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

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In re:		)	Chapter 11
		)	
EASTMAN KODAK COMPANY, <i>et al.</i> , <sup>1</sup>		)	Case No. 12-10202 (ALG)
Debtors.		)	(Jointly Administered)
<hr/>		)	
OFFICIAL COMMITTEE OF RETIRED		)	
EMPLOYEES OF EASTMAN KODAK		)	
COMPANY, <i>et al.</i> ,		)	
		)	
Plaintiffs		)	Adv. Proc. No. 12-01747
		)	
v.		)	
		)	
EASTMAN KODAK COMPANY, <i>et al.</i> ,		)	
		)	
Defendants.		)	
<hr/>		)	

<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.



**DEFENDANT DEBTOR'S MEMORANDUM OF LAW IN SUPPORT OF ITS  
MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO STAY THE COMPLAINT  
OF RETIREE COMMITTEE FOR DECLARATORY JUDGMENT**

Defendant Eastman Kodak Company (“**Kodak**”), on behalf of itself and its affiliated debtors and debtors in possession (collectively, the “**Debtors**”), hereby submits this memorandum of law in support of the Defendant Debtor’s Motion to Dismiss, or in the Alternative, to Stay the Complaint of Retiree Committee for Declaratory Judgment [Dkt. No. •] (the “**Motion**”). In support of the Motion, the Debtors respectfully state as follows:

**Preliminary Statement**

1. The committee representing retirees appointed pursuant to section 1114 (“**1114 Committee**”) has asked the Court to issue an order that section 1114 of the Bankruptcy Code applies both to vested and unvested benefits. The relief sought is unnecessary for three reasons. The action accordingly should be dismissed or stayed.

2. First, the Debtors’ proposal to the 1114 Committee does not distinguish between vested and unvested benefits. Second, the Debtors have been negotiating and intend to continue to negotiate with the 1114 Committee concerning modification of retiree benefits regardless of whether they are vested or not. Third, even if an actual controversy concerning the application of section 1114 to unvested benefits might arise in the future, the resources of the parties and the Court now are better spent seeking a consensual resolution rather than litigating an issue that may never arise.

3. For these reasons, there is no actual controversy requiring a determination whether section 1114 applies both to vested and unvested benefits, and the 1114 Committee’s action should be dismissed without prejudice or stayed.

### Background

4. On January 19, 2012, the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the “**Bankruptcy Code**”). The Debtors are operating their business and managing their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. These chapter 11 cases are being jointly administered.

5. On February 27, 2012, the Debtors filed the Motion for an Order Authorizing Debtors to Terminate Non-Vested Medicare Enhancement Benefits for Post-1991 Retirees (the “**Termination Motion**”). The Termination Motion sought Court approval for the Debtors to terminate certain health care benefits for employees who retired or became eligible for long-term disability benefits on or after October 1, 1991 and their survivors.

6. The Debtors subsequently filed the Motion for an Order Directing the Appointment of a Section 1114 Committee (the “**Appointment Motion**”), in which the Debtors advised the Court that they were withdrawing the Termination Motion without prejudice pending appointment of a committee to act as the authorized representative of the retirees with respect to any future proposals to modify retiree medical and survivor benefits.

7. On April 16, 2012, the Court entered an order approving the Appointment Motion and appointed an official committee of retired employees – the 1114 Committee.

8. Since the 1114 Committee’s appointment, the Debtors worked constructively with the committee’s advisors in a number of ways, including:

- Agreeing to a stipulation clarifying that the general bar date does not apply to claims arising from any future modifications to retiree benefits;
- Agreeing on supplemental procedures for reimbursement of expenses for members of the 1114 Committee incurred before approval of the retention of counsel to the 1114 Committee;

- Involving the 1114 Committee’s financial advisors, Zolfo Cooper LLP, in information sessions with the financial advisors to the Official Committee of Unsecured Creditors and the Ad Hoc Committee of Second Lien Noteholders;
- Responding to voluminous information requests served by the 1114 Committee;
- Involving the 1114 Committee and its advisors in the Debtors’ patent portfolio sale process; and
- As described below, submitting a proposal to the 1114 Committee for modification of retiree benefits.

9. On July 9, 2012, the 1114 Committee filed the Complaint seeking a declaratory judgment that section 1114 of the Bankruptcy Code applies to all “retiree benefits” (as the term is defined in section 1114(a) of the Bankruptcy Code) (“**Retiree Benefits**”), whether or not those benefits are vested.

10. On July 10, 2012, the Debtors asked the 1114 Committee to agree to stay the declaratory judgment action because it was not ripe for adjudication. The 1114 Committee refused, asserting that the issue of whether section 1114 of the Bankruptcy Code applies to unvested Retiree Benefits is ripe for determination.

11. On July 19, 2012, the Debtors provided the 1114 Committee’s advisors with a proposal concerning Retiree Benefits (the “**Proposal**”), which was revised on August 10, 2012 to reflect certain of the 1114 Committee’s request. The treatment of Retiree Benefits under the Proposal is not based on whether the benefits are vested or not vested. Further, the Debtors have not negotiated and do not intend to negotiate modifications to Retiree Benefits based on whether the benefits are vested or not vested. Rather, the Debtors are working with the 1114 Committee’s advisors to provide them with information they have requested to evaluate the Proposal, and the Debtors are hopeful that they can work cooperatively with the 1114 Committee

to reach an agreement regarding the treatment of Retiree Benefits, and the extent and form of recovery to Retirees.

### Argument

**I. The Issue of Whether Section 1114 of the Bankruptcy Code Applies to All Retiree Benefits Is Not Ripe for Adjudication and the Complaint Should Therefore Be Dismissed Without Prejudice.**

12. The 1114 Committee seeks a declaration that section 1114 of the Bankruptcy Code applies to all Retiree Benefits, not only such benefits that are vested. As this Court has previously indicated, this issue is not ripe for adjudication. *See* Mar. 20, 2012 Hearing Transcript (The Court: “I think I would cost the debtor more in attorneys’ fees on this issue than the issue is actually worth consider the implication from Visteon, which [sic] you may not be able to do it during the course of the case, but you can do it on emergence from bankruptcy. . . . So I think it would be premature to delve into, to jump into this legal argument at this point . . .”). It was precisely because of this Court’s prior direction regarding the modification of Retiree Benefits that the Debtors fashioned the Proposal to apply to all Retiree Benefits (without distinction as to vested or unvested Retiree Benefits). Consistent with its prior direction on the subject, the Court does not need to consider whether section 1114 of the Bankruptcy Code applies to unvested Retiree Benefits at this time (and hopefully it will never need to do so).

13. Federal courts only have jurisdiction to decide cases or controversies that are ripe for adjudication. Complaints alleging unripe issues must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Bankr. P. 7012. *See Thomas v. City of New York*, 143 F.3d 31, 34 (2d Cir. 1998) (“Ripeness is a constitutional prerequisite to the exercise of jurisdiction by the federal courts.”); *see also Dougherty v. Town of North Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 90 (2d Cir. 2002) (“The purpose of the ripeness requirement is to ensure that a dispute

has generated injury significant enough to satisfy the case or controversy requirement of Article III of the U.S. Constitution.”).

14. Without an actual controversy between parties, federal courts have no jurisdiction to hear a case. *See Certain Underwriters at Lloyd’s, London v. St. Joe Minerals Corp.*, 90 F.3d 671, 675 (2d Cir. 1996). Ripeness requires an actual dispute between parties — an “actual controversy” — to prevent courts from adjudicating hypothetical and abstract disputes. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985) (courts should not endeavor to resolve contingencies that may or may not occur as expected or may not happen at all).

15. Requests for declaratory judgments only are ripe where a lack of action by the court could harm the moving party. A request for declaratory judgment may not be based on hypothetical facts, but rather must be based on existing circumstances raising questions of specific right. *See N. Am. Airlines, Inc. v. Int’l Bhd. of Teamsters Local 747*, No. 04 Civ. 9949 (KMK), 2005 U.S. Dist. LEXIS 4385, at \*25 (S.D.N.Y. Mar. 20, 2005) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)) (case may be heard only if “the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.”).

16. Whether section 1114 of the Bankruptcy Code applies to all Retiree Benefits is not a controversy that must be decided now, and it may never need resolution. The existing Proposal includes all Retiree Benefits, whether vested or unvested; no case or controversy exists as to the question raised.

17. Thus, the declaratory judgment that the 1114 Committee seeks would, impermissibly, be based on a hypothetical and abstract dispute. *See, e.g., Empire State Pharm. Society Inc. v. A. Perales*, 672 F. Supp. 146 (S.D.N.Y. 1987) (holding that the action is not ripe for adjudication where plaintiff has not been denied enrollment or threatened with denial yet). The issue the 1114 Committee seeks to raise is not ripe, and the Complaint must accordingly be dismissed.

## **II. Alternatively, the Complaint Should Be Dismissed in the Court's Discretion.**

18. If the Court were to conclude that an actual controversy does exist, the Court should exercise its discretion and dismiss the Complaint without prejudice.

19. Under the Declaratory Judgment Act, federal courts, including bankruptcy courts, have the authority to “declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is sought.” 28 U.S.C. §§ 157, 2201(a). However, this relief is discretionary, even if an actual controversy exists, because the “accelerated judicial intervention” authorized by the act “creates the risk of burdening courts and litigants with disputes that were otherwise destined to disappear by themselves.” *Greater New York Hosp. Ass’n. v. The United States of America*, No. 98 Civ. 2741(RLC) 1999 WL 1021561, at \*8 (S.D.N.Y. Nov. 9, 1999) (quoting *In re Combustion Equip. Ass’n. Inc. v. United States Env’tl. Prot. Agency*, 838 F.2d 35, 37 (2d. Cir.1988)).

20. In determining whether to exercise discretion to dismiss an action, courts look to see if an immediate decision will protect against the possibility of future harm to the plaintiff and weigh this benefit against the burden of litigating the issue and the possibility the issue will be resolved without judicial intervention. *See Deshawn E. v. Safir*, 156 F.3d 340, 344 (2d Cir. 1998). The 1114 Committee will suffer no disadvantage if it does not receive a

declaratory judgment at this time. As described above, the current Proposal applies to all Retiree Benefits. The issue the 1114 Committee has asked the Court to resolve has not arisen and may never arise. The 1114 Committee's request therefore is, at best, premature. Resolving this hypothetical issue now is a waste of the parties' time and the Court's resources.

21. As an alternative to dismissal without prejudice, this Court should exercise its discretion and stay the proceeding to allow the parties the opportunity to negotiate and potentially reach a consensual resolution regarding the modification of the Retiree Benefits. *See Clinton v. Jones*, 502 U.S. 681, 706-7 (1997) (courts have "broad discretion to stay proceedings as an incident to [their] power to control [their] own docket"). For all the reasons discussed regarding the Court's discretion to dismiss the Complaint without prejudice, should the Court determine that dismissal is inappropriate, the Court should stay the proceeding until December 31, 2012 unless the Court so orders otherwise, but in no event earlier than 90 days following the date hereof, to permit the parties to continue to work toward a negotiated modification of Retiree Benefits.

### **Conclusion**

WHEREFORE, for the reasons set forth herein, the Debtors respectfully request that the Court dismiss the Complaint without prejudice, or in the alternative, stay the proceeding.

Dated: August 13, 2012  
New York, New York

/s/ Andrew G. Dietderich

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