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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	**Chapter 11**
EASTMAN KODAK COMPANY, et al.,[1]	**Case No. 12-10202 (ALG)**
Debtors.	**(Jointly Administered)**
OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF EASTMAN KODAK, COMPANY, et al.,	
Plaintiff,	**Adv. Proc. No. 12-01947 (ALG)**
v.	
WILMINGTON TRUST, N.A., in its capacities as Successor Indenture Trustee and Collateral Agent	
Defendant.	

[1] The Debtors, 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.

OPPOSITION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF EASTMAN KODAK COMPANY ET AL. TO WILMINGTON TRUST, N.A.'S MOTION TO DISMISS CERTAIN COUNTS OF THE COMMITTEE'S COMPLAINT

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PRELIMINARY STATEMENT[2]

The Committee asserts that certain of the Debtors' valuable assets – such as Kodak's Patent Infringement Claims and Foreign Patents – do not constitute the Second Lien Parties' Collateral and should be available for distribution to the Debtors' unsecured creditors. In an effort to avoid this result, the Successor Trustee seeks to dismiss those portions of the Complaint that challenge the Second Lien Parties' liens on, and security interest in, these two categories of assets. The Successor Trustee's arguments, however, are unavailing and should be rejected.

Patent Infringement Claims

The Committee alleges that the Second Lien Parties' liens did not attach to the Patent Infringement Claims (and any lien that did attach was not properly perfected) because the Patent Infringement Claims are "commercial tort claims" that (a) the Trustees expressly excluded from the Collateral listed in the Security Agreement and the Financing Statements, and (b) were not identified with sufficient particularity in the Security Agreement or the Financing Statements, as required by the UCC.

In response, the Successor Trustee focuses its analysis solely on ***amounts ultimately recovered*** on account of the Patent Infringement Claims, and conveniently ignores the critical question of whether a lien actually attached to the Patent Infringement Claims in the first place (and, if so, whether such lien was properly perfected). The reason for this misdirection is obvious: the Trustees unquestionably failed to properly attach, and perfect, a security interest in any commercial tort claim – a distinct asset under revised Article 9 of the UCC to which specific, heightened identification requirements apply.

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2 Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Committee's Complaint [Docket No. 1, Adv. Pro. 12-01947] (the "Complaint").

The Successor Trustee's arguments are fatally flawed for numerous reasons. As an initial matter, the Successor Trustee assumes (wrongly) that any amounts ultimately recovered on account of the Patent Infringement Claims constitute "proceeds" of the underlying Patents, which somehow permits the Successor Trustee to wholly disregard – and render meaningless – the heightened identification requirements imposed by the UCC for commercial tort claims. The Successor Trustee's broad interpretation of the concept of proceeds would swallow the specific UCC rules applicable to commercial tort claims, and should not be permitted to "save" the Second Lien Parties' purported lien on the Patent Infringement Claims.

Specifically, in its Motion to Dismiss, the Successor Trustee incorrectly argues that because the Second Lien Parties have a valid security interest in the underlying Patents, a security interest in the amounts ultimately realized on account of the Patent Infringement Claims automatically attached and was perfected as soon as the Second Lien Parties perfected their security interest in the underlying Patents. Unfortunately for the Successor Trustee, this argument does not refute the Committee's claim.

The Patent Infringement Claims are commercial tort claims. No commercial tort claims were described in the Security Agreement or the Financing Statements with the particularity required by the UCC. In fact, such claims were expressly excluded from the "Collateral" (as defined in the Security Agreement) on which liens were granted. Thus, no lien on the Patent Infringement Claims attached or was perfected. Because the Patent Infringement Claims themselves are not part of the Second Lien Parties' Collateral, the Second Lien Parties could not, and did not, obtain an "automatically perfected lien" on amounts ultimately realized therefrom.

Even assuming, *arguendo*, that the Patent Infringement Claims, or any "amounts recovered" therefrom, are indeed "proceeds" of the underlying Patents, the Collateral would not include all of Kodak's Patent Infringement Claims. As explained below, the plain language of the UCC and relevant authority make clear that "proceeds" of the Patents would ***not*** include either (i) the proceeds of Patent Infringement Claims that existed *prior* to execution of the Security Agreement (much less any Patent Infringement Claims that were asserted prior to such date), or (ii) any value of the Patent Infringement Claims (and any recoveries thereon) above and beyond the value of the underlying Patents (as infringed) as of the time of the execution of the Security Agreement.

Foreign Patents

The Committee also alleges that the Second Lien Parties do not have a security interest in the Foreign Patents as the Security Agreement expressly excludes "assets located outside of the United States" from the definition of Collateral. The Successor Trustee argues otherwise, ignoring applicable case law that establishes that patents issued by foreign governments are deemed to be located in the respective non-U.S. jurisdictions in which they were granted.

Even if the Foreign Patents were part of the Second Lien Parties' Collateral, the Committee asserts that such security interest may be avoided pursuant to section 544 of the Bankruptcy Code because a foreign hypothetical judgment lien creditor could avoid such interest under applicable foreign law. The Successor Trustee argues that the Committee does not have the right to step into the shoes of such a foreign hypothetical judgment lien creditor due, in part, to its misapplication of the presumption against extraterritoriality. The Successor Trustee completely misses the point.

Despite the Successor Trustee's contention, the Committee is ***not*** attempting to use section 544(a) of the Bankruptcy Code to avoid a lien or another security interest created under foreign law (*i.e.*, to use U.S. law to invalidate acts taken pursuant to foreign law). Rather, the Committee is simply seeking to apply the rights of a foreign hypothetical judgment creditor under applicable ***foreign*** law in order to avoid a purported lien pursuant to section 544(a) of the Bankruptcy Code, much as bankruptcy courts routinely apply ***foreign*** law for determining property and contractual rights when such foreign law is the "applicable non-bankruptcy law."

Finally, the Successor Trustee's policy arguments regarding the legislative intent behind the UCC are irrelevant and should be disregarded, as the Committee does not dispute the applicability of the UCC to determine the perfection required by U.S. law – as opposed to the perfection required by foreign law available to a foreign hypothetical judgment lien creditor.

In light of the foregoing, and as discussed in greater detail herein, the Successor Trustee has failed to demonstrate that the Committee's claims are implausible, and the Motion to Dismiss must be denied in its entirety.

FACTUAL BACKGROUND

1. Pursuant to the Security Agreement, the Grantors purported to grant to the Former Trustee, for the ratable benefit of the Second Lien Noteholders, a second priority lien on and security interest in certain of their assets, including the following:

> . . . all patents, patent applications, utility models and statutory invention registrations, all inventions claimed or disclosed therein and all improvements thereto . . . (the "Patents").
>
> . . . any and all claims for damages and injunctive relief for past, present and future infringement, dilution, misappropriation, violation, misuse or breach with respect to

> any of the foregoing. . . . [(the "Patent Infringement Claims")].[3]

2. The Security Agreement further provides, in pertinent part:

> . . . notwithstanding anything herein to the contrary, in no event shall the Collateral include or the security interest granted [here]under . . . attach to: (A) any assets of any Grantor ***located outside the United States*** (other than equity interests as otherwise provided by this Agreement) . . . ."[4]

3. No commercial tort claims are listed among the "Collateral" identified in the Security Agreement or the related Financing Statements. See Stamer Decl. Ex. 1 at Schedule XI and Ex. 2 at Appendix A-1 (listing "Commercial Tort Claims" as "None.").[5]

4. On information and belief, no steps have been taken to perfect the Second Lien Parties' liens and security interests in any of the jurisdictions that issued the Foreign Patents.

5. In the Complaint, the Committee:

- Count I: Sought a declaratory judgment that the Excluded Assets (including the Foreign Patents and the Patent Infringement Claims) do not constitute the Second Lien Parties' collateral;
- Count II: Objected to the secured status of the Second Lien Parties' claims to the extent such claims purport to be secured by the Excluded Assets;
- Count III: Sought to avoid any liens of the Second Lien Parties on the Foreign Patents;
- Count IV: Sought to avoid any liens of the Second Lien Parties on the Patent Infringement Claims;

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[3] See Declaration of Michael S. Stamer in Support of the Motion to Dismiss, dated December 21, 2012 [Docket No. 5, Adv. Pro. 12-01947] (the "Stamer Decl."), Ex. 1, § 1(g)(i), (iii), (vi).

[4] Id. § 1(g)(i) (emphasis added).

[5] On March 5, 2010, a UCC-1 Financing Statement was filed with the New Jersey Department of the Treasury, identifying Kodak as the "Debtor," and the Former Trustee as the "Secured Party." The Former Trustee also filed substantially identical UCC-1 Financing Statements in the respective jurisdiction of each other Debtor's incorporation. Schedule A to each of these Financing Statements included the same description of "Collateral" as set forth in the Security Agreement. On February 29, 2012, amendments to the Financing Statements were filed that purported to assign the liens and security interests perfected thereby from the Former Trustee to the Successor Trustee.

- Count V: Sought a declaratory judgment that, to the extent the Patent Infringement Claims are proceeds, certain of them are Excluded Assets and, therefore, the Second Lien Parties' alleged liens thereon are unperfected;
- Count VI: Sought to avoid any liens of the Second Lien Parties on Unperfected Deposit Accounts; and
- Count VII: Objected to the secured status of the Second Lien Parties' claims to the extent such claims purport to be secured by the Unperfected Assets.

6. On December 21, 2012, the Successor Trustee filed its motion to dismiss certain counts of the Complaint and memorandum of law in support thereof [Docket No. 4, Adv. Pro. 12-01947] (the "Motion to Dismiss"). In the Motion to Dismiss, the Successor Trustee seeks entry of an order dismissing Counts III, IV, and V in their entirety and dismissing Counts I, II, and VII to the extent they relate to the Foreign Patents or the Patent Infringement Claims.

LEGAL STANDARD

7. Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Federal Rule of Bankruptcy Procedure 7012(b), a motion to dismiss for failure to state a claim must be denied where, as here, a complaint states a plausible claim for relief. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). When considering whether a plausible claim exists, "a court must 'accept as true all factual allegations set out in the plaintiff's complaint, draw inference from those allegations in the light most favorable to the plaintiff, and construe the complaint liberally.'" T-Bone Rest. LLC v. General Elec. Capital Corp. (In re Glazier Grp. Inc.), No. 12-01878 (ALG), 2012 WL 6005764, at *2 (Bankr. S.D.N.Y. Nov. 30, 2012) (quoting Rescuecom Corp. v. Google Inc., 562 F.3d 123, 127 (2d Cir. 2009)). A complaint may properly include legal conclusions that are supported by factual allegations. See Iqbal, 556 U.S. at 678-79.

OPPOSITION

I. THE PATENT INFRINGEMENT CLAIMS AND AMOUNTS COLLECTED THEREON ARE EXCLUDED FROM THE SECOND LIEN PARTIES' COLLATERAL

8. The Committee asserts that the Security Agreement fails to properly identify the Patent Infringement Claims – and in fact states that the Second Lien Parties did not take a security interest in ***any*** commercial tort claim – and thus, as set forth in Counts I and II of the Complaint, the Second Lien Parties' security interest never attached to the Patent Infringement Claims (or any amount collected thereon). Additionally, the Committee asserts that the Financing Statements fail to properly identify the Patent Infringement Claims – and also state that the Second Lien Parties' collateral did not include ***any*** commercial tort claim – and thus, as set forth in Counts II, IV, and VII of the Complaint, any lien on the Patent Infringement Claims (or any amount collected thereon) was not properly perfected and should be avoided.

A. The Second Lien Parties' Security Interest Never Attached to the Patent Infringement Claims

9. In order for the Second Lien Parties to enforce any rights against the Patent Infringement Claims, the Successor Trustee must first demonstrate that the Second Lien Parties' security interest attached to the Patent Infringement Claims. This it cannot do.

10. Although a general description of collateral is typically sufficient for a security interest to attach to such collateral, a far "greater specificity" is required for a security interest to attach to "commercial tort claims." <u>See</u> N.J. UCC § 9-108(e); 9-108 cmt. 5 ("all tort claims" is not sufficient for security interest to attach to such claims, but "all tort claims arising out of the explosion of debtor's factory" is sufficient).

11. Notably, the Successor Trustee has not disputed (nor could it) that the ***Patent Infringement Claims themselves*** are "commercial tort claims." The UCC defines a

"commercial tort claim" as "a claim arising in tort with respect to which . . . the claimant is an organization." N.J. UCC § 9-102(a)(13). Here, there is no doubt that Kodak is an organization. It is also generally accepted that patent infringement claims are "claims arising in tort." See, e.g., Carbice Corp. of Am. v. Am. Patents Dev. Corp., 283 U.S. 27, 33 (1931) (patent "[i]nfringement . . . is essentially a tort."); Wordtech Sys., Inc v. Integrated Networks Solutions, Inc., 609 F.3d 1308, 1313 (Fed. Cir. 2010) ("[p]atent infringement is a tort"); Mars, Inc. v. Coin Acceptors, Inc., 527 F.3d 1359, 1365 (Fed. Cir. 2008) (same).

12. As they are commercial tort claims, in order for the Second Lien Parties' security interest to attach to the Patent Infringement Claims, they would have to have been described with requisite specificity in the Security Agreement. N.J. UCC § 9-108(e). The Security Agreement, however, does not meet this requirement and, in fact, explicitly excludes commercial tort claims from its definition of Collateral. See Stamer Decl. Ex. 1 at Schedule XI (listing "Commercial Tort Claims" as "***None***") (emphasis added). Because the Second Lien Parties' purported security interest did not attach to the Patent Infringement Claims, the Court does not need to reach the issue of whether any such security interest was properly perfected.

13. In addition, pursuant to section 9-204 of the UCC, "[a] security interest does not attach under . . . an after-acquired property clause to . . . a commercial tort claim." N.J. UCC § 9-204(b)(2); see also N.J. UCC § 9-204 cmt. 4 (explaining that "[i]n order for a security interest in a [commercial] tort claim to attach, the claim must be in existence when the security agreement is authenticated."); Shirley Med. Clinic, P.C. v. United States, 446 F. Supp. 2d 1028, 1033 (S.D. Iowa 2006) (same). Thus, to the extent that any Patent Infringement Claims arose ***after*** the Security Agreement was executed, attachment of the Second Lien Parties' security

interest to such claims is precluded by the UCC's prohibition on the application of "after-acquired" property clauses to future commercial tort claims.

14. Accordingly, because the Patent Infringement Claims are excluded from the Second Lien Parties' Collateral, the Successor Trustee's Motion to Dismiss Counts I and II of the Complaint with respect to the Patent Infringement Claims should be denied.

B. To the Extent the Second Lien Parties' Security Interest Attached to the Patent Infringement Claims, the Second Lien Parties Failed to *Perfect* Such Interest

15. The same defects in the description of the Patent Infringement Claims (and the affirmative statement that the Second Lien Parties' Collateral does not include any commercial tort claims) that are present in the Security Agreement (and prevented the attachment of valid liens to such claims) are also present in the Financing Statements and prevent any liens which may have attached from being perfected. Section 9-504 of the UCC provides that "[a] financing statement sufficiently indicates the collateral that it covers if the financing statement provides . . . a description of the collateral pursuant to Section 9-108." N.J. UCC § 9-504(1). As discussed above, section 9-108(e)(1) of the UCC requires more than a generic description with respect to commercial tort claims in order to properly perfect a security interest therein.

16. As stated above, the Financing Statements fail to specifically identify the Patent Infringement Claims. Indeed, the Successor Trustee concedes that the description of the Collateral in the Financing Statements is "generic." Motion to Dismiss at 8. In fact, no commercial tort claims are listed among the "Collateral" identified in the Financing Statements. See Stamer Decl. Ex. 2 at Appendix A-1 (listing "Commercial Tort Claims" as "***None***.") (emphasis added). Thus, even if the Second Lien Parties' security interest had attached to the Patent Infringement Claims (which it had not), such security interest was never properly perfected. Accordingly, the Financing Statements do not comply with section 9-504(1) of the

UCC with respect to the Patent Infringement Claims, and, thus, the Second Lien Parties' alleged security interest in the Patent Infringement Claims was never properly perfected. See, e.g., Shirley Med. Clinic, 446 F. Supp. 2d at 1034 (holding that the description in a financing statement of "[p]roceeds from any lawsuit" was insufficient under section 9-108 of the UCC to perfect a security interest in a judgment obtained on a commercial tort claim).

17. Accordingly, to the extent the Second Lien Parties' security interest attached to the Patent Infringement Claims, such security is unperfected and can be avoided. The Successor Trustee's Motion to Dismiss Counts II, IV and VII of the Complaint with respect to the Patent Infringement Claims should be denied.

C. The Second Lien Parties Do Not Have a Perfected Security Interest in Amounts Ultimately Collected on the Patent Infringement Claims

18. The Successor Trustee argues that the Second Lien Parties have a perfected security interest in the "amounts collected" ultimately from the Patent Infringement Claims because such amounts constitute "proceeds" of the Patents on which the Second Lien Parties have a perfected security interest. This argument, however, ignores the fact that prior to generating an "amount collected" from a Patent Infringement Claim is a commercial tort claim, for which a higher standard of identification is required by the UCC – a standard that was not complied with here. As demonstrated above, the Second Lien Parties' security interest never attached to the Patent Infringement Claims (see Section I.A. supra) and, to the extent such security interest attached, it was not properly perfected (see Section I.B. supra). Both the Security Agreement and the Financing Statements explicitly state that no Commercial Tort Claims (which include the Patent Infringement Claims) are included in the Second Lien Parties' Collateral. See Stamer Decl. Ex. 1 at Schedule XI, Ex. 2 at Appendix A-1 (listing "Commercial Tort Claims" as "***None***.") (emphasis added).

19. In light of the Trustees' failure to create or perfect a security interest in the Patent Infringement Claims, the Successor Trustee argues that it has "an automatically perfected lien in ***amounts recovered*** from the Patent Infringement Claims" because such amounts purportedly constitute "proceeds" of the underlying Patents. Motion to Dismiss at 10 (emphasis added). In other words, the Successor Trustee argues that the heightened standard applicable to the attachment and perfection of a security interest in commercial tort claims vanishes if the applicable commercial tort claims are themselves proceeds of other properly perfected collateral. Despite the Successor Trustee's assertion that "[t]here is no other plausible reading" of the UCC (See Motion to Dismiss at 11-12), several courts have read the applicable statutory provisions in a way that supports the Committee's claims.

20. For example, in In re Zych, 379 B.R. 857 (Bankr. D. Minn. 2007), the court considered whether a creditor with a security interest in cattle also had a security interest in the payments owed to the debtor under a settlement of a commercial tort claim of conversion of such cattle, notwithstanding the creditor's failure to specifically identify such commercial tort claim in its security agreement. Id. at 862. Just as the Successor Trustee does, the secured party in Zych argued that under section 9-315 of the UCC, notwithstanding its failure to specifically identify commercial tort claims in its security agreement, it had a security interest in the settlement payments as "proceeds" of the cattle (which indisputably constituted its collateral). See id. at 862-63. The court rejected this argument, noting that "[w]hile there is no doubt that the cattle are . . . the factual cause underlying [the debtor's] commercial tort claim for conversion, the UCC treats commercial tort claims distinct from the proceeds and general intangibles provisions upon which [the secured party] relies." Id. at 862. After analyzing the relevant UCC provisions and comments thereto, the Zych court found that "to conclude otherwise would allow [the

secured party] to entirely circumvent the patent requirements of [sections 9-108 and 9-204 of the UCC]. Id. at 863. Ultimately, the Zych court held that "***the heightened identification requirement applicable to commercial tort claims survives the disposition of the claim and extends to proceeds of a commercial tort claim***" and that a secured party that failed to comply with such requirements "is precluded from claiming a security interest in the proceeds of [the] commercial tort claim." Id. at 861, 864 (emphasis added).

21. Similarly, in Shirley Medical Clinic, the court had to determine the relative priority of alleged security interests in a judgment on a claim for breach of fiduciary duty. One of the claimants ("SMC") asserted its security interest on the basis of a filed financing statement whose description of the collateral included "proceeds from any lawsuit due or pending." Id. at 1034. The court found in favor of the competing claimant, holding that SMC's financing statement failed to properly perfect SMC's security interest in the judgment at issue because (i) a claim of a breach of fiduciary duty was a commercial tort claim, (ii) a judgment on such claim represented proceeds of a commercial tort claim, and (iii) as such, any security interest in such judgment required a more specific description in compliance with section 9-108(e) of the UCC. Id. at 1034.

22. Here, the Successor Trustee relies on precisely the same arguments that were rejected by the Zych and Shirley Medical Clinic courts without citing any controlling authority in support of its position. See Motion to Dismiss at 11-12. The ***sole*** authority that the Successor Trustee cites is *dicta* in a case that held that a secured party had no standing to bring commercial tort claims arising from collateral in which it had a security interest. See City Sanitation, LLC v. Allied Waste Servs. of Mass. (In re American Cartage, Inc.), 565 F.3d 82 (1st Cir. 2011). Indeed, in that case, such proceeds were later distributed to the debtors' administrative claimants.

See In re American Cartage, Inc., Case No. 03-44308 (Bankr. D. Ma.), Trustee's Final Report, dated May 15, 2012 [Docket No. 369] and Order Approving Trustee's Final Report, dated July 31, 2012 [Docket No. 373].

23. Accordingly, the Second Lien Parties' purported security interest in any amounts collected on the Patent Infringement Claims can be avoided. The Successor Trustee's Motion to Dismiss Counts II, IV and VII of the Complaint with respect to amounts collected on the Patent Infringement Claims should be denied.

II. TO THE EXTENT THE PATENT INFRINGEMENT CLAIMS AND AMOUNTS COLLECTED THEREON CONSTITUTE "PROCEEDS," CERTAIN OF SUCH PROCEEDS SHOULD BE EXCLUDED FROM THE SECOND LIEN PARTIES' COLLATERAL

24. The Committee asserts that, to the extent the Second Lien Parties have a valid and perfected lien on certain Patent Infringement Claims based on their characterization as proceeds, such lien is limited both in amount and to claims arising after the grant of security, as set forth in Counts I, II, V, and VII.

A. To the Extent the Patent Infringement Claims or Any Recoveries Thereon are "Proceeds," Any Such "Proceeds" That Arose Prior to the Execution of Security Agreement Do Not Constitute the Second Lien Parties' Collateral and Any Security Interest Therein Must be Avoided

25. The UCC defines "proceeds" to include "(A) whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral; (B) whatever is collected on, or distributed on account of, collateral; (C) rights arising our of collateral; [and] (D) to the extent of the value of collateral, claims arising out of the loss, nonconformity, or interference with the use of, effects or infringement of rights in, or damage to, the collateral . . . ." N.J. UCC § 9-102(a)(64). To the extent the Court were to find that the Patent Infringement Claims or any ultimate recoveries thereon constitute "proceeds" of the underlying Patents, the Second Lien

Parties' security interest must be limited to only the proceeds of those Patent Infringement Claims that arose ***after*** the execution of the Security Agreement. The Successor Trustee's bald assertion that "[t]he Committee cannot cite to any authority supporting [this] legal theory because none exists" (Motion to Dismiss at 12) is contravened not only by the plain language of the UCC, but also by longstanding Supreme Court precedent and the commentary of leading authorities in the area of security interests in intellectual property.

26. First, nothing in the UCC definition of "proceeds" indicates that this term is meant to be applied retrospectively, *i.e.*, that "proceeds" include all traceable property in any form that was ***ever*** derived from the underlying collateral and is still in existence. See N.J. UCC § 9-102(a)(64). Indeed, it would be absurd to argue that taking a lien on a cow today would give the secured party a lien on a calf that the cow had ***previously*** birthed. Yet, this is precisely the argument the Successor Trustee is advancing – that the concept of "proceeds" should date back to the inception of the collateral, and grant a secured party a perfected lien on any asset ever yielded from the collateral (even prior to the execution of a security agreement) without any requirement to take, or perfect, a security interest in such separate and distinct property at the time of the grant. Indeed, if this were the case, the extent of a secured creditor's lien could be potentially limitless and unascertainable, which would clearly contravene the UCC's disfavor of secret liens.

27. Further, the Supreme Court has warned that it would be "a great mistake to suppose that the assignment of a patent carries with it a transfer of the right to damages for infringement committed before such assignment." Moore v. Marsh, 74 U.S. 515, 522 (1869). This admonition has been cited by the Federal Circuit as recently as 2010. See, e.g., Abraxis Bioscience, Inc. v. Navinta, LLC, 625 F.3d 1359, 1367 (Fed. Cir. 2010). Recognizing the

implications of the longstanding rule of Moore v. Marsh, commentators have noted that in addition to obtaining a lien on patents themselves, "the lender should secure the right to sue for infringements because a security interest in the intellectual property alone may not transfer such rights." Business Workouts Manual, § 24:5 (Mathew W. Kavanough & Randye B. Soref, eds., 2012).[6]

28. Accordingly, the Second Lien Parties' purported security interest in the Patent Infringement Claims and any amounts collected thereon should be limited to claims and amounts arising after the execution of the Security Agreement. The Successor Trustee's Motion to Dismiss Counts I, II, V and VII of the Complaint with respect Patent Infringement Claims (and amounts collected thereon) arising after the execution of the Security Agreement should be denied.

B. To the Extent the Patent Infringement Claims or Any Recoveries Thereon are "Proceeds," Such "Proceeds" Do Not Constitute the Second Lien Parties' Collateral to the Extent Their Value Exceeds the Value of the Underlying Patents Themselves

29. The language of the UCC relied upon by the Successor Trustee throughout the Motion to Dismiss defines "proceeds," in relevant part, as "***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. UCC § 9-102(a)(64) (emphasis added). Thus, by definition, the value of "proceeds" of any Patent arising from its infringement cannot exceed the value of such Patent. Accordingly, to the extent a Patent had been infringed

6 Chapter 24 of the Business Workouts Manual was authored by G. Larry Engle, who serves on the ABA Task Force on Security Interests in Intellectual Property.

prior to the execution of the Security Agreement, the value of its "proceeds" cannot exceed its value, as so infringed.[7]

30. The Successor Trustee devotes exactly one sentence to the Committee's value argument, declaring it in a conclusory fashion to be "facially deficient." See Motion to Dismiss at 12. As set forth above, however, the plain language of the UCC runs contrary to this unsupported contention.

31. Accordingly, the Second Lien Parties' purported security interest in the Patent Infringement Claims and any amounts collected thereon should be limited to the value of the underlying Patent(s) (as infringed) as of the time of the execution of the Security Agreement. The Successor Trustee's Motion to Dismiss Counts I, II, V and VII of the Complaint with respect the Patent Infringement Claims and the amounts collected thereon in excess of the value of the underlying Patent (as infringed) as of the time of the execution of the Security Agreement should be denied.

III. THE FOREIGN PATENTS ARE EXCLUDED FROM THE SECOND LIEN PARTIES' COLLATERAL

32. The Committee asserts that because the Foreign Patents are located in the respective non-U.S. jurisdictions in which they were granted, they are "assets located outside of the United States" and thus, as set forth in Counts I and II of the Complaint, the Second Lien Parties' security interest did not attach to the Foreign Patents.

33. While the Successor Trustee acknowledges that the Security Agreement expressly excludes from the definition of "Collateral" any of the Debtors' assets that are "located outside the United States," it erroneously asserts that this exclusion does not apply to the Foreign Patents

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[7] Similarly, if a secured party took a lien in collateral that was already damaged, the value of its lien in insurance or other similar proceeds would be limited to the value of the collateral as damaged. See N.J. UCC § 9-102(a)(64)(E).

because they are located in the United States. Motion to Dismiss at 14. Contrary to the Successor Trustee's bald assertion that the Committee's position is "entirely without legal support" (Motion to Dismiss at 2), there is ample legal support – which the Successor Trustee has chosen to ignore – for the proposition that the Foreign Patents are located outside the United States.

34. The effect of any patent is confined, by definition, to the geographical limits of the jurisdiction that granted it. See, e.g., Aluminum Co. of Am. v. Sperry Prods., Inc., 285 F.2d 911, 925 (6th Cir. 1960) ("[a] patent is granted by a sovereign power and its rights, privileges and obligations begin and end with the country that issues it."); Standard Gas Power Co. of Ga. v. Standard Gas Power Co. of Del., 224 F. 990, 992 (D. Ga. 1915) (existence of a patent right is "co-extensive with the limits of" the issuing jurisdiction). See also Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 527 (1972) (it is not infringement to make or use a U.S. patented product outside of the U.S.). Thus, each of the Foreign Patents is effective, and can be infringed, only in the jurisdiction in which it was issued, and therefore its legal *situs* could only exist in such jurisdiction, *i.e.*, outside of the United States. See AMP, Inc. v. United States, 492 F. Supp. 27, 34-35 (M.D. Pa. 1979) (noting, in determining that proceeds of foreign patents owned by a U.S. corporation constituted foreign source income, that "patents only have effect in the country under whose laws they are issued. Hence, the patents at issue here only existed outside the United States.").

35. Moreover, the Successor Trustee's argument that the Foreign Patents are located in the United States because that is where Kodak is domiciled is directly contradicted by

applicable authority,[8] including a recent decision by the United States Bankruptcy Court for the District of Delaware. In In re Elpida Memory, Inc., a chapter 15 case involving a foreign debtor who was the registered holder of a number of United States patents, Judge Sontchi stated that the debtor's patents were located not in the country in which the debtor was domiciled, but in the country in which the patents were issued. See In re Elpida Memory, Inc., No. 12–10947 (CSS), 2012 WL 6090194, at *1-2 (Bankr. D. Del. Nov. 20, 2012) (stating that United States patents of a Japanese company were located within the territorial jurisdiction of the United States in determining whether the chapter 15 debtor's assets could be sold pursuant to section 363 of the Bankruptcy Code).

36. Similarly, the Bankruptcy Appellate Panel for the Ninth Circuit rejected the argument that intangible property, such as patents, is invariably located where a person is domiciled, stating that "in determining the location of intangible property . . . , a trial court must adopt a 'context-specific' analysis . . . .'" State of Montana, Department of Revenue v. Blixseth (In re Blixseth), No. NV–11–1305–PaJuH, 2012 WL 6562839, at *5 (B.A.P. 9th Cir. Dec. 17, 2012) (quoting Office Depot Inc. v. Zuccarini, 596 F.3d 696, 702 (9th Cir. 2010)). See also Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558, 1570 (Fed. Cir. 1994) (noting that a patent's "legal *situs* would seem to be anywhere it is called into play."). Here, both the approach adopted in In re Blixseth and the *situs* approach employed in Beverly Hills Fan Co. require the finding that the legal *situs* of each Foreign Patent is the foreign country in which such Patent was issued and the only jurisdiction in which it may be enforced.

[8] Although a domicile of an asset's owner may be appropriate for purposes of determining the proper U.S. jurisdiction in which to perfect a security interest, it does not determine the "location" of such asset for all purposes.

37. Although the Successor Trustee has cited to a number of cases purporting to stand for the proposition that a patent is "located" in the owner's state of incorporation, none of these cases held that a ***foreign*** patent, although registered in a ***foreign*** jurisdiction, is nevertheless "located" in the United States. Instead, ***all*** of the cases that the Successor Trustee cited on this point dealt with patents issued by the ***United States*** and registered by the U.S. Patent and Trademark Office, and, accordingly, such domestic jurisdictional disputes are of no precedential value here. See 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) (in determining whether a New York plaintiff met the statutory requirements to attach a ***U.S***. patent held by a California defendant, the court found that the defendant had contractually submitted to the jurisdiction of New York courts, noting in *dicta* that, as a general matter, a ***U.S***. patent is located in the state where its owner is domiciled); Ebsary Gypsum Co. v. Ruby, 256 N.Y. 406 (1931) (dealing solely with the limits of the court's jurisdiction and without discussing a potential *situs* of a ***U.S***. patent for any other purpose); Kent Jewelry Corp. v. Kiefer, 119 N.Y.S.2d 242 (N.Y. Sup. Ct. N.Y. County 1952) (dealing exclusively with the question of what law governs an assignment of a patent right); Horne v. Adolph Coors Co., 684 F.2d 255 (3d Cir. 1982) (addressing personal jurisdiction and due process issues without considering or analyzing any substantive law); Vital State Can., Ltd. v. Dreampak, LLC, 303 F. Supp.2d 516 (D.N.J. 2003) (citing Horne for the proposition that a ***U.S***. patent has its *situs* at the residence of the owner).

38. Accordingly, because the Foreign Patents are "assets located outside of the United States," the Defendant's Motion to Dismiss Counts I and II of the Complaint with respect to the Foreign Patents should be denied.

IV. EVEN IF THE FOREIGN PATENTS ARE NOT EXCLUDED FROM THE SECOND LIEN PARTIES' COLLATERAL, THE SECOND LIEN PARTIES' PURPORTED SECURITY INTEREST THEREIN IS AVOIDABLE

39. Additionally, as set forth in Count III of the Complaint, the Committee asserts that even if the Second Lien Parties' security interest attached to the Foreign Patents, such security interest may be avoided under section 544(a) of the Bankruptcy Code to the extent a foreign hypothetical judgment lien creditor could avoid such security interest. The Successor Trustee erroneously asserts that (i) the Committee does not have the right under section 544(a) to stand in the shoes of foreign creditors, (ii) because the Financing Statements were sufficient to properly perfect such security interest under U.S. law, the laws of the foreign jurisdictions that issued the Foreign Patents are irrelevant to questions under section 544(a), (iii) application of section 544(a) with reference to a foreign hypothetical judgment lien creditor would violate the "presumption against extraterritoriality," and (iv) important policy goals of the UCC and the Bankruptcy Code would be undercut by a ruling in the Committee's favor. The Successor Trustee is wrong on each count.

A. Section 544(a) Grants the Committee the Rights of a Foreign Hypothetical Judgment Lien Creditor

40. Section 544 of the Bankruptcy Code gives the Committee (due to the derivative standing granted to it by this Court) the power to avoid any obligation that is voidable by a hypothetical lien creditor at the time of the commencement of these cases. See 11 U.S.C. § 544(a)(1). Although the Successor Trustee acknowledges that the Committee may step into the shoes of a U.S. hypothetical judgment lien creditor, it asserts that the Committee cannot do so with respect to a ***foreign*** hypothetical judgment lien creditor. Indeed, the Successor Trustee's entire argument is premised on the false assumption that, for purposes of section 544(a), the

hypothetical judgment lien creditor must be a judgment lien creditor under U.S. law. However, the Successor Trustee offers no support for this conclusory assertion.

41. As this Court has stated, "[t]he power conferred by this grant of hypothetical status, depends . . . however, upon the substantive law of the jurisdiction governing the property in question." In re Euro-Swiss Int'l Corp., 33 B.R. 872, 879 (Bankr. S.D.N.Y. 1983) (citation omitted) (emphasis added). Here, the Foreign Patents were granted by foreign governments and each is governed by the laws of the jurisdiction that granted it. See Aluminum Co. of Am. v. Sperry Prods., Inc., 285 F.2d at 911, 925 ("A patent is granted by a sovereign power and its rights, privileges and obligations begin and end with the country that issues it."). As such, the relevant substantive law with respect to each Foreign Patent for purposes of section 544(a) of the Bankruptcy Code is the respective applicable foreign law.

42. The application of foreign law in U.S. bankruptcy cases is not controversial. See, e.g., In re CPW Acquisition Corp., No. 08–14623 (AJG), 2011 WL 830556 (Bankr. S.D.N.Y. Mar. 3, 2011) (noting that if the court retained jurisdiction over the dispute, it would resolve it in accordance with English law); USGen New Eng., Inc. v. TransCanada Pipelines, Ltd.(In re USGen New Eng., Inc.), 429 B.R. 437 (Bankr. D. Md. 2010) (applying Canadian law to determine the amount of a creditor's rejection damages claim); In re Anselmi, 52 B.R. 479 (Bankr. D. Wyo. 1985) (applying Mexican law to determine whether an interest in a trust was exempt pursuant to section 522(b)(2)(B) of the Bankruptcy Code.). Thus, this Court is free to look to foreign law to determine whether a hypothetical judgment lien creditor in any of the relevant foreign jurisdictions could avoid the Second Lien Parties' asserted security interest in the relevant Foreign Patent under such law, based on the Former Trustee's failure to take any action that such foreign jurisdiction requires to perfect such security interest.

43. None of the cases cited by the Successor Trustee deals with the question of whether a party similarly situated to the Committee may step into the shoes of a foreign hypothetical judgment lien creditor. In fact, none of these cases even ***contemplate*** the potential applicability of foreign law in the context of section 544(a) of the Bankruptcy Code. See Musso v. Ostashko, 468 F.3d 99, 104 (2d Cir. 2006) (no discussion of foreign law); Robinson v. The Howard Bank (In re Kors, Inc.), 819 F.2d 19, 22-23 (2d Cir. 1987) (same); Ivey v. Transouth Fin. Corp. (In re Clifford), 566 F.2d 1023, 1025 (5th Cir. 1978) (same). The Successor Trustee is merely cherry-picking language from factually distinguishable cases, each of which addressed only U.S. law issues. None of the cases cited by the Successor Trustee supports the assertion that section 544(a) of the Bankruptcy Code does not permit application of foreign law.

44. The Successor Trustee's argument against the Committee's avoidance claim is based on a Texas bankruptcy court's decision in Askanase v. United States (In re Guyana Development Corp.), 189 B.R. 393, 397 (Bankr. S.D. Tex. 1995). In that case, the 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 under section 545(2) of the Bankruptcy Code.

45. Askanase is clearly distinguishable from the instant case. As a threshold matter, Askanase involved section 545, rather than section 544, of the Bankruptcy Code. In addition, federal tax liens are fundamentally different from consensual liens on personal property. See United States v. Kimbell Foods, Inc., 440 U.S. 715, 734 (1979) (noting that there are "significant differences between federal tax liens and consensual liens."). "The importance of securing adequate revenues to discharge national obligations justifies the extraordinary priority accorded federal tax liens . . . ." Id. Unlike federal tax liens, consensual liens, like those of the Second

Lien Parties, are not accorded "extraordinary priority." Because of this, no policy considerations require the protective measure of supplanting with U.S. law the respective foreign laws that may or may not recognize the Second Lien Parties' security interests within the relevant foreign jurisdictions.[9] In addition to these distinctions, the Askanase court reached its conclusion with respect to the unavailability of section 545 remedies to a foreign *bona fide* purchaser without ***any*** discussion or analysis, and the decision is thus of limited precedential value.

B. Compliance with New Jersey's Perfection Regime is Irrelevant to the Committee's Avoidance Claims Under Section 544(a)

46. The Successor Trustee expends significant effort establishing that New Jersey law governs the *perfection* of security interests in Kodak's Foreign Patents in the United States. See Motion to Dismiss at 15-19. The Committee does not dispute this assertion. However, the issue of which U.S. state's perfection regime governs the perfection of a lien on a piece of property is ***not*** before the Court.[10] Rather, the question is whether a hypothetical foreign judgment lien creditor could, ***under the applicable foreign law***, avoid the Second Lien Parties' liens. Thus, whether the Trustees took any action to perfect a lien on (or a similar interest in) any of the Foreign Patents under the laws of the respective jurisdictions that issued the Foreign Patents is the only issue relevant to the question of whether a hypothetical judgment lien creditor in any of these jurisdictions could avoid the Second Lien Parties' security interest.

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[9] See Kimbell Foods, Inc., 440 U.S. at 734 (noting the increased need "to invoke protective measures against defaulting debtors" with respect to tax liens).

[10] The Successor Trustee's reliance on Mull Drilling Co. v. SemCrude, L.P. (In re SemCrude, L.P.), 407 B.R. 82 (Bankr. D. Del. 2009), and Arrow Oil & Gas, Inc. v. SemCrude, L.P. (In re SemCrude, L.P.), 407 B.R. 112 (Bankr. D. Del. 2009), is therefore misplaced.

C. The Presumption Against Extraterritoriality is Inapplicable

47. The Successor Trustee erroneously asserts that for purposes of applying section 544(a) of the Bankruptcy Code, referencing a foreign hypothetical judgment lien creditor would violate the "presumption against extraterritoriality" by applying the Bankruptcy Code's "strong-arm" powers "outside the United States." See Motion to Dismiss at 23. Any presumption against extraterritorial application of U.S. laws is inapplicable to the instant case because the Committee is not trying to use the Bankruptcy Code to avoid a lien or another security interest created under foreign law. Rather, the Committee is seeking to stand in the shoes of a foreign hypothetical judgment creditor and apply the rights of such creditor ***under applicable foreign law*** for purposes of section 544(a) of the Bankruptcy Code. If anything, it is the Successor Trustee that improperly seeks to violate the presumption against extraterritoriality by seeking to apply ***U.S***. law (*i.e.*, the New Jersey UCC) to property located ***outside the United States*** (*i.e.*, the Foreign Patents) to potentially undermine the rights of ***foreign*** judgment lien creditors in such property.

48. Moreover, the two cases relied on by the Successor Trustee to support its position that a court applying section 544(a) of the Bankruptcy Code should disregard the rights of a foreign hypothetical judgment lien creditor are clearly distinguishable from the instant case. In Maxwell Commc'n Corp. v. Societe Generale (In re Maxwell Commc'n Corp.), 186 B.R. 807, 815 (S.D.N.Y. 1995), the debtor and the examiner sought to avoid, under U.S. law, certain transfers between two foreign entities. The District Court's decision that application of section 547 was impermissibly extraterritorial under the circumstances of that case was based on its unique facts, namely: (i) the existence of simultaneous English and U.S. proceedings (which the District Court characterized as "[t]he unique aspect and the most important feature of this case"), and (ii) the lack of a close enough nexus to the United States. Id. at 813, 817.

49. In addition, the Second Circuit did not affirm the District Court's ruling on the basis of extraterritoriality, but rather on comity grounds, deferring to the English court's disposition of the issue. Maxwell Commc'n Corp. v. Societe Generale (In re Maxwell Commc'n Corp.), 93 F.3d 1036, 1054-55 (2d Cir. 1996). In so ruling, the Second Circuit declined to decide whether the presumption against extraterritoriality barred application of section 547 of Bankruptcy Code abroad, and expressed no view regarding the "contention that the Bankruptcy Code ***never*** applies to non-domestic conduct or conditions." Id. at 1055. Accordingly, not only did Maxwell have nothing to say regarding the application of section 544 of the Bankruptcy Code, it has not even conclusively settled the presumption against extraterritoriality for which the Successor Trustee cites it.

50. The other case relied on by the Successor Trustee, Morrison v. Nat'l Austl. Bank Ltd., 130 S.Ct. 2869 (2010), involved a "foreign-cubed" class action, in which "(1) ***foreign*** plaintiffs [were] suing (2) a ***foreign*** issuer in an American court for violations of American securities laws based on securities transactions in (3) ***foreign*** countries." Id. at 2894 n.11 (Breyer, J., concurring in part and concurring in the judgment). The Supreme Court held that a private right of action under Section 10(b) and Rule 10b–5 of the Securities Exchange Act of 1934 could be maintained ***by foreign plaintiffs*** only if: (i) the security was listed on an American stock exchange or (ii) the purchase or sale took place in the United States. Id. at 2888. In so ruling, the Supreme Court determined the extraterritorial effect of ***U.S***. laws on transactions that did not touch the United States – an inquiry that is very different from determining whether ***foreign*** law applies to the avoidance of a lien in a bankruptcy case of a U.S. company.

D. The Policy Considerations Cited by the Successor Trustee are Inapplicable

51. Under the plain reading of section 544(a) of the Bankruptcy Code, the liens on, and security interests in, the Foreign Patents asserted by the Second Lien Parties are subject to avoidance.[11] In a last-ditch attempt to challenge the Committee's arguments, the Successor Trustee departs from the plain reading of section 544 of the Bankruptcy Code and instead engages in an irrelevant discussion about the purported purpose of the UCC and the potential implications of requiring secured lenders to perfect their security interests in foreign jurisdictions. See Motion to Dismiss at 24-25. Such arguments, which misconstrue the Committee's position, as discussed below, are nothing more than a red herring.

52. First, the Successor Trustee erroneously argues that the Committee asserts that the Second Lien Parties failed to comply with the perfection requirements with respect to the Foreign Patents in the United States. That is not the Committee's contention. Rather, the Committee asserts that the Second Lien Parties failed to take any action to perfect a lien on (or a similar security interest in) the Foreign Patents under the laws of the respective jurisdictions that govern such Foreign Patents.

53. Next, the Successor Trustee erroneously asserts that the Committee is asking this Court to "override" the UCC's perfection regime "anytime a debtor's general intangible has a connection to a foreign country." Motion to Dismiss at 24. This is simply not true. The Committee's argument does not challenge in any way the UCC's perfection regime in the United States. The Committee merely asserts that a secured creditor that takes a security interest in a

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[11] "The Second Circuit adheres to the plain meaning doctrine of statutory construction." In re Pan Am Corp., 124 B.R. 960, 966 (Bankr. S.D.N.Y. 1991), aff'd, 929 F.2d 109 (2d Cir. 1991); see also United States v. Holroyd, 732 F.2d 1122, 1125 (2d Cir. 1984) ("when the express language of a statute is clear, a court will not adopt a different construction absent clear legislative history contradicting the plain meaning of the words.").

patent issued by a foreign government, in addition to complying with the UCC to perfect such interest in the United States, must also comply with the issuing sovereign's laws in order to protect its rights *vis-a-vis* the rights of ***foreign*** creditors under the applicable ***foreign*** perfection regime(s).[12] The fact that ***foreign*** law may not recognize the UCC as the statute controlling perfection in the applicable ***foreign jurisdiction*** does not in any way detract from the fact that implementing the UCC in the United States was "a monumental legislative achievement that took decades to accomplish." Motion to Dismiss at 24.

54. Regardless of whatever policy arguments the Successor Trustee attempts to advance, the plain language of the UCC requires denial of the Motion to Dismiss. The UCC addresses perfection requirements in the United States exclusively. Thus, none of the Successor Trustee's arguments alters the fact that the relevant inquiry under section 544(a) of the Bankruptcy Code is whether there is a hypothetical lien creditor under ***any*** applicable laws – which, with respect to the Foreign Patents, are the respective laws applicable in the countries that issued such patents. The Successor Trustee's Motion to Dismiss Count III of the Complaint with respect to the Committee's claims under section 544(a) of the Bankruptcy Code should be denied.

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[12] See Carl S. Bjerre, International Project Finance Transactions: Selected Issues Under Revised Article 9, 73 AM. BANKR. L.J. 261, 269 (1999) ("[A]lthough one of Article 9's principal *raisons d'etre* is to protect a secured party against competing creditors, no action taken pursuant to Article 9 can protect the secured party against a competing creditor who brings its litigation in a forum the choice-of-law rules of which point to a regime other than Article 9."); Lynn M. LoPucki, Why the Debtor's State of Incorporation Should Be the Proper Place for Article 9 Filing: A Systems Analysis, 79 MINN. L. REV. 577, 629 (1995) ("If collateral has some relationship to both the U.S. and a foreign country, the secured party will want to comply with the laws of both countries by filing in each.").

CONCLUSION

WHEREFORE, the Committee respectfully requests the Court deny the Motion to Dismiss in its entirety and grant the Committee such other relief as is just and proper.

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