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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)
Debtor.	(Jointly Administered)
	Re: Doc. No. 4175

LIMITED OBJECTION OF LEAD PLAINTIFF, BRET S. JONES TO CONFIRMATION OF FIRST AMENDED JOINT CHAPTER 11 PLAN OF EASTMAN KODAK COMPANY AND ITS AFFILIATED DEBTORS

Lead Plaintiff, Bret S. Jones (the "Lead Plaintiff"), in the securities class action entitled *Timothy A. Hutchinson, Individually and on Behalf of All Others Similarly Situated v. Perez, et al.*, Case No. 12-cv-01073-HB (the "Securities Litigation"), filed in the United States District Court for the Southern District of New York (the "District Court"), on behalf of himself and all persons (the "Putative Class"), who purchased or otherwise acquired publicly traded securities of Eastman Kodak Company ("Kodak" or the "Debtor")[1] between July 26, 2011 and January 19, 2012, inclusive (the "Class Period"), submits this limited objection (the "Objection") to confirmation of the *First Amended Joint Chapter 11 Plan of Reorganization of Eastman Kodak and*

[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Plan.

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Its Affiliated Debtors, dated June 27, 2013 [Doc. No. 4175][2] and as may be amended (the "First Amended Plan"), and state the following:

BACKGROUND

A. The Securities Litigation

1. On February 10, 2012, an initial complaint for violation of federal securities laws was filed in the District Court. The initial complaint did not name the Debtor as a defendant pursuant to the dictates of the automatic stay, but proceeded as against the named non-Debtor defendants (the "Non-Debtor Defendants").

2. On April 17, 2012, the District Court appointed Bret S. Jones as Lead Plaintiff and Robbins Geller Rudman & Dowd LLP and Holzer Holzer & Fistel, LLC as co-Lead Counsel. On June 1, 2012, Lead Plaintiff filed an amended consolidated complaint (the "Amended Complaint").

3. The Amended Complaint requests damages resulting from violations of certain federal securities laws, including Sections 10(b) and 20(a), and Rule 10b-5 promulgated thereunder, of the Securities Exchange Act of 1934 (the "Federal Securities Laws") in connection with the purchase by Lead Plaintiff and the Putative Class of Kodak's securities.

4. On November 8, 2012, the District Court issued an Opinion and Order granting the Non-Debtor Defendants' motion to dismiss the Amended Complaint (the "Dismissal Order"). On January 8, 2012, the District Court granted Lead Plaintiff's motion to alter or amend the Dismissal Order, and on January 23, 2013, Lead Plaintiff filed the Second Amended Complaint (the "Second Amended Complaint"). On April 25, 2013, the Non-Debtor Defendants' motion to

[2] A version of the First Amended Plan was filed on June 24, 2013 [Doc. No. 4140]. However, on June 27, 2013, the Debtors filed a (revised) Solicitation Version of the First Amended Plan [Doc. No. 4175, at p. 261] as part of the Solicitation Version of the First Amended Disclosure Statement. This Objection addresses the provisions of the revised solicitation version of the First Amended Plan.

dismiss the Second Amended Complaint was granted. On May 30, 2013, Lead Plaintiff filed a notice of appeal to the Second Circuit Court of Appeals of the dismissal of the Second Amended Complaint and submitted its opening brief on August 5, 2013.

B. The Bankruptcy Proceeding

5. On January 19, 2012 (the "Petition Date"), the Debtors filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York.

6. On July 17, 2012, Bret S. Jones, as Lead Plaintiff, filed a proof of claim (Claim No. 5481) against Kodak on behalf of the Putative Class (the "Class Claim") for damages arising out of the Debtor's violations of the Federal Securities Laws as alleged in the Securities Litigation in connection with the purchase and sale of the Debtor's securities. Individual proofs of claim (Claim Nos. 5442 and 5435 (the "Individual Claims" and together with the Class Claim, the "Securities Claims")) were filed by Bret S. Jones and Timothy A. Hutchinson, respectively, for damages arising out of their individual purchase and sale of securities of the Debtors (collectively, Jones, individually and as Lead Plaintiff, and Hutchinson are the "Securities Claimants").

7. On April 30, 2013, the Debtors filed the *Disclosure Statement for Debtors' Joint Plan of Reorganization under Chapter 11 of the Bankruptcy Code* [Doc. No. 3651] (the "Disclosure Statement").

8. On June 26, 2013, the Bankruptcy Court entered an Order [Doc. No. 4167] approving the Disclosure Statement, as amended (the "Disclosure Statement Approval Order"), and fixed the hearing on confirmation of the First Amended Plan for August 20, 2013 (the "Confirmation Hearing"). On June 27, 2013, the Debtors filed the Solicitation Version of the First Amended Disclosure Statement and First Amended Plan [Doc. No. 4175] (*see*. n.2, *supra*).

9. Prior to filing this Objection, counsel for the Securities Claimants and counsel for the Debtors confirmed that the Securities Claims are Class 10-Section 510(b) Claims, are deemed to reject the First Amended Plan and are not entitled to vote on the First Amended Plan. Therefore, the Securities Claimants are not Releasing Parties under the First Amended Plan. *See* ¶ 13, *infra*.

RELEVANT PROVISIONS OF THE FIRST AMENDED PLAN

10. "Released Parties" is defined to include not only the Debtors but also, *inter alia*, their "current and former directors, officers . . . employees, agents" "in their capacities as such." FAP, § 2.2.179. The First Amended Plan indicates that Holders of Claims release all Released Parties from, *inter alia*, any and all claims, obligations, rights, suits, damages "based on or relating to, or in any manner arising from, in whole or in part . . ." "the purchase, sale or rescission of the purchase or sale of any Security of the Debtors . . . the subject matter of, or the transactions or events giving rise to, any Claim or Equity Interest that is treated in the Plan" or "any action or omission as an officer, director, agent, representative, *fiduciary, controlling person, affiliate or responsible party"* except "to the extent such act or omission is determined by a Final Order to have constituted willful misconduct, gross negligence, fraud, or a criminal act." FAP, § 12.6 (emphasis added).

11. "Releasing Parties" is defined to include, *inter alia*, "each Holder of a Claim that (i) affirmatively votes to accept the Plan or (ii) either (A) abstains from voting or (B) votes to reject the Plan, and in the case of (A) or (B), does not opt out of the Releases." FAP, § 2.2.181.

OBJECTION

12. The First Amended Plan fails to satisfy Section 1129(a) of the Bankruptcy Code on the following grounds:

(a) the First Amended Plan release, injunction and exculpation provisions are

improper to the extent that the Debtors take the position that the Securities Claimants are Releasing Parties;

(b) the First Amended Plan should not preclude the Securities Claimants from proceeding with the Securities Claims against the Debtors solely to the extent of available insurance coverage, irrespective of any injunctions or distributions under the First Amended Plan; and

(c) the First Amended Plan fails to provide an adequate protocol for the preservation of the Debtors' books, records or documents retained by the Reorganized Debtors.

A. The First Amended Plan Release, Injunction and Exculpation Provisions are Improper to the Extent the Debtors Maintain that the Securities Claimants and the Putative Class are Releasing Parties.

13. The Securities Claims are subject to subordination under Section 510(b) of the Bankruptcy Code and are thus Class 10 Claims under the First Amended Plan.[3] Therefore, the Claimants are not entitled to vote (and did not vote) on the First Amended Plan, are not required to opt out of the releases in Section 12.6 of the First Amended Plan and are not Releasing Parties.[4] Notwithstanding the foregoing, in the unlikely event that the Debtors attempt to deem the Securities Claimants Releasing Parties, the Securities Claimants object to the release, and the exculpation and injunction provisions as improper on the following grounds.

[3] The Securities Claimants inadvertently received Class 4 Ballots and have been advised that they need not return the Ballots with respect to the Securities Claims because they have Class 10 Claims and are not entitled to vote.

[4] The First Amended Disclosure Statement, § 7.B, clarified that the failure to "opt-out" of the release applies only to those holders "entitled to vote" who abstain or vote to reject the First Amended Plan.

(i) The Bankruptcy Court Lacks Jurisdiction to Release, Exculpate and/or Enjoin the Prosecution of the Securities Claims Asserted in the Securities Litigation against Non-Debtors.

14. To the extent the First Amended Plan intends to release the claims of the Securities Claimants and the Putative Class or enjoin them from prosecuting those claims against the Non-Debtor Defendants, the Court must, as a threshold question, first determine whether it has jurisdiction to release and/or enjoin third-party claims against non-debtors as they relate to the Securities Litigation. The Third Circuit Court of Appeals in *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 214, n. 12 (3d Cir. 2000), has expressed its concern "that the Bankruptcy Court apparently never examined its jurisdiction to release and permanently enjoin [the third party's] claims against non-debtors." While certain matters between non-debtor third parties affecting the debtor and the bankruptcy case may be within the subject matter jurisdiction of the Court, it is not without limits and the Court "cannot simply presume it has jurisdiction in a bankruptcy case to permanently enjoin third-party *class actions* against non-debtors." *Id.* (emphasis added).

15. The Second Circuit addressed the jurisdictional issue and upheld its earlier holding in the same case that a "'bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *rest* of the bankruptcy estate.'" *Johns-Manville Corp. v. Chubb Indemnity Ins. Co. (In re Johns-Manville Corp.)*, 600 F.3d 135, 152 (2d Cir. 2010) ("*Manville 2010*")(quoting *In re Johns-Manville Corp.*, 517 F.3d 52, 66 (2d Cir. 2008) ("*Manville 2008*")). Such jurisdiction is statutory. *In re Combustion Engineering, Inc.*, 391 F.3d. 190, 225 (3d Cir. 2004). As noted in the *Manville 2010* decision, *Manville 2008* held that "a bankruptcy court's *in rem* jurisdiction was insufficient to enjoin the [direct claim] based upon . . . legal theories that seek to impose liability on [the insurer] as a separate entity rather than on the policies." *Manville 2010*, 600 F.3d at 152. Thus, the nature of the third-party claim against

the non-debtor, whether it is direct or derivative, must be considered before the Court can exercise subject matter jurisdiction in connection with non-debtor releases and injunctions in the First Amended Plan. The Securities Litigation clearly asserts direct claims against non-debtor third parties over which the Court does not have subject matter jurisdiction.

(ii) The Release, Exculpation and Injunction Provisions Are Improper.

16. The First Amended Plan provides for releases by Holders of Claims and Interests in favor of, *inter alia*, various non-Debtors, including the Non-Debtor Defendants in the Securities Litigation. FAP, § 12.6.

17. The exculpatory provision in the First Amended Plan, § 12.7, is applicable to pre-petition conduct by numerous parties, which may include the Non-Debtor Defendants. To the extent this conduct is within the scope of the allegations in the Securities Litigation, it is improper.

18. The First Amended Plan further provides that Holders of Claims or Interest that are released under Section 12.6 of the First Amended Plan, are permanently enjoined from, *inter alia,* continuing any action with respect to the Claim. FAP, § 12.8. Without further qualification (other than that the claim is released under the First Amended Plan), the injunction may be construed to apply to the Securities Litigation.

19. The broad and gratuitous release and exculpatory and injunctive relief afforded under Sections 12.6, 12.7 and 12.8, respectively, of the First Amended Plan are improper to the extent interpreted to impact, enjoin, prohibit and/or preclude the Securities Claimants from asserting claims in the Securities Litigation or seeking discovery post-Effective Date.

20. Non-debtors are not entitled to the protections of the Bankruptcy Code and should not benefit therefrom. The release of claims against non-debtors can only be justified, if at all, in the most extraordinary and unusual circumstances, none of which exist or have been

demonstrated herein. *See Deutsche Bank AG London Branch v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 141-42 (2d Cir. 2005) (holding that non-debtor releases are proper only in rare cases and may be "tolerated only if the affected creditor consents" and the releases are shown to be an "important part of the reorganization"). Even "the mere fact of financial contribution by a non-debtor cannot be enough to trigger the right to a [*Metromedia*] release of non-debtor claims." *Cartalemi v. Karta Corp. (In re Karta Corp.)*, 342 B.R. 45, 55 (S.D.N.Y. 2006); *see also Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 211 (3d Cir. 2000) (holding that a debtor must satisfy its burden of proof and establish through specific factual findings that non-debtor third-party releases are fair and necessary). Efforts to enjoin claims against a non-debtor third party must be an integral part of a plan. *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (2d Cir. 1992), which is plainly not the case here. Certainly the First Amended Plan offers no justification for these provisions whatsoever. In the absence of unusual circumstances and any relevant clear and convincing evidence, the release and injunction provisions of the First Amended Plan are improper.

21. To be clear, the Securities Claimants do not consent to the releases and injunction in sections 12.6 and 12.8 of the First Amended Plan.

22. As previously stated (*see* ¶ 13, *supra*), in an abundance of caution, and in the event the Debtors seek to deem the Securities Claimants Releasing Parties, the following language should be included in the First Amended Plan and any order confirming the First Amended Plan:[5]

> Nothing in the First Amended Plan, as may be amended, or in any order confirming the First Amended Plan, as may be amended, shall or is intended to (i) affect, release, enjoin or impact in any

[5] Even if the Securities Claimants are not Releasing Parties, clarification that their rights to discovery post-Confirmation are not impacted by the First Amended Plan is necessary.

> way the prosecution of the claims of the Securities Claimants or the Putative Class asserted, or to be asserted, against any non-Debtor in the Securities Litigation or any non-Debtor, or (ii) preclude the Securities Claimants or the Putative Class from seeking discovery from the Debtors, the Reorganized Debtors or any transferee of the Debtors' assets.

B. The Plan Should Preserve the Rights of the Securities Claimants to Proceed with Their Claims Against the Debtors to the Extent of Available Insurance Coverage, Irrespective of Any Injunctions or Distributions Under the Plan.

23. Upon information and belief, the Debtors maintain director and officer liability insurance policies (the "D&O Policies") in favor of their directors and officers for claims asserted in the Securities Litigation, as well as for claims against the Debtors directly for violations of the Federal Securities Laws. While the First Amended Plan refers to the Debtors' D&O Policies, Plan, § 8.9, they fail to disclose the extent of the coverage provided by any of the D&O Policies. Lead Plaintiff maintains that the Securities Claimants and the Putative Class are entitled to look to the proceeds of such insurance for payment in connection with the claims of the Securities Claimants and the Putative Class and may, at least, pursue these Claims against the Debtors to the extent of such available insurance post-Confirmation. Because the Securities Claimants may not have a direct action against the insurance carriers under the D&O Policies, the proceeds of the D&O Policies may only be accessed through the pursuit of the claims asserted in the Securities Litigation. Accordingly, the Plan should not impact the rights of the Securities Claimants or the Putative Class to pursue their claims against the Debtors to the extent of the proceeds of the D&O Policies.

24. In order to overcome this objection, the First Amended Plan should provide that:

> Nothing in the First Amended Plan, as may be amended, or in any Order confirming the First Amended Plan, as may be amended, shall preclude the Securities Claimants and the Putative Class from pursuing their claims against the Debtors to the extent of available insurance coverage and proceeds. The Claims of the Securities Claimants and the Putative Class against the Debtors, to the extent of available insurance, are preserved and not discharged by the

First Amended Plan, as may be amended.

C. The First Amended Plan Fails to Provide an Appropriate Mechanism for the Preservation of Documents.

25. Although the Debtors are compelled to maintain and preserve their assets during the Chapter 11 proceeding (unless authorized by order of the Bankruptcy Court to abandon them, after notice and an opportunity to be heard, *see* 11 U.S.C. §§ 363(b)(1) and 554(a), Fed. R. Bankr. P. 6004 and 6007(a)), the First Amended Plan fails to provide for the preservation of the Debtors' assets, including the Debtors' books, records documents, files, electronic data in any format, including native format (collectively, the "Documents") by the Reorganized Debtors post-confirmation.

26. To the extent any Documents are transferred to a non-Debtor entity prior to the Effective Date of the First Amended Plan, the Debtors should be required to maintain either the originals or true copies of the Documents, in their current format (including, but not limited to, electronic or native), and similarly, the Reorganized Debtors must maintain the originals or true copies of the Documents in their current format (including, but not limited to, electronic or native), transferred after the Effective Date. The First Amended Plan does not include any mechanism for the preservation of Documents in either event.

27. Indeed, whether the Documents are retained by the Debtors, Reorganized Debtors, some other estate representative or third-party, or transferred to a non-Debtor entity prior to the Effective Date, the Documents (either originals or true copies) must be maintained so as to be available to parties in interest, especially if the Documents are not available elsewhere. To do otherwise prejudices the rights of the Securities Claimants, members of the Putative Class and other parties in interest. Some protocol must be established to prevent the destruction or abandonment of the Documents that include critical information relevant to the Securities Litigation unavailable elsewhere. At the very least, some mechanism for providing notice and an

opportunity to be heard by this Court or a court of competent jurisdiction must be established before any such Documents are abandoned, transferred, destroyed or rendered otherwise unavailable.

28. It is imperative that the Reorganized Debtors or any third-party transferee retain and preserve the Documents that may be potentially relevant to the Securities Litigation and the claims arising therefrom, at least until such time as the Securities Claimants are able to conduct and complete discovery.

29. The First Amended Plan must require and include the mechanism for the Debtors, Reorganized Debtors or any transferee of the Documents to maintain and preserve those Documents and to advise parties in interest of their intention with respect to the Documents. In that regard, the First Amended Plan and any order confirming the First Amended Plan must include the following language:

> From and after the Effective Date, the Debtors, Reorganized Debtors and/or any transferee of the Debtors' books, records, documents, files, electronic data (in whatever format, including native format) or any tangible object (collectively, the "Documents") (i) shall preserve and maintain all of the Documents, and (ii) shall not destroy, abandon, transfer or otherwise render unavailable such Documents absent further order of this Court or any court of competent jurisdiction, upon reasonable notice to parties in interest, including the Securities Claimants, with an opportunity to be heard.

CONCLUSION

30. Based on the foregoing, Lead Plaintiff respectfully requests that absent a resolution of the issues set forth above, an order be entered (i) denying confirmation of the First Amended Plan, and (ii) granting such other and further relief as the Court deems just and proper.

Dated: August 9, 2013

Respectfully submitted,

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