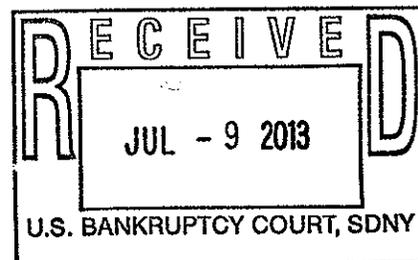


Hearing Date: July 17, 2013 at 11:00 A.M. (Eastern Time)  
Objection Deadline: July 10, 2013 at 4:00 P.M. (Eastern Time)

Ahsan Zia  
Tinton Falls, NJ 07712  
732.610.2733  
[ahsanzia2010@gmail.com](mailto:ahsanzia2010@gmail.com)

A common shareholder

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**



In re: )  
          ) Chapter 11  
          ) Case No. 12-10202 (ALG)  
EASTMAN KODAK COMPANY )  
Debtor )  
          )

**SHAREHOLDERS' MOTION FOR AN ORDER APPROVING  
THE APPOINTMENT OF AN OFFICIAL EQUITY COMMITTEE**

Dear Honorable Judge Allan L. Groper:

I, Ahsan Zia on behalf of myself and other non-insider common shareholders of Eastman Kodak Company (the debtor) hereby file this motion on July 03, 2013 for your order approving the appointment of an Official Equity Committee to protect the interest of common shareholders.

**BACKGROUND**

Honorable Judge, on June 28, 2012 you had denied the request for an official equity committee for the following reasons:

- **There is an ad hoc shareholders committee;** However, There has been no communication between the "ad hoc" committee and the shareholders and the "ad hoc" committee has not asked for an official Equity Committee.
- **The shareholders' interested would be protected by other involved parties;** On April 30, 2013 Eastman Kodak Company filed a Plan of Reorganization (POR) (docket 3651) proposing to cancel the existing common equity upon the approval and effectiveness of this POR. On June 21, 2013, in the first amended POR (docket 4073), the Debtors once again proposed to cancel the common stock.



- **Debtor cannot afford the expense related to the official committee;** However, it is my understanding that costs alone should not deprive public debt and security holders of representation.
- **There is not enough estate left with the debtor that will allow any meaningful distribution to the existing shareholders;** However, it is my understanding that if a company is "hopelessly insolvent" an Equity Committee can be denied. But Eastman Kodak does not fit that description of "hopelessly insolvent"<sup>[18][19]</sup>.

Your honor, we have also filed multiple requests to the United States Trustee, MS. Tracy Hope Davis, with reference to an appointment of official equity committee. Every time, the US trustee has denied the request, with the latest being on June 04, 2013<sup>[17]</sup>. Her response was "not at this time."

### WHY AN OFFICIAL EQUITY COMMITTEE IS REQUIRED

Since the filing of Chapter 11 bankruptcy protection on January 19, 2012, the debtor has made tremendous progress in the elimination of multi billion dollars liabilities, signing new contracts, and selling the 1100 Digital Imaging portfolio etc. Some of the major accomplishments to be noted are:

1. Sale of DI and PI to KPP to settle \$2.8 billion liability
2. Sale of 1100 DI patents portfolio for \$525 Million
3. OPEB settlement of \$1.2 billion down to \$635 million
4. Partnership deal with Uni-Pixel
5. Partnership deal with Kingsbury Corporation
6. Partnership with the State of New York for the Eastman Kodak Business Park
7. Signed contracts with CVS and major film studios
8. And many, many deals that we, the shareholders, are not even aware of, as so many of the courts documents have been redacted.

Your honor, Kodak is an asset rich company with 7000 plus patents (worth ~\$2billion: docket 4163, 4164) and billions of dollars in real estate plus Kodak brand alone has potential value of \$3.3 billion. Kodak's future business is worth billions of dollars. In addition, Kodak has \$1 billion in cash and has also secured a financing deal for \$895 million upon bankruptcy exit. Please see the referenced documents for more details. These documents have been previously submitted to the court by various other parties and have been assigned official court docket numbers. A detailed list of all the official court documents can be found here:  
<http://www.scribd.com/stockboardguy/documents>

Your honor, Eastman Kodak Company's CEO, Mr. Antonio Perez, and the Board of Directors have never looked after the common shareholder's interest. They have repeatedly failed to fulfill their fiduciary duty to the shareholders. They put in place the so called "Poison Pill" to block any takeover of the company. And, they falsely stated that this was in the best interest of shareholders and the company. Now, the company has filed for bankruptcy protection and the commons are on the verge of being worthless? While in Chapter 11, the debtor has spent close to \$1 billion in legal and other bankruptcy related fees. Also, while in bankruptcy, the executives and some other employees get bonuses? What kind of justice is this? Your honor, we need you to serve real justice and protect the interest of common shareholders.

Your honor, the debtor has kept the shareholders in the dark and has been falsely stating the value of the company. The debtor has been filing important documents under seal and not completely disclosing all the necessary information. Several shareholders have informed the court that a full disclosure is required by rule 2019 (docket numbers: 4105, 4104, 4041).

Your honor, the PP&E assets that are not covered by the liquidation analysis of certain tangible and intangible assets report prepared by Ernst & Young LLP are assumed to have a recovery range of 10% to 15% of book value.

- “PP&E” includes all owned land, land improvements and buildings, machinery, equipment, construction in progress and rental products.
- The liquidation analysis of certain tangible and intangible assets report prepared by Ernst & Young LLP includes values of material PP&E assets of \$92 million to \$119 million for all EKC entities. The value of PP&E associated with Debtor entities is \$39 million to \$51 million.

Since Eastman Kodak is not being liquidated the PP&E assets must be given proper value for a sale. We demand 100% value for these items.

Your honor, the shareholders have done a detailed analysis of company’s assets and came to the conclusion that Kodak is still worth billions of dollars. Details are provided in this document: “KODAK SHAREHOLDERS GROUP POR OBJECTIONSv5.pdf” which is attached for your review.

#### **CLOSING REMARKS**

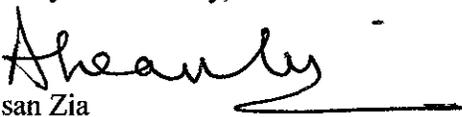
Your honor, shareholders have the right to invoke rule 2004 “Examination in Bankruptcy”. We need equity committee for this purpose. We also have the right to rule 9017 where we are allowed to bring in the testimony of an expert to evaluate debtor’s assets. Please do not deprive us of our rights.

Your honor, Kodak common shareholders have been suffering financially and emotionally for many years with the most suffering brought by the debtor’s bankruptcy filing. Our interest has not been looked after; not by the US trustee, not by the company’s CEO or by the BOD, not by anyone! Your honor, we look to you to uphold justice. We are relying on the appointment of an official equity committee to protect our interest, to protect the future of thousands of American families, to protect those who bought Kodak, who believed in Kodak, and want to move with Kodak into the future. We believe there is value in Eastman Kodak and their future business.

**Mr. Robert Saikaley makes a compelling case for Equity Committee in docket number 4131.**

**Please issue an order approving an Official Equity Committee.**

Thank you. Sincerely,

  
Ahsan Zia

### REFERENCES

1. Letter to Judge Gropper re: Violation of Rule 2019 by Second Lien Note Holders Committee Members Filed by Steven Stern, court docket 4105.
2. Letter to Judge Gropper re: Violation of Rule 2019 by Second Lien Note Holders Committee Members Filed by Michael Simoni, court docket 4104.
3. Letter to Judge Gropper re: Disclosure of Economic Interests Filed by Michael Simoni, court docket 4041.
4. Letter to Judge Gropper re: Equity Committee Filed by Nancy Bo, court docket 4040.
5. Letter to Judge Gropper re: Equity Committee Filed by Dave M. Dayon. (White, Greg), court docket 3901.
6. Letter to Tracy Hope Davis re: Equity Committee Filed by Michael S. Doggett, court docket 3826.
7. Letter to Judge Gropper re: Equity Committee Filed by Thomas E. Vanstone, court docket 3824.
8. Letter to Tracy Hope Davis & Brian S. Masumoto re: Equity Committee Filed by Sheila R. Paganini, court docket 3823.
9. Letter to Judge Gropper re: Equity Committee Filed by Richard B. Villata, court docket 3788.
10. Letter to Judge Gropper re: US Trustee Filed by Adrian G. Niesz, court docket 3903.
11. Letter to US Trustee re: Valuation of Kodak's Patent Portfolio Filed by Michael S. Doggett, court docket 3910.
12. Letter to Judge Gropper re: I.P. Portfolio Filed by Michael Simoni, court docket 4172.
13. Partial Portion of Letter to Judge Gropper re: Common Shareholder Committee Filed by Robert Saikaley, court docket 4131.
14. Letter to Judge Gropper re: Valuation of Assets Filed by Kenneth Heinlein, court docket 4164.
15. Letter to Judge Gropper re: Intellectual Property Evaluation Filed by James E. Hurst, court docket 4163.
16. KODAK SHAREHOLDERS GROUP POR OBJECTIONSv5.pdf.
17. Zia.pdf.
18. The New Wave of Equity Committees in Bankruptcy: What Are They and Are They Here to Stay? BHarrison\_EquityCommittee\_1006.pdf.
19. Equity Committees: A Consequence of the "Zone of Insolvency", zone\_insolvency\_glassman\_schlerf\_ward.pdf.
20. Letter to Judge Gropper re: Equity Committee/Bond Trading Filed by Dave M. Dayon, court docket 3774.

## **OBJECTIONS OF KODAK SHAREHOLDERS GROUP TO THE 4/30/2013 PLAN OF REORGANIZATION**

- A. Kodak Shareholder Group's POR objections**
- B. Kodak Shareholder Group's alternative POR proposal**
- C. Kodak's hidden balance sheet assets**
- D. Valuation of Kodak's intellectual property assets**
- E. Kodak will lose \$3.4B if common shares are cancelled**
- F. Kodak/Uni-Pixel partnership valuation**
- G. Kodak's valuation with Kodak/Uni-Pixel partnership**
- H. Kodak's valuation EBITDA projections from 2014 to 2018**

## A. Objections to the Plan of Reorganization (POR)

1. The new Kodak will be a very profitable company according to the income sheet projections in the POR. EBITDA will be \$199M (7.7% of revenue) in 2014 and increase to \$494M (15.4% of revenue) in 2017, with a 35.4% annual EBITDA growth rate. The revenues are projected to grow from \$2,573M in 2014 to \$3,204M in 2017 with an annualized growth rate of 7.6%.
2. April 30, 2013 POR EBITDA projections do not include the future profits of the Kodak/Uni-Pixel partnership which was made public on April 16, 2013. Kodak/Uni-Pixel joint venture is entering the \$16B touch screen market in 2013 Q4 with quickly increasing manufacturing capacity. The touch screen market is expected to double in five years to \$32B. Kodak/Uni-Pixel partnership has a new patented technology that provides 35% cost savings compared to other products. Their new touch screen products will provide 60% gross margin to Kodak and Uni-Pixel and the revenues and profits will be shared equally by the partners. Fast increasing Uni-Pixel stock price reflects the potential of this deal. Uni-Pixel provides detailed forecasts of this project.
3. April 30, 2013 POR does not have a proper and acceptable security valuation of Kodak. The 9/30/2013 book value of \$441M grossly underestimates the true value of Kodak. It does not take into account the future cash flows, the growth rate of these cash flows. In addition, it does not take into account Kodak's intellectual property valued at \$7.5B, \$3.4B deferred tax assets, and \$2B market value of Kodak's land, buildings, machinery and equipment as shown in Sections C and D.
4. Kodak POR provides a four year earnings and cash flow projections of New Kodak. It is essential for any proper security valuation to have at least full five years of earnings and cash flow projections.
5. A new independent valuation of New Kodak is required using proper security valuation methods. April 30, 2013 POR valuation of Kodak at \$441M book value is wrong. It uses an incorrect valuation method and have many accounting ticks and errors.
6. New Kodak's \$441M valuation based on the 9/30/2103 book value of assets should not be accepted by the court as a valid valuation. It is not an acceptable valuation method in the financial industry and is not used by any security valuation professional or company. This book value does not represent the value of New Kodak's future cash flows and the true market value of New Kodak's assets.
7. In addition, the \$441M book value does not include Kodak's hidden balance sheet assets valued at \$13.5B as demonstrated in Sections C and D. This includes unaccounted patents valued at \$7.5B, unaccounted deferred tax credits valued at \$2.8B, unaccounted goodwill valued at \$1B, unaccounted market value of Kodak's land, buildings, machinery and equipment valued at \$2B and missing cash of \$247M. New Kodak will account for these hidden assets when it implements fresh start accounting after it emerges from bankruptcy. These hidden assets belong to current common shareholders.
8. New Kodak's intrinsic value is at least \$4B. This is based on an EBITDA multiple of 10 and New Kodak's five year average EBITDA of \$405M during the 2104-2018 period. EBITDA multiple of 10 is conservative for a company that has revenue growth of 7.5% and EBITDA growth of 35.4%. Similar companies trade at market valuations of 20-30 EBITDA multiples.
9. Including the EBITDA projections of Kodak/Uni-Pixel joint venture doubles New Kodak's 10xEBITDA valuation to \$8B as shown in Section G.
10. The intrinsic value of New Kodak using a five year discounted cash flow (DCF) method and April 30, 2013 POR free cash flow projections is \$5.7B with a 10% discount rate, and 4% long term growth rate, and \$2.7B with a 15% discount rate and 4% long term growth rate. If a 20% EBITDA growth rate is assumed for the 2019-2023 period, lower than the 35.4% rate used in the April 30, 2103 POR for the 2014-2017 period, a ten year DCF analysis gives New Kodak an intrinsic value of \$7.4B with a 10% discount rate and \$3.7B with a 15% discount rate.
11. Including the EBITDA projections of Kodak/Uni-Pixel joint venture doubles New Kodak's intrinsic value to \$10.9B with a 10% discount rate and \$5.3B with a 15% discount rate if we use a five year DCF analysis, and \$15.2B with a 10% discount rate and \$7.3B with a 15% discount rate if we use a ten year DCF analysis.

12. The above EBITDA multiple and DCF valuations of New Kodak do not include the value of Kodak's intellectual property and other hidden (unaccounted) balance sheet assets, which are valued at \$13.5B as shown in Section C.
13. It is evident that April 30, 2013 POR includes an incorrect and grossly underestimated \$441M valuation of New Kodak in order to give the \$375M secured note holders 85% ownership of New Kodak. This will enable the secured note holders to obtain gigantic profits from their small \$375M secured note investment.
14. The majority of the \$375M secured note holders are also the lenders of \$654M exit financing to New Kodak at an exceptionally high 16% interest rate. Considering the current low interest rate environment, projected high profitability of New Kodak, and the exceptionally high collateral (65% of New Kodak's assets) given to the lenders, the 16% interest rate for the exit financing is unacceptable.
15. It is evident that there is collaboration between Kodak's BOD and the secured note holder hedge funds to take over New Kodak at a low cost of \$375M from Kodak shareholders and unsecured creditors.
16. Exhibit-1 of Section F shows that Blackstone GSO Capital Partners has increased its secured note ownership from \$63M on January 31, 2012 to \$105M on May 7, 2013. Recently, Blackstone has also purchased \$135M worth of general unsecured claims. April 30, 2013 POR gives 22% ownership of New Kodak's equity to Blackstone. Blackstone Group is also the financial advisor to the secured debt holders in Kodak bankruptcy. It is evident that there is conflict of interest in this arrangement, and Kodak's BOD is aware of this situation.
17. If April 30, 2013 POR is approved Kodak will lose its \$3.4B deferred tax assets as shown in Section E paragraph 23. The loss of \$3.4B deferred tax assets will substantially increase New Kodak's taxes, reduce its cash flows and will result in a much lower equity value to all Kodak stakeholders. Section E demonstrates that a minimum of 40% common shares ownership of New Kodak is essential to preserve Kodak's \$3.4B deferred tax assets.
18. April 30, 2013 POR. does not show how the 9/30/2013 financials were developed. There seems to be a \$247M cash shortfall in the consolidated company balance sheet compared to the 10-Q report published on April 29, 2013. POR should include detailed income sheet, balance sheet and cash flow projections from 3/31/2013 to 9/30/2013.
19. April 30, 2013 POR valuation of New Kodak's book value on 9/30/2013 is incorrect, because the balance sheet allocates \$518M from \$2,715M liabilities subject to compromise to pension and other post retirement liabilities. The bankruptcy court should not allow this, as one impaired class of unsecured creditors will be treated differently and more favorably as compared to the remaining unsecured creditors. This is an accounting trick intentionally used to reduce New Kodak's starting equity in its 9/30/2013 balance sheet to \$441M in order to justify giving 85% of New Kodak's ownership to the \$375M secured note holders.
20. April 30, 2013 POR valuation of New Kodak's book value on 9/30/2013 is incorrect, because \$129M goodwill is written off in the 09/30/2013 balance sheet for fresh start accounting. This an accounting trick intentionally used to reduce New Kodak's starting equity to \$441M in order to justify giving 85% of New Kodak's ownership to the \$375M secured note holders.
21. April 30, 2013 POR shows the \$375M secured note holders as impaired debtors. The bankruptcy court should not allow this. The \$375M secured note holders are given 85% ownership of New Kodak which has a value over \$4B. It is evident that this is done intentionally to circumvent the bankruptcy regulations. If one group of the impaired class creditors accept the POR, then there may not be a need for a valuation hearing, and the bankruptcy court can rule for the approval of the POR.
22. Kodak's BOD gave away Kodak's DI and PI divisions for \$650M to KPP in order to meet the conditions of the \$654M exit financing. This was done hastily and only for the benefit of the secured note holders and the lenders of the exit financing, who are in fact mostly the same hedge funds. Kodak's previously signed obligation to KPP was only \$700M, and Kodak settled the \$1.4B KPP liability in its books with a \$300M cash payment to KPP. Kodak could have easily sold the DI business by competitive bidding for \$400M and the PI business by competitive bidding for \$1B. The PI business includes 105,000 kiosks, and at \$10K per kiosk it is worth at least \$1B. The competitive bidding of DI and PI businesses would have generated \$1,400M cash for Kodak, \$750M higher than \$650M cash that Kodak received from KPP.

23. Kodak reported publicly that the KPP deal eliminated the \$2.7B UK pension liabilities and provided \$650M cash and equivalents. The April 30, 2013 POR only shows a \$325M addition to the consolidated cash holdings. Kodak's public statement about this transaction is false.

24. With the very low cash proceeds from the KPP deal, and with the missing \$247M cash in Kodak's 09/30/2013 balance sheet, April 30, 2013 POR shows that Kodak may not have enough US cash to pay the \$375M secured note holders in full. It is evident that this is done intentionally to give 85% of New Kodak to secured note holders at the fire sale book value of \$441M.

25. Kodak's BOD also gave away Kodak's DI and KISS patents, valued by independent valuation firms at \$2B, for \$527M. Kodak did this deal secretly, and it is unknown whether Kodak will generate more future profits from this deal, which also included licensing of Kodak's remaining patents to the consortium members that include some of the largest technology companies in the world.

26. Kodak's BOD misled the shareholders by announcing a 5% limit to the ownership of the company to protect Kodak's \$5B net operating losses (NOL's) for the benefit of the shareholders. This action by the BOD prevented any possible buy out of the company at a favorable price before the bankruptcy decision. Kodak's BOD did this unilaterally without asking shareholder approval. Then, BOD declared bankruptcy on January 19, 2012, before 2012 March annual shareholder meeting, and obtained bankruptcy court's ruling to extend the 5% equity ownership restriction during the bankruptcy to keep the NOL's. This again prevented a possible buy out of the company. Due to the bankruptcy, Kodak's annual shareholder meeting in March 2102 did not take place, and shareholders could not vote on the ownership restriction. The 5% ownership restriction – poison pill – was put in place for the benefit of shareholders to protect the NOL's. Therefore, the 3.4B deferred tax assets from the NOL's are the property of the shareholders of Kodak and should not be wasted in order to give away New Kodak to the secured note holder hedge funds.

27. Kodak's CEO Antonio Perez's statements since mid 2011 until January 19, 2012 bankruptcy declaration, and then after bankruptcy until today should be investigated by SEC. Some of his public statements were false and some of them were misleading the shareholders of Kodak.

28. Kodak's BOD did not do its fiduciary duty to protect and maximize shareholder value. BOD did the opposite. It destroyed shareholder value, and now BOD proposes cancellation of the common shares with zero value for the shareholders. Shareholders were not represented in Kodak's bankruptcy proceedings, and they were always kept in the dark. Most of the court documents were redacted to prevent shareholder access to important financial and legal information.

29. Kodak spent close to \$1B for professional fees during bankruptcy and studied 19 different code named projects to increase value for the stakeholders, supposedly including the shareholders. If the end result was to give the company to the \$375M secured note holders and to offer a very high 16% interest to \$654M long-term debt provided by the same secured creditors, this could have been easily done at the beginning of the bankruptcy in January 2102, without wasting \$1B professional fees.

## **B. Alternative and better POR for all stakeholders**

The \$375M secured notes and \$50M priority claims are paid in full.

The \$2.7B unsecured creditors own 51% of New Kodak equity and 1.35B unsecured notes payable after the \$654M long-term exit financing is paid in full. This adds up to 100%+ recovery for the unsecured creditors.

Common shareholders own 49% of New Kodak equity.

Alternative POR is based on April 30, 2013 POR cash flow projections.

Alternative POR does not include Kodak/Uni-Pixel joint venture which significantly increases cash flow projections starting in 2014.

### **Plan of Reorganization**

1. Kodak pays off \$375M secured notes by borrowing against its 927M cash or \$712M receivables. Alternatively, it sells its lowest growth, lowest cash flow business unit to pay off this debt.

2. Kodak renegotiates the \$654M exit financing or finds new financing to reduce 16% interest rate to 10%. This saves \$170M interest expense from 2014 to 2017 and adds that amount to the cash flow.
3. Kodak gives 51% of New Kodak equity to \$2.7B unsecured creditors and 49% to the common shareholders.
4. Kodak gives \$1.35B unsecured notes payable starting in 2018 to unsecured creditors.
5. April 30, 2013 POR projects accumulated cash holdings of \$1,323B in 2017. With the \$170M interest savings, the cash in 2107 increases to \$1.493B.
6. New Kodak pays off remaining \$637M long-term debt in full in 2017, leaving a cash balance of \$856M at the end of 2017, sufficient to continue its US and foreign operations.
7. Without the exit financing interest expense, New Kodak generates \$400M cash flow in 2018 and significantly higher in 2019 and afterwards.
8. New Kodak pays off \$1.35B unsecured notes by the end of 2020. This gives the \$2.7B unsecured creditors 100%+ recovery with 50% paid in cash and 51% of New Kodak equity .
9. Common shareholders and qualified unsecured creditors own more than 50% New Kodak's equity. Therefore, \$3.4B deferred tax assets are preserved and fully utilized by New Kodak.
10. New Kodak uses fresh start accounting in 2018 as common shareholders own 49% New Kodak equity, less than the 50% limit
11. With the Kodak/Uni-Pixel joint venture, \$654M exit financing is paid off by 2015, and \$1.35B unsecured note is paid off by 2017.

### **C. Kodak's Hidden Balance Sheet Assets**

9/30/2013 balance sheet numbers provided by Kodak in its April 30, 2013 POR underestimates the real value of Kodak's assets by \$13.5B These are Kodak's unaccounted hidden real assets and are explained in (1),(2),(3),(4) and (5). When these \$13.5B worth of hidden assets are considered, Kodak becomes solvent and has \$10.1B equity.

1. There is a \$247M cash shortfall between the balance sheet cash published in 2013-10Q for Q1 and the 09/30/2013 balance sheet cash published by Kodak in the April, 2013 POR.
2. 12/31/2012 balance sheet includes \$3.4B deferred tax assets. New Kodak will be a very profitable company and will be able to use all of its deferred tax assets, if common shareholders and qualified creditors own more than 50% of New Kodak equity. \$2.8B of the \$3.4B deferred tax asset is missing in the 09/30/2013 balance sheet published by Kodak in the April 30, 2013 POR.
3. 9/30/2013 balance sheet numbers include \$165M goodwill, excluding the \$113M goodwill for Kodak's patents. New Kodak will have at least \$1B additional goodwill, as it will be very profitable and will be able to use the intangible assets that it has built during the last few years by investing billions of dollars for developing state-of-art patented technologies, manufacturing systems, marketing and distribution networks and many large commercial customer relationships. This \$1B additional goodwill asset is missing in the 09/30/2013 balance sheet published by Kodak in the April 30, 2013 POR.
4. After the sale of the DI/KISS patent portfolio for \$527M (1,100 patents), Kodak has 20,000 remaining patents. Kodak's 2012 10-K balance sheet shows \$113M goodwill for the value of 1100 DI/KISS patents plus the remaining 20,000 patents. However, Kodak has already realized \$527M profits (from close to zero balance asset value) by selling the 1,100 (DI/KISS) patents. This sale gives a \$479K value per patent, even though most of these 1,100 patents had already been licensed generating \$3B revenue to Kodak during the last several years. Section D demonstrates that Kodak's patents are worth \$7.5B, and this amount should be included in the balance sheet as \$7.5B other intangible assets. This \$7.5B other intangible (patents) asset is missing in the 09/30/2013 balance sheet published by Kodak in the April 30, 2013 POR.

5. 09/30/2103 balance sheet numbers include \$621M net property, plant and equipment assets. This number grossly underestimates the current market value of Kodak's almost fully depreciated property, plant and equipment assets by at least \$2B. Page 70 of 2012 10K annual report provides a breakdown of Kodak's property, plant and equipment assets. Kodak's land assets are valued at \$41M. The current market value of Kodak's US and international land assets is at least \$500M. 2012 10K shows that Kodak's building purchased at \$1,314M and machinery and equipment purchased at \$3,716M were given a total balance sheet value of \$652M after \$4,412M accumulated depreciation. The current market value of Kodak's buildings, machinery and equipment is at least \$2B, and at least \$1.5B higher than the \$621M value given in the 9/30/2013 balance sheet. This \$2B additional land, buildings, plant and equipment asset is missing in the 09/30/2013 balance sheet published by Kodak in the April 30, 2013 POR.

#### **D. Valuation of Kodak's Intellectual Property Assets**

The Plan of Reorganization (POR) published by Kodak on April, 30, 2013 values Kodak after emergence from bankruptcy (New Kodak) at \$441M. This is based on Kodak's estimate of its balance sheet book value on September 30, 2013. This valuation methodology is wrong. It does not take into account the value of future earnings and cash flows of New Kodak, which will be a very profitable company starting in 2014.

In addition, the \$441M valuation does not include many hidden assets in Kodak's balance sheet. Kodak's biggest hidden asset is its 20,000+ patents which is worth at least \$4.4B and could be worth as much as \$14.4B. Our base case valuation is \$7.5B.

Kodak's \$7.5B patent assets by itself proves that April 30, 2013 POR is wrong and unfairly allocates zero ownership of New Kodak equity to the common shareholders of Kodak. Common shareholders must own the majority of New Kodak's equity, because they are the rightful owners of Kodak's 20,000+ patents valued at \$7.5B.

An independent valuation of Kodak's US and foreign patents, including a full audit of Kodak's patent assets, is essential. And the result of this valuation should be included in any new POR that may be prepared by Kodak and/or the creditors of Kodak.

1. Kodak reported in Global Sustainability 2010 Annual Report (the last annual report before its bankruptcy on January 19, 2012) that it owns more than 20,000 US patents (2010 10-K, page 26).
2. Kodak Shareholders Group conducted a computer search using the Acclaim IP software and the US Patent and Trademarks Office database and the European, Japanese and the WIPO databases and verified the above number of 20,000+ active US Kodak patents. Our search resulted in 28,320 active Kodak patents, excluding the patent applications.
3. Recently published numbers by the media (11,000 patents) and by Kodak in the April 30, 2013 POR (7,500 patents) are incorrect.
4. Kodak recently sold its 1,100 DI/KISS patents for \$527M, at an average price of \$479,000 per patent. These patents had already been licensed to many large companies and generated \$3B revenue to Kodak during the last few years. Otherwise, Kodak could have received more than \$479,000 per patent from this sale.
5. IPOfferings LLC is a reputable public service organization that provides patent sales and price information to businesses, inventors, patent brokers, patent auctions and IP professionals to assist them in the sales and acquisition of U.S. Patents.
6. IPOfferings reported recently that during the first quarter of 2013 the average patent price paid per patent was \$356,037 and the median price paid per patent was \$350,000 for the seven patent sales in the USA.
7. IPOfferings reported for the Full Year 2012 an average price paid per patent of \$373,573 and median price paid per patent of \$220,588. The lower median price indicates that there were a few high-priced sales that pulled up the average price.
8. Our conservative valuation of Kodak's patents is \$4.4B assuming only 20,000 US patents and the 2012 median patent price of \$221K per patent.

9. Our base case valuation of Kodak's patents is \$7.5B assuming only 20,000 US patents and the 2012 average patent price of \$373K per patent.

10. Our optimistic case valuation of Kodak's patents is \$14.4B assuming 30,000 US and international patents and Kodak's recent average patent sale price of \$479,000 per patent.

### **E. Kodak will lose \$3.4B if common shares own less than 40% equity in New Kodak**

1. Kodak had \$4,396M net operating losses (NOL's) and \$730M tax credits on Dec 31, 2012. This and other deferred tax assets provided Kodak with a total net deferred tax assets of \$3,377M. Kodak assumed a \$2,838M valuation allowance to reduce this number to \$539M. The reason for this valuation allowance was Kodak's unprofitability in 2012 and the previous years and the projected continuation of the unprofitability.

2. Kodak after bankruptcy emergence (New Kodak) will be a very profitable company. April 30, 2013 POR projections show that New Kodak' earnings before tax, interest, and depreciation and amortization (EBITDA) will grow from \$199M in 2014 to \$494M in 2017 with a 35.4% annual growth. During 2014-2017 period, the total EBITDA will be \$1,335M. Assuming a much lower and conservative 20% annual growth rate New Kodak's total EBITDA during the 2018-2023 period will be \$5,886M. Therefore, 2014-2023 ten year period total EBITDA will be \$7,221M.

3. During the 2014-2017 period, excluding \$496M depreciation and amortization and \$428M interest expense, earnings before tax (EBT) will be \$409M. New Kodak will pay off its remaining \$637M debt in 2017. So, it will be debt free and will not incur any interest expense. Therefore during the period 2018-2023, New Kodak's EBT will be \$4,116M, \$5,886M EBITDA minus \$750M depreciation and amortization. And 2014-2013 ten year period total EBT will be \$4,753M.

4. Assuming a 35% corporate tax rate, New Kodak's tax payments will be over \$1,664M during the 2014-2023 ten year period, without its NOL's and tax credits. So, if New Kodak keeps its NOL's and tax credits, Kodak's 10 year tax savings will be \$1,664M – 49% of its total available deferred tax assets of \$3,377M. And Kodak will be able to use the remaining 51% during the next five years from 2023 to 2028.

5. The EBT and tax calculation above does not include the significant earnings contribution from the recently announced Uni-Pixel partnership which will more than double New Kodak's EBT and taxes. Therefore, it is very likely that New Kodak including Uni-Pixel partnership will fully use its \$3.4B deferred tax assets to eliminate \$3.4B future taxes during the next 10 years and before 2023.

**6. It is evident that keeping the NOL's benefits all Kodak stakeholders. It will enable New Kodak to avoid \$3.4B in taxes during the next ten years.**

7. In August 2, 2011, Kodak's BOD implemented a poison pill in order to keep its NOL's. This poison pill limited the new ownership of its common shares at 4.9% and placed a 50% limit to increased ownership of its 5%+ shareholders. After the bankruptcy petition on January 19, 2012, Kodak obtained bankruptcy court ruling to extend the poison pill for the trading of its common shares during the bankruptcy in order to preserve its NOL's. Kodak, however, chose not to implement any trading restrictions to its secured and unsecured debt to maintain the debt holders who may be qualified creditors after emergence from bankruptcy with change of ownership.

8. Currently, with the extended poison pill on the trading of common shares, all of Kodak's NOL's are available for future tax reductions of New Kodak provided that Kodak meets all of the IRS rules for keeping NOL's. It is expected that Kodak will have change of ownership after emergence from bankruptcy.

9. If New Kodak has a change of ownership, in order to maintain its NOL's it will have to apply IRC section 382(l)(5) bankruptcy exception rules. If New Kodak meets all of the conditions of these rules, it will be able to use its NOL's without any limitations. And the business of Old Kodak need not be continued insofar as the preservation of the NOLs is concerned.

10. In order to meet the main requirement of IRC section 382(l)(5) Kodak needs to ensure that its pre-change shareholders and qualified creditors (determined immediately before the ownership change) own

at least 50 percent of the value and voting power of New Kodak's stock immediately after the ownership change. Comparing the shareholders before and after the ownership change is fairly straightforward. However, determining just who the "qualified creditors" are is very difficult.

11. To be a qualified creditor, a creditor must meet one of two tests. The creditor must have been a creditor at least 18 months before the date of the filing of the bankruptcy case. Alternatively, the debt must have arisen in the ordinary course of the business of the debtor (trade debt), and be held by the person who at all times held the beneficial interest in that indebtedness. Lenders who may acquire trade debt will not constitute qualified creditors.

12. To determine the qualified creditors Kodak must rely on a statement, signed under penalties of perjury, by beneficial owners of its debt regarding the amount of indebtedness the beneficial owners own and the length of time that the beneficial owners have owned the indebtedness.

13. Treasury Regulations section 1.382-9(d)(1)–(3) may permit Kodak's debt to be treated as having always been owned by the same creditor if, after the ownership change, that creditor is not a 5% shareholder of New Kodak or an entity through which a 5% shareholder has an indirect interest in Old Kodak. However, this provision does not apply to indebtedness beneficially owned by entities whose participation in formulating a plan of reorganization makes evident to Kodak (whether or not Kodak had previous knowledge) that these entities have not owned the Treasury Regulations section 1.382-9(d)(1)–(3) indebtedness for the requisite period of 18 months before the bankruptcy petition date of January, 19, 2012.

14. Kodak already knows the identity of its existing \$375M 2108 and 2109 secured note holders who have participated in formulating its POR and some of its \$683M 2017 and 2013 unsecured note holders. And Kodak already knows that most of these debt holders have not owned the secured and unsecured notes for at least 18 months before January 19, 2012. Therefore, Kodak cannot use Treasury Regulations section 1.382-9(d)(1)–(3) to determine its qualified creditors.

15. Kodak has \$247M 2019 Senior Secured Notes issued on on March 15, 2011. These secured note holders cannot become qualified creditors, because the issue date of the debt is 9 months prior to January 19, 2012 bankruptcy petition date, less than the minimum 18 months requirement.

16. Kodak has \$493M 2018 Senior Secured Note issued on March 5, 2010. The holders of 2018 secured notes are eligible to become qualified creditors if they have owned the debt since July 19, 2010, 18 months prior to the petition date.

17. Currently, only \$375M of 2019 and 2018 secured notes are remaining after the DIP financing in April 2013. Kodak has not reported a percentage breakdown of 2019 and 2018 notes ownership for the remaining \$375M secured notes. However, Kodak knows who these secured note holders are and must ask them to verify their eligibility to be become qualified creditors of New Kodak for NOL purposes. It is evident that much lower than 31% of \$375M secured note holders will be qualified creditors as shown in Exhibit-1, which is prepared using the secured note ownership data published by Akin Gump Strauss Hauer & Feld LLP, the Counsel to the Second Lien Noteholders Committee, first on January 31, 2012 and then on May 10, 2013. These two ownership documents show that even if we assume that on January 31, 2012 secured note holders were qualified creditors who had owned the notes since July 19, 2010, most of them have sold out all or majority of their secured notes since January 31, 2012. And the new owners of the secured notes cannot be qualified creditors, as they have not owned the notes since July 19, 2010. Exhibit-1 below shows that on May 7, 2013, 21 institutions owned \$168.738M 2018 secured notes and \$85.118M 2019 secured notes, \$253.856M in total and 67.7% of the existing \$375M 2018 and 2019 secured notes. Exhibit-1 also shows that only \$53.663M of 2018 secured notes (31.8 % of \$168.738M total) were owned by the original owners on January 31, 2012, and only \$49.353M of 2019 secured notes (58.0 % of \$85.118M total) were owned by the original owners on January 31, 2012. As shown in (15), 2019 secured notes cannot be qualified creditors. Therefore, it is evident that only \$53.663M of 2018 secured notes may be qualified creditors out of the total \$253.856 2108 and 2019 secured notes owned by 21 institutions on May 7, 2013. This is 21.1 % of the total 2018, and 2019 secured notes ownership.

18. Kodak has \$400M 2017 unsecured convertible notes issued on September 23, 2009. The holders of 2017 convertible notes are eligible to become qualified creditors if they have owned the debt since July 19, 2010, 18 months prior to the petition date. The trustee, Bank of America, knows who the convertible note holders are and Kodak must ask these note holders to verify their eligibility to become qualified creditors of New Kodak for NOL purposes. Financial Industry Regulatory Authority (FINRA) reports show that since July 19, 2010 (18 months prior to the Jan 19, 2012 petition date) there were 1980 bond trades of the 2017

unsecured convertible notes with a face value of \$1M or over. Even if we assume that all of these trades were only \$1M trades, this amounts to a trading volume of \$1,980M for the \$400M 2017 convertible notes. It is evident that most of the current holders of these notes will not be qualified creditors. In fact, Exhibit-1 shows that only 20.7% of institutions who held 2017 unsecured convertible notes on January 31, 2012 continued to be holders of these notes on May 7, 2013.

19. Kodak has \$250M 2013 unsecured notes issued on October 10, 2003, and \$33M other 2013, 2018 and 2021 unsecured notes issued at various unreported dates. The holders of these notes are eligible to become qualified creditors if they have owned the debt since July 19, 2010, 18 months prior to the petition date. The trustee, Bank of America, knows who these unsecured note holders are and Kodak must ask these note holders to verify their eligibility to become qualified creditors of New Kodak for NOL purposes. (FINRA) reports show that since July 19, 2010 (18 months prior to the Jan 19, 2012 petition date) there were 775 bond trades of the 2013 unsecured notes with a face value of \$1M or over. Even if we assume that all of these trades were only \$1M trades, this amounts to a trading volume of \$775M for the \$250M 2013 unsecured notes. It is evident that most of the current holders of these notes will not be qualified creditors.

20. The total amount of 2017 unsecured convertible notes, 2013 unsecured notes and other 2013, 2018, and 2021 unsecured notes is \$683M. This is 25.3% of the \$2.7B long term liabilities subject to compromise. It is evident in (18) and (19) that most of these notes will not be qualified creditors. Assuming (optimistically) 40% will qualify, Kodak may get 10% qualified creditors from the \$683M unsecured debt, if they give 100% ownership of New Kodak to the \$2.7B unsecured creditors.

21. Kodak has \$283M trade debt. This is 10.4% of the \$2.7B long term liabilities subject to compromise. Trade debt holders will be qualified creditors for NOL purposes, provided that the trade debt holders held their beneficial interest in that indebtedness at all times and have not sold any of their debt to lenders who will not constitute qualified creditors. Kodak must ask trade debt holders to verify their eligibility to become qualified creditors of New Kodak for NOL purposes. Since January 19, 2013 petition date, more than 50% of \$283M trade debt has been transferred to financial institutions as filed with the bankruptcy court. Assuming that the remaining 50% will qualify, Kodak may get 5.2% qualified creditors from the \$283M trade debt, if they give 100% ownership of New Kodak to the \$2.7B unsecured creditors.

22. In addition to \$683M unsecured notes and \$283M trade debt, Kodak's \$2.7B long term liabilities subject to compromise includes \$785M pension and other post employment obligations, \$710M settlements (including \$650M OPEB) and \$255M other liabilities such as accrued liabilities for customer programs, deferred compensation, environmental, taxes, and contract and lease rejections. None of these creditors will be qualified creditors for NOL purposes.

23. April 30, 2013 POR proposes 85% ownership of New Kodak to \$375M unsecured note holders and 15% ownership to \$2.7B unsecured creditors. If this POR is approved, New Kodak will lose its NOL's and the resulting \$3.4B deferred tax assets, because New Kodak will have 20.2% ownership by qualified creditors, approximately 17.9% coming from \$375M secured note holders and \$50M priority claims and 2.3% coming from \$2.7B long term liabilities subject to compromise.

24. Unsecured creditors may propose that they should be given 100% ownership of New Kodak for the payment of the \$2.7B unsecured liability. However, this reorganization plan will cost New Kodak \$3.4B as it will lose its NOL's and the resulting \$3.4B deferred tax credits. 100% ownership of New Kodak by \$2.7B unsecured credit holders will result in only 15.2% qualified creditor ownership, much less than the 50%+ ownership requirement.

25. There is no combination of \$425M secured note plus priority claim holders and \$2.7B unsecured creditors ownership that will result in 50%+ qualified creditor ownership to satisfy IRS's NOL rules - without any common share ownership. Kodak will lose \$3.4B, the value of its deferred tax credits, if New Kodak has zero ownership by the common shareholders.

**26. In order for Kodak, not to lose its \$3.4B deferred tax assets, New Kodak must have a minimum of 40% ownership by the common shareholders.**

**EXHIBIT - 1**

Data published by											
Akin Gump Strauss Hauer & Feld LLP ounsel to 2nd Lien Noteholders Committee	Debt Holdings on Jan 31, 2012			Debt Holdings on May 7, 2013				Old and Cold Debt			
	Secured	Secured	Unsecured	Secured	Secured	Unsecured	Unsecured	Secured	Secured	Unsecured	
	2018 Notes	2019 Notes	2017 Conv	2018 Notes	2019 Notes	2017 Conv	2013 Notes	2018 Notes	2019 Notes	2017 Conv	
Alden Global	12,000,000	8,000,000	0	0	0	0	0	0	0	0	
Archview L.P.*	10,000,000	20,025,000	0	0	0	0	0	0	0	0	
Avenue Capital	25,000,000	0	0	0	0	0	0	0	0	0	
Barclays	13,500,000	8,000,000	0	-3,572,000	5,252,000	-773,000	-1,565,000	0	5,252,000	0	
Bennett Management Corporation*	20,750,000	0	0	18,000,000	0	0	0	18,000,000	0	0	
Blackstone GSO Capital Partners**	11,000,000	47,500,000	5,000,000	66,300,000	38,100,000	0	0	11,000,000	38,100,000	0	
Brevan Howard	5,000,000	0	0	0	0	0	0	0	0	0	
Capital Ventures International	18,500,000	2,000,000	0	23,451,000	6,477,000	1,000,000	0	18,500,000	2,000,000	0	
Chatham Capital, LLC*	0	0	0	1,969,000	0	0	0	0	0	0	
Contrarian Capital Management, L.L.C.*	0	0	0	4,500,000	5,500,000	0	0	0	0	0	
Credit Suisse*	5,000,000	0	0	0	1,000,000	0	0	0	0	0	
CSS, LLC	0	0	0	3,861,000	1,477,000	0	0	0	0	0	
Deutsche Bank Securities Inc.	6,000,000	5,132,000	0	0	4,000,000	5,000,000	0	0	4,000,000	0	
Fore Research & Management LP	0	0	0	7,000,000	0	0	0	0	0	0	
GoldenTree Asset Management, LP	0	0	0	0	0	0	0	0	0	0	
Greenlight Capital	13,000,000	0	0	0	0	0	0	0	0	0	
J.P. Morgan Securities LLC*	10,000,000	10,000,000	33,000,000	66,000	0	3,616,000	1,575,000	66,000	0	3,616,000	
JP Morgan Investment Management	53,474,000	0	0	0	0	0	0	0	0	0	
Knighthead	1,000,000	0	0	0	0	0	0	0	0	0	
KS Management	2,500,000	0	0	0	0	0	0	0	0	0	
Linden	5,000,000	0	0	0	0	0	0	0	0	0	
Litespeed	0	27,000,000	0	0	0	0	0	0	0	0	
Merrill Lynch, Pierce, Fenner & Smith	0	0	0	8,835,000	-5,373,000	400,000	214,000	0	0	0	
Morgan Stanley	8,800,000	3,500,000	0	0	0	0	0	0	0	0	
Nomura Corporate Research and Asset	0	0	0	1,097,000	0	0	0	0	0	0	
Onex Credit Partners, LLC*	0	0	0	5,907,000	4,344,000	0	0	0	0	0	
RBS Global Banking & Markets*	15,000,000	5,000,000	8,000,000	190,000	0	0	550,000	190,000	0	0	
River Birch Capital	8,500,000	0	0	0	0	0	0	0	0	0	
Serengeti Asset Management LP*	0	0	0	15,092,000	1,000,000	2,450,000	10,000,000	0	0	0	
Silver Point Capital	0	0	0	0	0	5,800,000	0	0	0	0	
Stone Lion Capital Partners L.P.	0	0	0	0	9,988,000	0	0	0	0	0	
Strategic Value Partners, LLC*	0	0	0	9,904,000	7,500,000	0	0	0	0	0	
The D. E. Shaw Group*	48,000,000	2,000,000	0	0	0	0	0	0	0	0	
UBS Securities LLC**	12,000,000	0	0	5,907,000	1,361,000	0	0	5,907,000	0	0	
Visium Asset Management	0	0	0	0	4,000,000	0	0	0	0	0	
Wolverine Asset Management	0	0	0	231,000	492,000	0	0	0	0	0	
<b>Total</b>	<b>304,024,000</b>	<b>138,157,000</b>	<b>46,000,000</b>	<b>168,738,000</b>	<b>85,118,000</b>	<b>17,493,000</b>	<b>10,774,000</b>	<b>53,663,000</b>	<b>49,352,000</b>	<b>3,616,000</b>	
								31.80%	57.98%	20.67%	

## **F. Valuation of Kodak/Uni-Pixel Partnership**

1. Kodak's POR published on April 30, 2013 did not include the projected EBITDA from the Kodak/Uni-Pixel partnership which was made public on April 16, 2013.
2. Kodak/Uni-Pixel partnership is expected to add \$1.314B EBITDA to New Kodak's income during the period from 9/30/2013 to 12/31/2017.
3. EBITDA projections are as follows: \$10M in 2013-Q4, \$181M in 2014, \$261M in 2015, \$364M in 2016 and \$499M in 2017.
4. EBITDA projections are calculated using the information provided by Uni-Pixel senior executives during Uni-Pixel's Q1 2013 Earnings Conference Call on April 30, 2013.
5. The following forecasts in ((7), (8), (9), and (10) are provided by Uni-Pixel's executives and used in the New Kodak's Uni-Pixel partnership EBITDA projections.
6. The base case projections assume that only 50% of the revenue and EBITDA projections resulting from the forecast in (7), (8), (9), and (10) will be attained by New Kodak.
7. Kodak and Uni-Pixel will share revenues of the partnership equally – 50/50.
8. Kodak/Uni-Pixel will have 700K sq ft per month production capacity in 9/30/2013. This will increase to 1.3M sq ft per month in 1/01/2014, and to 10M sq ft per month in 12/31/2014.
9. Kodak/Uni-Pixel's current price for 1 sq ft touch screen product is \$20. This is 20-35% lower than the competition, and they expect this price will be stable in the future.
10. Kodak/Uni-Pixel expects to capture 10% of the \$16B touch sensor market by the end of 2014.
11. The following assumptions in (12), (13) and (14) are provided by financial analysts and are used in the New Kodak's Uni-Pixel partnership EBITDA projections.
12. The EBITDA contribution from Kodak/Uni-Pixel product revenues will be 50%-60%. The EBITDA projections in (2) and (3) use 50% EBITDA contribution.
13. The touch sensor market is expected to grow 20% per year, from \$16B in 2013 to \$27.6B in 2017.
14. Kodak/Uni-Pixel market share of the touch sensor market is expected to grow from 10% in 2014 to 16% in 2017.

## **G. Valuation Of Post-Emergence Kodak (New Kodak)**

The Plan of Reorganization (POR) Disclosure Document published on April 30, 2013 does not have a proper and acceptable security valuation of New Kodak. The 2013 book value of \$441M grossly underestimates the true value of New Kodak. It does not take into account the future cash flows, the growth rate of these cash flows, Kodak's \$7.5B patent assets and the \$3.4B deferred tax assets that New Kodak will fully utilize.

Kodak POR provides a four year earnings and cash flow projections of New Kodak. It is essential for any proper security valuation to have at least full five years of earnings and cash flow projections. In addition, Kodak did not include revenues, earnings and cash flows of Kodak/Uni-Pixel touch screen joint venture in the April 30, 2013 POR. This partnership will provide significantly large and fast growing revenues, earnings and cash flows to New Kodak.

For the above reasons, Kodak's April 30, 2013 POR is grossly inadequate, wrong and needs to be modified.

New Kodak is a very profitable and fast growing company. It will generate sufficient cash flows to pay all secured and unsecured creditors what Kodak currently owes with interest within the next five to six years.

The earnings before interest expense, taxes and depreciation and amortization (EBITDA) projections below clearly confirms this. April 30, 2013 POR does not include EBITDA projections for 2018. 2018 EBITDA projection is added using the revenue and cost trends in Kodak's projections.

New Kodak will be able to use its \$3.4B deferred tax assets in full during the next 5-10 years to minimize its taxes. So, almost all of the EBITDA will be available for payment of its debts with interest.

**1. April 30, 2013 POR EBITDA projections** – 2014-2018 EBITDA = \$2.023B, 2014 EBITDA=\$199M, 2015 EBITDA=\$282M, 2016 EBITDA= \$360M, 2017 EBITDA= \$494M, 2018 EBITDA=\$649M. 5 year average EBITDA = \$405M.

**New Kodak value** - 5\*5 year average EBITDA = **\$2B**, 10\*5 year average EBITDA= **\$4B**, 15\*5 year average EBITDA= **\$6.1B**.

**New Kodak value** - 5 year (2014-2018) DCF with 15% discount rate, 4% long term growth rate = **\$2.7B**. 5 year (2014-2018) DCF with 10% discount rate, 4% long term growth rate = **\$5.7B**. 10 year (2014-2023) DCF with 15% discount rate, 4% long term growth rate, and 20% EBITDA growth during 2018-2023 = **\$3.8B**. 10 year (2014-2023) DCF with 10% discount rate, 4% long term growth rate, and 20% EBITDA and Capex growth rates during 2018-2023 = **\$8.1B**

**2. April 30, 2013 POR EBITDA projections plus conservative Kodak/Uni-Pixel partnership EBITDA** – 2014-2018 EBITDA = \$3.014B, 2014 EBITDA=\$288M, 2015 EBITDA=\$412M, 2016 EBITDA= \$542M, 2017 EBITDA= \$744M, 2018 EBITDA=\$986M. 5 year average EBITDA = \$603M.

**New Kodak value** - 5\*5 year average EBITDA = **\$3B**, 10\*5 year average EBITDA= **\$6B**, 15\*5 year average EBITDA= **\$9B**.

**New Kodak value** - 5 year (2014-2018) DCF with 15% discount rate, 4% long term growth rate = **\$4B**. 5 year (2014-2018) DCF with 10% discount rate, 4% long term growth rate = **\$8.3B**. 10 year (2014-2023) DCF with 15% discount rate, 4% long term growth rate, and 20% EBITDA growth during 2018-2023 = **\$5.6B**. 10 year (2014-2023) DCF with 10% discount rate, 4% long term growth rate, and 20% EBITDA and Capex growth rates during 2018-2023 = **\$11.6B**

**3. April 30, 2013 POR EBITDA projections plus base case Kodak/Uni-Pixel partnership EBITDA** – 2014-2018 EBITDA = \$4.011B, 2014 EBITDA=\$379M, 2015 EBITDA=\$543M, 2016 EBITDA= \$724M, 2017 EBITDA= \$993M, 2018 EBITDA=\$1,323M. 5 year average EBITDA = \$802M.

**New Kodak value** - 5\*5 year average EBITDA = **\$4B**, 10\*5 year average EBITDA= **\$8B**, 15\*5 year average EBITDA= **\$12B**

**New Kodak value** - 5 year (2014-2018) DCF with 15% discount rate, 4% long term growth rate = **\$5.3B**. 5 year (2014-2018) DCF with 10% discount rate, 4% long term growth rate = **\$10.9B**. 10 year (2014-2023) DCF with 15% discount rate, 4% long term growth rate, and 20% EBITDA growth during 2018-2023 = **\$7.3B**. 10 year (2014-2023) DCF with 10% discount rate, 4% long term growth rate, and 20% EBITDA and Capex growth rates during 2018-2023 = **\$15.2B**.

**4. April 30, 2013 POR EBITDA projections plus optimistic Kodak/Uni-Pixel partnership EBITDA** – 2014-2018 EBITDA = \$5.998B, 2014 EBITDA=\$559M, 2015 EBITDA=\$803M, 2016 EBITDA= \$1,088M, 2017 EBITDA= \$1,492M, 2018 EBITDA=\$1,996M. 5 year average EBITDA = \$1,200M.

**New Kodak value** - 5\*5 year average EBITDA = **\$6B**, 10\*5 year average EBITDA= **\$12B**, 15\*5 year average EBITDA= **\$18B**.

**New Kodak value** - 5 year (2014-2018) DCF with 15% discount rate, 4% long term growth rate = **\$7.9B**. 5 year (2014-2018) DCF with 10% discount rate, 4% long term growth rate = **\$16B**. 10 year (2014-2023) DCF with 15% discount rate, 4% long term growth rate, and 20% EBITDA growth during 2018-2023 = **\$10.8B**. 10 year (2014-2023) DCF with 10% discount rate, 4% long term growth rate, and 20% EBITDA and Capex growth rates during 2018-2023 = **\$22.2**.

#### **Kodak/Uni-Pixel EBITDA Contribution Scenario Assumptions:**

**Conservative Kodak/Uni-Pixel partnership EBITDA contribution** – 25% of the revenue projections provided in Uni-Pixel's Q1 2013 Earnings Conference Call on April 30, 2013.

**Base Case Kodak/Uni-Pixel partnership EBITDA contribution** – 50% of the revenue projections provided in Uni-Pixel’s Q1 2013 Earnings Conference Call on April 30, 2013.

**Optimistic Kodak/Uni-Pixel partnership EBITDA contribution** – 100% of the revenue projections provided in Uni-Pixel’s Q1 2013 Earnings Conference Call on April 30, 2013

## H. Kodak’s Valuation EBITDA Projections from 2014 to 2018

EASTMAN KODAK COMPANY  
PROJECTED CONSOLIDATED STATEMENT OF OPERATIONS  
(in millions)

KODAK EBITDA PROJECTIONS EXCLUDING KODAK/UNI-PIXEL EBITDA FORECAST

(Prepared by Kodak Shareholders on May 6, 2013)

	KODAK EBITDA PROJECTIONS EXCLUDING KODAK/UNI-PIXEL EBITDA FORECAST					
	For the Quarter Ended 12/31/2013	2014	2015	2016	2017	2018
Total net sales	681	2,573	2,713	2,923	3,203	3,510
Total cost of sales	552	2,033	2,085	2,186	2,305	2,430
Gross profit	129	540	628	737	898	1,080
Selling, general and administrative expenses (BU-specific)	67	244	249	257	270	284
Selling, general and administrative expenses (general corporate)	39	134	121	121	132	144
Research and development costs (BU-specific)	16	75	79	78	83	88
Research and development costs (general corporate)	7	28	29	31	33	35
Operational EBIT	0	59	150	250	380	529
Restructuring costs and other	9	25	15	15	10	7
Non-operational pension (income) cost	1	3	3	3	3	3
Other operating (income) expenses, net	2	0	0	0	0	0
Income (loss) from continuing operations before interest expense, other income (charges), net, reorganization items, net and income taxes	-12	31	132	232	367	519
Interest expense	26	104	106	109	109	0
Reorganization items, net	14	4	0	0	0	0
Other (income) charges	-1	-4	-5	-6	-7	-8
Income (loss) from continuing operations before income taxes	-51	-73	31	129	265	527
(Benefit) provision for income taxes	7	26	27	29	32	35
NET INCOME (LOSS) ATTRIBUTABLE TO EKC	-58	-99	4	100	233	492
Operational EBIT	0	59	150	250	380	529
Depreciation & Amortization	39	140	132	111	113	115
Operational EBITDA	39	199	282	361	493	644
Free Cash Flow (EBITDA minus interest expense, taxes and capex)	17	23	84	172	328	569
Incremental net sales of Kodak/Uni-Pixel	0	0	0	0	0	0
Total cost of sales of Kodak/Uni-Pixel	0	0	0	0	0	0
Gross profit of Kodak/Uni-Pixel	0	0	0	0	0	0
Kodak/Uni-Pixel Capital Expenditures (30% of Profits)	0	0	0	0	0	0

EASTMAN KODAK COMPANY  
PROJECTED CONSOLIDATED STATEMENT OF OPERATIONS  
(in millions)

KODAKEBITDA PROJECTIONS WITH CONSERVATIVEKODAK/UNI-PIXEL EBITDA FORECAST

(Prepared by Kodak Shareholders on May 6, 2013)

	For the		For the Year Ended December 31,			
	Quarter Ended 12/31/2013	2014	2015	2016	2017	2018
Total net sales	691	2,754	2,974	3,287	3,702	4,184
Total cost of sales	557	2,123	2,215	2,368	2,555	2,767
Gross profit	134	630	758	919	1,148	1,417
Selling, general and administrative expenses (BU-specific)	67	244	249	257	270	284
Selling, general and administrative expenses (general corporate)	39	134	121	121	132	144
Research and development costs (BU-specific)	16	75	79	78	83	88
Research and development costs (general corporate)	7	28	29	31	33	35
Operational EBIT	5	149	280	432	630	866
Restructuring costs and other	9	25	15	15	10	7
Non-operational pension (income) cost	1	3	3	3	3	3
Other operating (income) expenses, net	2	0	0	0	0	0
Income (loss) from continuing operations before interest expense, other income (charges), net, reorganization items, net and income taxes	-7	121	262	414	617	856
Interest expense	26	104	106	109	109	0
Reorganization items, net	14	4	0	0	0	0
Other (income) charges	-1	-4	-5	-6	-7	-8
Income (loss) from continuing operations before income taxes	-46	17	161	311	515	864
(Benefit) provision for income taxes	7	26	27	29	32	35
NET INCOME (LOSS) ATTRIBUTABLE TO EKC	-53	-9	134	282	483	829
Operational EBIT	5	149	280	432	630	866
Depreciation & Amortization	39	140	132	111	113	115
Operational EBITDA	44	289	412	543	743	981
Free Cash Flow (EBITDA minus interest expense, taxes and capex)	22	86	175	299	503	805
Incremental net sales of Kodak/Uni-Pixel	10	181	261	364	499	674
Total cost of sales of Kodak/Uni-Pixel	5	90	130	182	250	337
Gross profit of Kodak/Uni-Pixel	5	90	130	182	250	337
Kodak/Uni-Pixel Capital Expenditures (30% of Profits)	12	27	39	55	75	101

EASTMAN KODAK COMPANY  
PROJECTED CONSOLIDATED STATEMENT OF OPERATIONS  
(in millions)

KODAK EBITDA PROJECTIONS WITH BASE CASE KODAK/UNI-PIXEL EBITDA FORECAST

(Prepared by Kodak Shareholders on May 6, 2013)

	For the		For the Year Ended December 31,			
	Quarter Ended 12/31/2013	2014	2015	2016	2017	2018
Total net sales	701	2,934	3,234	3,651	4,201	4,857
Total cost of sales	562	2,214	2,346	2,550	2,804	3,104
Gross profit	139	721	889	1,101	1,397	1,754
Selling, general and administrative expenses (BU-specific)	67	244	249	257	270	284
Selling, general and administrative expenses (general corporate)	39	134	121	121	132	144
Research and development costs (BU-specific)	16	75	79	78	83	88
Research and development costs (general corporate)	7	28	29	31	33	35
Operational EBIT	10	240	411	614	879	1,202
Restructuring costs and other	9	25	15	15	10	7
Non-operational pension (income) cost	1	3	3	3	3	3
Other operating (income) expenses, net	2	0	0	0	0	0
Income (loss) from continuing operations before interest expense, other income (charges), net, reorganization items, net and income taxes	-2	212	393	596	866	1,193
Interest expense	26	104	106	109	109	0
Reorganization items, net	14	4	0	0	0	0
Other (income) charges	-1	-4	-5	-6	-7	-8
Income (loss) from continuing operations before income taxes	-41	108	292	493	764	1,201
(Benefit) provision for income taxes	7	26	27	29	32	35
NET INCOME (LOSS) ATTRIBUTABLE TO EKC	-48	82	265	464	732	1,165
Operational EBIT	10	240	411	614	879	1,202
Depreciation & Amortization	39	140	132	111	113	115
Operational EBITDA	49	380	543	725	992	1,317
Free Cash Flow (EBITDA minus interest expense, taxes and capex)	27	149	266	427	677	1,040
Incremental net sales of Kodak/Uni-Pixel	20	361	521	728	998	1,347
Total cost of sales of Kodak/Uni-Pixel	10	181	261	364	499	674
Gross profit of Kodak/Uni-Pixel	10	181	261	364	499	674
Kodak/Uni-Pixel Capital Expenditures (30% of Profits)	12	54	78	109	150	202

EASTMAN KODAK COMPANY  
PROJECTED CONSOLIDATED STATEMENT OF OPERATIONS  
(in millions)

KODAKEBITDA PROJECTIONS WITH OPTIMISTIC KODAK/UNI-PIXEL EBITDA FORECAST

(Prepared by Kodak Shareholders on May 6, 2013)

	For the		For the Year Ended December 31,			
	Quarter Ended 12/31/2013	2014	2015	2016	2017	2018
Total net sales	721	3,295	3,755	4,379	5,199	6,204
Total cost of sales	572	2,394	2,606	2,914	3,303	3,777
Gross profit	149	901	1,149	1,465	1,896	2,427
Selling, general and administrative expenses (BU-specific)	67	244	249	257	270	284
Selling, general and administrative expenses (general corporate)	39	134	121	121	132	144
Research and development costs (BU-specific)	16	75	79	78	83	88
Research and development costs (general corporate)	7	28	29	31	33	35
Operational EBIT	20	420	671	978	1,378	1,876
Restructuring costs and other	9	25	15	15	10	7
Non-operational pension (income) cost	1	3	3	3	3	3
Other operating (income) expenses, net	2	0	0	0	0	0
Income (loss) from continuing operations before interest expense, other income (charges), net, reorganization items, net and income taxes	8	392	653	960	1,365	1,866
Interest expense	26	104	106	109	109	0
Reorganization items, net	14	4	0	0	0	0
Other (income) charges	-1	-4	-5	-6	-7	-8
Income (loss) from continuing operations before income taxes	-31	288	552	857	1,263	1,874
(Benefit) provision for income taxes	7	26	27	29	32	35
NET INCOME (LOSS) ATTRIBUTABLE TO EKC	-38	262	525	828	1,231	1,839
Operational EBIT	20	420	671	978	1,378	1,876
Depreciation & Amortization	39	140	132	111	113	115
Operational EBITDA	59	560	803	1,089	1,491	1,991
Free Cash Flow (EBITDA minus interest expense, taxes and capex)	37	276	449	682	1,027	1,512
Incremental net sales of Kodak/Uni-Pixel	40	722	1,042	1,456	1,996	2,694
Total cost of sales of Kodak/Uni-Pixel	20	361	521	728	998	1,347
Gross profit of Kodak/Uni-Pixel	20	361	521	728	998	1,347
Kodak/Uni-Pixel Capital Expenditures (30% of Profits)	12	108	156	218	299	404



**U.S. Department of Justice**

Office of the United States Trustee  
*Southern District of New York*

33 Whitehall Street  
21<sup>st</sup> Floor  
New York, New York 10004

(212) 510-0500  
Fax: (212) 668-2255

June 4, 2013

VIA E-MAIL

Ahsan Zia  
ahsanzia2010@gmail.com

Re: **In re Eastman Kodak Company et al., Case No. 12-10202 (ALG)**

Dear Ahsan Zia:

The Office of the United States Trustee is in receipt of your request for the appointment of an official committee of equity security holders (“Equity Committee”) in the above-referenced cases. This Office has also received the (i) Letters dated February 6, 2013, February 17, 2013, and May 28, 2013 from Sullivan & Cromwell LLP on behalf of the Debtors; and (ii) Letters dated February 6, 2013, May 8, 2013, and May 29, 2013 from Milbank, Tweed, Hadley & McCloy LLP on behalf of the Official Committee of Unsecured Creditors. Based upon this Office’s analysis and careful review of the foregoing communications, the United States Trustee declines to form an Equity Committee at this time.

Very Truly Yours,

TRACY HOPE DAVIS  
UNITED STATES TRUSTEE

By: /s/ Linda A. Riffkin  
Linda A. Riffkin  
Assistant United States Trustee

cc: Michael H. Torkin, Esq., Counsel to the Debtors (via e-mail)  
Tyson M. Lomazow, Esq., Counsel to the Official Committee of Unsecured Creditors (via e-mail)

### **Equity Committees: A Consequence of the "Zone of Insolvency"**

Written by: [Neil B. Glassman](#), [Jeffrey M. Schlerf](#), Christopher A. Ward

A good deal has been written lately regarding directors and officers and their fiduciary duties when a company enters the "zone of insolvency". Chancellor Allen's footnote in *Credit Lyonnais Bank Nederland N.V. v. Pathe Communications*, 1991 WL 277613 (Del. Ch. 1991), heightened awareness that directors owe all creditors a fiduciary duty under that scenario, yet what has not been discussed is equity's need for representation after a company enters the "zone of insolvency." There has been a surprising number of official committee of equity security-holders appointed in recent years.<sup>1</sup> This phenomenon may be attributed, at least in part, to *Credit Lyonnais* and the subsequent decisions.

By definition, the board of directors is a warrior for shareholders. However, since *Credit Lyonnais*, once a board determines that the company may not be able to pay its debts as they come due, the board ceases being a warrior for the shareholders and becomes a watchdog for all creditors. At this moment shareholders lose their favored position in the corporate structure. For all intents and purposes, any lingering concerns of shareholders can be easily forgotten if the board elects to file for protection under chapter 11. The Bankruptcy Code has built-in protections for secured and unsecured creditors, and these creditors are actively represented in a bankruptcy case. However, prior to *Credit Lyonnais*, shareholders were typically left out of the equation. The creation of a quasifiduciary duty to all creditors in the "zone of insolvency" left shareholders in the precarious position of not being zealously represented upon the filing of a bankruptcy petition. As a result, official equity committees can become the warrior the board once was. Since in many bankruptcy cases the interests of shareholders run contrary to those of other creditors, inevitably there will be disagreements regarding valuations of a company's assets and its chances of survival. The appointment of an equity committee certainly changes the dynamics of these struggles.

#### **Process for Appointment of Equity Committee**

A shareholder's first step in requesting the appointment of an official equity committee is sending a letter to the Office of the U.S. Trustee petitioning the Trustee to solicit interest among shareholders to serve on an official equity committee. "Ad hoc" or informal committees often will already have been formed before such a request, so that equity's concerns may have already been brought to the attention of management or debtor's counsel (usually with less-than-satisfactory results). These committees consist of shareholders who are knowledgeable about the company's condition and, typically, disenchanted with the attention given to their interests or management's general intentions regarding equity. These informal committees invariably are represented by counsel.

Time is not necessarily on the share-holder's side when seeking the appointment of an official equity committee. One impediment in the process will be a cool reception or even opposition by the debtor. One way to expedite the process is to seek support from counsel to the Securities & Exchange Commission (SEC). With SEC support of an official equity committee, the U.S. Trustee may be more receptive to the idea. Otherwise, filing a motion with the court may be the only other option in a fastmoving case.

#### **Applicable Legal Standard**

Under §1102(a)(2) of the Code, upon request of a party in interest, the court may order the appointment of a committee of equity security-holders if necessary to assure "adequate

representation” of equity securityholders. 11 U.S.C. §1102. Section 1102 does not define what constitutes “adequate representation.”

To make that determination, courts have considered the following factors: (1) the number of shareholders, (2) the complexity of the case, (3) the solvency of the debtor, (4) whether the cost to the estate outweighs the adequate representation interest of shareholders and (5) whether the interests of shareholders are already represented. *In re Exide*, 2002 U.S. Dist. LEXIS 27210 (D. Del. 2002). No one factor is dispositive, and the relative weight that should be afforded to the various factors depends on the circumstances of the particular reorganization case. *In re Kalvar Microfilm Inc.*, 195 B.R. 599, 600 (Bankr. D. Del. 1996).

### **Not Hopelessly Insolvent**

In considering the solvency issue, the most frequently applied legal standard is whether the debtors are “hopelessly insolvent.” *In re Exide* at \*4 (determining that appointment of an official committee of equity security-holders was necessary to assure adequate representation where the debtor was not hopelessly insolvent).

It is not a question of whether recovery to the debtors’ shareholders is guaranteed. *Id.* Economic indicators must demonstrate that there is value for shareholders and that those shareholders are not necessarily “out of the money.” *In re Mansfield Ferrous Castings Inc.*, 96 B.R. 779, 781 (Bankr. N.D. Ohio 1988) (rejecting insolvency as barring appointment of an equity committee and stating that the court will be guided by all the facts and not just the issue of solvency). Where the debtor is even marginally solvent, shareholders have a meaningful interest in the outcome of the case and should have the benefit of an equity committee representing their interests, regardless of the cost. *In re Wang Laboratories Inc.*, 149 B.R. 1, 3. This can be established through various means, including the volume of shares trading postpetition (in the bankruptcy context, this will most likely be in over-the-counter trading or on “pink slips”), the post-petition volatility in share price or through the market capitalization of the debtors. The more difficult arguments to allege are that substantial room for improvement exists with respect to the debtors’ business operations, or that regardless of the fact that unsecured creditors are not being paid in full, a restructuring will provide a more viable deleveraged company that may in the future provide value to equity.

### **Substantial Likelihood of Recovery**

Opponents of equity committees seek application of a higher standard than “not hopelessly insolvent,” as advocated in *In re Williams Communications Group Inc.*, 281 B.R. 216 (Bankr. S.D.N.Y. 2002). This standard requires that there is a substantial likelihood that shareholders will receive a meaningful distribution in the chapter 11 case under a strict application of the absolute priority rule. The “substantial likelihood” standard established in *Williams* does not appear to be supported by prior case law. In fact, since the *Williams Communication* ruling in 2002, courts have been reluctant to apply the “substantial likelihood” standard. *In re Northwestern Corp.*, 2004 WL 1077913, \*2 (Bankr. D. Del. May 13, 2004).

The party seeking the formation of an official equity committee will no doubt assert that the court should not impose the “substantial likelihood of a meaningful distribution” standard on shareholders as a condition to official recognition. If this were the standard, then it would require the U.S. Trustee (or the court) to rely on a valuation of the debtors in every case prior to exercising their discretion under §1102 to appoint an official equity committee. In most chapter 11 cases, there is some uncertainty surrounding the debtors’ performance and financial

information. Thus, equity-holders would have to put forth a valuation case, at their own expense, relying on questionable information that they have limited access to in order to persuade the U.S. Trustee and/or the court that the debtors' enterprise value exceeds the total amount of potential claims against the estates. This would unfairly alter shareholders from having their voice heard in already tenuous negotiations with the core constituencies in the case.

The more prevalent view is that when equity is marginally in the money, shareholders need an equity committee. While there may be substantial debt in a given chapter 11 case, expert financial testimony can show equity is substantially "in the money," even if only \$1-2 per share. For example, in the recent *Trump Hotels and Casino* case, there was approximately \$2 billion in debt, and approximately 30 million shares of common stock equivalents. The equity committee increased the recovery for shareholders from virtually nothing to a cash distribution of approximately \$40 million in addition to warrants (or \$2-3 per share). This return turned out to be inconsequential to the bondholders, who received most of the reorganized equity. One may ask what motivation do directors have to fight for such "scraps" in the absence of official representation of equity-holders?

### **Shareholders Interests Are Not Adequately Represented**

Shareholders seeking the appointment of an equity committee must also demonstrate that their interests will not be adequately protected by any other party. As a starting point, most constituencies in a chapter 11 case have divergent interests. The post-petition lender is out to assure that its post-petition financing is repaid. The creditors' committee wants assurance that unsecured creditors are, at a minimum, being made whole prior to any distribution to equity. These considerations, in turn, are the focus of the bankrupt debtor—before much attention is given to equity.

The legislative history of §1102 confirms that the purpose of an equity committee is to "counteract the natural tendency of a debtor in distress to pacify large creditors, with whom the debtor would expect to do business at the expense of small and scattered public investors." S.Rep.No. 989, 95th Cong., 2d Sess. 10 (1978). The other creditor constituencies that are represented in the chapter 11 case have their own interests to protect and cannot reasonably be expected to protect the interests of shareholders. Under the proper circumstances, the appointment of an official equity committee may be the only way to ensure the fairness of the process and provide adequate representation to equity.

### **Cases Are Clearly Large and Complex**

For the most part, debtors will have difficulty arguing that their cases are not large and complex. In most instances, one need go no further than the affidavit in support of the "first-day pleadings" where debtors routinely argue that their cases are large and complex and therefore must be jointly administered. The size and complexity of a debtor's case can further be highlighted by considering their corporate structure and workforce. Another avenue to support this position would be to review the amount of professionals retained in the case, as well as the applications to retain such professionals, as most will include resounding admissions regarding the intricacies of the debtor's cases and the need for seasoned professionals.

### **No Undue Delay or Burden to the Debtors' Estates**

The fundamental purpose of §1102(a)(2) is to provide a level playing field for public shareholders, but there will obviously be some costs and concomitant delay. However, the additional cost must be weighed against the need for adequate representation of shareholders.

*Wang Laboratories*, 149 B.R. 4. The oversight of professional fees already provided by the U.S. Trustee and the court operates as a check against any official committee undertaking unreasonable activities. “The potential added cost is not sufficient in itself to deprive the creditors of the formation of an additional committee if one is otherwise appropriate.” *In re Interco Inc.*, 141 B.R. 422, 424 (Bankr. E.D. Mo. 1992). *See, also, In re McLean Indus. Inc.*, 70 B.R. 852, 860 (Bankr. S.D.N.Y. 1987) (“costs alone cannot, and should not, deprive public debt and security-holders of representation”). Allowing the board to once again hear from shareholders should not always be considered a negative consequence; rather, the board should realize that it will be fulfilling its duty to *all* creditors, which should be a fair and equitable plan that treats *all* parties fairly.

### **Actions the Equity Committee Can Undertake**

The most compelling argument in support of the formation of an official equity committee is that it will provide an oversight to the chapter 11 process that is not already in place. Illustrations of what activities an official equity committee can undertake to add this value include:

1. Analyze the debtors’ business plan, which will likely form the basis of the debtors’ ultimate restructuring strategy (be it a stand-alone reorganization plan, going-concern sale or otherwise);
2. Work with the other constituencies and their professionals to provide a determination, valuation and accounting—for the benefit of all creditors and equityholders—of the debtors’ assets and liabilities, the extent to which the debtors’ equity-holders are “in the money,” the debtors’ ability to confirm a feasible plan and the treatment of equity-holders through any such plan;
3. Analyze and/or seek approval to commence potential causes of action against insiders and/or the current or former directors or any other possible breaches of fiduciary duty;
4. Analyze whether the debtors’ estates have any other claims or causes of action including, but not limited to, causes of action under chapter 5 of the Code;
5. Analyze whether any of the debtors should proceed under a distinct and separate reorganization plan, or if consolidation (substantive or otherwise) of two or more of the debtors is appropriate;
6. Analyze whether insider shareholders should be afforded separate voting classes and treatment through any reorganization plan;
7. Analyze whether there has been any mismanagement, self-dealing or other improprieties in the debtors’ operations; and
8. Perform such other and further analyses as is deemed necessary and proper after notice and opportunity of interested parties to be heard.

### **Conclusion**

The appointment of an official equity committee will mean shareholders receive a greater voice in a chapter 11 case where equity may be “in the money.” More than anything, delay can negatively affect a request for the appointment of an official equity committee as the passage of time will render the equity’s voice silent and allow the debtor to gain momentum. If a request for the solicitation of an equity committee goes unanswered by the U.S. Trustee, an informal committee must be prepared to attack in order to salvage equity’s voice in the chapter 11 process. Shareholders and professionals must move quickly and convincingly in order to succeed.

*Reprinted with permission from the ABI Journal, Vol. XXIV, No. 10, December/January 2006.*

*The American Bankruptcy Institute is a multi-disciplinary, non-partisan organization devoted to bankruptcy issues. ABI has more than 11,000 members representing all facets of the insolvency field. For more information, visit ABI World at [www.abiworld.org](http://www.abiworld.org).*

**1:** Equity committees have been appointed in at least 30 cases in 12 separate jurisdictions across the nation since 2000. Some examples include: USG Corp. (01-2094 D. Del.); Loral Space & Communications Ltd. (03-41710 S.D.N.Y.); THCR/LP Corp. (Trump Hotels & Casinos) (04-46898 D. N.J.); Interstate Bakeries Corp. (0445814 W.D. Mo.); Intermet Corp. (04-67597 E.D. Mich.); Bush Industries (04-12295 W.D.N.Y.); Footstar (04-22350 S.D.N.Y.); Gadzooks (04-31806 N.D. Texas); Seitel (03-12227 D. Del.); Mirant Corp. (03-46590 N.D. Texas); Impath (03-16113 S.D.N.Y.); Solutia (03-17949 S.D.N.Y.); Peregrine Systems Inc. (02-12740 D. Del.); Cone Mills (03-12944 D. Del.); Exide Technologies (02-11125 D. Del.); MSCP Holdings Inc. (02-10253 D. Del.); Kmart Corp. (0202474 N.D. Ill.); Adelpia Communications Corp. (02-41729 S.D.N.Y.); Pathmark Stores Inc. (02-2963 D. Del.); Federal Mogul Corp. (01-10578, D. Del.); W.R. Grace (01-01139 D. Del.); Quintus Corp. (01-501 D. Del.); Imperial Distributing (01-00140 D. Del.); Amresco Inc. (01-35327 N.D. Texas); Finova Corp. (01-00697 D. Del.); Comdisco (01-24795 N.D. Ill.); Heilig-Meyers (00- 34533 E.D. Va.); Coram Healthcare Corp. (00-03299 D. Del.); Stone & Webster Inc. (00-2142, D. Del.); and LTV Steel Co. (00-43866 N.D. Ohio). Equity Committees were also appointed in at least the following cases across the nation prior to 2000: American Banknote (S.D.N.Y.); Harnischfeger Industries (D. Del.); Continental Airlines Holdings Inc. (D. Del.); El Paso Electric Co. (N.D. Texas); America West Airlines (D. Ariz.); Roses Stores Inc. (D. N.C.); Sizzler International (C.D. Calif.); Caldor Corp. (S.D.N.Y.); Leslie Fay Cos. (S.D.N.Y.); JohnsManville (S.D.N.Y.); Wang Laboratories (D. Mass.); Beker Industries (S.D.N.Y.); Evans Products (S.D. Fla.); and Columbia Gas (D. Del.). In addition, the appointment of an equity committee was sought, but not obtained, in several other cases. See, e.g., GB Holdings Inc. (0543736 D.N.J.); Ultimate Electronics (05-10104 D. Del.); Touch America (03-11195 D. Del.); Resorts International Inc. (94-259 D. N.J.); Edisto Resources Corp. (92-1345 D. Del.).

## US CORNER

# The New Wave of Equity Committees in Bankruptcy: What Are They and Are They Here to Stay?

Bob Rajan, Director, PricewaterhouseCoopers Corporate Advisory and Restructuring LLC, New York, US and  
Brett Harrison, Partner, McMillan Binch Mendelsohn LLP, Toronto, Canada

### Introduction

In recent months, several high-profile bankruptcy cases have involved the appointment of a formal equity committee. Historically very rare, the formation of an ad hoc and/or appointment of a formal equity committee appears to have recently taken the US bankruptcy world by storm and will likely impact how future restructurings are handled.

Since 2000, equity committees have formally been appointed in several US bankruptcies, including Mirant Corporation, Loral Space & Communications Limited, Trump Hotels and Casinos, Kmart Corp., USG Corp., Interstate Bakeries Corporation, Calpine Corporation, Oneida Ltd., OCA, Inc., Dana Corporation and Delphi Corp. The formation of these equity committees has acted and may continue to act as an obstacle in any consensual restructuring plan developed by a debtor for itself and its creditors.

Generally speaking, Chapter 11 is a mechanism whereby an overleveraged debtor will utilise the US Bankruptcy Code (the 'Code') to settle or compromise its debts and emerge stronger as a healthier and hopefully viable entity. Chapter 11 allows a debtor-in-possession to obtain relief from its creditors, negotiate its past due obligations, typically in the form of cash and/or future equity of the reorganised debtor, and rehabilitate itself. Consequently, if bankruptcy is a tool that creditors use to protect their interests, should shareholders, who typically receive nothing in a restructuring, have similar rights in these proceedings?

### The reason and rationale for equity committees

It is well established that the board of directors of a solvent corporation has a fiduciary duty to its share-

holders. However, when a company enters the 'zone of insolvency', it is primarily due to the fact that a company may not be able to pay its debts as they become due and accordingly, the fiduciary duty now extends to its creditors. Pursuant to the absolute priority rule in the Code, shareholders are forced to the bottom of the hierarchy and in most cases are forgotten in the process. Since the end game is for all stakeholders to obtain some value of the reorganised entity, the introduction of an equity committee has the potential to promote conflicts regarding the valuation of an enterprise and its future ownership structure. Many shareholders use this conflicting fiduciary duty of when a solvent corporation enters the zone of insolvency and the resulting change of fiduciary duty, as its first and foremost basis for the immediate appointment of an equity committee. Equity participants believe that their interests are not adequately protected upon insolvency and therefore feel it necessary to have a formal seat at the negotiating table.

Notwithstanding the above reasoning, it is unclear and somewhat confusing why equity committees were appointed in certain cases and not in others. For example, the US Bankruptcy Court declined the formation of equity committees in such mega-cases as WorldCom Inc., Enron Corp., Global Crossing Ltd., UAL Corporation and Lernout & Hauspie Speech Products N.V. Whilst it goes without saying that the appointment of formal equity committees include costs that will be borne by the debtor and, if the equity ultimately receives no distribution, by the creditors, some professionals argue that the majority of distressed equity players are large institutions and/or distressed funds who can afford their own advice and, for that reason, their associated professional fees should not be charged to the bankrupt estate at all.

### Notes

\* Bob Rajan is a Director with PricewaterhouseCoopers Corporate Advisory and Restructuring LLC in New York and advises debtors in both Chapter 11 and out-of-court cross-border restructurings. Brett Harrison is a partner with McMillan Binch Mendelsohn LLP based in Toronto who advises clients on various restructuring and cross-border issues.

Bob Rajan and Brett Harrison

Regardless, the Code does provide for such a committee and it is very typical these days, in fact, for equity committees hoping to be formally appointed to seek backing from the Securities and Exchange Commission ('SEC'). As prescribed in section 1102(a)(1) of the Code, the Court may order the appointment of such a committee:

Except as provided in paragraph 3, as soon as practicable after the order for relief under chapter 11 under this title, the United States Trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders as the United States Trustee deems appropriate.

Section 1102(a)(2) goes on to state:

On request of a party in interest, the court may order the appointment of additional committees of creditors or of equity security holders if necessary to assure adequate representation of creditors or of equity security holders. The United States trustee shall appoint any such committee.

Unfortunately, the Code does not define or provide any assurance of 'adequate representation' and this is more or less determined on a case-by-case basis. Historically, US courts have used five factors to make such a determination:

1. Number of shareholders;
2. Complexity of the case;
3. Solvency of Debtor;
4. Cost to Estate outweighs the adequate representation interest of shareholders; and
5. Whether the interests of shareholders are already represented.

The onus is therefore on the equity holders to convincingly prove the above factors to the US Trustee and subsequently a bankruptcy judge. Courts have stipulated that no one factor should be preferred over the others but in dealing with each of the aforementioned issues, it would appear that the third item, solvency, is the 'make-or-break' feature regarding the appointment of an equity committee, while the other four points are somewhat easier to illustrate.

In particular, cases contemplating the formation of an equity committee typically are public companies whereby the common stock is widely held and actively traded both before and after the petition date. As a general note, it is vastly agreed that these types of ownership structures inevitably lead to complex restructurings and thus factors #1 and #2 are typically satisfied. In addition, equity holders in almost all cases are easily able to state and prove that the other constituencies, including the creditors' committee, do not represent the interest of shareholders, thereby

advocating the need to adequately protect the interests of shareholders; this relates to factor #5.

Depending on the stage of the case and with respect to factor #4, it is sometimes difficult to prove the cost-benefit advantage of appointing an equity committee but at times it can be best to appoint a formal committee and later disband it if it can be proven that no meaningful recoveries exist for equity security holders. As stated above, no one factor should outweigh another and 'costs alone cannot and should not deprive public debt and security holders of representation' as set out *In re McLean Indus., Inc.*, 70 B.R. 852, 860 (Bankr. S.D.N.Y. 1987).

Although the solvency test is one of the most difficult to apply, it is one of the most commonly used reasons referred to when determining whether or not to appoint a formal equity committee.

## The concept of solvency

Solvency is the most-used applicable legal standard when deciding whether or not to appoint an equity committee. In many cases, it is imperative for the shareholders to prove to the courts that the debtor was not or is not 'hopelessly insolvent', as opposed to simply proving solvency. It is a very common technique for shareholders to analyse (and use to their advantage) the pre- and post-petition trading data of the common equity along with positive press releases from company management to prove the point of not being hopelessly insolvent.

If a debtor is hopelessly insolvent, justification can be made that there is no need for shareholder opinion, as shareholders are out-of-the-money and the cost required and charged to the bankrupt estate for the professionals representing the shareholders outweigh the adequate representation interest of the shareholders and would, therefore, be unduly burdensome to the bankrupt estate.

Other stakeholders not in favour of an equity committee will attempt to illustrate that equity holders are out-of-the-money and there is no substantial likelihood or potential for a meaningful distribution of value as set out *In re Williams Communications Group, Inc.*, 281 B.R. 216 (Bankr. S.D.N.Y. 2002). Since the *Williams* ruling in 2002, this higher standard has rarely been used as a precedent for future cases and is supported by minimal prior case law (*In re Northwestern Corporation 2004*, WL 1077913, \*2 (Bankr. D. Del. 13 May 2004)). However, in the bankruptcy of the grocery chain Winn-Dixie Stores, Inc., the five-month-old shareholder committee was disbanded because it was disclosed that there was in fact, no meaningful recovery to shareholders.

This higher standard highlights the 'chicken-and-egg' game involved in restructuring negotiations. In order for equity holders to bring their position to the

forefront, they are preliminarily forced to produce a valuation with limited information from the debtor and minimal resources in order to illustrate their cause prior to being able to execute their rights under section 1102.

Not surprisingly, the solvency issue surfaces when the debtor appears to be superficially solvent on some level, and it can therefore be proven that shareholders have some meaningful interest in the outcome of the case. The shareholders therefore take the position that they should be entitled to 'voice' their opinions meaningfully via section 1102. Bankruptcy cases involving debtors substantially leveraged with minimal (but not zero) equity value have the dangerous ability to pose problems in trying to obtain a consensual reorganisation.

### Role of the equity committee

Similar to the formation and role of a creditors' committee in US Bankruptcy, a formal equity committee should participate and be very interactive with the debtor and its advisors, and in some cases will need to communicate with other stakeholders. Effective and frequent communication amongst all parties reduces the risk and extent of litigation in any reorganisation. Specifically, section 1103(c) of the Code allows the equity committee to participate in the plan process which may include an investigation into the financial affairs and operations of the debtor, negotiate specific terms and conditions relating to the debtor's Plan of Reorganisation ('POR') and participate in the confirmation of the POR. Also, analogous to the rights of a creditors' committee, it is technically possible for an equity committee to file its own POR, should the debtor's exclusivity period expire and just cause be shown.

The goal of not only the equity committee (along with the creditors' committee) is to maximise value; the nuance is determining an optimal valuation and how to divide that value (if at all possible) in order to satisfy all stakeholders. However, an equity committee must not only maximise the overall value of the reorganised debtor but also the specific consideration received, whether it is purely common stock of the reorganised debtor or in the form of hybrid instruments such as preferred shares and/or warrants that may or may not be conditional on the debtor achieving certain financial milestones after exiting bankruptcy. In several cases, these equity-like securities can turn out to be in-the-money in the future.

To accomplish their goals, equity committees typically try:

a. To be involved as early as possible in the case. The earlier the concerns are voiced and recognised, the better the chance of obtaining a seat at the table to negotiate a more efficient confirmation process;

- b. To ensure open communication with all stakeholders but especially the debtor and its advisors to minimise litigation costs;
- c. To ensure the debtor is obtaining optimal value by achieving maximum profitability and obtaining maximum value related to the disposal of assets (i.e. no improvident realisation);
- d. To monitor an efficient claims management process to minimise value of claims and the optimal level of assets is used to satisfy creditor claims and minimise litigation costs; and
- e. To provide a supportable enterprise valuation.

### Valuation concerns – pre- and post-petition

Determining whether or not meaningful equity value exists can be a challenge and in some cases may give new meaning to the expression, 'optical illusion'. Take for example, the case of Interstate Bakeries Corporation ('IBC').

A motion filed by the ad hoc committee of equity security holders on 2 November 2004 disclosed that IBC filed for Chapter 11 bankruptcy protection on or about 12 August 2004 but just 40 days prior, finalised a USD 100 million private placement of senior subordinated convertible notes. Court documents filed by legal counsel of the ad hoc committee of equity security holders on 2 November 2004 indicate the notes were priced with a 34.7% conversion premium and approximately three months after bankruptcy (i.e. post-petition) only traded at a slight discount. This financing would have been approved by its board of directors and management would have had to illustrate to investors meaningful equity value in order to consummate the financing. So, regardless that market share price may be driven by such extraneous factors as vulture funds, market manipulation, option value and global political events, from a capital markets basis, it would appear that the market perceived IBC equity to be 'in-the-money' at the time of the fund raising.

From an accounting convention, IBC filed its petition and other first-day motions indicating its book value of assets to be USD 305 million greater than its book value of liabilities – once again, indicating meaningful equity value. Although it is a fairly consistent theme that when companies become more and more distressed, it becomes more difficult to understand their financial statements, as they are typically not up-to-date, it is plausible that a significant write-down in assets (i.e., market value) as of the petition date may yield some potential equity value.

Furthermore, management stated in the press prior to the petition date comments indicating shareholder value. The sudden disappearance of this 'value' may in itself merit an investigation. In fact, the SEC did

Bob Rajan and Brett Harrison

support the formation of an equity committee with respect to IBC and all factors stated above strongly conquer this holistic notion of IBC being 'hopelessly insolvent' and accordingly the potential for meaningful equity value.

The aforementioned facts may have justified the need for an equity committee (which it did) or possibly an investigation of management or a thorough examination of the world's supposedly efficient capital markets.

The example above illustrates the concept of solvency and the potential establishment for an equity committee before and right after the petition date. During bankruptcy and prior to emergence, it is necessary to determine and support an enterprise valuation where it can be shown that all liabilities subject to compromise can be satisfied and any residual value should flow to equity holders. However, it is a well-known fact that enterprise value is subjective to a point. The choice of discount rates, terminal values, comparable companies and financial projections five years beyond, let alone three years, is based on so many assumptions and factors, one has to question how realistic some of these hypothetical estimates are, under dynamic circumstances.

By example, Foamex International Inc. ('Foamex') filed for bankruptcy on 19 September 2005 listing assets of USD 620 million and debts of USD 744 million, thereby implying no equity value from an accounting book value basis. However, Foamex's stocks and bonds continued to trade, and since May of this year, institutional shareholders kept implying that a formal committee should be appointed because equity was in-the-money due to improved and extraordinary financial performance of the debtor and consequently a higher valuation and potential distribution and/or recovery for equity holders. It is only recently, that the shareholders have withdrawn their bid for the creation of an official equity committee, and its reasons are unknown at this juncture.

It is the opinion of certain professionals that equity committees do not make sense at all because debtholders are entitled to the assets of a corporation and if the market value of the assets exceeds the market value of liabilities, the company should not have entered bankruptcy in the first instance. In other instances, it is often thought that liabilities might be overstated thereby drowning out any equity value. Or in fact, certain liabilities may be transferred to other entities or ultimately removed (e.g. pensions), reducing the net asset deficiency and possibly creating some level of equity value, even superficially.

## International implications

The concept of a formal equity committee has not made any material impact internationally as it has in

the United States. It may take time to do so, if at all. The traditional thought of 'equity receives nothing' is still strictly followed in most developed countries and even with developing and refined bankruptcy legislation may be difficult to implement in not only creditor-friendly jurisdictions but in debtor-friendly courts.

Because of the extensive cross-border interconnectivity of businesses between Canada and the US, the concept of 'shareholder opinion' during a restructuring may start to be given a voice at the table during large Canadian restructurings. Although the statute under which most large Canadian restructurings occur, the *Companies Creditors' Arrangement Act* does not provide for the recognition of committees in the way that section 1102 of the Code does, the Canadian courts have historically followed US jurisprudence on the use of committees in restructurings.

A good example of the effect of an active shareholder group in Canada can be seen from the restructuring of Stelco Inc. ('Stelco'). Stelco highlights the importance of valuation evidence in establishing that shareholders' interests should be considered in a restructuring.

Although the shareholders were never granted official 'committee' status in that case, a group of shareholders joined together as an informal committee. To many observers, Stelco appeared solvent at the time that it sought protection, however, it claimed to be insolvent on the ground that if it were to be immediately wound up, it would have an approximately CAD 1.2 billion unfunded pension liability. Stelco's union challenged the finding that Stelco qualified for court protection as it was not insolvent, but this challenge was denied by the supervising judge who found that Stelco had negative equity.

Shortly after Stelco's filing, the price of steel rose dramatically and Stelco had one of its best quarters ever, financially speaking. This gave the shareholders hopes that they would have a voice in the development of the POR. Although Stelco had originally signalled that it would involve its shareholders by appointing two significant shareholders to its board of directors, the POR that Stelco eventually developed provided no value for the shareholders. This caused the shareholders to fight the sanctioning of the POR. They brought a motion to be formally recognised, but this motion was never heard, likely in recognition that Canadian courts have not generally granted shareholders committee status. As is typical in these cases, the key issue in the battle between the shareholders and Stelco was whether there was any value for the shareholders.

The dispute became a classic valuation fight with each side filing valuations supporting its position. The debtor filed three valuations while the shareholders relied on one. It is not clear, but it appears that, as a result of the fact that they were an informal committee, the shareholders were having funding issues and did not have the same resources as the debtor to fight

the dispute. The final determination of the court that the shareholders were out-of-the-money was pivotal in the court holding that the POR was fair and reasonable and in denying the request of the shareholders for a further sale process.

Although the shareholders eventually lost, they did voice their concern and manage to delay the sanction process by several months and dramatically increase the costs of the sanctioning of the POR. In another case, this amount of leverage could easily have led to a negotiated resolution, particularly where the shareholders formed a formal committee which would have been funded by the debtor. That is all to say that it would not be surprising to see an increase in the use of equity committees in Canadian cases where there is an argument that there remains some value for shareholders.

## Conclusion

At the beginning of this article, the question was asked whether or not shareholders should receive similar rights as creditors in US bankruptcy proceedings. It goes without saying that the sudden emergence of equity committees in US bankruptcy is most likely not an anomaly and is here to stay. Regardless of how equity value is derived both pre- and post-petition either due to capital markets behaviour or from an enterprise valuation perspective and regardless of whether or not they should be granted such protection in a bankruptcy or can protect itself by continuing to actively trade, bankruptcy courts are not likely to reject the formal appointment of an equity committee if it appears that there is any level of equity value, even superficially, or if it can be proven that the debtor is not hopelessly insolvent.

This type of 'new age' thinking will take time to be adopted internationally and may never actually be accepted but, with the growing integration of capital markets and extensive cross-border growth activity, anything is possible.

## References

1. Ball, Corinne, 'Distressed Mergers and Acquisitions; News; 'Delphi' May Encourage Formation of Equity Panels', *New York Law Journal*, Volume 235 81, p. 5, col. 1
2. Beaudette, Marie, 'Court Denies OCA Lender Bid to Disband Shareholder Panel', *Daily Bankruptcy Review*, 24 July 2006.
3. Brickley, Peg, 'The Ch.11 Shareholder Scorecard', *Daily Bankruptcy Review*, 14 July 2006.
4. Coleman, Thomas Henry, 'Equity Committees Protect Shareholders in Chapter 11 Reorganizations of Publicly-Held Companies', <[ceb.com/newsletter/v3/business\\_law2.htm](http://ceb.com/newsletter/v3/business_law2.htm)>.
5. Favole, Jared A., 'Shareholders Aim to Hire Adviser on Delphi Restructuring', *Daily Bankruptcy Review*, 2 August 2006.
6. Fitzgerald, Patrick, 'DE Shaw Drops Bid for Shareholder Panel in Foamex Ch 11', *Daily Bankruptcy Review*, 23 August 2006.
7. Glassman, Neil B., Schlerf, Jeffrey M., Ward, Christopher A. Ward, 'Equity Committees – Representation of Shareholders in Bankruptcy Cases', *Financier Worldwide's Restructuring and Insolvency Series 2005*.
8. Martini, D., 'Equity Committees – Why Bother?', The American Bar Association – Meeting of Seventh Committee on Business Bankruptcy. San Antonio, 2-5 November 2005 featuring panel members: Thomas, Kaaran E., Gottlieb, Lawrence C., Merola, Frank, Harris, James.
9. Rebello, Joseph, 'Creditors and Shareholders of Delphi Take Different Stances on GM's Role', *Daily Bankruptcy Review*, 1 August 2006.
10. Richardson, Karen, 'Tracking the Numbers / Street Sleuth: New Way to Play Distressed Firms: Acquire the Stock', *The Wall Street Journal*, 1 May 2006, p. C1.
11. Trincal, Emma, 'Shareholder Activism Comes to Chapter 11', <[www.thestreet.com/markets/hedgofunds/10277660/html](http://www.thestreet.com/markets/hedgofunds/10277660/html)>.