

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

IN RE: : Chapter 11  
POLAROID CORPORATION, et al., :  
Debtors. : Bankruptcy Case No. 01-10864-PJW  
: \_\_\_\_\_  
POLAROID CORP. f/k/a OEP :  
Imaging Corp., :  
Appellant, :  
v. : Civil Action No. 04-088-JJF  
WIND DOWN ASSOCIATES, :  
Appellee. :  
: \_\_\_\_\_

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**MEMORANDUM OPINION**

November 12, 2004

Wilmington, Delaware

**Farnan, District Judge.**

Presently before the Court is an appeal by Appellant, Polaroid Corporation f/k/a OEP Imaging Corporation ("New Polaroid") from the December 29, 2003 and December 31, 2003 Orders (the "Orders") of the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") directing New Polaroid to provide \$7 million to fund administrative costs incurred by the Debtors' estates (the "Estate") under the Second Amended and Restated Asset Purchase Agreement (the "Asset Purchase Agreement") and the Order Authorizing and Approving the Asset Purchase Agreement and Sale of Substantially All of the Debtors' Assets (the "Sale Order"). For the reasons discussed, the Court will affirm the decision of the Bankruptcy Court.

**I. THE PARTIES' CONTENTIONS**

By its appeal, New Polaroid challenges the Bankruptcy Court's Orders directing it to pay \$7 million in excess administrative costs to Wind Down Associates, LLC (the "Plan Administrator" or "Wind Down"). New Polaroid contends that the Bankruptcy Court erred in requiring it to fund these excess administrative costs, because such funding was not required under the Sale Order and the Asset Purchase Agreement, unless Wind Down did not have "any cash available" to pay the Estate Costs. New Polaroid contends that the Estate had \$18 million in cash readily available to pay such costs as a result of New Polaroid's

redemption of stock, and therefore, further funding by New Polaroid is not needed. In addition, New Polaroid contends that the Bankruptcy Court improperly considered parol evidence of the parties' intent to vary the clear and unambiguous term "any cash available" as used in the Sale Order and the Asset Purchase Agreement. Specifically, New Polaroid contends that it was error for this term to be construed so as to exclude the cash proceeds of a partial redemption of preferred stock by New Polaroid, which was made at the request of the Official Committee of Unsecured Creditors.

In response, Wind Down agrees with New Polaroid that the Asset Purchase Agreement is clear and unambiguous, but contends that when reading the Agreement as a whole, it is clear that the Debtor sought to protect the Stock set aside for unsecured creditors against dilution by runaway Estate Costs. Specifically, Wind Down directs the Court to Section 7.04(c) of the Asset Purchase Agreement, which permits the Debtor to liquidate its Stock to pay excess Estate Costs only where those costs exceed \$37 million. Thus, reading the provisions of the Asset Purchase Agreement as a whole, Wind Down contends that "any cash available" does not include cash derived from New Polaroid's redemption of the unsecured creditors' stock. According to Wind Down, to conclude otherwise would render Section 7.04(c) meaningless and would permit New Polaroid to escape its

obligation to pay Estate Costs simply by redeeming from the Estate enough Stock to create "cash" equal to New Polaroid's Estate Costs obligation.

## **II. STANDARD OF REVIEW**

The Court has jurisdiction to hear an appeal from the Bankruptcy Court pursuant to 28 U.S.C. § 158(a). In undertaking a review of the issues on appeal, the Court applies a clearly erroneous standard to the Bankruptcy Court's findings of fact and a plenary standard to its legal conclusions. See Am. Flint Glass Workers Union v. Anchor Resolution Corp., 197 F.3d 76, 80 (3d Cir. 1999). With mixed questions of law and fact, the Court must accept the Bankruptcy Court's finding of "historical or narrative facts unless clearly erroneous, but exercise[s] 'plenary review of the trial court's choice and interpretation of legal precepts and its application of those precepts to the historical facts.'" Mellon Bank, N.A. v. Metro Communications, Inc., 945 F.2d 635, 642 (3d Cir. 1991) (citing Universal Mineral, Inc. v. C.A. Hughes & Co., 669 F.2d 98, 101-02 (3d Cir. 1981)). The appellate responsibilities of the Court are further understood by the jurisdiction exercised by the Third Circuit, which focuses and reviews the Bankruptcy Court decision on a de novo basis in the first instance. In re Telegroup, 281 F.3d 133, 136 (3d Cir. 2002).

## **III. DISCUSSION**

Reviewing the decision of the Bankruptcy Court in light of the applicable law, the Court concludes that the Bankruptcy Court correctly interpreted the Asset Purchase Agreement to require New Polaroid to pay its share of Estate Costs, without regard to the cash derived from New Polaroid's redemption of stock. In construing the terms of a contract, the Court must uphold the intention of the parties as expressed in the agreement, by giving effect to all provisions of the agreement and reading the disputed terms in the context of the agreement as a whole. See e.g. Gleason v. Norwest Mortg., Inc., 243 F.3d 130, 140 (3d Cir. 2001); E.I. du Pont de Nemours and Co., Inc. v. Shell Oil Co., 498 A.2d 1108, 1113 (Del. 1985); USA Cable v. World Wrestling Fed'n Entm't, Inc., 2000 WL 875682, \*8 (Del. Ch. 2000).

In this case, two provisions of the Asset Purchase Agreement are particularly relevant, Sections 7.04(b) and 7.04(c). In pertinent part, these Sections provide:

(b) If, after June 2, 2002 and until the distribution of all of the Sellers' Stock by the Sellers and/or their successor(s) to the creditors of the Sellers, the aggregate amount of the Estate Costs paid exceeds \$27,000,000 (and the Sellers and/or their successor(s) do not have any cash available to pay additional Estate Costs), then, for any Estate Costs in excess of \$27,000,000 that become due and payable, the Purchaser forthwith shall pay to the Sellers and/or their successor(s) an amount equal to such excess up to \$4,000,000 in cash, upon receipt by the Purchaser of reasonably satisfactory documentation evidencing Sellers' and/or their successor(s) obligation to pay such Estate Costs. If, after June 2, 2002 and until the distribution of all of the Sellers' Stock by the Sellers and/or their successor(s) to the creditors of

the Sellers, the aggregate amount of the Estate Costs paid exceeds \$31,000,000 (and the Sellers and/or their successor(s) do not have any cash available to pay additional Estate Costs), the Sellers and the Purchaser understand that, for any Estate Costs in excess of \$31,000,000 that become due and payable, the Agent, on behalf of the secured lenders to the Sellers, forthwith shall pay to the Sellers and/or their successor(s) an amount equal to such excess up to \$3,000,000 in cash (the "Bank Reimbursement"), upon receipt by the Agent of reasonably satisfactory documentation evidencing Sellers' and/or their successor(s)' obligation to pay such Estate Costs. If, after June 2, 2002 and until the distribution of all of the Sellers' Stock by the Sellers and/or their successor(s) to the creditors of the Sellers, the aggregate amount of the Estate Costs paid exceeds \$34,000,000 (and the Sellers and/or their successor(s) do not have any cash available to pay additional Estate Costs), then, for any Estate Costs in excess of \$34,000,000 that become due and payable, the Purchaser forthwith shall pay to the Sellers and/or their successor(s) an amount equal to such excess up to \$3,000,000 in cash (the "Second Tier Reimbursement"), upon receipt by the Purchaser of reasonably satisfactory documentation evidencing Sellers' and/or their successor(s)' obligation to pay such Estate Costs.

(c) If, after June 2, 2002 and until the distribution of all of the Sellers' Stock by the Sellers and/or their successor(s) to the creditors of the Sellers, the aggregate amount of the Estate Costs paid or required to be paid exceeds \$37,000,000 (and the Sellers and/or their successor(s) do not have any cash available to pay additional Estate Costs), then, for any Estate Costs in excess of \$37,000,000 that become due and payable, and for the sole purpose of generating cash to fund all or a portion of such excess, up to a maximum excess of \$4,500,000, the Sellers and/or their successor(s) shall have the right, but not the obligation, to sell to the Purchaser up to such number of shares of the Sellers' Stock as shall equal four percent (4%) of the Issued Stock for a maximum aggregate purchase price of \$4,500,000, as follows: the Sellers and/or their successor(s) shall have the right, but not the obligation, to sell such number of shares of the Sellers' Stock to the Purchaser at a price equal to: (i) for the first two percent

(2%) of the Issued Stock, \$1,250,000 for each one percent (1%) of the Issued Stock (or a pro-rata price based thereon); and (ii) for the next two percent (2%) of the Issued Stock, \$1,000,000 for each one percent (1%) of the Issued Stock (or a pro-rata price based thereon). . . .

Examining Section 7.04(b) of the Asset Purchase Agreement as a whole and in light of the remaining subparagraphs of Section 7.04, particularly Section 7.04(c), the Court agrees with the Bankruptcy Court that the Asset Purchase Agreement is not ambiguous, and the only way Section 7.04 makes sense in the context of the Asset Purchase Agreement as a whole is to require New Polaroid to pay its share of administrative expenses, regardless of New Polaroid's stock redemption. It is evident from the Asset Purchase Agreement that the purpose of Section 7.04(b) and 7.04(c) is to provide a framework for paying Estate Costs which protects the Stock set aside for the unsecured creditors against dilution by the Estate Costs. If New Polaroid were permitted to redeem from the Estate enough Stock to create the "cash" equaling its payment obligation, these protections would be eviscerated, Section 7.04(c) of the Asset Purchase Agreement would be meaningless and New Polaroid would essentially be permitted to escape its funding obligations under Section 7.04(b). In this regard, the Court agrees with the Bankruptcy Court that New Polaroid should not be permitted to take advantage of the fortuitous event of its stock redemption to avoid its obligations under the Asset Purchase Agreement to fund Estate

Costs. Accordingly, the Court will affirm the Orders of the Bankruptcy Court entered December 29, 2003 and December 31, 2003.

### **III. CONCLUSION**

For the reasons discussed, the Bankruptcy Court's Orders entered on December 29, 2002 and December 31, 2002 directing New Polaroid to provide \$7 million to fund administrative costs incurred by the Estate under the Asset Purchase Agreement and the Sale Order will be affirmed.

An appropriate Order will be entered.



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WIND DOWN ASSOCIATES, :  
Appellee. :

**FINAL ORDER**

At Wilmington, this 12th day of November 2004, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that the December 29, 2003 and December 31, 2003 Orders of the United States Bankruptcy Court for the District of Delaware directing New Polaroid to provide \$7 million to fund administrative costs incurred by the Debtors' estates under the Second Amended and Restated Asset Purchase Agreement and the Order Authorizing and Approving the Asset Purchase Agreement and Sale of Substantially All of the Debtors' Assets is **AFFIRMED.**

JOSEPH J. FARNAN, JR.  
UNITED STATES DISTRICT JUDGE