

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

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

POLAROID CORPORATION, ET AL,

Court File No. 08-46617

Debtors.

Court File Nos:

(includes:

- Polaroid Holding Company;
- Polaroid Consumer Electronics, LLC;
- Polaroid Capital, LLC;
- Polaroid Latin America I Corporation;
- Polaroid Asia Pacific LLC;
- Polaroid International Holding LLC;
- Polaroid New Bedford Real Estate, LLC;
- Polaroid Norwood Real Estate, LLC;
- Polaroid Waltham Real Estate, LLC)

- 08-46621 (GFK)
- 08-46620 (GFK)
- 08-46623 (GFK)
- 08-46624 (GFK)
- 08-46625 (GFK)
- 08-46626 (GFK)
- 08-46627 (GFK)
- 08-46628 (GFK)
- 08-46629 (GFK)

Chapter 7 Cases
Judge Gregory F. Kishel

**ORDER ON REMAND, TRUSTEE’S OBJECTION TO FILED CLAIM
OF PNY TECHNOLOGIES, INC. [CLAIM NO. 34]**

At St. Paul, Minnesota
May 5, 2016.

INTRODUCTION

The Trustee in these cases objected to two claims asserted by PNY Technologies, Inc. (“PNY”) under proofs of claim 34 and 188. An order was entered on the objections in 2013. A claim in favor of PNY in the amount of \$111,713.60 was allowed against the estate of Debtor Polaroid Corporation, and the balance of PNY’s claim was disallowed. Dkt. No. 2070, later reported at 529 B.R. 871 (Bankr. D. Minn. 2013).

PNY appealed from that order. At the parties’ request, and with the concurrence of the district court, a global mediation process involving the Trustee and PNY was then coordinated

NOTICE OF ELECTRONIC ENTRY AND
FILING ORDER OR JUDGMENT
Filed and Docket Entry made on **05/05/2016**
Lori Vosejpka, Clerk, By JRB, Deputy Clerk

and ordered. (The parties were involved in the district court on the appeal and on a contested report and recommendation for a related matter from these cases; plus they had other proceedings still pending in the bankruptcy court.)

A number of months passed without report from the parties or the mediator. The district court went ahead to issue a decision on the appeal over this matter. It reversed, vacating the order in its entirety. The matter was remanded, with a directive that PNY be allowed discovery of a specified scope before the Trustee's objection was considered anew on any evidence generated by PNY from that discovery process. *In re Polaroid Corp.*, 527 B.R. 335 (D. Minn. 2015).

After the remand, there was still no report on the mediation. A status conference was convened. The parties' request to resume mediation was denied; there was no sign that any progress had resulted from the earlier round, despite informal document exchanges and the mediator's efforts. Both sides gave their input for scheduling for the litigation that would permit adequate discovery. The court was fully deferential to the parties' expressed wishes as to discovery. A three-month period for additional discovery was set under a scheduling order.

During that period, PNY filed and then withdrew a motion to compel discovery. After pre-hearing briefing, a two-day evidentiary hearing was held. At the hearing, the Trustee appeared personally and by his attorney, Ralph V. Mitchell. PNY appeared by its attorney, David J. Adler.

Post-hearing briefing and the submission of proposed findings of fact and conclusions of law were directed. The parties made those submissions.

ISSUES

The contractual and transactional backdrop of this dispute was set forth in detail in the earlier order, 529 B.R. at 875-876. The core aspects of the backdrop are as follows.

PNY's claim against the Polaroid Corporation arose from a bi-contractual business relationship between those parties. Under one contract, the Brand Licensing Agreement ("the BLA"), PNY was given the right to produce consumer goods branded with the Polaroid trademark

under license. Under the other, the Support Services Agreement (“the SSA”), the Polaroid Corporation was to act as a named transactional intermediary for the placement of such merchandise with the Target Corporation (“Target”).¹

In sum, under the SSA the Polaroid Corporation was to contract with Target for Target’s purchase of merchandise produced by PNY. The Polaroid Corporation was to correspondingly purchase-order to PNY for Target’s needs. Upon PNY’s drop-shipment of inventory to Target in fulfillment, the Polaroid Corporation was to invoice Target; receive payment from Target; and remit the proceeds to PNY less a nominal service fee (1%). The Polaroid Corporation was to promptly communicate to PNY all changes sought by Target or any contentions or issues raised by Target. 529 B.R. at 876.

In turn, as the producer of goods sold and the recipient of nearly all of the financial benefit of sales to Target, PNY was assigned sole and specific responsibility for the quality of goods sold. It was also to bear the sole risk of any contentions from Target over the performance and provision on Target’s orders of merchandise. *Id.*

After the Polaroid Corporation went into bankruptcy in mid-December, 2008, PNY filed proof of claim no. 34 to assert a claim for “goods sold” in an amount of \$686,837.57.² The documentary attachments to claim no. 34 seemed to tie back into this ultimate number. However, they were not very illuminating on their face.

The documentation consisted of two types. The first was five pages of densely-formatted line-entries. This might have detailed specific shipments of particular products between mid-2007 and the late summer of 2008, but there was no express statement to that effect. Numbers, apparently prices, were associated to all lines and a total matched to the full amount of

¹In testimony during the evidentiary hearing, PNY’s Treasurer, Heidi Stuto, stated that the SSA “would allow [PNY] the only way [it] could do business with Target.” She did not offer further explanation.

²In the original order claim no. 188 was disallowed as duplicative. PNY had acknowledged this.

the claim asserted. The second was a one-page “Polaroid summation sheet.” It recited a “total for INVOICES” of \$111,713.60. It also had a separate section titled “DEDUCTIONS” that totaled \$575,123.97, with itemized line-entries under that. Again, the total of these two categories matched to the full amount of PNY’s claim against the estate stated on the form for the proof of claim. There was no explanation as to why the totals matched.³

In the first order on the Trustee’s objection, the “DEDUCTIONS” category was found to signify chargebacks that Target had made against its payment obligations on shipments of merchandise. Consistent with the understandings of the retail sector, such chargebacks were amounts that Target had withheld from payments due on later invoices from the Polaroid Corporation, in the assertion of a right to recover various costs or penalties that it deemed to be assessable back in adjustment on previous, already-fulfilled orders.

In the earlier order, the Trustee was granted summary judgment on the bulk of his objection; PNY was allowed a claim in the amount of \$111,713.60, attributable to the “INVOICES” category under its proof of claim, but the balance of its claim was disallowed. The claim on account of “INVOICES” was allowed on the ruling that the Trustee had not met his burden as objector, to rebut the prima facie validity assigned to that component of the claim under Fed. R. Bankr. P. 3001(f). 529 B.R. at 883-884. The balance of the claim was disallowed on the ruling that PNY had borne the full risk of all chargebacks and thus could not have held the Polaroid Corporation to account for them by asserting a right to payment in a cognate amount.

When the Trustee’s objection was originally called for hearing, PNY demanded additional time for discovery before the objection was presented for ruling. That demand was rejected, on the ground that any reversal of the chargebacks of the sorts itemized would have been made only in response to corrective action by PNY as the exclusive bearer of risk under the SSA.

³None has ever been produced.

PNY, it was held, would have performed those actions and would have recorded them for itself. Thus, it was held, PNY should have had evidence of its own maintenance to back up its claim that the Polaroid Corporation had received payments from Target to rectify chargebacks, but had not sent the funds on to PNY as was its obligation. 529 B.R. at 883. As a result, PNY's allowed claim was reduced to the asserted component for "INVOICES" in the amount of \$111,713.60.

On appeal, the district court decisively disagreed on the matter of discovery. It held that the denial of PNY's demand was an abuse of discretion. 527 B.R. at 347. Thus, the 2013 order on PNY's claim was vacated in its entirety. The matter was remanded "to allow PNY to conduct discovery with respect to its entitlement to the \$575,123.97 sought in its proof of claim." 527 B.R. at 351.

The district court framed the scope of discovery on remand to match the issues of fact and law that remained after the reversal: the merits, i.e. PNY's ultimate right to an allowed claim, were to be bounded by the facial assertions of the proof of claim, a chain of legal entitlements arising in the invoiced shipments as to which Target had made the chargebacks itemized in the attachment to the proof of claim. The point of fact to be addressed on remand was whether Target had ever reviewed or rectified any of those specific chargebacks, by making a compensating payment or payments to the Polaroid Corporation that the Polaroid Corporation then failed to remit to PNY net of its service charge.⁴

The district court unequivocally charged PNY with the initial burden of production of evidence as to any reversal of the chargebacks, for an evidentiary hearing on remand:

⁴Again, 527 B.R. at 351 n.8 makes it absolutely clear: PNY was not allowed to open up independent bases for new claims against the estate that it had not previously asserted through a proof of claim--whether that was on previously-unmentioned, separate, invoiced provision of other goods or otherwise. Clearly, the district court felt that PNY's opportunity to assert claims based on other component debts had long-passed; which it had, the deadlines for timely filing of proofs of claim having been May 20, 2009 while the cases were pending under Chapter 11 [Dkt. No. 61] or December 31, 2009 during the post-conversion pendency of the cases under Chapter 7 [Dkt. No. 729].

[T]his Order should not be read to suggest in any way that PNY will ultimately succeed in showing that Target repaid \$575,123.97 to Polaroid that it had previously deducted from invoices. Indeed, if PNY is unable to present the evidence showing such reversals, it is undisputed that under the SSA PNY bears the responsibility for those charges and cannot recover them from Polaroid.

527 B.R. at 350.⁵

⁵The terms of the SSA fully support this allocation of burdens. As noted before, PNY's provision of merchandise inventory to Target was to be documented for procurement by two successive purchase orders. The first, running from Target to the Polaroid Corporation, reflected Target's inventory needs. SSA [PNY Exh. 1], ¶ 2(a). The second, running from the Polaroid Corporation to PNY, was to mirror the original purchase order, "reflecting the specific Customer [i.e. Target's] order terms for the Products . . ." SSA [PNY Exh. 1], ¶ 2(b). The second purchase order facially implied a direct contractual obligation from the Polaroid Corporation to PNY, for the full amount invoiced. However--and consistent with the pass-through essence of the SSA--the Polaroid Corporation's obligation to actually pay PNY on the second purchase order only arose when Target actually made payment to the Polaroid Corporation on the original Target-Polaroid purchase order:

Upon receipt of payments from the Customer [i.e. Target], Polaroid shall remit the same, less the service fee, to PNY

SSA [PNY Exh. 1], ¶ 2(d). The face of PNY's proof of claim must be construed in light of the contractual structure established by these terms. (Remember, a proof of claim is to be submitted as an assertion of a right to payment that was legally enforceable outside of bankruptcy, pre-petition. See 11 U.S.C. § 502(b)(1).) By attaching a long itemization, apparently of order data, PNY seemed to be asserting an unsatisfied right to payment on account of merchandise orders that would be linked with the many line-entries in the itemization. But then it attached that other document, with itemized "DEDUCTIONS" that signified chargebacks by Target, possibly made against the payments otherwise owing for the transactions noted in the other attachment. The proof of claim itself had no explanation at all, let alone one to that effect. By including the itemization of "DEDUCTIONS," PNY was seemingly confessing the fact of these chargebacks. But it never alleged affirmatively on its proof of claim that any of them had been reversed or that the Polaroid Corporation had received corresponding monies from Target that it did not remit to PNY. This was not a good way for PNY to open the assertion of a claim allowable in bankruptcy. It cast a confusing pall over its claim from the outset, because it seemed to assert a right to be made good for the chargebacks without ever stating that it had done something to get the chargebacks reversed as was its contractual burden; and without ever alleging a key predicate fact, that payment had been made to the Polaroid Corporation on the reversals. With those facial uncertainties over the claim, the Trustee was well-put to make his objection, to put PNY to the task. Given the persisting murkiness of the face of the proof of claim, it is properly PNY's burden to prove that Target did pay the Polaroid Corporation after all, in whole or in part, on account of the itemized chargebacks. With PNY contractually bearing the sole risk of nonpayment from Target, the Polaroid Corporation would have had no duty to pay any of this to PNY unless PNY had levered Target into actually reversing chargebacks and Target had actually made payment to the Polaroid Corporation. Without any allegations of those historical specifics on the face of PNY's proof of claim, it was not prima facie evidence of a matured pre-petition right to payment from the Polaroid Corporation on the transactions cryptically itemized on its face. The Trustee's objection to that effect was enough to meet his burden as objector, even without producing substantial evidence as would otherwise have been his burden. Cf. *In re Brown*, 82 F.3d 801, 805 (8th Cir. 1996). Within the context of a bankruptcy case, this shifted the burden of production of evidence to PNY. E.g., *In re Be-Mac Transport*

ANALYSIS OF EVIDENCE AND FINDINGS OF FACT

The two days' worth of evidence for this matter were detail-intense in their delivery. The post-trial submissions were well-organized and closely-supported by counsel for both sides, a good job all around; they narrowed the range of controversy.

At the top of the dispute, of course, are the two major categories of component claim ("INVOICES" and "DEDUCTIONS"). The full amount of PNY's filed claim, inclusive of both categories, is subject to test on remand. The district court *vacated* the 2013 order, which has to be read as doing away with all of its rulings, and this despite the fact that the Trustee did not cross-appeal as to the allowance of PNY's claim on "INVOICES." *United States v. Maxwell*, 590 F.3d 585, 589 (8th Cir. 2010) (citing *Creighton v. Anderson*, 922 F.2d 443, 449 (8th Cir. 1990) and *Riha v. Int'l Tel. & Tel. Corp.*, 533 F.2d 1053, 1054 (8th Cir. 1977) (per curiam), for proposition that "A judgment vacated on appeal is of no further force and effect"). And in any event, a treatment of the "DEDUCTIONS"-related issues asserted by PNY required all transactions on the SSA to be considered and netted out, on the evidence that the parties brought forward on their respective cases. This necessarily pulled the asserted claim on "INVOICES" into the mix, as the underlying transactions were reflected through the evidence received.

Below those categories, there are three items of focused controversy.

1. Issue Specified in District Court's Decision

On the original round, PNY's major contention was the matter of the chargebacks--PNY's insistence that the Polaroid Corporation had not accounted to or paid PNY for any of the identified chargebacks that Target may have reversed and for which remittance would have been made to the Polaroid Corporation after such reversals. Under the district court's ruling,

Co., Inc., 83 F.3d 1020, 1025 n.3 (8th Cir. 1996); *In re Brown*, 82 F.3d at 805. All of this bankruptcy-law governance dovetailed with the SSA's allocation of substantive risks and benefits in the transactional flow of inventory provision to Target.

this was the one issue that merited remand. It was the one issue for which the district court directed a reopened opportunity for discovery, with any fruits to be proffered into evidence against the Trustee's claim objection.

On remand, the presentation on this issue could have been straightforward--a matter of comparative accounting among records from PNY, Target, and the Polaroid Corporation. However involved the tracing would have gotten, this was the direct evidence that the district court contemplated. Such evidence would have supported precise fact-finding on the two predicate facts identified by the district court--reversals of chargebacks by Target and compensating payment to the Polaroid Corporation, the Polaroid Corporation's remittance or non-remittance to PNY correspondingly and in like amount.

The district court charged PNY to produce that evidence. PNY produced almost no direct, transfer- or transaction-specific evidence of the sort, as to either predicate fact. Instead, PNY relied largely on proof by indirection, particularly on the predicate fact that was essential to fixing liability in the Polaroid Corporation--the failure to pay PNY after receipt of money from Target.

A small amount of evidence on remand was responsive to the district court's direction, but it went only to the first predicate fact--Target's payment to the Polaroid Corporation in reversal of chargebacks. It went largely to one of the categories of chargeback, the line-entry for "PRICE PROTECTION-PP." The Polaroid Corporation's own internal records relating to the SSA, the monthly internal reconciliation for September, 2008 received as PNY Exh. 6, reflected a credit from Target in the very amount asserted for that category on the proof of claim, \$150,765.30 booked in September, 2008.⁶ This book entry is corroborated by internal communications between Polaroid employees in November and December, 2008, PNY Exhs. 81, 85, as well as the testimony of James Dolan, the controller of the Polaroid Corporation at the time.

⁶This credit is noted as if a debit, at the very end of the second page of the exhibit, under "Less Target Chargeback's [sic] & Deductions."

PNY offered only one other bit of evidence on the issue of chargebacks reversed and compensated: a small correction on the Polaroid Corporation's account, booked by Target for a chargeback made before September 16, 2008, in the amount of \$7,015.00. This chargeback had been initially assigned to a PNY-related transaction, but in mistake. Apparently it was related to a past sale of merchandise that the Polaroid Corporation had made with Target in its own right.⁷ PNY Exhs. 82, 77. PNY did not link this small reversal to any of the categories of chargebacks itemized in its proof of claim.

As to all of the other categories in issue through PNY's proof of claim, PNY offered no direct evidence at all, as to whether Target had actually reversed chargebacks and compensated for them. There is no direct evidence that Target reversed prior chargebacks on account of PNY-related transactions. Beyond the total of \$157,780.30 already noted, there is no direct evidence to meet the first predicate fact that PNY was charged to prove.⁸

⁷During the period of the SSA, the Polaroid Corporation continued to separately sell merchandise inventory of its own procurement to Target, using its preexisting vendor account relationship with Target. Target did not establish a separately-numbered account for its purchases of PNY-produced merchandise subject to the SSA; Target booked, invoiced, paid, and adjusted all of its all purchases of Polaroid-branded merchandise through the one account for the Polaroid Corporation. James Dolan, the controller of the Polaroid Corporation, testified that this presented significant challenges for the Polaroid Corporation's internal accounting. Among other things, it required the creation of an exotic bookkeeping treatment of all PNY-related transactions with Target, that was to reflect only the 1% administrative fee as revenue and an asset to the Polaroid Corporation from all PNY-invoiced transactions. All PNY-generated business was to be zeroed-out every month to reflect that cash-pass-through nature above the 1% fee.

⁸As to that gap in evidence, PNY offered only an excuse: when PNY was investigating the status of its transactions under the SSA, it demanded documentary backup for the other chargebacks from Target. Target directed PNY to Target's on-line electronic platform for merchandise vendors, to get the details from Target's account for the Polaroid Corporation. PNY needed the Polaroid Corporation's access to the account data on the Target platform, but PNY complains that the Polaroid Corporation refused. The refusal was rooted in the complete commingling of transactional data within the records for the one account, for PNY-generated sales and Polaroid-generated sales to Target alike. Apparently the Polaroid Corporation balked due to the belief that the posted pricing for Polaroid-generated merchandise was confidential or proprietary under its own agreements with Target. This dilemma seems to be an invariable incident of the deeply-insinuated customer-sharing under the SSA. There is no evidence that PNY demanded that the Polaroid Corporation retrieve the full account data from Target and extract PNY-related information through its own analysis.

That, of course, is only half of PNY's burden to establish an allowed claim. It also had to prove up an unsatisfied pre-petition right to payment from the Polaroid Corporation, on account of such compensated chargeback-reversals. As to these specific reversals, PNY had to prove that the Polaroid Corporation did not account to PNY for such realization, by passing payment on to PNY as the SSA required.

As to that particular transaction-specific point of fact, PNY produced no direct evidence at all. (This was the very issue for which PNY demanded discovery in the first place, and had gotten its vindication on that demand from the district court.)

Instead, when it came time for evidence PNY leaped over the specific points of fact that the district court had charged it to prove. It relied instead on indirect evidence--mainly the same internal Polaroid Corporation monthly account reconciliation for September, 2008, which seemed to show an accumulated excess of receipts from Target on PNY-sourced transactions over remittances to PNY, of \$432,527.00, through that month. PNY Exh. 6. Of the two inputs for this bottom line, the total of payments to PNY (\$5,079,316.00) matched to PNY's own records per the testimony of Heidi Stuto, PNY's Treasurer. For the stated total of payments received from Target (\$5,511,844.00), PNY relied on the presence of the raw figure on the Polaroid Corporation's own books and records. It then insisted that the Trustee was bound by this, as something in the nature of a party admission on the part of the Polaroid Corporation.

So in lieu of what the district court prescribed, PNY tried to establish an aggregated failure by the Polaroid Corporation to remit on reversed chargebacks, using a conclusory end-of-the-day approach. It tried to build that on a string of proposed inferences, without proving up any of the individual points suggested by its proof of claim on a transaction-specific basis. It argued that the summary entries on PNY Exh. 6 had to be indirect, circumstantial evidence of underlying transactions that led to a substantial unremitted balance facially owing to PNY. Then, the argument went, because the higher face-amount of those booked receipts from Target *could* have had a

component for reversals of chargebacks, they should be *found* to have included such reversals.

This apparently was an attempt to respond to the district court's directive, but the means and form of proof did not match the directive at all. About the best that can be said for it, is that the cryptic content of PNY's proof of claim would not be inconsistent with this line of argument.⁹

When this theory came out at and after the evidentiary hearing, it was a surprise. PNY did not articulate this theory of fact, or any theory of comparable precision, before the evidentiary hearing was convened. Rather, it entered the evidentiary hearing relying on another statement it characterized as an admission, that "Polaroid had received approximately \$255K more than it had paid to PNY," as of the date of its bankruptcy filing. PNY cited this statement from an internal communication from Patricia Donovan, a finance director at the Polaroid Corporation, PNY Exh. 85.¹⁰

Leading into the evidentiary hearing, it was not clear from pre-hearing submissions how PNY would respond to the specifics of the district court's directive. Nonetheless, the Trustee prepared to stake out a response to PNY's reliance on Exh. 85, and a final position of his own on the amount of PNY's claim. He commissioned a reconciliation of the parties' full performance over the duration of the SSA, from mid-June, 2007 to late September, 2008, seeking to arrive at a final

⁹Which is to say: the proof of claim might be construed as a submerged assertion of unremitted funds received by the Polaroid Corporation in the reversal of prior chargebacks and an allowable claim on that basis up to the unpaid amount shown on PNY Exh. 6. There still would have been a difference of \$142,596.97 between that figure (\$432,527.00) and the total for "DEDUCTIONS" on its proof of claim (\$575,123.97). PNY did not offer an explanation for that. Does that make the proof of claim only a place-keeper, rather than a focused assertion of pre-petition liability? Apparently by the time of final post-hearing submissions PNY was no longer asserting a claim to that extent of that excess--at least on this alternate argument. *But see* pp. 13-19, *infra*.

¹⁰This single statement lay within a narrative on running disputes between the Polaroid Corporation and PNY over both the SSA and the BLA. The various assertions were broadly and cursorily phrased, and amounts owing were expressed in terms of rounded thousands of dollars that were in contention back and forth. As evidence toward precise fact-finding, this communication was not exactly precise. More tellingly, the raw, rounded-off number does not tie to any of the documentary evidence. PNY argued the statement as a proper evidentiary basis for a liability of "at least \$255K"; but its weight and probity are negligible.

net figure owing to one side or the other. This, apparently, was to be submitted in direct response to PNY's *indirect* proof; and perhaps to any new proof directly responsive to the remand.

James Dolan, currently employed by the Trustee as a consultant, assembled the reconciliation from his review of the Polaroid Corporation's electronically-maintained accounting records (monthly schedules and reconciliations for the Polaroid Corporation's accounting on PNY-sourced transactions), the Polaroid Corporation's source documents as to what it paid PNY, and other electronic transaction records. Dolan had been the Polaroid Corporation's controller during the period in question, and was responsible for the review of all source documents and the maintenance of accurate records of account.

Dolan testified that his latter-day reconciliation had involved a more thorough review of source documents than had been done for the inputs for the regular monthly reconciliations, which had been generated through a more automated process. He testified that his review of source documents had revealed an error in the earlier accounting for the invoices cleared in transactions during the month of March, 2008. The errors had been made in the columnar booking of initial invoice amounts versus payments received on them. In specific, the original invoice amount had been erroneously booked as a receipt of cash for three separate transactions, when the actual receipts during that month had been significantly smaller due to chargebacks made by Target on those same invoices. This resulted in a significant overstatement of cash receipts from Target for that month.

Dolan testified to his finding as to the accurate total of payments-in from Target showing on the Polaroid Corporation's records after that correction. At that point, the Trustee offered the written results of the reconciliation that Dolan had prepared for the evidentiary hearing. PNY's counsel adamantly objected to the sufficiency of this exhibit as a summary under Fed. R. Evid. 1006. He complained that he had never been provided with the original source documents from which the accuracy of the summary's preparation could be tested, contrary to the rule.

When the Trustee's counsel was pressed from the bench on that point, he withdrew the exhibit. He did not offer Trustee Exh. 4 again.¹¹ But, a second time, he elicited and obtained Dolan's testimony, over PNY's objection, as to the total of cash payments from Target that the Polaroid Corporation's records reflected: \$5,172,970.00.¹² That twice-made statement is evidence in the record. It was received the first time without objection.¹³ Dolan's competency as a witness on the point was not challenged.¹⁴

From the Trustee's evidence, the difference between Target's cash payments to the Polaroid Corporation and PNY's cash receipts on the SSA is \$41,923.57.¹⁵ PNY concedes the veracity of half of that evidence--the total of its receipts--on the content of its own records. On the arithmetic, the Trustee concedes that PNY has an allowable unsecured claim in that net amount, as a reflection of the full performance under the SSA inclusive of all reversals of Target chargebacks actually received in cash by the Polaroid Corporation. Dolan testified that he based his conclusions on the Polaroid Corporation's records of *all* cash transactions of both sorts.

The number is significantly different, but the end-point of the Trustee's evidence may

¹¹The Trustee's counsel later felt compelled to complain that PNY had demanded a newly-prepared account reconciliation from the Trustee since the inception of this dispute; and now that the Trustee had finally spent the bankruptcy estate's resources to pay for one, PNY rejected it as evidence because it did not like the results. That statement is a little snide; as a technical point of the receipt of evidence, PNY's issue with the non-production of source documents was valid in the context of an evidentiary hearing. Nonetheless, the Trustee's reluctance to fund a reconstructive accounting was not ill-founded--given the way the law, the SSA, and the district court had allocated the burden of production of evidence on his objection to PNY's claim.

¹²More specifically, \$5,172,969.65 (\$5,511,843.81 minus \$338,874.16, the total of the errors booked to cash receipts in March, 2008).

¹³Yes, as a foundational preliminary to the proffer of the written reconciliation--which *itself* then fielded an objection.

¹⁴Dolan did testify that his responsibilities as controller had been "financial accounting, reporting, and compliance regulations," and to "provide the financial request, information requested by the company." Tr. [BKY 08-46617, Dkt. No. 2428], 153, 273.

¹⁵This is net of the Polaroid Corporation's 1% service fee, as Dolan testified with his calculations. The actual difference between the corrected total of cash receipts from Target and the total of cash disbursements to PNY is \$93,853.65.

be characterized in the same way as PNY urged for its own, much larger number: the net outcome may properly be found to subsume a final, net balance of payments received from Target in reversal of chargebacks that lay *somewhere* in the categories and the total of the “DEDUCTIONS” recited on PNY’s proof of claim, and then was remitted to PNY. On all of the evidence of record, the Trustee’s proof preponderates; it is now inferred that the total of individual remittance payments made to PNY included all payments made by Target during the corresponding period to the Polaroid Corporation on reversal of prior chargebacks, and in particular for the month of September, 2008 when the \$150,765.30 compensatory payment was received from Target. For want of the particularized, category- and transaction-specific evidence that PNY was charged to produce on remand, that is the only finding that can be made. More to the point, a claim in that lesser, net, end-of-day amount--\$41,923.57--is the only one that may be allowed to PNY under the rubric of the remand.

2. Potential Claim Based on Transactional Grounds Outside Scope of Remand

Once it was back before the trial court at its own doing, PNY acted as if it were not constrained by the closely-etched boundaries of the district court’s remand, *supra*, 5-6. PNY’s response to its burden had a large gap, but it tried to build around that; it argued that the evidence and the posture of the record supported the allowance of its claim to the extent of \$432,527.00, or \$473,000.00, or maybe even \$686,837.57.

PNY urged several alternate rationales for this. There was a continuing insistence that the Trustee had an initial and substantial burden of production going into the evidentiary hearing (a position clearly contrary to the district court’s analysis and mandate). There was a reliance on internal Polaroid Corporation communications that were in evidence by stipulation, that went to the then-current status of cross-running payment obligations between the Polaroid Corporation and PNY (when the content of those communications was clearly not based on any numerically-precise analysis, and they clearly were made with some bluster in the midst of pitched

contention between the Polaroid Corporation and PNY). Then there was a reliance on the September, 2008 monthly internal reconciliation, as (in PNY's opinion) the only truly reliable reflection of the Polaroid Corporation's end-game obligation to PNY.

One thing is oddest about these arguments: PNY expressly recognized that it was going beyond the boundaries of the remand to advocate for the allowance of a claim on these alternative theories. It did so even as it acknowledged the bedrock local precedent that a trial court "is bound to obey strictly an appellate mandate." *Bethea v. Levi Strauss and Co.*, 916 F.2d 453, 456 (8th Cir. 1990). PNY self-justifies ignoring the district court by citing to the doctrine of the law of the case. As the Eighth Circuit has held, that doctrine "strongly directs courts to follow decisions made in an earlier proceeding." *Id.* But under the opinion that PNY cites, the doctrine functions to settle "all issues *the appellate court decides*," which "become the law of the case." *Bethea*, 916 F.2d at 456 (emphasis added). Where an appellate court has actually decided particular issues, the doctrine of the law of the case "protect[s] the settled expectations of parties, ensure[s] uniformity of decisions, and promote[s] judicial efficiency." *Id.* This is intertwined with the operation of the mandate in the appellate function, which sets the bounds for what the trial court may do in according relief on remand. Unless a remand contains a directive for further proceedings, a trial court "has no authority to re-examine an issue settled by a higher court." *Bethea*, 916 F.2d at 456.

With that much recognized, the doctrine as articulated in *Bethea* does not apply here. Judge Tunheim did not settle any issue of fact on appeal; rather, he vacated the whole initial decision and remanded for fact-finding after the development of evidence. And PNY does not really raise the doctrine for the application of its own principles; rather, it invokes it as a platform for a different reason, to call up an exception: "A decision on a former appeal [must] be followed in any subsequent proceedings in that court or a lower court unless evidence subsequently introduced is

substantially different or the decision is clearly erroneous and works manifest injustice.”¹⁶ In *re Progressive Farmers Ass’n*, 829 F.2d 651, 655 (8th Cir. 1987); also *Bethea*, 916 F.2d at 457.

With that circuitous an invocation, PNY’s notion of the law of the case is inapposite. In the matter at bar the court injected the doctrine into the discussion at the evidentiary hearing, and solely in relation to whether the allowance of a \$111,713.60 claim was still binding on the parties. By taking up the doctrine and then asserting the exception (and doing so for the first time in briefing submitted weeks after the evidence was closed), PNY tried to hijack the line of analysis toward overriding the confines of the remand.

But that is wrong, because the specific overrides the general here. Judge Tunheim’s directive on remand limited the factual basis on which PNY could establish a claim on newly-generated evidence. “On remand, a [trial] court is bound to strictly obey an appellate mandate.” *Bethea*, 916 F.2d at 456. PNY was expressly prohibited from advancing new theories in fact or law for the allowance of its claim, beyond an unreported receipt by the Polaroid Corporation of then-unremitted funds from Target in reversal of prior chargebacks, up to the amounts itemized in PNY’s proof of claim. If a trial court does have some sort of additional license under the loosely-phrased exception in *Progressive Farmers Ass’n*, 829 F.2d at 655, it will not be taken here. As the recipient of a remand made on a close appellate analysis, this court will not deign to brand the district court’s identification of the sole issue in remaining controversy as “clearly erroneous,” and will not hold that binding PNY to the district court’s limitations would work a “manifest injustice.”

Even if those thoughts were taken up, and broader bases for an allowable claim were entertained, PNY did not produce any evidence to meet them anyway. PNY had no evidence of its own that Target had reversed chargebacks different from those subsumed in the Polaroid

¹⁶It is not entirely clear that this exception is expressly attached to the law-of-the-case doctrine. *Bethea* recites “the common law” as the general source of the exception. 916 F.2d at 457. Too, the exception’s phrasing is troublesome for a trial court: does it give a trial court license to second-guess the appellate court’s rulings on its own motion, by concluding there was clear error or fundamental injustice in the appellate court’s opinion? The chances that this was the intent seem small.

Corporation's internal accounting or Dolan's recent corrective analysis. It had no proof that Target had made additional remittances to the Polaroid Corporation on account of any additional reversals; and it had no evidence that the Polaroid Corporation had failed to pass on anything to PNY. There was no evidence of any unprocessed cash receipts from Target on other PNY-generated, chargeback-free invoices that the Polaroid Corporation had failed to remit to PNY.

PNY had all the time it requested to generate that evidence, from the Polaroid Corporation's records; from discovery procedures directed to Target directly; or from discovery requests for information in Target's records that could have been extracted by the Trustee to meet Target-imposed limitations on direct access to its own records. Going through Target directly, or through the Trustee to get into Target's records, may have required the fine-tuning of requests and procedures; more time for a discovery process than originally requested; and, probably, court intervention. *But PNY seemingly did not undertake the fine-tuning, and it never asked for more time or any third-party directive from the court.*

The evidence in the record would not support a claim of larger magnitude based on other remittance obligations in the Polaroid Corporation in favor of PNY, outside the scope of the chargeback-related transactions or not. So whether PNY has a way around the remand's limitation or not, there is no basis in the record on which a claim could be allowed on a transactional basis extrinsic to the subject matter of the district court's remand.

3. PNY's Theory of Obligation in Polaroid Corporation as Trustee or Fiduciary

In its post-hearing briefing, PNY raised another brand-new theory for an SSA-based liability in the Polaroid Corporation. Once again, the substantive basis for this theory went beyond the scope of chargeback-related debt; and hence PNY again exceeded the bounds of the mandate on remand. For that reason, this line of argument is no more properly in play at this point than was the one just discussed. But even if it were, it would not succeed on its framed merits any more than the other theory did.

PNY posits that the Polaroid Corporation was acting as a fiduciary and trustee for the benefit of PNY, as to all monies it received from Target under the SSA. In such a capacity, PNY argues, the Polaroid Corporation had the obligation to “maintain clear records of the disposition of trust assets”--i.e., the net Target-sourced monies generated under the SSA. As the argument goes, the Polaroid Corporation as “trustee” would then have the burden of proof over the propriety of its disposition of the funds, in any proceeding where that was at issue. By extension, PNY argues, the Trustee would have *an affirmative burden to disprove* that the Polaroid Corporation had misappropriated any Target-sourced funds to which PNY was entitled.

This sequential argument is just the platform for PNY’s end-game maneuver under this theory, dropped into the discussion weeks after the close of evidence: as PNY characterizes the record, the Trustee did not carry this burden at the evidentiary hearing because he did not produce a properly-supported accounting. Hence, it goes on, the Trustee did not rebut the prima facie status to be assigned pursuant to Fed. R. Bankr. P. 3001(f) to the summary allegation on PNY’s proof of claim, of a claim in the full asserted amount of \$686,837.57. Thus, end of story, in the allowance of that claim in full . . . as PNY would have it on that late-raised argument.

PNY musters authority under state law in ostensible support of this theory, for each of its predicate assertions.¹⁷ The argument fails at its foundation, however.

Under Massachusetts law, the parties’ expressions, memorializations, and conduct must “*unequivocally* show an intention that the legal estate be vested in one person to be held in

¹⁷The SSA, at ¶ 10(g), states that it is to be governed by Massachusetts law. Thus, see, e.g., *Carpenter v. Suffolk Franklin Sav. Bank*, 291 N.E.2d 609, 612 (Mass. 1973) (existence of a trust “does not depend on the terminology used”; rather, intention of parties, “manifested by their words and conduct and the end to be accomplished,” can support the existence of a trust relationship); *In re Tap, Inc.*, 52 B.R. 271, 276 (Bankr. D. Mass. 1985) (where debtor had sole function in contractual relationship to promptly transmit funds received by it; had no right to use funds for its own benefit; and there was no extension of credit, debtor was deemed to have held funds in trust for benefit of third party); *Akin v. Warner*, 63 N.E.2d 566, 569 (Mass. 1945) (trustee has burden to account for money or property held by it in trust, and corresponding burden of proof in any court proceeding); *Pantazis v. Tsourides*, 2009 WL 2603147, *10-11 (Mass. Super. Ct. 2009) (ditto; also trustee has duty to maintain clear records of disposition of trust assets).

some manner or for some purpose on behalf of another.” *Ventura v. Ventura*, 555 N.E.2d 872, 874 (Mass. 1990) (emphasis added; interior quotes and citation omitted). Here, the Polaroid Corporation and PNY themselves provided that they were to be “independent contractors and shall not be deemed to be partners, joint venturers, or agents of the other Party.” SSA [Exh. 1], ¶ 10(f). Under Massachusetts law, a partner, joint venturer, or agent typically holds fiduciary status as to its corresponding parties. *Zimmerman v. Bogoff*, 524 N.E.2d 849, 855 (Mass. 1988) (joint venturer); *Commonwealth v. Cleary*, 2011 WL 1707192, *3 (Mass. App. Ct. 2011) (agent); *In re Curran*, 157 B.R. 500, 509 (Bankr. D. Mass. 1993) (partner). But, under Massachusetts law an “independent contractor does not typically owe a fiduciary duty for the services its performs.” *E.g.*, *Intertek Testing Servs. NA, Inc. v. Curtis-Strauss LLC*, 2000 WL 1473126, *10 (Mass. Super. Ct. 2000); *Spring Investor Servs., Inc. v. Carrington Cap. Mgmt., LLC*, 2013 WL 1703890, *7 (D. Mass. 2013).

Under the SSA, many aspects of structure and process directly cut against the notion of Polaroid Corporation being a trustee with heightened fiduciary obligations to PNY. The Polaroid Corporation was granted a right to audit PNY’s books and records, SSA [PNY Exh. 1], ¶ 3(e); but PNY had no corresponding right and no free access as to the books and records of the Polaroid Corporation. The Polaroid Corporation had no obligation under the SSA to segregate and separately maintain the funds it received from Target on PNY’s fulfillment of orders of product. In performance, the Polaroid Corporation commingled all receipts from Target in its own business checking account, and remitted them to PNY from that account. PNY never demanded or obtained any different structures, or any safeguards of the sort that a formal trust almost invariably features. PNY used the vocabulary of a vendor-vendee relationship in its references to its dealings with the Polaroid Corporation under the SSA, all the way down to the “Basis for Claim” recited on its proof of claim, “Goods Sold.” The obligation in the Polaroid Corporation to report to PNY on order-specific changes in variations went no further than that; there was no express duty to furnish a

formal, cumulative reconciliation whether periodic or on demand.¹⁸

The dividing line under the Massachusetts-law authorities has its cognate in applications of federal bankruptcy law. *E.g.*, *In re WEB2B Payment Solutions, Inc.*, 815 F.3d 400, 408 (8th Cir. 2016) (where parties' agreement and performance is fully consistent with simple debtor-creditor relationship under contract, bankruptcy court is not to construe relationship as trust involving fiduciary obligations even though scattered aspects of relationship's processes under contract might in isolation be badges of fiduciary status under nonbankruptcy law).

This whole line of argument is a late-coming, unauthorized bid to upend the burden of production already assigned by the district court. But in any event, it would not succeed on its own internal merits. Outside of bankruptcy, the SSA would not support deeming the Polaroid Corporation to have had the status of a fiduciary to PNY.

OUTCOME

When the district court reversed the earlier order and remanded, it did not affirm the allowance of the claim based on "INVOICES" in the amount of \$111,713.60, and reverse as to the balance of the original outcome. Rather, the 2013 order received a categorical treatment; it was vacated in its entirety.

The Trustee had never appealed the allowance of the \$111,713.60 claim. This raises a small ambiguity as to whether the subject matter was reopened by the act of reversal alone, or was somehow left undisturbed and binding. This point could be argued and analyzed at

¹⁸And, one supposes, here is where the Trustee's post-hearing observation does fit in: when the Trustee finally did fund a cumulative reconciliation at the estate's expense, PNY rejected its use as evidence for substantive purposes. PNY has presented its own case as if the reconciliation were never done and the Trustee had never reached its bottom-line figure. PNY's nominal reason was that the written memorialization was not admissible into evidence absent access to source documentation. However, the outcome of the reconciliation clearly was contrary to PNY's interest as a claimant in contested litigation. In providing the accounting, the Trustee went beyond his obligations as the successor to a simple contractual counter-party to PNY. PNY decided that it did not want the results of the Trustee's reconciliation to be given any practical role in determining the parties' rights and liabilities, after all of its insistence that the reconciliation be prepared.

length, but the exercise is not warranted. The vehicle for the full prior disposition--the 2013 order--was vacated in its entirety. The 2013 order has no further legal force and effect as an adjudication, in any of its parts. *Supra*, p. 5. Because the 2013 order was cleared off the deck, the full extent and amount of PNY's filed claim is before the court now on the Trustee's objection--but only within the bounds of the district court's analysis.

At the beginning of the evidentiary hearing on remand, PNY's counsel apparently acknowledged this. He conceded that the parties' prior contentions over the \$111,713.60 component of his client's claim were "somewhat of a moot argument," because the real issue came down to the Polaroid Corporation's actual receipts from Target and PNY's actual receipts from the Polaroid Corporation over the term of the SSA. Tr. [BKY 08-46617, Dkt. No. 2427], 31.

With the scope of potential disposition set against that range of performance under the SSA, the evidence of record merits the allowance of a claim in favor of PNY in the amount of \$41,923.57, and nothing more. PNY did not carry the affirmative burden that the district court imposed on it, to any extent greater than noted *supra*, pp. 7-8. As to those chargeback-reversals, the Trustee's own evidence supported an inference in favor of the Trustee: a receipt of payment from Target on account of those reversals and any remittance on to PNY was accounted for and subsumed into the aggregate figures to which Dolan testified. Those netted out to the amount of the claim that the Trustee concedes, over the parties' performance under the SSA, until Target stopped making payments to the Polaroid Corporation in September, 2008.

After PNY did not meet its burden, the Trustee had no express obligation to bring forward a thing. When he did, it enabled a final reckoning on all of PNY's contentions, supported by admitted evidence. All this occurred after PNY had the opportunity for discovery that it sought in such a determined fashion.

ORDER

On the memorandum of decision just made,

IT IS ORDERED:

1. PNY is allowed a general unsecured claim against the estate of Debtor Polaroid Corporation in the amount of \$41,923.57.

2. In all other respects, the Trustee's objection to Claim No. 34, as filed by PNY, is sustained. The balance of the claim is disallowed.

BY THE COURT:

/s/ Gregory F. Kishel

GREGORY F. KISHEL
CHIEF UNITED STATES BANKRUPTCY JUDGE