

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

**Hearing Date: December 19, 2012**  
**Hearing Time: 11:00 a.m.**

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In re:	:
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	: Chapter 11
EASTMAN KODAK COMPANY, <i>et al.</i> ,	:
	:
	: Case No. 12-10202 (ALG)
Debtors.	:
	:
	: (Jointly Administered)
	:
	:
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**OBJECTION OF THE UNITED STATES TRUSTEE TO  
DEBTORS' APPLICATION FOR AN ORDER AUTHORIZING  
THE RETENTION AND EMPLOYMENT OF NIXON  
PEABODY LLC AS SPECIAL COUNSEL TO THE DEBTORS  
NUNC PRO TUNC TO SEPTEMBER 1, 2012**

TO: THE HONORABLE ALLAN L. GROPPER,  
UNITED STATES BANKRUPTCY JUDGE

Tracy Hope Davis, the United States Trustee for Region 2 (the "United States Trustee"), respectfully submits this objection of the United States Trustee Regarding Debtors' Application for an Order Authorizing the Retention and Employment of Nixon Peabody LLC as Special Counsel to the Debtors nunc pro tunc to September 1, 2012 (the "Application"). ECF Doc. No. 2473. In support thereof, the United States Trustee respectfully states:

**PRELIMINARY STATEMENT**

Section 328(a) of the Bankruptcy Code provides that a trustee or debtor in possession may, with the court's approval, employ a professional person "on any reasonable terms and condition of employment, including . . . on an hourly basis . . ." 11 U.S.C. § 328(a). Rule 2014(a) of the Federal Rules of Bankruptcy Procedure requires that an application to employ a professional under section 327 of the Bankruptcy Code describe "any proposed arrangement for compensation . . ." Fed. R. Bankr. P. 2014(a). LBR 2014-1 of this Court states that "[a]n



application for the employment of a professional person pursuant to §§ 327 and 328 of the Bankruptcy Code shall state the specific facts showing the reasonableness of the terms and conditions of the employment, *including the terms of any retainer, hourly fee, or contingent fee arrangement.*” (emphasis added).

In the Application, Nixon Peabody LLC (“Nixon Peabody”) redacts the hourly rates that it is charging the Debtors’ for its services, claiming that the rates are “commercially sensitive information.” Although Nixon Peabody has disclosed the rates to the Court and to a limited number of parties, other parties in interest cannot evaluate the reasonableness of the proposed retention unless the hourly rates are disclosed. Other than the bald assertion that its hourly rates are commercially sensitive, Nixon Peabody has provided no legal or factual rationale for its failure to disclose its terms of employment. Because the Application, as filed, violates both Rule 2014(a) and LBR 2014-1, the Application should be denied.

## **BACKGROUND**

### **General Background**

1. On January 19, 2012 (the “Petition Date”), Eastman Kodak Company (“Kodak”) and certain of its direct and indirect subsidiaries (each a “Debtor” and collectively, the “Debtors”) each filed petitions for relief under chapter 11, title 11, United States Code (the “Bankruptcy Code”). ECF Doc. No. 1.

2. Kodak, a globally integrated enterprise, was once the world’s leading producer of film and cameras, but, over the past several years the company has been working to transform itself from a business primarily based on film and consumer photography to a smaller business with a digital growth strategy focused on the commercialization of proprietary digital imaging and printing technologies. Affidavit of Antoinette P. McCorvey, ¶ 4-6. ECF Doc. No. 2.

3. The Debtors currently are operating their business and managing their affairs pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

4. No trustee or examiner has been appointed in these cases.

5. On January 25, 2012, the United States Trustee appointed the Official Committee of Unsecured Creditors. ECF Doc. No. 115.

### **The Application**

6. The Debtors filed the Application on November 30, 2012

7. During these chapter 11 cases, Nixon Peabody has been retained as an ordinary course professional pursuant to the Order Authorizing the Debtors' Retention and Compensation of Certain Professionals Utilized in the Ordinary Course of Business (the "OCP Order"). ECF Doc. No. 366.

8. Nixon Peabody has exceeded the monthly cap of \$50,000 (the "Monthly Cap") for the months of September and October 2012, and expects to exceed the Monthly Cap for the foreseeable future. Application at 3, ¶ 6. In addition, Nixon Peabody is approaching the total OCP case cap of \$500,000. Id. Accordingly, the Debtors are requesting permission to retain Nixon Peabody as special counsel under section 327(e) of the Bankruptcy Code.

9. Paragraph 13 of the Application states:

Nixon Peabody's 2012 hourly rates for the Debtor for matters, other than as described in the Special Litigation Counsel Order, are:

Partners: [redacted]  
Associates: [redacted]  
Paralegals: [redacted]  
Technical Specialists: [redacted]

Application at 6, ¶ 13.

10. Footnote 3 to the Application states:

Nixon Peabody's hourly rates have been redacted to preserve the confidentiality of commercially sensitive information. Unredacted versions of the Application have been provided to Chambers, the U.S. Trustee, counsel to the Creditors' Committee, counsel to the Ad Hoc Committee of Second Lien Noteholders and the Fee Examiner, Richard Stern, Esq.

Application at 6, fn. 3.

11. Nixon Peabody was also retained in these cases as special litigation counsel pursuant to the Order Authorizing the Retention and Employment of Nixon Peabody LLC as Special Litigation Counsel to the Debtors Nunc Pro Tunc to the Petition Date. ECF Doc. No. 921. The Debtors' Application for an Order Authorizing the Retention and Employment of Nixon Peabody LLC as Special Litigation Counsel to the Debtors Nunc Pro Tunc to the Petition Date (the "Special Litigation Counsel Application"), ECF Doc. No. 758, provided for a contingency fee arrangement, but the Engagement Letter accompanying the Special Litigation Counsel Application included the following information:

Fees and cost: We strive to provide the highest quality legal representation on a cost-effective basis. This is accomplished in part by having each element of our work performed by the attorneys with the appropriate skill and experience to do it. Our usual billing rates range from approximately \$215 per hour for associates to approximately \$800 per hour for senior partners. For instance, the rates on this case would normally be as follows for the 2010 calendar year: my rate is \$640 per hour; Mr. Foote's rate is \$575 per hour. However, our fees for the Matter will be billed on a modified contingent fee basis as described more fully in the attached Terms and Condition of Engagement.

Special Litigation Counsel Application, Exhibit C, p. 2.

12. In connection with its retention as Special Litigation Counsel, Nixon Peabody has filed two interim fee applications including requests for compensation for services rendered on an hourly basis. See ECF Doc. Nos. 1406 and 2149.

13. The interim fee applications disclose the following hourly rates:

Partner/Associates	Rate
K. Belgum	\$520.00
V. Milione	\$460.00
C. Desiderio	\$420.00
A. Anselone	\$290.00

### ARGUMENT

Section 328(a) of the Bankruptcy Code provides that a trustee or debtor in possession may, with the court’s approval, employ a professional person “on any reasonable terms and condition of employment, including . . . on an hourly basis . . . .” 11 U.S.C. § 328(a). Rule 2014(a) of the Federal Rules of Bankruptcy Procedure requires that an application to employ a professional under section 327 of the Bankruptcy Code describe “any proposed arrangement for compensation . . . .” Fed. R. Bankr. P. 2014(a). LBR 2014-1 of this Court states that “[a]n application for the employment of a professional person pursuant to §§ 327 and 328 of the Bankruptcy Code shall state the *specific facts* showing the reasonableness of the terms and conditions of the employment, *including the terms of any retainer, hourly fee, or contingent fee arrangement.*” (emphasis added).

In the face of these requirements, Nixon Peabody seeks to redact its hourly rates from its disclosure of the terms of its employment. This redaction is unprecedented. Professionals’ hourly rates must be disclosed in every application for employment on an hourly basis. The bankruptcy statutes, rules, and administrative orders that mandate this disclosure are all designed to ensure that the employment process is transparent and available for anyone and everyone to read and review. Section 328(a) specifically provides that a professional may be employed on “reasonable terms and conditions.” Although the Court is the ultimate arbiter of reasonableness, all parties are entitled to full disclosure of the terms and condition of the proposed employment

so that they may decide what position to take, if any, with respect to the proposed retention.

The Application also fails to address how Nixon Peabody's fee applications could be filed without redactions to preserve the confidentiality of its billing rates. If the Application is granted as requested, the fee application process would be eviscerated. Section 330(a)(1)(A) authorizes a court to award "reasonable compensation for actual, necessary services." 11 U.S.C. § 330(a)(1)(A). Bankruptcy Rule 2016(a) provides that a professional seeking compensation from the estate "shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested." Fed. R. Bank. P. 2016(a). Administrative Order M-389, Amended Guidelines for Fees and Disbursements for Professionals in Southern District of New York Bankruptcy Cases (the "Local Guidelines"), provides in Section A(2) that a fee application must include a certification that contain "a list of professionals and paraprofessionals providing services, *their respective billing rates*, the aggregate hours spent by each professional and paraprofessional, a general description of services rendered, a reasonably detailed breakdown of the disbursements incurred and an explanation of billing practices." (emphasis added).

If the hourly rates were allowed to be redacted, the fee application could therefore not disclose the time spent on an activity, the rate charged by a timekeeper, and the amounts charged under the various project categories. Such redactions would preclude an effective review of the fee application to determine the reasonableness of the requested compensation. While unredacted copies would presumably be made available to the Court and specified parties in interest, such a procedure would not be consistent with the objective of making the bankruptcy compensation process transparent to all parties in interest as well as the public.<sup>1</sup>

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<sup>1</sup> In an effort to encourage such transparency the Court issued Administrative Order M-412, Order Establishing Procedures for Monthly Compensation and Reimbursement of Expenses of Professionals

Nixon Peabody provides no explanation for the redaction other than the conclusory statement that its billing rates are “commercially sensitive information.” It does not assert that the rates would be entitled to protection as confidential commercial information under section 107(b)(1) of the Bankruptcy Code and it has not sought such a determination under Bankruptcy Rule 9018.<sup>2</sup> This is perhaps understandable, because information that must be disclosed under the retention and compensation provisions of the Bankruptcy Code cannot be sealed under section 107(b). If a professional does not wish to disclose its hourly rates, it should decline the bankruptcy engagement. If the professional accepts the engagement, it is bound to follow the statutes and rules that apply to all professionals. It should not be permitted to undertake the engagement and then unilaterally to decide that it is not bound by the disclosure obligations.

Nixon Peabody has already disclosed certain billing rates in this case in connection with its retention as Special Litigation Counsel. It is unclear why Nixon Peabody considers certain billing rates to be “commercially sensitive information” and others not to be. In any event, regardless of the reason, the hourly rates must be disclosed in accordance with sections 327, 328 and 330 of the Bankruptcy Code.

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(the “Monthly Compensation Order”) to now require that monthly fee statements be filed with the Court. *See* Monthly Compensation Order, ¶ (b). The Monthly Compensation Order also requires the professionals to disclose their “respective billing rates.” See Monthly Compensation Order, ¶ (c).

<sup>2</sup> Although Bankruptcy Code §107 has not been raised in connection with the redacting of the hourly rates, nor is it relevant to the Court’s determination, should Nixon Peabody argue that section 107 is applicable, the United States Trustee reserves the right to object to the Application on that ground.

**CONCLUSION**

WHEREFORE, the United States Trustee respectfully requests that the Court deny the Application and grant such other relief as is just.

Dated: New York, New York  
December 9, 2012

Respectfully submitted,  
TRACY HOPE DAVIS  
UNITED STATES TRUSTEE

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