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; 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 7 Cases
Judge Gregory F. Kishel

****

POLAROID CORPORATION,

Plaintiff,

v.

ADV 09-4032

RITCHIE CAPITAL MANAGEMENT, L.L.C., as Administrative and Collateral Agent, RITCHIE SPECIAL CREDIT INVESTMENTS, LTD., RHONE HOLDINGS II, LTD., YORKVILLE INVESTMENTS I, L.L.C., and RITCHIE CAPITAL STRUCTURE ARBITRAGE TRADING, LTD.,

Defendants.

****

ORDER GRANTING PLAINTIFF'S MOTION FOR DISMISSAL OF DEFENDANTS' COUNTERCLAIM, IN PART

****

At St. Paul, Minnesota, this 4th day of December, 2009.

This adversary proceeding came on before the Court for hearing on the Plaintiff's motion for dismissal of the Defendants' counterclaim. The Plaintiff appeared by its attorney, Sandra S. Smalley-Fleming. The Defendants appeared by their attorneys, James M. Jorissen and Bryan Krakauer.

This adversary proceeding was commenced in February, 2009. At that time, the named plaintiff ("Polaroid") was a debtor-in-possession under Chapter 11.[1] When Polaroid filed for bankruptcy, the Defendants (collectively, "the Ritchie parties") claimed security interests in Polaroid's trademark rights in Brazil, China, and India.

Via this adversary proceeding, Polaroid sought to avoid or otherwise nullify the Ritchie parties' liens. Their main theory was that the taking of the security interests constituted fraudulent transfers as to Polaroid's creditors, under Minnesota state law and federal bankruptcy law.[2] Toward the same end, Polaroid requested other forms of relief: the disallowance of the Ritchie parties' claims in their bankruptcy cases; the avoidance of the Ritchie parties' liens in consequence of any such disallowance; the equitable subordination of the Ritchie parties' claims; the recharacterization of their claims as equity rather than debt; and/or the nullification of their liens under more general equitable principles.

An involved series of events and circumstances is pleaded in support of these requests. However, the factual theory can be summed up simply enough: Polaroid was induced by the individual in control of it (Thomas J. Petters) to encumber its own assets, i.e., the

---

[1]Since the hearing on the motion at bar, the cases of the named plaintiff and the other debtors in this grouping of jointly-administered cases were converted to Chapter 7. John R. Stoebner, Esq., was appointed as Trustee. He will be formally substituted as party-plaintiff in due course.

[2]Polaroid also seeks avoidance of the imposition of the security interests as a preferential transfer under 11 U.S.C. § 547(a), "[t]o the extent that any of the [t]ransfers [of security interests] were made by Polaroid . . . on account of a preexisting debt obligation," presumably a debt Polaroid itself owed to the Ritchie parties.

trademarks, to the Ritchie parties, in order to provide security for the first time for preexisting debts owed to the Ritchie parties by Tom Petters and other companies in Petters's business structure (Petters Group Worldwide, LLC ("PGW") and Petters Company, Inc. ("PCI")).[3] The complaint recites that the underlying debt bore very heavy costs of debt service, "interest rates as high as 362.10%." It is alleged that the trademarks were encumbered on September 19, 2008, after the Ritchie parties concluded that the "obligations owed by [Tom] Petters and [PGW and PCI] was [*sic*] in serious jeopardy" of repayment. The basis for avoidance or subordination would be that Polaroid received nothing, or an inadequate benefit, from pledging its assets for third-party debt on which Polaroid had had no legal obligation, and that Tom Petters and the Ritchie parties knew that and still proceeded.[4] The resulting expropriation of value would be redressed by one or more of the remedies requested.[5]

Through counsel, the Ritchie parties interposed their answer in March, 2009. The answer tracks the complaint's organization; it specifies the Ritchie parties' responses to the complaint's fact averments and its ten separately-numbered counts. It pleads eight affirmative defenses, under the avoidance statutes plus boilerplate equitable theories.

Then, the Ritchie parties plead a counterclaim, in which they seek to vindicate their asserted "valid, enforceable security interests" in the trademark rights and an additional class of assets. They characterize the complaint as accusing them of being "aware of the fraudulent scheme perpetrated by Petters and trying to salvage [their] own loans at the expense of other

---

[3]At ¶75 of their answer, the Ritchie parties admit that Polaroid had not been liable on the debt relevant to Count I.

[4]As to the remaining requirement of fraudulent-transfer theory, it is alleged that this was done at a time when Polaroid was insolvent, or it became insolvent as a consequence.

[5]In the late spring of 2009, the trademark rights were sold with most of Polaroid's other significant assets, pursuant to 11 U.S.C. §§ 363(a) and 363(f). Thus, any avoidance remedy here would be applied to the "replacement lien" that was impressed on the cash proceeds as a condition of the sale.

creditors."[6] They attack Polaroid's efforts in suing this out as "malicious," "irresponsible," "disingenuous," "unreasonable," "inappropriate," "baseless," and so forth.

After that much stridency, the counterclaim settles down to detail an involved series of financing-related transactions that had commenced in early 2008, initiated at the request of Tom Petters and eventually involving him, the Ritchie parties, PGW and PCI, and then Polaroid. The Ritchie parties state that PGW executed promissory notes over a two-week period in February, 2008, under which PGW obligated itself to various of the Ritchie parties in a total of $85,000,000.00. Per the Ritchie parties, this resulted from negotiations initiated by Tom Petters toward a "bridge loan" to enable the sale of Polaroid's North American trademarks "to a retail distribution company." They acknowledge that the associated loans to PGW were made on an unsecured basis. However, they insist that this was done because the collateral previously contemplated (apparently Polaroid's assets) was already "encumbered by liens securing loans Polaroid owed to J.P. Morgan." They state that they ultimately consented to lend on an unsecured basis upon Tom Petters's proffer that he be a named obligor, and on his representation that the Polaroid assets would be pledged once the J.P. Morgan lien was released.

The Ritchie parties tacitly acknowledge the high rates of interest stated on the notes for this initial round of debt. They justify them by citing "common practice" founded on "the high degree of risk taken by the lender" on "unsecured, short-term notes to non-investment grade borrowers." They go on to state that Tom Petters made a renewed request for funding in May, 2008, which resulted in further advances of a total of $12,000,000.00. These advances were memorialized via notes dated May 9, 2008, executed by PGW, PCI, and Tom Petters individually, which had a due date of May 30, 2008.

---

[6]On December 2, 2009, Tom Petters was convicted of 20 felony counts (mail fraud, wire fraud, money laundering, and conspiracy) in the United States District Court for this district. All of the charges related to his business operations.

The Ritchie parties then state that they granted a series of extensions on the notes' due dates, at Tom Petters's request. This took the situation to early August, 2008. After that, a six-week round of negotiations ensued, on the Ritchie parties' demands for "some form of collateral security to secure the obligations of PGW . . . under the extended loans." Per the counterclaim, this led to the execution of a variety of documents on September 19, 2008.

Among them, two classes are relevant to the Ritchie parties' counterclaim. The first was a "Trademark Security Agreement" in which Polaroid granted the Ritchie parties a security agreement in "all of the trademarks owned by Polaroid in Brazil, India and China, including a portion of any proceeds realized from their license or sale."[7] The second was a security agreement and related documents executed by PCI and Thomas Petters, Inc. ("TPI") and Petters Capital, LLC ("PCLLC"), two separate companies in Tom Petters's corporate structure. Through these instruments, the Ritchie parties were granted security interests in several pre-existing promissory notes and related secured rights under which Polaroid or one of its related entities (Polaroid Consumer Electronics, LLC) were the debtor, and PCI, TPI, or PCLLC was the creditor and secured party. The various Polaroid- and Petters-related entities also executed intercompany agreements; in these the attachment of liens against "substantially all of the assets of Polaroid" in favor of PCI, TPI, and PCLLC was acknowledged, validated, or ratified.

The fact recitations of the counterclaim go on for six pages after that. The only part that is relevant to this motion is the Ritchie parties' insistence that Polaroid received reasonably equivalent value for the pledge of its trademark rights. That value was identified as the "maintaining [of] the stability of [Tom] Petters and PGW, the sole owners of Polaroid, which was essential for the stability of Polaroid."

The Ritchie parties base the two counts of their counterclaim on these stated facts.

---

[7]The language quoted is from ¶22 of the Ritchie parties' counterclaim, not from the original instrument.

In the first count, they maintain that their security interests in the Polaroid Brazil, China and India trademarks are "valid and enforceable," and that they are "entitled to the full benefit of those secured interests in [Polaroid's] bankruptcy proceedings." They seek a declaratory judgment to that effect.

In a second count, they maintain that PCI, TPI, and PCLLC "received fair value for the pledge [to the Ritchie parties] of the promissory notes" from Polaroid; that Ritchie's liens in those notes and their accompanying security "are valid and enforceable"; that the security interests in Polaroid's assets granted to PCI, TPI, and PCLLC "are valid and enforceable"; and that "Ritchie is entitled to the full benefit of those secured interests in [Polaroid's] bankruptcy proceedings." They seek a second, declaratory judgment, that they have "a valid and perfected security interest in" the notes under which Polaroid and Polaroid Consumer Electronics, LLC are the debtors of PCI, TPI, and PCLLC, plus in Polaroid's assets themselves via the "Intercompany Note Security Agreement" among the several Petters- and Polaroid-related entities. They also seek a declaration that the security interests granted to PCI, TPI, and PCLLC "are valid claims and liens enforceable against Polaroid (and its pertinent subsidiaries) in accordance with their terms."[8]

Polaroid moved to dismiss the Ritchie parties' counterclaim. Predictably, the Ritchie parties strenuously resisted the motion.

At the outset it is important to recognize that the Ritchie parties seek two different declaratory judgments, demarked by the two separate counts of their counterclaim. As it turns out, the outcome on the motion splits on the same line.

---

[8]At this time, the various Petters-related entities named by the Ritchie parties hold allowed claims against Polaroid, memorialized under the following filed proofs of claim: PCI, no. 122; Thomas Petters, Inc., no. 120; and Petters Capital, LLC, no. 124. Thus, their status would be that of a claimed-lienholder-of-claimed-lienholders; presumably, they would succeed to their own debtors' secured status were they to foreclose their "direct" liens against the given Petters-related entities. That is not being allowed at present, because all of these entities are under the protection of the federal courts: PCI's Chapter 11 case is the lead, no. 08-45257, in a group of jointly-administered cases of a number of Petters-related companies; TPI is under receivership in the United States District Court under *United States v. Thomas Joseph Petters, et al*, Civil No. 08-5348; and PCLLC is a debtor under Chapter 7, in case no. 09-43847.

The subject of the first count is an interest in Polaroid's assets that the Ritchie parties hold directly and in their own right: the security interest in trademarks and associated rights that Polaroid itself granted to them on September 19, 2008. As to this count, Polaroid frames its motion for dismissal under both FED. R. CIV. P. 12(b)(6) (allowing for dismissal "for failure to state a claim on which relief can be granted") and FED. R. CIV. P. 12(f) (empowering the court to "strike from a pleading . . . any redundant [or] immaterial . . . matter").[9] But, neither Polaroid's briefing nor its oral presentation articulated a theory on which the first count of the counterclaim was legally deficient on its pleaded facts. Thus, there is no basis for dismissal under Rule 12(b)(6).[10]

Thus, as to Count I, the motion rests solely on the argument that the count is only surplusage--that is, that in seeking a declaratory judgment on the validity and enforceability of its specific security interest in trademark rights, the Ritchie parties' counterclaim "is simply redundant of Polaroid's claims and [the Ritchie parties'] affirmative defenses." In support, Polaroid's counsel cites a number of recent decisions issued out of United States district courts from other districts, reported only in the electronic legal research services. None of these rulings have precedential effect here; and generally they stand for no more than a permissive authority in the court, to excise defendants' "redundant" requests for declaratory judgment where they would only mirror adjudications necessarily made in disposition of plaintiffs' claims. The actual precedent in this circuit recognizes a "liberal discretion" in the trial courts, "to strike pleadings under Rule 12(f)." *E.g., BJC Health System v. Columbia Cas. Co.*, 478 F.3d 908, 917 (8th Cir. 2007). However, that discretion is tempered by the Eighth Circuit's observation that "striking a party's pleadings is an

---

[9]Both of these rules are incorporated by FED. R. BANKR. P. 7012(b) for application in adversary proceedings in bankruptcy cases.

[10]Polaroid's brief includes a boilerplate, toss-off reference to *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007), the Supreme Court's recent reformulation of the standard for dismissal under Rule 12(b)(6). Because no argument is framed up under the "plausibility" analysis of *Twombly* and *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937 (2009), it is not necessary to apply Rule 12(b)(6) on its merits.

extreme measure," and motions for such relief "are viewed with disfavor and are infrequently granted." *Stanbury Law Firm v. I.R.S.*, 221 F.3d 1059, 1063 (8th Cir. 2000) (citation and internal quotations omitted).[11]

Regardless of the liberal discretion committed to the court, this is not a clear case of redundancy between claim and counterclaim. The main, frontal assault on the Ritchie parties' secured position--avoidance as a fraudulent transfer--does not implicate the Ritchie parties' technical compliance with the underlying legal requirements for a grant of lien under Article 9 of the Uniform Commercial Code. Adjudicating the demand for avoidance would not require a formal, threshold ruling that the transfer of the lien had been regular on its face, standing alone.

The case is a bit closer as to the other theories on which Polaroid would have the Ritchie parties' secured status nullified. Polaroid seeks to have the Ritchie parties' claim disallowed under 11 U.S.C. § 502(b)(1).[12] Its theory is broadly-pleaded, and might be construed to go to the liens' validity in the first instance. Polaroid's own request for a declaratory judgment in equity, to have the Ritchie parties' security instruments "declared null, void, and unenforceable," would or could require initial, subsidiary determinations as to the original propriety of these security interests under nonbankruptcy law. However, the findings and legal rulings made as the openers on these counts would not necessarily lead to a formal judgment of validity, in a form that would foreclose further challenges to the Ritchie parties' position under some other theory. In the disposition of Polaroid's claims, the holdings need only be formulated as resolutions of discrete *issues*, which could later be invoked under the rubric of collateral estoppel. As such, they probably would not be classifiable as a full adjudication of the *claim* of validity, so as to trigger res judicata.

So, the Ritchie parties' counsel's position is not unfounded: the denial of all relief

---

[11]Polaroid's counsel never mentioned the existence of this precedent in briefing or argument, contrary to an advocate's duty to any judicial tribunal.

[12]i.e., on the ground that the claim and its security aspects are "unenforceable against" the Polaroid Plaintiffs and their property "under . . . applicable law."

on the complaint in this adversary proceeding would not automatically subsume a determination that his clients' lien was valid beyond *all* challenge, or equate to one such.

Perhaps Polaroid's thought is that the functional overruling of the objection to the Ritchie parties' claim, as asserted in bankruptcy, would restore them to the status of holder of an allowed secured claim, as established by their filed proofs of claim.[13] That might work, if the only possible means for the recovery of the value from the Ritchie parties' claimed security were the bankruptcy process, via the administration of the sale proceeds of Polaroid's assets. However, the Ritchie parties seek a discrete, pointed adjudication in their favor, were the claims against them to fully fail; and they expressly want it to be "binding on all parties," for exploitation in the bankruptcy process in the underlying cases and for possible parlay in collateral application.[14] As their counsel urges, with all parties and the court getting so deeply into the facts through a plenary airing of the complaint's broad theories, his clients really should be allowed their final vindication if the case under the complaint fails.

So it just does not conduce, to dismiss the Ritchie parties' request for declaratory judgment under Count I of their counterclaim as redundant of Polaroid's request for avoidance. The motion for dismissal must be denied, in that part.

Count II of the counterclaim raises different and more abstruse issues on this motion. The reason is that this count would require two stages of adjudication for a full resolution.

---

[13]Polaroid's counsel came close to stating this, but in the end she said only that a decision on Polaroid's claims would lead to a "resolution of the questions and defenses on the validity of their claim."

[14]And one can envision one possible collateral application. An appeal from the order authorizing the sale of the bulk of the Polaroid assets free and clear of its liens is still pending in the Eighth Circuit Court of Appeals, at the instance of another secured creditor. The appellant there apparently is invoking *In re PW, LLC*, 391 B.R. 25 (B.A.P. 9th Cir. 2008) to argue that its lien still attaches to the trademarks as they repose in the ownership of the purchaser. If that appellant were to prevail on this theory, the assets themselves, post-sale, would be an additional source of recourse for that appellant. It is unknown at this time whether a disposition of the appeal in favor of that appellant could actually, concretely inure to the Ritchie parties' benefit, given that they did not take such an appeal themselves. But, they cannot be faulted for wanting to keep their options open.

The first question would be the validity of the Ritchie parties' lien against the assets of PCI, TPI, and PCLLC, i.e., their secured rights to payment from Polaroid. Standing in isolation, this issue is not even directly relevant to Polaroid's bankruptcy cases: it does not arise out of a debtor-creditor relationship to which Polaroid is a contractual or legal party, and it does not concern assets of their bankruptcy estates. Hence, this component of Count II cannot constitute a "core proceeding" in the case underlying this adversary proceeding, in the jurisdictional terms of 28 U.S.C. § 1334(b) and the classifications of 28 U.S.C. §§ 157(b)(1) - (3).

An attenuated argument could be made that the outcome on the issue, in the abstract, "could conceivably have [an] effect on the estate being administered in bankruptcy"; hence, a lawsuit involving these issues might fall within related-proceeding jurisdiction under 28 U.S.C. § 1334(b) and the classifications of 28 U.S.C. §§ 157(b)(3) and 157(c). *See, e.g., Celotex Corp. v. Edwards*, 514 U.S. 300, 307-308 (1995); *Specialty Mills, Inc. v. Citizens State Bank*, 51 F.3d 770, 773-774 (8th Cir. 1995); *In re Titan Energy, Inc.*, 837 F.2d 325, 329-330 (8th Cir. 1988); *In re Dogpatch U.S.A., Inc.*, 810 F.2d 782, 786 (8th Cir. 1987); *Nat'l City Bank v. Coopers and Lybrand*, 802 F.2d 990, 994 (8th Cir. 1986). However, PCI, TPI, and PCLLC are not named as parties here, and they are the essential parties-respondent whose interests would be directly impacted by the adjudication. Without them, the matter certainly could not go forward--and the Ritchie parties have identified no conceptual machinery through which they could defensibly be made a party in an adversary proceeding in a bankruptcy case in which they were not the debtors. If a judicial determination were to be made on this component issue, it would belong in two other bankruptcy cases and the receivership proceeding.[15]

The second question would be the validity and enforceability of the liens of PCI, TPI, and PCLLC against Polaroid's assets. This issue is beyond the scope of those raised by the

[15]This observation is not to be taken as a ruling that jurisdiction would lie in that context, either; the issue of jurisdiction there is not ripe, in Article III terms.

complaint in this adversary proceeding. Those liens are not called into question by the complaint in this proceeding; only the liens that Polaroid directly granted to the Ritchie parties are. Thus, the issue is simply not material to the litigation as Polaroid has framed it.

With the same thought but under a different theory, Count II is not a compulsory counterclaim cognizable in this adversary proceeding, under the specifications of Rule 13(a)(1).[16] The subject matter of Polaroid's claim, i.e., the "transaction or occurrence," is the direct grant of security interests in trademarks to the Ritchie parties on September 19, 2008--nothing more, nothing else. The empowering security interests for Count II were extracted by the Ritchie parties under different instruments, and from several entities other than Polaroid. Some of them were not even granted on the same date that Polaroid gave the trademark security interests.[17] All of this makes the grant of these liens a different "transaction or occurrence" for the purposes of Rule 13.

And, continuing that thought, if analyzed as a permissive counterclaim under Rule 13(b), the Ritchie parties lack direct standing to sue on the issue. They do not presently hold the liens in question, and hence they have no direct, presently-cognizable stake in the outcome of a contest over the lien's enforceability. *E.g. Jewell v. United States*, 548 F.3d 1168, 1172 (8th Cir. 2008) (discussing constitutional and prudential standing; and noting as to prudential standing, that "a litigant must assert his or her own legal rights and interest, and cannot rest a claim to relief on the legal rights or interests of third parties").

---

[16]Under the current text of the rule, a compulsory counterclaim is one that:

> (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and
>
> (B) does not require adding another party over whom the court cannot acquire jurisdiction.

[17]The security agreement granting the liens in the rights to payment held by PCI and Thomas Petters, Inc. was executed separately, on September 19, 2008. Per the Ritchie parties' admission, the security agreement in which Petters Capital, LLC was the pledgor was executed a week later, on September 26, 2008. (That date was two days after the FBI's raid on Tom Petters's headquarters. This sequencing may be relevant to the status of the liens, when that is reached in some other proceeding.)

The Ritchie parties counter this by arguing that they have present, derivative Article III standing as assignor of another creditor's "direct" rights against Polaroid. They allege that their security documents with PCI and the other two pledgors gave them a formal "assignment" of the rights against Polaroid. They then cite *Sprint Communications Co., L.P. v. APCC Services, Inc.*, ___ U.S. ___, 128 S.Ct. 2531 (2008), for the general proposition that assignees of rights to payment have standing under Article III to sue on the underlying debt in the federal courts.

The Supreme Court's pronouncement in *Sprint Communications* is broad; it even countenances standing in an "assignee for collection" only, one that does not have the right to keep the proceeds of collection. But, in the end, the argument has no merit. The anomalous, almost *sui generis* legal posture of Polaroid and the relevant pledgors distinguishes the matter at bar. All of the purported assignors are protected entities, under the jurisdiction of the federal courts and under a fiduciary administration that cannot leave the status of any claim unexamined. The administration through receivership and bankruptcy has been slow, yes, but necessarily so due to the remarkable complexity of Tom Petters's organization and operation. The status of *all* parties' liens and claims is still indeterminate, pending investigation, litigation, and judicial determination if necessary. Thus, because the assignments themselves may be challenged, the abstract observation in *Sprint Communications* does not apply. The argument built on it is a blithe tautology that takes no notice of the very *raison d'être* of federal jurisdiction over the subject matter here. The Ritchie parties do not have this sort of derivative standing, due to the block imposed by the current status of their purported assignors: a dictate to hold in place, sort out, and allow disbursement only to ensure ongoing administration.

Because the Ritchie parties lack standing on one of the two components of Count II, that count does not state a claim on which relief may be granted to them. In any event, in the context of this case, there is no jurisdiction over the other component. So, Polaroid's motion for

dismissal must be granted as to Count II of the Ritchie parties' counterclaim.[18]

IT IS THEREFORE ORDERED:

1. Count II of the Defendants' counterclaim is dismissed.

2. The Plaintiff's motion for dismissal as to Count I of the Defendants' counterclaim is denied.

BY THE COURT:

/e/ Gregory F. Kishel

GREGORY F. KISHEL
UNITED STATES BANKRUPTCY JUDGE

[18]In a terse, short argument, the Ritchie parties again tossed up another variant of their theory: a conflict of interest inherent in their opponent's position should prevent anything from proceeding against them--here, specifically, the submission of Polaroid's motion. The argument was without merit, in context, and at the time this motion was submitted.