IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	)	Chapter 11
AVAYA INC., *et al.*,	)	Case No. 23-90088 (DRJ)
Debtors.[1]	)	(Jointly Administered)

OBJECTION OF SECURITIES PLAINTIFF CITY OF PITTSBURGH COMPREHENSIVE MUNICIPAL PENSION TRUST FUND TO APPROVAL OF THE DISCLOSURE STATEMENT FOR, AND CONFIRMATION OF, THE JOINT PREPACKAGED PLAN OF REORGANIZATION OF AVAYA INC AND ITS DEBTOR AFFILIATES PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

[1] A complete list of each of the Debtors in these Chapter 11 Cases may be obtained on the website of the Debtors' claims and noticing agent at http://www.kccllc.net/avaya. The location of Debtor Avaya Inc.'s principal place of business and the Debtors' service address in these Chapter 11 Cases is 350 Mount Kemble Avenue, Morristown, New Jersey 07960.

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City of Pittsburgh Comprehensive Municipal Pension Trust Fund ("Pittsburgh"), proposed lead plaintiff in the federal securities class action entitled *Jiang v. Avaya Holdings Corp., et al.*, Case No. 1:23-cv-1258 (the "Securities Litigation"), pending in the United States District Court for the Southern District of New York (the "District Court"), on behalf of itself and the class it seeks to represent in the Securities Litigation (as described more fully below, the "Class"), hereby submits this objection (the "Objection") to (i) approval of the *Disclosure Statement Relating to the Joint Prepackaged Plan of Reorganization of Avaya Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [ECF No. 51] (the "Disclosure Statement") and (ii) confirmation of the *Joint Prepackaged Plan of Reorganization of Avaya Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [ECF No. 50] (the "Plan") proposed by Avaya Inc. ("Avaya") and its debtor affiliates (together with Avaya, the "Debtors") in the above-captioned chapter 11 bankruptcy cases (the "Chapter 11 Cases"). As and for this Objection, Pittsburgh respectfully states as follows:

PRELIMINARY STATEMENT[2]

1. On the Petition Date, February 14, 2023, the Debtors filed the Disclosure Statement and the Plan, which contains a sweeping and virtually unlimited third-party release and injunction (the "Third-Party Release and Injunction") that essentially eviscerates the claims of Pittsburgh and the Class against the Non-Debtor Defendants in the Securities Litigation.

2. As an initial matter, the record demonstrates that the Debtors have not even attempted to provide notice and an opportunity to opt out to members of the Class (which, as discussed below, would impose an unjustifiable burden on absent Class members in any event), in violation of the Class members' due process rights. For this reason alone, unless the claims of

[2] Capitalized terms used in this Preliminary Statement but not defined above have the meanings given thereto below.

Pittsburgh and the Class against the Non-Debtor Defendants are carved out of the Third-Party Release or Pittsburgh is given authority to opt out on behalf of the Class, the Plan cannot be confirmed.

3. Even if there were no due process issues, the Plan's Third-Party Release and Injunction prey on absent Class members who are deemed to reject and not entitled to vote on or receive a distribution under the Plan, exceed the boundaries of this Court's jurisdiction and constitutional adjudicatory authority, are legally impermissible under FRCP 23(e), and, as a *de facto* nonconsensual release, violate Fifth Circuit precedent. Stated differently, this Court is being asked to infringe upon the jurisdiction and authority of an Article III court with respect to non-bankruptcy, non-core claims of non-Debtors against non-Debtors and, in doing so, to potentially strip disenfranchised, defrauded investors of their only potential remedy through the Securities Litigation for no consideration whatsoever.

4. The Third-Party Release and Injunction should be modified as set forth in paragraph 41 below to expressly exclude the claims of Pittsburgh and the Class against the Non-Debtor Defendants and any other non-Debtor subsequently named as a defendant. Absent such a carve-out, the Plan cannot be confirmed in its current form.

5. The Plan also contains vague references to document retention that do not expressly require the Debtors and Reorganized Debtors to continue to comply with their evidence preservation obligations under the PSLRA and other applicable law. The Plan should be modified as set forth in paragraph 46 below to expressly require preservation of documents and other evidence potentially relevant to the Securities Litigation and the allegations contained therein.

6. Finally, the Disclosure Statement lacks adequate information to advise the Class of the Plan's impact on their claims against the Non-Debtor Defendants and on the prosecution of the Securities Litigation. Among other things, the Disclosure Statement:

- does not mention, let alone contain a description of, the Securities Litigation;
- violates Bankruptcy Rule 3016(c) by failing to disclose the scope of the Third-Party Release and Injunction;
- fails to provide any legal or factual basis for the Third-Party Release and Injunction, particularly as they may relate to Pittsburgh, the Class, and the Securities Litigation; and
- does not disclose whether or how the Debtors intend to preserve evidence potentially relevant to the Securities Litigation after the Effective Date of the Plan.

Unless the Debtors modify the Disclosure Statement, with corresponding modifications to the Plan, to address these fatal defects, the Disclosure Statement should not be approved on a final basis.

FACTUAL BACKGROUD

I. The Securities Litigation

7. On February 14, 2023, Oliver Jiang ("Jiang") filed a complaint (the "Complaint") initiating the Securities Litigation on behalf of himself and the Class against Debtor Avaya Holdings Corp. ("Avaya Holdings") and certain of its former officers, specifically James M. Chirico, Jr., and Kieran J. McGrath (together, the "Non-Debtor Defendants" and collectively with Avaya Holdings, the "Defendants").

8. The Complaint asserts claims against the Defendants under sections 10(b) and 20(a) of the Securities Exchange Act of 1934, and SEC Rule 10b-5, on behalf of a class (the "Class") consisting of all purchasers of the securities of Avaya Holdings between October 3, 2019 and November 29, 2022, inclusive (the "Class Period").

9. The Complaint alleges, among other things, that during the Class Period, the Defendants concealed onerous requirements they took on in connection with the Debtors' collaboration with RingCentral, Inc. The Complaint further alleges that defective reporting controls precluded the Debtors' senior executives from accurately recording and reporting the Debtors' financial results, which significantly compromised their ability to accurately budget and forecast.

10. Meanwhile, according to the Complaint, with the market price of the Debtors' securities artificially inflated, certain of the Debtors' senior executives cashed in, selling nearly 200,000 of their personally held shares of the Debtors' common stock and reaping more than $4.2 million in gross proceeds. The Debtors also cashed in by issuing and selling hundreds of millions of dollars' worth of bonds at artificially inflated prices because they were exchangeable into common stock. The truth would come out in dribs and drabs thereafter, driving down the market price of the Debtors' securities.

11. On February 16, 2023, after the Debtors filed these Chapter 11 Cases, Jiang filed a notice of voluntary dismissal of the Complaint without prejudice as to Avaya Holdings.

12. As the Securities Litigation was commenced immediately prior to these Chapter 11 Cases, a motion to appoint a lead plaintiff was not filed by any party prior to the Petition Date. On March 6, 2023, Pittsburgh filed a motion seeking its appointment as lead plaintiff and approval of Robbins Geller Rudman & Dowd LLP ("RGRD")[3] as lead counsel in the Securities Litigation (the "Lead Plaintiff Motion").

13. Given the magnitude of its losses, Pittsburgh anticipates that the District Court will grant the Lead Plaintiff Motion. However, because of the expedited timeline the Debtors

[3] RGRD also represents Jiang and filed the Complaint.

have established for these Chapter 11 Cases—seeking confirmation approximately one month after the Petition Date (as discussed below)—a hearing most likely will not be held on the Lead Plaintiff Motion prior to a hearing on confirmation of the Plan. In light of the potential impact of the Plan on the claims of the Class against the Non-Debtor Defendants and this compressed time frame, Pittsburgh cannot wait for a hearing on the Lead Plaintiff Motion before taking steps to protect the rights of the Class. If the District Court appoints different parties as lead plaintiff and lead counsel, those parties can step into the shoes of Pittsburgh and RGRD, respectively, in connection with these Chapter 11 Cases.

II. The Plan and Disclosure Statement

14. On February 14, 2023, the Debtors filed the Plan and Disclosure Statement with a proposed combined disclosure statement and plan confirmation hearing scheduled on March 22, 2023.

A. The Third-Party Release and Injunction

15. Article VIII.D of the Plan contains a deemed release (the "Third-Party Release") of numerous non-Debtors' claims against the Debtors and myriad other non-Debtors, as follows:

> ***Releases by Third Parties Other than the Settlement Group Releasing Parties.***
>
> **As of the Effective Date and subject to (i) the Preserved Claims (other than the Preserved Tranche B3 Claims), which shall not be included in this release, and (ii) the completion of that certain investigation commenced by, and under the direction and authority of, the Audit Committee, except for the rights that remain in effect from and after the Effective Date to enforce the Plan, the Definitive Documents, and the obligations contemplated by the Restructuring Transactions or as otherwise provided in any order of the Bankruptcy Court, on and after the Effective Date, the Released Parties will be deemed conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged, by the Releasing Parties, in each case on behalf of itself and its respective successors, assigns, and representatives and any and all other Persons that may purport to assert any Cause of Action derivatively, by or through the foregoing**

Persons, in each case solely to the extent of the Releasing Parties' authority to bind any of the foregoing, including pursuant to agreement or applicable non-bankruptcy law, from any and all claims and Causes of Action whatsoever (including any derivative claims, asserted or assertable on behalf of the Debtors or the Estates), whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, asserted or unasserted, accrued or unaccrued, existing or hereinafter arising, whether in law or equity, whether sounding in tort or contract, whether arising under federal or state statutory or common law, or any other applicable international, foreign, or domestic law, rule, statute, regulation, treaty, right, duty, requirement or otherwise, that such Holders or their estates, Affiliates, heirs, executors, administrators, successors, assigns, managers, accountants, attorneys, representatives, consultants, agents, and any other Persons claiming under or through them would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the Holder of any Claim or Interest or other Person, based on or relating to, or in any manner arising from, in whole or in part, the Debtors or the Estates, the Chapter 11 Cases, the Restructuring Transactions, 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 Interest that is treated under the Plan, the business or contractual arrangements or interactions between the Debtors and any Released Party, the restructuring of any Claim or Interest before or during the Chapter 11 Cases, the negotiation, formulation, preparation, or consummation of the RSA, the Restructuring Transactions, the Renegotiated RingCentral Contracts, the Governance Documents, the RO Backstop Agreement, the RO Documents, the DIP Facilities, the DIP Orders, the Disclosure Statement, the Plan Supplement, the Plan and related agreements, instruments, and other documents, the solicitation of votes with respect to the Plan, the Exit Facilities Documents and all other Definitive Documents, in all cases based upon any act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date.

Notwithstanding anything to the contrary in the foregoing, the releases set forth in the preceding paragraph shall not release any Released Party (i) other than a Released Party that is a Reorganized Debtor, Debtor, or a director, officer, or employee of any Debtor as of the Petition Date, from any claim or Cause of Action with respect to (a) the repurchase, redemption, or other satisfaction by any Company Party of HoldCo Convertible Notes previously held by such Released Party prior to the Petition Date or (b) the marketing, arrangement, syndication, issuance, or other action or inaction with respect to the

> **incurrence of the B-3 Term Loans or the Secured Exchangeable Notes) or (ii) from any claim or Cause of Action arising from an act or omission that is determined by a Final Order to have constituted actual fraud, willful misconduct, or gross negligence.**
>
> **Entry of the Confirmation Order shall constitute the Bankruptcy Court's approval, pursuant to Bankruptcy Rule 9019, of the Third-Party Release, which includes by reference each of the related provisions and definitions contained herein, and, further, shall constitute the Bankruptcy Court's finding that the Third-Party Release is: (1) consensual; (2) essential to the confirmation of the Plan; (3) given in exchange for the good and valuable consideration provided by the Released Parties; (4) a good faith settlement and compromise of the Claims released by the Third-Party Release; (5) in the best interests of the Debtors and their Estates; (6) fair, equitable, and reasonable; (7) given and made after due notice and opportunity for hearing; and (8) a bar to any of the Releasing Parties asserting any claim or Cause of Action released pursuant to the Third-Party Release.**

16. The "Releasing Parties" deemed to grant the Third-Party Release include, among numerous others, "all Holders of Claims or Interests that vote to reject the Plan ***or are deemed to reject the Plan*** and who do not affirmatively opt out of the releases provided by the Plan by checking the box on the applicable ballot or notice of non-voting status indicating that they opt not to grant the releases provided in the Plan." Plan, Art. I.171 (emphasis added). As a result, the Plan inexplicably requires parties who are receiving nothing under the Plan and thus are not entitled to vote, such as Pittsburgh and the Class members, to navigate the lengthy and complicated Disclosure Statement and Plan (if they even received it in the first place) to ultimately determine that they must affirmatively opt out of the Third-Party Release by completing and returning an "Opt Out Election Form" or risk losing rights they otherwise have. There is no indication in the record that the members of the Class were served with the Opt Out Election Form. Therefore, members of the Class will be unaware of the need to complete the Opt-Out Election Form by March 17, 2023 (the "Opt Out Deadline") to avoid being deemed to

gratuitously release claims against an assortment of non-Debtors, or that failing to complete and return such form would be considered *consent* to the Third-Party Release.

17. The "Released Parties" under the Third-Party Release comprise a similarly broad universe including, among numerous others,

> (a) each Debtor; (b) each Reorganized Debtor;… (i) each current and former Affiliate of each Entity in clause (a) through (j); and (k) each Debtor Related Party of each Entity in clause (a) and (b)….

Id. Art. I.170.

18. In turn, the Plan defines "Related Party" to include:

> current and former directors, managers, officers, committee members, members of any governing body, equity holders (regardless of whether such interests are held directly or indirectly), affiliated investment funds or investment vehicles, managed accounts or funds, predecessors, participants, successors, assigns, subsidiaries, Affiliates, partners, limited partners, general partners, principals, members, management companies, fund advisors or managers, employees, agents, trustees, advisory board members, financial advisors, attorneys (including any other attorneys or professionals retained by any current or former director or manager in his or her capacity as director or manager of an Entity), accountants, investment bankers, consultants, representatives, and other professionals and advisors and any such Person's or Entity's respective heirs, executors, estates, and nominees.

Id. Art. I.169.

19. This convoluted list of categories of parties and related parties appears to include the Non-Debtor Defendants (two of the Debtors' former senior executives, who obviously are contributing nothing in furtherance of the Plan) as Released Parties deemed to be released by the Releasing Parties "from any and all claims and Causes of Action whatsoever (including any derivative claims, asserted or assertable on behalf of the Debtors or the Estates), whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, asserted or unasserted, accrued or unaccrued, existing or hereinafter arising, whether in law or equity, whether sounding in tort or contract, whether arising under

federal or state statutory or common law, or any other applicable international, foreign, or domestic law, rule, statute, regulation, treaty, right, duty, requirement or otherwise."

20. Article VIII.G of the Plan contains an injunction purporting to enjoin, among other things, "commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such Claims or Interests released or settled pursuant to the Plan" (the "Injunction"). If any claims against the Non-Debtor Defendants in the Securities Litigation are released pursuant to the Third-Party Release, the Injunction would enjoin Pittsburgh and members of the Class from continuing to pursue such claims against the Non-Debtor Defendants, who, as a matter of law, could not obtain a discharge of those claims even if they were debtors themselves. *See* 11 U.S.C. 523(a)(19) (liabilities of an individual debtor for violations of securities laws are categorically nondischargeable).

B. Treatment of the Claims of Pittsburgh and the Class

21. The claims asserted (and subsequently, voluntarily dismissed without prejudice) against Avaya Holdings in the Securities Litigation are subject to subordination pursuant to section 510(b) of the Bankruptcy Code. Claims subordinated pursuant to section 510(b) are classified in Class 10 under the Plan (Section 510 Claims), and "will be cancelled, released, discharged, and extinguished and will be of no further force or effect, and Holders of Section 510 Claims will not receive any distribution on account of such Section 510 Claims." Plan, Art. III.B.10. Accordingly, Pittsburgh and the Class will receive no recovery under the Plan on account of their claims against the Debtors and thus are deemed to reject the Plan and are not entitled to vote.

C. Document Retention

22. Article VIII.J of the Plan ("Document Retention") directs that "[o]n and after the Effective Date, the Reorganized Debtors ***may*** maintain documents in accordance with their

standard document retention policy, as may be altered, amended, modified, or supplemented by the Reorganized Debtors." (emphasis added).

OBJECTION

23. The Plan cannot be confirmed and the Disclosure Statement cannot be approved on a final basis in their present forms because (a) the Class has not received notice of the Plan and Disclosure Statement in violation of their due process rights, (b) the Third-Party Release and Injunction exceed the boundaries of this Court's jurisdiction and constitutional adjudicatory authority, are legally impermissible under Federal Rule of Civil Procedure ("FRCP") 23(e), and, as a *de facto* nonconsensual release, violate Fifth Circuit precedent, (c) the Plan and Disclosure Statement contain vague document retention requirements that do not ensure that the Debtors and Reorganized Debtors will continue to comply with their evidence preservation obligations under the PSLRA (defined below) and other applicable law, and (d) the Disclosure Statement lacks adequate disclosure regarding (i) the Securities Litigation, (ii) the Third-Party Release and Injunction, and (iii) the Debtors' document retention obligations.

I. THE OPT-OUT MECHANISM IN THE THIRD-PARTY RELEASE VIOLATES THE DUE PROCESS RIGHTS OF THE CLASS.

24. In the first instance, no amount of additional disclosure or notice can address the chief deficiency in the Disclosure Statement and Plan—the imposition of an obligation on holders of claims in impaired, non-voting classes to read anything pertaining to the Plan or take any affirmative measures whatsoever to protect their rights against the Non-Debtor Defendants (in this case, former officers of the Debtors). Indeed, the Plan stands to deprive parties who are receiving nothing and are not entitled to vote, such as Pittsburgh and the Class, of their fundamental right to procedural due process. The Debtors cannot explain a due process failure away through any amount of incremental disclosure in the Disclosure Statement.

25. The District Court for the Eastern District of Virginia recently issued a lengthy appellate opinion rejecting a plan containing precisely the same type of broad and seemingly boundless third-party release as that which is now before this Court. *Patterson v. Mahwah Bergen Retail Grp., Inc.*, 636 B.R. 641, 702–03 (E.D. Va. 2022). Notably, the *Patterson v. Mahwah Bergen Retail Group* court struck down an 'opt-out' release very similar to the Third-Party Release and Injunction as a *de facto* non-consensual third-party release even though the debtors in that case, at the Bankruptcy Court's direction, had made some effort (albeit defective) to serve an opt-out notice on members of the proposed class of defrauded investors. Here, even if an opt-out release were appropriate with respect to creditors in impaired classes not entitled to vote on the Plan, the Debtors have made no effort whatsoever to serve the Class.

26. In its detailed opinion, the District Court for the Eastern District of Virginia struck down a nearly identical third-party release, finding that "[f[or more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" *Id.* at 653 (citations and quotations omitted). "[T]hird-party releases strike at the heart of these foundational rights. . ." *Id.* at 654.

27. Under similar facts, the *Patterson c*ourt found:

> The Third-Party Releases at issue in this case represent the worst of this all-too-common practice, as they have no bounds. The sheer breadth of the releases can only be described as shocking. They release the claims of *at least* hundreds of thousands of potential plaintiffs not involved in the bankruptcy, shielding an incalculable number of individuals associated with Debtors in some form, from every conceivable claim—both federal and state claims—for an unspecified time period stretching back to time immemorial. In doing so, the releases close the courthouse doors to an immeasurable number of potential plaintiffs, while protecting corporate insiders who had no role in the reorganization of the company.

Id. at 655 (emphasis in original).

28. The *Patterson* court further emphasized the inequity in the releases, noting:

> No court would find this "settlement" fair, reasonable and adequate under Rule 23, as application of those factors demonstrate. No party or counsel represented the interests of the class, much less represented them adequately. The settlement of the released claims did not result from any negotiation with the Releasing Parties, much less one that occurred at arm's length. Instead, it appears that negotiations only occurred between the individuals and entities that would benefit from releases in an effort to shield themselves from any liability, not those who would confer the benefit in exchange for some other benefit.

Id. at 687.

29. The Debtors have not given notice of the Plan or the manner of opting out of the Third-Party Release to all or substantially all members of the Class. In fact, none of the affidavits of service filed in this case demonstrate any effort to serve the Opt Out Election Form or Plan documents on members of the Class. While the utilization of an opt-out mechanism would be inappropriate even in the context of a plan that did not threaten to strip non-voting, disenfranchised investors of valuable claims against third parties without any consideration, it is at odds with fundamental principles of fairness and due process here. *Id.* at 675 ("[T]he record is silent as to how many of the targeted shareholders actually received the notice. Yet, hoping (without proving) that someone received a deficient document—without any further action from that person—does not meet the standard for knowing and voluntary consent to adjudication of a non-core claim by a bankruptcy court . . .")

30. In any event, for the reasons discussed in this Objection and by other courts, the Third-Party Release could not be approved even with such notice.

31. Thus, the Plan cannot be approved unless all members of the Class are excluded from the Third-Party Release, either by Court order or by Pittsburgh being permitted to opt out

on behalf of the Class.[4] To permit otherwise would "essentially thwart a lawsuit filed in a separate federal court." *Id.* at 661. Such a result is clearly violative of the Class's due process rights and threatens the integrity of the bankruptcy process if the Plan is confirmed in its present form.

II. THE PLAN CANNOT BE CONFIRMED AS PRESENTLY DRAFTED.

A. The Third-Party Release is an Impermissible, Non-Consensual Non-Debtor Release.

32. The Third-Party Release is improper and legally impermissible to the extent it purports to release claims of the Class against the Non-Debtor Defendants in the Securities Litigation. Accordingly, Pittsburgh's objection to the Third-Party Release through this Objection is (a) made on behalf of the Class, to which Pittsburgh will owe a fiduciary duty if and when the Lead Plaintiff Motion is granted, and thus does not constitute an individual election to opt out of the Third-Party Release, and (b) only applicable if the Court overrules Pittsburgh's due process-based objections.

33. Non-consensual third-party releases are categorically impermissible in the Fifth Circuit. *See, e.g.*, *Ad Hoc Group of Vitro Noteholders v. Vitro S.A.B. de CV (In re Vitro S.A.B. de CV)*, 701 F.3d 1031, 1059 (5th Cir. 2012) ("[A] non-consensual, non-debtor release through a

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[4] Pittsburgh is prepared to file a motion seeking authority, to the extent necessary, to opt out of the Third-Party Release on behalf of the Class, or certification of the Class for that limited purpose. If the Court were to entertain and grant such a motion or determine that Pittsburgh may opt out on a class-wide basis, or if the Debtors agree to a class-wide opt out (*see, e.g.*, Securities Plaintiffs' Notice of Opt-Out from Third-Party Release on Behalf of Themselves and the Certified Class, *In re Cobalt Int'l Energy, Inc.*, No. 17-36709 (MI) (Bankr. S.D. Tex. Mar. 27, 2018), ECF No. 629, attached hereto as **Exhibit A**), the concerns set forth in Section II of this Objection will be rendered moot, at least as they relate to Pittsburgh and the Class. Alternatively, Pittsburgh requests an extension of the Opt Out Deadline, on behalf of the Class, until after the District Court has ruled on the Lead Plaintiff Motion. As the Plan does not contain any threshold requirements with respect to the number of parties who opt out of the Third-Party Release, no number of opt-outs by members of the Class will have an impact on or delay confirmation of the Plan.

bankruptcy proceeding[] is generally not available under United States law. Indeed, this court has explicitly prohibited such relief.") (citing *In re Pac. Lumber Co.*, 584 F.3d 229, 251–52 (5th Cir. 2009); *In re Zale Corp.*, 62 F.3d 746, 760 (5th Cir. 1995)). Although the Debtors describe the Third-Party Release as consensual, it is not. *See Imperial Indus. Supply Co. v. Thomas*, 825 F. App'x 204, 206–07 (5th Cir. 2020) ("Tacit acquiescence between relative strangers ignores the basic tenets of contract law . . . [and] generally speaking, 'silence or inaction does not constitute acceptance of an offer.') (citations omitted)); *Patterson*, 636 B.R. at 685–86 ("A party's silence, however, is insufficient to show its intention to be bound by the terms of a contract. . . . [N]either the Debtors nor the Bankruptcy Court identified any facts that would support the application of an exception to the general rule of contracts that silence cannot manifest assent.") (internal citations omitted); *id.* at 674 (citing *Wellness Int'l Network, Ltd. V. Sharif*, 575 U.S. 665, 684–85 (2015)).

34. There is no better evidence of the fact that the Third-Party Release is nonconsensual than the burden it would impose on Class members who are receiving nothing under the Plan and are not entitled to vote. To opt out of the Third-Party Release, each member of the Class would first have to:

- discover the existence of the Chapter 11 Cases,
- find and comb through a lengthy bankruptcy docket,
- locate and comprehend the dense Plan, Disclosure Statement, Opt Election Form, and a myriad of other documents,
- interpret the complex terms of and multiple cross references to the Third-Party Release,
- realize they hold securities fraud claims against the Non-Debtor Defendants,
- ascertain that those claims are potentially released under the Third-Party Release, and

- affirmatively opt out of the Third-Party Release (*i.e.*, agree to give up their only source of any recovery for absolutely nothing),

all within the narrow one-month window between the Petition Date and the Opt Out Deadline, ***and all without having been provided any notice by the Debtors***. The absurdity and fundamental unfairness of that requirement is evident on its face, as has been recognized in the Eastern District of Virginia and elsewhere. *E.g.*, *Patterson*, 636 B.R. at 687.

35. The Class's claims against Avaya Holdings are subordinated pursuant to section 510(b) of the Bankruptcy Code and thus Class members are receiving no distributions under the Plan. Attempting to engineer consent to the Third-Party Release is inappropriate in the extreme. The Court need only consider one question in evaluating whether the Third-Party Release is in fact consensual: Would any rational and fully informed member of the Class ever voluntarily relinquish independent, direct claims against the insured Non-Debtor Defendants, their only potential source of recovery for the losses they sustained as a result of the Defendants' wrongdoing, *in exchange for absolutely nothing?* ***Put differently, if the Plan required Class members to affirmatively opt <u>in</u> to the Third-Party Release, would they ever actually do so?*** The only legitimate answer is that they would not, and thus the supposedly consensual Third-Party Release is anything but. *Cf. In re SunEdison, Inc.*, No. 16-10992-SMB, Doc. No. 4253 (Bankr. S.D.N.Y. Nov. 8, 2017) (finding chapter 11 debtors' argument that silence by holders of claims—even those who were entitled to vote but did not vote—should be deemed consent to a third-party release was "not persuasive because the Debtors have not identified the source of their duty to speak"); *In re Chassix Holdings, Inc.*, 533 B.R. 64, 78 (Bankr. S.D.N.Y. 2015) (finding that procedures where a party is deemed to consent by failing to opt out of a third-party release "is to some extent a legal fiction").

36. The court in *In re Aegean Marine Petroleum Network, Inc.* criticized the impropriety of a similar effort to use an opt-out mechanism to fabricate "judicial deemed consent" to a third-party release by holders of securities fraud claims who, like here, were deemed to reject the Plan and were not entitled to vote:

> This is all about consent and what consent means, right? So you're basically urging me to say that you need me to manufacture consent for you because we know, we know in every one of these cases, there are people who are going to get this big package and they're not going to open it, or even if they open it, they're not going to understand it, and they're not going to respond. We know that. ***So all that this opt-out approach does is it seeks to manufacture judicial deemed consent without an actual thought process on behalf of the person whose consent is being sought.***
>
> As I said in *Chassix*, there are times in the law when policies put that burden on people. The law supports class actions. It supports it for the purpose of judicial efficiency. And so it puts on people the burden of opting out, otherwise, they're included. ***There is no such policy in favor of releases. In fact, the policy is the opposite.*** What I'm told [in] Metromedia is that they ought to be rare. . . .
>
> ***If we're going to seek consent, it ought to be real consent***, and it should be on an opt-in basis, not an opt-out basis.

In re Aegean Marine Petroleum Network Inc., Case No. 18-13374-mew (Bankr. S.D.N.Y.), Transcript of Hearing Held Feb. 14, 2019 (emphasis added) (the "Aegean Transcript"), at 28:1–29:6.[5]

37. The *SunEdison* court similarly observed that:

> The Debtors' argument that the Non-Voting Releasors' silence should be deemed their consent to the Release is not persuasive because the Debtors have not identified the source of their duty to speak. The Debtors do not contend that an ongoing course of conduct with their creditors gave rise to a duty to speak. . . .
>
> Instead, the Debtors essentially contend that the warning in the Disclosure Statement and the ballots regarding the potential effect of silence gave rise

[5] The relevant pages of the Aegean Transcript are annexed hereto as **Exhibit B**.

> to a duty to speak, and the Non-Voting Releasors' failure to object to or reject the Plan should be treated as their deemed consent to the Release. Indeed, this appears to be the unspoken rationale of the authorities cited by the Debtors. ***The Debtors have failed, however, to show that the Non-Voting Releasors' silence was misleading or that it signified their consent to the Release. There are other plausible inferences that support the opposite inference. For example, the meager recoveries (here, less than 3% for the unsecured creditors) may explain their inaction without regard to the Release.***

SunEdison, 576 B.R. at 460–61 (emphasis added).

38. The Bankruptcy Court for the District of Delaware recently came to a similar conclusion in *In re AAC Holdings, Inc.*:

> Why should the burden be on creditors and shareholders who are getting nothing to respond to say they want to opt out from these releases? And I guess along with that is: What reasonable person would get this notice and say, I'm getting nothing under this plan, but I'm going to go ahead and give them a release? What reasonable investor or reasonable creditor would ever do that?
> . . .
> And for creditors, they might not have gotten [the notice]. They might have gotten it and didn't pay attention to it. They might have gotten it and said why bother, I'm not getting anything under this plan, and they don't read the whole thing.

In re AAC Holdings, Inc., Case No. 20-11648 (Bankr. D. Del.), Transcript of Hearing Held Aug. 31, 2020 (the "AAC Transcript"), at 37:5–11; 38:15–19.[6]

39. Likewise here, the Third-Party Release contained in the Plan is improper and unjust because Class members are not receiving any distribution under the Plan, are deemed to reject the Plan, and are not entitled to vote. Under those circumstances, it is inequitable in the extreme to require Class members to affirmatively act to prevent the completely gratuitous release of their valuable claims against solvent and likely insured third parties.

40. The Third-Party Release also renders the Plan unconfirmable because this Court lacks jurisdiction and/or constitutional adjudicatory authority to release the direct, non-

[6] The relevant pages of the AAC Transcript are annexed hereto as **Exhibit C**.

bankruptcy, non-core claims asserted against the Non-Debtor Defendants in the Securities Litigation pending before the District Court, for which Pittsburgh and the Class are entitled to adjudication in the District Court, an Article III tribunal. *See Patterson*, 636 B.R. at 670–72.

41. To correct these fatal defects, the Plan must expressly exclude the Class and its claims against the Non-Debtor Defendants in the Securities Litigation from the Third-Party Release and Injunction. Absent such revisions, the Plan cannot be confirmed. To that end, the following should be added to the definition of "Releasing Parties" to clarify that Class members are not deemed to grant the Third-Party Release:

> , provided further that neither any plaintiffs nor the proposed class (including to any extent modified in the future) or any member thereof in the securities class action captioned as *Jiang v. Avaya Holding Corp., et al.*, Case No. 1:23-cv-1258 (S.D.N.Y.) shall constitute Releasing Parties.

42. The Plan therefore must be modified, with conforming revisions to the Disclosure Statement, to clarify that the Third-Party Release does not release, the Injunction does not enjoin the continued prosecution of, and the Plan does not otherwise impact any claims of the Class against the Non-Debtor Defendants. Without such a modification, consistent with the holdings in, for example, *AAC Holdings, Patterson*, and *Aegean Marine*, the Plan cannot be confirmed.

B. The Plan Must Require the Debtors to Preserve Potentially Relevant Evidence Until the Conclusion of the Securities Litigation.

43. The Securities Litigation is in its nascent stages and fact discovery in the Securities Litigation has not even begun given the dictates of the stay pursuant to the PSLRA (defined below). As the issuer of the securities that are the subject of the Securities Litigation and given their intimate involvement in the facts and circumstances alleged therein, the Debtors undoubtedly have books, records, electronically stored information, and other evidence potentially relevant to the Securities Litigation in their possession, custody, and/or control.

44. The Securities Litigation is subject to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4, which mandates that

> any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.

15 U.S.C. § 78u-4(b)(3)(C)(i). This mandatory requirement is subject to "sanction for willful violation." 15 U.S.C. § 78u-4(b)(3)(C)(ii). Even though Pittsburgh dismissed the Securities Litigation as to Avaya Holdings without prejudice, Pittsburgh maintains that this statutorily mandated preservation obligation should still apply to Avaya Holdings by virtue of the class and individual proofs of claim that Pittsburgh currently intends to file against Avaya Holdings.

45. Continuing preservation of the Debtors' books, records, electronically stored information, and other items of evidence that are potentially relevant to the Securities Litigation post-confirmation is absolutely crucial to avoid prejudice to Pittsburgh and the Class. However, the Plan does not contain, nor does the Disclosure Statement describe, any affirmative requirement that the Debtors take any action to preserve potentially relevant evidence, nor does the Disclosure Statement contain any explanation of what, if any, measures the Debtors intend to implement to ensure they retain and preserve all such evidence through the completion of the Securities Litigation. Instead, the Plan provides only that the Reorganized Debtors *may* maintain documents in accordance with their standard policy, *or* may alter that policy.

46. Inclusion of the following provision in the Plan, and corresponding disclosure in the Disclosure Statement, would resolve Pittsburgh's concerns with respect to the post-confirmation preservation of evidence that is potentially relevant to the Securities Litigation:

> Until the entry of a final and non-appealable order of judgment or settlement with respect to all defendants now or hereafter named in the litigation captioned as *Jiang v. Avaya Holding Corp., et al.*, Case No. 1:23-cv-1258 (S.D.N.Y.) (the "Securities Litigation"), the Debtors, the Reorganized Debtors, and any transferee or custodian of the Debtors' books, records, documents, files, electronic data (in whatever format, including native format), or any tangible object or other item of evidence relevant or potentially relevant to the Securities Litigation, wherever stored (collectively, the "Potentially Relevant Books and Records"), shall preserve and maintain the Potentially Relevant Books and Records as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure, and shall not destroy, abandon, transfer, or otherwise render unavailable such Potentially Relevant Books and Records.

III. THE DISCLOSURE STATEMENT CANNOT BE APPROVED.

47. In addition, the Disclosure Statement cannot be approved in its current form because it does not provide adequate information regarding (i) the Securities Litigation, (ii) the Third-Party Release and Injunction, and (iii) the Debtors' document preservation obligations (*infra* section II.B).

A. The Disclosure Statement Does Not Contain an Adequate Description of the Securities Litigation.

48. The Securities Litigation involves serious and substantial allegations of wrongdoing by the Defendants, and was filed immediately prior to these Chapter 11 Cases. Due to the timing of the filing, it is understandable that the Disclosure Statement did not initially include a description of the Securities Litigation. However, the Disclosure Statement sent to creditors (but not the Class) in the solicitation process made no effort to describe or disclose the Securities Litigation.

49. Creditors and parties are entitled to be advised of the pendency of the Securities Litigation when deciding how to vote on the Plan. *See In re Bally Total Fitness of Greater N.Y., Inc.,* 2007 Bankr. Lexis 4729, at *23 (Bankr. S.D.N.Y. Sept. 17, 2007) (taking into account

pending litigation when determining feasibility of a Plan). Yet, the Disclosure Statement contains no description of the Securities Litigation.

B. The Disclosure Statement violated Bankruptcy Rule 3016(c) by failing to disclose the scope of the Third-Party Release and Injunction.

50. Federal Rule of Bankruptcy Procedure ("Bankruptcy Rule") 3016(c) provides that:

> [i]f a plan provides for an injunction against conduct not otherwise enjoined under the [Bankruptcy] Code, the plan and disclosure statement shall describe in specific and conspicuous language (bold, italic, or underlined text) all acts to be enjoined and identify the entities that would be subject to the injunction.

Fed. R. Bankr. P. 3016(c); *see also In re Keys Fitness Prods., L.P.*, No. 08-31790-HDH-11, 2008 Bankr. LEXIS 3309 at *14–15 (Bankr. N.D. Tex. Sept. 11, 2008) (noting disclosure of non-debtor release satisfies Bankruptcy Rule 3016(c)); *In re Lower Bucks Hosp.*, 471 B.R. 419, 460 (Bankr. E.D. Pa. 2012). The *Lower Bucks* court noted that although Rule 3016(c) purports to address only injunctions, "[i]ts purpose is to alert parties in interest that the plan purports to restrict their rights in ways that ordinarily would not result from confirmation of a plan." 471 B.R. at 460. As here, "[w]hether 'enjoined' or merely 'released,' in this case, the Plan was designed to deprive [third parties] of their right to prosecute a claim against a non-debtor." *Id.* Thus, Bankruptcy Rule 3016(c) applied to the presentation of both the Third-Party Release and the Injunction in the Plan and Disclosure Statement.

51. The Disclosure Statement might facially comply with Bankruptcy Rule 3016(c) by presenting the language of the Third-Party Release and Injunction, copied essentially verbatim from the Plan, in bold text—but its compliance with the rule ends there. The Disclosure Statement merely parroted the convoluted Third-Party Release language from the Plan—including the use of defined terms that are defined only in, and thus require extensive

cross-references to, the Plan—without describing with any specificity (or at all) the universe of claims and parties impacted by the Third-Party Release. Nor did the Disclosure Statement "describe in specific and conspicuous language … all acts to be enjoined" by the Injunction.

52. While the flaws in the Third-Party Release cannot be cured simply by additional disclosure, the current draft forces Class members (if they received any notice and are even aware of the impact of these Chapter 11 Cases) to undertake an analysis that is at best complicated and difficult to navigate, imposing a dizzying burden to cross-reference cumbersome definitions that incorporate multiple, extremely broad tiers of related parties and related parties' related parties, and with no explanatory disclosure in the Disclosure Statement. Accordingly, even if members of the Class were aware of the Disclosure Statement and Plan (despite the Debtors' failure to provide them with actual notice), there is nothing whatsoever in the Disclosure Statement to inform them of the draconian impact the Third-Party Release and Injunction could have on their independent, direct claims against the Non-Debtor Defendants.

53. The prejudice to Pittsburgh and the Class is particularly onerous where Pittsburgh and the Class are not receiving any economic value under the Plan. Moreover, the Third-Party Release operates as an impermissible *de facto* final judgment dismissing the claims of Pittsburgh and the Class against the Non-Debtor Defendants, even though those claims cannot be adjudicated outside of the District Court unless Pittsburgh and the Class consent to Bankruptcy Court adjudication (which they do not). Despite these glaring flaws, the Disclosure Statement does not provide any factual or legal justification for the deemed release by Pittsburgh and members of the Class—because no such justification exists.

RESERVATION OF RIGHTS

54. Pittsburgh reserves all rights with respect to approval of the Disclosure Statement and confirmation of the Plan or any other chapter 11 plan proposed in these Chapter 11 Cases,

including but not limited to objecting to confirmation of the Plan or any other plan on any and all grounds, whether or not raised in this Objection.

CONCLUSION

For all of the foregoing reasons, Pittsburgh respectfully request that the Court deny confirmation of the Plan and approval of the Disclosure Statement unless the issues raised in this Objection are appropriately addressed.

[*Remainder of page left intentionally blank*]

Dated: March 17, 2023

Respectfully submitted,

/s/ Michael S. Etkin

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CERTIFICATE OF SERVICE

I certify that on March 17, 2023, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Michael S. Etkin

EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	)	Chapter 11
COBALT INTERNATIONAL ENERGY, INC., *et al.*,	)	Case No. 17-36709 (MI)
Debtors,	)	(Jointly Administered)

SECURITIES PLAINTIFFS' NOTICE OF OPT-OUT FROM THIRD-PARTY RELEASE ON BEHALF OF THEMSELVES AND THE CERTIFIED CLASS

PLEASE TAKE NOTICE that, pursuant to paragraph 22 of the *Order (I) Approving the Adequacy of the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures With Respect to Confirmation of the Debtors' Proposed Joint Chapter 11 Plan, (III) Approving the Forms of Ballots and Notices in Connection Therewith, (IV) Scheduling Certain Dates With Respect Thereto, and (V) Granting Related Relief* [ECF No. 563] entered by this Court on March 8, 2018, Articles III.M and IV.H of the disclosure statement approved thereby, and Article I.A.106 of the *Fourth Amended Joint Chapter 11 Plan of Cobalt International Energy, Inc. and Its Debtor Affiliates* (as may be further amended from time to time, the "Plan") [ECF No. 561], the plaintiffs (including lead plaintiffs) and court-appointed class representatives (the "Securities Plaintiffs")[1] in the federal securities action entitled *In re Cobalt International Energy, Inc. Securities Litigation*, No. 4:14-cv-3428 (S.D. Tex.) (the "Securities Litigation"), on behalf of themselves and the certified class of investors in the Securities Litigation (the "Certified Class"), hereby opt out of the third-party releases contained in Article VIII.C of the Plan (the

[1] The Securities Plaintiffs are GAMCO Global Gold, Natural Resources & Income Trust, GAMCO Natural Resources, Gold & Income Trust, St. Lucie County Fire District Firefighters' Pension Trust Fund, Fire and Police Retiree Health Care Fund, San Antonio, Sjunde AP-Fonden and Universal Investment Gesellschaft m.b.H.

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"Third-Party Release") and, accordingly, no Securities Plaintiff or member of the Certified Class shall be a "Releasing Party" under, and as defined in, the Plan.

PLEASE TAKE FURTHER NOTICE that this notice is filed without prejudice to any other rights of the Securities Plaintiffs or the Certified Class or any member thereof, and the Securities Plaintiffs reserve the right to object to confirmation of the Plan or any other chapter 11 plan for any of the above-captioned debtors in possession on any basis whatsoever.

Dated: March 27, 2018

/s/ Thomas R. Ajamie

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Counsel for the Securities Plaintiffs

CERTIFICATE OF SERVICE

I certify that on March 27, 2018, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Thomas R. Ajamie
Thomas R. Ajamie

EXHIBIT B

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 18-13374-mew

- x

In the Matter of:

AEGEAN MARINE PETROLEUM NETWORK INC.,

Debtor.

- x

United States Bankruptcy Court

One Bowling Green

New York, NY 10004

February 14, 2019

10:08 AM

B E F O R E :

HON MICHAEL E. WILES

U.S. BANKRUPTCY JUDGE

ECRO: MATTHEW

HEARING RE: Approval of disclosure Statement

Objections Filed

Application authorizing the employment and retention of Moelis & Company LLC as its investment banker and financial advisor for the Debtor effective nunc pro tunc to the petition date

Transcribed by: Sonya Ledanski Hyde

THE COURT: This is all about consent and what consent means, right? So you're basically urging me to say that you need me to manufacture consent for you because we know, we know in every one of these cases, there are people who are going to get this big package and they're not going to open it, or even if they open it, they're not going to understand it, and they're not going to respond. We know that. So all that this opt-out approach does is it seeks to manufacture judicial deemed consent without an actual thought process on behalf of the person whose consent is being sought.

As I said in Chassix, there are times in the law when policies put that burden on people. The law supports class actions. It supports it for the purpose of judicial efficiency. And so it puts on people the burden of opting out, otherwise, they're included. There is no such policy in favor of releases. In fact, the policy is the opposite. What I'm told me Metromedia is that they ought to be rare. They are anything but rare. I have not had a single Chapter 11 case in which people have not sought third-party releases. They're sought in every single case.

And to me, using an opt-out approach is not consistent with what Metromedia tells me to do. I know what I said in Chassix. I've been doing this job an extra almost four years now, and I'm more firmly convinced. I have never

allowed an opt-out form. I won't say that I can never be convinced that there are circumstances that require it, but nothing that you've said here convinces me that it's appropriate. If we're going to seek consent, it ought to be real consent, and it should be on an opt-in basis, not an opt-out basis.

MR. WINGER: If I may respond to a few points, Your Honor. The opt-out/opt-in issue applies to different stakeholders who frankly have a different set of facts depending on where they're sitting. So what Your Honor described, I believe, was focused on folks that are entitled to vote. They get a massive solicitation package, and they just throw it away. That is one category of folks whose consent would be deemed in the absence of taking an affirmative step.

THE COURT: Let me just say in plenty of cases, I have approved voting in favor of the plan as a consent to the releases. I'm not taking that away from you.

MR. WINGER: Correct. So --

THE COURT: I'm talking about people who fail to vote or who vote no.

MR. WINGER: So I believe we have what I'll call four or five categories where consent is the opt-out versus opt-in is relevant. Obviously, we have parties that vote to accept that is consistent with Your Honor's rulings in other

EXHIBIT C

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	Chapter 11
AAC HOLDINGS, INC., et al,	Case No. 20-11648(JTD)
Debtors.	824 Market Street Wilmington, Delaware 19801
	Monday, August 31, 2020

TRANSCRIPT OF TELEPHONIC HEARING RE:
MOTION OF THE DEBTORS FOR ENTRY OF AN ORDER (I) APPROVING ADEQUACY OF DISCLOSURE STATEMENT, (II) APPROVING SOLICITATION AND NOTICE PROCEDURES FOR CONFIRMATION OF DEBTORS' PLAN OF REORGANIZATION, (III) APPROVING BALLOT AND NOTICE FORMS IN CONNECTION THEREWITH, (IV) SCHEDULING CERTAIN DATES WITH RESPECT THERETO, AND (V) GRANTING RELATED RELIEF
BEFORE THE HONORABLE JOHN T. DORSEY
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES VIA TELEPHONE:

For the Debtors:	Karen Abbott, Esq. David Kurzweil, Esq. Dennis A. Meloro, Esq. Nancy Peterman, Esq. Matthew Petrie, Esq. GREENBERG TRAURIG, LLP Leighton Aiken, Esq. FERGUSON BRASWELL FRASER KUBASTA, PC

(Appearances Continued)

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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

APPEARANCES VIA TELEPHONE: (Continued)

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For the Official Committee of Unsecured Creditors:	Justin Alberto, Esq. Anthony De Leo, Esq. COLE SCHOTZ, PC
For the SEC:	David Baddley, Esq. UNITED STATES SECURITIES AND EXCHANGE COMMISSION
For the Indiana Public Retirement Systems:	Andrew D. Behlmann, Esq. Michael Etkin, Esq. LOWENSTEIN SANDLER, LLP
For the Ad Hoc Group of Term Lenders:	Matthew Lunn, Esq. Robert Popitti, Esq. YOUNG, CONAWAY, STARGATT & TAYLOR, LLP Sayan Bhattacharyya, Esq. Daniel Fliman, Esq. STROOCK & STROOCK & LAVAN, LLP
For Ankura Trust Company, LLC:	Mark D. Collins, Esq. Amanda Steele, Esq. RICHARDS, LAYTON & FINGER, PA Todd Meyers, Esq. KILPATRICK, TOWNSEND & STOCKTON, LLP
For the Special Committee:	Sean O'Neal, Esq. CLEARY, GOTTLIEB, STEEN & HAMILTON, LLP
Also Appearing:	Meryl Rothchild, Esq. DELOITTE, LLP Jette Campbell Mike Logan Scott Vogel AAC HOLDINGS, INC.

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THE COURT: Well, let me ask --

MS. PETERMAN: The other --

THE COURT: -- you a question about that.

MS. PETERMAN: Sure.

THE COURT: Why should the burden be on creditors and shareholders who are getting nothing to respond to say they want to opt out from these releases? And I guess along with that is: What reasonable person would get this notice and say, I'm getting nothing under this plan, but I'm going to go ahead and give them a release? What reasonable investor or reasonable creditor would ever do that?

MS. PETERMAN: (Indiscernible) Your Honor. I can't answer that question. I do think that, as part of the bankruptcy process, as long as there's adequate information and adequate notice provided, a creditor or equity holders can make an informed business decision as to whether or not they want to opt out or not. We tried to make the notices as simple as possible.

And again, I think, ultimately, at the confirmation hearing, Your Honor could rule in that way; that, you know, you don't believe, based upon a fully developed record, based on any evidence that we present with respect to the releases, based upon the solicitation procedures and the outcome and the responses we get in the solicitation process, whether that was a proper process and whether or not the opt-out

classes should be approved and whether creditors should be bound to that.

So, again, we think that we have adequate notice and we have adequate information. Creditors can make an informed decision and opt out or not, but it will be their business decision.

THE COURT: Aren't there a lot of reasons, though, a creditor might not yet return the ballot if the only thing that they're returning is to say I want to opt out of these releases, I'm not getting anything under the plan. So, you know, it could be, one, they didn't get the notice because -- particularly with shareholders, because you have this process that the notices actually come from people who have -- I have no control over and you have no control over.

And for creditors, they might not have gotten it. They might have gotten it and didn't pay attention to it. They might have gotten it and said why bother, I'm not getting anything under this plan, and they don't read the whole thing. I mean, there's a number of reasons why someone might not return to say, not only am I not getting anything under this plan, but I don't want to release all these third parties from anything.

MS. PETERMAN: Yes (indiscernible) a couple of things there, a couple of different points. First is that -- I'm going to address the notice process. So, unfortunately,