

Response Deadline: August 9, 2013 at 4:00 p.m.
Hearing Date and Time: August 20, 2013 at 11:00 a.m.

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

In re: Chapter 11
Eastman Kodak Company, et al., Case No. 12-10202 (ALG)
Debtors. (Jointly Administered)

**LIMITED AND CAUTIONARY OBJECTION AND RESERVATION OF RIGHTS OF
THE BANK OF NEW YORK MELLON, AS TRUSTEE UNDER THE EASTMAN
KODAK EMPLOYEES’ SAVINGS AND INVESTMENT PLAN TRUST AGREEMENT,
TO THE CONFIRMATION OF THE FIRST AMENDED JOINT CHAPTER 11 PLAN
OF REORGANIZATION OF EASTMAN KODAK COMPANY AND ITS’ DEBTOR
AFFILIATES**

The Bank of New York Mellon (the “BNY Mellon”), as a trustee under the Eastman Kodak Employees’ Savings and Investment Plan (“Savings Plan”), files this Limited Objection and Reservation of Rights (“Limited Objection”) to the First Amended Joint Chapter 11 Plan of Reorganization of Eastman Kodak Company and its’ Debtor Affiliates [Docket No. 4175]. In support of its Limited Objection, BNY Mellon respectfully states as follows:

I. PRELIMINARY STATEMENT

1. The Debtor Eastman Kodak Company (“Kodak”) is the Plan Sponsor of the Eastman Kodak Employees’ Savings and Investment Plan (the Savings Plan).



2. The Savings Plan is a qualified defined contribution plan intended to meet the requirements of IRC section 401(k), which allows for deductions from compensation and certain matching contributions for eligible employees who also participate in the KRIP cash balance plan.

3. As required by Employee Retirement Income Security Act¹ (“ERISA”), the Internal Revenue Code,² and other applicable law, the Savings Plan holds its assets in a trust formed under the Eastman Kodak Employees’ Savings and Investment Plan Trust Agreement (“SIP Trust Agreement”) effective as of November 1, 2002, between Eastman Kodak Company and Boston Safe Deposit and Trust Company, predecessor Trustee to BNY Mellon.

4. The Savings and Investment Plan Committee (“SIPCO”) is the Savings Plan administrator. SIPCO and Kodak are fiduciaries under the Savings Plan. Upon information and belief, the Chairperson of SIPCO is an officer of Kodak, and other members of SIPCO are, or were, officers or directors or employees of the Debtors.

5. BNY Mellon is a directed trustee under the SIP Trust Agreement. As a directed trustee, BNY Mellon holds the assets, but follows the investment directions of the named fiduciary or its investment managers.

6. As described in more detail below, BNY Mellon files this precautionary Limited Objection to the Confirmation of the Plan, only to the extent that the SIP Trust Agreement, including but not limited to, the reimbursement and indemnification provisions are not assumed, or any obligation of the Plan Sponsor, SIPCO, and SIPCO’s individual members owing to BNY Mellon, as Trustee and arising under the SIP Trust Agreement, is modified by the Plan (together

¹ 29 U.S.C. § 1001 et seq.

² 26 U.S.C. § 101 et seq.

with any amendments or supplements thereto, including but not limited to the Cure Notice and Plan Supplement (as hereafter defined), the “Plan”) [Docket No. 4175].

II. FACTUAL BACKGROUND

7. On January 19, 2012 (the “Petition Date”), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

8. Shortly after the Petition Date, in *In re Eastman Kodak ERISA Litigation*, 12-CV-06051 (W.D.N.Y.) (“SIP Litigation”), participants in the Savings Plan (the “SIP Plaintiffs”) instituted a lawsuit assert claims under ERISA, against numerous defendants, including but not limited to BNY Mellon, SIPCO and its members, in connection with the Savings Plan investments in Kodak stock. The SIP Plaintiffs assert, among other things, that ERISA-covered fiduciary duties were breached with respect to the management and control of Savings Plan assets and that the Defendants knew or should have known that Kodak stock was not a suitable and appropriate investment for the Savings Plan because of Kodak’s financial condition during the relevant period. The SIP Plaintiffs purport to bring their claims as representatives of the SIP and on behalf of a putative class of all participants in the Savings Plan for whose individual accounts the Savings Plan invested in Kodak stock beginning in January 2010. While BNY Mellon has filed a Motion to Dismiss the SIP Litigation asserting, *inter alia*, that BNY Mellon is not liable to the SIP Plaintiffs, no decision has been rendered on the Motion to Dismiss.

9. The SIP Litigation was commenced after the Petition Date and the Plan Sponsor of the Savings Plan, Kodak was not named as a defendant.

10. BNY Mellon timely filed a Proof of Claim³ arising from its role as Trustee under the SIP Trust Agreement, which Proof of Claim was filed as “unliquidated and contingent.”

³ Proof of Claim Docket, 4221.

11. On June 26, 2013, this Court entered the Order Approving Debtors' Disclosure Statement and the Motion for an Order (i) Approving the Disclosure Statement; (ii) Establishing a Voting Record Date for the Plan; (iii) Approving Solicitation Packages and Procedures for the Distribution Thereof; (iv) Approving the Forms of Ballots; (v) Establishing Procedures for Voting on the Plan; (vi) Establishing Notice and Objection Procedures for the Confirmation of the Plan; and (vii) Establishing Procedures for the Assumption and/or Assignment of Executory Contracts and Unexpired Leases under the Plan [Docket No. 4167] (the "Solicitation Order").

12. The Solicitation Order establishes Estimation Procedures and Cure Procedures.⁴

13. On July 19, 2013, BNY Mellon timely filed a Motion to Estimate its prepetition claim under the SIP Trust Agreement for voting ("Estimation Motion"),⁵ in accordance with the Solicitation Order.

14. In accordance with the Cure Procedures, the Debtors filed the Cure Notice.⁶

15. The SIP Trust Agreement is included in the Cure Notice and assigned a cure amount of "\$0.00".

16. The Debtors also filed a Notice of Filing of Plan Supplement for the First Amended Joint Chapter 11 Plan of Reorganization of Eastman Kodak Company and its' Debtor Affiliates ("Plan Supplement") [Docket No. 4489].

17. In addition to listing the SIP Trust Agreement as an executory contract to be assumed (Exhibit A to the Plan Supplement), the Plan Supplement provides: "The Reorganized Debtors shall assume all contractual indemnification obligations arising under each Executory

⁴ Solicitation Order at decretal paragraph F.

⁵ Docket No. 4371.

⁶ Second Notice of Proposed Assumption of Specified Contracts [Docket No. 4483].

Contract and Unexpired Lease that is assumed by the Debtors pursuant to the Plan, the Confirmation Order or otherwise.”⁷

18. BNY Mellon has filed a Limited Objection to the Cure Notice, objecting to the Cure Amount as \$0.00, and instead asserting a Cure Amount of \$223,595.62 as the liquidated amount due and outstanding as of June 30, 2013 under the SIP Trust Agreement (“SIP Trust Agreement Cure Amount”), with the reservation of rights with respect to additional ordinary fees and expenses incurred under the SIP Trust Agreement that have accrued but have not yet been billed in the ordinary course, together with the currently contingent and unliquidated claims with respect to the SIP Litigation. [Docket No. 4603].

III. LIMITED OBJECTION TO THE RELEASES, INJUNCTIONS AND EXCULPATION PROVISIONS UNDER THE PLAN

19. The Debtors filed its First Amended Joint Chapter 11 Plan of Reorganization of Eastman Kodak Company and its’ Debtor Affiliates.

20. The Plan provides for the assumption and continuation of the Savings Plan (“Savings Plan Assumption”)⁸, in accordance with ERISA, and other applicable law: “On the Effective Date, with respect to all Compensation and Benefits Programs (including, for the avoidance of doubt, the Qualified Plans), each Reorganized Debtor shall assume and continue to honor in accordance with their terms and applicable laws (including, as applicable, ERISA and the Internal Revenue Code) and perform all Compensation and Benefits Programs to which the applicable Debtor is party, subject to any rights to terminate or modify such plans.”⁹

⁷ Exhibit M to the Plan Supplement.

⁸ The Savings Plan is included in the definition of “Qualified Plan” under the Plan. Plan at 2.2.175 and 2.2.177.

⁹ Section 7.2 of Plan.

21. Additionally, the Plan provides that all general administrative claims arising under the Savings Plan shall be paid in the ordinary course, and without the need for filing of claims.¹⁰

22. Further, the Plan provides that the Debtors shall continue to honor all indemnification obligations of its officers, directors, and other parties, subject to certain limitations, under the Saving Plan.¹¹

23. BNY Mellon asserts that the Savings Plan Assumption and continuation of the Savings Plan, in accordance with ERISA, and other applicable law, requires the assumption and continuation of the SIP Trust Agreement.

24. Currently the Cure Notice and the Plan Supplement provide for the assumption of the SIP Trust Agreement, including but not limited to the indemnification provisions thereunder (“SIP Trust Assumption”).¹²

25. Notwithstanding the Savings Plan Assumption and the SIP Trust Assumption, the Plan appears to designate claims arising in connection with the SIP Litigation that may be asserted against the Debtors to be included in the “Section 510(b) Claims”. Section 510(b) Claims is defined in the Plan as “any Claim arising from the rescission of a purchase or sale of a security of the Debtors or an Affiliate of the Debtors, for damages arising from the purchase or sale of such security, or for reimbursement or contribution allowed under section 502 of the Bankruptcy Code on account of such Claim.”¹³

¹⁰ Plan at Section 2.2.155, Section 3.1(c) and Section 3.2.

¹¹ Plan at 8.10.

¹² Docket Nos. 4483 and 4489.

¹³ Plan at 2.2.212.

26. Section 510(b) Claims are Class 10 Claims under the Plan, and are deemed to reject the Plan.¹⁴

27. Under the Plan, “Released Parties” appears to include some if not all of the members of SIPCO.¹⁵

28. BNY Mellon believes that the terms “Releasing Parties”, as set forth in the Plan at 2.2.181, does not include either: (a) BNY Mellon as SIP Plan Trustee as the SIP Trust Agreement are being assumed, or (b) the Class 10 Claimants, as they are not provided with the opportunity to vote with respect to the Plan.

29. The Plan further provides broad releases, injunctions and exculpations from liability in favor of parties other than the Debtors. *See*, Discharge of Claims and Termination of Equity Interests (Plan at 12.4); Voluntary Release by Holders of Claims (Plan at 12.6); Exculpation (at Plan 12.7) and Injunction (Plan at 12.8) (as they related to claims against the Debtors, collectively herein as “Debtor Releases.” and as they relate to claims asserted or that may be asserted against parties other than the Debtors, collectively referred to herein as “Third Party Releases.”)

30. The Bankruptcy Code provides that the Debtor is the only party entitled to a discharge upon confirmation. 11 U.S.C. §524(e) and § 1141(d)(1)(A). The Bankruptcy Code further provides that a plan shall be confirmed only if it complies with all applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1129(a)(1).

31. ERISA Section 410(a), 29 U.S.C. § 1110(a), provides that “any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for

¹⁴ Plan at 4.1.2.

¹⁵ Plan at 2.2.179.

any responsibility, obligation, or duty under this part [Part 4 – Fiduciary Responsibility] shall be void as against public policy.”

32. The Second Circuit has recognized that a bankruptcy court has no jurisdiction to release creditors’ claims against non-debtor third parties where such claims have no effect on the *res* of the bankruptcy estate. Specifically, in 2008, the Second Circuit declared as follows:

[T]he non-debtor releases] were meant to provide . . . global finality for Travelers. But global finality is only as “global” as the bankruptcy court’s jurisdiction. A court’s ability to provide finality to a third-party is defined by its jurisdiction, not its good intentions. We have previously recognized that “a nondebtor release is a device that lends itself to abuse. By it, a non-debtor can shield itself from liability to third parties. In form, it is a release; in effect, it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code.

Johns-Manville Corp. v. Chubb Indemnity Ins. Co. (In re Johns-Manville Corp.), 517 F.3d 52, 66 (2d Cir. 2008), *rev’d on other grounds, Travelers Indem. Co. v. Bailey*, 129 S.Ct. 2195 (June 18, 2009) (internal citations and quotations omitted), *aff’d in part & rev’d in part*, 600 F.3d 135 (2d Cir. 2010). The Second Circuit further declared that:

[A] bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate. In *MacArthur* we recognized that conclusion as the decisional pivot for both *MacArthur* and *Davis*. “[I]n both instances, third parties seek to collect out of the *proceeds* of Manville’s insurance policies on the basis of Manville’s conduct . . . [P]laintiffs’ claims are inseparable from Manville’s own insurance coverage and are consequently well within the Bankruptcy Court’s jurisdiction over Manville’s assets.”

Johns-Manville (2008), 517 F.3d at 66 (quoting *Johns-Manville*, 837 F.2d 89, 92-93 (2d Cir. 1988).

33. A “nondebtor release is a device that lends itself to abuse. By it, a nondebtor can shield itself from liability to third parties. In form, it is a release; in effect, it may operate as a

bankruptcy discharge arranged without a filing and without the safeguards of the Code. The potential for abuse is heightened when releases afford blanket immunity.” *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 142 (2d Cir. 2005). A nondebtor release “should not be approved absent the finding that truly unusual circumstances render the release terms important to success of the plan” *Metromedia*, 416 F.3d at 143.

34. Consensual third-party releases are permissible where a creditor or interest holder agrees to a release even though it could vote to accept a plan without agreeing to the release. For example, a creditor release of its claims against third parties is consensual where the creditor can “check a box” on a plan ballot to “opt in” to a third-party release separately from the creditor’s vote in favor of the plan. *See In re Oneida Ltd.*, 351 B.R. 79, 94 (Bankr. S.D.N.Y. 2006) (finding “no issue under applicable Second Circuit authority” with a plan that provided “for releases of claims held by creditors who affirmatively indicate their willingness to grant such releases by ‘checking a box’ on their plan solicitation ballots.”).

35. BNY Mellon maintains that because Class 10 Claimants are not permitted to vote with respect to the Plan and hence cannot “opt-out” of the Third Party Releases, the Third Party Release cannot be applicable to Class 10 Claimants.

36. But for the SIP Trust Agreement Cure Amount, BNY Mellon asserts that because the Plan provides for the Savings Plan Assumption and the SIP Trust Assumption, and the continued compliance with ERISA and other applicable law, the Debtors Releases cannot be applicable with respect to claims under the Saving Plan or the SIP Trust Agreement.

37. BNY Mellon further asserts that because the Plan provides for the Savings Plan Assumption and the SIP Trust Assumption, and the continued compliance with ERISA and other

applicable law, the Third Party Release cannot be applicable with respect to claims under the Saving Plan or the SIP Trust Agreement.

38. Thus, to the extent the release provisions in the Plan purport to relieve the members of SIPCO, as named fiduciary to the Savings Plan, or any other Savings Plan fiduciary from any liability for their conduct in respect to the Savings Plan, it would appear to represent an impermissible attempt to relieve such Saving Plan fiduciary of responsibility and liability for any breach of fiduciary duty claim which may be held by the Savings Plan and, as such, contrary to the express prohibitions of ERISA and the Savings Plan Assumption and the SIP Trust Assumption. To the extent the release provisions are construed as not constituting an impermissible limitation of liability provision – but rather as a release intended to settle a dispute that SIPCO, or other Savings Plan fiduciaries, did not fulfill its fiduciary responsibility or duty solely with respect to the particular conduct, including but not limited to the SIP Litigation, BNY Mellon objects to any attempt to release SIPCO, or other Savings Plan fiduciaries, as breach of fiduciary duty claims are vested in the Savings Plan, as a whole, for the benefit all Savings Plan participants and, as such, may only be released, if at all, by all Saving Plan participants, beneficiaries and fiduciaries to the Saving Plan.

A. Limited Objection to Debtors’ Releases

39. BNY Mellon asserts that because the Plan provides for the Savings Plan Assumption and the SIP Trust Assumption, and because ERISA provides that “any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part [Part 4 – Fiduciary Responsibility] shall be void as against public policy, to the extent the Plan seeks to authorize or approve Debtors’

Releases with respect to the SIP Trust Agreement in violation of ERISA, BNY Mellon objects to confirmation of the Plan.

B. Limited Objection to Third Party Releases

40. BNY Mellon asserts that because the Plan provides for the Savings Plan Assumption and the SIP Trust Assumption, and the Class 10 “deemed rejection” without the opportunity to vote, claimants having claims arising under the SIP Agreement or the SIP Trust Agreement cannot be bound by the Third Party Releases.

41. Furthermore, as stated above, ERISA precludes the granting of releases under the Saving Plan or SIP Trust Agreement without the express consent of the parties to be bound by such release.

42. Therefore, to the extent the Plan seeks to authorize or approve Third Party Releases with respect to the Saving Plan or the SIP Trust Agreement, BNY Mellon objects to confirmation of the Plan.

IV. CONCLUSION

WHEREFORE, The Bank of New York Mellon, as Trustee under the SIP Trust Agreement, respectfully requests the Court confirm the Plan *if and only if* the Plan (a) assumes the Eastman Kodak Employees’ Savings and Investment Plan and the related Eastman Kodak Employees’ Savings and Investment Plan Trust Agreement without modification; (b) does not release the Plan Sponsor, SIPCO or any other party of any obligation under Eastman Kodak Employees’ Savings and Investment Plan Trust Agreement; and (c) for such other relief as is consistent herewith.

Dated: August 9, 2013
Pittsburgh, Pennsylvania

Respectfully submitted,

REED SMITH LLP

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

In re:	Chapter 11
Eastman Kodak Company, et al., Debtors.	Case No. 12-10202 (ALG) (Jointly Administered)

AFFIDAVIT OF SERVICE

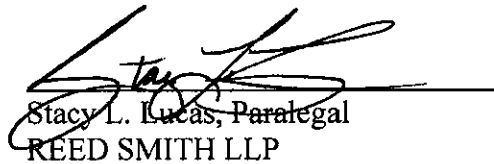
STATE OF PENNSYLVANIA)
) ss.:
COUNTY OF ALLEGHENY)

I Stacy L. Lucas being duly sworn, depose and say:

I am not a party to this action, am over eighteen years of age and employed by Reed Smith LLP, 225 Fifth Avenue, Suite 1200, Pittsburgh, PA 15222.

On the 9th day of August, 2013, I served a copy of the *Limited and Cautionary Objection and Reservation of Rights of The Bank of New York Mellon, as Trustee Under the Eastman Kodak Employee's Savings and Investment Plan Trust Agreement, to the Confirmation of the First Amended Joint Chapter 11 Plan of Reorganization of Eastman Kodak Company and its' Debtor Affiliates* on the parties listed on the attached Service List in the manners indicated.

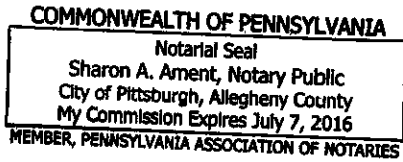
I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.



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SWORN TO AND SUBSCRIBED
BEFORE ME THIS 9th DAY OF
August, 2013

Sharon A Ament
NOTARY PUBLIC



SERVICE LIST

<p>The Honorable Judge Allan L. Gropper One Bowling Green Courtroom: 617 New York, NY 10004-1408</p> <p>VIA HAND DELIVERY</p>	<p>Andrew G. Dietderich, Esq. Michael H. Torkin, Esq. Mark U. Schneiderman, Esq. Sullivan & Cromwell LLP 125 Broad Street New York NY, 10004-2498 Facsimile: 212-558-3588</p> <p><i>Counsel to the Debtors</i></p> <p>VIA FACSIMILE</p>
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