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

In re	)	Chapter 11
	)	
EASTMAN KODAK COMPANY., <i>et al.</i> , <sup>1</sup>	)	Case No. 12-10202 (ALG)
	)	
Debtors	)	(Jointly Administered)
	)	

**OBJECTION AND RESERVATION OF RIGHTS OF ACE AMERICAN INSURANCE COMPANY AND WESTCHESTER FIRE INSURANCE COMPANY TO DEBTORS' PROPOSED CURE AMOUNT IN CONNECTION WITH ASSUMPTION OF INSURANCE POLICIES, BOND PROGRAMS AND RELATED AGREEMENTS**

ACE American Insurance Company (“ACE”) and Westchester Fire Insurance Company (“Westchester Fire” and together with ACE, the “ACE Entities”) hereby file this objection and reservation of rights (the “Objection”) to the cure amounts proposed by the Debtors (as hereinafter defined) in connection with the assumption of various insurance policies, bond programs and related agreements pursuant to the Debtors’ Joint Plan of Reorganization under Chapter 11 of the United States Bankruptcy Code and in support hereof, state as follows:

<sup>1</sup>The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: Eastman Kodak Company (7150); Creo Manufacturing America, LLC (4412); Eastman Kodak International Capital Company, Inc. (2341); Far East Development Ltd. (2300); FPC Inc. (9183); Kodak (Near East), Inc. (7936); Kodak Americas, Ltd. (6256); Kodak Aviation Leasing LLC (5224); Kodak Imaging Network, Inc. (4107); Kodak Phillipines, Ltd. (7862); Kodak Portuguesa Limited (9171); Kodak Realty, Inc. (2045); Laser-Pacific Media Corporation (4617); NPEC Inc. (5677); Pakon, Inc. (3462); and Qualex Inc. (6019). The location of the Debtors’ corporate headquarters is: 343 State Street, Rochester, NY 14650.



## **BACKGROUND**

1. On January 19, 2012 (the “Petition Date”), Eastman Kodak Company and certain affiliated debtors (collectively, the “Debtors”) filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §101 *et seq.* (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Southern District of New York.

2. On April 30, 2013, the Debtors filed their Joint Chapter 11 Plan of Reorganization of Eastman Kodak Company and its Debtor Affiliates [Dkt. 3650] (as subsequently amended, the “Plan”) [Dkt. 4073] which was confirmed by this Court by Order dated August 23, 2013 [Dkt. 4966].

### **A. The ACE Insurance Program**

3. Prior to the Petition Date, ACE issued certain insurance policies (as renewed, amended, modified, endorsed or supplemented from time to time, collectively, the “Policies”) to certain of the Debtors and certain of their non-debtor affiliates as named insureds. In connection therewith, ACE and the Debtors and/or their non-debtor affiliates also entered into certain written agreements related to the Policies (as renewed, amended, modified, endorsed or supplemented from time to time, and including any exhibit or addenda thereto, collectively, the “Insurance Agreements”).

4. Pursuant to the Policies and Insurance Agreements (collectively, the “Insurance Program”),<sup>2</sup> ACE provides, *inter alia*, certain workers’ compensation, general liability, automobile liability, storage tank liability, and excess liability insurance for specified

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<sup>2</sup> Any description or summary herein of the terms of the ACE Insurance Program is provided for convenience purposes and therefore reference should be made to Policies and Agreements for the exact provisions, terms and/or conditions thereof. Nothing herein is intended to alter, modify or otherwise affect the terms and conditions of the ACE Insurance Program. Copies of the Policies and Insurance Agreements were previously provided to Debtors.

policy periods subject to certain limits, deductibles, retentions, exclusions, terms and conditions, as more particularly described therein. Consistent with the Policies and the Insurance Agreements, and as more particularly described therein, the insureds, including one or more of the Debtors, are required to pay to ACE certain amounts including, but not limited to, insurance premiums, including retrospective and audit premiums, and are responsible for certain deductibles, as well as obligations regarding the notice of and assistance in the defense of any claims made under the Policies (the “Obligations”).

5. Pursuant to the terms of the Insurance Program, the Debtors have provided letters of credit and other collateral security to ACE for the purpose of securing their Obligations to ACE. Indeed, the Insurance Program expressly requires the Debtors to (i) provide ACE with collateral and security in an amount and form acceptable to ACE, and (ii) continue providing collateral and security until ACE determines that there is no longer any need for such.

6. The terms of the relevant Policies have expired. However, ACE may remain responsible for claims made under those Policies for the time-period that they were active. In addition, the Debtors remain responsible for the performance of their respective Obligations.

7. On July 13, 2012, ACE filed Proof of Claim No. 4612 in the amount of \$873,646.

8. On July 10, 2013, ACE filed its Amended Proof of Claim No. 6194 (the “Amended Claim”).<sup>3</sup> The Amended Claim reflects amounts due as of the Petition Date under the Insurance Program, including, without limitation, those Policies identified on the Policy List

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<sup>3</sup> On August 16, 2013, Debtors filed Debtors’ Thirteenth Omnibus Objection to Claims and therein sought to expunge ACE’s first-filed proof of claim to avoid incidental double recovery. ACE does not object to the extent the objection seeks only to replace the original proof of claim with ACE’s Amended Claim in the total amount of \$2,209,402.

attached hereto as Exhibit A. The amount due to ACE as of the Petition Date, as reflected by its Amended Claim, totals \$2,209,402 consisting of (i) a secured claim in the amount of \$1,066,540, the collateral for which is held by ACE in the form of cash proceeds from a letter of credit issued in order to secure Obligations under the workers' compensation and general liability programs; and (ii) an unsecured claim totaling \$1,142,862, which consist of \$681,760 of additional Obligations on account of the workers' compensation and general liability programs as well as retrospective and audit premiums<sup>4</sup> in the amount of \$461,102.<sup>5</sup>

**B. Westchester Fire Bond Program**

9. Prior to the Petition Date, Westchester Fire issued on behalf of one or more of the Debtors workers' compensation, customs and other miscellaneous bonds in the aggregate face amount of \$5,970,000 (US) and \$7,000 (CAN) (collectively, the "Bonds"). Such Bonds are identified on the Bond Liability Chart attached hereto as Exhibit B.

10. Pursuant to, among other things, an Agreement of Indemnity dated May 17, 2002, the Debtors agreed to indemnify Westchester Fire for any sums it might be required to pay by reason of executing the Bonds. The Bonds, the Agreement of Indemnity, and all other related agreements shall be referred to as the "Bond Program." In addition, the Debtors agreed to provide Westchester Fire with collateral security currently in the form of an irrevocable letter of credit issued by Wells Fargo in the face amount of \$2,500,000. The letter of credit secures the indemnification obligations of the Debtors in connection with the Bond Program.

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<sup>4</sup> The retrospective premium component of the ACE Insurance Program calculates adjusted annual premiums based upon the insured's past claims experience and annual audits.

<sup>5</sup> On the Debtors' request, ACE previously provided a spreadsheet containing its calculation of these amounts to the Debtors' Michael Huntingdon. The analysis relies upon, among other things, the historical and anticipated losses under the workers' compensation and general liability programs.

11. On July 13, 2012, Westchester Fire filed Proof of Claim No. 4591 in the face amount of \$5,970,000. Since the Petition Date, Westchester Fire has continued to administer and pay claims under the Bonds, in particular, the customs bonds.<sup>6</sup>

**C. The Debtors Assumption of the Insurance Program and Bond Program**

12. The Plan as filed did not provide for either assumption or rejection of the Policies, Insurance Agreement, or the Bonds and their related agreements. Given the uncertainty surrounding the Debtors' proposed treatment of the Insurance Program and the Bond Program, prior to the deadline to object to the Plan, undersigned counsel reached out to and engaged in discussions with Debtors' counsel.

13. As of Wednesday, August 14, 2013 (the continued objection deadline extended by the Debtors to the ACE Entities), the Debtors had not yet decided whether the Insurance Program and the Bond Program would be assumed or rejected and they did not believe they would be able to make that determination prior to the confirmation hearing scheduled for August 20, 2013. Despite the Bankruptcy Code requirement that all elections to assume or reject be made as of confirmation, 11 U.S.C. §365(d)(2), as an accommodation to the Debtors, the ACE Entities agreed to continue all issues concerning assumption or rejection to the September omnibus hearing in exchange for (i) the ACE Entities' preservation of all contract specific confirmation objections; and (ii) the Debtors' agreement to faithfully negotiate the ACE Entities' standard assumption language for inclusion in the proposed form of confirmation order.

14. While the Debtors agreed to negotiate language that would apply in the event of assumption, it quickly became clear that the Debtors had no intention to consider ACE's

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<sup>6</sup> The Debtors have secured the return of Bond No. K0697790A in favor of the Colorado Division of Workers' Compensation. Westchester Fire takes the position that the return of the original bond may be construed as a release of Westchester Fire from all responsibilities associated with that bond.

proposed language and directed the ACE Entities to submit to the Insurance Neutrality language negotiated by another insurer and set forth in Section 15.16 of the Plan. It was, and it remains the position of the ACE Entities, that Plan Section 15.16 says everything other than (i) the Debtors are in fact assuming the Insurance Program and the Bond Program in their entirety, and (ii) the Debtors agree to cure any defaults thereunder as a condition to assumption.

15. Notwithstanding the agreed upon stipulation, on Friday, August 16, 2013, two business days prior to the confirmation hearing, counsel for the Debtors represented to the ACE Entities that (i) the Debtors were in fact electing to “assume” the Insurance Program and the Bond Program, (ii) that notwithstanding the insurance neutrality language in the Plan, it was the Debtors’ intent to *assume* all of the all Policies, Insurance Agreements and Bonds consistent with Section 365 of the Bankruptcy Code, and (iii) that counsel for the ACE Entities was invited to stand and preserve this agreement on the record of the confirmation hearing.

16. On August 20, 2013, undersigned counsel appeared at the confirmation hearing and confirmed, on record, that notwithstanding the language in Section 15.16 of the Plan, the Debtors would be assuming all of the ACE Entities’ Policies, Bonds and all other related agreements. The Debtors did not object to this representation. (See Transcript at pp. 134-137).

17. While no Notice of Assumption has been filed or served upon the ACE Entities, the Debtors have expressed the position that the cure amount due in connection with all of the assumed Policies, Insurance Agreements and the Bonds is zero.

#### **OBJECTION TO PROPOSED CURE AMOUNT**

18. Pursuant to Section 365 of the Bankruptcy Code, before a contract may be assumed, the Debtors must cure or provide adequate assurance that the Debtors will promptly cure all defaults. 11 U.S.C. § 365(b)(1); In re Wireless Data, Inc., 547 F.3d 484, 489 (2d Cir.

2008). “One of the purposes of Section 365 is to permit the debtors to continue in a beneficial contract; provided, however, that the other party to the contract is made whole at the time of the debtors’ assumption of the contract.” In re Entertainment, Inc., 223 B.R. 141, 151 (Bankr. N.D. Ill. 1998).

19. The ACE Entities object to the proposed assumption only to the extent that Debtors have failed to demonstrate that they will cure any defaults, compensate the ACE Entities for any loss, and/or provide adequate assurance of future performance. Pursuant to Bankruptcy Code Section 365(b)(1)(A), the Debtors are required to cure all defaults under an executory contract as a condition to the assumption of said contract. In re M. Fine Lumber Co., Inc., 383 B.R. 565, 573 (Bankr. E.D.N.Y. 2008) (“The debtor bears the burden of showing that the requirements for assumption under § 365 have been met.”) (citations omitted).

20. ACE objects to the proposed cure of \$0 in connection with the assumption of its Policies.

21. The Debtors are required to pay in full \$461,102 due and owing to ACE under the outstanding retro premiums in order to assume their various Policies and Insurance Agreements. As stated in the Amended Proof of Claim, there is no collateral securing this obligation. Payment of such premiums is an essential Obligation under the Insurance Program and must be paid immediately.

22. Additionally, in order to assume ACE’s various Policies and Insurance Agreements, the Debtors must provide either additional collateral in the form of a letter of credit, or cash sufficient to cover ACE’s continued exposure under the workers’ compensation and general liability policies. Following a good faith actuarial analysis based on historical data and industry expertise, ACE concluded that the current collateral is insufficient to pay the Debtors’

deductibles associated with projected losses.<sup>7</sup> The terms of the Insurance Agreements require the parties to maintain sufficient collateral as determined by ACE.

23. Based on ACE's analysis, in order to comply with the terms of the Insurance Agreements, cure outstanding defaults thereunder, and as adequate assurance of future performance, the Debtors must provide ACE additional collateral in the amount of \$681,760 in the form of cash or a letter of credit. While the Debtors have succeeded in confirming a plan that restructures their businesses, the Reorganized Debtors emerge from chapter 11 a new and smaller enterprise that warrants a new credit & risk analysis.

24. Westchester Fire does not object to the proposed cure amount of \$0 insofar as it pertains solely to the assumption of its Bonds and Bond Program and the collateral necessary to maintain those programs. Based on what Westchester Fire believes is the current exposure under the outstanding Bonds, Westchester Fire believes it possesses sufficient collateral to pay current and future claims and expenses under the Bonds.

25. However, as of August 30, 2013, Westchester Fire has incurred legal fees and expenses in the approximate amount of \$25,000 by reason of its execution of the Bonds and this bankruptcy case. This amount is not contingent, and, pursuant to the Indemnity Agreement and applicable law, Westchester Fire is entitled to reimbursement of this amount from the Debtors. Ogle v. Fidelity Deposit Co. of Maryland, 586 F.3d 143 (2d Cir. 2009) (holding that a surety may collect postpetition attorneys' fees arising under a prepetition indemnity agreement). As such, the Debtors are required to immediately pay in full \$25,000 in fees and expenses due and owing to Westchester Fire in order to assume the Bonds and the Bond Program.

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<sup>7</sup> Debtors have previously expressed concerns that ACE may be over-collateralized. In the event this position becomes necessary to resolve, or other general issues relating to the terms of the Policies, ACE preserves and reserves all rights to argue that this Court lacks jurisdiction to hear this dispute.



**RESERVATION OF RIGHTS**

26. The ACE Entities expressly preserve and reserve, and do not waive, any and all rights, defenses, limitations or other exclusions under the Insurance Program and the Bond Program, and all applicable law, including the doctrine of equitable subrogation. Nothing contained in this Objection shall be deemed to expand coverage available under the Policies or the Bonds. The ACE Entities further preserve and reserve their rights to object to any claim of coverage under any of the Policies.

27. The ACE Entities further preserve and reserve their right to seek adjudication that the Debtors, individually or collectively, have waived, forfeited, or discharged any coverage available under the Policies.

28. Except as otherwise stated herein, the ACE Entities do not object to the assumption of the Policies and Agreements. However, the ACE Entities preserve and reserve their right to assert additional charges under the Policies, Insurance Agreements and Bonds for amounts that become due prior to assumption and as the result of regular accounting and credit reviews conducted by the ACE Entities in the normal course of business.

WHEREFORE, ACE respectfully requests that this Court require the Debtors to (i) immediately pay the sum of \$461,102 to ACE, and (ii) submit additional collateral in the amount of \$681,760 in order to cure outstanding defaults, and (iii) requests such other and further relief as this Court may deem necessary. Westchester Fire likewise respectfully requests that this Court (i) require the Debtors to immediately pay attorneys' fees incurred to date in the approximate amount of \$25,000, and (ii) for such other and further relief as this Court may deem necessary.

Dated: September 9, 2013

Respectfully submitted,

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# **EXHIBIT A**

Policy Number	Insured Name	Inception Date	Expiration Date
SCF C32306202	EASTMAN KODAK COMPANY	01/01/1989	01/01/1990
SCF C32306214	EASTMAN KODAK COMPANY	01/01/1989	01/01/1990
SCF C32306536	EASTMAN KODAK COMPANY	01/01/1989	05/01/1989
SCF C20430059	EASTMAN KODAK COMPANY	05/01/1989	05/01/1990
SCF C20430229	EASTMAN KODAK COMPANY	05/01/1989	01/01/1990
SCF C20433620	EASTMAN KODAK COMPANY	01/01/1990	01/01/1991
SCF C20433711	EASTMAN KODAK COMPANY	01/01/1990	01/01/1991
SCF C34330153	EASTMAN KODAK COMPANY	01/01/1990	01/01/1991
SCF C34330165	EASTMAN KODAK COMPANY	01/01/1990	01/01/1991
SCF C30437467	EASTMAN KODAK COMPANY	12/31/1990	12/31/1991
SCF C36284407	EASTMAN KODAK COMPANY	01/01/1991	01/01/1992
SCF C36284419	EASTMAN KODAK COMPANY	01/01/1991	01/01/1992
SCF C36290171	EASTMAN KODAK COMPANY	01/01/1991	01/01/1992
SCF C20440971	EASTMAN KODAK COMPANY	01/01/1992	01/01/1993
WLR C20440880	EASTMAN KODAK COMPANY	01/01/1992	01/01/1993
WLR C20440958	EASTMAN KODAK COMPANY	01/01/1992	01/01/1993
SCF C37838913	EASTMAN KODAK COMPANY	01/01/1992	01/01/1993
SCF C37838925	EASTMAN KODAK COMPANY	01/01/1992	01/01/1993
CCS C39168510	EASTMAN KODAK COMPANY	05/15/1992	05/01/1993
SCF C39168558	EASTMAN KODAK COMPANY	05/15/1992	05/01/1993
SCF C3916856A	EASTMAN KODAK COMPANY	05/15/1992	05/01/1993
WLR C39168492	EASTMAN KODAK COMPANY	05/15/1992	05/01/1993
WLR C39168509	EASTMAN KODAK COMPANY	05/15/1992	05/01/1993
WLR C39193899	EASTMAN KODAK COMPANY	05/15/1992	05/15/1993
SCF C20441100	EASTMAN KODAK COMPANY	12/31/1992	01/01/1993
SCF C20445373	EASTMAN KODAK COMPANY	05/01/1993	05/10/1994
SCF C20445385	EASTMAN KODAK COMPANY	05/01/1993	05/01/1994
WLR C20445361	EASTMAN KODAK COMPANY	05/01/1993	05/01/1994
SCF C39938479	EASTMAN KODAK COMPANY	05/01/1993	05/01/1994
WLR C39938455	EASTMAN KODAK COMPANY	05/01/1993	05/01/1994

WLR C39938467	EASTMAN KODAK COMPANY	05/01/1993	05/01/1994
WLR C20445373	EASTMAN KODAK COMPANY	05/10/1993	05/10/1994
SCF C4086197A	EASTMAN KODAK COMPANY	05/01/1994	05/01/1995
SCF C40862365	EASTMAN KODAK COMPANY	05/01/1994	05/01/1995
WLR C40862341	EASTMAN KODAK COMPANY	05/01/1994	05/01/1995
CMR G03135974	EASTMAN KODAK COMPANY	01/01/1989	01/01/1993
HDO G14027907	EASTMAN KODAK COMPANY	05/15/1992	05/01/1993
HDO G16583650	EASTMAN KODAK COMPANY	05/01/1993	05/01/1994
HDO G16587424	EASTMAN KODAK COMPANY	05/01/1994	05/01/1995
HDO G16588969	EASTMAN KODAK COMPANY	05/01/1994	05/01/1995

# **EXHIBIT B**

### Bond Liability Chart

<b>Bond No.</b>	<b>Principal</b>	<b>Type of Bond</b>	<b>Liability</b>
K08489774	Eastman Kodak Company	US Customs	\$360,000.00
K08489786	Eastman Kodak Company	US Customs	\$700,000.00
K08489762	Eastman Kodak Company	US Customs	\$350,000.00
K0862253A	Eastman Kodak Company	Maine Fund Raiser	\$25,000.00
K08622577	Eastman Kodak Company	Alabama Fund Raiser	\$10,000.00
K08622498	Eastman Kodak Company	Massachusetts Solicitors	\$25,000.00
K0697790A	Eastman Kodak Company	Colorado Workers' Compensation	\$3,500,000.00
K06978022	Eastman Kodak Company	Massachusetts Workers' Compensation	\$1,000,000.00
M413265	Eastman Kodak Company	Canadian Customs	C\$7,000
		<b>Total Outstanding Liability (US)</b>	<b>\$5,970,000.00</b>
		<b>Total Outstanding Liability (Canada)</b>	<b>C\$7,000.00</b>