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Defendant Eastman Kodak Company (“**Kodak**”), on behalf of itself and its affiliated debtors and debtors in possession (collectively, the “**Debtors**”), hereby submits this reply in support of its Motion For Entry of an Order Enforcing the Automatic Stay Against Ricoh Company, Ltd.’s and Ricoh Americas Corporation’s (together, “**Ricoh**”) Adversary Proceeding (the “**Motion**”) [Adv. Docket No. 7].¹ In support of the Motion, Kodak respectfully states:

PRELIMINARY STATEMENT

1. Ricoh’s adversary proceeding should not proceed now. On May 24, 2013, Judge Cote denied Ricoh’s motions to withdraw the reference of the Ricoh Action and the instant Motion,² clearing the way for this Court to decide whether (a) Ricoh’s adversary proceeding was commenced in violation of the automatic stay and should thus be dismissed, or (b) if it was not, whether the adversary proceeding should nonetheless be stayed because of the disruptive impact it would have on the Debtors’ reorganization efforts. Ricoh’s protestations that resolution of the Motion turns on questions of federal patent law have now been put aside, and Kodak’s Motion should be granted.

2. This Court has twice held that 11 U.S.C. § 362(a)(1) applies to patent infringement claims that could have been commenced before the chapter 11 petition was filed, even if the claims are purportedly limited to postpetition infringement. Ricoh’s contrary position merely rehashes arguments that the Court has already rejected, and the opposition (“**Opposition**” or “**Opp’n**”) presents no reason for this Court to reach a different conclusion than it has reached previously. Ricoh’s attempt to bifurcate its patent infringement claims into prepetition and postpetition proceedings would be inefficient and should not be permitted.

¹ Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

² See No. 13 Civ. 2808 (DLC) (S.D.N.Y. filed Apr. 26, 2013) [Civ. Docket No. 7] and No. 13 Civ. 3394 (DLC) (S.D.N.Y. filed May 20, 2013) [Civ. Docket No. 3].

3. The mere fact that Ricoh commenced its action as an adversary proceeding should not have any bearing on the outcome, as Ricoh adopted this strategy in an obvious attempt to avoid the automatic stay. The Ricoh Action is the postpetition component of purported patent infringement that allegedly began prepetition and continued postpetition. Ricoh's unsuccessful efforts to divest this Court of jurisdiction demonstrate that it has no intention of pursuing its claims before this Court, and that its true intent is to pursue an action in the District Court. Ricoh's arguments, if accepted, would permit any party with patent infringement claims directed to patents issued before the Petition Date to subvert the automatic stay and the claims resolution process by commencing an adversary proceeding, and then seeking to have that action proceed in District Court. The exception would swallow the rule and defeat the purpose of section 362(a)(1) of the Bankruptcy Code. The Ricoh Action thus falls squarely outside the limited judge-made exception to the automatic stay for adversary proceedings.

4. Even if the Ricoh Action does not violate the automatic stay, this Court should stay the adversary proceeding because it would burden, distract and impede the Debtors' reorganization efforts at an important juncture in these chapter 11 proceedings. Proceeding with the Ricoh Action will require attention from key Kodak personnel responsible for intellectual property issues, including related to the recently-announced global settlement with the U.K. Kodak Pension Plan, and will impose unnecessary costs on the Debtors' estates. The Ricoh Action should be stayed to permit the Debtors to remain focused on pursuing confirmation of their plan of reorganization and emergence from chapter 11.

5. The Debtors are compelled to respond to Ricoh's repeated assertions that the Motion is an improper attempt to "obstruct" Judge Cote's May 9, 2013 order directing the

parties to mediation with respect to the S.D.N.Y. Action and Ricoh's claims asserted in these proceedings. These spurious accusations are unfounded. The Debtors, unlike Ricoh, have consistently endorsed mediation as a cost-effective tool in seeking a consensual resolution of the parties' disputes. Notwithstanding any formal or informal settlement efforts, the Ricoh Action was improperly commenced and should be dismissed. The Ricoh Action will require attention from the Debtors, their employees and advisors, beginning with a response to the adversary complaint that is due June 14, 2013. The Motion is ripe for decision and should be granted.

ARGUMENT

A. The Ricoh Action Violates the Automatic Stay.

6. The crux of Ricoh's argument regarding why its adversary proceeding does not violate the automatic stay is that Kodak "disregards controlling Federal Circuit and other authority . . . holding that each act of patent infringement gives rise to a separate and distinct cause of action." (Opp'n at 4.) The purported "controlling precedent" that Ricoh relies on, *Hazelquist v. Guchi Moochie Tackle Co., Inc.*, 437 F.3d 1178 (Fed. Cir. 2006), is inapposite because it did not address the automatic stay in the context of patent infringement that allegedly started prepetition and continued postpetition. *Hazelquist*, as this Court has recognized, concerned alleged "acts of infringement that occurred after [a] bankruptcy discharge." 437 F.3d at 1179; Hr'g Tr. 85 & 99, Mar. 20, 2012 (distinguishing *Hazelquist* as "a post discharge case" and explaining that the issue before the Federal Circuit was whether "an individual can commute infringing [conduct] beyond the date of the bankruptcy discharge") (Glueckstein Decl. Ex. 5³).

Hazelquist addressed a different section of the Bankruptcy Code, 11 U.S.C. § 524(a)(2), with

³ All references to the "Glueckstein Decl." are to the "Declaration of Brian D. Glueckstein in Support of Defendant Eastman Kodak Company's Motion and Memorandum of Law in Support of its Motion for Entry of an Order Enforcing the Automatic Stay Against Ricoh Company, Ltd.'s and Ricoh Americas Corporation's Adversary Proceeding," dated May 10, 2013 [Adv. Docket No. 8].

different statutory language and objectives than section 362(a)(1). 437 F.3d at 1180 (holding that patent infringement claims that “arose after the bankruptcy discharge” are “not enjoined by section 524”). Ricoh also makes much of *Baldwin Technology Corp. v. Dahlgren International, Inc.* (*In re Dahlgren International, Inc.*), 147 B.R. 393 (N.D. Tex. 1992). *Dahlgren*, however, involved only patent infringement “claims for post-confirmation money damages and injunctive relief.” *Id.* at 403. Interpreting a confirmed plan of reorganization, the *Dahlgren* court held that the confirmed plan did not bar post-confirmation patent infringement claims. *Id.* at 403-05. Neither *Hazelquist*, *Dahlgren* nor any other case that Ricoh cites addresses the application of section 362(a)(1) to claims for patent infringement that allegedly started prepetition and continued postpetition with respect to patents that issued before the commencement of the bankruptcy proceeding.⁴

7. Courts that have considered this issue, including this Court—twice in these chapter 11 proceedings—have held that the automatic stay applies to an action for postpetition patent infringement that allegedly began prepetition. Bankr. Docket Nos. 551 & 721; Hr’g Tr. 59-63, Mar. 8, 2012 (Glueckstein Decl. Ex. 4); Hr’g Tr. 95-101, Mar. 20, 2012 (Glueckstein Decl. Ex. 5); *In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litig.*, 140 B.R. 969, 976-77 (N.D. Ill. 1992); *In re Spansion, Inc.*, 418 B.R. 84, 92 (Bankr. D. Del. 2009), *vacated on other grounds, sub nom. Samsung Elec. Co. Ltd. v. Ad Hoc Consortium of Floating Rate Noteholders*, No. 09-0836 (RBK), 2010 WL 2636115 (D. Del. June 29, 2010); *Alloc, Inc. v. Unilin Décor N.V.*, No. 02-C-1266, 2005 WL 3448060, at *9 (E.D. Wis. Dec. 15,

⁴ *E.g.*, *Cordis Corp. v. Boston Scientific Corp.*, 635 F. Supp. 2d 361 (D. Del. 2009) (patent infringement case with no discussion of section 362(a)(1)); *Williams v. Gillette Co.*, 887 F. Supp. 181 (N.D. Ill. 1995) (same); *Roche Palo Alto LLC v. Apotex, Inc.*, 531 F.3d 1372 (Fed. Cir. 2008) (same); *Lawlor v. Nat’l Screen Serv. Corp.*, 349 U.S. 322 (1955) (antitrust case with no discussion of section 362(a)(1)).

2005). The relevant inquiry, as explained by this Court, is whether an “action or proceeding against the debtor . . . was or could have been commenced before the commencement of the case.” Hr’g Tr. 62, Mar. 8, 2012 (Glueckstein Decl. Ex. 4) (quoting 11 U.S.C. § 362(a)(1)). This inquiry turns on the application of section 362(a)(1) of the Bankruptcy Code to the alleged course of conduct at issue, not an application of federal patent law.

8. Ricoh attempts to dismiss as “pure *dicta*” (Opp’n at 8) Judge Engelmayer’s holding that the “appropriate procedure” “[t]o litigate” patent infringement that allegedly “began pre-petition and continued post-petition” is “to obtain relief from the automatic stay.” *Aeritas, LLC v. AMR Corp. (In re AMR Corp.)*, No. 12 Civ. 8180(PAE), 2013 WL 1155434, at *4-5 (S.D.N.Y. Mar. 21, 2013) (citing *Mahurkar*, 140 B.R. at 976-77). Ricoh incorrectly focuses on the holding regarding the lack of objection to the prepetition proofs of claim. *Id.* at *3. Ricoh ignores Judge Engelmayer’s basis for denying the claimant’s motion to withdraw the reference of the separate “administrative expense claim based on a parallel claim of patent infringement.” *Id.* at *4; *id.* at *5 (holding that “[s]hould Aeritas continue to believe that its rights and interests *are* being injured by locating its patent infringement claims against Debtors in the Bankruptcy Court,” it must move to “lift[] the stay.”) (emphasis added). *In re AMR* correctly held that a party must move to lift the stay before pursuing claims for postpetition patent infringement that allegedly started prepetition. *Id.* at *4-5.

9. As the Court explained when it denied Apple Inc.’s motion to lift the stay to commence a new proceeding against the Debtors purportedly limited to postpetition patent infringement, “[i]t may be that each patent-infringement is a separate act for purposes of patent law, but for purposes of bankruptcy law, there seems to be no dispute that Apple’s case at the ITC was or could have been commenced before the Chapter 11 filings.” Hr’g Tr. 62, Mar. 8,

2012 (Glueckstein Decl. Ex. 4). Here, similarly, Ricoh could have commenced an action directed to the patents at issue before the Petition Date. Indeed, nearly nine months before Ricoh commenced its adversary proceeding, Ricoh filed two proofs of claim asserting prepetition infringement of seven of the eight patents it asserts in the Ricoh Action based on identical conduct.⁵ (Glueckstein Decl. Exs. 1 & 2.) “[T]he continuation during bankruptcy of conduct . . . begun beforehand is most certainly one in which an action was or could have been commenced before the commencement of the case under this title.” *Mahurkar*, 140 B.R. at 976. This interpretation and application of section 362(a)(1) is “not only good law but also good sense.” Hr’g Tr. 63, Mar. 8, 2012 (Glueckstein Decl. Ex. 4).

10. Ricoh’s assertion that Kodak is “seeking immunity for acts of future infringement” (Opp’n at 6) is baseless. Enforcing the automatic stay with respect to the Ricoh Action does not leave Ricoh without recourse.⁶ As the Court previously explained, if Kodak infringes the patent rights of others postpetition, it “may be incurring administrative liability.” Hr’g Tr. 86, Mar. 20, 2012 (Glueckstein Decl. Ex. 5). “Damages for wrongs done during the bankruptcy proceedings are administrative claims, and thus paid in full most of the time.” *Mahurkar*, 140 B.R. at 977. The possibility of such liability is an adequate deterrent against

⁵ The lone patent not asserted in the Proofs of Claim, U.S. Patent No. 7,169,522 B2, was issued on January 30, 2007, well in advance of the Petition Date, and thus also could have been asserted before the commencement of these chapter 11 proceedings.

⁶ Ricoh misleadingly asserts that “Kodak apparently expects later to assert that all post-bankruptcy infringement claims would be allegedly discharged by Kodak plan of reorganization.” (Opp’n at 15.) Kodak has never advanced any such argument. Regardless, any concerns Ricoh has with respect to the discharge provision in the plan of reorganization are properly addressed in an objection to the plan, not here, and are beyond the scope of this Motion.

infringement and assures Ricoh an appropriate remedy if it ultimately establishes that Kodak has infringed the asserted patents.⁷

11. To the extent Ricoh cites *Dahlgren* for the proposition that its cause of action for injunctive relief is not subject to the automatic stay, Ricoh's reliance is misplaced. *Dahlgren* merely held that a claim for injunctive relief cannot constitute a section 503(b)(1)(A) administrative expense. 147 B.R. at 403. Claims for injunctive relief for postpetition patent infringement that allegedly began prepetition are subject to the automatic stay. *Mahurkar*, 140 B.R. at 977 ("hold[ing] that litigation on Mahurkar's request for an injunction is barred by the automatic stay"). As Judge Easterbrook explained in *Mahurkar*, "[i]njunctive relief requiring debtors to abandon one part of their business or dramatically change their methods of doing business have a high holdup value for creditors" and risk allowing a single creditor to "grab one aspect of the business and squeeze it for value that, while assisting [that] single creditor, may depress the collective value of the assets." *Id.* at 976.

B. Ricoh's Decision to Commence Its Action as an Adversary Proceeding Does Not Exempt Ricoh from the Automatic Stay.

12. Ricoh argues it should be exempt from the automatic stay because it chose to assert its claims by adversary proceeding in the Bankruptcy Court. (Opp'n at 10-12.) Of course, Ricoh has no intention of litigating in this forum, as evidenced by Ricoh immediately moving to withdraw the reference of this adversary proceeding [Adv. Docket No. 2] and then separately moving to withdraw the reference with respect to this Motion [Adv. Docket No. 10].

While Judge Cote denied both motions to withdraw the reference without prejudice, Ricoh is free

⁷ Ricoh's reliance on *In re Cinnabar 2000 Haircutters, Inc.*, 20 B.R. 575 (Bankr. S.D.N.Y. 1982), is misplaced. (Opp'n at 6.) The key fact in *In re Cinnabar* was that a district court had entered a judgment that permanently enjoined the debtor from using the plaintiff's trademark "approximately one month before the debtor filed its Chapter 11 petition." 20 B.R. at 576. Here, by contrast, there has been no determination, final or otherwise, that Kodak is infringing or has ever infringed any Ricoh patent. *In re Cinnabar* is thus inapplicable.

to renew its demand for withdrawal following this Court's resolution of the Motion and Ricoh is certain to do so.

13. The course charted by Ricoh contradicts the reason that the "judicially-created" exception, *Armco Inc. v. N. Atl. Ins. Co. Ltd. (In re Bird)*, 229 B.R. 90, 96 (Bankr. S.D.N.Y. 1996), for adversary proceedings exists: to ensure that "[a]ll collection efforts will proceed only under the bankruptcy court's control, either in the bankruptcy court or in another forum only if the court grants relief from the stay." *Prewitt v. N. Coast Vill., Ltd. (In re N. Coast Vill., Ltd.)*, 135 B.R. 641, 643 (B.A.P. 9th Cir. 1992). Ricoh has no intention of submitting itself to the "bankruptcy court's control." *Id.* Indeed, Ricoh has done everything in its power to avoid this Court's jurisdiction.

14. Although Ricoh's patent infringement claims have a postpetition component, like other adversary proceedings that have been held to violate the automatic stay, the Ricoh Action involves claims that arise out of prepetition conduct that is the subject of the Proofs of Claim. *See, e.g., Galitz v. Edghill (In re Edghill)*, 113 B.R. 783, 784 (Bankr. S.D. Fla. 1990). Accordingly, the automatic stay should bar Ricoh's attempt to strategically use an adversary proceeding to exert leverage at an important time in these chapter 11 cases.

C. Even if the Ricoh Action Does Not Violate the Automatic Stay, It Should Nonetheless be Stayed.

15. If the Court determines that the Ricoh Action does not violate the automatic stay, the Court should exercise its inherent or statutory authority pursuant to section 105(a) of the Bankruptcy Code and/or section 959(a) of the United States Code to stay the Ricoh Action until after the Court has issued a ruling regarding confirmation of the Debtors' plan of reorganization. Permitting the Ricoh Action to proceed at this time would impose an unnecessary and significant burden on the Debtors when they should remain focused on

proceeding towards emergence from chapter 11. At the same time, a stay would not prejudice Ricoh or impede the efficient resolution of its asserted claims through mediation or other means.

16. The Debtors are currently engaged in myriad tasks for the benefit of all stakeholders. On May 15, 2013, the Debtors filed a motion seeking approval of a global settlement with the U.K. Kodak Pension Plan that is an important step in the Debtors' reorganization and path to emergence [Bankr. Docket No. 3709]. This settlement, which encompasses multiple transactions including the sale of the Personal Imaging and Document Imaging Businesses, will resolve the largest unsecured claim against the Debtors and provide the Debtors with necessary liquidity to emerge from chapter 11. The hearing on this motion is scheduled for June 20, 2013. Implementation of the settlement will require substantial attention from the Debtors and their management team in advance of the anticipated closing in September 2013.

17. The settlement with the U.K. Kodak Pension Plan is central to the plan of reorganization and disclosure statement that the Debtors filed on April 30, 2013 [Bankr. Docket Nos. 3650 & 3651]. The Debtors recently filed a motion for an order approving the disclosure statement, establishing voting procedures and establishing notice and objection procedures in order to proceed to a proposed confirmation hearing on August 9, 2013 [Bankr. Docket No. 3763]. Ricoh waited until this important juncture in these chapter 11 cases to assert claims for patent infringement that could have been asserted long ago. The Court should stay the action and permit the Debtors and their stakeholders to remain focused on building consensus for the plan and proceeding towards a confirmation hearing. *In re Television Studio Sch. of N.Y.*, 77 B.R. 411, 413 (Bankr. S.D.N.Y. 1987) (staying proceedings because "the Debtor has filed a plan

and obtained a date for a hearing to consider approval of its disclosure statement” and the lawsuit would “divert . . . attention away from the reorganization process”).

18. Indeed, Ricoh admits it will use the adversary proceeding to subject Kodak to wide-ranging discovery directed at multiple areas of the Debtors’ business operations. (Opp’n at 9.) Burdensome discovery would needlessly deplete the Debtors’ estates at the expense of other creditors. The burden of responding to discovery requests will be borne by the same small group of Kodak employees actively involved in resolving other intellectual property-related claims, reviewing each of Kodak’s intellectual property-related agreements, and assisting with intellectual property issues related to the global settlement with the U.K. Kodak Pension Plan. The “logistical stress” of “attempting to simultaneously undertake a massive reorganization while monitoring and producing documents” in a new patent infringement case could impair the reorganization process. *See Hawaii Structural Ironworkers Pension Trust Fund v. Calpine Corp., Inc.*, No. 06 Civ. 5358(PKC), 2006 WL 3755175, at *5 (S.D.N.Y. Dec. 20, 2006); *see also Lomas Fin. Corp. v. N. Trust Co. (In re Lomas Fin. Corp.)*, 117 B.R. 64, 67 (S.D.N.Y. 1990) (affirming section 105(a) injunction where the bankruptcy court found that “key personnel would be distracted from participating in the reorganization process causing [the debtor] and its creditors both immediate and irreparable harm”) (citation omitted). A stay is thus appropriate.

19. Contrary to Ricoh’s suggestion (Opp’n at 16), the claims asserted in the Ricoh Action do not require resolution prior to confirmation of a plan of reorganization. Kodak would satisfy any administrative liability subsequently imposed pursuant to the terms of the plan of reorganization. Ricoh knows that its patent infringement claims will not be finally resolved on the merits prior to August 2013 even if the case proceeds now.

20. Ricoh's inability to prosecute its claims "sooner rather than later . . . is not a harm—and is certainly not an irreparable harm—sufficient to" warrant denial of a stay. *See Nevada Power Co. v. Calpine Corp. (In re Calpine Corp.)*, 365 B.R. 401, 413 (S.D.N.Y. 2007). A stay of this proceeding would impose no hardship on Ricoh because it "will neither diminish the potential liability of [Kodak] nor complicate [Ricoh's] evidentiary burdens" in subsequent litigation. *See Calpine Corp. v. Nevada Power Co. (In re Calpine Corp.)*, 354 B.R. 45, 50 (Bankr. S.D.N.Y. 2006). While unlikely, any "prejudice [Ricoh] suffers as a result of [Kodak's] continued alleged infringement while the case is stayed can be cured by a damages award that compensates [Ricoh] for this additional infringement should [Ricoh] ultimately prevail." *Lederer v. Newmatic Sound Sys., Inc.*, No. 10-CV-0271 (JS)(AKT), 2011 WL 31189, at *3 (E.D.N.Y. Jan. 4, 2011) (citation omitted).

21. Finally, Ricoh's repeated assertions (Opp'n at 1-4, 14-15) that Kodak seeks to "escape" or "sabotage" the mediation order entered by Judge Cote in the S.D.N.Y. Action are wrong and appear intended to mislead the Court. To be clear, the Debtors will participate in the mediation in good faith, as directed, with respect to all of the disputes between the parties. The Debtors welcome Ricoh's sudden embrace of mediation, which is ironic given that just weeks ago, Ricoh raised a torrent of objections to the Debtors' proposed claims administration and alternative dispute resolutions procedures, arguing, *inter alia*, that "any compelled further mediation likely would end within minutes" and would be "unlikely" to result in "any kind of comprehensive resolution." *See Ricoh Company, Ltd.'s Opposition to Debtors' Motion for Entry of an Order Authorizing the Implementation of Claims Administration and Alternative Dispute Resolution Procedures ¶¶ 5 n.5, 10* [Bankr. Docket No. 3512].

22. While Kodak certainly would prefer a negotiated resolution of its disputes with Ricoh without the expense and burden of litigation, any efforts to resolve these disputes—through mediation or otherwise—do not change the fact that the Ricoh Action should not go forward at this time.

CONCLUSION

Kodak respectfully requests that the Court grant the Motion and enforce the automatic stay or otherwise exercise its discretion to stay the Ricoh Action, and order such other and further relief as it deems just and proper.

Dated: May 28, 2013
New York, New York

/s/ Andrew G. Dietderich
Steven L. Holley
Andrew G. Dietderich
Brian D. Glueckstein
Michael H. Torkin
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
Telephone: (212) 558-4000
Facsimile: (212) 558-3588

- and -

Pauline K. Morgan
Joseph M. Barry
YOUNG CONAWAY STARGATT &
TAYLOR, LLP
1270 Avenue of the Americas
Suite 2210
New York, New York 10020
Telephone: (212) 332-8840
Facsimile: (212) 332-8855

Counsel to the Debtors and
Debtors in Possession