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LOWENSTEIN SANDLER LLP
Michael S. Etkin, (ME 0570)
Ira M. Levee (IL 9958)
1251 Avenue of the Americas, 17th Floor
New York, New York 10020
(212) 262-6700 (Telephone)
(212) 262-7402 (Facsimile)
and
65 Livingston Avenue
Roseland, New Jersey 07068
(973) 597-2500 (Telephone)
(973) 597-2481 (Facsimile)

Hearing Date: August 20, 2013 at 11:00 a.m. (ET)
Objection Deadline: August 9, 2013 at 4:00 p.m. (ET)

Bankruptcy Counsel for Mark Gedek, Mark J. Nenni, Andrew J. Mauer, Thomas W. Greenwood, Barry Bolger, Julius Coletta, Dale Toal, Claude Matte and Allen E. Hartter, on Behalf of the ERISA Plans, Themselves and a Class of All Others Similarly Situated

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)
	Re: Doc. Nos. 4175

OBJECTION OF MARK GEDEK, MARK J. NENNI, ANDREW J. MAUER, THOMAS W. GREENWOOD, BARRY BOLGER, JULIUS COLETTA, DALE TOAL, CLAUDE MATTE, AND ALLEN E. HARTTER TO CONFIRMATION OF FIRST AMENDED JOINT CHAPTER 11 PLAN OF EASTMAN KODAK COMPANY AND ITS AFFILIATED DEBTORS

Mark Gedek, Mark J. Nenni, Andrew J. Mauer, Thomas W. Greenwood, Barry Bolger, Julius Coletta, Dale Toal, Claude Matte and Allen E. Hartter ("ERISA Claimants"),[1] on behalf of themselves, the Eastman Kodak Employees' Savings and Investment Plan (the "SIP") and the

[1] As used herein, ERISA means the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq*., as amended.

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Kodak Employee Stock Ownership Plan (the "ESOP") (collectively, the "ERISA Plans"), and a putative class of all others similarly situated (the "Class"), hereby submit this objection (the "Objection") to confirmation of the *First Amended Joint Chapter 11 Plan of Reorganization of Eastman Kodak and 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

1. On September 14, 2012, the ERISA Claimants filed a Consolidated Complaint (the "Complaint") in the United States District Court for the Western District of New York (the "District Court"), Civil Action No. 6:12-CV-06051-DGL (the "ERISA Litigation"), on behalf of the ERISA Plans, themselves, and all other similarly situated participants in or beneficiaries of the ERISA Plans between January 1, 2010 and the date of the final liquidation of the ERISA Plans, inclusive (the "Class Period"). The Complaint was brought pursuant to ERISA §§ 409, 502(a), 29 U.S.C. §§ 1109 and 1132, and alleged breaches of fiduciary duties enumerated in ERISA § 404(a); 29 U.S.C. § 1104(a) by certain current and former officers and directors (the "Non-Debtor Defendants") of the Eastman Kodak Company ("Kodak" or the "Debtor")[3] in connection with the ERISA Plans. Solely as a result of the automatic stay, Kodak was not named as a defendant in the ERISA Litigation.

2. On October 29, 2012, the Non-Debtor Defendants filed a motion to dismiss (the "MTD") the Complaint. The ERISA Claimants timely opposed the MTD and on January 14,

[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.

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

2013, the Non-Debtor Defendants filed their reply in support of the MTD. A hearing on the MTD was held on May 23, 2013, and a ruling has not yet been issued.[4]

3. ERISA Claimants, Toal and Matte, filed a proof of claim on behalf of the ERISA Plans and the putative Class (Claim No. 498) (the "ERISA Claim") against Kodak for damages in excess of $50 million based upon the ERISA violations, as set forth above and more specifically in the Complaint.

4. 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"). On June 7, 2013, the ERISA Claimants filed an objection to the Disclosure Statement [Doc. No. 3943] (the "Disclosure Statement Objection").

5. The Disclosure Statement was amended to, *inter alia*, address the purely disclosure-related issues in the Disclosure Statement Objection. In all other respects, the issues raised in the Disclosure Statement Objection were reserved for confirmation. *See Debtors' Omnibus Reply in Support of Motion for an Order (I) Approving the Disclosure Statement, Etc.* [Doc. No. 4142, at Ex. A, pp. 12-13.]. To the extent any confirmation-related issues were not resolved by the amended Disclosure Statement, the ERISA Claimants incorporate the Disclosure Statement Objection as if set forth at length herein.

6. 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

[4] Bank of New York Mellon, the trustee of the SIP was also named as a defendant in the ERISA Litigation and filed a motion to dismiss the Complaint simultaneously with the Non-Debtor Defendants' MTD. A decision on the Bank of New York Mellon's motion to dismiss is also pending.

First Amended Disclosure Statement and First Amended Plan [Doc. No. 4175] (*see*. n.2, *supra*).

7. On July 19, 2013, the Court entered an *Order Granting Debtors' Omnibus Motion to Estimate the Amount, or Establish the Classification, of Certain Claims Solely for Purposes of Voting to Accept or Reject the First Amended Joint Chapter 11 Plan of Reorganization of Eastman Kodak Company and Its Debtor Affiliates* [Doc. No. 4377] (the "Classification Order"), whereby the ERISA Claim was "classified as a Class 10 Claim *solely for purposes of voting to accept or reject the Amended Plan*" with all other rights, including contesting classification of the ERISA Claim as a Class 10 Claim, reserved. Classification Order, ¶6 (emphasis added). As a result, the ERISA Claimants, as Holders of the ERISA Claim, are deemed to reject, and not entitled to vote on, the First Amended Plan, and, therefore, are not a Releasing Party (*see* ¶ 11, *infra*). Furthermore, prior to filing this Objection, counsel for the ERISA Claimants and counsel for the Debtors agreed that the classification of the ERISA Claim for all purposes other than voting would be resolved post-Confirmation and all rights with respect thereto are reserved. For the avoidance of doubt, the First Amended Plan and any order confirming the First Amended Plan should clearly indicate that confirmation of the First Amended Plan does not constitute a determination as to subordination pursuant to 11 U.S.C. § 510(b) or otherwise of the ERISA Claim.[5]

RELEVANT PROVISIONS OF THE FIRST AMENDED PLAN

8. "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."

[5] Furthermore, any attempt to deem the ERISA Claim withdrawn as of the Effective Date without any further action of the Debtors or the Reorganized Debtors and without any further action, order or approval of the Bankruptcy Court is improper. While a similar provision appeared in the earlier version of the First Amended Plan dated June 24, 2013 [Doc. No. 4140, § 10.3.5], it was (apparently intentionally) deleted from the Solicitation Version of the First Amended Plan [Doc. No. 4175]. To the extent the Debtors intend to deem the ERISA Claim, under this or any similar provision, unilaterally withdrawn, the ERISA Claimants object and dispute that any basis exists for such improper relief.

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).

9. "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

10. 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 ERISA Claimants are Releasing Parties;

(b) the First Amended Plan should not preclude the ERISA Claimants from proceeding with the ERISA Claim 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 ERISA Claimants and the Putative Class are Releasing Parties.

11. By virtue of the Classification Order, the ERISA Claim is a Class 10 Claim for voting purposes only. Therefore, the Holder of the ERISA Claim is not entitled to vote on the First Amended Plan, is not required to opt out of the releases in Section 12.6 of the First Amended Plan and is not a Releasing Party.[6] Notwithstanding the foregoing, in the unlikely event that the Debtors attempt to deem the ERISA Claimants Releasing Parties, the ERISA Claimants object to the release, and the exculpation and injunction provisions as improper on the following grounds.

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

12. To the extent the First Amended Plan intends to release the claims of the ERISA Claimants and the 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 ERISA 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

[6] 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.

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).

13. 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 ERISA Litigation clearly asserts direct claims against non-debtor third parties over which the Court does not have subject matter jurisdiction. Each of the Non-Debtor Defendants in the ERISA Litigation is named in his or her personal capacity as a fiduciary of the Plan. Their obligations under ERISA to the ERISA Plans and their participants are independent of their responsibilities to the Debtor. Consequently, the liability of the Non-Debtor Defendants is not dependent, in any way, upon a finding of liability on the part of the Debtor.

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

14. 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 ERISA Litigation. FAP, § 12.6.

15. 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 ERISA Litigation, it is improper.

16. 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 ERISA Litigation.

17. 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 ERISA Claimants from asserting claims in the ERISA Litigation or seeking discovery post-Effective Date.

18. 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.

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

20. As previously stated (*see* ¶ 11, *supra*), in an abundance of caution, and in the event the Debtors seek to deem the ERISA Claimants Releasing Parties, the following language should be included in the First Amended Plan and any order confirming the First Amended Plan:[7]

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

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

B. The Plan Should Preserve the Rights of the ERISA 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.

21. Upon information and belief, the Debtors maintain fiduciary liability insurance policies (the "Liability Policies") in favor of their directors and officers for claims asserted in the ERISA Litigation, as well as for claims against the Debtors directly for violations of ERISA. While the First Amended Plan refers to the Debtors' D&O Policies,[8] Plan, § 8.9, they fail to disclose the extent of the coverage provided by any Liability Policies or if the D&O Policies provide coverage for ERISA violations. The ERISA Claimants maintain that the ERISA Class is entitled to look to the proceeds of such insurance for payment in connection with the claims of the ERISA Claimants and the ERISA Class, and may, at least, pursue these Claims against the Debtors to the extent of such available insurance post-Confirmation. Because the ERISA Claimants may not have a direct action against the insurance carriers under the Liability Policies or any other applicable policy, the proceeds of such policies may only be accessed through the pursuit of the claims asserted in the ERISA Litigation. Accordingly, the Plan should not impact the rights of the ERISA Claimants or the ERISA Class to pursue their claims against the Debtors to the extent of the proceeds of the Liability Policies.

22. 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 ERISA Claimants and the ERISA Class from pursuing their claims against the Debtors to the extent of available insurance coverage and proceeds. The Claims of the ERISA Claimants and the ERISA Class against the Debtors, to the extent of available insurance, are preserved and not discharged by the First Amended Plan, as may be amended.

[8] Unless advised otherwise, the Liability Policies would appear to be treated or considered as D&O Policies under the Plan.

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

23. 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.

24. 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.

25. 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 ERISA Claimants, members of the ERISA 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 ERISA 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.

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

27. 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 ERISA Claimants, with an opportunity to be heard.

CONCLUSION

28. Based on the foregoing, the ERISA Claimants respectfully request 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,

LOWENSTEIN SANDLER LLP

By: */s/ Michael S. Etkin*
Michael S. Etkin (ME-0570)
Ira M. Levee (IL-9958)
1251 Avenue of the Americas, 17th Floor
New York, New York 10020
Tel: (212) 262-6700
Fax: (212) 262-7204

and

65 Livingston Avenue
Roseland, New Jersey 07068
(973) 597-2500 (Telephone)
(973) 597-2481 (Facsimile)

Bankruptcy Counsel for Mark Gedek, Mark J. Nenni, Andrew J. Mauer, Thomas W. Greenwood, Barry Bolger, Julius Coletta, Dale Toal, Claude Matte and Allen E. Hartter, on Behalf of the ERISA Plans, Themselves and a Class of All Others Similarly Situated

Robert A. Izard
Mark P. Kindall
IZARD NOBEL LLP
29 South Main Street, Suite 305
West Hartford, CT 06107
Tel: (860) 493-6292
Fax: (860) 493-6290
Email: mkindall@izardnobel.com
Email: rizard@izardnobel.com

Jacob A. Goldberg
Gerald D. Wells, III
FARUQI & FARUQI, LLP
101 Greenwood Avenue, Suite 600
Jenkintown, PA 19046
Tel: (215) 277-5770
Fax: (215) 277-5771
Email: jgoldberg@faruqilaw.com
Email: jwells@faruqilaw.com

Interim Co-Lead Class Counsel

Jules L. Smith
BLITMAN & KING LLP
The Powers Building, Suite 500
16 West Main Street
Rochester, NY 14614
Tel: (585) 232-5600
Fax: (585) 232-7738
Email: jlsmith@bklawyers.com

Interim Liaison Class Counsel

Todd Collins
Shannon J. Carson
Patrick F. Madden
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
Tel: (215) 875-3000
Fax: (215) 875-4613
Email: tcollins@bm.net
Email: scarson@bm.net
Email: pmadden@bm.net

Counsel for Plaintiff Thomas Greenwood

Todd M. Schneider
Adam B. Wolf
SCHNEIDER WALLACE COTTRELL BRAYTON KONECKY LLP
180 Montgomery Street, Suite 2000
San Francisco, CA 94104
Tel: (415) 655-8547
Fax: (415) 421-7105
Email: tschneider@schneiderwallace.com
Email: awolf@schneiderwallace.com

Counsel for Plaintiff Julius Coletta

Edward W. Ciolko
Peter A. Muhic
Mark K. Gyandoh
Julie Siebert-Johnson
KESSLER TOPAZ MELTZER & CHECK, LLP
280 King of Prussia Road
Radnor, PA 19087
Tel: (610) 667-7706
Fax: (610) 667-7056
Email: eciolko@ktmc.com
Email: pmuhic@ktmc.com
Email: mgyandoh@ktmc.com
Email: jsjohnson@ktmc.com

Counsel for Plaintiffs Dale Toal and Claude Matte

Gregory Y. Porter
BAILEY & GLASSER LLP
910 17th St. Suite 600
Washington, DC 20006
Tel: (202) 463-2101
Fax: (202) 463-2103
Email: gporter@baileyglasser.com

Counsel for Plaintiff Allen Hartter