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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: EASTMAN KODAK COMPANY, *et al.*,[1] Debtors.	Bankruptcy Case No. 12-10202 (ALG)
KYOCERA CORPORATION, Plaintiff, v. EASTMAN KODAK COMPANY, Defendant.	Adv. Proc. No. 13-01093 (ALG)

DEFENDANT EASTMAN KODAK COMPANY'S MOTION AND MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR ENTRY OF AN ORDER (I) ENFORCING THE AUTOMATIC STAY AND DISMISSING IN PART KYOCERA CORPORATION'S ADVERSARY COMPLAINT AS VOID AB INITIO, AND (II) EXTENDING THE STAY TO THE REMAINING CLAIMS

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

Defendant Eastman Kodak Company ("**Kodak**"), on behalf of itself and its affiliated debtors and debtors in possession (collectively, the "**Debtors**"), hereby submits this motion (the "**Motion**"), pursuant to sections 362(a) and 105(a) of Title 11 of the United States Code (the "**Bankruptcy Code**") and section 959(a) of Title 28 of the United States Code, for entry of an order, substantially in the form attached hereto as Exhibit A (the "**Proposed Order**"), (I) enforcing the automatic stay and dismissing in part Kyocera Corporation's ("**Kyocera**") adversary complaint as void *ab initio*, and (II) extending the stay to the remaining claims.[1] In support of the Motion, Kodak concurrently submits the following memorandum of law.

PRELIMINARY STATEMENT

1. On January 4, 2013, Kyocera commenced an adversary proceeding purportedly seeking an injunction and to recover damages limited to Kodak's alleged postpetition infringement of 15 U.S. patents issued to Kyocera [Adv. Docket No. 1] (the "**Kyocera Action**"). As is plain from the adversary complaint, however, 13 of the patents were issued well before the commencement of these chapter 11 cases—including one that issued almost 18 years earlier. Indeed, months before commencing its adversary proceeding, Kyocera filed a proof of claim based on Kodak's alleged prepetition infringement of eight of the patents at issue in the Kyocera Action. Moreover, Kyocera previously sued Kodak for patent infringement in the U.S. District Court for the Southern District of California on one of the patents asserted in both its adversary complaint and proof of claim.

2. Kyocera's claims for infringement of 13 of the patents asserted in the Kyocera Action "could have been commenced before the commencement of" Kodak's chapter 11 case, and therefore violate the automatic stay provided by the Bankruptcy Code. 11 U.S.C.

[1] Kodak expressly reserves its rights to raise any and all available defenses or objections not made herein in any subsequent pleadings or filings with this or any other Court with jurisdiction over the Kyocera Action.

§ 362(a)(1). This Court has twice held in these proceedings that the automatic stay applies to patent infringement claims that could have been commenced before the chapter 11 petition was filed, even if the claims are purportedly limited to postpetition infringement. Courts in this circuit are clear that claims asserted in violation of the automatic stay are void *ab initio*, and the appropriate remedy is to dismiss those claims. The Court should therefore dismiss claims 3 through 15 from the Kyocera Action.

3. The claims based on infringement of two other Kyocera patents—one issued days before the commencement of these chapter 11 cases and one after—should be stayed. The Court should exercise its equitable powers under section 105(a) of the Bankruptcy Code and/or section 959(a) of the United States Code to extend the automatic stay to prevent Kyocera from pursuing postpetition infringement claims directed to those two patents at this time, as well as any other claims the Court might determine are not void *ab initio*. Kyocera should not be permitted to divert the Debtors' resources and attention from the reorganization process to defend claims relating, at least in part, to businesses that Kodak has either exited (digital cameras) or is in the process of exiting (consumer inkjet printers).

BACKGROUND

A. Kodak's Chapter 11 Proceedings

4. On January 19, 2012 (the "**Petition Date**"), each of the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code, thereby triggering the automatic stay as set forth in section 362 of the Bankruptcy Code. The Debtors are operating their businesses 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 January 25, 2012, the Office of the United States Trustee for the Southern District of New York (the "**U.S. Trustee**") appointed an Official Committee of Unsecured Creditors (the "**Creditors' Committee**") pursuant to section 1102 of the Bankruptcy Code [Bankr. Docket No. 115].

6. Founded in 1880 and long one of the world's leading material science companies, the Debtors and their non-Debtor affiliates operate an integrated global business involving a diverse collection of mature and growth businesses and an array of valuable intellectual property. In order to address a shortfall in liquidity in the United States, monetize non-strategic intellectual property, fairly resolve legacy liabilities and focus on their most valuable business lines, the Debtors commenced these chapter 11 cases.

7. As stated in previous filings, the Debtors are pursuing a path to emerge from chapter 11 in 2013 with a strategic focus on their Commercial Imaging business, which is centered on commercial, packaging and functional printing solutions and enterprise services.

B. The Disputes Between Kyocera and Kodak

8. In December 2011, Kyocera sued Kodak for patent infringement in the U.S. District Court for the Southern District of California. *Kyocera Corp.* v. *Eastman Kodak Co.*, No. 11CV2934 JAH JMA (S.D. Cal. filed Dec. 19, 2011) [Docket No. 1] (the "**S.D. Cal. Action**"). Kyocera's complaint there alleges that "Kodak has infringed and continues to infringe" U.S. Patent No. 7,097,286 (the "'**286 Patent**"), which was issued to Kyocera on August 29, 2006 [S.D. Cal. Action Docket No. 1 ¶¶ 7, 10]. None of the other patents now asserted—including patents issuing years before the '286 Patent—were asserted in the S.D. Cal. Action. That action was stayed pursuant to section 362(a) of the Bankruptcy Code upon commencement of these chapter 11 cases before Kodak had an opportunity to respond to Kyocera's complaint.

9. In July 2012, Kyocera filed a proof of claim (the "**Kyocera Claim**," attached hereto as Exhibit B) against the Debtors "in an amount to be determined but no less than $80,000,000" based on Kodak's alleged prepetition infringement of 22 U.S. patents owned by Kyocera, including the '286 Patent. (Kyocera Claim ¶ 2.)[2] The Kyocera Claim seeks damages for prepetition patent infringement for 21 patents not previously asserted against Kodak, including eight that are now included in the Kyocera Action. (*Id.* at ¶ 3.) The Kyocera Claim also asserts the right to set off and recoup any damages owing to Kodak arising from an unrelated breach of contract action pending against Kyocera in the U.S. District Court for the Western District of New York, *Eastman Kodak Co.* v. *Kyocera Corp.*, No. 10-CV-6334 (W.D.N.Y. filed June 22, 2010) (the "**W.D.N.Y. Action**"). (*Id.* at ¶ 27.)

10. Kyocera's exposure in the W.D.N.Y. Action is significant. Kyocera failed to pay for the use of Kodak's digital camera technology under the terms of a now expired ten-year license agreement with Kodak. (Kodak Complaint ¶¶ 4, 16 [W.D.N.Y. Action Docket No. 1].) Kodak has asserted claims seeking damages for breach of contract and a declaratory judgment regarding the terms of the parties' license agreement. (*Id.* at ¶ 9.) The W.D.N.Y. Action and the claims asserted there are unrelated to the claims asserted in Kyocera Action. The W.D.N.Y. Action is progressing and trial is scheduled to begin on August 12, 2013 [W.D.N.Y. Action Docket No. 139].

C. Kyocera's Adversary Complaint

11. Kyocera filed its adversary complaint on January 4, 2013, alleging that Kodak has infringed 15 U.S. patents issued to Kyocera in the period since commencing this chapter 11 case [Adv. Docket No. 1 (the "**Adversary Complaint**")]. As set forth in the

[2] The patents included in the Kyocera Claim are U.S. Patent Nos.: 7,097, 286; 7,893,597; 7,456,705; 8,008,739; 6,027,791; 7,212,093; 7,311,854; 7,623,810; 7,672,612; 8,057,975; 7,027,806; 5,902,993; 5,399,850; 7,181,171; 6,898,069; 7,057,876; 5,644,211; 6,229,249; 6,229,404; 7,098,580; 6,587,008; and 7,242,258.

Adversary Complaint, 13 of the 15 patents asserted against Kodak were issued well in advance of theses chapter 11 cases (the "**13 Kyocera Patents**"):

- U.S. Patent No. 5,399,850, issued on March 21, 1995;
- U.S. Patent No. 6,027,791, issued on February 22, 2000;
- U.S. Patent No. 6,055,006, issued on April 25, 2000;
- U.S. Patent No. 6,898,069, issued on May 24, 2005;
- U.S. Patent No. 7,027,806, issued on April 11, 2006;
- U.S. Patent No. 7,545,461, issued on June 9, 2009;
- U.S. Patent No. 7,097,286, issued on August 29, 2006;
- U.S. Patent No. 7,212,093, issued on May 1, 2007;
- U.S. Patent No. 7,311,854, issued on December 25, 2007;
- U.S. Patent No. 7,558,506, issued on July 7, 2009;
- U.S. Patent No. 7,623,810, issued on November 24, 2009;
- U.S. Patent No. 7,957,414, issued on June 7, 2011; and
- U.S. Patent No. 8,055,156, issued on November 8, 2011.

(Adversary Complaint ¶¶ 32, 39, 46, 53, 60, 67, 74, 81, 88, 95, 102, 109, 116.) According to the Adversary Complaint, the remaining two patents at issue, U.S. Patent No. 8,092,962 (the "**'962 Patent**") and U.S. Patent No. 8,260,284 (the "**'284 Patent**"), were issued on January 10, 2012 and September 4, 2012, respectively. (*Id.* ¶¶ 18, 25.)

12. Eight of the 15 patents included in the Kyocera Action claiming postpetition infringement were also included in the Kyocera Claim seeking damages for prepetition infringement: U.S. Patent Nos. 5,399,850; 6,027,791; 6,898,069; 7,027,806;

7,097,286; 7,212,093; 7,311,854; and 7,623,810. The '286 Patent is also separately the subject of the stayed S.D. Cal. Action.[3]

13. The Adversary Complaint contains only broad assertions that Kodak's allegedly infringing activity pertains to products, without any specificity, including Kodak consumer printers, that incorporate widely used technology such as scanning devices, electrophotographic devices, wireless communications, wiring boards, and ferrite components. (*E.g.*, Adversary Complaint ¶¶ 21, 35, 70, 84 and 98.) Kyocera seeks injunctive relief despite Kodak's public announcements, months before Kyocera filed its Adversary Complaint, that it has exited the digital camera business and will, starting in 2013, focus its consumer inkjet printer business on the sale of ink to its installed base and wind down sales of consumer inkjet printers. (Press Release, Kodak Continues Progress Toward Emergence (Sept. 28, 2012), attached hereto as Exhibit C.)[4]

JURISDICTION AND VENUE

14. The Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). The statutory predicates for the relief requested herein are sections 362(a) and 105(a) of the Bankruptcy Code and section 959(a) of the United States Code.[5]

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[3] Kyocera also seeks (claim 16) a declaratory judgment with respect to all of the patents that each act of infringement "that has occurred or will occur after the Petition Date constitutes a separate, post-petition act of infringement." (Adversary Complaint ¶ 125.) This claim should be similarly dismissed or stayed along with the underlying claims for patent infringement.

[4] Kyocera's campaign to interfere with the administration of the Debtors' estates included interposing a lengthy objection to the Debtors' supplemental motion for an order authorizing the sale of Kodak's digital imaging patent portfolio, despite admitting that Kyocera's license to Kodak's patents expired on March 31, 2012. [Bankr. Docket No. 2736 ¶ 38 and Adv. Docket No. 3 at p. 4 n.6.] That objection was resolved, and the motion was approved on January 11, 2013. [Bankr. Docket No. 2847.]

[5] Despite voluntarily commencing the Kyocera Action in this Court, Kyocera filed a motion to withdraw the reference of its adversary proceeding to the United States District Court for the Southern District Of New York

ARGUMENT

A. The Kyocera Action Violates the Automatic Stay with Respect to the Thirteen Patents that Issued Well Before these Chapter 11 Cases.

15. The automatic stay is one of the fundamental protections afforded to debtors under the Bankruptcy Code. *E.g.*, *Midatlantic Nat'l Bank* v. *N.J. Dep't of Envt'l Protection*, 474 U.S. 494, 503 (1986). The automatic stay provides the debtor with a "breathing spell" after the commencement of a chapter 11 case, shielding it from creditor harassment and from a multitude of litigation in a variety of fora at a time when a debtor's personnel should be focusing on restructuring. *E.g.*, *E. Refractories Co., Inc.* v. *Forty Eight Insulations, Inc.*, 157 F.3d 169, 172 (2d Cir. 1998); *Teachers Ins. & Annuity Ass'n of Am.* v. *Butler*, 803 F.2d 61, 64 (2d Cir. 1986); *Taylor* v. *Slick*, 178 F.3d 698, 702 (3d Cir. 1999), *cert denied*, 528 U.S. 1079 (2000); *In re Univ. Med. Ctr.*, 973 F.2d 1065, 1074 (3d Cir. 1992).

16. Numerous courts, including this Court—twice in these chapter 11 proceedings—have ruled that section 362(a)(1) prohibits a plaintiff from proceeding with an action for postpetition patent infringement when the patents at issue were issued before the petition date and the claims could have been asserted before commencement of the bankruptcy proceedings. Bankr. Docket Nos. 551 and 721; Hr'g Tr. 59-63, Mar. 8, 2012; Hr'g Tr. 95-101, Mar. 20, 2012; *In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litig.*, 140 B.R. 969, 976-77 (N.D. Ill. 1992); *In re Spansion, Inc.*, 418 B.R. 84, 92 (Bankr. D. Del. 2009), *vacated on other grounds*, *sub nom. Samsung Elec. Co. Ltd.* v. *Ad Hoc Consortium of Floating Rate Noteholders*, No. 09-0836 (RBK), 2010 WL 2636115 (D. Del. June 29, 2010); *Alloc, Inc.* v. *Unilin Décor N.V.*, No. 02-C-1266, 2005 WL 3448060, at *9 (E.D. Wis. Dec. 15, 2005).

[Adv. Docket No. 3]. That motion remains pending before Judge Koeltl and does not impact this Court's ability to the decide Kodak's Motion. Fed. R. Bankr. P. 5011(c) ("The filing of a motion for withdrawal of a case . . . shall not stay the administration of the case or any proceeding therein before the bankruptcy judge . . . .").

17. Kyocera wrongly assumes that its attempt to limit its claims to alleged infringement after the Petition Date insulates the Kyocera Action from the automatic stay. The Court has twice considered this precise issue in the context of parties seeking relief from the automatic stay to pursue patent infringement claims against Kodak, and concluded that the operative fact is not the infringement period but rather the nature of claims being asserted. As this Court explained when denying Apple Inc.'s motion to lift the stay to allow Apple Inc. to pursue a new action against Kodak for postpetition infringement, section 362(a)(1) of the Bankruptcy Code "prohibits the 'commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or *could have been commenced* before the commencement of the case." (Hr'g Tr. 62, Mar. 8, 2012 (emphasis added) (quoting 11 U.S.C. § 362(a)(1)).) The Court quoted Judge Easterbrook's decision in *Mahurkar*, noting that this interpretation of section 362(a) is "not only good law but also good sense." (Hr'g Tr. 63, Mar. 8, 2012.)

18. Thirteen of the patents in the Kyocera Action were issued well in advance of the Petition Date. Indeed, prior to filing its Adversary Complaint, Kyocera filed a proof of claim against the Debtors based on Kodak's alleged prepetition infringement of eight of the patents in the Kyocera Action. (*See* Kyocera Claim ¶ 3.) It is thus plain that Kyocera's case could have been commenced before the chapter 11 filings with respect to these patents but was not. The Kyocera Action violates the automatic stay in regard to these patents, is void *ab initio* and should be dismissed. Hr'g Tr. 59-63, Mar. 8, 2012; Hr'g Tr. 95-101, Mar. 20, 2012; *In re Spansion, Inc.*, 418 B.R. at 92 (holding that "[e]ven though the alleged patent infringement is ongoing, the automatic stay applies" because "the claims asserted could have been brought, and were, in fact, brought, prepetition); *Alloc*, 2005 WL 3448060, at *9 (holding that limiting claims

to postpetition damages for patent infringement would not save prepetition claims from automatic stay). As Judge Easterbrook explained in *In re Mahurkar*, limiting claims excepted from the automatic stay to those that could have only been brought postpetition is appropriate because "[b]ankruptcy is a collective proceeding, one in which creditors divide claims while the court attempts to maximize the total value of the assets." 140 B.R. at 976-77 (citations omitted). The automatic stay applies to Kyocera's claims.

19. Kyocera did not seek relief from this Court from section 362(a) of the Bankruptcy Code prior to commencing the Kyocera Action. Therefore, the assertion of claims against Kodak for the 13 Kyocera Patents—even claims purportedly limited to postpetition infringement—are void *ab initio*. *See E. Refractories Co., Inc.,* 157 F.3d at 172 ("proceedings or actions" in violation of "section 362(a)(1) are void and without vitality") (citations omitted); *Dalton* v. *New Commodore Cruise Lines Ltd.*, No. 02 Civ. 8025(DLC), 2004 WL 344035, at *3 (S.D.N.Y. Feb. 24, 2004) (ruling that lawsuit "filed in derogation of the automatic stay" was "void *ab initio*"). The appropriate remedy is to dismiss the claims asserted in violation of the automatic stay. *See Hearst Magazines* v. *Stephen L. Geller, Inc.*, No. 08 Civ. 11312(LLS), 2009 WL 812039, at *2 (S.D.N.Y. Mar. 25, 2009) (holding action in violation of the section 362(a) was "void from its commencement, and . . . will be dismissed without prejudice"); *Serio* v. *DiLoreto*, No. 00 CIV 8651 (LTS)(HB), 2002 WL 426165, at *1 (S.D.N.Y. Mar. 19, 2002) (granting defendant's motion to dismiss action that violated the automatic stay as void).

20. Kyocera's postpetition infringement claims with respect to the eight patents contained in the Kyocera Claim seeking prepetition damages are inappropriate for two additional reasons. First, as this Court recognized in denying Fujifilm Corporation's motion for stay relief, "separating a single lawsuit into pre and post petition pieces would be a waste of

judicial resources." (Hr'g Tr. 100:2-7, Mar. 20, 2012.) Multiple proceedings to address Kyocera's claims to the same patents would also be a waste of the Debtors' resources. Second, a separate action for alleged postpetition infringement would permit Kyocera an improper end around the automatic stay of claims for prepetition infringement of the same patents. Permitting Kyocera to litigate those claims now would encourage other parties to similarly bifurcate their patent infringement claims and commence similar adversary proceedings against the Debtors alleging postpetition infringement.

21. Kyocera's claims to the '286 Patent should be independently dismissed pursuant to the first-filed doctrine because Kyocera previously asserted this patent against Kodak in the pending S.D. Cal. Action. The first-filed doctrine prohibits Kyocera from avoiding the stay of the S.D. Cal. Action by filing a new action in this Court. *See*, *Chamberlain Grp., Inc.* v. *Lear Corp.* (*In re Lear Corp.*), No. 09-14326(ALG), 2009 WL 3191369, at *1-3 (Bankr. S.D.N.Y. Sept. 24, 2009) (dismissing "new action . . . under the first-filed doctrine" where the plaintiffs previously filed "a patent infringement suit" in another court).

B. The Court Should Stay Kyocera's Claims to the '962 Patent and the '284 Patent, and Any Other Remaining Claims.

22. The Court should exercise its equitable powers under section 105(a) of the Bankruptcy Code and/or section 959(a) of the United States Code to stay Kyocera's claims directed to the '962 Patent, issued days before the Petition Date, and the '284 Patent, issued after the Petition Date. In addition, the Court should extend the stay to any other claims asserted in the Kyocera Action that the Court determines are not void *ab initio*.

23. As this Court recognized in *Go West Entertainment, Inc.* v. *New York State Liquor Authority* (*In re Go West Entertainment, Inc.*), "significant authority exists suggesting that courts may properly invoke § 105(a) to enjoin proceedings that are excepted from

the automatic stay." 387 B.R. 435, 441 (Bankr. S.D.N.Y. 2008) (Gropper, J.) (quoting *La. Pub. Servs. Comm'n* v. *Mabey* (*In re Cajun Elec. Power Co-op*), 185 F.3d 445, 457 n.18 (5th Cir. 1999)); *see also Garrity* v. *Leffler* (*In re Neuman*), 71 B.R. 567, 571 (S.D.N.Y. 1987) ("The Bankruptcy Court has authority under § 105(a) broader than that under the automatic stay provision, § 362, and 'may use its equitable powers to assure the orderly conduct of the reorganization proceedings.'") (quoting *In re Baldwin-United Corp. Litig.*, 765 F.2d 343, 348 (2d Cir. 1985)). In deciding whether to extend the automatic stay under section 105(a), bankruptcy courts focus on whether the action would "embarrass, burden, delay or otherwise impede the reorganization proceedings," and whether the stay is "necessary to preserve or protect the debtor's estate or reorganization prospects." *Lyondell Chem. Co.* v. *Centerpoint Energy Gas Serv.* (*In re Lyondell Chem. Co.*), 402 B.R. 571, 590 (Bankr. S.D.N.Y. 2009).

24. Moreover, section 959(a) of the United States Code provides that actions that could otherwise be brought under section 959(a) are "subject to the general equity power of such court so far as the same may be necessary to the ends of justice." 28 U.S.C. § 959(a). Similar to the consideration under section 105(a) of the Bankruptcy Code, the Second Circuit has explained that in determining whether to exercise equitable authority under section 959(a) to stay postpetition claims, a bankruptcy court should determine if the suit would "embarrass, burden, delay or otherwise impede the reorganization proceeding." *Jaytee-Penndel Co.* v. *Bloor* (*In re Investors Funding Corp. of N.Y., IFC Collateral Corp.*), 547 F.2d 13, 16 (2d Cir. 1976).

25. Permitting Kyocera to proceed now against Kodak for alleged patent infringement would burden, delay and impede these chapter 11 cases. First, as explained in section A above, all but two of Kyocera's claims are already subject to the automatic stay imposed by section 362(a) of the Bankruptcy Code. Proceeding with Kyocera's claims relating

only to the '962 Patent and the '284 Patent is inefficient. Litigating the Kyocera Action piecemeal would be a waste of both judicial and the Debtors' resources.

26. Second, the Debtors are at an important juncture of these chapter 11 cases. Among other things, on January 11, 2013, the Debtors obtained Court approval of a transaction to sell their digital imaging patent assets [Bankr. Docket No. 2847]. The Court noted that transaction was important to moving these cases forward, and the Debtors and all interested parties are focused on closing the transaction. At the same time, the Debtors and their stakeholders are exploring other asset dispositions and working to secure exit financing. The Debtors are also in the process of negotiating the terms and structure of a plan of reorganization with their principal stakeholders. Defending any portion of the vague assertions contained in the Kyocera Action not already stayed would require the Debtors to divert resources and interrupt myriad tasks taking place for the benefit of all stakeholders. The imposition on the reorganization process resulting from the Kyocera Action provides more than a sufficient basis to stay the remaining claims. *See*, *e.g.*, *In re Lyondell*, 402 B.R. at 590 (holding that legal proceedings against parent entity needed to be enjoined to preserve subsidiary's reorganization prospects"); *Nev. Power Co.* v. *Calpine Corp.* (*In re Calpine Corp.*), 365 B.R. 401, 410 (S.D.N.Y. 2007) (describing the "distraction of key employees from its restructuring efforts" as a separate irreparable harm onto the debtor); *In re Television Studio Sch. of N.Y.*, 77 B.R. 411, 413 (Bankr. S.D.N.Y. 1987) (staying proceedings to prevent diversion of "attention away from the reorganization process").

27. Moreover, nothing requires adjudication of the Adversary Complaint now. Kyocera seeks damages for alleged patent infringement. While Kodak would be incurring additional liability if Kyocera's allegations have merit (and they do not), Kyocera's claims do

not need to be liquidated at this point. In fact, there already will be at least one other proceeding at a later date to adjudicate Kyocera's prepetition claims for patent infringement. Kyocera's demand for an injunction is a red herring given that Kodak has announced that it has exited or is exiting certain businesses, including the manufacturing and sale of digital cameras and consumer inkjet printers, that are focal points of the Adversary Complaint. (Exhibit C, Press Release.) Any remaining claims should thus be stayed.

28. With the exception of the '284 Patent issued after the Petition Date, Kyocera could have pursued any claims for patent infringement against Kodak prior to the Petition Date. Kyocera instead chose to sit on its rights and waited to assert these claims at a time it strategically viewed as advantageous. Such conduct should not be permitted.

C. If the Court Permits Any Portion of the Kyocera Action to Proceed, the Debtors Respectfully Request that the Court Require Kyocera to Provide Additional Information About Kodak's Allegedly Infringing Activity.

29. Under section 105(a) of the Bankruptcy Code, the Court has authority to "issue any order . . . necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). If the Court is inclined to permit some or all of the Kyocera Action to proceed, the Debtors respectfully submit that requiring Kyocera to provide this Court and the Debtors with more information about Kodak's allegedly infringing conduct would be appropriate. *Id.*; *see also* Fed. R. Bankr. P. 7012; Fed. R. Civ. P. 12(e).

30. Kyocera's Adversary Complaint contains only broad assertions that Kodak's allegedly infringing activity pertains to products, including Kodak consumer printers, that incorporate widely used technology such as scanning devices, electrophotographic devices, wireless communications, wiring boards, and ferrite components. (*E.g.*, Adversary Complaint ¶¶ 21, 35, 70, 84 and 98.) Kyocera provides no information about the products at issue and the

scope and nature of the alleged infringement. The Debtors and their stakeholders need to be able to evaluate the potential exposure from the Kyocera Action.

NOTICE

31. Notice of this Motion shall be provided to: (a) the U.S. Trustee; (b) Milbank, Tweed, Hadley & McCloy LLP, counsel to the Creditors' Committee; (c) U.S. Bank, National Association, as indenture trustee; (d) Wilmington Trust, National Association, as indenture trustee; (e) the Securities and Exchange Commission; (f) the Internal Revenue Service; (g) Davis Polk & Wardwell LLP, counsel to Citicorp North America, Inc., as agent for the Debtors' postpetition secured lenders; (h) the Environmental Protection Agency; (i) Akin Gump Strauss Hauer & Feld LLP, counsel to the Ad Hoc Committee of Second Lien Noteholders; (j) Arent Fox LLP, counsel to the Official Committee of Retired Employees; (k) all parties requesting notice in these chapter 11 cases pursuant to Bankruptcy Rule 2002; and (l) Morrison & Foerster LLP, counsel to Kyocera. The Debtors respectfully submit that further notice of this Motion is neither required nor necessary.

NO PRIOR REQUEST

32. No prior motion for the relief requested herein has been made to this or any other Court.

CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court grant the relief requested herein and order such other and further relief as it deems just and proper.

Dated: January 15, 2013
New York, New York

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