submit that the adversary proceeding is more than just an argument. It details in very, as I indicated, in very detailed fashion the issues and allegations and challenges to the liens of Acorn Capital.

Again, our papers set forth in great detail the other bases under 363(f) for avoidance as well, specifically with respect to PACT. However, I would also let the Court, you know, signal to the Court that they seem

to be making a creditor of a creditor argument, that for some reason the sale free and clear isn't appropriate and they're seeking to invoke arguments on behalf of PACT. PACT is part of the -- is part of one of the Petters estate's affiliates, a part of a Ponzi scheme as well, and in any event, there's no dispute that a maximum of $10 million of funds are at stake for which there's adequate protection under any circumstances anyway. Their liens would permit avoidance. We think that the consent has been given and that the other bases under 363(f) support the free and clear finding as well.

The Court has pointed out in its previous rulings the standard set forth in Gaylord Grain and I think I won't go into that again. I think our pleadings do that and I think the Court had those arguments before. And I would ask the Court to overrule the objections of Acorn Capital and authorize the sale free and clear and not allow what Acorn seems to be intent on doing and has been intent on doing from the start to simply act and proffer arguments to operate as a wedge to

disrupt the sale.

THE COURT: All right. Mr. Chesley.

MR. CHESLEY: Just for the record, the Committee supports the Debtor's position on this, Your Honor.

THE COURT: As I see it from the content of the record made in argument now, I have yet, then, to address the points that Mr. Krakauer made and Mr. Rosow made on behalf of Ritchie Capital and Acorn Capital and all of the other objections have been resolved and will have their memorializations resolved in the order.

I'm just going to ask any attorney out there who's representing any other party am I correct in that regard? Not hearing anybody else, all right. Good enough.

All right. I'm going to overrule the objections of both Ritchie Capital and Acorn Capital to the motion for sale free and clear of liens. Addressing those that Mr. Krakauer articulated in his argument just now, I think the record bears out, and I'm talking about the evidence, specifically Mr. Spencer's

evidence, the record bears out the soundness of the Debtor's election to proceed with a Section 363 sale of assets rather than going through the considerably more risky alternative of an operating plan that would recast the strategy of this debtor or these debtors in their own right through these entities, recast their entire mode of operation, their business plan and their strategy for their engagement with the marketplace the second time in five years. That simply is not in prospect and would not be a responsible use of the estate's resources nor would it be carrying out the fiduciary obligation of a debtor in possession. It was considered but it is not to be considered judicially as an objection to the prima facie showing that the debtor has made for the sale, and I'm speaking of a sale under Section 363(z) in the first instance here.

As to the objections going to a sale process that excluded the participation of a bidder based upon the credit bids of creditors of these debtors as members, participants, partners or whatever in that bidder, I'm going

to overrule that objection. Again, I think that goes to Section 363(s) rather than Section 363(f). Basically on the rationale that I telegraphed in earlier hearings which will lock step with my conclusions that in fact the interests of Ritchie Capital and related entities and Acorn Capital in the assets that would be the subject of the sale here are in fact in bona fide dispute and, hence, credit bidding is not available as a platform for a bid for the assets. I am going to overrule the objections founded on the allegations of continuing and ongoing conflicts on the rationales voiced by the Debtor's counsel in the briefings submitted to me.

Going on to Mr. Rosow's objections -- oh, and also speaking to Mr. Krakauer's objection that somehow consideration of a sale is premature because of the possibility of trustee election going forward in the Potters general case and the motion for termination or alteration of the receivership that Judge Montgomery I believe is to hear tomorrow, because those make consideration premature,

I'm just overruling that one out of hand. I'm rejecting that one flatly out of hand. Testimony is uncontroverted that the burn on these estate assets is ongoing. These debtors are hobbled at this point. It's appropriate -- it was appropriate to make use of a bidding process to get a one-time realization in full of their value at this point that happened. I am not going to upset that in deference to the possibility of further dithering around on these other issues. And I don't mean to demean the substantive seriousness of any of those matters but this process sale is not going to get sidetracked on those issues.

Going on to Mr. Rosow's points, I am going to conclude as a matter of law that the content of the complaints in the adversary proceedings and the content of the answers interposed as a response rather than a motion for dismissal, which, as Mr. Singer does know, would have been available others an alternate response under Rule 12(c), I believe, demonstrates fully that within the meaning of Section 363(f)(4) those interests are in bona

fide dispute. The debtors have, through lengthy complaints, articulated a basis for challenging the attachment of these liens. Fundamentally, I guess, as I read it, other than as to a fairly small, and I'm just going to say that in a comparative way, other than as to a fairly small components of Acorn's claim which it rather tenaciously insists was based on a direct loan to Polaroid, but other than that, I think the theory of the whole fraudulent transfer, constructively fraudulent transfer allegations here is that Tom Potters induced Polaroid to pledge its assets for the debts of another entity or entities in his business structure. That always gives rise to the prospect that there's a constructively fraudulent transfer. The theory has been used to challenge leverage buyouts on the ground that the pledge of an acquired company's assets for the debt that's incurred by an acquiring company that's a holding company, is a constructively fraudulent transfer, a transfer for less than reasonably equivalent value out of that estate or out of that debtor, out of that entity, excuse me. The

same theory prevails here. I think there's sufficient pleading going to the various other elements, going to avoidability of the liens to make out a bona fide dispute here and, hence, the prospect -- the remedy of a sale free and clear of liens, the expedient under Section 363(f)(4) is available to these estates and, hence, it will permit the sale free and clear of the liens of Ritchie Capital and Acorn with the liens to attach to the proceeds and there to repose until such time as the question of the survival of those liens is addressed through the litigation. And if it should turn out through the litigation that the liens remain attached, so be it. But under the circumstances, the promotion of the reduction to value here through a process that aired these assets to the marketplace resulted in vigorous bidding and I would have to conclude and already have concluded resulted in a highest and best offer for them should not be held up and held hostage to liens that are in bona fide dispute. That's the whole purpose of a sale free and clear.

And I'm not even going to speak to the

actual fraud allegations of the complaints other than to note the overarching pall of the Thomas Potters difficulties over all of the assets that were involved in his business empire, all of the allegations that went to the cross-pledging of assets for debts of others within. There have been enough allegations here made that this was done with actual fraudulent intent towards this Debtor's creditors and it's going to be the estate's burden but under the circumstances I can't dismiss those out of hand.

And I'm further going to make an observation here as to Mr. Rosow's preoccupation with the fact that the debtor here voiced so many of its factual allegations as being on information and belief. Mr. Potters is the obvious source of validation or verification as to many of the factual allegations. He's not talking and for particularly good reasons. The Debtor's management here could not possibly have spoken to all of the factual elements, particularly going to actual fraud. And given the backdrop to the Polaroid cases, emerging as they did in

the downfall of Thomas Potters' whole business combine, I cannot reject out of hand the making of any factual allegation that's stated to be on information and belief. The one best source, as I say, isn't available as a result of the current pall over his future occasioned by the pendency of rather large federal criminal charges here.

And going on to the various other points that Mr. Rosow made, I'm going to conclude that the arguments presented in the Debtor's briefing in response to the objections are -- make out a sufficient basis, and I'm going to adopt the legal and factual rationales posed there, to overrule Acorn's objections on their merits as well. The sale free and clear can go forward with liens to attach same dignity, priority, validity, and affect. And the value, then, will be reduced to a liquid form and -- not quite liquid form based upon the equity component with the liens to attach, that affords adequate protection and it affords adequate protection as to that core component of Acorn Capital's asserted secured statutes and founded on the assertion

that there was a direct loan from Acorn Capital to Polaroid that is not subject to the possible avoidance as a constructively fraudulent transfer, a pledge of assets made for the debt of a third party.

Acorn Capital has made allegations but in a fairly summary way that indirect benefits exist even as to the pledge of assets for the benefit of a third party. Eighth Circuit precedent basically says, and I'm thinking of the Barkfriedy (phonetic) decision in which I was reversed and hence took the Eighth Circuit's rationale very much to heart and its surrounding decisions as well as its citation of my own decision in the Jolly's, Inc. matter. They cited me in reversing me which was sort of an interesting turn of events. The consideration of indirect benefit, particularly benefit to a third party, must be really quite concrete, identifiable, measurable, and cognizable. And that's, among other things, if the debtors or their successors in interest make out that the debt that would be the foundation of these liens was in fact the debt of a third party, then

that's going to operate to shift the burden over which is another over to the proponents of those liens to show that that indirect benefit is cognizable under that rather broad but fairly demanding standard. That's just another reason why these liens are in bona fide dispute.

I think that disposes of all of the issues going to Section 363(f) and whether the sale should go forward, then, free and clear of liens. I am ready to make a finding based upon the lack of any other objections that the requisites for the sale itself have been made based upon a manifest record that's been made here. So I will make that finding now. Unless there's any other issue relating to the application of Section 363(f), I'll go ahead on that. I'll just offer the opportunity to anybody else.

MR. CHESLEY: There are none to our knowledge, Your Honor.

THE COURT: All right. There being no other objections, I will in accordance with the tenor of the various understandings summarized and referred to very

much in the abstract on the record by Mr. Singer, those going to those various other objections and pursuant to the rulings I've made, my conclusions that the debtor as proponent of a sale and a sale free and clear has met its burden under Section 363(a) and Section 363(f). I'm going to go ahead and grant the motion as qualified by those various understandings and I would look forward to entering an order at some point in the day tomorrow to that effect.

MR. SINGER: We will finalize the -- put the purchase agreements with Hilco and get the purchase agreements as well as the proposal or as circulated and as reflected in my remarks earlier to the Court promptly tomorrow, Your Honor.

THE COURT: Don't stay up all night doing it because I want it to be perfect.

MR. SINGER: As do I, Your Honor. The next motion, Your Honor, unless the Court has a particular order in mind.

THE COURT: I'll defer to you.

MR. SINGER: Okay. I would at

the risk of bouncing to a different case, I think the related motion dealing with the domain transfer that is in the PGW case is the one I'd like to take up next. And that motion briefly seeks to transfer as part of the sale domain names that are not only registered in the name of PGW rather than Polaroid. We've provided a verified motion that details the factual counts for the basis for that request for relief. I do have an amended order for consideration. I believe it may have been attached to an earlier pleading but it only is designed -- amended to the extent it adds additional domain names that were uncovered that were in Polaroid's name that are subject to the sale and attached. And it's not part of the electronic record and I have a hard copy or I could send that to the Court's attention electronically tomorrow, whatever the Court's preference is.

THE COURT: What I'd like you to do is give me a hard copy just so we know what we'll be looking at here but I want you to transmit it to me electronically tomorrow morning.

MR. SINGER: Okay.

THE COURT: All right. You're still on that motion, right?

MR. SINGER: Yes. I'm just trying to -- I think one -- the concerns that were expressed in early remarks related to the domain name motion I just wanted to clarify because in paragraph 4 of the order, the proposed order, it makes it pretty clear that PGW and Polaroid reserve their rights as to what consideration, if any, should be ascribed. And the idea is that these will be sold free and clear and that the parties reserve their rights to allocate or to argue at a later date what consideration, if any, belongs to the respective estates.

THE COURT: All right. Is there anything else that you wanted to put on the record as to that motion?

MR. SINGER: Not that motion, Your Honor.

THE COURT: All right. Good. All right. I'll hear any input on that.

MR. CHESLEY: That was the agreement, Your Honor.

THE COURT: Okay. All right. Anybody else? Mr. Runck?

MR. RUNCK: Your Honor, for the record, we filed an objection but the reservation of rights language that Mr. Singer referenced resolves our objection.

THE COURT: All right. Very good. All right. Hearing nothing else, I will grant that motion as modified pursuant to the terms of the final form of order that's been presented here which I will look forward to entering when it's submitted in electronic format tomorrow.

MR. SINGER: The next motion, Your Honor, is the Debtor's motion to extend the exclusivity period. The Debtor's sale efforts have obviously been consuming and the direction of the company relative to a plan and in future courses of action all hinged upon the outcome of the sale hearing today. The exclusivity period expires tomorrow and the Debtors have requested their motion and I believe the Committee supports the motion to extend the exclusivity period by 30 days in order to enable what we contemplate to be a

joint plan between the Committee and the Debtors dealing with the disposition of claims, assets, and the like. No objections have been filed, although that -- it was filed on an expedited basis.

THE COURT: Right.

MR. CHESLEY: Your Honor, just very briefly. We spoke to the Office of the United States Trustee with respect to the relief which was actually a joint motion recognizing that this will be a joint plan of liquidation along with a creditor trust mechanism which the Court recognized earlier. So we fully expect to meet those deadlines. Now that the sale has closed, we would ask for the entry of this relief seeking just the 30 days to conclude these matters.

THE COURT: Okay. And my only question was going to be is 30 days going to be enough. I would rather not hear another motion but if -- as I understand it, things have been blocked out already to some degree.

MR. CHESLEY: They have, Your Honor. Plans have been drafted, disclosure statement's been drafted, the creditor trust

has been drafted so we're ready to go and we will not be back asking for more time.

THE COURT: All right. Very good. Anybody have any input on that? Very good. I will grant that motion, then, and I think I've got an order and I would just as soon enter that one before my staff and I --

MR. SINGER: You do have an electronic version of that order, Your Honor.

THE COURT: Pardon?

MR. SINGER: You do have an electronic version of that order.

THE COURT: Right. Yeah. I'll see that that's entered tonight.

MR. SINGER: Thank you, Your Honor.

THE COURT: I always want to be careful about that.

MR. SINGER: Another -- the final -- the next motion, Your Honor, is the Debtor's motion for extension of time to assume or reject leases. That is similarly time sensitive as that period also expires tomorrow, April 17. The debtor has five real estate leases and Debtor is requesting

similarly a short extension of 90 days so that the plan -- the sale can be consummated and the plan can be confirmed and we'd request the Court enter an order as well that's been submitted extending the time for assumption or rejection as well. I think there was one objection that was initially filed. That objection has since been withdrawn.

THE COURT: And that was the objection that I think came in just a couple of days ago.

MR. SINGER: Yeah. The objection was -- wasn't really so much to the extension itself. That particular lease, the lease expires by its own terms by the end of May.

There was some issue relative to whether an administrative expense claim should accrue because of pre-petition rent true-up issues and I think we reconciled a process for trying to resolve that issue and get to the facts. And it really didn't deal with the merits of the motion to extend and on that basis they withdrew their motion.

THE COURT: I do recall it was

called a limited objection.

MR. SINGER: Yes.

THE COURT: And the objection has been withdrawn. All right. Does anybody have anything they want to note as to that motion? All right. Hearing nothing, I will grant that motion and I probably have an order for that already.

MR. SINGER: Yes. Yes, you do, Your Honor.

THE COURT: There's nothing else to be added to that.

MR. SINGER: Nothing else. But again, that's equally time sensitive so if the Court could do that --

THE COURT: Right. Well, I'll get that one entered yet today as well.

MR. SINGER: In bringing this matter to conclusion, Your Honor, the final motion I would make is an oral motion and I hope the Court forgives that. As you know, we've had a robust auction process that has been unparalleled in a -- for a number of professionals I would suspect. And it has been remarkably productive. The stalking

horse bid was started off at 42 million. We're ending north of 88 million if my calculations, recollection about that are correct. We've provided, through this demonstrable benefit to the estate, the estate is currently sitting on cash of approximately $30 million. So we have a -- and hope to have a plan that deals with those funds in a way as a result of this process that has -- will hopefully yield a tremendous amount of value to these estates.

This auction process would not have been what it was, it would not have been as robust as it was if it wasn't for those two bidders agreeing to serve as bidder and backup bidder and what everyone undisputedly acknowledges to them a very tumultuous process to get to the end of the day here..

Both parties have requested in connection with one other -- with each of their bids a million dollar breakup fee for the value that they brought to the table in connection with their bids. The debtor support -- as you know, the debtor has supported the Patriarch bid and firmly

believes that without Patriarch's presence in this auction process, that we would be -- we do not believe that the estate's would have yielded the values that they have garnered today as a result of this auction.

And Patriarch, as this Court knows, has been selected by the Debtors on two different occasions in connection with the auction and has fallen up short yet has still agreed to serve as part of this process with an irrevocable offer and as backup bidder.

I think it is only fair and appropriate that I make a motion orally this time to honor the commitments on the basis in which the Debtor accepted their offers throughout the day on the million dollar breakup fee and request the Court allow us to, as part of the sale or to authorize the breakup fee of a million dollars as accepted in connection with the Debtor's bids in the sale motion perhaps or in a separate order to that effect to give them -- to recognize the benefit that they've conferred in this process.

THE COURT: All right. That request hasn't been put up the flagpole,

right? Nobody other than the people in this room right at this moment who are aware of it?

MR. SINGER: That's correct, Your Honor. That is absolutely correct.

THE COURT: All right. Okay. Thank you.

MR. CHESLEY: Your Honor, Richard Chesley on behalf of the Committee. We had lodged on objection when Hilco had raised that issue with respect to a one million dollar breakup fee with respect to their bid several -- feels like several weeks ago. We obviously raised another objection today to a secondary breakup fee.

If you look at the purpose of a breakup fee, Your Honor, it's obviously to make sure you have a floor and you got -- you bring people to the table. These two bidders fought it out long and hard and certainly may even defied the viability of the original breakup fee of a million seven which now has to be paid to Genii which hasn't been seen for weeks. But we've already been there and the Court's already approved that. We understand it. We respect it. But we think a secondary

breakup fee in light of the fact that we had two very, very eager bidders who were not here to collect the breakup fee but were here to vigorously bid for these assets is not appropriate in these cases.

We're happy, if the Court wants, to have this put up on motion and to file a very short response but that would be the Committee's position. Thank you.

THE COURT: All right. Good enough. Anybody else want to be heard on that? Mr. Runck?

MR. RUNCK: Your Honor, the Petters committee would just like to second the Polaroid committee's objection to the secondary breakup fee. We also objected to the secondary breakup fee at a prior time when it was asserted by Hilco. Like Mr. Chesley said, Your Honor, there already is a payment of a breakup fee here. Neither of these bidders were the stalking horse bidder so we don't believe a payment of the secondary breakup fee is authorized or appropriate in this case. Thank you, Your Honor.

THE COURT: All right.

Anybody else want to be heard on that?

MR. ROSOW: Your Honor, Mike Rosow from Acorn Capital. We'd just reiterate positions taken by both committees.

THE COURT: Okay. I'm going to deny that motion, number one, because there's been no notice whatsoever. And number two, if I'm hearing Mr. Chesley correctly, he's objecting, I think, across the board to the notion of a secondary breakup fee under circumstances like were generated at the one at bar sort of in the absolute.

And Mr. Chesley, is that correct?

MR. CHESLEY: That's correct, Your Honor. We already lodged that with our initial objection.

THE COURT: Right. And I have to agree with that. I really do have to agree with that. As I understand the nature of a breakup fee, and I've done a little reading on the case law, I had to for this case, among a couple of others, the whole purpose is to ensure that somebody comes forward and advances that first bid and has some incentive for putting itself that much at risk for the

up-front costs. After that, I suppose it's incorrect to say all bets are off but all bets are off insofar as a breakup fee is concerned because those who come forward after that are the motivated ones. They're the ones that really want the asset and are willing to come forward on their own merits as a business risk to bid against that stalking horse. Yes, the stalking horse here disappeared. And I did note with a small amount of humor that they sort of poked their nose in a couple of times during the course of the auction at Lindquist and Vennum and just insisted that they sort of wanted part of the stuff. And people from Houlihan and Lokey sort of shunted them off without really saying anything but they really haven't been an active part of the process once it was ascertained that there were interested parties who wanted to take the bulk of the assets.

Now, a deal is a deal. Genii had the right to their breakup fee. That was part of the consideration for them coming forward in the first instance and getting this process going. After that the bidders were on their

own on their own business judgment and according to their own risk of the transactional expenses involved in pushing their bid forward.

So I'm not only denying the motion on a procedural basis, I'm denying it on its merits. I, frankly, don't want to see it renewed. That's not what a breakup fee is all about. And what little case law we've got within the Eighth Circuit I think would back me up on that. So that's the way it stands.

Does anybody have anything else they want to note for the record here? All right. I will go and enter both of those orders before leaving in another 15, 20 minutes. I look forward to getting the other orders entered tomorrow. It's late. I thank everybody for their interest.

I will again say that after almost exactly 25 years on this job, I hadn't seen one like this before and I think maybe everybody else here can say the same thing.

So with that, anybody else have anything to note on the record? All right. Good enough. You're all welcome. Thank you.

Stand adjourned.

* * *

STATE OF MINNESOTA)
) ss.
COUNTY OF WASHINGTON)

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

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

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

IN EVIDENCE HEREOF, WITNESS MY HAND.

s:/ Lisa M.Thorsgaard