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

<p>In re:</p> <p>EASTMAN KODAK COMPANY, <i>et al.</i>,<sup>1</sup></p> <p>Debtors.</p>	<p>Chapter 11</p> <p>Case No. 12-10202 (ALG)</p> <p>(Jointly Administered)</p>
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**DEBTORS' OBJECTION TO THE MOTION  
OF WYNIT DISTRIBUTION LLC FOR ALLOWANCE  
AND PAYMENT OF ADMINISTRATIVE EXPENSE CLAIM**

<sup>1</sup> 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.



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Eastman Kodak Company (“**Kodak**”), on behalf of itself and its affiliated debtors and debtors in possession (collectively, the “**Debtors**”), herein submits its objection to the motion of Wynit Distribution LLC (“**Wynit**”) for allowance and payment of an administrative expense claim [Docket No. 1966] (the “**Admin. Motion**”). In support of its objection, the Debtors respectfully represent as follows:

### **PRELIMINARY STATEMENT**

1. Wynit seeks to rewrite its Distributor Agreement<sup>2</sup> with Kodak to create an administrative priority claim it wants the Debtors to pay immediately, in cash, at a time when the Debtors are focused on asset sales, enhancing operational liquidity, and maximizing the value of their estates for all creditors. Wynit’s administrative claim is without merit and is nothing more than an improper attempt to elevate the priority of its claim ahead of other creditors. This is not permitted under the Bankruptcy Code and should be rejected. Wynit filed a proof of claim [No. 5472] that will be administered in accordance with Court-approved procedures in due course.

2. The customer program and return credits Wnity relies upon to state its claim do not create a debt payable to Wnity. The plain language of the Distributor Agreement, the course of dealing between the parties, and the Customer Programs Order entered by this Court make clear that those credits, once approved by Kodak (in its discretion and on its terms), provide Wnity only an invoice deduction from outstanding amounts owed to Kodak.<sup>3</sup> There is no basis for Wnity to impose a new postpetition obligation upon the Debtors. In fact, when all invoices and credits are properly accounted for, there is a balance due and owing from Wnity to

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<sup>2</sup> “**Distributor Agreement**” refers to the master distributor agreement by and between Kodak and Wnity (by assignment from Wnity, Inc.) dated March 31, 2011, attached as Exhibit B to the Admin. Motion.

<sup>3</sup> Kodak has continued to maintain and administer certain prepetition customer program pursuant to the Final Order (A) Authorizing, But Not Directing, the Debtors to (I) Maintain and Administer Customer Programs and (II) Honor Related Prepetition Obligations to Customers and (B) Authorizing, But Not Directing, All Financial Institutions to Honor All Related Payment Requests [Docket No. 359] (the “**Customer Programs Order**”).

Kodak under the Distributor Agreement. Moreover, Wynit's balance was incurred postpetition and was not available for setoff on account of prepetition amounts owed by Kodak to Wynit.

3. Even if Wynit establishes that the Program and Return Credits<sup>4</sup> accrued under the Distributor Agreement somehow create a new obligation for Kodak—they do not—Wynit cannot satisfy its burden to establish it is entitled to administrative expense priority for the value of those Program and Return Credits. Wynit is a distributor whose business relationship with Kodak based on prepetition contracts is winding down. Kodak has thousands of creditors who have filed claims, all of which will be addressed by the Debtors in due course. There is nothing remarkable about Wynit's claim that justifies allowance and payment of an administrative claim before the Debtors' claims resolution process is even underway. Wynit's motion is nothing more than an attempt to obtain an improper payment from the Debtors now and must be denied. Wynit's motion follows its meritless motion to lift the automatic stay seeking to exercise purported setoff rights filed only days into these cases. Both Wynit motions should be denied.

### **BACKGROUND**

4. Kodak's relationship with Wynit consists of two agreements: (1) the Distributor Agreement, whereby Wynit purchased consumer products from Kodak to resell to retailers for sale to consumers, and (2) an original equipment manufacturer agreement by and between Kodak and Wynit (by assignment), dated January 11, 2010 (the "**OEM Agreement**"), whereby Kodak purchased certain products from Wynit. Wynit prematurely filed the Setoff

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<sup>4</sup> "**Program Credits**" refers to the various rebates and certain other financial incentives contemplated in the Distributor Agreement. "**Return Credits**" refers to refunds for defective goods shipped by Kodak to Wynit as contemplated in the Distributor Agreement.

Motion<sup>5</sup> on February 10, 2012, before this Court even entered final orders on the first day motions. The Setoff Motion seeks relief from the automatic stay to recoup the value of Program Credits under the Distributor Agreement, and then set off Kodak's debt to Wynit under the OEM Agreement against Wynit's remaining invoice balances under the Distributor Agreement. (Setoff Motion ¶ 8.) Kodak objected to Wynit's motion, in part, because it was unclear what amounts were due and owing between the parties. (Debtors' Objection to the Setoff Motion ¶ 4.) As explained in section II below, once the Debtors recoup the amount owed by Wynit under the Distributor Agreement, the net amount owing to Kodak arises under postpetition invoices. Therefore, the net amount cannot be used to set off against the prepetition debt that Kodak owes Wynit under the OEM Agreement because mutuality is lacking.

5. The Distributor Agreement consists of general terms and several schedules and attachments relating to individual product lines. Kodak also regularly added promotional schedules and customer programs that supplemented the Distributor Agreement in the form of e-mails, with the terms and conditions of promotions for Wynit's customers. (Declaration of Dean A. Carpenter (the "**Carpenter Decl.**") ¶ 4.) The Distributor Agreement sets forth the procedures through which Kodak and Wynit must account for invoices, Program Credits, and Return Credits. In the ordinary course, Wynit submitted purchase orders for Kodak products, which Kodak satisfied by shipping products and invoicing Wynit for the price of those products. (*Id.*) The Distributor Agreement provides that Wynit must pay Kodak the balance on an invoice within 30 days of the invoice date, but Wynit may withhold payment of any amounts "disputed in good faith" for more than 30 days without incurring late payment charges. (Distributor Agmt. ¶¶ 9.1, 9.3, 9.5.)

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<sup>5</sup> "**Setoff Motion**" refers to the Motion of Wynit Distribution LLC for Entry of an Order (A) Compelling the Debtor to Allow Program Credits as Permissible Recoupment Under Distributor Agreement and Modifying the Automatic Stay to Permit Wynit the Ability to Offset Its Claim Pursuant to 11 U.S.C. § 553 [Docket No. 291].

6. Paragraph 10 of the Distributor Agreement is entitled “Invoice Deductions” and expressly defines the parties’ procedures for reconciling open invoice balances with Program Credits—a process that Wynit has termed the “Netting Process” in its Setoff Motion. (Setoff Motion at ¶¶ 4-5 (citing the Distributor Agmt. at ¶ 10); Bauer Decl. ¶¶ 8-11.) The Distributor Agreement provides that the Netting Process starts with Wynit’s submission to Kodak of an invoice deduction explanation and supporting documentation, called a “debit memo,” showing that Wynit’s customers (retailers) sold Kodak products to consumers pursuant to a Kodak authorized promotion. (Distributor Agmt. ¶ 10.2.) Kodak proceeds to “initiate an investigation to determine whether to accept the deduction . . . [and] will issue a credit to [Wynit’s] account for the amount accepted by Kodak.” (*Id.* ¶ 10.3.) Wynit is then required to pay the remaining balance. (*Id.*) Kodak and Wynit agreed to use a process similar to the Netting Process to reconcile product returns and generate Return Credits in accordance with paragraph 11 of the Distributor Agreement. Kodak sells products to Wynit “without return privileges except where Product is determined to be defective in manufacturing, damaged in transit or shipped in error by Kodak.” (*Id.* ¶ 11.) “Kodak will issue a credit for authorized returns” where Wynit properly submitted claims for and returned defective products to Kodak. (*Id.*)

7. The parties’ course of dealing reflects the Netting Process as contemplated by the Distributor Agreement. (Carpenter Decl. ¶ 5.) Wynit agrees, as described by Wynit’s Controller Tricia L. Bauer: “[a]fter the conclusion of programs entitled to Program Credits . . . Wynit processes the debit memos against open payables Kodak is due from Wynit, thus decreasing the net amount Wynit remits in payment to Kodak.” (Bauer Decl. ¶ 9.) Wynit regularly netted Program and Return Credits against its rolling open invoice balance and rarely



paid the full value of an invoice to Kodak throughout the term of the contract. (Wynit Reply ¶¶ 9-12; Carpenter Decl. ¶ 5.) The parties' practice has always been to treat the Program Credits as invoice deductions, as Kodak did not pay or offer to pay Wynit in cash for valid Program Credits. (Carpenter Decl. ¶ 6.) Instead, Kodak anticipated these contingent invoice deductions by accruing against the revenue posted to Kodak's accounts receivable around the time that the products were shipped and invoiced to Wynit. (*Id.* ¶ 8.) Therefore, Kodak would plan for the Program Credits long before the Program Credits were actually claimed. (*Id.*)

8. Return Credits were accounted for through a similar Netting Process. (*Id.* ¶ 9.) When Wynit identified defective Kodak products, it submitted the requisite documentation in order to obtain Kodak's authorization for the returns. (*Id.*) Once authorized, Wynit would return the defective products to Kodak and reduce its invoice balance for purchases made under the Distributor Agreement by the authorized amount. (*Id.*)

9. Kodak announced it was exiting its dedicated capture devices business—an integral element of the Kodak-Wynit business relationship—on February 9, 2012, and the Distributor Agreement expired by its own terms on February 29, 2012. (Distributor Agmt. ¶ 2; Carpenter Decl. ¶ 10.) Kodak sent the final promotions schedule e-mail under the Distributor Agreement to Wynit on January 18, 2012, and the final authorized promotion occurred the week of March 18, 2012. (*Id.*) Kodak continued to review and approve or reject Wynit's debit memos to permit additional Program and Return Credits after the parties' relationship began winding down, exercising its permissive discretion pursuant to the Customer Programs Order. (*Id.* ¶¶ 7, 12.) Kodak's decision to consider Wynit's requests for additional Program and Return Credits did not alter the Netting Process that still operates to permit Wynit to deduct from its remaining outstanding invoice balance any approved credits. (*Id.* ¶ 8.) Kodak's expectation was that

Program and Return Credits approved after the Petition Date would be deducted from Wynit's outstanding invoice balance under the Distributor Agreement, and Kodak never agreed to pay Wynit their value. (*Id.*)

10. As Wynit has observed, substantially all of the Program and Return Credits that Wynit has claimed relate to digital cameras sold subject to the terms and conditions set forth in Schedule B-1 of the Distributor Agreement and Kodak's Minimum Advertised Price Program ("**MAP Program**") referenced therein. (Wynit Reply ¶ 15; Carpenter Decl. ¶ 11.) The MAP Program authorizes retailers to submit claims to Wynit for costs associated with Kodak's authorized promotional periods. (*Id.*) Wynit is compensated for administering the retailers' promotions and Program Credit claims through a "1% rebate that will be paid monthly on [Wynit's] prior month's net purchases of Digital Hardware products." (Distributor Agmt. Schedule B-1 ¶ 5.11; Carpenter Decl. ¶ 11.) Wynit is also compensated by an additional margin "in the form of an off-invoice discount . . . of 5% off invoice price . . . in support of the Distributor Sales process," for costs "associated with defective returns . . . and deduction management." (Distributor Agmt. Schedule B-1 ¶ 3.1; Carpenter Decl. ¶ 11.) These deductions (collectively, the "**Administration Percentage Deductions**") are independent of the invoice deductions from Program and Return Credits but are accounted for using the same Netting Process. (Carpenter Decl. ¶ 11.)

11. The netting of Program and Return Credits is also required by the Court's Customer Programs Order. The Debtors obtained authorization through the Customer Programs Motion to, in their discretion, "honor their prepetition obligations arising under or based upon the Customer Programs and otherwise continue their Customer Programs postpetition in the ordinary

course of business.” (Customer Programs Motion ¶ 5.)<sup>6</sup> The Debtors were explicit that “[t]he Debtors do not intend to pay to their Customers this accrued reserve, but rather to maintain their practice of crediting this amount towards future purchases through the issuance of credit memos.” (*Id.* at ¶ 20.) The Court granted the Debtors’ request, expressly ordering that the Debtors may, in their discretion, “continue to honor, maintain and administer the Customer Programs . . . in the ordinary course of business consistent with past practice.” (Customer Programs Order ¶ 2.)

12. Contrary to Wynit’s representations, there is no agreed upon “Agreed Reconciliation Statement” between the parties as that term is defined in the Admin. Motion.<sup>7</sup> (Carpenter Decl. ¶ 13.) Kodak has worked with Wynit in good faith over the past six months to reconcile the amounts owed between the parties but various issues remain unresolved, including a dispute involving certain disallowed Program Credits relating to Broadway Photo LLC. (*Id.*) After making progress, Wynit first requested administrative priority for its claim to Kodak on June 19, 2012. (*Id.*)

13. Wynit’s unpaid invoices owed to Kodak under the Distributor Agreement total \$1,168,829.93, of which \$134,372.13 was incurred after the petition date (the “**Distributor Agreement Invoice Balance**”).<sup>8</sup> (*Id.* ¶ 14.) Meanwhile, Wynit’s total approved invoice deductions amount to \$1,038,996.94. (*Id.*) This amount includes both \$807,575.76 in approved

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<sup>6</sup> Debtors’ Motion for Entry of Interim and Final Orders (A) Authorizing, But Not Directing, the Debtors to (I) Maintain and Administer Customer Programs and (II) Honor Related Prepetition Obligations to Customers and (B) Authorizing, But Not Directing, All Financial Institutions to Honor All Related Payment Requests [Docket No. 12] (“the **Customer Programs Motion**”).

<sup>7</sup> Kodak and Wynit exchanged various proposals in attempt to consensually resolve Wynit’s claim. To the extent Wynit purports to rely on any such proposal, those offers and the content of negotiations are not admissible pursuant to Federal Rule of Evidence 408.

<sup>8</sup> This figure reflects a resolution of the Broadway Photo issue at \$220,667.20 in allowed Program Credits to Wynit, which was proposed by Kodak in settlement discussions and appears to have been accepted by Wynit in its Admin. Motion.

Program Credits, and a separate \$231,421.18 in Return Credits. (*Id.*) Finally, Kodak agrees it owes Wynit \$450,246.34 under the OEM Agreement (the “**OEM Agreement Debt**”).<sup>9</sup> (*Id.*) The amounts listed here are derived from the Debtors’ books and records. (*Id.*) The Debtors dispute any assertion by Wynit that other debts or credits are owed between the parties.

## ARGUMENT

### **I. WYNIT IS NOT ENTITLED TO CASH PAYMENT FOR PROGRAM AND RETURN CREDITS**

14. “It is well established law that the filing of a bankruptcy petition does not alter a debtor’s contractual rights or obligations.” *Penn Traffic Co. v. COR Route 5 Co., LLC (In re Penn Traffic Co.)*, No. 05 Civ. 3755, 2005 U.S. Dist. LEXIS 20407, at \*20 (S.D.N.Y. Sept. 16, 2005). The terms of the Distributor Agreement continued to govern the relationship between Kodak and Wynit after Kodak filed its chapter 11 petition. The Distributor Agreement’s operative provision is entitled “Invoice Deductions” and clearly states that Kodak “will issue a credit to [Wynit’s] account for the amount [of Program Credits] accepted by Kodak.” (Distributor Agmt. ¶ 10.3.) The provision applicable to Return Credits is similarly unambiguous in stating that “Kodak will issue a credit for authorized returns.” (*Id.* ¶ 11.) The parties understood the concept of payment when they executed the Distributor Agreement, and used “pay” where they intended that a party should do so. For example, elsewhere in paragraph 10, Wynit is obligated to “pay” to Kodak any deducted amount that Kodak deems invalid. (*Id.* ¶ 10.3.) There is nothing in the Distributor Agreement to support Wynit’s argument that the Program Credits create an obligation for Kodak to “pay” Wynit. It is black letter law that unambiguous contract terms should be enforced. *See, e.g., Greenfield v. Philles Records*, 98

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<sup>9</sup> The Debtors reserve the right to seek to disallow the OEM Agreement Debt under section 502(d) of the Bankruptcy Code because, among other things, Wynit has failed to pay the Debtors \$129,832.99 in respect of postpetition amounts owed to the Debtors under the Distributor Agreement as set forth below.

N.Y.2d 562, 569 (2002) (“[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.”).

15. To implement these contract terms, Kodak established the Netting Process whereby valid Program and Return Credits are deducted from Wynit’s total invoice balances under the Distributor Agreement on a rolling basis. (Carpenter Decl. ¶ 5.) Wynit explained the Netting Process to this Court as follows:

*In fact, the practice between the parties, consistent with the terms of the Distributor Agreement, is that Wynit submits detailed debit memos to Kodak in support of the Program Credits, makes deductions based on the Program Offers and pays to Kodak the balance due net of the Program Credits.*

(Bauer Decl. ¶ 11 (emphasis added).) The parties’ course of dealing at all times was for any authorized Program Credits or Return Credits to be deducted from outstanding invoices. (Carpenter Decl. ¶ 6.) Wynit owes Kodak \$1,168,829.93 in outstanding invoice amounts to which the remaining approved Program Credits and Return Credits can be applied. (*Id.* ¶ 14.) Kodak exercised its discretion to approve Program and Return Credits after the Petition Date in order to permit Wynit additional deductions from Wynit’s invoice balance under the Distributor Agreement. (*Id.* ¶ 12.) The Distributor Agreement and the parties’ course of dealing require nothing more. Kodak never considered or conveyed to Wynit that it would pay Wynit their value in cash. (*Id.* ¶¶ 6-7.) There is no basis for Wynit to rewrite the Distributor Agreement to create an obligation for Kodak to make a payment to Wynit.<sup>10</sup>

16. Kodak’s chapter 11 petition does not alter the terms of the Distributor Agreement. Wynit’s Setoff Motion seeks approval to recoup Program and Return Credits

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<sup>10</sup> It is noteworthy that the term “Netting Process,” a centerpiece of Wynit’s Setoff Motion (*see* ¶ 5) and explained in the Bauer Declaration (¶¶ 8-11), has disappeared from the Admin. Motion.

against the Distributor Agreement Invoice Balance using the Netting Process. (Setoff Motion ¶ 8.) Wynit cannot carve out Program and Return Credits approved postpetition and use them to create an administrative claim payable now. Recoupment, Wynit's stated basis for realizing the Program and Return Credits (*Id.* ¶¶ 9-11), is an equitable defense to a claim that does not provide a separate cause of action. *See, e.g., Sumpter v. DPH Holdings Corp. (In re DPH Holdings Corp.)*, 468 B.R. 603, 618 (S.D.N.Y. 2012) (noting that recoupment is "not a separate cause of action or weapon of offense"). The Netting Process remains applicable to all approved Program and Return Credits.<sup>11</sup>

17. Wynit's citation to the Debtors' Customer Programs Motion to justify its attempt to monetize its invoice deductions is misplaced. The Debtors have exercised their business judgment, consistent with the Customer Programs Order, to continue customer programs where appropriate. The Debtors were clear that they only sought to maintain their practice of crediting against invoice amounts owed to Kodak and not "to pay to their Customers [any] accrued reserve." (Customer Programs Motion ¶ 20.) This is consistent with the course of dealing between Kodak and Wynit. Moreover, this Court's Customer Programs Order is clear that the Debtors are authorized only to administer customer programs in their discretion "in the ordinary course of business consistent with past practice." (Customer Programs Order ¶ 2.) Wynit's demand for payment is outside of the Debtors' ordinary course of business and is not permitted by the Customer Programs Order. (*Id.*; Carpenter Decl. ¶ 7.) There is nothing about the Distributor Agreement expiring on its terms that imposes a different obligation on Kodak. This is especially true where there is over \$1.1 million in unpaid invoices available from which

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<sup>11</sup> Although Wynit claims that it is entitled to administrative expense priority for its so-called "Post-Petition Claim," it also "asserts that it has the right to recoup the Post-Petition Claim against the Net Pre-Petition Obligation" if it suits Wynit. (Admin. Motion ¶ 24 n.7.) This demonstrates the opportunistic nature of Wynit's arguments.

to deduct the Program and Return Credits. Kodak is not authorized—nor would it be in the Debtors’ interest—to modify the terms of the Distributor Agreement or the parties’ ordinary course of dealing to permit Wynit to convert invoice deductions into cash. Moreover, permitting Wynit to impose an obligation on the Debtors to immediately pay Program Credits would undermine the Customer Programs Order and any incentive for the Debtors to honor customer programs in the future.

**II. WYNIT CANNOT SET OFF THE OEM AGREEMENT DEBT AGAINST THE DISTRIBUTOR AGREEMENT INVOICE BALANCE**

18. Section 553(a) of the Bankruptcy Code preserves a party’s prepetition setoff rights. 11 U.S.C. § 553(a). A creditor seeking to assert setoff rights preserved by section 553(a) “bears the burden of proving a right of setoff.” *Cairns & Assocs., Inc. v. Conopco, Inc. (In re Cairns & Assocs.)*, 372 B.R. 637, 660 (Bankr. S.D.N.Y. 2007). Under New York law, “[b]ecause debts must be due to the claimant for setoff to apply, there is no right to set off a possible, unliquidated liability against a liquidated claim that is due and payable.” *Ferguson v. Lion Holding, Inc.*, 312 F. Supp. 2d 484, 503 (S.D.N.Y. 2004). Where, as here, the Distributor Agreement Invoice Balance is disputed, indefinite, or unliquidated, it cannot be set off against liquidated claims that are due and payable because the “symmetry or reciprocity of obligation” necessary to establish mutuality is lacking. *See Global Cable, Inc. v. Adelpia Commc’n Corp. (In Re Adelpia Commc’n Corp.)*, No. 02 Civ. 997, 2006 U.S. Dist. LEXIS 37112, at \*11-12 (S.D.N.Y. June 6, 2006).

19. Among other things, Wynit’s administrative priority claim depends upon the acceptance of the prepetition portion of the Distributor Agreement Invoice Balance as an undisputed, liquidated matured debt due and owing by Wynit to Kodak. Wynit then seeks to use the Setoff Motion to set off Kodak’s OEM Agreement Debt of \$450,246.34 against what it

describes as its prepetition “debt” to Kodak of \$670,418.72 “for claims and debts incurred between the parties prior to the Petition Date.” (Setoff Motion ¶ 8; Admin. Motion ¶ 9.) This argument fails for two reasons, each of which is fatal to both Wynyit motions.

**A. The Debtors’ Right to Recoupment Requires a Netting Under the Distributor Agreement**

20. Wynyit’s attempt to set off the Distributor Agreement Invoice Balance as of the Petition Date ignores the remainder of the transaction between the parties and prejudices the Debtors’ rights. Wynyit has asserted a setoff right in the Setoff Motion and claims under the Distributor Agreement for \$540,585.75 in the Admin. Motion and another \$364,039.08 in its proof of claim, all while reserving its right to supplement its claims. (Setoff Motion ¶ 8; Admin. Motion ¶ 10; Wynyit Proof of Claim No. 5472.) As a defense to Wynyit’s claims, Kodak has a right to recoup the entirety of the Distributor Agreement Invoice Balance from Wynyit before there is a liquidated debt available to set off, and Kodak intends to exercise that right.

21. Under New York law, “[r]ecoupment means a deduction for a money claim through a process whereby cross demands arising out of the same transaction are allowed to compensate one another and the balance only to be recovered.” *Ferguson*, 312 F. Supp. 2d at 503 (citations omitted). Wynyit cannot dispute Kodak’s right of recoupment because it relies on the same facts under the Distributor Agreement as the basis for its recoupment rights. (See Setoff Motion ¶¶ 9-11.) It is undisputed that, with Kodak’s assent, Wynyit regularly netted both Program Credits and Return Credits against its rolling open invoice balance. (Carpenter Decl. ¶ 5.) Thus, the parties have treated the purchase of products and approval of credits under the Distributor Agreement as part of a single ongoing transaction of product purchases and credits through the Netting Process. The Distributor Agreement sets forth the terms of a transaction between the parties, including both Wynyit’s obligations to pay and when Wynyit is eligible for



Program and Return Credits in the form of invoice deductions. Kodak even anticipated those credits in connection with accounting for the product sales through revenue accruals long before any Program Credits were approved. (*Id.* ¶ 8.)

22. Kodak is entitled to recoup the value of the outstanding invoices prior to Wynit attempting to use the Distributor Agreement Invoice Balance as the basis for setoff. Kodak's records reflect that the Wynit's outstanding approved Program and Return Credits total \$1,038,996.94. (*Id.* ¶ 14.) Once netted against the Distributor Agreement Invoice Balance, the result under the Distributor Agreement is a debt owed from Wynit to Kodak of \$129,832.99. Wynit's outstanding postpetition invoices total \$134,372.13. Therefore, Wynit's debt under the Distributor Agreement of \$129,832.99 is immediately due and owing to Kodak.<sup>12</sup> This postpetition debt by Wynit to Kodak under the Distributor Agreement lacks mutuality with the OEM Agreement Debt because it is not "a claim against the creditor which arose prepetition" and is therefore not subject to setoff. *Cairns & Assocs., Inc. v. Conopco, Inc. (In re Cairns & Assocs.)*, 372 B.R. 637, 660 (Bankr. S.D.N.Y. 2007); *see also Delta Air Lines, Inc. v. Bibb (In re Delta Air Lines)*, 359 B.R. 454, 468 (Bankr. S.D.N.Y. 2006) (recognizing that creditors cannot set off prepetition claims against postpetition liabilities). The Setoff Motion should be denied and Wynit's prepetition claim under the OEM Agreement will be resolved in the claims resolution process.<sup>13</sup>

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<sup>12</sup> The Debtors reserve all rights to seek payment from Wynit of its remaining postpetition balance due under the Distributor Agreement and, and to seek to disallow the OEM Agreement Debt until such amounts are paid.

<sup>13</sup> In the event the Court determines that, after applying the Program and Return Credits, the remaining portion of the Distributor Agreement Invoice Balance is subject to setoff against the OEM Agreement Debt, Wynit would be entitled to a \$320,413.35 general unsecured claim and not an administrative claim.

**B. There Was No Liquidated, Undisputed Distributor Agreement Debt on the Petition Date**

23. Wynit's so-called debt to Kodak of \$670,418.72 was not a liquidated, undisputed debt on the Petition Date that can form the basis for a valid setoff. First, the dispute over whether Wynit is entitled to \$440,687.20 in Program Credits for debit memos it submitted prepetition for sales by retailer Broadway Photo LLC remained unresolved as of the Petition Date. (Carpenter Decl. ¶ 13.) In fact, that issue remains unresolved today, although Wynit's Admin. Motion appears to accept Kodak's proposed resolution of a \$220,667.20 Program Credit. (Admin. Motion ¶ 9 n.4.) Nonetheless, the Broadway Photo dispute precluded Wynit from treating that portion of the Distributor Agreement Invoice Balance as a liquidated debt.

24. Second, under the terms of the Distributor Agreement, Wynit is obligated to pay its invoice balance due and owing to Kodak 30 days after the invoice date. (Distributor Agmt. ¶¶ 9.1, 9.3.) Wynit may withhold payment of any amounts "disputed in good faith" for more than 30 days without incurring late payment charges. (*Id.* ¶ 9.5.) Therefore, Kodak has treated Wynit's failure to pay the Distributor Agreement Invoice Balance to date, including \$1,034,457.80 for goods invoiced before the Petition Date, as being disputed in good faith. Absent a good faith dispute, Wynit is unlawfully in possession of more than \$1.1 million of the Debtors' assets and in breach of the Distributor Agreement. Wynit cannot have it both ways.

25. Third, the Distributor Agreement Invoice Balance remained unliquidated as of the Petition Date because it was subject to invoice deductions that were contingent upon events that had yet to occur. As explained above, the Netting Process permitted Wynit to deduct the value of approved Program and Return Credits from its total invoice balance after submitting debit memos and appropriate documentation. The realization of Program Credits depended upon consumers' purchase of Kodak's products from a retailer during the promotional period.

Similarly, authorization of Return Credits required that Wynit received goods verified to be defective. The Distributor Agreement Invoice Balance therefore remained subject to the netting of Program and Return Credits on the Petition Date and was not a liquidated debt against which setoff rights could be exercised.

26. Of course, by no means was Wynit required to seek additional Program or Return Credits. Wynit could have forfeited the credits and liquidated the Distributor Agreement Invoice Balance on the Petition Date, resulting in an undisputed debt subject to setoff. Instead, Wynit continued to submit debit memos and product return authorization requests during the postpetition period, effecting recoupment of funds from the Distributor Agreement Invoice Balance long after the Petition Date.<sup>14</sup>

### **III. WYNIT IS NOT ENTITLED TO ADMINISTRATIVE EXPENSE PRIORITY FOR THE VALUE OF THE PROGRAM OR RETURN CREDITS**

27. In the event the Court determines that a new debt is created by the Program or Return Credits—which the Debtors dispute—Wynit has not established any basis for granting that claim administrative priority. The party seeking administrative expense priority for its claim bears the burden of demonstrating entitlement. *Supplee v. Bethlehem Steel Corp. (In re Bethlehem Steel Corp.)*, 479 F.3d 167, 172 (2d Cir. 2007). In addition, “[b]ecause the presumption in bankruptcy cases is that the debtor’s limited resources will be equally distributed among his creditors, statutory priorities are narrowly construed.” *Trustees of Amalgamated Ins. Fund v. McFarlin’s, Inc.*, 789 F.2d 98, 100 (2d Cir. 1986). A “creditor’s claim will not be

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<sup>14</sup> It is telling that Wynit proposes that part of the purported “Post-Petition Claim” of \$540,585.73 be used to pay down the so-called “Net Pre-Petition Obligation” of \$220,172.38. (Admin. Motion ¶ 24.) It is unclear whether Wynit is trying to set off or recoup the Post-Petition Claim against the Net Pre-Petition Obligation, but either option belies Wynit’s claim for administrative expense priority. On the one hand, Wynit is precluded from exercising setoff because setoff is only proper between two prepetition debts. *See Delta Air Lines, Inc. v. Bibb (In re Delta Air Lines)*, 359 B.R. 454, 468 (Bankr. S.D.N.Y. 2006). On the other hand, recoupment would establish that the debt is unliquidated and Wynit would be precluded from setting off the OEM Agreement Debt against it in the first place. Wynit’s proposal thus fails either way.

entitled to administrative expense status unless (a) it ‘arises from a transaction with the debtor-in-possession,’ and (b) ‘the consideration supporting the claimant’s right to payment was both [i] supplied to and [ii] beneficial to the debtor-in-possession in the operation of the business.’” *Ramirez Chrysler Jeep Dodge, Inc. v. Old Car Liquidation Trust (In re Old Carco LLC)*, No. 10-2800, 2010 U.S. Dist. LEXIS 118174, at \*8 (S.D.N.Y. 2010) (quoting *In re Mammoth Mart, Inc.*, 536 F.2d 950, 954 (1st Cir. 1976)). Furthermore, “[t]he services performed by the claimant must have been ‘induced’ by the debtor-in-possession, not the pre-petition debtor.” *In re Worldcom, Inc.*, 308 B.R. 157, 166 (S.D.N.Y. 2004). Wynit has not satisfied its burden on any of these elements.

**A. Wynit Has Failed to Demonstrate that Its Claim Arises From a Transaction With the Debtor in Possession**

28. Wynit cannot establish that its administrative expense claim is based upon a transaction with Kodak as a debtor in possession. The Distributor Agreement is undisputedly a prepetition contract, and the final promotions schedule e-mail was sent to Wynit prepetition. (Carpenter Decl. ¶ 10.) Moreover, \$1,034,457.80 of the unpaid Distributor Agreement Invoice Balance is from products ordered, shipped, and invoiced prepetition. (*Id.* ¶ 14.) Wynit has presented no evidence that the Program and Return Credits it is claiming are derived from products ordered postpetition. The fact that Kodak approved certain Program and Return Credits postpetition does not create a new transaction with any Debtor. *See In re Old Carco LLC*, 424 B.R. 650, 659 (Bankr. S.D.N.Y. 2010) (holding that repurchase obligations, which arose postpetition pursuant to the terms of prepetition contracts, were not entitled to administrative priority).

29. As of the Petition Date, Wynit had a contingent claim for the value of Program or Return Credits arising from its prepetition purchases. That claim already existed

although the Program and Return credits vested postpetition. Contingent claims are “obligations that will become due upon the happening of a future event that was within the actual or presumed contemplation of the parties at the time the original relationship between the parties was created.” *Olin Corp. v. Riverwood Int’l Corp. (In re Manville Forrest Prods. Corp.)*, 209 F.3d 125, 129 (2d Cir. 2000) (quotations omitted). Wynit cannot deny that the Program and Return Credits were contemplated by the parties at the time that Wynit purchased the products from Kodak. Kodak anticipated the credits by accruing against the revenue posted to Kodak’s accounts receivable around the time of shipment. (Carpenter Decl. ¶ 8.) The approval of Product and Return Credits because of the postpetition occurrence of a contingent event does not create a transaction with Kodak as a debtor in possession. *See, e.g., In re AppliedTheory Corp.*, 312 B.R. 225, 245 (Bankr. S.D.N.Y. 2004) (holding that “[i]t is basic bankruptcy law that a pre-petition promise to satisfy an obligation upon the happening of a later condition is not transmogrified into a post-petition obligation when the condition is satisfied post-petition”).

**B. Wynit Has Not Provided Consideration or a Benefit to the Debtor in Possession**

30. A claim is not entitled to administrative priority if the consideration provided by the claimant was supplied prepetition. *McFarlin’s*, 789 F.2d at 103-04. Indeed, “[a] debt is not entitled to priority simply because the right to payment arises after the debtor in possession has begun managing the estate.” *Id.* at 101. The consideration for Kodak’s obligation to Wynit for the value of the Program and Return Credits is Wynit’s promise to pay for the underlying goods reflected in the invoice balance. Wynit has no right to claim Program or Return Credits without an antecedent purchase from Kodak. Here, virtually all of the antecedent purchases that comprise the Distributor Agreement Invoice Balance occurred prepetition, and Wynit has not come forward with any evidence that a specific Program or

Return Credit accrued from any particular postpetition invoice. Wynit has failed to demonstrate that it has furnished consideration to Kodak as a debtor in possession, precluding administrative priority for the claim. *See Supplee v. Bethlehem Steel Corp. (In re Bethlehem Steel Corp.)*, 497 F.3d 167, 174 (2d Cir. 2007) (holding that retirement benefits accrued during the prepetition period but paid out after the Petition Date are not eligible for an administrative expense claim).

31. To the extent Wynit may be found to have supplied Kodak with consideration postpetition, furnishing consideration to a debtor in possession by performing under a contract during the postpetition period “is not enough” to give rise to an administrative expense claim. *In re CIS Corp.*, 142 B.R. 640, 642-43 (S.D.N.Y. 1992). There must also be a nexus between the benefit provided to the estate and the creditor’s administrative expense claim. *See In re AppliedTheory Corp.*, 312 B.R. at 239-41. Indeed, the creditor must provide a “concrete, actual benefit” to the debtor in order for the creditor’s claim to receive administrative expense priority. *In re Refco, Inc.*, No. 07-4784, 2008 U.S. Dist. LEXIS 2484, at \*23 (S.D.N.Y. 2008).

32. Wynit cannot establish a nexus between the value of the credits—asserted by Wynit to be \$540,585.73 (Admin. Motion ¶¶ 10-11)—and the value of an actual benefit provided to Kodak after the Petition Date. Wynit improperly lumps together the Program and Return Credits. There is no conceivable benefit to the Debtors’ estates from providing refunds for the return of defective products. As an initial matter, the \$231,421.18 in Return Credits cannot possibly be entitled to administrative priority. Moreover, Wynit contends that “during the postpetition period, Wynit continued to perform, among other things, marketing and customer price reduction programs for the benefit of the Kodak bankruptcy estate.” (*Id.* ¶ 14.) But any such administrative tasks do not give rise to an administrative expense claim. Virtually all of

Wynit's Program Credits accrued under the MAP Program referenced in Schedule B-1 of the Distributor Agreement. That agreement contemplates Wynit's administering the customer programs and providing direct compensation to Wynit for that service in the form of the Administrative Percentage Deductions. Pursuant to Schedule B-1 and the MAP Program, the Administrative Percentage Deductions tie directly to Wynit's administration of customer programs and product returns. (*See* Distributor Agmt. Schedule B-1 ¶¶ 3, 4.) In contrast, the claimed Program and Return Credits have no nexus to any service Wynit provided postpetition.

**C. Kodak Never Induced Wynit to Perform Under the Distributor Agreement**

33. The inducement inquiry ensures that administrative expense priority only attaches to benefits "knowingly accepted and desired, post-petition, by the post-petition debtor-in-possession." *In re Adelpia Bus. Solutions, Inc.*, 296 B.R. 656, 665 (Bankr. S.D.N.Y. 2003). Courts protect against opportunistic creditors foisting "benefits" on the debtor's estate for the purposes of generating claims. *See id.*

34. Wynit asserts that Kodak induced it to administer customer programs by continuing to review and approve Program and Return Credits. (Admin Motion at ¶ 23.) This argument defies logic. There is no scenario where Kodak induced Wynit to perform services to Kodak's benefit by continuing to authorize a total of \$231,421.18 in Return Credits before and after the Petition Date. Furthermore, nothing in the Customer Programs Order, the Debtors' Objection to the Setoff Motion, or the parties' course of dealing suggested to Wynit that it could receive an administrative claim for the value of the Program and Return Credits notwithstanding the express terms of the Distributor Agreement. Any such approval by Kodak as a new payment obligation would have been outside the ordinary course of business and not permitted by the Customer Programs Order. (Customer Programs Order ¶ 2; Carpenter Decl. ¶ 7.) Kodak's

approval of certain Program and Return Credits merely permitted Wynit to take additional invoice deductions pursuant to the terms of the Distributor Agreement.

35. Nothing in the Distributor Agreement or the parties' course of dealing required Wynit to continue to administer customer programs. Wynit was free to cancel the relevant customer program entirely and have its customers sell products at full price.

(Distributor Agmt., Schedule B-1 ¶ 5.6.) Because Wynit elected to administer the customer programs after the Petition Date, Kodak exercised its discretion provided by the Customer Programs Order and approved Wynit's invoice deductions submitted after the Petition Date.

(Carpenter Decl. ¶ 12.) None of Kodak's actions suggested that Wynit was free to disregard the long-established Netting Process.

#### **IV. ANY ADMINISTRATIVE EXPENSE CLAIM SHOULD BE LIMITED TO THE CONTRACT VALUE OF SERVICES AND BE PAID IN THE FUTURE**

36. The "focus on allowance of a priority is to prevent unjust enrichment of the estate, not to compensate the creditor for its loss." *In re Worldcom, Inc.*, 308 B.R. 157, 166 (Bankr. S.D.N.Y. 2004). If the Court finds that Wynit is entitled to an administrative priority claim in any amount, Wynit is only entitled to "the reasonable value" of the services it actually rendered under the Distributor Agreement. *In re Patient Education Media, Inc.*, 221 B.R. 97, 101 (Bankr. S.D.N.Y. 1998) (quoting *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531 (1984)). When a contract exists between the debtor and the claimant, the court can presume that "the contractual rate is the reasonable value of the goods or services provided to the estate" unless a party "introduces convincing evidence to the contrary." *Bethlehem Steel Corp. v. BP Energy Co.* (*In re Bethlehem Steel Corp.*), 291 B.R. 260, 264 (Bankr. S.D.N.Y. 2003).

37. As noted above, the Distributor Agreement already establishes the value of Wynit's relevant customer programs and returns administration through the Administration



Percentage Deductions. Virtually all of the Program Credit claims arise from retail sales of digital cameras at authorized discount prices pursuant to Kodak's MAP Program. (Carpenter Decl. ¶ 11.) The Distributor Agreement provides that Wynit is entitled to a "1% rebate that will be paid monthly on [Wynit's] prior month's net purchases of Digital Hardware products for Company to manage retailer execution of the" MAP Program. (Distributor Agmt. Schedule B-1 ¶ 5.11.) The Distributor Agreement also provides Wynit with the right to a distributor margin "in the form of an off-invoice discount . . . of 5% off invoice price . . . in support of the Distributor Sales process" for administering returns and other programs. (*Id.* ¶ 3.1.) This margin compensates Wynit for costs including "handling costs associated with defective returns . . . and deduction management." (*Id.*) Wynit's administrative expense claim is therefore approximately ten times larger than the value of services Wynit provided under the contract. Certainly an evidentiary hearing would be necessary to determine the amount of any administrative priority claim. Allowing an administrative claim for the full amount of Program and Return Credits would unjustly enrich Wynit to the detriment of the Debtors' estates and their creditors.

38. Finally, to the extent that the Court finds that Wynit is entitled to an administrative expense claim in any amount, the Debtors request that the Court exercise its discretion to deny Wynit's demand for immediate payment upon entry of an order and rule that Wynit's administrative expense claim will be paid following confirmation of a plan of reorganization. "The timing of distributions for administrative expense payments, other than at the close of the case, is within the discretion of the Court." *In re Shihai*, 392 B.R. 62, 67-68 (Bankr. S.D.N.Y. 2008). There is no basis for requiring the Debtors to pay Wynit's claim now. The Debtors are focused on monetizing assets, including the sale of the digital imaging patent portfolio and other recently announced efforts to sell certain lines of business. The payment of

claims is premature. Wynit's attempt to jump in front of other creditors and grab cash now should not be permitted. There is nothing special or unique about Wynit's claim that justifies the Debtors' making a payment at a time when the Debtors are attempting to bring money into the estate and focus on restructuring. Permitting Wynit to collect payment now will lead many other creditors to attempt to do the same, draining the Debtors' resources. The Court's discretion as to the timing of administrative payments should be used to ensure the "orderly and equal distribution among creditors and the need to prevent a race to a debtor's assets." *In re Chi-Chi's, Inc.*, 305 B.R. 396, 401 (Bankr. D. Del. 2004).

### **CONCLUSION**

39. For the foregoing reasons, the Debtors respectfully request that the Court deny both Wynit's Admin. Motion and Setoff Motion, and grant such further relief to the Debtors as is appropriate.

Dated: September 12, 2012  
New York, New York

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