

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

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<p>In re:</p> <p>Polaroid Corporation, et al.,</p> <p style="text-align:center">Debtors.</p>	<p><b>Jointly Administered under Case No. 08-46617</b></p> <p>Court Files No.'s:</p> <p>08-46617 (GFK)</p>
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(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

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**DEBTOR'S REPLY IN SUPPORT OF ITS MOTION TO (I) SELL FINE ART  
PHOTOGRAPHY COLLECTION FREE AND CLEAR OF LIENS, CLAIMS,  
ENCUMBRANCES AND INTERESTS AND OUTSIDE THE ORDINARY COURSE OF  
BUSINESS PURSUANT TO 11 U.S.C. § 363; (II) APPROVE TERMS AND  
CONDITIONS OF CONSIGNMENT AGREEMENT WITH SOTHEBY'S, INC.; (III)  
GRANT SUPER-PRIORITY LIENS IN CERTAIN SALE PROCEEDS TO SECURE  
REIMBURSEMENT OF CERTAIN SUMS EXPENDED;  
AND (IV) GRANT RELATED RELIEF**

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PBE Corporation, formerly known as Polaroid Corporation (the “**Debtor**”),<sup>1</sup> through its undersigned attorneys, respectfully files this verified reply in support of its *Motion to: (I) Sell Fine Art Photography Collection Free and Clear of Liens, Claims, Encumbrances and Interests and Outside the Ordinary Course of Business Pursuant to 11 U.S.C. § 363; (II) Approve Terms*

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<sup>1</sup> On June 19, 2009, the Debtor filed documents with the appropriate offices of the Secretary of State for the purpose of changing its corporate names to omit the reference to the word “Polaroid.” The Debtor Polaroid Corporation is now “PBE Corporation.”

*and Conditions of Consignment Agreement with Sotheby's, Inc.; (III) Grant Super-Priority Liens in Certain Sale Proceeds to Secure Reimbursement of Certain Sums Expended; and (IV) Grant Related Relief.* Capitalized terms not otherwise defined herein shall have the meanings given to such terms in the motion (the “**Motion**”) unless the context requires otherwise. This Reply is to the letters of Bea Nettles (“**Nettles**”), Jan Pietrzak (“**Pietrzak**”), Judy Dater (“**Dater**”), and A.D. Coleman (“**Coleman**”) (each letter, an “**Objection**” and the authors, collectively the “**Objectors**”) mailed to the Court objecting to the relief requested by the Debtor in its motion.<sup>2</sup> The Debtor respectfully requests this Court overrule such objections and grant the Debtor’s Motion.

### **BACKGROUND**

The Collection, referred to as the “Polaroid Collection,” is an iconic collection of approximately 16,000 fine art photographs encompassing an astonishing eclectic range of world-class contemporary photography spanning the more than sixty year history of Polaroid instant film. The Debtor owns the photographs in the Collection – items that have been acquired over the course of many years (indeed decades) in exchange for substantial consideration. Officially founded in the late sixties, the Collection encouraged and assisted photographers in the medium of Polaroid instant photography by giving such photographers film, cameras, studio time and even cash payments and, in return, acquired an exciting and diversified collection of original instant film images from virtually every photographic genre. Additionally, the photographers whose works were selected and included in the Collection received publicity associated with the display or exhibition of the work. As demonstrated by the attachments to the Nettles Objection, Nettles conveyed “ownership” of the images delivered over 20 years ago and at that time “fully

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<sup>2</sup> The letters submitted by the Objectors were received by the Court and filed on August 26, 2009, the day before the hearing on the Motion.

released” her interest in the ownership of the photographs in exchange for benefits that included film and the public exhibition of her works. Other than the ownership of the photographic image itself that was conveyed and the license granted to display and exhibit and use the images for publicity purposes associated with the exhibition of the work, Nettles retained copyrights.

On October 12, 2001, Polaroid Corporation (“**Old Polaroid**”) filed for relief under Chapter 11 of Title 11 of the United States Code (the “**Bankruptcy Code**”) in the District of Delaware, administratively consolidated under Case No. 01-10864 (the “**Prior Bankruptcy Proceeding**”). In the Prior Bankruptcy Proceeding, Old Polaroid filed certain sworn and verified schedules with the United States Bankruptcy Court for the District of Delaware (the “**Delaware Court**”) that specifically included the artwork and photographs in the Collection. *See* Prior Bankruptcy Proceeding, Schedule B – Personal Property, Docket No. 320 and filed December 17, 2001, a true and correct copy of relevant portions of the filed schedule is attached hereto as Exhibit A. The Court should, and is entitled to, take judicial notice of the facts contained in the records available from the Delaware Court’s CM/ECF system attached as exhibits to this Reply relating to the bankruptcy case of Old Polaroid. *See* Fed. R. Evid. 201. Old Polaroid also filed a sworn and verified Statement of Financial Affairs that also indicates that the items of the Collection were not “property owned by another person that the debtor holds or controls.” *See* Prior Bankruptcy Proceeding, Question 14, Statement of Financial Affairs, Docket No. 341 and filed December 17, 2001, a true and correct copy of relevant portions of the filed Statement is attached hereto as Exhibit B.

In the Prior Bankruptcy Proceeding, Old Polaroid filed a motion for, among other things, an order authorizing and approving a sale of substantially all of the Old Polaroid’ assets to OEP Imaging Corporation free and clear of any and all liens, claims, encumbrances and interests of

whatever kind or character (the “**Prior Bankruptcy Sale Motion**”). *See* Prior Bankruptcy Case, Docket No. 865 filed April 18, 2002 and the Debtor’s Records, a true and correct copy of the Prior Bankruptcy Sale Motion (without voluminous exhibits) is attached hereto as Exhibit C.

Pursuant to the asset purchase agreement by and among OEP Imaging Corporation and Old Polaroid (the “**OEP APA**”), the Acquired Assets (as defined therein), included “Polaroid’s collection of art and photographs and the items stored in Polaroid’s archives.” *See* OEP APA, p. 13, § 2.01(s). On July 3, 2002, the Delaware Court entered an order approving the sale and granting other requested relief. *See* Prior Bankruptcy Case, Docket No. 1249 (the “**Prior Bankruptcy Sale Order**”), a true and copy of the OEP APA (without voluminous exhibits) is attached hereto as Exhibit D.

Pursuant to the Prior Bankruptcy Sale Order, the Delaware Court made several findings of fact that cannot be disputed in these proceedings:

1. That “due, proper, timely, adequate and sufficient notice of the motion, the Sale Hearing, and the Transactions, including, without limitation, the Sale of the Acquired Assets... has been provided....” Prior Bankruptcy Sale Order, p. 4, ¶ D.
2. That “[a] reasonable opportunity to object or be heard with respect to the Motion and the relief requested therein ... has been afforded to all interested persons and entities...” Prior Bankruptcy Sale Order, p. 4, ¶ E.
3. That “[t]he Purchaser is a good faith purchaser under section 363(m) of the Bankruptcy Code and, as such, is entitled to all of the protections afforded thereby.” Prior Bankruptcy Sale Order, p. 7, ¶ L.
4. That “[t]he transfer of the Acquired Assets ... to the Purchaser will be a legal, valid and effective transfer of such assets ... and will vest the Purchaser with all right, title, and interest of [Old Polaroid] to such assets ... free and clear of all claims and interests...” Prior Bankruptcy Sale Order, p. 9, ¶ S.
5. That “[Old Polaroid] may sell the Acquired Assets free and clear of all claims and interests of any kind or nature whatsoever...” Prior Bankruptcy Sale Order, p. 9, ¶ T.

As a result of these facts, the Delaware Court ordered:

6. That “[t]he Acquired Assets ... shall be transferred, conveyed, and assigned to the

Purchaser free and clear of any and all claims, liens, pledges... and other liabilities (whether secured or unsecured, contingent, or absolute, liquidated or unliquidated, perfected, perfected or unperfected, choate or inchoate, filed or unfilled (sic), scheduled or unscheduled, noticed or unnoticed, recorded or unrecorded) ... restrictions, loans, ...other agreements, instruments, contracts, judgments, and orders of any court ... and any actions and proceedings of any kind or nature , and any claim by any person or entity asserting any rights or interests except as specifically reserved within the Purchase Agreement.” Prior Bankruptcy Sale Order, p. 14-15, ¶ 6.

7. That “all persons... holding Interests of any kind or nature whatsoever against or in [Old Polaroid], the Acquired Assets... arising out of, in connection with, or in any way relating to, [Old Polaroid], the Acquired Assets.... or the transfer of the Acquired Assets... to the Purchaser, hereby are forever barred, estopped and permanently enjoined from asserting against the Purchaser, its successors or assigns, property, or assets, such persons’ or entities’ respective interests. No such person or entities shall assert against the Purchaser or its successors in interest any liability, debt, claim, or obligation relating to or arising from the ownership or operation of the acquired Assets or any liabilities calculable by reference to [Old Polaroid] or the Sellers or [Old Polaroid]’s or the Sellers’ assets or operations” Prior Bankruptcy Sale Order, p. 15, ¶ 7.
8. That “[t]his Order (a) shall be effective as a determination that, on the Closing Date, all Interests of any kind or nature whatsoever existing with respect to [Old Polaroid], the Acquired Assets... prior to Closing have been unconditionally released, discharged, and terminated ... and that the conveyances described herein have been effected, and (b) shall be binding upon and shall govern the acts of all the entities without limitation...” Prior Bankruptcy Sale Order, p. 19, ¶ 19.
9. That, pursuant to section 363(m) of the Bankruptcy Code, “the reversal or modification on appeal of the authorization provided herein to consummate the Transactions shall not affect the validity of the Transactions as to the Purchaser, except to the extent such authorization is duly stayed pending such appeal prior to such consummation.” Prior Bankruptcy Sale Order, p. 25, ¶ 29.

As a result of the Prior Bankruptcy Sale Order entered more than seven (7) years ago, OEP Imaging Corporation purchased substantially all of the assets of Old Polaroid, including, without limitation, the thousands of items contained in the Collection at that time, and that such purchase was, and is, free and clear of all interests, claims, interests and encumbrances, including the purported interests of the Objectors. On April 27, 2005, Petters Group Worldwide, LLC (“PGW”) acquired the shares of OEP Imaging and, as a successor-in-interest, ownership and control of the assets of Old Polaroid, including the Collection.

## **ARGUMENT**

This proceeding is not the proper forum to challenge the validity or results of the Prior Bankruptcy Sale Order and an improper and impermissible attack on the prior order of the Delaware Court, more than seven (7) years after such order was issued. Parties have relied upon such Prior Bankruptcy Sale Order over the past seven years. Moreover, the statute of limitations for any claim has long ago expired. The items the Debtor seeks to consign to Sotheby's for sale at one or more public auctions to be conducted by Sotheby's have all been part of the Collection since prior to 2002 and subject to the Prior Bankruptcy Sale Order. In fact, each of the Objectors transferred their work to the Collection years and decades prior to the Prior Bankruptcy Proceeding. For this reason, and those articulated below, the Debtor respectfully requests this Court overrule the Objections, grant the motion and authorize the Debtor to consign to Sotheby's certain items of the Collection for sale at a public auction to be conducted by Sotheby's.

### **The Debtor's Motion to Transfer Title to Items of the Collection Is Independent of Ownership of Author's Copyright and Objections Should be Overruled**

It is important to recognize that the Debtor, through this Motion, has not sought to transfer the ownership of any copyright of any photographer, artist, author or contributor to the Collection. The ownership of the material objects, the photographs of the Collection, is separate and distinct from ownership of the copyright. 17 U.S.C. § 202 (aptly titled "Ownership of copyright as distinct from ownership of a material object"). Additionally, most transfers of ownership of a copyright must be in writing and signed by the transferor or his/her duly authorized agent. 17 U.S.C. § 204(a).

As demonstrated by the attachments to the Nettles Objection, Old Polaroid's and the Debtor's standard agreement with artist and photographers provided the Collection title to the image(s) in exchange or barter for film, equipment, studio time or monetary compensation. Such

agreements clearly provide that the artist retained his/her copyright, but granted a non-exclusive license for display and exhibition of the image(s).

To be clear, the present Motion does not seek to transfer ownership of any author's copyright, even if such right has been transferred to Old Polaroid and/or the Debtor, but merely seeks to transfer the Debtor's ownership interest in, or title to, the material objects of the Collection. In fact, pursuant to the terms and conditions of the Auction, Sotheby's and the Debtor "make no representations and warranties, express or implied, as to whether the purchaser acquires any copyrights, including but not limited to, any reproduction rights in any property." *See* Conditions of Sale, attached as Exhibit C to the Motion. Therefore, to the extent any objection is based on an Objector's misunderstanding of the Debtor's intentions with regard to a transfer of the ownership of an author's copyright, such objection must be overruled.

**The Objector's Lack of Any Interest in any Item(s) of the Collection Has Been Established**

At some point, the Prior Bankruptcy Sale Order must become final, and Section 363(m) of the Bankruptcy Code provides that finality. Section 363(m) provides:

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

11 U.S.C. § 363(m). "Section 363(m) protects the reasonable expectations of good faith third-party purchasers by preventing the overturning of a completed sale, absent a stay, and it safeguards the finality of the bankruptcy sale. Section 363(m) further shields third parties who rely upon the bankruptcy court's order from endless litigation." *In re Farmland Industries, Inc.*, 408 B.R. 497, 508 (8th Cir. B.A.P. 2009) (Kressel, C.J.) (citing *Official Comm. of Unsecured*

*Creditors v. Trism, Inc. (In re Trism, Inc.)*, 328 F.3d 1003, 1006 (8th Cir. 2003); *In re Sax*, 796 F.2d 994, 998 (7th Cir. 1986)).

The protections afforded by 11 U.S.C. § 363(m) go beyond just protecting title to the assets sold. A bankruptcy sale under § 363, free and clear of all liens, is a judgment that is good as against the world, not merely as against parties to the proceedings.” *Regions Bank v. J.R. Oil Co., LLC*, 387 F.3d 721, 732 (8th Cir. 2004); *In re Farmland Industries, Inc.*, 408 B.R. at 508. The statute provides broad protection and does not permit a collateral attack on a sale even where the challenger contends that the relief requested is not aimed at undoing the sale. *GAF Holdings, LLC v. Rinaldi (In re Farmland Indus., Inc.)*, No. 07-6046 (8<sup>th</sup> Cir. B.A.P. July 27, 2009) (Kressel, J.). Where no party has obtained a stay of a sale pending appeal, § 363(m) moots any challenge to a sale order where “reversing or modifying the authorization to sell would affect the validity of the sale or lease.” *In re Trism, Inc.*, 328 F.3d at 1006-07. As the Farmland Industries Court noted:

Sales under 11 U.S.C. § 363 ... are entitled to heightened protections. If a disgruntled bidder were permitted to attack the legitimacy of a sale years later and essentially disgorge the profits made by parties to the sale, it would undermine the protections of § 363(m), inject uncertainty and instability into the sale process, and ultimately chill bidding and decrease the prices paid by cautious bidders who fear endless litigation. “Finality and regularity of proceedings are significant factors whenever the courts are involved in a sale of property, for devotion to those principles encourages fervent bidding and ensures that interested parties will sincerely extend their best and highest offers at the auction itself.” *Four B. Corp. v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.)*, 107 F.3d 558, 564 (8th Cir. 1997).

*In re Farmland Industries, Inc.*, 408 B.R. at 509.

OEP Imaging Corporation was a good faith purchaser of the property of Old Polaroid, including the Collection. As such, it, and the Debtor, as successor in interest to OEP Imaging Corporation, are both entitled to rely on the finality of the Prior Bankruptcy Sale Order. As a



result, ownership of the items of the Collection was vested in OEP Imaging Corporation by the Delaware Court, and the Debtor acquired ownership of the items of those same items of the Collection from OEP Imaging Corporation pursuant to the OEP APA. The Debtor respectfully asserts ownership of the items of the Collection is not at issue, especially seven years after entry the Prior Bankruptcy Sale Order and expiration of the appeal period and any applicable statutes of limitation, the Objections filed to the Motion should be overruled, and the Motion seeking authorization for the consignment of certain items of the Collection to Sotheby's to conduct one or more public auctions of such items should be granted.

**Objector Coleman Is Unable to Demonstrate Standing to Bring Claims or Seek Relief in These Proceedings**

“To establish standing, a plaintiff must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged action; and redressable by a favorable ruling.” *Horne v. Flores*, 129 S.Ct. 2579, 2592 (2009). In the instant case, Mr. Coleman has not demonstrated the requisite standing regarding the present motion.

The Debtor has no record of, nor has Mr. Coleman provided, any record of himself actually contributing any material, object, photograph or other any other item to, or assert any interest in, any item(s) in the Collection. Thus, Mr. Coleman has not, and the Debtor believes can not, establish an injury redressable by a favorable ruling by this Court. Indeed, the Prior Order in fact enjoins him from undertaking the campaign he is not attempting to spearhead. *See* Prior Bankruptcy Sale Order, Therefore, the Debtor respectfully requests this Court overrule the Coleman Objection.

**CONCLUSION**

The Debtor's verified Motion does not seek to transfer any author's copyright and, to the extent any Objection is based on any Objector's misunderstanding of the relief being sought in

the Motion, the Debtor respectfully asserts, such Objection should be overruled. To the extent the Court considers objections to the potential sale of items of the Collection, the Debtors respectfully assert such objections should be overruled. The assets of the Collection were acquired by OEP Imaging Corporation more than seven years ago free and clear of any and all liens, claims and interests, including those of the Objectors. The Debtor acquired OEP Imaging Corporation's interest in the Collection in 2005 as successor-in-interest. The Objectors did not raise objections to the Prior Bankruptcy Sale Order in a timely manner, and the parties, as well as successors in interest such as the Debtor, are entitled to rely on such order. All of the items subject to the assertions of the Objectors have been conveyed more than twenty years ago. Based on the protections provided by 11 U.S.C. § 363(m), OEP Imaging Corporation, and successor-in-interest, the Debtor, acquired the assets of the Collection free and clear of all interests, including those of the Objectors.

WHEREFORE, the Debtor respectfully requests the Court (1) overrule the Objections of Nettles, Pietrzak, Dater and Coleman; (2) authorize the Debtor to consign certain portions of the Collection to Sotheby's for sale at one or more public auctions to be conducted by Sotheby's; and (3) and grant such other, further or additional relief as the Court may deem just and equitable.

DATED: August 27, 2009

**LINDQUIST & VENNUM P.L.L.P.**

By: /e/ George H. Singer

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**ATTORNEYS FOR THE DEBTOR**

## VERIFICATION

I, Mary L. Jeffries, Chief Executive Officer of the PBE Corporation, declare under penalty of perjury that the facts set forth in the preceding *Reply In Support of Its Motion to: (I) Sell Fine Art Photography Collection Free and Clear of Liens, Claims, Encumbrances and Interests and Outside the Ordinary Course of Business Pursuant to 11 U.S.C. § 363; (II) Approve Terms and Conditions of Consignment Agreement with Sotheby's, Inc.; (III) Grant Super-Priority Liens in Certain Sale Proceeds to Secure Reimbursement of Certain Sums Expended; and (IV) Grant Related Relief* are true and correct according to the best of my knowledge, information and belief.

Executed on: 8-27, 2009

  
\_\_\_\_\_  
Mary L. Jeffries

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

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In re

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

POLAROID CORPORATION, ET AL.,

08-46617 (GFK)

Debtors.

(includes:

Polaroid Holding Company;

08-46621 (GFK)

Polaroid Consumer Electronics, LLC;

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Polaroid Waltham Real Estate, LLC)

08-46629 (GFK)

Chapter 11 Cases  
Judge Gregory F. Kishel

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**CERTIFICATE OF SERVICE**

Gretchen Luessenheide of the City of New Hope, County of Hennepin, State of Minnesota, under penalty of perjury, states that on August 27, 2009 she caused to be served the following document:

Debtor's Reply in Support of its Motion to (I) Sell Fine Art Photography Collection Free and Clear of Liens, Claims, Encumbrances and Interests and Outside the Ordinary Course of Business Pursuant to 11 U.S.C. § 363; (II) Approve Terms and Conditions of Consignment Agreement with Sotheby's, Inc.; (III) Grant Super-Priority Liens in Certain Sale Proceeds to Secure Reimbursement of Certain Sums Expended; and (IV) Grant Related Relief

upon:

A.D. Coleman <a href="mailto:adc@photocritic.com">adc@photocritic.com</a>	Judy Dater <a href="mailto:judydater@aol.com">judydater@aol.com</a>
Bea Nettles <a href="mailto:bea@beanettles.com">bea@beanettles.com</a>	Jan Paul Pietrzak 12 Conchas Loop Santa Fe, NM 87508 (via U.S. Mail)

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

/e/Gretchen Luessenheide  
Gretchen Luessenheide