

Andrew G. Dietderich
Michael H. Torkin
John J. Jerome
Mark U. Schneiderman
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
Telephone: (212) 558-4000
Facsimile: (212) 558-3588
Counsel to the Debtors and Debtors in Possession

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

)	
In re:)	Chapter 11
EASTMAN KODAK COMPANY, <i>et al.</i> , ¹)	Case No. 12-10202 (ALG)
Debtors.)	(Jointly Administered)
)	

**DEBTORS' OMNIBUS REPLY IN SUPPORT OF THEIR MOTION FOR ORDERS
(I) (A) CONDITIONALLY AUTHORIZING THE SALE OF PATENT ASSETS
FREE AND CLEAR OF CLAIMS AND INTERESTS, (B) ESTABLISHING A
COMPETITIVE BIDDING PROCESS AND (C) APPROVING THE NOTICE
PROCEDURES AND (II) AUTHORIZING THE SALE OF PATENT ASSETS
FREE AND CLEAR OF CLAIMS AND INTERESTS**

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Eastman Kodak Company (7150); Creo Manufacturing America LLC (4412); Eastman Kodak International Capital Company, Inc. (2341); Far East Development Ltd. (2300); FPC Inc. (9183); Kodak (Near East), Inc. (7936); Kodak Americas, Ltd. (6256); Kodak Aviation Leasing LLC (5224); Kodak Imaging Network, Inc. (4107); Kodak Philippines, Ltd. (7862); Kodak Portuguesa Limited (9171); Kodak Realty, Inc. (2045); Laser-Pacific Media Corporation (4617); NPEC Inc. (5677); Pakon, Inc. (3462); and Qualex Inc. (6019). The location of the Debtors' corporate headquarters is: 343 State Street, Rochester, NY 14650.



TABLE OF CONTENTS

	<u>Page</u>
Background.....	1
Reply to Objections of Apple and Flashpoint.....	2
A. The Disputed Kodak Patents Are Property of the Estate.....	2
B. Property of the Estate is Determined as a Contested Matter	5
C. The Question of Adequate Protection is Premature.....	7
D. Apple and Flashpoint Can Be Adequately Protected.....	8
E. The Requirements of 363(f)(4) Are Satisfied.	9
F. Limitations on Objections at the Final Sale Hearing are Reasonable.....	11
Unresolved Non-Apple/Flashpoint Objections.....	11
A. Treatment of Scheduled Agreements Under the Revised Conditional Sale Order.....	12
B. Notice and Timing to Object to Entry of a Final Sale Order.....	13
C. Inclusion of Certain Agreements on Exhibit C to the Motion.....	14
Conclusion	14

TABLE OF AUTHORITIES

	<u>Page(s)</u>
CASES	
<i>Eastman Kodak Co. v. Apple Inc. and Flashpoint Technology Inc.</i> (<i>In re Eastman Kodak Co.</i>), Adv. Proc No. 12-01720 (ALG).....	2
<i>Anderson v. Conine (In re Robertson)</i> , 203 F.3d 855 (5th Cir. 2000)	5
<i>Chartschlaa v. Nationwide Mut. Ins. Co.</i> , 538 F.3d 116 (2d Cir. 2008).....	4, 5, 6
<i>Cinicola v. Sharffenberger</i> , 248 F.3d 110 (3d Cir. 2001).....	3
<i>Darby v. Zimmerman (In re Popp)</i> , 323 B.R. 260 (B.A.P. 9th Cir. 2005).....	5
<i>Folger Adam Sec., Inc. v. DeMateis/Macgregor JV</i> , 209 F.3d 252 (3rd Cir. 2000)	10
<i>Gorka v. Joseph</i> (<i>In re Atlantic Gulf Communities, Corp.</i>), 326 B.R. 294 (Bankr. D. Del. 2005).....	3
<i>In re Alexander Gallo Holdings, LLC.</i> , Case No. 11-14220 (Bankr. S.D.N.Y. Nov. 10, 2011)	8
<i>In re Alexander Gallo Holdings, LLC.</i> , Case No. 11-14220 (Bankr. S.D.N.Y. Oct. 6, 2011)	8
<i>In re Balco Equities</i> , 323 B.R. 85 (Bankr. S.D.N.Y. 2005).....	4
<i>In re Carozzella & Richardson</i> , 247 B.R. 595 (2nd Cir. B.A.P. 2000).....	4
<i>In re Dewey Ranch Hockey, LLC</i> , 414 B.R. 577 (Bankr. D. Ariz. 2009).....	8
<i>In re DVI, Inc.</i> , 306 B.R. 496 (Bankr. D.Del. 2004)	4
<i>In re Eastman Kodak Co.</i> , No. 12-10202 (ALG), 2012 WL 2255719	3, 6, 10

In re Extra Room, Inc.
2011 WL 846448 (Bankr. D. Ariz. March 7, 2011)9

In re J.B. Winchells, Inc.,
106 B.R. 384 (Bankr. E.D. Pa. 1989)6

In re Kane,
628 F.3d 631 (3d Cir. 2010).....3

In re Murel Holding Corp.,
75 F. 2d 941 (2d Cir. 1935).....9

In re NJ Affordable Homes Corp.,
2006 WL 2128624 (Bankr. D. N.J. June 26, 2009)10

In re Olympia Holding Corp.,
129 B.R.10

In re Steve & Barry’s Manhattan Inc.,
Case No. 08-12579 (Bankr. S.D.N.Y. Aug. 5, 2008)8

In re Steve & Barry’s Manhattan Inc.,
Case No. 08-12579 (Bankr. S.D.N.Y. Aug. 8, 2008)8

In re Trans World Airlines, Inc.
2001 WL 1820325 (Bankr. D. Del. 2001)6

In re Whitehall Jewelers Holdings, Inc.,
2008 WL 2951974 (Bankr. D. Del. July 28, 2008)5

Matter of Hawkins,
224 B.R. 334 (Bankr. E.D. La. 1998)7

Moldo v. Clark (In re Clark),
266 B.R. 163 (B.A.P. 9th Cir. 2001).....4

Precision Indus., Inc. v. Qualitech Steel SBQ, LLC,
327 F.3d 537 (7th Cir. 2003)9

Sanyo Electric, Inc. v. Howard’s Appliance Corp. (In re Howard’s Appliance Corp.),
874 F. 2d 88 (2nd Cir. 2008).....3

Seward v. Devine,
888 F.2d 957 (2d Cir. 1989).....5

U.S. v. Inslaw, Inc.,
932 F.2d 1467 (D.C. Cir. 1991).....5

United States v. Whiting Pools,
462 U.S. 198 (1983).....3

Warnick v. Yassian (In re Rodeo Canon Dev. Corp.),
362 F.3d 603 (9th Cir. Cal. 2004).....5

STATUTES

11 U.S.C. § 105(a)10

11 U.S.C. § 361.....9

11 U.S.C. § 363(b).....6

11 U.S.C. § 363(b)(1)3, 4

11 U.S.C. § 363(e)6, 7, 8, 13

11 U.S.C. § 363(f).....3, 4, 6, 7, 9, 10, 13

11 U.S.C. § 363(f)(4)4, 10, 11

11 U.S.C. § 363(h)3

11 U.S.C. § 363(p)(2)4

11 U.S.C. § 365(n)2, 12, 13

11 U.S.C. § 541.....6

11 U.S.C. § 541(a)3

35 U.S.C. § 261.....5

OTHER AUTHORITIES

Bankruptcy Rule 6004(c).....6

Bankruptcy Rule 70016

Bankruptcy Rule 90146

Bankruptcy Rules 7001(2) and 7001(9).....7

H.R. Rep No. 95-595 (1977).....9

Local Rule 9014-2.....7

Eastman Kodak Company (“**Kodak**”), on behalf of itself and its affiliated debtors and debtors in possession (collectively, the “**Debtors**”), hereby submits this omnibus reply (the “**Reply**”) to the objections filed in connection with the *Debtors’ Motion for Orders (I) (A) Conditionally Authorizing the Sale of Patent Assets Free and Clear of Claims and Interests, (B) Establishing a Competitive Bidding Process and (C) Approving the Notice Procedures and (II) Authorizing the Sale of Patent Assets Free and Clear of Claims and Interests* [Docket No. 1361] (the “**Sale Motion**”) and respectfully states as follows:

Background

1. During the past 12 months, the Debtors and their advisors have been working toward a possible sale of the Digital Imaging Patent Assets.¹ Since the commencement of the case, the Debtors have worked closely with the legal and financial advisors for the key stakeholders in these proceedings, including the DIP Agent, Creditors’ Committee and Second Lien Noteholders Committee, to craft Bidding Procedures designed to maximize the value received by creditors through the Sale.

2. The Debtors received 24 formal and informal objections to the proposed Sale. The majority of these objections were from Licensees (as defined below). The Debtors do not intend to impair the rights of Licensees through the Sale and have revised the Sale Order to address Licensee concerns. As of the filing of this Reply, the Debtors believe that these revisions have resolved 13 of the objections, subject to review of final changes by the applicable parties. *See Order (A) Conditionally Authorizing the Sale of Patent Assets Free and Clear if Claims and Interests; (B) Establishing a Competitive Bidding Process; and (C) Approving the Notice Procedures* [Docket No. 1557] (the “**Revised Conditional Sale Order**”).

¹ Capitalized terms not otherwise defined herein have the meanings given to them in the Sale Motion.

3. Apple Inc. (“**Apple**”) and FlashPoint Technology, Inc. (“**Flashpoint**”) each filed an objection² to the Sale of certain patents within the Digital Imaging Patent Assets (the “**Disputed Kodak Patents**”). Apple and Flashpoint have asserted certain interests in the Disputed Kodak Patents, and the Debtors have commenced an adversary proceeding to determine the validity of these alleged interests (*Eastman Kodak Co. v. Apple Inc. and Flashpoint Technology Inc. (In re Eastman Kodak Co.)*, Adv. Proc No. 12-01720 (ALG) (the “**Adversary Proceeding**”). As discussed below, authorization of the Revised Conditional Sale Order will allow the Debtors to monetize the Digital Imaging Patent Assets while protecting the alleged interests of Apple and Flashpoint if those interests are not resolved in the Adversary Proceeding by the time of the Final Sale Hearing.

Reply to Objections of Apple and Flashpoint

A. The Disputed Kodak Patents Are Property of the Estate.

4. Apple and Flashpoint have both asserted that the Disputed Kodak Patents are not property of the estate, and that the Court may only determine that the Disputed Kodak Patents are property of the estate in the Adversary Proceeding. Both Apple and Flashpoint incorrectly assert that a finding that the Disputed Kodak Patents are property of the Debtors’ estates necessitates a determination of the validity of Apple or Flashpoint’s alleged interests in the Disputed Kodak Patents. No such determination is required; accordingly, the Court may find that the Disputed Kodak Patents are property of the estate in the Revised Conditional Sale Order.

5. Section 541(a) defines property of the estate to include “all legal and equitable interest of the debtor in property as of the commencement of the case.” The scope of

² See *Limited Objection of Apple Inc. to Debtors’ Motion for Orders Authorizing the Sale of Patent Assets Free and Clear of Claims and Interests* [Docket No. 1498] (the “**Apple Objection**”); *Objection of Flashpoint Technology, Inc. to Kodak’s Sale Motion* [Docket No. 1361] [Docket No. 1485] (the “**Flashpoint Objection**”).

section 541(a) is intentionally broad. *United States v. Whiting Pools*, 462 U.S. 198, 204-05 (1983). A debtor has authority to sell property as property of the estate under section 363(b)(1) if the debtor has an interest in the property to be sold. *Cinicola v. Sharffenberger*, 248 F.3d 110, 121 (3d Cir. 2001). However, the debtors' interest does not need to be exclusive, or finally determined, for property to constitute property of the estate. *See, e.g., In re Eastman Kodak Co.*, No. 12-10202 (ALG), 2012 WL 2255719, at *[8] (Bankr. S.D.N.Y. June 15, 2012) (citing *In re Kane*, 628 F.3d 631, 641 n.7 (3d Cir. 2010); *Gorka v. Joseph (In re Atlantic Gulf Communities, Corp.)*, 326 B.R. 294, 2999 (Bankr. D. Del. 2005).

6. Of course, if a debtor merely has “bare legal title” in property as of the commencement of the case, that property is not included in the estate. *Sanyo Electric, Inc. v. Howard's Appliance Corp. (In re Howard's Appliance Corp.)*, 874 F. 2d 88, 93 (2nd Cir. 2008). However, if a debtor has legal title and equitable interests in property as of the commencement of the case, that property is property of the estate even if subject to alleged interests of third parties. Sections 363(f) and 363(h), which provide for sales of property in which third parties allege an interest, would be meaningless if a debtor were required to have — *indisputably* — 100% of the interests in property in order to sell it. Debtors routinely sell property under section 363(f) that is subject to asserted interests of third parties. The clause has no other purpose. And, because the clause is dependent on section 363(b)(1) for the authority to sell in the first place, property of the estate necessarily includes property subject to an interest ‘in bona fide dispute’ under section 363(f)(4). *Cf. Moldo v. Clark (In re Clark)*, 266 B.R. 163, 171 (B.A.P. 9th Cir. 2001).

7. Apple and Flashpoint do not dispute that the Debtors had legal title to the Disputed Kodak Patents as of the commencement of the case.³ Instead, they assert that the Disputed Kodak Patents are not property of the estate because the Debtors' equitable interest could be reduced in the future. But time travel is not part of the 541 analysis in this Circuit: property of the estate is measured as of the commencement of the case. *Chartschlaa v. Nationwide Mut. Ins. Co.*, 538 F.3d 116, 122 (2d Cir. 2008). *See also In re Balco Equities*, 323 B.R. 85, 92 (Bankr. S.D.N.Y. 2005) (holding that real estate, subject to a constructive trust claim that was not adjudicated prior to the commencement date, could be sold pursuant to 363(f)(4) "because the construct trust itself was the subject of a bona fide dispute"); *In re DVI, Inc.*, 306 B.R. 496 (Bankr. D. Del. 2004) (holding the same for personal property subject to a non-adjudicated constructive trust claim).

8. It is obvious that Kodak had more than bare legal title to the patents as of the commencement of these cases. A patent, in essence, is a right to bring a cause of action for the unlicensed practicing of the invention claimed in the patent. And property of the estate necessarily includes "causes of action owned by the debtor or arising from property of the estate." *Chartschlaa*, 538 F.3d at 122; *see also Seward v. Devine*, 888 F.2d 957, 963 (2d Cir. 1989). Kodak had, and still has, at least the following with respect the Disputed Kodak Patents:

- sole legal title;
- all the rights that arise from being the named patentee under Title 35 of the U.S. Code (the "**Patent Act**"), including the exclusive right to bring an enforcement action subject to the terms of the Patent Act;

³ Because the Debtors have established *prima facie* ownership of the Disputed Kodak Patents, the burden shifts to Apple and Flashpoint to prove that the Debtors do not have an equitable interest in the Disputed Kodak Patents. *See, e.g., In re Carozzella & Richardson*, 247 B.R. 595, 602 (2nd Cir. B.A.P. 2000); 11 U.S.C. § 363(p)(2).

- the exclusive right to sell the patents;⁴
- over a decade of history exploiting the patents for its own account;
- over \$3 billion in proceeds, and counting, from related licensing activities;
- over a dozen active litigations seeking to enforce the patents;
- the right as patentee to defend the patents against Apple’s and Flashpoint’s untimely claims; and
- the determination of the ITC that Apple’s ownership claim to a key Disputed Kodak Patent (U.S. Patent No. 6,292,218) — both on inventorship and contract grounds — is meritless.

9. Any patent is subject to the potential correction of inventorship, just as any cause of action is subject to defenses. But this does not mean that the patent or cause of action ceases to be property of the estate *ex ante* – otherwise they never could be. *Cf. U.S. v. Inslaw, Inc.*, 932 F.2d 1467, 1471 (D.C. Cir. 1991) (“It is undisputed that [property of the estate] encompasses causes of action that belong to the debtor, as well as the debtor's intellectual property, such as interests in patents, trademarks and copyrights.”).⁵

B. Property of the Estate is Determined as a Contested Matter.

10. The finding that the Disputed Kodak Patents are property of the estate is properly made as a contested matter, as provided in Bankruptcy Rule 6004(c) (“A motion for

⁴ “Subject to the provisions of this title, patents shall have the attributes of personal property” and may be assigned by the patentee by an instrument in writing. 35 U.S.C. §261.

⁵ Prior cases that have precluded a debtor from selling property subject to disputed ownership can be distinguished because those courts failed to find that the debtor had any equitable interest in the property at the commencement of the case. *See Warnick v. Yassian (In re Rodeo Canon Dev. Corp.)*, 362 F.3d 603, 608 (9th Cir. Cal. 2004) (bankruptcy court failed to make finding of “equitable ownership”); *Anderson v. Conine (In re Robertson)*, 203 F.3d 855, 861-63 (5th Cir. 2000) (final judgment prior to commencement of the case granted a third party “total separate ownership” of applicable property). Other courts have barred a sale because, under the unique facts of those cases, the determination of whether property was “property of the estate” required the determination of the interests of a third party in such property. *See Darby v. Zimmerman (In re Popp)*, 323 B.R. 260, 269 (B.A.P. 9th Cir. 2005) (determination that property was “property of the estate” and not property of an allegedly “alter-ego” entity should have been made through a parallel pending adversary proceeding); *In re Whitehall Jewelers Holdings, Inc.*, 2008 WL 2951974, at *6 (Bankr. D. Del. July 28, 2008) (sale could not proceed without adversary proceedings because the “debtor seeks to invalidate a creditor’s interest” in order to establish property of the estate). Neither of the above principles applies here.

authority to sell property free and clear of liens or other interests shall be made in accordance with Rule 9014”). None of sections 363(b), 363(e), 363(f) or 541 require an adversary proceeding under Bankruptcy Rule 7001. *See* Advisory Committee Notes to Bankruptcy Rule 9014 (“Whenever there is an actual dispute, other than an adversary proceeding, before the bankruptcy court, the litigation to resolve that dispute is a contested matter.”). Indeed, Bankruptcy Rule 6004(c) expressly eliminated the need for an adversary proceeding in connection with a sale under section 363(f), which had been required under former bankruptcy rule 701(3). *See In re J.B. Winchells, Inc.*, 106 B.R. 384, 394 (Bankr. E.D. Pa. 1989); *In re Trans World Airlines, Inc.* 2001 WL 1820325, at *9 (Bankr. D. Del. 2001).

11. Both Apple and Flashpoint assert that a finding that the Disputed Kodak Patents constitute property of the estate must be made in the Adversary Proceeding. This assertion is incorrect: the Court need not make any determination regarding the validity or extent of Apple or Flashpoint’s interests in order to determine that the Disputed Kodak Patents are property of the estate. The Debtors are not requesting in this Motion to “exclud[e] the claimed interests of Apple and Flashpoint,” *In re Eastman Kodak Co.*, No. 12-10202 (ALG), 2012 WL 2255719, at *2 (Bankr. S.D.N.Y. June 15, 2012), but instead are establishing only that the Debtors held more than ‘bare legal title’ on the commencement date and can satisfy the low bar of section 541. *See Chartschlaa*, 538 F.3d at 122 (“It would be hard to imagine language that would be more encompassing than this broad definition”) (internal quotation omitted). The extent of the interests of Apple and Flashpoint are the subject of the Adversary Proceeding and will have the benefit of the protections in sections 363(e) and 363(f) until adjudicated. Accordingly, Bankruptcy Rules 7001(2) and 7001(9) are not implicated.

C. The Question of Adequate Protection is Premature.

12. The Revised Conditional Sale Order preserves the rights of Apple and Flashpoint to object at the Final Sale Hearing to the adequate protection that the Debtors propose to provide in connection with the Sale. The Court may authorize the Debtors to sell the Disputed Kodak Patents under section 363(f), contingent upon a finding at the Final Sale Hearing that section 363(e) has been satisfied. There is no need to reach this issue now.

13. Much may change prior to the Final Sale Hearing. Kodak believes that Apple and Flashpoint's alleged interests in the Disputed Kodak Patents will be found to be barred by applicable statutes of limitations and/or the equitable doctrine of laches: and adequate protection need not be provided for a defective interest. *See Matter of Hawkins*, 224 B.R. 334, 338 (Bankr. E.D. La. 1998). Alternatively, Apple and/or Flashpoint may settle their disputes with Kodak or buy the Disputed Kodak Patents, at which point an adequate protection request from them would be moot. Apple and Flashpoint are not prejudiced if the question of adequate protection is addressed at the Final Sale Hearing, when the relevant issues will be more certain and more information will be available. In contrast, if the Debtors are prevented from starting the Sale process in the manner that they have determined is optimal, recoveries to creditors will be threatened or delayed.

14. Furthermore, assessing the sufficiency of adequate protection requires evidence. The Conditional Sale Hearing is not an evidentiary hearing. *See Local Rule 9014-2*. To determine that adequate protection is insufficient, Apple asks the Court to make findings that require factual support, yet Apple has submitted no evidence to the Court.

15. In this District, courts consider adequate protection at a final sale hearing in connection with the approval of a sale, not as a prerequisite to establishing sale procedures.⁶ This is also the practice in other jurisdictions – for example, the court in *In re Dewey Ranch*, while ultimately finding that the adequate protection proposed by the debtor was insufficient, did not consider the sufficiency of adequate protection until *after* an auction had been conducted and a significant body of evidence regarding the sufficiency of adequate protection had been submitted to the court. *See In re Dewey Ranch Hockey, LLC*, 414 B.R. 577, 586 (Bankr. D. Ariz. 2009). Adequate protection cannot be assessed in a factual vacuum.

D. Apple and Flashpoint Can Be Adequately Protected.

16. While the Debtors believe adequate protection should not be determined until the Final Sale Hearing, even at this early stage in the Sale process it is clear that the Debtors could carry their burden to adequately protect Apple's and Flashpoint's alleged ownership interests in the Disputed Kodak Patents for purposes of section 363(e). Apple and Flashpoint rely heavily on *Dewey Ranch*, a case driven by the unique factual circumstances of professional sports leagues. The interests which were to be adequately protected in that in that case arose from voluntary and unique obligations that the debtors had undertaken as a condition of their participation in the National Hockey League, a collective organization in which actions taken by the owner of one team can have a major impact on owners of other teams. *Id* at 581.

17. In contrast, the alleged interests that Apple and Flashpoint seek to protect are property interests that are not unique – they are ubiquitous. Hundreds of thousands of patents are granted each year and transactions involving the sale or licensing of intellectual property are

⁶ Compare, e.g., *In re Steve & Barry's Manhattan Inc.*, Case No. 08-12579 (Bankr. S.D.N.Y. Aug. 5, 2008) and *In re Alexander Gallo Holdings, LLC.*, Case No. 11-14220 (Bankr. S.D.N.Y. Oct. 6, 2011) (sale procedures orders that do not address adequate protection) with *In re Steve & Barry's Manhattan Inc.*, Case No. 08-12579 (Bankr. S.D.N.Y. Aug. 8, 2008); and *In re Alexander Gallo Holdings, LLC.*, Case No. 11-14220 (Bankr. S.D.N.Y. Nov. 10, 2011) (final sale orders addressing adequate protection).

commonplace. Numerous parties, many in the same lines of business as Apple and Flashpoint, have paid Kodak in exchange for a license to the Disputed Kodak Patents, demonstrating that valuation of Apple and Flashpoint's alleged interest in the Disputed Kodak Patents is perfectly feasible.

18. Despite the existence of a global patent market, Apple and Flashpoint assert that their alleged property interests cannot be adequately protected because Apple and Flashpoint must receive indubitably equivalent non-economic adequate protection. This principle is not supported by the legislative history of section 361 and decades of case law, both of which contemplate adequately protecting all interests in property with monetary compensation. *Cf. In re Murel Holding Corp.*, 75 F. 2d 941, 942 (2d Cir. 1935) (describing adequate protection and indubitable equivalence in terms of "value" and compensation); H.R. Rep No. 95-595, at 339 (1977) ("Though the creditor might not receive his bargain *in kind*, the purpose of the section is to insure that the secured creditor receives in value essentially what he bargained for.") (emphasis added). In the case of lessees of property sold pursuant to 363(f), "[a]dequate protection does not necessarily guarantee a lessee's continued possession of the property, but it does demand, in the alternative, that the lessee be compensated for the value of its leasehold." *Precision Indus., Inc. v. Qualitech Steel SBQ, LLC*, 327 F.3d 537, 548 (7th Cir. 2003); *see also In re Extra Room, Inc.* 2011 WL 846448, at *2 (Bankr. D. Ariz. March 7, 2011). There is no basis for treating patents as a special type of property, more unique than real estate, that cannot be adequately protected with monetary compensation.

E. The Requirements of 363(f)(4) Are Satisfied.

19. Apple does not argue that the Disputed Kodak Patents are not in bona fide dispute. Instead, it argues that the Debtors' planned sale of the Disputed Kodak Patents free and clear of Apple and Flashpoint's interests under 363(f)(4) is "illusory" because, following the

Sale, even if Apple and Flashpoint have no ownership interest in the patents, incorrect inventorship will still be available as an affirmative defense to infringement actions in which the Disputed Kodak Patents are asserted. Apple Objection at 11-12.

20. Apple's argument is defective in two respects. First, the only cases cited by Apple in support of its argument pertain to rights of recoupment, which, those courts reasoned, survived a 363(f)(4) sale because recoupment can *only* be asserted as a defense, and therefore is not a claim or interest. *See, e.g., Folger Adam Sec., Inc. v. DeMateis/Macgregor JV*, 209 F.3d 252, 260 (3rd Cir. 2000) (distinguishing between an "enforceable obligation", which can be stripped in a 363(f)(4) sale, and a "defense"). Here, the context is completely different: inventorship is akin to an ownership interest in a patent, and property generally can be sold free and clear of ownership interests under section 363(f)(4). *See, e.g., In re Eastman Kodak Co.*, No. 12-10202 (ALG), 2012 WL 2255719, at *3 (Bankr. S.D.N.Y. June 15, 2012) (citing *In re Olympia Holding Corp.*, 129 B.R. at 681 and *In re NJ Affordable Homes Corp.*, 2006 WL 2128624 (Bankr. D. N.J. June 26, 2009)). The ability to use a property interest to establish an affirmative defense does not justify excepting that property interest from the ambit of 363(f), the affirmative defense is merely a fruit of ownership.⁷

21. Second, even if inventorship is left as an affirmative defense to infringement actions after the Sale, a Sale pursuant to section 363(f)(4) would cleanse all other claims and interests with respect to the Disputed Kodak Patents, including Apple and Flashpoint's alleged ownership interests arising under the patent law and the motley crew of state law claims that Apple has now stated as counterclaims in the Adversary Proceeding. In the

⁷ Although not relief requested by this Motion, the Debtors may request a clarifying injunction under section 105(a) with respect to the assertion of affirmative defenses based on inventorship or ownership of the Kodak Disputed Patents in furtherance of their sale free and clear.

Debtors' judgment, the benefit to the Debtors' estates from removing encumbrances from the Disputed Kodak Patents through a sale under section 363(f)(4) is significant, because potential purchasers will find the Disputed Kodak Patents more attractive if the purchaser will not be subject to even meritless litigation from an aggressive and well-funded litigation party such as Apple.

F. Limitations on Objections at the Final Sale Hearing are Reasonable.

22. Apple argues that its rights to object at the Final Sale Hearing should be fully preserved; however, it provides no specifics as to how it would be prejudiced by the objection limitations set forth in the Revised Conditional Sale Order. Apple's only interest in the sale of the Digital Imaging Patent Portfolio is Apple's alleged property interest in the Disputed Kodak Patents, and the express preservation of Apple's ability to object to the sufficiency of adequate protection preserves Apple's rights with respect to its interest. If Apple has the unfettered ability to object at the Final Sale Hearing, potential purchasers will discount the Digital Imaging Patent Portfolio accordingly, as they are well-aware of Apple's history of seeking to delay for as long as possible the payment of royalties for its pervasive, continuing infringement.

Unresolved Non-Apple/Flashpoint Objections

23. The Debtors received 22 objections to the proposed Conditional Sale Order, in addition to those from Apple and Flashpoint. As of the filing of this Reply, the Debtors believe that 13 of these objections have been resolved (the "**Resolved Objections**"), subject to review of final changes by the applicable parties.⁸

⁸ The Debtors believe the following objections have been resolved: Docket Nos. 1471, 1474, 1476, 1478, 1514, 1518 and 1524.

24. The nine outstanding objections are from licensees and purported licensees of intellectual property who have proposed a variety of different provisions intended to clarify: (1) the treatment of licensees and purported licensees (the “**Licensees**”) under the Conditional Sale Order,⁹ (2) the schedule for objections to entry of the Final Sale Order, and (3) whether certain contracts should be included on Exhibit C to the Sale Motion. The Debtors have reviewed these objections and taken them into account when preparing the Revised Conditional Sale Order, which the Debtors believe reflects a strong consensus of its Licensees taken as a group and fairly protects the rights of all Licensees.

A. Treatment of Scheduled Agreements Under the Revised Conditional Sale Order.

25. The Revised Conditional Sale Order does not impair the rights afforded to Licensees under the Bankruptcy Code because the order provides, among other things, that the Digital Imaging Patent Assets must be sold subject to (i) commitments to standards-setting organizations; (ii) any rights of the Licensees under section 365(n) of the Bankruptcy Code if a Licensee’s Scheduled Agreement (as defined in the Revised Conditional Sale Order) is rejected; and (iii) all rights of a Licensees under a Scheduled Agreement that is not rejected.

See Paragraph 8 of the Revised Conditional Sale Order. In addition, at the request of certain Licensees, the Debtors have included a reservation of rights provision reserving all Licensees’ rights with respect to the Debtors’ decision to assume, assign or reject any Scheduled Agreement. *See* Paragraph 18 of the Revised Conditional Sale Order. The Debtors believe that these provisions fully protect the interests of the Licensees.

⁹ Following the objection deadline, the Debtors actively sought input on the revisions to the proposed Conditional Sale Order from all objecting parties (other than Apple and Flashpoint). The form of Revised Conditional Sale Order reflects these broad discussions.

26. Certain objecting Licensees have argued that they have interests in property that merit adequate protection under section 363(e) and/or a determination that the Digital Imaging Patent Assets can be sold free and clear of the Licensee's interests under section 363(f). This argument is misplaced. Without addressing here the question whether a license creates an interest in property for such purposes, the Revised Conditional Sale Order expressly requires that the Digital Imaging Patent Assets must be sold subject to all rights of the Licensees under their Scheduled Agreements and/or section 365(n) of the Bankruptcy Code, as applicable. *See* Paragraph 8 of the Revised Order. Since the rights of Licensees under the Scheduled Agreements are not impaired (except as contemplated by section 365(n)), there is no loss of an interest in property to which the protections of sections 363(e) and 363(f) of the Bankruptcy Code apply.¹⁰

B. Notice and Timing to Object to Entry of a Final Sale Order.

27. Given that the Sale has been structured to preserve the rights of Licensees, the contemplated notice of Final Sale Hearing (and related objection deadline) is appropriate under the circumstances. Licensees will have an opportunity to review the Final Sale Order and copies of the final versions of the Sale Agreement(s) seven days prior to the Final Sale Hearing, an opportunity to object four days prior to the Final Sale Hearing, and an opportunity to object to the Sale if the Final Sale Order is inconsistent with the terms of the Revised Conditional Sale Order.¹¹ The Debtors believe the proposed dates for the objection deadlines are reasonable and

¹⁰ As of the date of this Reply, none of the objecting Licensees has alleged with specificity any interest in property other than as may be incidental to a license arising under a Scheduled Agreement. If such an interest in property nevertheless exists, it will attach to the proceeds of the sale with the same validity and priority as it attached to the Digital Imaging Patent Assets, pursuant to paragraph R of the Revised Conditional Sale Order.

¹¹ Local Rule 2002-2 permits the Court to order an expedited sale process.

appropriate under the circumstances and no additional notice is required in connection with the bidding process, the Sale or the Final Sale Hearing.

C. Inclusion of Certain Agreements on Exhibit C to the Sale Motion.

28. The Debtors currently are working with certain Licensees to determine whether certain agreements should be included on Exhibit C to the Sale Motion.

Conclusion

29. For the foregoing reasons, and the reasons set forth in the Sale Motion, Kodak respectfully requests that the Court grant the Motion and order such other and further relief as the Court may deem just and proper.

Dated: June 29, 2012
New York, New York

/s/ Andrew G. Dietderich

Andrew G. Dietderich
Michael H. Torkin
John J. Jerome
Mark U. Schneiderman
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
Telephone: (212) 558-4000
Facsimile: (212) 558-3588

- and -

Pauline K. Morgan
Joseph M. Barry
YOUNG CONAWAY STARGATT &
TAYLOR, LLP
1270 Avenue of the Americas
Suite 2210
New York, New York 10020
Telephone: (212) 332-8840
Facsimile: (212) 332-8855

Counsel to the Debtors and Debtors in
Possession