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Hearing Date: February 20, 2013
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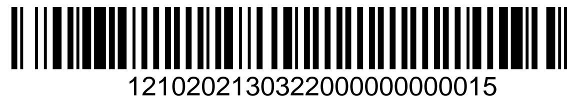
UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
	)	
EASTMAN KODAK COMPANY, et al.	)	Case No. 12-10202 (ALG)
	)	
Debtors.	)	(Jointly Administered)
	)	
OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF EASTMAN KODAK COMPANY, et al.,	)	
Plaintiff,	)	
v.	)	
	)	Adv. Proc. No. 12-01947(ALG)
WILMINGTON TRUST, N.A., in its capacities as Successor Second Lien Notes Trustee and Collateral Agent	)	
Defendant.	)	



NOTICE OF MOTION TO DISMISS THE COMPLAINT

PLEASE TAKE NOTICE that, upon the Declaration of Michael S. Stamer, dated December 21, 2012, all exhibits attached thereto, and Wilmington Trust, N.A.'s Memorandum of Law in Support of Its Motion to Dismiss Certain Counts of the Committee's Complaint (the "Memorandum of Law") and all prior proceedings herein, Wilmington Trust, N.A., in its capacities as Successor Second Lien Notes Trustee and Collateral Agent (the "Second Lien Notes Trustee") is moving this Court for entry of an order, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (made applicable by Rule 7012 of the Federal Rules of Bankruptcy Procedure), (1) dismissing in their entirety Counts III, IV and V of the Complaint of the Official Committee of Unsecured Creditors of Eastman Kodak Company, *et al*. (the "Committee"), and (2) dismissing Counts I, II and VII of the Complaint as each relates to the Foreign Patents and amounts recovered from the Patent Infringement Claims, as those terms are defined in the accompanying Memorandum of Law.

PLEASE TAKE FURTHER NOTICE that a hearing will be held in connection with entry of an order granting the relief requested and any further relief on February 20, 2013, or as soon thereafter as counsel may be heard, before the Honorable Alan L. Gropper, United States Bankruptcy Judge, at the United States Bankruptcy Court for the Southern District of New York, Alexander Hamilton Custom House, One Bowling Green, New York, New York 10004.

PLEASE TAKE FURTHER NOTICE that the Committee's response to the Second Lien Notes Trustee's motion to dismiss, if any, must be filed and served so that they are actually received no later than January 25, 2013 and the Second Lien Notes Trustee's reply papers must be filed by February 13, 2013.

New York, New York
Dated: December 21, 2012

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Debtors.	)	(Jointly Administered)
OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF EASTMAN KODAK COMPANY, et al.,	)	
Plaintiff,	)	
v.	)	Adv. Proc. No. 12-01947(ALG)
WILMINGTON TRUST, N.A., in its capacities as Successor Second Lien Notes Trustee and Collateral Agent	)	
Defendant.	)	

WILMINGTON TRUST, N.A.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS CERTAIN COUNTS OF THE COMMITTEE'S COMPLAINT

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Defendant Wilmington Trust, N.A., in its capacities as successor Second Lien Notes Trustee and collateral agent (in such capacities and, together with its predecessor, The Bank of New York Mellon, N.A., the "Second Lien Notes Trustee"), by and through its undersigned counsel, files this memorandum of law in support of its accompanying motion (the "Motion") pursuant to Federal Rule of Civil Procedure 12(b)(6) (made applicable by Federal Rule of Bankruptcy Procedure 7012(b)) to dismiss, with prejudice, those counts in the Complaint (the "Complaint") filed by the Official Committee of Unsecured Creditors (the "Committee") (a) seeking a declaratory judgment that amounts collected from certain patent infringement claims commenced by the Debtors (the "Patent Infringement Claims") and certain patents issued to the Debtors in foreign countries (the "Foreign Patents") are not part of the Second Lien Notes Trustee's collateral; (b) objecting to the secured status of the Second Lien Noteholders'[1] claims to the extent such claims are secured by amounts collected from the Patent Infringement Claims or the Foreign Patents; and (c) seeking to avoid the Second Lien Notes Trustee's liens on amounts collected from the Patent Infringement Claims and the Foreign Patents.

Specifically, the Second Lien Notes Trustee moves to dismiss Counts III, IV, and V in their entirety and Counts I, II, and VII insofar as each relates to the Patent Infringement Claims and Foreign Patents.

[1] The "Second Lien Noteholders" are the holders of the (i) 9.75% Senior Secured Notes due March 1, 2018 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 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.

PRELIMINARY STATEMENT

By its Complaint, the Committee alleges that the Second Lien Notes Trustee does not have a valid, perfected security interest in the Foreign Patents and amounts collected from the Patent Infringement Claims. These allegations are entirely without legal support and are directly contradicted by the plain language of the Security Agreement (as defined below) and the clear provisions of the New Jersey Uniform Commercial Code. Thus, the Committee has by these allegations failed to state a claim upon which this Court can grant relief. As this Motion presents pure issues of law ripe for consideration on a motion to dismiss, the relevant counts in the Complaint should be dismissed.

Specifically, this Court should dismiss the Committee's claims respecting amounts collected from the Patent Infringement Claims because such claims are based on the incorrect legal premise that amounts collected from the Patent Infringement Claims (a) constitute "commercial tort claims," and/or (b) can only constitute "proceeds of collateral" if they are commenced after the attachment of the security interest. Both of the Committee's legal conclusions respecting the Patent Infringement Claims are wrong as a matter of law.

Similarly, this Court should dismiss the Committee's claims respecting the Foreign Patents because such claims ignore controlling law defining (a) the "location" of a patent; (b) where the UCC requires the Second Lien Notes Trustee to perfect its secured interests in the Foreign Patents; and (c) the statutory avoidance powers of a bankruptcy trustee.

First, with respect to the Patent Infringement Claims, the Committee ignores that the plain language of the UCC provides the Second Lien Noteholders with an automatically perfected security interest in amounts collected from the Patent Infringement Claims by virtue of the Second Lien Notes Trustee's perfected security interest in the patents giving rise to the Patent

Infringement Claims. The fact that the Debtors may have commenced some of the Patent Infringement Claims before executing the Security Agreement is entirely irrelevant.

Second, with respect to the Committee's attempt to exclude the Foreign Patents from the Second Lien Noteholders' Collateral, the Committee misstates applicable law by asserting that "the Foreign Patents are deemed to be located in the respective non-U.S. jurisdictions in which they were granted." Compl. ¶ 17. Under New York law, which governs the Security Agreement, patents are located where their owners are domiciled. Eastman Kodak Company, the owner of the Foreign Patents, is incorporated in New Jersey and maintains a principal place of business in New York. As a result, the Foreign Patents are located in the United States and are not subject to the exclusion for assets "located outside the United States" set forth in section 1 of the Security Agreement.

Third, the Committee's claims respecting the Foreign Patents are based on the legally flawed theory that the Second Lien Notes Trustee is required to perfect its security interests in the Foreign Patents in every jurisdiction around the globe in which such patents were issued. The UCC requires nothing of the sort. The Second Lien Notes Trustee properly perfected its liens in the Foreign Patents by timely filing a UCC-1 financing statement in New Jersey, where the Debtor is "located" for purposes of the UCC. Moreover, the Committee's allegation respecting the perfection of the security interests in the Foreign Patents—that this Court is required to engage in a complex analysis of perfection statutes in numerous countries around the world—is untenable, impractical and incorrect. The Committee apparently wants this Court to conduct a lengthy factual hearing, involving numerous experts in foreign laws in every foreign jurisdiction around the world in which Kodak holds patents, simply to determine whether the

Second Lien Notes Trustee has a perfected security interest in the Foreign Patents. The Committee's position is incorrect as a matter of law.

Fourth, the Committee's claims respecting the Foreign Patents fail as a matter of law because the Committee improperly seeks to exceed its statutory avoidance powers pursuant to section 544(a) of the Bankruptcy Code by trying to step into the shoes of a hypothetical foreign judgment lien creditor. Section 544(a) permits the Committee to step into the shoes of a hypothetical judgment lien creditor pursuant to state law. Section 544(a) does not permit the Committee to assume the identity of a hypothetical foreign judgment lien creditor. The Committee's Complaint seeks a broad extension of the trustee's avoidance powers that is unsupported by the text of section 544(a), its legislative history, and relevant case law. There is more than a century of history to the hypothetical judgment lien creditor test of section 544(a), and none of it supports the committee's legal theory. Moreover, the Committee's approach would undercut important public policy goals of both the UCC and the Bankruptcy Code.

The Committee has provided no legitimate reason why a secured creditor should have to traipse all over the globe to perfect its security interest, especially when that security interest involves U.S.-based Debtors, a security agreement entered into in the United States with a New York choice-of-law provision, and a U.S.-based bankruptcy proceeding. This is not a case involving a foreign insolvency proceeding or a foreign debtor.

Accordingly, as a matter of law, the Second Lien Notes Trustee has valid, perfected security interest in amounts collected from the Patent Infringement Claims and the Foreign Patents and this Court should therefore dismiss Counts III, IV, and V in their entirety and Counts I, II, and VII as each relates to the Patent Infringement Claims and Foreign Patents.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On January 19, 2012 (the "Petition Date"), the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"), which is still pending before this Court.

On October 31, 2012, the Committee filed a motion (the "Standing Motion") [Docket No. 2276] seeking standing on behalf of the Debtors' bankruptcy estates to file a complaint seeking avoidance of the Second Lien Notes Trustee's security interests in the Patent Infringement Claims, the Foreign Patents, and certain deposit accounts (the "Disputed Deposit Accounts") on the grounds that the Second Lien Notes Trustee had failed to perfect its security interests in those assets. Standing Motion at ¶ 14.

In the Standing Motion, the Committee did not request standing to challenge whether the Second Lien Notes Trustee had a valid security interest in amounts collected from the Patent Infringement Claims, the Foreign Patents or the Disputed Deposit Accounts. Instead, the Committee stated that it intended to file an objection "to certain claims, liens, and security interests of the Second Lien Parties," in which it would dispute the attachment of the Second Lien Notes Trustee's security interest in those assets. Standing Motion at n. 2, ¶14.[2] The Committee has never sought standing to challenge whether the Second Lien Notes Trustee has an attached security interest in amounts collected from the Patent Infringement Claims, the Foreign Patents or the Disputed Deposit Accounts.

[2] The security interests at issue in this motion are held by all Second Lien Noteholders, not just the members of the Second Lien Noteholders Committee.

On November 12, 2012, the Second Lien Parties[3] filed an objection to the Standing Motion (the "Objection") [Docket No. 2349], arguing, *inter alia*, that amounts collected on the Patent Infringement Claims constitute proceeds of collateral in which the Second Lien Notes Trustee properly perfected its security interest by timely filing a UCC-1 financing statement; that the Second Lien Notes Trustee also properly perfected its security interests in the Foreign Patents by timely filing a UCC-1 financing statement; and that section 544(a) of the Bankruptcy Code does not empower the Committee to step into the shoes of a hypothetical foreign lien creditor under foreign law to avoid the Second Lien Notes Trustee's perfected lien on the Foreign Patents.

At the November 14, 2012, hearing on the Standing Motion, this Court heard oral argument on the issues raised in the Standing Motion and Objection. Later that same day, this Court entered an order granting the Committee standing to prosecute the claims raised in the Standing Motion. [Docket No. 2370].

On November 16, 2012, the Committee filed the Complaint, in which it, *inter alia*, (1) requests a judgment declaring that the Foreign Patents and amounts collected on the Patent Infringement Claims do not constitute the Second Lien Notes Trustee's collateral; (2) objects to the secured status of the Second Lien Noteholders' claims to the extent such claims purport to be secured by the Foreign Patents and amounts collected on the Patent Infringement Claims; (3) seeks to avoid the Second Lien Notes Trustee's liens on and security interests in the Foreign Patents and amounts collected on the Patent Infringement Claims on the grounds that they were not properly perfected; (4) requests a judgment declaring that, to the extent the Patent

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[3] 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 the 2018 Indenture and (ii) 10.625% Secured Notes due March 15, 2019 (the "2019 Notes" and, together with the 2018 Notes, the "Second Lien Notes") issued pursuant to the 2019 Indenture, and (b) the Second Lien Notes Trustee.

Infringement Claims or recoveries thereon are proceeds, amounts accrued before the Security Agreement was executed do not constitute the Second Lien Notes Trustee's collateral; and (5) objects to the secured status of the Second Lien Noteholders' claims to the extent such claims purport to be secured by the Foreign Patents and amounts collected on the Patent Infringement Claims.

The Second Lien Notes Trustee's perfected UCC security interests in the Foreign Patents and Amounts Collected on the Patent Infringement Claims

On or about March 5, 2010, Kodak issued the 2018 Notes pursuant to the 2018 Indenture by and among Kodak, as issuer, the guarantors as defined in the 2018 Indenture, and the Second Lien Notes Trustee. On or about March 15, 2011, Kodak issued the 2019 Notes pursuant to the 2019 Indenture by and among Kodak, the guarantors as defined in the 2019 Indenture, and the Second Lien Notes Trustee. In connection with entering into the Indentures, Kodak and certain of its affiliates (collectively, the "Grantors") granted to the Second Lien Notes Trustee, for the ratable benefit of the holders of the 2018 Notes and the 2019 Notes (the "Second Lien Noteholders"), a second priority lien and security interest (the "Security Interest") in certain of their respective assets (collectively, the "Collateral") pursuant to a Security Agreement, dated as of March 5, 2010 (the "Security Agreement"). (See Declaration of Michael S. Stamer in Support of the Motion, dated December 21, 2012 (the "Stamer Decl."), Ex. 1). The Security Agreement defines Collateral to include, *inter alia*, "all patents, patent applications, utility models and statutory invention registrations, all inventions claimed or disclosed therein and all improvements thereto . . . (the "Patents")." (Id. § 1(g)). Pursuant to the Security Agreement, Collateral also includes "all proceeds of, collateral for, income, royalties, and other payments now or hereafter due and payable with respect to, and supporting obligations relating to, any and all of the Collateral." (Id. at § 1(i)).

On March 5, 2010, UCC-1 financing statements (the "Financing Statements" and each a "Financing Statement") were filed with the New Jersey Department of Treasury, each identifying one of the Debtors as the "Debtor," and the Former Trustee as the "Secured Party." (See Stamer Decl., Ex. 2). On February 29, 2012, amendments to the Financing Statements were filed with the New Jersey Department of Treasury assigning the Security Interest to the current Second Lien Notes Trustee. The Financing Statements are proper in all respects and contain valid, enforceable and generic descriptions of the Debtors' property secured by the Second Lien Notes Trustee's liens: "All of the Debtor's right, title and interest, whether now owned or hereafter acquired and whether now or hereafter existing, wherever located . . . ."[4] (Id. at 1). Schedule A to the Financing Statement filed with respect to Kodak explicitly includes the Patents in its definition of "Collateral" covered by the Financing Statement. Eastman Kodak Company Financing Statement, Schedule A. (Id. at 4). The Committee does not dispute that the Second Lien Notes Trustee properly followed the perfection steps set forth in Article 9 of the Uniform Commercial Code ("UCC") with respect to the Foreign Patents.

ARGUMENT

Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Federal Rule of Bankruptcy Procedure 7012(b), a court should dismiss a complaint if it fails to state a claim upon which relief can be granted. Although the court must accept the factual allegations in the complaint as true, the plaintiff's claims must be supported by more than mere conclusory statements. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56

[4] This Court may properly consider the Security Agreement and the Financing Statements when ruling on the Motion because the Financing Statements are (1) explicitly referenced in the Complaint (see Complaint at ¶ 13); (2) are "integral" to the Committee's claims; and (3) are a matter of public record. See Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47-48 (2d Cir. 1991) (when ruling on a motion to dismiss, the court may consider documents integral to the complaint that are within the actual knowledge of the plaintiffs).

(2007); E.E.O.C. v. Staten Island Sav. Bank, 207 F.3d 144, 148 (2d Cir. 2000). The allegations must be sufficient "to raise a right to relief above the speculative level," and provide more than a "formulaic recitation of the elements of a cause of action." Twombly, 550 U.S. at 555. A court should dismiss a complaint unless a plaintiff pleads "enough facts to state a claim to relief that is plausible on its face." Id. at 570.

While a court must accept as true all of the factual allegations contained in a complaint, that principle does not apply to legal conclusions. See Bryant v. N.Y. State Educ. Dep't, 692 F.3d 202, 210 (2d Cir. 2012) ("Although all factual allegations in the complaint must be assumed true for the purposes of a motion to dismiss, this principle is 'inapplicable to legal conclusions.'") (quoting Iqbal, 556 U.S. at 678).

For purposes of this Motion, the Second Lien Notes Trustee accepts as true all well-pleaded facts in the Complaint. This Motion is based on pure issues of law respecting the attachment and perfection of security interests.

I. THE SECOND LIEN NOTEHOLDERS HAVE A PROPERLY PERFECTED SECURITY INTEREST IN AMOUNTS COLLECTED ON THE PATENT INFRINGEMENT CLAIMS

The Committee incorrectly alleges that the Second Lien Noteholders do not have a perfected security interest in amounts collected on the Patent Infringement Claims because amounts recovered from the Patent Infringement Claims should be characterized as "Commercial Tort Claims" instead of as proceeds of the Second Lien Noteholders' Collateral. Alternatively, even if the amounts recovered by the Debtors from the Patent Infringement Claims are proceeds of the Second Lien Noteholders' Collateral, the Committee alleges that the Second Lien Noteholders are entitled only to amounts recovered from Patent Infringement Claims commenced after execution of the Security Agreement. The Committee's primary and

alternative theories both fail as a matter of law because they are contrary to the plain language of the UCC.

The Second Lien Noteholders have a perfected security interest in amounts recovered from the Patent Infringement Claims because the Second Lien Noteholders have a properly perfected security interest in the Debtors' Patents giving rise to the Patent Infringement Claims. Amounts recovered from the Patent Infringement Claims constitute "proceeds" of the Second Lien Noteholders' Collateral. See N.J. U.C.C. § 9-102(64).

A. The Second Lien Noteholders Have A Properly Perfected Security Interest In Amounts Recovered From The Patent Infringement Claims Because Such Amounts Are "Proceeds" Of The Second Lien Noteholders' Collateral

The Committee incorrectly alleges that the Second Lien Notes Trustee failed to perfect its lien in amounts recovered from the Patent Infringement Claims because the Patent Infringement Claims were not each identified in detail on the Financing Statement. Complaint at ¶¶ 22, 38. The Committee bases its Complaint on the erroneous legal conclusion that amounts recovered from the Patent Infringement Claims are "Commercial Tort Claims" under the UCC. The UCC says no such thing. Indeed, the UCC clearly defines amounts recovered by the Debtors on the Patent Infringement Claims as "proceeds" of the Second Lien Noteholders' Collateral and not as Commercial Tort Claims. See N.J. U.C.C. § 9-102(64)(D). Thus, the Second Lien Notes Trustee need not identify the Patent Infringement Claims in detail on the Financing Statement because it has an automatically perfected lien in amounts recovered from the Patent Infringement Claims because such amounts constitute "proceeds" of the Second Lien Noteholders' Collateral.

The Committee does not dispute that the Security Agreement expressly provides the Second Lien Notes Trustee with a lien on the Debtors' Patents and the "proceeds" of such Patents. (Stamer Decl., Ex. 1 §§ 1(g) and 1(i)). The Committee also does not dispute that (a) the Second Lien Notes Trustee properly perfected its lien in the Patents by timely filing the

Financing Statement with the New Jersey Department of Treasury's Division of Commercial Recording and (b) the Patent Infringement Claims derive from the Patents. When the Second Lien Notes Trustee timely filed the Financing Statement, it also perfected its security interest in the Patents' proceeds. See N.J. U.C.C. § 9-315(c) ("[a] security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected").

"Proceeds" is defined in the UCC as including "to the extent of the value of collateral, claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to, the collateral . . . ." N.J. U.C.C. § 9-102(64)(D). Amounts collected from the Patent Infringement Claims fit squarely within the UCC's definition of "proceeds" of Collateral because the Debtors are prosecuting the Patent Infringement Claims in an effort to recover loss, interference with the use of, infringement of rights in and damages to the Patents. Thus, the Second Lien Noteholders have a properly perfected security interest in any amounts recovered by the Debtors from the Patent Infringement Claims.

The Second Lien Noteholders' position is supported by the straightforward application of the plain meaning of the UCC. The Committee, on the other hand, cannot cite to any authority supporting its claims that this Court should characterize amounts recovered from the Patent Infringement Claims as "commercial tort claims." The UCC expressly provides that "[a] security interest in a tort claim also may exist under [Article 9] if the claim is proceeds of other collateral." N.J. U.C.C. § 9-102 cmt. 5.g (emphasis added). That is precisely the case here: amounts recovered from the Patent Infringement Claims are proceeds of the Debtors' Patents.

In other words, the Second Lien Notes Trustee's lien on amounts recovered from the Patent Infringement Claims arises from the Second Lien Notes Trustee's perfected lien on the Patents and the proceeds of those Patents. The plain language of the UCC therefore supports

dismissal of the Committee's claims relating to amounts recovered from the Patent Infringement Claims. There is no other plausible reading of the statute. Indeed, in a recent case addressing whether the right to prosecute a commercial tort claim may constitute proceeds of original collateral, the First Circuit explicitly stated that a secured party may have an interest in the right to the recovery from the commercial tort claim as proceeds of the original collateral. See City Sanitation, LLC v. Allied Waste Servs. Of Mass. (In re Am. Cartage), 656 F.3d 82, 88-89 (1st Cir. 2011) ("Article 9 teaches that when a party has an interest in a commercial tort claim as proceeds, what the secured party has is a right to the recovery, not a right to the claim itself."). Thus, the UCC provides the Second Lien Noteholders with a perfected security interest in amounts recovered from the Patent Infringement Claims.

B. The Second Lien Noteholders Have A Perfected Security Interest In Amounts Recovered From The Patent Infringement Claims Even If The Debtors Commenced Such Claims Before Executing The Security Agreement

In a last-ditch attempt to defeat the Second Lien Notes Trustee's properly perfected liens in amounts recovered from the Patent Infringement Claims, the Committee alleges that even if amounts recovered by the Debtors from the Patent Infringement Claims are characterized as proceeds of collateral, such proceeds would only include amounts recovered from Patent Infringement Claims commenced after the execution of the Security Agreement. The Committee cannot cite to any authority supporting its legal theory because none exists. Neither the plain language of the UCC, nor any applicable case law, limits a secured party's interest in amounts recovered from lawsuits to only those lawsuits commenced after execution of the relevant security agreement.

The Committee's allegations respecting the timing of the Patent Infringement Claims are also entirely without legal support. The dates that the Patent Infringement Claims were commenced are entirely irrelevant to the lien perfection analysis because amounts collected on

the Patent Infringement Claims are proceeds of the Debtors' patents, not the Patent Infringement Claims themselves. When a secured party takes a security interest in an asset that is in existence at the time the security agreement is executed, the secured party correctly expects that it has a corresponding security interest in the proceeds of that asset. Here, it is irrelevant to the lien perfection analysis when the Patent Infringement Claims were commenced because the Second Lien Noteholders have a valid, perfected security interest in the Debtors' patents and the proceeds of those patents (i.e., amounts collected from the Patent Infringement Claims).

The Committee's claims that amounts recovered from the Patent Infringement Claims do not constitute Collateral of the Second Lien Noteholders and that the Second Lien Notes Trustee's liens in amounts recovered from the Patent Infringement Claims are subject to avoidance under section 544(a) of the Bankruptcy Code are thus facially deficient. Accordingly, this Court should dismiss Count IV and Count V in their entirety and Count I, Count II, and Count VII to the extent they seek to either object to the secured status of the Second Lien Notes Trustee's claims relating to, or avoid the Second Lien Notes Trustee's security interests in, amounts recovered from the Patent Infringement Claims.

II. THE SECOND LIEN NOTEHOLDERS HAVE A PROPERLY PERFECTED SECURITY INTEREST IN THE FOREIGN PATENTS

The Committee incorrectly alleges that the Second Lien Notes Trustee does not have a properly perfected lien in the Foreign Patents because (a) the Foreign Patents are not included in the Second Lien Noteholders' Collateral and (b) the Second Lien Notes Trustee failed to properly perfect its liens in each country that issued a patent to the Debtors.

The Committee's allegations fail as a matter of law because:

- The Foreign Patents are included in the Second Lien Noteholders' Collateral pursuant to the Security Agreement;

- The Committee's Complaint ignores that the Second Lien Notes Trustee properly perfected its security interests in the Foreign Patents with a valid and timely filed Financing Statement;
- Section 544(a) does not cloak the Committee with rights or legal status relevant to foreign perfection laws; and
- The Committee's approach would undercut important public policy goals of both the UCC and Bankruptcy Code.

By its Complaint, the Committee is seeking a broad extension of the trustee's avoidance powers that is unsupported by the relevant case law, legislative history and text of section 544(a). There is more than a century of history to the hypothetical judgment lien creditor test of section 544(a), and none of it supports the Committee's legal theory.

A. The Security Agreement Provides The Second Lien Noteholders With Valid Security Interests In The Foreign Patents

As a threshold matter, the Security Agreement provides the Second Lien Noteholders with valid security interests in the Foreign Patents. Section 1(g)(i) of the Security Agreement expressly provides the Second Lien Noteholders with a valid security interest in, among other things, "all patents, patent applications, utility models and statutory invention registrations, all inventions claimed or disclosed therein and all improvements thereto . . . ." (Stamer Decl. Ex. 1 § 1(g)(i)). Although Section 1 of the Security Agreement excludes from Collateral certain of the Debtors' assets "located outside the United States," the Foreign Patents are, as a matter of law, located inside the United States.

The Committee does not dispute that New York law governs the Security Agreement. See Security Agreement, § 26. Since the parties to the Security Agreement specified that New York law should govern the Security Agreement, any dispute regarding the location of the Foreign Patents for the purposes of sections 1(g)(i) and 1(i) of the Security Agreement should be governed by New York law. Under New York law, patents are located where their owners are

domiciled. Mishcon de Reya N.Y. LLP v. Grail Semiconductor, Inc., No. 11-cv-04971, 2011 WL 6957595 at *5, n. 6 (S.D.N.Y. Dec. 28, 2011) (citing Ebsary Gypsum Co. v. Ruby, 256 N.Y. 406, 409–10, 176 N.E. 820 (1931); Kent Jewelry Corp. v. Kiefer, 119 N.Y.S.2d 242, 251 (N.Y. Sup. Ct. 1952).[5] This rule applies even in cases in which the patent holder is domiciled in a country other than the one that granted the patent. See Kent Jewelry Corp., 119 N.Y.S.2d at 251 (holding that validity of transfer of a U.S. patent held by an inventor domiciled in Germany had to be determined by the application of German law because the situs of the patent rights was the domicile of the holder).

Here, the Foreign Patents are owned by Eastman Kodak Company, which is incorporated in New Jersey and has its principal place of business in New York. Thus, the Foreign Patents are "located" in the United States and are part of the Second Lien Noteholders' Collateral pursuant to sections 1(g)(i) and 1(i) of the Security Agreement.

B. The Second Lien Notes Trustee's Secured Interests In The Foreign Patents Are Properly Perfected Under The New Jersey UCC

The relief sought by the Committee fails as a matter of law because the Second Lien Notes Trustee properly perfected its security interests in the Foreign Patents pursuant to New Jersey law, which perfection law is applicable to this case.

When analyzing whether the Second Lien Notes Trustee properly perfected its liens in the Foreign Patents, this Court should follow the same basic approach adopted in Mull Drilling Co. v. SemCrude, L.P. (In re SemCrude, L.P.), 407 B.R. 82, 104-05 (Bankr. D. Del. 2009)

[5] Even if this Court applied New Jersey law to determine the location of the Foreign Patents, the Third Circuit has expressly held that a patent is located where the patent holder "reside[s]." Horne v. Adolph Coors Co., 684 F.2d 255, 259 (3d Cir. 1982) ("a state trade secret and a patent should be deemed to have their fictional situs at the residence of the owner"). See also Vital State Can., Ltd. v. Dreampak, LLC, 303 F.Supp. 2d 516, 520 (D.N.J. 2003) (citing Third Circuit's decision in Horne for same proposition). The Debtor entity that owns the patents "resides" in the United States and thus the analysis is no different in the Third Circuit.

("SemCrude I"), to determine the applicable law governing perfection of the Second Lien Noteholders' security interests in the Foreign Patents.

First, this Court should apply the choice of law rules of the forum in which it sits. Bianco v. Erkins (In re Gaston & Snow), 243 F.3d 599, 601-02 (2d Cir. 2001); SemCrude I, 407 B.R. at 105. Here, when determining issues related to perfection and priority of security interests in transactions governed by Article 9 of the UCC, New York courts apply the choice of law rules provided by section 9-301 of the New York UCC.

When this basic approach is followed, the applicable scope and choice-of-law provisions of the New York UCC expressly dictate that: (i) Article 9 of the UCC applies to this transaction; (ii) New Jersey's version of the UCC governs the perfection and effect of perfection for Article 9 security interests granted by this Debtor because the Debtor is "located" in New Jersey; (iii) the Second Lien Notes Trustee properly perfected its security interests by filing the Financing Statement in the offices of the New Jersey Department of Treasury; and (iv) a properly perfected UCC security interest as of the Petition Date has priority over the rights of a "lien creditor," including the rights of the Committee standing in the shoes of a bankruptcy trustee.

This straightforward analysis is consistent with the primary goal of the UCC, which is to promote certainty and predictability in commercial transactions. Here, the Second Lien Notes Trustee perfected its security interests in the Foreign Patents by filing the Financing Statement.

The Committee cannot provide any legitimate reason why a secured creditor should have to traipse all over the globe to perfect its security interest, especially when that security interest involves a U.S.-based Debtor, a security agreement entered into in the United States with a New York choice-of-law provision and a U.S.-based bankruptcy proceeding. This case does not

involve any foreign insolvency proceeding. This is a domestic bankruptcy case involving domestic debtors.

1. New Jersey law governs the perfection of the Second Lien Notes Trustee's secured interests in the Foreign Patents

It is well settled in the Second Circuit that a federal bankruptcy court applies the choice-of-law rules of the forum state in which it sits. See In re Gaston & Snow, 243 F.3d at 601-02. Thus, federal bankruptcy courts sitting in New York must apply the choice-of-law rules prescribed by section 9-301 of the New York UCC before determining issues involving the perfection and priority of a security interest in transactions to which Article 9 applies. See Kraken Invs. Ltd. v. Jacobs (In re Salander-O'Reilly Galleries, LLC), 475 B.R. 9, 33 (S.D.N.Y. 2012) ("UCC Section 9-301 states that perfection and priority issues are governed by the law of the state where the debtor or collateral is located. See N.Y. U.C.C. § 9-301(a)-(b).") (affirming bankruptcy court's decision to apply New York law); United States ex rel. Solera Constr., Inc. v. J.A. Jones Constr. Group, LLC, No. CV 2003-1383, 2010 WL 1269938, at *2 (E.D.N.Y. Apr. 2, 2010) ("Under the UCC, the local law of the jurisdiction in which a debtor is 'located' governs 'perfection, the effect of perfection or nonperfection and the priority of a security interest in collateral.' N.Y. U.C.C. § 9-301(a).").

2. Article 9 of the UCC applies to this transaction and includes a statutory choice-of-law directive governing the perfection of the Second Lien Notes Trustee's security interests in the Foreign Patents

Article 9 of the UCC applies to the Debtor's grant of security interests in its Foreign Patents to the Second Lien Notes Trustee and the perfection of those secured interests. N.Y. U.C.C. § 9-109. Section 9-109 also provides the limited circumstances in which Article 9 does not apply, none of which exceptions apply here. N.Y. U.C.C. § 9-109(c).

Article 9 does not apply where: (1) "a statute, regulation or treaty of the United States preempts [Article 9]; . . . or (3) a statute of . . . a foreign country . . . other than a statute generally applicable to security interests, expressly governs creation, perfection, priority, or enforcement of a security interest created by the . . . [foreign] country . . . ." N.Y. U.C.C. § 9-109(c) (emphasis added). None of these circumstances is present here. There are no treaties of the United States or federal statutes that preempt Article 9 in this situation. See Moldo v. Matsco, Inc. (In re Cybernetic Servs, Inc.), 252 F.3d 1039, 1044 (9th Cir. 2001) (holding that neither Article 9 nor the Patent Act requires holders of security interests—as distinguished from holders of ownership interests—to record said interests with the Patent and Trademark Office).

Moreover, the security interests at issue were not "created by" any foreign country. It is "well-settled" that 9-109(c)(3) refers only to security interests granted by a governmental debtor. SemCrude I, 407 B.R. at 106; Arrow Oil & Gas, Inc. (In re Semcrude, L.P.), 407 B.R. 112, 135 (Bankr. D. Del. 2009) ("SemCrude II"); 4 WHITE & SUMMERS, UNIFORM COMMERCIAL CODE § 30-10 (6th ed.) ("Subsections (c)(2) and (3) deal with special laws concerning governmental debtors."); see also Comment 9 to UCC § 9-109(c)(3) (listing as examples only security interests granted by governmental debtors).

Thus, the statutory choice-of-law directive in the UCC applies here: "while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest." N.Y. U.C.C. § 9-301. A "registered organization" such as a corporation "that is organized under the law of a State is located in that State." N.Y. U.C.C. § 9-307(e). Accordingly, because the Debtor is a corporation organized under New Jersey law, New York's statutory directive mandates that a court look to

New Jersey law to determine whether the Second Lien Notes Trustee has perfected security interests in the Foreign Patents. SemCrude I, 407 B.R. at 105; SemCrude II, 407 B.R. at 133.

3. The Second Lien Notes Trustee properly perfected its secured interests in the Foreign Patents pursuant to the New Jersey UCC

The Committee cannot dispute that the Second Lien Notes Trustee properly perfected its security interests in the Foreign Patents pursuant to the UCC. The UCC provides that Foreign Patents are a type of "general intangible." Comment 5(d) to N.J. U.C.C. § 9-102. To perfect an interest in a general intangible patent in New Jersey, a secured creditor must file a UCC financing statement with the New Jersey Department of Treasury. N.J. U.C.C. §§ 9-310(a), 9-501(a)(2).

The Second Lien Notes Trustee timely filed the appropriate Financing Statement covering the Foreign Patents with the New Jersey Department of Treasury. Accordingly, the Second Lien Notes Trustee's security interests in the Foreign Patents were perfected by filing the Financing Statement, and no other action is required to perfect security interests in the Foreign Patents.

Finally, the Committee cannot dispute that a perfected UCC lien is superior to and cannot be avoided by a hypothetical judgment "lien creditor" of the Debtor. N.J. U.C.C. § 9-322. Accordingly, this Court should dismiss the Committee's claims relating to the perfection of the security interests in the Foreign Patents.

C. Section 544(a) Grants The Committee The Legal Rights Of A Hypothetical *State Law* Judgment Creditor, Not Rights Under Foreign Laws

The Committee seeks to invoke the "strong-arm" powers of section 544(a) of the Bankruptcy Code in an effort to avoid the Second Lien Notes Trustee's liens on the Foreign Patents. The Complaint incorrectly alleges that section 544(a) permits the Committee to exercise rights under foreign laws to avoid a perfected Article 9 UCC security interest. Complaint at ¶

35. In other words, the Complaint incorrectly alleges that if any hypothetical judgment lien creditor, anywhere in the world, could avoid the Second Lien Notes Trustee's liens pursuant to the laws of any foreign country, then the Committee is permitted to avoid the Second Lien Notes Trustee's liens on the Foreign Patents pursuant to section 544(a). This is not the law.

1. Section 544(a) does not permit the Committee to exercise rights under foreign creditor law to avoid a perfected UCC security interest

Section 544(a)(1-2) provides:

> (a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by –
>
> (1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;
>
> (2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists…

Section 544(a) of the Bankruptcy Code permits the Committee to step into the shoes of a hypothetical judgment lien creditor under applicable state law. See Musso v. Ostashko, 468 F.3d 99, 104 (2d Cir. 2006) ("The advantage of [hypothetical judgment lien creditor] status derives not from the Bankruptcy Code but, rather, from the relevant state law defining creditor rights.") (emphasis added); Robinson v. The Howard Bank (In re Kors, Inc.), 819 F.2d 19, 22-23 (2d Cir. 1987) ("Once the trustee has assumed the status of a hypothetical lien creditor under § 544(a)(1), state law is used to determine what the lien creditor's priorities and rights are.") (emphasis added). Even under the old Bankruptcy Act, courts referred to state law when analyzing the

trustee's "strong-arm" powers. See, e.g., Ivey v. Transouth Fin. Corp. (In re Clifford), 566 F.2d 1023, 1025 (5th Cir. 1978) ("Section 70(c)(3) confers the rights of a hypothetical judgment lien creditor upon the trustee. State law determines the rights of a judgment lien creditor as against other claimants.") (emphasis added). Nothing in the relevant legislative history of either the Bankruptcy Act or the current Bankruptcy Code leads to a different conclusion. The Second Lien Notes Trustee is unaware of any authority suggesting that section 544(a) permits the Committee to exercise rights under foreign creditor law to avoid the Second Lien Notes Trustee's liens in the Foreign Patents.

Moreover, the Committee's position runs counter to the main purpose of section 544, which is to protect creditors by granting a bankruptcy trustee the power to avoid "unfiled, unrecorded or secret liens." See Teerlink v. Lambert (In re Teerlink Ranch Ltd.), 886 F.2d 1233, 1235-36 (9th Cir. 1989); see also City Nat'l Bank of Miami v. Gen. Coffee Corp. (In re Gen. Coffee Corp.), 828 F.2d 699, 701 (11th Cir. 1987) ("Congress has resolved through § 544 that the debtor's creditors must at all costs be protected from secret liens.") (citation omitted); Clark v. Valley Fed. Savs. and Loan Ass'n (In re Reliance Equities, Inc.), 966 F.2d 1338, 1344 (10th Cir. 1992) (section 544(a) is "designed to protect creditors by eliminating secret liens"). The Second Lien Notes Trustee's liens in the Foreign Patents, by contrast, are properly filed and recorded with the New Jersey Department of Treasury. The Committee has not alleged that such liens are "secret." The Financing Statement perfecting the Second Lien Notes Trustee's security interests in the Foreign Patents has been—and still is—available for public viewing since it was filed.

In Askanase v. United States (In re Guy. Dev. Corp.), 189 B.R. 393, 397 (Bankr. S.D. Tex. 1995), the bankruptcy court rejected the same legal theory that the Committee will advance

here. In Askanase, a chapter 11 trustee tried to avoid an IRS lien on the debtor's foreign assets pursuant to section 545(2) of the Bankruptcy Code by arguing that the IRS cannot enforce its lien in foreign jurisdictions. Id. at 396. The Askanase court rejected the trustee's argument that it could step into the shoes of a hypothetical foreign bona fide purchaser of the debtor's property to avoid a domestic tax lien. Id. at 397. Instead, the court looked to whether a bona fide purchaser under applicable U.S. law—in that case, Texas—would be able to avoid the statutory lien. The court concluded that the trustee was unable to avoid the tax lien because a "bona fide purchaser under Texas law" was subject to the lien. Id. at 396-97.[6]

Similarly, here, a hypothetical judgment lien creditor under section 544(a) is subject to the Second Lien Notes Trustee's properly perfected liens in the Foreign Patents. Thus, the Second Lien Notes Trustee has priority over any hypothetical section 544(a) creditor seeking to avoid the Second Lien Notes Trustee's lien in the Foreign Patents under U.S. law. Accordingly, section 544(a) does not permit the Committee to avoid the Second Lien Notes Trustee's liens in the Foreign Patents. See Askanase, 189 B.R. at 397 ("The Court declines to conclude that the bona fide purchaser contemplated by 11 U.S.C. § 545(2) is imbued with extraterritorial powers . . . .").

[6] Numerous courts have analogized section 545(2) to section 544(a) because section 545(2) permits a trustee to avoid a statutory lien on the debtor's property if such a lien is avoidable by a hypothetical bona fide purchaser of such property at the time of the commencement of the case. Compare 11 U.S.C. § 545(2) with 11 U.S.C. § 544(a)(3); see also United States v. LMS Holding Co. (In re LMS Holding Co.), 50 F.3d 1526, 1527 n.2 (10th Cir. 1995) ("In their summary judgment motion debtors relied on 11 U.S.C. § 544; . . . While we believe that the more specific provision for avoidance of statutory liens under § 545 is applicable here, either section provides the same avoidance power."); Ironworkers Combined Fund v. Soc'y Bank of E. Ohio, N.A. (In re The Gibbons-Grable Co.), 100 B.R. 901, 904 (Bankr. N.D. Ohio 1989) ("this court finds that the underlying premise of the trustee's power in Section 545 to be applicable to Section 544").

2. Congress did not intend section 544(a) to apply extraterritorially.

The Committee improperly seeks to apply its section 544(a) "strong-arm" powers outside the United States. Complaint at ¶ 35. Federal courts have explained that there is a presumption against giving extraterritorial effect to U.S. laws, including the Bankruptcy Code. "An act of Congress will not be found to apply to conduct occurring outside the U.S. unless the affirmative intention of the Congress to apply the law extraterritorially is clearly expressed in the statute." Maxwell Comm'cn Corp. v. Société Générale (In re Maxwell Comm'cn Corp.), 186 B.R. 807, 818 (S.D.N.Y. 1995) (quoting E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)) (holding that section 547 of the Bankruptcy Code does not apply extraterritorially) (internal quotations omitted), aff'd 93 F.3d 1036 (2d Cir. 1996); see also Morrison v. Nat'l Austl. Bank Ltd., __ U.S. __, 130 S.Ct. 2869, 2883 (2010) (holding that section 10(b) of the Exchange Act does not apply extraterritorially). The presumption against extraterritorial application of federal law, including the Bankruptcy Code, "is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." Maxwell Comm'cn Corp., 186 B.R. at 815 (citations omitted). The purpose of the presumption against extraterritorial application of federal law is to "protect against unintended clashes between our laws and those of other nations which could result in international discord." Id. The presumption also "recognizes that Congress is primarily concerned with domestic conditions when it legislates." Id.

Much like section 547 analyzed by the Maxwell court, section 544(a) of the Bankruptcy Code does not contain any indication—let alone a "clear expression"—that Congress intended section 544(a) to grant avoidance powers to bankruptcy trustees under foreign laws. The clear purpose of section 544(a) is to provide a bankruptcy trustee with avoidance powers based on U.S. state law. Here, the Committee cannot dispute that under the law of any U.S. state, a

hypothetical judgment lien creditor could not avoid the Second Lien Notes Trustee's perfected liens on the Foreign Patents under the UCC.

D. This Court Should Dismiss The Committee's Claims Relating To The Foreign Patents Because Such Claims Violate The Plain Language And Underlying Policy Of The UCC

One of the "underlying purposes and policies" of the UCC is "to simplify, clarify and modernize the law governing commercial transactions" and "promot[e] certainty and predictability in commercial transactions." N.J. U.C.C. § 1-102(2)(a); SemCrude I, 407 B.R. at 107 (quoting Shell Oil v. HRN, Inc., 144 S.W.3d 429, 435 (Tex. 2004)). Similarly, one of the "principal purposes" of the revisions to Article 9 in 2001 "was to require that all UCC security interest filings for a given corporation be made in the corporation's state of incorporation." SemCrude I, 407 B.R. at 107 (quoting Aura Systems, Inc. v. Barovich (In re Aura Systems, Inc.), 347 B.R. 720, 724 (Bankr. C.D. Cal. 2006)). Permitting Count III and the portion of Count VII relating to the Foreign Patents to survive would frustrate the express purpose of the UCC and Article 9 to promote uniformity and certainty in secured transactions.

The Committee, in effect, is asking this Court to override the modern centralized perfection approach of the UCC adopted by all fifty states for bankruptcy avoidance purposes anytime a debtor's general intangible has a connection to a foreign country. Before the 2001 revisions, Article 9 provided that the state where collateral was located was usually the proper location for perfecting a security interest. Comments 4 to 6 of N.J. U.C.C. § 9-301. Revised Article 9 was enacted, in part, to "reduce the number of filing offices in which secured parties must file or search when collateral is located in several jurisdictions." Id. This was a monumental legislative achievement that took decades to accomplish and it has greatly simplified the steps required for perfection by creditors in the United States. The Second Lien Notes Trustee properly followed the perfection rules of Revised Article 9.

If the Committee's proposed rule of international perfection were adopted, nearly every multinational bankruptcy would require the secured creditors to engage foreign legal experts in each foreign country in which the debtor operates to prove that the secured creditors properly perfected their security interests pursuant to the law of those countries. Neither the Bankruptcy Code nor the UCC endorses the inefficiencies and uncertainties that would result from requiring the Second Lien Notes Trustee to retain patent law and secured transaction experts from each of those countries to prove that it has perfected security interests in the Foreign Patents. Imagine the result if creditors were required to engage numerous experts in foreign law each time a multinational company went into bankruptcy. Neither the federal bankruptcy code, nor New Jersey law, nor any United States treaty requires that this Court undertake any such analysis of foreign law.

CONCLUSION

For the foregoing reasons, the Second Lien Notes Trustee requests that this Court enter an order (i) dismissing Count I to the extent it seeks a declaratory judgment that the Foreign Patents or amounts recovered from the Patent Infringement Claims do not constitute Collateral of the Second Lien Noteholders; (ii) dismissing Count II and Count VII to the extent they object to the secured status of the Second Lien Noteholders' claims on the grounds that they purport to be secured by the Foreign Patents or amounts recovered from the Patent Infringement Claims; (iii) dismissing Count III, Count IV, and Count V in their entirety; (iv) holding that the Foreign Patents and amounts recovered from the Patent Infringement Claims constitute Collateral of the Second Lien Noteholders; (v) holding that the Second Lien Notes Trustee's liens on the Foreign Patents and amounts recovered from the Patent Infringement Claims are properly perfected and unavoidable; and (vi) granting such other relief that the Court finds just and proper.

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