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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 Indenture Trustee and Collateral Agent	
Defendant.	

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WILMINGTON TRUST, N.A.'S REPLY IN FURTHER SUPPORT OF ITS PARTIAL 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, for its reply to the Committee's Opposition [Docket No. 9, Adv. Pro. 12-01947] (the "Opposition")[1] to Wilmington Trust, N.A.'s Motion to Dismiss Certain Counts of the Committee's Complaint [Docket No. 4, Adv. Pro. 12-01947] (the "Motion to Dismiss"), respectfully states as follows:

PRELIMINARY STATEMENT

The Committee's Opposition is premised upon a mischaracterization of the nature of the Second Lien Noteholders' valid, perfected security interest in amounts collected from the Patent Infringement Claims. The Committee's Opposition also ignores the plain language of the Uniform Commercial Code ("UCC"), the Bankruptcy Code and controlling case law in challenging the Second Lien Notes Trustee's liens in the Foreign Patents.

First, with respect to amounts collected from the Patent Infringement Claims, the Committee appears to be under the impression that the Second Lien Noteholders claim that they have a security interest in—and a corresponding right to prosecute—the Patent Infringement Claims themselves. The Committee repeatedly argues in its Opposition that the Second Lien Notes Trustee did not properly perfect its lien on the Patent Infringement Claims because such claims are "commercial tort claims" under the UCC and must be described with a certain level of specificity in the relevant UCC financing statements. The Second Lien Notes Trustee has never argued that it has a perfected security interest in the Patent Infringement Claims themselves. Rather, as demonstrated by the plain language of the UCC, the accompanying comments to the

[1] Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion to Dismiss.

UCC, controlling case law and leading treatises, the Second Lien Noteholders have a valid and perfected security interest in amounts collected from the Patent Infringement Claims because such amounts constitute "proceeds" of the Debtors' patents. The Committee has never challenged the Second Lien Notes Trustee's liens on the Debtors' domestic patents, which patents give rise to the Patent Infringement Claims. It is legally irrelevant whether the Patent Infringement Claims were commenced before or after the security agreement was executed; the Second Lien Noteholders have a valid and perfected security interest in all amounts collected from the Patent Infringement Claims, regardless of when such claims were commenced.

Second, the Committee challenges the Second Lien Notes Trustee's liens on the Foreign Patents by arguing that the Second Lien Noteholders do not have any security interest in the Foreign Patents, and, even if a security interest did attach, it was not properly perfected because the Second Lien Notes Trustee did not travel the globe to perfect its liens in each jurisdiction in which the patents were issued.

The Committee's argument respecting attachment of the Second Lien Noteholders' security interest to the Foreign Patents ignores controlling New York law, which law the Committee does not dispute governs the Security Agreement. The Committee does not dispute that the Security Agreement provides the Second Lien Noteholders with a valid security interest in all of the Debtors' patents that are located in the United States. Because New York law expressly provides that the Debtor's patents—including the Foreign Patents—are "located" in the United States, no further analysis is needed.

The Committee takes unsupported liberties with the case law it cites in support of its legally incorrect argument that even if the Second Lien Noteholders have a valid security interest in the Foreign Patents, the Second Lien Notes Trustee did not properly perfect its liens. The

plain language of the UCC and relevant case law provide that the Second Lien Notes Trustee properly perfected its liens in the Foreign Patents by filing a proper financing statement in New Jersey, where Kodak is incorporated.

In any case, section 544(a) of the Bankruptcy Code does not bestow the Committee with the right to step into the shoes of a hypothetical foreign judgment lien creditor. The Committee improperly seeks a broad expansion of the strong-arm powers provided by the Bankruptcy Code. In addition to contradicting relevant authority, the Committee's novel interpretation of section 544(a) would cause tremendous inefficiencies and increased costs in bankruptcy cases involving multinational organizations. If this Court endorses the Committee's reading of section 544(a), a parade of secured transactions experts from around the world will need to weigh in on every case involving a multinational corporation with patents issued in foreign jurisdictions. Neither the UCC nor the Bankruptcy Code endorses such an inefficient and costly result. The UCC was meant to streamline a lender's ability to perfect its security interests, and the UCC financing statements filed by the Second Lien Notes Trustee put the world on notice that the Second Lien Notes Trustee has perfected liens in the Foreign Patents. This Court should reject the Committee's novel, inefficient, costly and incorrect interpretation of the UCC and section 544(a).

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

The Committee spends a substantial portion of its Opposition brief debunking two arguments that the Second Lien Notes Trustee does not make: (1) that the Second Lien Parties have a perfected security interest in the Debtors' "commercial tort claims"; and (2) that amounts collected from the Patent Infringement Claims constitute "proceeds" of the Patent Infringement Claims themselves. (Opposition ("Opp. Br.") at 7-10.) The Second Lien Notes Trustee has never made either argument. The Committee's Opposition repeatedly demonstrates a

fundamental mischaracterization of the nature of the Second Lien Noteholders' security interest in amounts collected from the Patent Infringement Claims. The Second Lien Noteholders have a valid security interest in amounts collected from the Patent Infringement Claims because such amounts constitute proceeds of the Debtors' ***patents***. The Committee has ***never*** challenged the Second Lien Notes Trustee's liens on the Debtors' domestic patents, which patents give rise to the Patent Infringement Claims.[2]

A. The Second Lien Noteholders' Security Interest Attaches To Amounts Collected On The Patent Infringement Claims Because Such Amounts Are Proceeds Of The Second Lien Noteholders' Collateral

The Committee argues that the Second Lien Noteholders cannot have a security interest in amounts collected from the Patent Infringement Claims because such amounts constitute "commercial tort claims," which must be described in the security agreement with heightened specificity pursuant to N.J. U.C.C. § 9-108(e). However, section 9-108(e) of the UCC only requires that commercial tort claims be identified with enhanced specificity in order to qualify as ***original collateral***. See N.J. U.C.C. § 9-102 cmt. 5.g ("[a] tort claim may serve as ***original*** collateral under this Article only if it is a 'commercial tort claim'") (emphasis added). Other provisions of Article 9 make it crystal clear that a security interest can also attach to amounts collected from a commercial tort claim when those amounts are "proceeds" of other collateral, even if the commercial tort claim itself is not described in the applicable UCC financing statement. N.J. U.C.C. § 9-102(64)(D); N.J. U.C.C. § 9-102 cmt. 5.g.

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[2] Some authority suggests that the Patent Infringement Claims themselves can constitute "proceeds" of the Second Lien Noteholders' collateral, and the Second Lien Notes Trustee does not waive that argument. Clark & Clark, *Do Commercial Tort Claims Qualify as Proceeds of Original Collateral*, 09-12 CLARK'S SEC. TRANS. MONTHLY 2 (Sept. 2012) (arguing that an interpretation of "proceeds" that includes the recovery on a claim but not the claim itself "conflicts with the plain language of Comment 5(g) to UCC 9-102 ('A security interest in a tort claim also may exist under this Article if the claim is proceeds of other collateral').").

1. The relevant statutes support the Second Lien Notes Trustee's position

The UCC's definition of "proceeds" explicitly includes "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) (emphasis added). The Official Comment to section 9-102 also 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). The holder of a security interest in amounts collected on a tort claim as proceeds of other collateral is thus ***not*** required to describe the underlying tort claim with specificity under N.J. U.C.C. § 9-108(e).

The Committee does not dispute that on March 5, 2010, the Second Lien Notes Trustee took a security interest in substantially all of the Debtors' assets, including "all patents, patent applications, utility models and statutory invention registrations, all inventions claimed or disclosed therein and all improvements thereto . . . (the 'Patents')." 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). Schedule A to the Financing Statement that was also filed on March 5, 2010 explicitly includes the Patents in its definition of "Collateral." See Stamer Decl., Ex. 2 at 4. Thus the Committee does not—and cannot—dispute that the Second Lien Notes Trustee has properly perfected liens on the Patents. Amounts collected on the Patent Infringement Claims constitute "proceeds" of the Patents. Because a security interest in proceeds of underlying collateral becomes perfected automatically upon the perfection of the underlying collateral, the Second Lien Noteholders have a properly perfected interest in the amounts collected on the Patent Infringement Claims. See N.J. U.C.C. § 9-315(c).

2. The relevant case law supports the Second Lien Notes Trustee's Motion to Dismiss

Multiple federal courts of appeals have endorsed the Second Lien Notes Trustee's position. See, e.g., City Sanitation, LLC v. Allied Waste Servs. Of Mass. (In re Am. Cartage), 656 F.3d 82, 88-89 (1st Cir. 2011); Helms v. Certified Packaging Corp., 551 F.3d 675, 678 (7th Cir. 2008). In City Sanitation, the First Circuit explained that proceeds of collateral could include a right to recover damages on a conversion claim, albeit not a right to ***prosecute*** that claim. 656 F.3d at 88-89 ("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."). The Second Lien Notes Trustee is not seeking to foreclose on, or prosecute, the Patent Infringement Claims. The Committee's argument that the disputed collateral in City Sanitation was eventually distributed to administrative claimants is completely irrelevant. (Opp. Br. at ¶ 22.)

In Helms, a lender had a security interest in equipment damaged in a fire. The Seventh Circuit held that section 9-102(a)(64)(D) of the UCC also provided the lender with a security interest in amounts recovered by the borrower in subsequent lawsuits relating to the fire—up to the value of the damaged collateral—***even though the security agreement did not contain any description of any "commercial tort claims***." Helms, 551 F.3d at 679. The same is true here with respect to amounts recovered from the Patent Infringement Claims.

Leading treatises also recognize that a lender with a valid security interest in patents or other intellectual property also has a security interest in amounts recovered on claims arising directly from infringement of that intellectual property. See Thomas W. Ward, INTELLECTUAL PROPERTY IN COMMERCE, § 2:32 (2013) ("infringement claims can be the 'proceeds' of other intellectual property collateral . . . at least up to the value of the original collateral"); Clark &

Clark, *Do Commercial Tort Claims Qualify as Proceeds of Original Collateral*, 09-12 CLARK'S SEC. TRANS. MONTHLY 2 (Sept. 2012) ("the infringement claim should qualify as a pre-petition tort claim that is 'proceeds' of the security interest covering general intangibles (including patents)").

The Committee's allegation that the Second Lien Notes Trustee does not "cit[e] any controlling authority in support of its position" is completely disingenuous. (Opp. Br. at ¶ 22.) The plain language of the UCC is "controlling authority," and two federal courts of appeal have agreed with the Second Lien Notes Trustee. Conversely, the lack of any applicable authority supporting the Committee's argument is striking.

3. The cases cited by the Committee are irrelevant and non-controlling

In its Opposition, the Committee cites two non-controlling cases—one irrelevant case from Iowa and one heavily criticized case from the Minnesota bankruptcy court—to support its incorrect construction of the UCC. In Shirley Med. Clinic, P.C. v. United States, 446 F.Supp. 2d 1028 (S.D. Iowa 2006), a secured party argued that it had a security interest in certain breach of fiduciary duty claims ***as original collateral*** because the applicable security agreement and financing statement included "proceeds from any lawsuit due or pending" in the definition of collateral. 446 F.Supp. 2d at 1033-34. The Committee's citation to Shirley Medical is further evidence of the Committee's fundamental mischaracterization of the nature of the Second Lien Parties' security interest. The Second Lien Notes Trustee has a valid and perfected lien in amounts collected from the Patent Infringement Claims ***not*** because such amounts are proceeds of the Patent Infringement Claims, but rather because such amounts are proceeds of the underlying Patents.

Despite the clear and unequivocal language of the UCC, the Committee fears unreasonably that the "Successor Trustee's broad interpretation of the concept of proceeds would

swallow the specific UCC rules applicable to commercial tort claims." (Opp. Br. at 2.) Shirley Medical demonstrates perfectly why the Committee's argument falls flat. If a secured party wants a security interest in a commercial tort claim, the UCC requires that tort claim to be described with a certain level of specificity. See N.J. U.C.C. § 9-108(e). Not every commercial tort claim will yield "proceeds" of underlying collateral. The breach of fiduciary duty claims in Shirley Medical are the perfect example. The secured lender in Shirley Medical would have a difficult time arguing that amounts collected on a breach of fiduciary duty claim fit into the UCC definition of "proceeds" of underlying collateral. 446 F.Supp. 2d at 1034. As a result, the secured lender in Shirley Medical was forced to make an argument that the Second Lien Notes Trustee ***does not*** make here: that it had a valid security interest in the underlying claims as ***original collateral***. Id. at 1033.

The other case cited by the Committee, In re Zych, 379 B.R. 857 (Bankr. D. Minn. 2007), has been heavily criticized, in part because the Zych court misconstrued the reasoning of the Shirley Medical court. The co-chair of the American Bar Association's Subcommittee on Intellectual Property Financing wrote that the reasoning of the Zych court "should be rejected because it turns the new Article Nine definition of a commercial tort claim into an unwarranted limitation on the proceeds right—a result that seems counter to both the language of section 9-109(d)(12) and the expansion of the proceeds definition intended by the Revision drafters." See Thomas W. Ward, INTELLECTUAL PROPERTY IN COMMERCE, § 2:32 (2013). Professor Ward also concludes correctly that "[t]he comments accompanying the definition of a 'commercial tort claim' suggest that its limited availability as original collateral was not intended to disturb the separate and independent right of a secured party to reach a damage or infringement claim as the 'proceeds' of other original collateral." Id.

This Court should not follow the court's reasoning in Zych because it directly contradicts the plain language of the UCC. The drafters of the new definition of "commercial tort claim" in the UCC sought to protect debtors from inadvertently including unforeseen tort claims in their lender's collateral—not to deprive lenders of the benefit of their bargain by excluding amounts collected from lawsuits brought to avenge damage to, or infringement of, their collateral. See N.J. U.C.C. § 9-102(64)(D); N.J. U.C.C. § 9-102 cmt. 5.g.

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

The Committee incorrectly argues that even if the Second Lien Notes Trustee has a valid lien on amounts collected from the Patent Infringement Claims as proceeds of collateral, that lien extends only to claims arising after execution of the Security Agreement. (Opp. Br. at ¶¶ 25-28.) The Committee does not cite to any relevant authority in support of its argument. Rather, the Committee cites irrelevant cases about the standing of patent assignees to prosecute infringement claims arising pre-assignment. See Moore v. Marsh, 74 U.S. 515, 522 (1868); Abraxis Bioscience, Inc. v. Navinta, LLC, 625 F.3d 1359, 1367 (Fed. Cir. 2010). Neither case cited by the Committee even mentions the UCC.

Once again, the Committee mischaracterizes the issue. The Second Lien Noteholders do not claim to have a security interest in the Patent Infringement Claims ***themselves***, regardless of when such claims were asserted. Rather, the Second Lien Noteholders have a perfected security interest in all amounts collected on the Patent Infringement Claims because such amounts are proceeds of the Patents.

The Committee incorrectly argues that the Second Lien Noteholders can only have a perfected security interest in the proceeds of the Patent Infringement Claims that were

commenced ***after*** execution of the security agreement. Two simple examples will show why the Committee's argument is legally incorrect and makes no practical sense.

First, assume that a lender takes a security interest in the borrower's equipment that existed at the time the security agreement was executed. The borrower then sells its equipment and receives cash. The Committee cannot seriously argue that the lender does not have an automatically perfected security interest in the cash proceeds of the sale of the borrower's equipment. See N.J. U.C.C. § 9-102(64)(A) ("Proceeds" includes "whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral"); N.J. U.C.C. § 9-315(c). The same is true here: it is undisputed that the Second Lien Noteholders have a valid, perfected security interest in the Patents that existed before execution of the security agreement. The Second Lien Noteholders thus have a valid, perfected security interest in the proceeds of those Patents (i.e., amounts collected from the Patent Infringement Claims), even if the Patent Infringement Claims were commenced before execution of the Security Agreement.

As a second example, assume that one of the Patent Infringement Claims commenced ***before*** execution of the Security Agreement settled today and resulted in a cash payment to the debtors after the court approved the settlement. The Second Lien Noteholders have a perfected security interest in that cash because it constitutes cash collateral. The Committee does not explain why the Second Lien Noteholders should have an interest in amounts collected on Patent Infringement Claims that settle today, but not at some point in the future.

The Committee's citation to the Business Workouts Manual is similarly misguided. The Committee cites the Business Workouts Manual for the uncontroversial proposition that a lender "should secure the right to sue for infringements because a security interest in the intellectual

property alone may not transfer such rights." (Opp. Br. at ¶ 27.) That point is simply irrelevant. The Second Lien Notes Trustee is not seeking the right to sue for patent infringement.

Because the Second Lien Noteholders have a properly perfected security interest in amounts recovered from the Patent Infringement Claims, this Court should dismiss Counts IV and 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 FOREIGN PATENTS ARE INCLUDED IN THE SECOND LIEN NOTEHOLDERS' COLLATERAL

The Committee makes two legally incorrect arguments in opposition to the Motion to Dismiss the Committee's claims relating to the Foreign Patents. First, the Committee incorrectly argues that the Second Lien Noteholders' security interest never attached to the Foreign Patents because the Foreign Patents are "located" outside the United States. Second, the Committee incorrectly argues that section 544(a) of the Bankruptcy Code permits the Committee to step into the shoes of a hypothetical ***foreign*** judgment lien creditor. Neither of the Committee's arguments is supported by the relevant statutes and case law.

The Committee does not dispute that (1) New York law governs the parties' dispute over the location of the Foreign Patents, and (2) under New York law, patents are located where their owner is domiciled. See Stamer Decl., Ex. 1 at § 26 (providing that the Security Agreement "shall be governed by, and construed in accordance with, the laws of the State of New York"); 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) ("Under New York law, a patent is located where its owner is domiciled."). Accordingly, because Kodak is incorporated in New Jersey and has its principal

place of business in New York, the Foreign Patents are "located" in the United States for purposes of the UCC. Thus, pursuant to the Security Agreement, the Foreign Patents are included in the Second Lien Notes Trustee's Collateral. No other analysis is required.

The Committee acknowledges, as it must, that Kodak's domicile "may be appropriate for purposes of determining the proper U.S. jurisdiction in which to perfect a security interest." (Opp. Br. ¶ 35, n.8.) The Committee then disingenuously states that the Second Lien Notes Trustee's position "is directly contradicted by applicable authority." (Opp. Br. ¶ 35.) The Committee's authority is neither relevant nor applicable. First, none of the Committee's authority addresses New York law, which law applies to this analysis. Second, even a cursory read of the Committee's cases demonstrates that the Committee's cases do not stand for the propositions for which the Committee cites them.

The most egregious example is the Committee's citation to In re Elpida Memory, Inc., No. 12-10947 (CSS), 2012 WL 6090194, at *1-2 (Bankr. D. Del. Nov. 20, 2012). The Committee trumpets Elpida as a "recent decision" that constitutes "applicable authority." (Opp. Br. ¶ 35.) Elpida, however, is not "applicable authority" because it neither addresses how to determine the location of a patent, nor applies New York law. Nowhere does Elpida analyze or substantively address the applicable law governing the location of a patent. Because Elpida does not even mention the UCC or New York law respecting the "location" of patents, the Committee's claims that Elpida "directly contradict[s]" the Successor Trustee's argument regarding the location of patents is baseless.

The authority cited by the Second Lien Notes Trustee in its Motion to Dismiss, on the other hand, is directly on-point. In a recent case in the Southern District of New York, the court held that "[u]nder New York law, a patent is located where its owner is domiciled." Mishcon de

Reya, 2011 WL 6957595, at *5 n.6 (S.D.N.Y. Dec. 28, 2011) (citing Kent Jewelry Corp. v. Kiefer, 119 N.Y.S.2d 242, 251 (Sup. Ct., N.Y. County 1952)); see also Ebsary Gypsum Co. v. Ruby, 256 N.Y. 406, 409-10, 176 N.E. 820 (1931) (holding that a patent has no situs apart from the domicile of its owner) (citing Bryan v. University Pub. Co., 112 N.Y. 382, 284 (N.Y. 1889)). In contrast to the cases cited by the Committee, Mishcon de Reya ***is*** "applicable authority."

The Committee's only response to Mishcon de Reya is that it should not apply here because the Foreign Patents were issued by foreign countries and not in the United States. The Committee fails to explain why New York law governing the location of a patent would change based on which jurisdiction issued the patent. Because the parties to the Security Agreement agreed that New York law should govern the Security Agreement and its construction, this Court should find that the "Foreign Patents" are located in the United States, where their owner is domiciled.

The other cases cited by the Committee in support of its argument are entirely inapplicable. In one example, the Committee uses an ellipsis to omit crucial language from a court's opinion. The Committee cites Montana Dep't 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) for the proposition that "in determining the location of intangible property . . . , a trial court must adopt a 'context-specific analysis,'" rather than relying on the domicile of the owner of the property. (Opp. Br. at ¶ 36.) The Committee uses the ellipses to intentionally omit the words "***for venue purposes***." Id. (emphasis added). This Court should not be misled by the Committee's selective quotation of Blixseth. Blixseth does not hold that this Court must adopt a "context specific" analysis for the location of a patent pursuant to New York law.

In fact, Blixseth says absolutely nothing about patents. And Blixseth certainly does not address where patents are "located" under governing New York law. The other cases cited by the Committee are similarly inapplicable. See Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 527 (1972) (holding that it is not infringement to make or use a U.S. patented product outside of the U.S.; court did not address the issue of where a patent is located); Aluminum Co. of Am. v. Sperry Prods., Inc., 285 F.2d 911, 925 (6th Cir. 1960) (holding that there was no misuse of the patents at issue as a result of defendant's licensing and cross-licensing of foreign patents; court did not address the location of the patents); AMP, Inc. v. United States, 492 F. Supp. 27, 34-35 (M.D. Pa. 1979) (a federal tax case where the court construed an inapplicable U.S. Treasury regulation providing that "[w]here bare legal title is retained by the seller, the sale shall be deemed to have occurred at the time and place of passage to the buyer of beneficial ownership and the risk of loss . . . .").

III. THE BANKRUPTCY CODE DOES NOT PERMIT THE COMMITTEE TO STEP INTO THE SHOES OF A HYPOTHETICAL *FOREIGN* JUDGMENT LIEN CREDITOR

The Committee incorrectly argues that section 544(a) of the Bankruptcy Code permits it to step into the shoes of a hypothetical foreign judgment lien creditor. The plain language of the statute and relevant case law do not support the Committee's argument.

A. Section 544(a) Does Not Grant The Committee The Rights Of A Hypothetical Foreign Judgment Lien Creditor

Section 544(a) permits a trustee to avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by a hypothetical creditor who "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," either (1) "a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien" or (2) "an execution against the debtor that is

returned unsatisfied at such time." 11 U.S.C. § 544(a)(1-2). State law defines the scope of the trustee's avoidance powers as a hypothetical judgment lien creditor. 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). In fact, in every case cited by the Second Lien Notes Trustee in its Motion to Dismiss and the Committee in its Opposition, ***state*** law, not ***foreign*** law, defined the scope of the trustee's avoidance powers. The Committee has failed to cite a single case in which a trustee was permitted to step into the shoes of a hypothetical foreign judgment lien creditor under section 544(a).

The Committee attempts unsuccessfully to distinguish the most factually similar case. In Askanase v. United States (In re Guy. Dev. Corp.), 189 B.R. 393, 397 (Bankr. S.D. Tex. 1995), 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. Askanase, 189 B.R. 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. The Committee first argues that Askanese is inapplicable because it addresses section 545 of the Bankruptcy Code instead of section 544. (Opp. Br. at ¶ 45.) But the Committee ignores that courts have expressly found that sections 545 and 544 provide the same avoidance power. See 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").

Further, the Committee's argument contradicts the main purpose of section 544(a), 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."); 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").

Contrary to the Committee's argument, the perfection rules contained in New Jersey's UCC—and not the laws of various foreign jurisdictions—govern whether the Second Lien Notes Trustee properly perfected its lien in the Foreign Patents. In fact, the Committee admits that the Second Lien Notes Trustee "compl[ied] with the perfection requirements with respect to the Foreign Patents in the United States." (Opp. Br. at ¶ 52.) The inquiry should end there. As explained above, the Foreign Patents are "located" in the United States under governing New York law. Thus, for perfection purposes, it makes no difference that the Foreign Patents were issued in foreign jurisdictions. Applicable choice of law rules provide that the New Jersey UCC controls how the Second Lien Notes Trustee should perfect its interest in its collateral, and the

Committee expressly admits that the Second Lien Notes Trustee properly perfected its interests pursuant to New Jersey law. (Opp. Br. at ¶ 46.)

In short, the Committee has failed to identify any authority supporting its argument that section 544(a) permits the Committee to exercise rights under foreign law to avoid the Security Interest in the Foreign Patents.

B. Congress Did Not Intend Section 544(a) To Apply Extraterritorially

The Committee's argument that it is not trying to apply section 544(a) extraterritorially is simply not credible. The Committee is seeking to use its strong-arm powers under section 544(a) to step into the shoes of a hypothetical ***foreign*** judgment lien creditor. If it were not for section 544(a), the Committee would not have any basis to step into the shoes of any hypothetical judgment lien creditor, domestic or foreign. Thus, the Committee is seeking to extend its strong-arm powers under section 544(a) into foreign jurisdictions. The Committee does not cite any authority in support of its position; rather, it simply denies that it is trying to extend the reach of section 544(a) outside the United States.

The Committee's attempt to distinguish the controlling authority cited in the Motion to Dismiss is unavailing. In a decision regarding the extraterritorial application of section 547 of the Bankruptcy Code that was affirmed by the Second Circuit, a federal court in the Southern District of New York held that "[a]n 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), 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 Maxwell court held that the presumption against extraterritoriality, in the absence of explicit congressional direction to the contrary, prevented the use of section 547 of the Bankruptcy Code to avoid a U.S. debtor's alleged preferential transfers to foreign creditors. 186 B.R. at 819. The court found that Congress has not "clearly expressed" its desire that section 547 govern extraterritorial conduct. Id. at 820. The same is true here respecting section 544(a). The Committee has failed to point to any evidence of congressional intent, whether in the text or legislative history of section 544 or in applicable case law, to permit the Committee to step into the shoes of a hypothetical foreign judgment lien creditor. Section 544(a) is designed to provide a bankruptcy trustee with avoidance powers based on U.S. state law, and the Committee does not dispute that a hypothetical judgment lien creditor would be unable to avoid the Second Lien Notes Trustee's perfected liens in the Foreign Patents under the law of every U.S. state.

C. 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

The Committee does not challenge that 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." Mull Drilling Co. v. SemCrude, L.P. (In re SemCrude, L.P.), 407 B.R. 82, 107 (Bankr. D. Del. 2009) (quoting Aura Sys., Inc. v. Barovich (In re Aura Sys., Inc.), 347 B.R. 720, 724 (Bankr. C.D. Cal. 2006)). 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 4-6 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. As explained above, Kodak is

incorporated in New Jersey and the Foreign Patents are located in the United States pursuant to governing New York law. The Committee fails to explain why the Second Lien Notes Trustee should be required to traipse all over the globe to perfect its liens in assets located in the United States, especially when Kodak is also located in the United States.

In addition to violating the plain language of the UCC, the Committee's argument in support of a broad international expansion of section 544(a) ignores the practical nightmare that will result from permitting a trustee to step into the shoes of ***any*** hypothetical foreign judgment lien creditor, ***anywhere*** in the world. The Committee does not deny that if its 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.

CONCLUSION

WHEREFORE, the Second Lien Notes Trustee respectfully requests the Court grant the Motion to Dismiss in its entirety and grant the Second Lien Notes Trustee such other relief as is just and proper.

New York, New York
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