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

OBJECTION OF THE SECOND LIEN PARTIES[1] TO DEBTORS' SECOND MOTION FOR AN ORDER EXTENDING THEIR EXCLUSIVE PERIODS DURING WHICH ONLY THE DEBTORS MAY FILE A CHAPTER 11 PLAN AND SOLICIT ACCEPTANCES THEREOF

[1] The "Second Lien Parties" include (a) the ad hoc committee of certain holders (the "Second Lien Noteholders Committee") of the (i) 9.75% Senior Secured Notes due March 1, 2018 (the "2018 Notes") issued pursuant to that certain Indenture dated March 5, 2010, as amended, supplemented or otherwise modified from time to time (the "2018 Indenture"), by and among Eastman Kodak Company, as issuer ("EKC" and, collectively with the above-captioned debtors and debtors in possession, the "Debtors"), the guarantors as defined in the 2018 Indenture, and Wilmington Trust, N.A., as successor indenture trustee to The Bank of New York Mellon, N.A. and (ii) 10.625% Secured Notes due March 15, 2019 (such notes together with the 2018 Notes, the "Second Lien Notes") issued pursuant to that certain Indenture dated March 15, 2011, as amended, supplemented or otherwise modified from time to time (the "2019 Indenture"), by and among EKC, as issuer, the guarantors as defined in the 2019 Indenture, and Wilmington Trust, N.A., as successor indenture trustee to The Bank of New York Mellon, N.A. and (b) Wilmington Trust, N.A., as successor indenture trustee to The Bank of New York Mellon, N.A. (the "Second Lien Notes Trustee").

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Legislative History

The Second Lien Parties, by and through their undersigned counsel, hereby object (the "Objection") to the Debtors' Second Motion for an Order Extending the Exclusive Periods During Which Only the Debtors May File a Chapter 11 Plan and Solicit Acceptances Thereof [ECF No. 2103] (the "Second Exclusivity Motion").[2] In support of the Objection, the Second Lien Parties respectfully state as follows:

PRELIMINARY STATEMENT

By the Second Exclusivity Motion, the Debtors request a second lengthy extension of their exclusive periods to file a plan of reorganization and solicit acceptances thereof (the "Exclusive Periods"), through and including February 28, 2013 and April 30, 2013, respectively. The request for an additional three and a half month extension of each of the Exclusive Periods, which would have the effect of providing the Debtors a 16-month monopoly over the plan process, should be denied because the Debtors have failed to make material progress toward a chapter 11 plan of reorganization during the first ten months of these chapter 11 cases. Indeed, a further extension of the Exclusive Periods will make a successful outcome to these cases less likely.

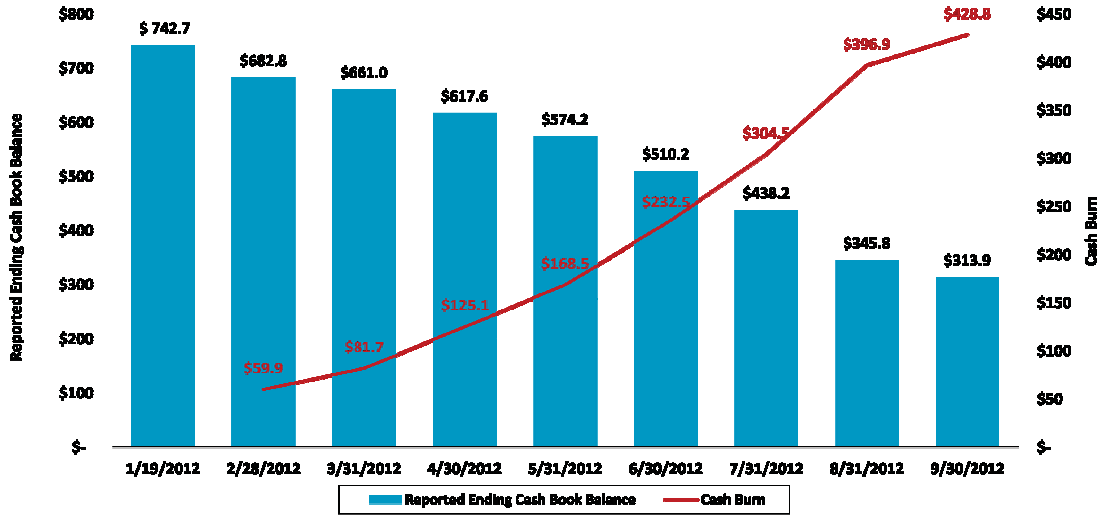
The Second Lien Parties advised the Debtors in September that they intended to oppose the Second Exclusivity Motion and the requested 198-day extension of the Exclusive Periods. In an effort to try to resolve their objection consensually and force plan negotiations to begin, the Second Lien Parties agreed to a 30-day adjournment of the hearing on the Second Exclusivity Motion. Rather than begin serious discussions regarding a plan during the adjournment, however, the Debtors focused almost exclusively on exploring supplemental postpetition

[2] This Objection is based on information publicly available as of November 11, 2012. The Second Lien Parties reserve all rights to supplement this Objection prior to the hearing on the Second Exclusivity Motion.

financing alternatives. As a result, no progress, negotiation or even a serious discussion with respect to a chapter 11 plan has occurred since the Debtors filed the Second Exclusivity Motion.

The Debtors continue to suffer operating losses and burn cash at an astounding rate that is rapidly eroding the Debtors' liquidity and creditors' potential recoveries. In fact, the Debtors have experienced a ***net loss*** *from operations of almost* ***$1 billion*** since the commencement of these chapter 11 cases – an *average net loss of approximately $107 million a month*. In addition, since the commencement of these chapter 11 cases, the Debtors' ***cash position has decreased*** *by approximately* ***$429 million*** – an *average cash burn rate of approximately $50 million per month*. This figure includes more than $100 million in Debtor professional fees incurred over the first eight and a half months of these cases.

Cumulative Monthly Cash Burn
($ in millions)



Source: Eastman Kodak Monthly Operating Reports.
Note: Cash Burn ending 2/28/2012 of $59.9 million represents cash burn from petition date of 1/19/2012 to 2/28/2012.

In the face of such operating losses and evaporating liquidity, the Debtors' management team and Board of Directors (the "Debtors' Current Leadership") have failed to take sufficient

action to stem the operating losses or preserve cash despite repeated pleas for action from the Second Lien Parties. The massive net operating losses and cash burn that have occurred during these chapter 11 cases and the failure of the Debtors' Current Leadership to take timely and decisive action to prevent future losses and cash burn have resulted in the Debtors' need for additional financing, significantly reduced potential creditor recoveries, jeopardized the Debtors' ability to reorganize successfully and undoubtedly caused the Debtors to lose ground against their competitors – an obstacle that may prove insurmountable.

While the Debtors previously advised the Court and other parties in interest that their $950 million DIP financing facility would provide sufficient liquidity to fund the chapter 11 cases,[3] it appears that may not be accurate. The Debtors' recent financial disclosures demonstrate that, at the Debtors' current pace and despite having approximately $743 million in cash (pro forma including DIP financing proceeds) ten months earlier when these cases commenced, the Debtors likely will run out of money during the first half of 2013 without additional financing and will be in default of their DIP financing facility much sooner.[4] The Debtors anticipate *further* operating cash burn of approximately $101 million during the requested 198-day extension of the Exclusive Periods. When adjusted for the Debtors' monthly expenses of approximately $20 million in restructuring costs for the same period, approximately $10 million for OPEB and related costs through the end of 2012 and roughly $5 million per month in DIP interest, the Debtors' projected cash burn from October 2012 through the end of

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[3] *See Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors (A) to Obtain Postpetition Financing Pursuant to 11 U.S.C. §§ 105, 361, 362, 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) and 364(e) and (B) to Utilize Cash Collateral Pursuant to 11 U.S.C. § 363, (II) Granting Adequate Protection to Pre-Petition Secured Parties Pursuant to 11 U.S.C. § 361, 362, 363 and 364, and Scheduling Final Hearing Pursuant to Bankruptcy Rules 4001(B) and (C)* [ECF No. 16] ¶ 32.

[4] *See* Eastman Kodak Company Form 8-K, dated October 12, 2012, available at http://www.sec.gov/Archives/edgar/data/31235/000089183612000118/ex_99-1.htm.

the requested extension of the Exclusive Periods escalates to approximately ***$306 million*** (or ***$384 million*** through the Debtors' projected effective date of June 30, 2013).[5] As such, the Debtors are projected to burn through all but $8 million of their cash during the requested extension of the Exclusive Periods. In fact, the Debtors do not expect to turn cash flow positive until the second half of 2013 at the earliest, assuming they meet their projections, which they historically have been unable to do. If the Debtors are unable to meet these projections, their cash balance will decline even further and faster than presently projected by the Debtors. An additional extension of the Exclusive Periods – while losses rapidly mount, liquidity rapidly vanishes and creditor recoveries rapidly decrease – is not in the best interests of the Debtors' estates or their creditors.

In addition, the Debtors have not made material progress toward a successful conclusion to these chapter 11 cases. In an attempt to meet the heavy burden of demonstrating progress that would justify a further extension of the Exclusive Periods, the Debtors enumerate in the Second Exclusivity Motion certain tasks and projects that they are currently "reviewing," "analyzing," "working on," "preparing," "anticipate doing," "initiating," or "undertaking." The Second Exclusivity Motion sets forth very little that has actually been *accomplished*, and there is little to add from the past thirty days. Specifically, the Debtors allege the following in an attempt to manufacture progress:

[5] These figures are based on publicly available information set forth in Eastman Kodak Company Form 8-K, dated October 12, 2012, available at http://www.sec.gov/Archives/edgar/data/31235/000089183612000118/ex_99-1.htm, and *Debtors' Motion for an Order Pursuant to Sections 105, 363 and 1114 of the Bankruptcy Code and Bankruptcy Rules 9019 approving the Settlement Agreement Between the Debtors and the Official Committee of Retired Employees* [ECF No. 2138].

Category	Debtors' Activities	Actual Progress Supporting Exclusivity Extension
Business Stabilization	Obtained DIP financing and "first day" relief; continuing to maintain vendor and client relationships; commenced analysis of executory contracts and leases; renegotiated film supply contracts; obtained Court approval of a settlement; rejected 12 real property leases; and filed several motions to reject a small number of contracts.	**None.** While maintaining customer and vendor relations, obtaining first day relief, and beginning to review executory contracts and leases are important, these are routine tasks every chapter 11 debtor is expected to perform in the very early part of the case and do not constitute progress justifying a second extension of the Exclusive Periods.
Profit Improvement, Liquidity and Expense Management	Built liquidity models; continuing to review and rationalize businesses, overhead, workforce and customer accounts.	**Insufficient.** The Debtors' actions to rationalize operations, overhead and their workforce have been inexcusably slow and insufficient, resulting in continued massive losses and cash burn. Failure to act in a timely and adequate manner has made achieving a successful restructuring more difficult.
Business Portfolio Review	Completed review of business portfolio and determined which businesses the Debtors propose to reorganize and which they propose to sell.	**Insufficient.** While formulating an opinion on which businesses the Debtors believe should be sold and which should be reorganized is important, after ten months in chapter 11 and approximately a decade of restructuring and realigning their businesses in light of the decline of photographic film, the Debtors should have made much more progress. In particular, although the Debtors recently published certain pro forma financial statements that reflect anticipated asset sales, the wind-down of the Debtors' consumer inkjet business and certain overhead reductions, the information is preliminary and untested and, at this point, cannot serve as the basis for a chapter 11 plan.
Asset Dispositions	Made decision to exit the digital camera, Kodak Gallery and consumer inkjet printers businesses; IP Portfolio[6] sale process is ongoing; and very recently initiated sale process for personalized imaging and document imaging businesses.	**None.** Belatedly deciding to exit unprofitable business lines after suffering many years of losses does not constitute progress justifying a second extension of the Exclusive Periods. After being touted by the Debtors as the cornerstone of their restructuring, the IP Portfolio sale has been serially delayed and the outcome is uncertain. Additionally, the sale of the personalized imaging and document imaging businesses has just begun and the outcome and timing of such sale process is unknown. The Debtors offer no justification for why it took seven months in chapter 11 to decide to begin to market these businesses. None of these actions has allowed parties to make progress on formulating a chapter 11 plan or justify a second extension of the Exclusive Periods.

[6] The "IP Portfolio" includes the Debtors' Digital Capture and KISS patent portfolios (each as defined in the Declaration of Michael J. Lasinski of 284 Partners LLC, attached as Exhibit C to the Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors (A) to Obtain Postpetition Financing (the "DIP Facility") Pursuant to 11 U.S.C. §§ 105, 361, 362, 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) and 364(e) and (B) to Utilize Cash Collateral Pursuant to 11 U.S.C. § 363, (II) Granting Adequate Protection to Pre-Petition Secured Parties Pursuant to 11 U.S.C. §§ 361, 362, 363 and 364, and Scheduling Final Hearing Pursuant to Rules 4001(b) and (c) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") [ECF No. 16]).

Category	Debtors' Activities	Actual Progress Supporting Exclusivity Extension
Case Administration	Obtained a bar date; continuing to review and reconcile claims.	**None**. Obtaining a bar date and reviewing and reconciling claims are basic tasks every chapter 11 debtor is expected to perform and do not constitute progress or cause for a second extension of the Exclusive Periods. Further, the Debtors acknowledge that they have just begun to reconcile the nearly 6,000 filed claims.
Collaboration with Stakeholders	Provided information to key stakeholders and sought their input on issues.	**None**. Providing information to key stakeholders is both routine and expected of every chapter 11 debtor and does not justify a second extension of the Exclusive Periods. Moreover, the Debtors only began providing information to the Second Lien Parties in a timely and cooperative manner in the past few months, after the filing by the Second Lien Parties of a motion pursuant to Bankruptcy Rule 2004 and the Debtors were confronted with a slow and uncertain IP sale. Indeed, the Debtors admitted in a recently filed press release that, as of October 12, 2012, no plan-related discussions had occurred but that they were finally "ready to begin discussions on a plan of reorganization with certain key creditor groups."[7] Unfortunately, serious plan discussions still have not commenced.
Planning for Global Emergence	Continuing to negotiate with the retiree committee and communicate with the U.K. pension trustees; and "the Debtors intend to focus on tasks in coming months to prepare themselves to propose a plan of reorganization."	**Insufficient.** Communicating with constituents and *intending* to focus in the future on tasks necessary to *prepare* themselves to propose a plan does not constitute progress or cause for an extension of the Exclusive Periods. The recent settlement with the retiree committee is important, but the fact that the Debtors are only now ready to begin chapter 11 plan discussions after ten months in bankruptcy, during which they have posted net operating losses of almost $1 billion, burned $429 million in cash and incurred more than $100 million in Debtor professional fees, is inexcusable and supports the denial of the Second Exclusivity Motion.

In light of the extremely high cost of each month in chapter 11 and the Debtors' overall lack of progress, a second extension of the Exclusive Periods is not in the best interest of the Debtors' estates and creditors.

Most important, the Debtors cannot demonstrate any material progress with respect to a chapter 11 plan. The Debtors have not begun actual plan negotiations with their creditors. Further, the current facts (including the nearly $1 billion of operating losses, $429 million of

[7] Press Release, Eastman Kodak Company, *Kodak to Begin Plan of Reorganization Discussions with Stakeholders* (Oct. 12, 2012).

cash burn during the chapter 11 cases and a slow and uncertain IP sale) strongly suggest that the Second Lien Parties will not be paid in full in cash. Since the Debtors do not appear to have the means to refinance, reinstate or otherwise unimpair the Second Lien Parties' secured claims, and secured creditors cannot be forced to accept equity in exchange for their secured claims, the Debtors have no ability to confirm a chapter 11 plan without the support of the Second Lien Parties, whose support they are unlikely to obtain under the current circumstances. Thus, as things stand, the Debtors cannot demonstrate a reasonable prospect for filing a viable, confirmable plan of reorganization. The lack of progress with respect to a chapter 11 plan after ten months in chapter 11, despite incurring more than $100 million in Debtor professional fees, warrants the denial of the Second Exclusivity Motion.

Furthermore, the sale of the IP Portfolio, the cornerstone of the Debtors' restructuring plan, has been indefinitely delayed and its outcome is uncertain. Since the beginning of these chapter 11 cases, the Debtors have touted the sale of the IP Portfolio as the "silver bullet" that would generate significant liquidity with which to fund their chapter 11 cases, pay back secured creditors and facilitate a successful restructuring. By way of example, the Debtors put forward testimony in support of approval of the DIP Facility that the value of the IP Portfolio is between $2.2 and $2.6 billion.[8] Based in large part on the Debtors' estimate of value, the Second Lien Parties agreed to be primed by the DIP Facility and consented to the first extension of the Exclusive Periods. Based on the same estimate of value, the parties also drafted and negotiated a six-level "waterfall" provision allocating the expected billions of dollars of intellectual property sale proceeds in the order approving the DIP Facility. The majority of the Debtors' efforts during the first ten months of these chapter 11 cases have been focused on this one sale process, all at

[8] *See* ECF No. 16, Ex. C.

the expense of contingency planning: the Debtors should have been dual-tracking their efforts and making progress on a viable "Plan B" alternative. Creditors have been patient, especially considering the continued losses and cash burn, but given the lack of plan negotiations and the uncertainty of the IP sale timing and outcome, it is time to democratize the plan process as Congress intended and allow creditors the opportunity to propose a plan of reorganization.

Finally, the Second Lien Parties have lost all faith in the ability of the Debtors' Current Leadership to lead the Debtors' restructuring efforts or, in fact, to lead the Debtors at all. The Debtors' Current Leadership has shown no ability or willingness to prioritize tasks based on the importance of such tasks to the Debtors' restructuring or to take speedy and decisive action when necessary. Specifically, the Debtors' Current Leadership has proven to be unable and/or unwilling to (i) cut expenses, exit unprofitable business lines or take other necessary action to minimize losses and preserve liquidity in a sufficient and timely manner, (ii) communicate publicly with their constituents in a transparent and accountable manner,[9] or (iii) make actual progress toward a chapter 11 plan. The lack of faith in the Debtors' Current Leadership is not unique to the Second Lien Parties. The Debtors' Chief Executive Officer, Antonio Pérez, and his tenure at Kodak have been widely criticized by several financial news sources and online publications including CBS and CNBC.[10] A further example of the Debtors' Current Leadership's failure to lead these chapter 11 cases appropriately relates to the management

[9] After repeated urging from the Second Lien Parties and only when the exclusive filing period was drawing to a close, the Debtors reluctantly published certain limited financial disclosures.

[10] *See, e.g.,* Steve Tobak, *The 10 Worst Corporate Boards in the World*, CBS Money Watch (June 14, 2012), *available at* http://www.cbsnews.com/8301-505125_162-57452810/the-10-worst-corporate-boards-in-the-world; Herb Greenberg, *The Worst CEOs for 2012?*, CNBC.com (Apr. 12, 2012), *available at* http://www.cnbc.com/id/47030593/ Herb_Greenberg_The_Worst_CEOs_ for_2012.

incentive plan proposed by the Debtors.[11] Given the workforce reductions, the contemplated termination of employee and retiree benefits, the massive losses and cash burn and the overall downward trajectory of these cases, the Debtors' Current Leadership showed poor judgment by seeking to implement a management incentive plan that would further enrich Mr. Pérez and the rest of the Debtors' management team, including certain officers who supposedly were crucial to the Debtors' restructuring efforts but have since been terminated and/or replaced.[12] Simply said, the Debtors' Current Leadership has lost its right to lead.

If the status quo were maintained, the Second Lien Parties believe that the Debtors' Current Leadership would continue to allow the rapid erosion of value and liquidity until creditor recoveries are *de minimis*. Accordingly, the Second Exclusivity Motion should be denied and the Second Lien Parties and other creditors given the opportunity to avert this outcome. The Second Lien Parties can move these cases forward to a successful conclusion by quickly proposing a confirmable chapter 11 plan. Particularly where, as here, the Debtors' cash position continues to deteriorate materially on a daily basis, the Debtors' primary bankruptcy exit strategy is uncertain, the Debtors have been unwilling and/or unable to propose a chapter 11 plan, and creditors have lost all faith in the Debtors' Current Leadership, the Second Exclusivity Motion should be denied.

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[11] *See* ECF No. 1625. The Debtors sought authority to, among other things, implement a key employee incentive plan (the "KEIP") for the Debtors' senior officers that would reward them with incremental bonuses in the event unsecured creditors received anything greater than a 10% recovery under a confirmed plan of reorganization.

[12] The Debtors eventually adjourned the KEIP without date, but only after it became clear that the Second Lien Parties and others would object.

FACTUAL BACKGROUND

A. The Debtors' History of Sustained Financial Losses

1. The operational cash flow burn for Eastman Kodak Company and its Debtor and non-Debtor affiliates (collectively, "Kodak") for 2010 was approximately $219 million.[13] For the year ended December 31, 2011, the total operational cash burn for Kodak was approximately $1 billion, representing an increase in cash burn of approximately $780 million.[14] All told, Kodak's cash balance declined by more than $2 billion from its peak in 2007 to December 31, 2011, while borrowings have simultaneously increased since 2009.[15]

2. During this prolonged period of tremendous losses, Kodak's management has failed to project Kodak's performance accurately. Throughout the prepetition period, Kodak consistently underperformed relative to initial management guidance on both a revenue and earnings-from-operations basis. For example, in 2008, actual earnings were 377% lower than the midpoint of management's projection.[16] In 2010, annual earnings were 575% lower than the midpoint of management's projection made in late October 2010, only two months before year end.[17] In 2011, while Kodak projected $300-400 million of asset sales and intellectual property revenue of $250-350 million, it ultimately realized just $153 million in proceeds from sales of businesses/assets and $128 million in intellectual property revenue.[18]

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[13] This information is based on publicly available materials, including Capital IQ reports, Kodak press releases and SEC filings.

[14] *See supra* note 13.

[15] *See supra* note 13.

[16] This information is derived from publicly available sources, including Capital IQ reports, Kodak SEC filings following prepetition annual strategies review meetings and third quarter earnings releases.

[17] *See supra* note 13.

[18] This information is derived from Kodak press releases, earnings transcripts and SEC filings, including the Form 10-K for period ending December 31, 2011.

B. Financial Performance Has Continued to Decline in Chapter 11

3. The Debtors' decline has accelerated during the chapter 11 cases. According to the Debtors' January and February Monthly Operating Reports, the Debtors generated a net loss from continuing operations of approximately $100 million in each of the first two months of these chapter 11 cases.[19] The Debtors' operational performance continued to deteriorate, and their subsequent Monthly Operating Reports disclosed approximately $129 million, $91 million and $88 million in losses for the months of March through May.[20] In June, July and August, the Debtors generated an aggregate net loss from continuing operations of approximately $318 million.[21] In September alone, the Debtors had an additional net loss from continuing operations of approximately $141 million.[22]

4. Moreover, since January 19, 2012 (the "Petition Date"), the Debtors have burned through approximately $429 million in cash.[23] In June, July and August, the Debtors' cash position decreased by approximately $228 million.[24] In September, the Debtors reported an additional decrease in cash of approximately $32 million.[25]

C. Recent Developments Regarding the IP Portfolio

5. For approximately five months prior to the Petition Date and immediately following the commencement of these chapter 11 cases, the Debtors' professionals actively were marketing the IP Portfolio to generate necessary liquidity and fund these chapter 11 cases.

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[19] ECF Nos. 744, 745.

[20] ECF Nos. 1019, 1282, 1542.

[21] ECF Nos. 1783, 1951, 2107.

[22] ECF No. 2261.

[23] ECF No. 2107.

[24] ECF Nos. 1783, 1951, 2107.

[25] ECF No. 2261.

6. On June 11, 2012, the Debtors filed a motion (the "Bid Procedures Motion"), by which they sought approval of certain bidding procedures for the sale of the IP Portfolio.[26] Since the Debtors had been unable to generate sufficient interest in the market, the Bid Procedures Motion contemplated a confidential auction process without a stalking horse bidder. The bid procedures provided for, among other things, an auction in early August, with the designation of successful bidder(s) one week later and a final sale hearing to be held shortly thereafter.[27] Despite the auction having commenced in early August, there has been no public announcement regarding the results, and the hearing to approve the sale of the IP Portfolio has been adjourned indefinitely.[28]

7. The Debtors have emphasized on numerous occasions the critical nature of the sale of the IP Portfolio to the success of the Debtors' restructuring efforts. *See, e.g.*, Mar. 20, 2012 Hr'g Tr. 70:25-71:2 ([Mr. Glueckstein:] "[W]e are moving forward expeditiously with a planned sale of a valuable intellectual property portfolio that is important to the debtor[s'] [re]organization efforts…."); Feb. 28, 2012 Hr'g Tr. 10:20-10:25 (noting that a main reason the Debtors filed for bankruptcy was to monetize their intellectual property assets); Jan. 19, 2012 Hr'g Tr. 17:1-17:4 ([Mr. Dietderich:] "That's what brings us here [on the Petition Date], Your Honor. We have evidence to put in the record today that the value of that patent, on a purely financial basis, is between 2.2 and 2.6 billion dollars. . . ."); Jan. 19, 2012 Hr'g Tr. 28:7-28:8 ([Mr. Torkin:] "Now, I think Mr. Dietderich alluded to [the fact that] one of the central aspects of this case is our intellectual property"); Bid Procedures Mot. ¶ 34 ("[T]he monetization of the [IP Portfolio] is an important aspect of the financing for [the Debtors'] restructuring and [their]

[26] ECF No. 1361.

[27] ECF No. 1590.

[28] ECF No. 2019.

transformation to a digital growth business. The Debtors and their advisors have determined that the sale of the [IP Portfolio] could yield sufficient financing for the Debtors' emergence from chapter 11 and the continued post-emergence transformation of the Debtors' businesses, as well as fulfilling the terms of the DIP Facility. . . ."). The IP Portfolio is also an important component of the Second Lien Parties' collateral.

OBJECTION

THE DEBTORS HAVE FAILED TO CARRY THEIR BURDEN OF ESTABLISHING CAUSE FOR A SECOND EXTENSION OF THE EXCLUSIVE PERIODS

I. The Standard for Extending the Exclusive Periods

8. Section 1121(d) of title 11 of the United States Code (the "Bankruptcy Code") requires a debtor to show "cause" for an extension of the exclusive periods. Except as may be extended by a court for cause, section 1121 of the Bankruptcy Code limits the period of time during which a debtor has the exclusive right to file a plan of reorganization and solicit acceptances thereof to 120 and 180 days, respectively. *See* 11 U.S.C. §§ 1121(b) & (c). The burden of proving cause for an extension of exclusivity is on the moving party. *In re Borders Group, Inc.*, 460 B.R. 818, 821 (Bankr. S.D.N.Y. 2011); *see also In re Curry Corp.*, 148 B.R. 754, 756 (Bankr. S.D.N.Y. 1992) ("[D]ebtor must make a clear showing of 'cause' to support an extension of the exclusivity period.").

9. It is well-established that a request to extend exclusivity is "a serious matter" and "should 'be granted neither routinely nor cavalierly.'" *In re All Seasons Indus., Inc.*, 121 B.R. 1002, 1004 (Bankr. N.D. Ind. 1990) (quoting *In re McLean Indus., Inc.*, 87 B.R. 830, 834 (Bankr. S.D.N.Y. 1987)); *In re Parker St. Florist & Garden Ctr., Inc.*, 31 B.R. 206, 207 (Bankr. D. Mass. 1983) (agreeing with objector that exclusivity extensions should not be granted routinely).

10. Significantly, a "debtor's burden gets heavier with each extension it seeks as well as the longer the period of exclusivity lasts." *Official Comm. of Unsecured Creditors of Mirant Ams. Generation, L.L.C. v. Mirant Corp. (In re Mirant Corp.)*, No. 4-04-CV-476-A, 2004 WL 2250986, at *2 (N.D. Tex. Sept. 30, 2004) (citing *In re Dow Corning Corp*., 208 B.R. 661, 664 (Bankr. E.D. Mich. 1997)).

11. Indeed, one of the fundamental purposes of section 1121 of the Bankruptcy Code is "to limit the delay that makes creditors the hostages of Chapter 11 debtors." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.)*, 808 F.2d 363, 372 (5th Cir. 1987) (characterizing section 1121 of the Bankruptcy Code as "a congressional acknowledgement that creditors, whose money is invested in the enterprise no less than the debtor's, have a right to a say in the future of that enterprise"), *aff'd*, 484 U.S. 365 (1988); *see also Century Glove, Inc. v. First Am. Bank of N.Y.*, 860 F.2d 94, 102 (3d Cir. 1988) (discussing legislative history to section 1121(d) and noting that "unlimited exclusivity gave a debtor 'undue bargaining leverage,' because it could use the threat of delay to force unfair concessions") (emphasis omitted); *In re Curry Corp.*, 148 B.R. at 756 (stating that an extension of exclusivity "should not be employed as a tactical device to put pressure on creditors to yield to a plan that they might consider unsatisfactory"). Thus, it is clear that the Debtors must satisfy a very heavy burden to obtain a second extension of the Exclusive Periods – a period which would give the Debtors a 16-month monopoly over the plan process, 267% longer than the statutory period set forth in section 1121 of the Bankruptcy Code.

12. Although the Bankruptcy Code does not define "cause," bankruptcy courts have great latitude in deciding, on a case by case basis, whether to extend or reduce the exclusive periods. *See*, *e.g.*, *In re Energy Conversion Devices, Inc*., 474 B.R. 503, 507 (Bankr. E.D. Mich.

2012) (quoting *Geriatrics Nursing Home, Inc. v. Fidelity Bank, N.A. (In re Geriatrics Nursing Home, Inc.)*, 187 B.R. 128, 132 (D.N.J. 1995) (interpreting the word "may" in section 1121(d), coupled with the lack of a statutory definition for "cause," to confer upon the bankruptcy court "great latitude" in deciding whether to modify a debtor's exclusive period)); *In re Sharon Steel Corp.*, 78 B.R. 762, 763 (Bankr. W.D. Pa. 1987) (same).

13. Contrary to the Debtors' assertion that courts in this District "routinely" grant second extensions of exclusivity,[29] each case is decided on its own merits, and in each case, the debtor must carry its heavy burden of establishing "cause" for a second extension.

14. In determining whether cause exists to extend (or terminate) exclusivity, courts apply a list of non-exclusive factors, including: (1) the size and complexity of the case; (2) the necessity for sufficient time to permit the debtor to negotiate a plan of reorganization and prepare adequate information; (3) the existence of good faith progress toward reorganization; (4) whether the debtor is paying its bills as they become due; (5) whether the debtor has demonstrated reasonable prospects for filing a viable plan; (6) whether the debtor has made progress in negotiations with its creditors; (7) the amount of time that has elapsed in the case; (8) whether the debtor is using exclusivity in order to pressure creditors to submit to the debtor's reorganization demands; and (9) whether an unresolved contingency exists. *In re Adelphia Commc'ns Corp.*, 352 B.R. 578, 586-87 (Bankr. S.D.N.Y. 2006) (citing *Dow Corning*, 208 B.R.

[29] Second Exclusivity Mot. ¶ 41. In fact, three of the four cases cited by the Debtors for this proposition effectively were uncontested requests for a second extension of exclusivity. *Id.* (citing *In re AMR Corp.*, Case No. 11-15463 (SHL) (Bankr. S.D.N.Y. Jul. 19, 2012) (uncontested other than *pro se* shareholder objection); *In re The Great Atl. & Pac. Tea Co.*, Case No. 10-24549 (RDD) (Bankr. S.D.N.Y. Aug. 18, 2011) (uncontested); *In re Gen. Growth Props., Inc.*, Case No. 09-11977 (ALG) (Bankr. S.D.N.Y. Mar. 8, 2010) (contested; extension granted over objections but for a shorter period than requested by the debtors); *In re Chemtura Corp.*, Case No. 09-11233 (REG) (Bankr. S.D.N.Y. Oct. 27, 2009) (uncontested)). In the one contested case, *General Growth*, it was clear at the point the debtors were requesting a second extension of exclusivity that all creditors would be paid in full, which is a very different situation than the instant cases. Thus, the cases cited by the Debtors do not establish that second extensions of exclusivity are routinely granted and are certainly not helpful in establishing cause for a second extension of the Debtors' Exclusive Periods.

at 664 and explaining that while "cause" is not defined in the Bankruptcy Code, courts have developed a list of factors to inform the inquiry, which have come to be called the "*Adelphia* factors").

15. Courts have recognized that some of the *Adelphia* factors may be more relevant or important than others based on the facts of each case. *See Bunch v. Hoffinger Indus., Inc. (In re Hoffinger Indus., Inc.)*, 292 B.R. 639, 644 (B.A.P. 8th Cir. 2003) (emphasizing that not all of the factors are relevant in each case, and that it lies within the discretion of the bankruptcy court to determine which are appropriate in each case); *Dow Corning*, 208 B.R. at 669 ("[W]hen a court considers a laundry list of factors in the course of deciding a matter, it is not limited to the elementary task of counting the factors. Sometimes one or more factors strongly point to a particular result while others point the other way only weakly. And sometimes certain factors are just more relevant or important than others.").

16. Moreover, the *Adelphia* court recognized that the case law factors may not be determinative in every case, and that the "primary consideration" for the court in determining whether to extend the debtor's exclusivity is whether such extension would move the case forward. *See Adelphia*, 352 B.R. at 590 (quoting *Dow Corning*, 208 B.R. at 670, and considering whether a termination of exclusivity would move the case forward). This amounts to "'a practical call that can override a mere toting up of the factors.'" *Id.*; *see also Official Comm. of Unsecured Creditors v. Henry Mayo Newhall Mem'l Hosp. (In re Henry Mayo Newhall Mem'l Hosp.)*, 282 B.R. 444, 453 (B.A.P. 9th Cir. 2002) ("[A] transcendent consideration is whether adjustment of exclusivity will facilitate moving the case forward to a fair and equitable resolution."). In other words, "the test is better expressed as determining whether [denying the Second Exclusivity Motion and] terminating exclusivity would move the case forward

materially, to a degree that wouldn't otherwise be the case. Certainly practical considerations, or other considerations in the interest of justice, could override, in certain cases, the results after analysis of the nine factors." *Adelphia*, 352 B.R. at 590 (quoting *Dow Corning*, 208 B.R. at 670).

17. Since section 1121 of the Bankruptcy Code was intended to limit the debtor's ability to delay proposal of a plan at its creditors' expense, *see Timbers*, 808 F.2d at 372, declining to extend a debtor's exclusivity "serves to eliminate the potential harm and disadvantages to creditors and democratizes the reorganization process." *Bankruptcy Act Revision, Serial No. 27, Part 3*, Hearings on H.R. 31 and H.R. 32 before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, 94th Cong., 2nd Sess. (Mar. 29, 1976). The *Timbers* court noted that the bankruptcy courts should not only be "mindful of the legislative goal behind § 1121," but also should "avoid reinstituting the imbalance between the debtor and its creditors that characterized proceedings under the old Chapter XI." 808 F.2d at 372.

18. Finally, to the extent that creditors "los[e] faith in the capability and perhaps the integrity of debtor's management," such loss of confidence "is a factor the court should and must consider in its determination" whether to continue a debtor's exclusive periods. *In re All Seasons Indus.*, 121 B.R. at 1006 (finding creditors' loss of confidence in the integrity of management a relevant factor in determining whether to extend a debtor's exclusive period to file a chapter 11 plan); *see also In re Fountain Powerboat Indus., Inc.*, No. 09-07132, 2009 WL 4738202, at *6 (Bankr. E.D.N.C. Dec. 4, 2009) (considering a creditor's "loss of confidence in management" based on, among other things, concern over debtor's historical losses a factor in deciding whether to terminate exclusivity) (internal citations omitted); *see also Official Comm. of Unsecured Creditors v. Elder Beerman Stores Corp. (In re Elder Beerman Stores Corp.)*, No. 97-

175, 1997 WL 1774880, at *10-12 (S.D. Ohio June 23, 1997) (agreeing with bankruptcy court that evidence of former directors' pre- and post-petition behavior, which called into question their ability to conduct good-faith negotiations with creditors in formulating a consensual plan of reorganization, would be relevant to court's exclusivity analysis only if the directors had a role in "the then-current state of negotiations").

II. The Relevant *Adelphia* Factors Weigh in Favor of Denying the Debtors' Second Exclusivity Motion

19. While courts have applied the nine non-exclusive *Adelphia* factors for determining whether cause exists to extend or terminate exclusivity, the factors will have different weight based on the facts of each case. *See Hoffinger*, 292 B.R. at 643-44; *Dow Corning*, 208 B.R. at 669. First, although the Debtors' cases may be large and complex, "[s]ize and complexity alone cannot suffice as cause" to extend exclusivity because a debtor's "size and complexity must be accompanied by other factors . . . to justify an extension of plan exclusivity." *In re Pub. Serv. Co. of N.H.*, 88 B.R. 521, 537 (Bankr. D.N.H. 1988); *see also In re Henry Mayo Newhall Mem'l Hosp.*, 282 B.R. at 452-53 (recognizing as "debunked" the view that complex cases require extended exclusivity) (internal citations omitted).

20. Each of the other seven relevant *Adelphia* factors supports denial of the Second Exclusivity Motion: (a) whether there has been good faith progress toward reorganization; (b) whether there has been sufficient time for the debtor to negotiate a plan of reorganization and prepare adequate information; (c) whether the debtor is paying its bills as they become due; (d) whether the debtor has demonstrated reasonable prospects for filing a viable plan; (e) whether

the debtor has made progress in negotiations with its creditors; (f) the amount of time that has elapsed in these cases; and (g) whether an unresolved contingency exists.[30]

A. The Debtors Have Not Made Material Progress Toward Reorganization or Demonstrated Reasonable Prospects for Filing a Viable Plan

21. The third and fifth *Adelphia* factors weigh heavily against granting the Second Exclusivity Motion. Despite ten months in chapter 11, the Debtors cannot show that they have made material progress toward a successful reorganization or that they have reasonable prospects for filing a confirmable plan. *See In re Sharon Steel*, 78 B.R. at 762 (agreeing with objecting creditors that debtors failed to make progress in resolving operational inefficiencies and addressing their debt load and, as such, "the leverage accorded to the debtor by the period of exclusivity must give way to the legitimate interests of other parties in interest so that progress toward an effective reorganization . . . may be enhanced before it is too late . . . [to] rescue the debtor from its precarious posture").

22. As detailed above, the Debtors are averaging net operating losses of approximately $107 million a month and cash burn of approximately $50 million a month. These massive losses are rapidly eroding potential creditor recoveries, the Second Lien Parties' collateral and the Debtors' available liquidity. At the current pace, absent additional financing, the Debtors will run out of money in the first half of 2013 and will violate the minimum liquidity covenant in the DIP Facility even sooner. A critical first step in progressing these cases toward a successful reorganization would be for the Debtors' Current Leadership to take decisive action (or at least articulate a viable, concrete plan) to reduce operating and administrative expenses drastically and increase revenue to preserve liquidity. The actions of the Debtors' Current

[30] The *Adelphia* factor not listed is the use of exclusivity to pressure creditors to agree to the debtor's restructuring demands, which is inapplicable to the cases at bar. To date, there have been no plan discussions so there has been no opportunity for the Debtors to attempt to pressure creditors into accepting any restructuring demands.

Leadership, however, have been inadequate and slow, which has allowed the operational losses and cash burn to continue unabated and reduced the Debtors' prospects for a successful reorganization.

23. Another critical initial step toward reorganization would be production of a business plan for reorganized Kodak as currently contemplated by the Debtors. While the Debtors have articulated which businesses they believe should be reorganized and which should be sold, the Second Lien Parties have not received a comprehensive business plan.[31] Based upon the actions of the Debtors' Current Leadership to date, the Debtors' declining liquidity and their huge net operating losses, the Debtors' Current Leadership has not demonstrated that it has the ability to develop such a business plan.

24. The Debtors' efforts toward the formulation of a chapter 11 plan are, at best, preliminary. The Second Lien Parties agreed to a brief adjournment of the hearing on the Second Exclusivity Motion because the Debtors stated that they were ready to begin plan negotiations with their creditors. Plan discussions, however, still have not occurred. Rather, the Debtors focused all of their efforts during the 30-day adjournment on potential financing alternatives. While additional financing is important, it does not constitute progress on the terms of a chapter 11 plan. The Debtors have acknowledged that they have yet to make progress on a chapter 11 plan. *See*, *e.g.*, Second Exclusivity Mot. ¶ 32 (noting the Debtors "*intend to focus on* [certain] tasks *in the coming months* to *prepare* themselves *to propose* a plan of reorganization. . .") (emphasis added); ¶ 33 (stating the Debtors need "additional time . . . to negotiate, document,

[31] Over the summer, the Debtors provided to the Second Lien Parties and subsequently published certain information the Debtors labeled a "business emergence plan." In actuality, those materials are more in the nature of diligence and are insufficient as a business plan. The Debtors' recent pro forma financial disclosures reflect anticipated asset sales, the wind-down of their consumer inkjet business and certain overhead reductions, but the information is preliminary and has not been fully vetted such that it could serve as the basis for a chapter 11 plan.

file, solicit votes on, and ultimately gain confirmation of a plan of reorganization"); ¶ 49 (stating the Debtors will "seek input from their key stakeholders as . . . a plan of reorganization is developed"); ¶ 51 ("The *details of the Debtors' eventual chapter 11 plan have not yet been developed* and . . . *the chapter 11 plan negotiations are likely to be lengthy.*") (emphasis added); Press Release, Eastman Kodak Company, *Kodak to Begin Plan of Reorganization Discussions with Stakeholders*, Oct. 12, 2012 (stating that the Debtors are "*now ready to begin discussions on a plan of reorganization* with certain key creditor groups" (emphasis added)) (available in Form 8-K). Tellingly, the fee applications filed by Debtors' lead bankruptcy counsel as of the date of the Second Exclusivity Motion showed no time billed to the development and preparation of a chapter 11 plan.[32]

25. It appears that the Debtors' singular plan for this restructuring was to sell the IP Portfolio for more than $2 billion. It is currently unclear, however, if and when any sale will actually occur. Even if the sale of the IP Portfolio does happen, the consideration received by the Debtors may not live up to the expectation created by the Debtors – that it would provide "sufficient financing for the Debtors' emergence from chapter 11 and the continued post-emergence transformation of the Debtors' businesses, as well as fulfilling the terms of the DIP Facility."[33] Given that the pillar of the Debtors' restructuring strategy is in jeopardy and, as described above, little other meaningful progress has been made, the Debtors are not materially closer to confirming a chapter 11 plan than they were on the Petition Date. In fact, the Debtors have made the prospect of a successful restructuring *less* likely as a result of mismanagement by the Debtors' Current Leadership and the massive losses and cash burn in the interim.

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[32] *See* ECF Nos. 1727, 1907.

[33] Bid Procedures Mot. ¶ 34.

26. Moreover, except for the recent settlement with the retiree committee, the Debtors have failed to accomplish the vast majority of the goals they advanced to justify the first five-month extension of the Exclusive Periods.[34] Indeed, the Debtors have resurrected many of these goals as justification for a *second* extension of the Exclusive Periods:

- The Debtors have yet to make sufficient progress in streamlining business operations and reducing operating and overhead costs to an appropriate and sustainable level.
- The Debtors have yet to reach a deal on the sale of their IP Portfolio, and they have yet to announce additional licensing revenues or to recover damages from their costly intellectual property litigations.
- The Debtors have been slow to implement any strategies regarding environmental and contract-based liability.
- Although the Debtors have been in dialogue with the U.K. pension plan trustees, the Debtors have shown no progress towards a resolution of this thorny issue.
- The Debtors have not commenced serious discussions regarding a chapter 11 plan with their creditors.

27. Given that the Debtors' most significant accomplishments during their initial exclusivity extension appear to be the retiree settlement, the establishment of a bar date, and the review of less than 9% of their executory contracts, the only conclusion to be drawn is that the Debtors have squandered their Exclusive Periods. They should not be given an additional five and a half months to do it again. In addition, the Second Lien Parties and other creditors should not be both (i) forced to watch the value of their collateral and their potential recoveries continue

[34] In their first exclusivity motion, the Debtors asserted that, to "put them in a position to propose a plan of reorganization to the Court and their creditors," they needed a 180-day extension of their original exclusive periods to focus on, among other things: (a) streamlining business operations and reducing operating costs; (b) continuing the sale of the IP Portfolio; (c) pursuing material intellectual property litigation to obtain licensing revenue or damages in lieu thereof; (d) establishing a bar date; (e) implementing strategies with respect to environmental and contract-based liability; (f) continuing to analyze executory contracts for rejection or assumption; (g) reducing retiree medical benefits; (h) resolving U.K. pension liability issues; (i) negotiating the resolution of various commercial relationships; and (j) exploring alternatives for the reorganized Debtors' capital structure. *See* ECF No. 831.

to decline precipitously (based on the Debtors' projections, during the requested 198-day extension of the Exclusive Periods, the Debtors will suffer additional cash burn of approximately $306 million – depleting to only $8 million their $743 million of liquidity as of the Petition Date (pro forma including the DIP financing proceeds)) and (ii) precluded from moving these cases forward to conclusion themselves.

28. Finally, the facts suggest that the Debtors will be unable to satisfy in full in cash, reinstate or "cram-up" the holders of the Second Lien Notes pursuant to a chapter 11 plan. Since secured creditors cannot be forced to accept equity in exchange for their secured claims, the Debtors seemingly have no ability to confirm a chapter 11 plan without the support of the Second Lien Parties, whose support they are unlikely to obtain absent a material change in the current circumstances.

29. Accordingly, since the Debtors cannot show material progress toward restructuring or any reasonable prospects for filing a viable plan, the Second Exclusivity Motion should be denied.

B. The Debtors' Dwindling Cash Position Supports Denying the Second Exclusivity Motion

30. The fourth *Adelphia* factor – a chapter 11 debtor's payment of debts as they come due – must be balanced against its effect on the debtor's cash position. *In re Southwest Oil Co. of Jourdanton, Inc.*, 84 B.R. 448, 451, 453 (Bankr. W.D. Texas 1987) (holding that the fact that the debtor's cash position had deteriorated during the initial exclusive period, and that it would likely continue to deteriorate during any further extension, weighed against granting an extension of exclusivity, despite the fact that, among other things, the debtor was paying its debts as they came due). "If the debtor's assets are likely to be depleted during the requested extension, it is unlikely that an extension will be granted." *In re Gibson & Cushman Dredging Corp.*, 101 B.R.

405, 410 (E.D.N.Y. 1989) (in assessing whether pending litigation should factor into the court's exclusivity analysis, holding that the debtor's financial position was relevant) (citing *Southwest Oil*, 84 B.R. at 453). Where a debtor's liquidity is jeopardized by the debtor's continued payment of its debts, the fact that a debtor may be paying its debts as they come due does not weigh in favor of maintaining the debtor's exclusivity.

31. Here, the Debtors' public disclosures show that their cash position is rapidly being depleted. The September Monthly Operating Report reveals that the Debtors were down to $314 million in cash on September 30, 2012.

32. Absent additional financing, the Debtors are projected to have just $8 million left at the end of the requested extension of the Exclusive Periods, and they will breach the minimum liquidity covenant in the DIP Facility much sooner. Accordingly, in the not-too-distant future, there may be a default under the DIP Facility and the Debtors will no longer be able to pay their debts as they come due. Assuming the Debtors can meet their projections, which they historically have been unable to do, the Debtors do not expect to turn cash flow positive until the second half of 2013 at the earliest.

33. These facts therefore weigh in favor of denying the Second Exclusivity Motion and providing the Second Lien Parties or other parties in interest an opportunity to file a chapter 11 plan while there is still the opportunity to achieve a successful outcome.

C. The Debtors Cannot Show Progress in Negotiations with the Second Lien Parties or Other Creditors

34. The sixth *Adelphia* factor – whether a debtor has made progress in negotiations with creditors – also favors denying the Second Exclusivity Motion. To demonstrate progress in negotiation, a debtor must do more than posture and must exhibit leadership to create a process where all key parties engage in a bona fide give-and-take. *See Dow Corning,* 208 B.R. at 668

(agreeing with objectors that merely holding meetings without any "hard bargaining" does not constitute substantive progress in negotiations with creditors). After ten months, the Debtors have not commenced actual discussions with creditors in respect of a chapter 11 plan.[35] As stated above, there is not even a comprehensive, vetted business plan that can serve as the basis for a chapter 11 plan.

35. The Debtors' failure to engage in negotiations and make progress toward a restructuring plan during the first ten months of these cases supports a denial of the Second Exclusivity Motion. *See Dow Corning,* 208 B.R. at 668 (finding that the sixth *Adelphia* factor weighed in favor of the official committees' joint motion to terminate exclusivity, which argued that "precious little progress" in negotiations was made during the exclusive period).

D. The Amount of Time Elapsed Since the Petition Date Was Sufficient to Make Progress on a Plan

36. As described above, the Debtors cannot show that they have taken any material steps toward the formulation and negotiation of a confirmable restructuring plan. Ten months is more than ample time in which to develop a chapter 11 plan – time that the Debtors spent almost exclusively on the sale of the IP Portfolio, the outcome of which is uncertain. Therefore, the second and seventh *Adelphia* factors regarding the passage of time favor denying the Second Exclusivity Motion.

37. While attempting to sell the IP Portfolio is an important exercise, the Debtors simultaneously should have been working toward a plan of reorganization. Understanding that there would be uncertainty until the results of the sale process were known, the Debtors could have, and should have, made progress with the Second Lien Parties and other creditors on a

[35] Although the Debtors have held meetings with advisors to the Second Lien Parties and have provided certain diligence information regarding the Debtors' businesses, there has been no negotiation, nor any collaboration on the terms of a plan of reorganization.

viable "Plan B" alternative in case the sale of the IP Portfolio did not go as the Debtors expected. *See Dow Corning*, 208 B.R. at 664 (recognizing that "over the past year . . . a lot of time has passed," which the creditors "cannot have back. Furthermore, the more time which has elapsed, the more opportunity there should have been . . . to reach consensus."). The Debtors elected not to focus on a "Plan B" alternative and only recently, as the expiration of the Exclusive Periods approached, began providing detailed information to the Second Lien Parties with respect to which businesses they believe should be sold and which should be reorganized. The information provided by the Debtors is very preliminary, however, and the Second Lien Parties believe the Debtors will likely need to revisit and revise the information that has been provided based on asset sale progress and overhead assumptions, among other things.

38. The Debtors have squandered their Exclusive Periods, with management tilting at windmills in the form of intellectual property value that may not exist and businesses that are not profitable, all while spending on average over $10 million each month on Debtor professional fees without any material progress toward a plan of reorganization. Having had and wasted ten months, it is time to break the Debtors' stranglehold on the plan process so that other parties may move these cases forward.

E. The Debtors Cannot Establish Any "Unresolved Contingencies," the Resolution of Which Would Merit Maintaining the Debtors' Exclusive Periods

39. Another *Adelphia* factor is the existence of "unresolved contingencies" to a debtor's ability to propose and prosecute a chapter 11 plan. Several courts have found that litigation within the bankruptcy court involving even a key dispute between the parties is not the type of contingency that justifies maintaining exclusivity. *See*, *e.g.*, *Dow Corning*, 208 B.R. at 668-69 (quoting *In re Lake in the Woods*, 10 B.R. 338, 345 (E.D. Mich. 1981) (finding that the pendency of litigation between the principal adversaries in the bankruptcy case did not favor an

extension of exclusivity because "[o]nce [such] dispute has been resolved by the bankruptcy court, a dissatisfied party will be free to appeal the ruling and further prolong the reorganization proceedings")). The existence of an open issue with important ramifications for the development of a chapter 11 plan similarly does not warrant continuation of a debtor's exclusivity. *See In re Pub. Serv. Co. of N.H.*, 99 B.R. 155, 176 (Bankr. D.N.H. 1989) (holding that because the debtor failed to make progress in negotiations with respect to the fundamental issue of determining utility rates during the prior extension of exclusivity, the debtor failed to show cause for a further extension).

40. Here, the Debtors have failed to show that there are any "unresolved contingencies" that would weigh in favor of continuing the Exclusive Periods. The Debtors allege in the Second Exclusivity Motion that the claims reconciliation process, including with respect to the claims asserted by the U.K. pension trustees, is one such "unresolved contingency" that amounts to a gating item to proposal of a chapter 11 plan. To the contrary, claims reconciliation is regularly handled simultaneously with prosecution of a plan of reorganization or even after confirmation and does not – and should not – prevent progress toward a chapter 11 plan. The development and prosecution of a chapter 11 plan should proceed on a parallel track. Similarly, the pending sale of the IP Portfolio does not constitute the sort of "unresolved contingency" that would justify an extension of the Exclusive Periods. The Debtors can continue to pursue these important matters, but due to the Debtors' massive operating losses and cash burn each month, the estates cannot afford to wait for the Debtors to resolve them before making progress with respect to a plan. As such, this *Adelphia* factor also supports denying the Second Exclusivity Motion.

III. Denying the Second Exclusivity Motion Would Materially Advance These Cases

41. Determining whether exclusivity should continue or terminate depends primarily on whether termination "would move the case forward materially." *Adelphia*, 352 B.R. at 590. Where a debtor's management is married to an idealistic and unreasonable depiction of the value of the debtor's assets and is unable or unwilling to move forward on a path that is in the best interests of its estates, those parties with vested economic interests should be permitted to propose a path out of chapter 11. *See*, *e.g.*, *Timbers*, 808 F.2d at 372 & n.15 (recognizing creditors' right to help steer the course of the debtor's restructuring).

42. The Debtors cannot show that they have taken sufficient steps to fix the cash burn and liquidity issues plaguing these estates, nor can they show that they have made progress toward a chapter 11 plan. Allowing exclusivity to lapse will enable the Second Lien Parties to try to propose, solicit, confirm and consummate a plan prior to the Debtors running out of money. Creditors should no longer be trapped by the untenable combination of (i) rapid value destruction and (ii) no material progress toward a chapter 11 plan by the party with a monopoly on the process.

43. The Second Lien Parties should be permitted to file a chapter 11 plan and move these cases toward emergence. If the Second Exclusivity Motion were denied and the Exclusive Periods expired, the Second Lien Parties believe they would be able to quickly propose a plan that maximizes value for creditors and satisfies all of the requirements of confirmation set forth in the Bankruptcy Code. The Second Lien Parties respectfully submit that such action is the best way to expedite the Debtors' emergence from chapter 11 and maximize recoveries, and is consistent with the congressional intent to democratize the plan process.

IV. The Second Lien Parties Have Lost Faith in the Debtors' Current Leadership

44. Starting well before the Petition Date, the Second Lien Parties have had serious concerns about the ability of the Debtors' Current Leadership to act in the best interests of its stakeholders. These concerns have been exacerbated by the Debtors' systemic cash burn and sustained losses, and the failure of the Debtors' Current Leadership to take quick and substantial corrective action to stem such losses.

45. Amid the cash burn, operating losses and plummeting trading prices of the Debtors' securities,[36] and despite the uncertainty regarding the value to be generated by the IP Portfolio auction and the future of the Debtors' operating businesses, employees and retiree benefits, the Debtors' Current Leadership chose to propose the KEIP. Such inappropriate action reinforces the misplaced priorities of the Debtors' Current Leadership and its inability to lead this restructuring effectively.

46. The Debtors' Current Leadership has proven to be unable and/or unwilling to (i) take the difficult actions that chapter 11 requires, such as quickly cutting expenses, exiting unprofitable business lines or taking other action to minimize losses and preserve liquidity, (ii) consistently act in a transparent and collaborative manner with their key constituents, including public investors, despite being a public company, or (iii) develop a viable restructuring plan. The cumulative effect of these failures has caused the Second Lien Parties to lose confidence in the ability of the Debtors' Current Leadership to shepherd the Debtors out of chapter 11. Under such circumstances, it is appropriate to deny the Second Extension Motion and allow the Debtors' exclusivity to lapse.

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[36] Between the Petition Date and November 9, 2012, the trading price of the Second Lien Notes fell by 21% percent (from 88 to 69.25), and the trading price of the Debtors' unsecured notes dropped by more than 55% (from 29.25 to 13). Moreover, DIP Facility claims are now trading below par, reflecting the delayed, uncertain IP sale process and the Debtors' poor financial performance.

V. The Debtors Would Not Be Prejudiced If the Second Exclusivity Motion Were Denied

47. The Debtors' estates would not be prejudiced if the Second Exclusivity Motion were denied. To the contrary, the Debtors' stakeholders would have a better chance of maximizing value if parties with a more objective view of the Debtors' circumstances and a greater urgency for exiting chapter 11 were able to propose a plan. Allowing exclusivity to lapse in no way forecloses the Debtors from proceeding with any chapter 11 plan they may be contemplating; it simply grants others the right to file a plan at the same time. *See In re Grossinger's Assocs*., 116 B.R. 34, 36 (Bankr. S.D.N.Y. 1990) (holding that a loss of plan exclusivity does not mean that the debtor is foreclosed from promulgating a meaningful plan, only that the right to propose a plan will not be exclusive with the debtor); *In re Mother Hubbard, Inc*., 152 B.R. 189, 195 (Bankr. W.D. Mich. 1993) (holding that termination of exclusivity is not prejudicial to the debtor because the debtor retains the ability to attempt to confirm its own plan of reorganization); *In re Southwest Oil*, 84 B.R. at 454 (emphasizing that a denial of the debtors' requested extension of exclusivity "does not prejudice the debtors' co-existent right, nor dilute the debtors' duty to file a plan"). The end of exclusivity also does not foreclose the Debtors from continuing with their claims reconciliation process, the sale of the IP Portfolio, the sale of the personalized imaging and document imaging businesses or other important matters. The Debtors' attempt to link these tasks to continued exclusivity is unavailing. Moreover, that a debtor may wish to prevent creditors from "interfering" with its reorganization and proposal of a plan is not "cause" within the meaning of section 1121(d) to allow exclusivity to continue. *See In re Parker St. Florist*, 31 B.R. at 207 (finding that the statutory grant to creditors of the right to file a competing plan after 120 days, absent an

exclusivity extension, prevents debtors from arguing that "cause" exists to extend exclusivity merely to prevent a creditor from filing a competing plan).

48. Indeed, the existence of competing plans may result in a higher and more expeditious recovery for the parties. *See*, *e.g.*, *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 457 (1999) (explaining in the context of the new value exception to the absolute priority rule that allowing competing plans is one method of ensuring that property is exposed to the marketplace, thereby increasing creditor recoveries) (internal citations omitted); *In re Rubicon US REIT, Inc.*, Case No. 10-10160 (BLS) (Bankr. D. Del. June 18, 2010) (following early termination of debtors' exclusive periods by ad hoc group of noteholders, confirming noteholders' plan of reorganization that provided for unimpairment of all creditors other than the noteholders); *In re Sound Radio, Inc.*, 93 B.R. 849, 851, 859 (Bankr. D.N.J. 1988), *aff'd in part, rev'd in part*, 103 B.R. 521 (D.N.J. 1989), *aff'd*, 908 F.2d 964 (3d Cir. 1990) (after court authorized the filing of competing plans, the plan that was ultimately confirmed paid creditors in full, paid more per share to equity and allowed debtor to go forward as reorganized company).

49. It is likewise true in these chapter 11 cases that denying the Debtors' request for continued exclusivity will not prejudice the Debtors but, in fact, will be beneficial to their estates. To the extent there is a plan of reorganization in process, the Debtors will still be able to file and prosecute it. As the Second Lien Parties are not aware of substantive progress in this regard, however, it would be better to permit constituents with economic skin in the game to take the laboring oar. The Debtors' desire to maintain control of the plan process cannot be the basis for maintaining their exclusivity, especially when the estates are burdened with massive ongoing operating losses and cash burn.

50. Since (i) the Debtors have failed to carry their burden of establishing cause for an extension of exclusivity, (ii) the end of exclusivity would have the salutary effect of moving these cases forward by providing other parties in interest with the opportunity to file a chapter 11 plan while there is still sufficient liquidity and asset value to implement it and (iii) creditors have lost all faith in the Debtors' management and its ability to lead the Debtors to a successful reorganization, the Second Exclusivity Motion should be denied.

CONCLUSION

WHEREFORE, the Second Lien Parties respectfully request that the Court (a) deny the relief requested in the Second Exclusivity Motion, and (b) grant the Second Lien Parties such other and further relief as the Court deems just, proper and equitable.

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