

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:

POLAROID CORPORATION, *et al.*,

Debtors.

Case No. 01-10864 (PJW)
Chapter 11
Jointly Administered

**APPLICATION PURSUANT TO 11 U.S.C. § 503(b) FOR
COMPENSATION FOR SUBSTANTIAL CONTRIBUTION TO THE CASE**

TO THE HONORABLE PETER WALSH,
UNITED STATES BANKRUPTCY JUDGE:

North American Capital Corp. and P.I. Pension Plan submit this application pursuant to section 503(b) of the Bankruptcy Code for reimbursement for the efforts of their principal, Stanley Roth, in the reorganization of the above-captioned “Debtors”, and represent as follows:

Preliminary Statement

1. This application requests compensation for Roth’s extraordinary efforts to preserve value for unsecured creditors. As set forth below, Roth’s personal efforts provided an indispensable supplement to the Official Committee of Unsecured Creditors (the “Committee”) and its professionals in their ultimately successful effort to oppose the originally proposed sale of the Debtors’ assets – which would have left mere nominal value for unsecured creditors – and to replace it with provisions that, according to the disclosure statement (the “Disclosure Statement”) relating to the Third Amended Joint Plan of Reorganization of Primary PDC, Inc. (f/k/a Polaroid Corporation) and its Debtor

Subsidiaries and the Official Committee of Unsecured Creditors (the “Plan”¹), will result in a return to unsecured creditors of between 14¢ and 18¢ on the dollar. Under the law in this district and the Third Circuit, Applicants should be compensated for their “substantial contribution.”

2. The application rests upon two related propositions, both of which are amply demonstrated below. First, the Committee, when viewed as a whole (i.e., including the Committee’s counsel, Akin Gump Strauss Hauer & Feld, LLP (the “Committee Counsel”), the Committee’s financial advisors, Houlihan Lokey Howard & Zukin (the “Committee Professionals”) and Roth, its chair) was directly responsible for the recovery received by general unsecured creditors under the plan. Second, without diminishing the significant roles played by the Committee’s Professionals in achieving this result, the Committee could not have done so without the separate contribution of Roth detailed below.

Jurisdiction and Venue

3. This Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue is proper under 28 U.S.C. §§ 1408 and 1409.

Background

4. On or about October 12, 2001, each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. Applicants were given a seat on the Committee when it was appointed on October 23, 2001. Roth, the principal of

¹ The Plan was approved by the Court on November 18, 2003 and became effective on December 17, 2003.

North American Capital Corp. and the administrator of P.I. Pension Plan, was subsequently selected as chairman of the Committee.²

5. On April 18, 2002, the Debtors filed a motion for authorization to sell substantially all of their assets to a stalking horse, OEP Imaging Corporation, subject to higher and better bids. The sale was presented as a *fait accompli*. Roth and the Committee recognized that the sale process, up to that time, was principally driven by the Debtors' secured creditors, who had no need or interest in providing a recovery to unsecured creditors. After reviewing the Debtors' financial information, which had been made available for the first time in connection with the proposed sale, Roth realized that the proposed sale would not lead to significant recovery for the unsecured creditors.

6. In particular, under the proposed sale, the only consideration that would be available to general unsecured creditors would be warrants to purchase 6% of the common stock of the purchaser exercisable at the same price that OEP paid for its common stock. Attached as Exhibit A are selected pages from the proposed sale contract, dated as of April 18, 2002. These warrants for which the recipients would have had to pay the exercise price would have had only nominal value.

7. Roth and the Committee Professionals realized that the only way to achieve a return to unsecured creditors was to offer a credible alternative to the proposed sale. Roth and the Committee Professionals analyzed the feasibility of a Committee proposed stand-alone plan, and determined that such a plan could be feasible, *i.e.*, that the

² Roth resigned from the Committee by letter dated August 13, 2002, to preclude any conflict of interest due to his appointment as the representative of the unsecured creditors on the board of directors of the reorganized debtor.

Debtors could continue to operate on their own, if they could receive financing of \$110 million.

8. Roth then undertook to obtain a commitment for a \$110 million loan. Using the resources of North American Capital Corp. and its connections in the financial world, and following weeks of personal review by Roth with the prospective lender, Roth obtained a commitment for \$110 million in financing from Congress Financial, which supported a committee-proposed plan under which the unsecured creditors would receive the stock of a reorganized debtor, and the secured creditors' interests would be adequately protected. A copy of the draft commitment letter is attached as Exhibit B.

9. The secured creditors, the Debtors, and OEP opposed the Committee's proposal, but agreed to renegotiate the proposed sale. Under the final sale agreement, as approved, unsecured creditors received, instead of the mere warrants for 6% of the common stock of the company, a combination of common and preferred stock for 35% of the company. As shown in Exhibit C hereto, based on the purchase price paid by OEP, this stock was valued at approximately \$35 million. However, the Debtors, in their Third Amended Disclosure Statement, value these securities at over \$180 million.³

10. In addition, Roth vociferously insisted that the sale agreement include

- An additional \$10 million earmarked for administrative claims to be paid by secured creditors and/or OEP;
- a representative of the unsecured creditors on the board of directors of the reorganized Debtor;
- provisions to ensure the easy tradability of the securities.

³ Specifically, the disclosure statement estimates that unsecured claims will total between \$1 billion and \$1.4 billion, and that unsecured creditors will receive between 14¢ and 18¢ on the dollar, depending upon the amount of unsecured claims. See Exhibit D.

11. All of these provisions were included in the final sale agreement that was approved at the auction that began on June 26, 2002.

12. In short, the intervention of Roth was responsible for raising the amount of consideration available to unsecured creditors from nominal amounts to highly substantial ones; the Committee could not have achieved this without the highly unusual personal efforts of Roth. This is corroborated by the declaration of Fred Hodera, committee counsel, attached as Exhibit E.

13. The effectiveness of the intervention was also recognized at the hearing on the approval of the sale, at which the Court stated:

I believe fairly early in the case, Mr. Hodara made it clear that the Committee was not going to sign off on a sale transaction without a fight. And the Committee was going to see what it could do in terms of professional advice and shopping around with parties interested in a financial transaction to see what could be done in terms of a standalone plan. And, as I recall it, we stretched out the auction process in order to give the Committee more time to come up with that alternative.... And the Committee came in with what I understand to be an alternative proposal, albeit in the form of a term sheet, not a specific deal, with obviously was not deemed acceptable, but which *required the purchaser in this case to concede a value in favor of the Committee's constituency to a very significant degree.* And, in that regard, I think *the Committee, acting on behalf of the general creditor body, has achieved a significant result in producing value for the creditors which prior to the auction process – or should I say the bidding negotiations was only going to produce a very small return for them.*

So I think that the conduct of the Committee has not only demonstrated that this transaction was shopped, but *the conduct of the Committee by reason of this shopping process has produced greater value for its constituency.*

Transcript of June 28, 2002 hearing, Exhibit F hereto (emphasis added).

Relief Requested and Reasons Therefor

14. North American Capital Corp. and P.I. Pension Plan seek compensation for the services Roth personally rendered to the Debtors' unsecured creditors in enhancing the sales price. Based upon the prior valuation of the stock to be received of \$35 million (see paragraph 9 above), and the additional \$10 million set aside for administrative expenses, Applicants calculate a total benefit to the estate of \$45 million, and request compensation of a modest 1% of that amount.⁴ As set forth below, such compensation is authorized under the Bankruptcy Code and this Court's precedents.

I. 1. Section 503 Provides Authority For The Allowance And Payment Of Compensation And Reimbursement Of Expenses

15. Section 503(b)(3) of the Bankruptcy Code provides that there shall be allowed as administrative expenses of the estate, among other things:

the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by— ... [D] a creditor ... or committee representing creditors ... in making a substantial contribution in a case under chapter ... 11 of this title.

11 U.S.C. § 503(b) (3). In addition, section 503(b)(4) requires allowance of:

reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant.

11 U.S.C. § 503(b) (4).

16. Section 503(b)(3)(D) authorizes an administrative expense priority claim where a substantial contribution has been made to a reorganization. 11 U.S.C. §

⁴ As noted above, the Disclosure Statement states that the benefit to creditors is far larger – over \$180 million. The amount sought by Applicants is approximately one quarter of a percent of that valuation.

503(b)(3)(D); *In re Buckhead America Corp.*, 161 B.R. 11, 14-15 (Bankr. D. Del. 1993); *Lebron v. Mechem Financial Inc.*, 27 F.3d 937 (3d Cir. 1994); *In re Hooker Inv. Inc.*, 188 B.R.117 (S.D.N.Y. 1995); *In re McLean Indus. Inc.*, 88 B.R. 36, 38-39 (Bankr. S.D.N.Y. 1988). As creditors, Applicants are eligible for compensation under the terms of section 503(b), see *Lebron, supra*, 27 F.3d at 943, however, a creditor has the burden of proving that its activities in the case resulted in the requisite contribution. *Buckhead America, supra*, 161 B.R. at 15.

17. Section 503(b) codifies an exception to the general rule that parties usually bear their own costs. In *Lebron*, the Third Circuit explicitly recognized this exception, stating:

The services engaged by creditors, creditor committees and other parties interested in a reorganization are presumed to be incurred for the benefit of the engaging party and are reimbursable if, but only if, the services "directly and materially contributed" to the reorganization.

Lebron, 27 F.3d at 943. Roth's services substantially contributed to the Debtors' reorganization and benefited all unsecured creditors. Accordingly, Roth's compensation should be allowed as an administrative expense of the estate pursuant to section 503(b) of the Bankruptcy Code.

18. Alternatively, Applicants should be considered professionals assisting the Committee entitled to compensation under section 503(b)(4). See *Marcus Montgomery Wolfson & Burten P.C. v. AM Int'l, Inc. (In re AM Int'l, Inc.)*, 203 B.R. 898, 904 (D. Del. 1996) (awarding compensation to accountants/financial advisors to *ad hoc* committee).

19. Although the Bankruptcy Code does not define the term "substantial contribution," courts consider services that "foster and enhance, rather than retard or interrupt the progress of the reorganization." *Lebron*, 27 F.3d at 944 (quoting *Consolidated Bancshares, Inc.*, 785 F.2d 1249, 1253 (5th Cir. 1986)).

20. This court, in *Buckhead America*, set forth three factors the courts consider in determining whether a creditor has satisfied this burden: whether the services (i) were rendered solely to benefit the client or to benefit all parties in the case; (ii) provided direct, significant and demonstrable benefit to the estate; and (iii) were duplicative of services rendered by attorneys for the committee, the committee themselves, or the debtor and its attorneys. *Id.* at 15. As demonstrated below, Roth's actions satisfy the tests.

II. Roth Is Entitled To Reimbursement Of His Fees And Expenses Because He Made A Substantial Contribution To The Debtors' Estate

21. If Roth had not acted, it is likely that the Debtors' assets would have sold for the amount of the initial bid, leaving virtually no consideration for unsecured creditors. As a direct result of his actions, at least \$45 million is available to the estate under the Plan. This is as clear a case of substantial contribution as can be.

22. The decision in *McLean Industries, supra*, is apposite. In that case the applicant (SP&B) filed an objection to a proposed sale of certain stock owned by the estate for \$350,000, which led to other parties supporting the objection, an adjournment, and a subsequent bid of \$1.5 million. *See McLean Industries*, 88 B.R. at 38. The court found that this action constituted a substantial contribution:

We find that SP&B has conferred a benefit upon the estate. The "substantial contribution" SP&B made was that it raised the initial objection to the sale of the Arecibo stock and thereby seemingly prompted others to assert their position concerning the propriety of the sale.... While such objections might have been made in any event ... had the price issue not been raised, the objection to the propriety of the transaction might not have been made.

Id. at 39. Here, the issue is even clearer, because Roth and the Committee were the only party opposing the proposed sale, and because Roth's ability to make a Committee plan conceivable was the sole and direct cause of the improved purchase price.

23. Another similar case is *Marcus Montgomery Wolfson & Burten P.C. v. AM International, Inc. (In re AM International, Inc.)*, 203 B.R. 898 (D. Del. 1996), in which the Court found that 1,095,000 warrants procured by the equity committee had value which was not available in the pre-packaged plan. *See id.* at 904-05. Likewise, in this case, Roth's efforts directly led to and created the additional compensation for unsecured creditors of at least \$35 million and the additional \$10 million for administrative expenses.

A. Roth's Actions Benefited All Unsecured Creditors, And Not Just The Applicants

24. Roth's actions easily satisfy the first element articulated in *Buckhead America*. His actions, through the Committee, benefited all creditors, and only benefited Applicants insofar as all creditors benefited.

B. Roth Provided Direct, Significant And Demonstrable Benefit To The Estate

25. There is no question but that Roth's actions provided a significant benefit to the Debtors' estate by raising the purchase price for the Debtors' assets.

C. Roth's Efforts Were Not Duplicative Of Those Of The Debtor Or Of The Committee

26. Roth's efforts were not duplicative of the services rendered by the Debtors, the Debtors' professionals or the Committee. Clearly they did not duplicate anything done by the Debtors; they also did not duplicate the efforts of the Committee's professionals. Roth's contributions were a necessary and indispensable component of the Committee's "team" approach that succeeded in enhancing the sale price.

III. Roth's Reimbursement Should Be Calculated Based On the Value of His Services as a Professional

27. When North American Credit Corp. was appointed to the Committee the Committee gained, in effect, an extra set of professionals that complemented the professionals retained by the Committee. See Hodara Affidavit. Accordingly, it is appropriate that Applicants receive professional compensation for their efforts. In these circumstances, compensation equal to 1% of the benefit to the estate is appropriate.⁵ See, e.g., *In re Intelogic Trace, Inc.*, 188 B.R. 557 (Bankr. W.D. Tex. 1995) (collecting cases regarding “success fees” in bankruptcy, and approving an award of 1% of benefit to estate).

28. In addition, as noted above, the efforts of North American Credit Corp. can be compensated under section 503(b)(4), which directs the court to consider “the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title.”

⁵ As note above at 9, Roth is asking for 1% of the most conservative calculation of the benefit to creditors, and approximately one quarter of 1% of the actual benefit to creditors.

WHEREFORE, Applicants request entry of an order (i) finding that Applicants made a substantial contribution to this case that benefited the Debtors' estates; (ii) allowing Applicants an administrative claim pursuant to Bankruptcy Code section 503(b) in the amount of \$450,000, and (iii) granting such further and additional relief as this Court deems just and proper.

Dated: January 30, 2004

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