Docket #0852 Date Filed: 09/17/2020

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re

JCK LEGACY COMPANY, et al.,

Debtors.[1]

Hearing Date: September 23, 2020
Hearing Time: 11:00 a.m.

Objection Deadline: September 18, 2020, at 4:00 p.m.

Chapter 11
Case No. 20-10418 (MEW)

(Jointly Administered)

OBJECTION OF BETH DESMOND TO CONFIRMATION OF THE DEBTORS' JOINT PLAN OF DISTRIBUTION AND APPROVAL OF THE DEBTORS' DISCLOSURE STATEMENT

TO: THE HONORABLE MICHAEL E. WILES,
UNITED STATES BANKRUPTCY JUDGE:

Beth Desmond ("Desmond"), respectfully submits this objection (the "Objection") to confirmation of the Debtors' joint plan of distribution (the "Plan") [DKT 780] and approval of the Debtors' disclosure statement (the "Disclosure Statement") [DKT 781]. In support hereof, Desmond respectfully states:

I. INTRODUCTION

1. The Plan does not satisfy the confirmation requirements of Section 1129(a) of the Bankruptcy Code and, as such, cannot be confirmed. The Plan violates Section 1129(a)(1) because: (i) the proposed cancelation of Old McClatchy Securities (Article 6.11), vesting of assets (Article 10.1), and release of liens (Article 10.10) purport to terminate the Bond (as defined below), or otherwise limit Desmond's right to collect thereon, in violation of Sections 524(e) and 1129(b) of the Bankruptcy Code, and case law within the Second Circuit; (ii) the non-consensual release and

[1] The last four digits of Debtor JCK Legacy Company's tax identification number are 0478. Due to the large number of debtor entities in these jointly administered chapter 11 cases, a complete list of the debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors' claims and noticing agent at http://www.kccllc.net/McClatchy.

2010418200917000000000004

exculpation of the Debtors and various third parties contained in Article 10.5, Article 10.6, and paragraph 48 of the proposed Confirmation Order violate Second Circuit precedent; (iii) the discharge, release, exculpation, or injunction (or substantially equivalent relief) conferred by Articles 6.12(c), 10.2, 10.5, 10.6, and 10.7 violates Section 1141(d)(3); and (iv) the lack of classification of Desmond's secured claim violates Sections 1122 and 1123(a). Confirmation of the Plan should be denied.

2. Desmond also objects to the approval of the Disclosure Statement because it does not provide adequate information concerning the Plan. The Debtors are required to provide further disclosure concerning: (i) the Debtor's financial information (ii) the basis for the Plan's classification of classes entitled to vote, (iii) the Plan's classification and treatment of Desmond's claim, (iv) the Plan's impact on the Bond (as defined below) securing Desmond's claim and any insurance policy applicable to the Desmond Lawsuit (as defined below), and (v) the Plan's impact on the Desmond Lawsuit. Moreover the Disclosure Statement relates to a plan that is patently unconfirmable. Approval of the Disclosure Statement should be denied and may only be approved upon the resolicitation of a modified Disclosure Statement.

II. FACTS

3. On November 29, 2012, Desmond commenced a defamation lawsuit against Debtor The News and Observer Publishing Company ("The N&O") and Mandy Locke ("Locke"), an employee of The N&O (the "Desmond Lawsuit"). On November 18, 2016, Desmond became a judgment creditor of The N&O and Locke by virtue of a judgment entered by the Wake County Superior Court in favor of Desmond in the original principal amount of $6,160,132.31 (the "Judgment"). On February 6, 2017, Desmond became a secured creditor of The N&O and Locke by virtue of an appeal bond issued by the Westchester Fire Insurance Company in the original

principal amount of $8,109,539.41 (the "Bond").[2] The Bond secured the Judgment while The N&O pursued an appeal therefrom (the "Appeal"). On July 6, 2020, Desmond filed a Proof of Claim asserting a secured claim in the amount of not less than $8,109,539.41.

4. On May 12, 2020, Desmond filed a motion seeking relief from the automatic stay (the "Lift Stay Motion") [DKT 438] to allow the North Carolina Supreme Court to issue its final decision resolving the Appeal.[3] On June 30, 2020, this Court entered its Order Pursuant to 11 U.S.C. § 362(d) modifying the automatic stay imposed by 11 U.S.C. § 362(a) solely to the extent necessary to permit the North Carolina Supreme Court to issue an appeal opinion (the "First Lift Stay Order") [DKT 592].

5. On August 14, 2020, the North Carolina Supreme Court filed its opinion affirming the Judgment on all issues other than the issue of punitive damages, which was remanded for further consideration. On September 10, 2020, Desmond and the Debtors filed a stipulation seeking further modification of the automatic stay (the "Second Lift Stay Order") to the extent necessary for (i) each of the Parties to file and prosecute its respective Rehearing Petitions (as defined in the Second Lift Stay Order) and all other pleadings related thereto or in connection therewith and (ii) the Rehearing Petitions to proceed to final adjudication by the North Carolina Supreme Court. The request for a Second Lift Stay Order is pending with this Court as of the date hereof.

III. OBJECTION

A. The Plan Is Unconfirmable

i. *Governing Law*

[2] A true and correct copy of the Bond is attached hereto as Exhibit A.
[3] Additional facts related to the merits and facts of the Desmond Lawsuit and the Appeal are contained in the Lift Stay Motion and incorporated herein by reference.

6. To confirm a Chapter 11 plan, the Bankruptcy Court must find that the plan complies with each of the requirements set forth in Section 1129(a) of the Bankruptcy Code. One such requirement, Section 1129(a)(1), requires that "[t]he plan complies with the applicable provisions of" Title 11. Section 1129(b)(1) provides that a Chapter 11 plan must, among other requirements, "not discriminate unfairly, and [be] fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. 1129(b)(1). Section 1129(b)(2)(A) provides, in relevant part, that with respect to secured claims (including Desmond's), the condition that the Plan be fair and equitable requires that the Plan provide:

> (i)
>
> > (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
> >
> > (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
> >
> > . . .
>
> (iii) for the realization by such holders of the indubitable equivalent of such claims.

11 U.S.C. 1129(b)(2)(A).

7. As currently drafted, the Plan is not confirmable because it does not comply with Section 1129(b)(2) by entirely omitting the treatment of Desmond's secured claim in contravention of the Bankruptcy Code. Moreover, the Plan violates Section 1122 and Section 1123(a), because it does not separately classify Desmond's secured claim, or provide for whether her secured claim is impaired. Finally the Plan violates Section 1141(d)(3), because it purports to grant a liquidating debtor a discharge in a manner prohibited by the Bankruptcy Code.

ii. *The Plan's Provisions (i) Releasing, Discharging, or Cancelling Certain Instruments Issued by the Debtors, (ii) Releasing All Liens and Encumbrances on Property of the Estate, or (iii) Transferring Property Free and Clear Violate the Bankruptcy Code and Second Circuit Case Law*

8. Article 10.1 of the Plan provides that on

> the Effective Date, (a) all of the Wind-Down Debtors' Rights shall vest in the Wind-Down Debtors free and clear of all Claims, Liens, charges, encumbrances, rights, and Interests; (b) all of the Plan Administration Trust Assets shall vest in the Plan Administration Trust free and clear of all Claims, Liens, charges, encumbrances, rights and Interests; and (c) all of the GUC Recovery Trust Assets shall vest in the GUC Recovery Trust, which, as successor to the Debtors, for purposes of prosecuting the GUC Recovery Trust Causes of Action, owned such property or interest in property as of the Effective Date, free and clear of all Claims, Liens, charges, encumbrances, rights, and Interests.

Plan at Article 10.1.

9. Article 10.10 of the Plan further provides, in relevant part, "on the Effective Date, all mortgages, deeds of trust, Liens, pledges, or other security interests against any property of the Estates shall be fully released and discharged . . . ." Plan at Article 10.10.

10. In addition, Article 6.11 of the Plan provides for the release, discharge, and cancellation of "the obligations of, Claims against, and/or Interests in the Debtors under, relating, or pertaining to any agreements, Indentures, certificates of designation, bylaws, or certificate or articles of incorporation or similar documents governing the Old McClatchy Securities, *and any other note, bond, indenture, Certificate, or other instrument or document evidencing or creating any indebtedness or obligation of the Debtors*[.]" Plan at Article 6.11 (emphasis added). For a number of reasons, Articles 10.1, 10.10, and 6.11 render the Plan unconfirmable.

11. First, the proposed cancelation of Old McClatchy Securities (Article 6.11), vesting of assets (Article 10.1), and release of liens (Article 10.10) would deny Desmond the treatment she is entitled to under Section 1129(b)(2). As a secured creditor, Desmond must receive full payment on her claim, retain her interest in the Bond, or receive the indubitable equivalent of full payment or lien retention. Yet, the Plan as currently drafted purports to discharge the Bond and

treat her as a general unsecured creditor, in violation of Section 524(e)[4] of the Bankruptcy Code and, consequently, in violation of Section 1129(a)(1). This complete misclassification and transformation of Desmond's secured claim violates Section 1129(b) and Section 1122. Such utter mistreatment of Desmond's secured claim should not be included in a Chapter 11 plan and cannot be confirmed by this Court. Rather, the Plan must specifically provide that no provision of the Plan, including Articles 6.11, 10.1, and 10.10, modifies Desmond's secured status.

12. The Plan provisions are utterly ambiguous as to whether the Plan treats the Bond as property of the estate. It is black letter law that Desmond's rights to the Bond and Bond proceeds are not property of the estate such that they can be transferred pursuant to the Plan. *Ames Dep't Stores, Inc. v. Lumbermens Mut. Cas. Co.*, 542 B.R. 121, fn. 70 (Bankr. S.D.N.Y. 2015) ("The right to bond *proceeds* (and though this is more metaphysical, rights to "the bond") are not estate property.") (emphasis in original). Instead, only "the bundle of contractual rights under the bond agreement (and thus the bond agreement itself)" constitutes property of the estate. *Id.* (emphasis removed). Put another way, "[t]he debtor retains a reversionary interest in an appeal bond subject to divestiture if the debtor is unsuccessful once the appeal process has been completed." *Keene Corp. v. Acstar Ins. Co.*, 162 B.R. 935, 942 (Bankr. S.D.N.Y 1994). This "metaphysical" "reversionary" interest constitutes the only portion of the Bond which the Debtors may assign pursuant to Articles 10.1 and 10.10. Yet Articles 10.1 and 10.10 purport to assign all rights to the Bond and the Bond proceeds. Such assignment of non-estate property is impermissible,[5] thus rendering the Plan unconfirmable.

[4] Section 524(e) provides, in relevant part that "discharge of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. 524(e).

[5] Desmond further asserts (i) such assignment constitutes an avoidable transfer under North Carolina's Uniform Voidable Transactions Act. NC Gen. Stat. 39-23.1 *et. seq.*, and (ii) this Court cannot have jurisdiction to order a transfer of any portion of the Bond other than the Debtors' reversionary interest therein.

iii. *The Plan's Non-Consensual Release of the Debtors and Various Third-Parties Violates Second Circuit Precedent*

13. In relevant part, Article 10.5 of the Plan requires all Holders of Claims, to release, waive, and discharge all claims against the Debtors, their affiliates, and their estates' claims. Plan at Article 10.5. Article 10.6 of the Plan further provides for a similarly broad exculpation of the Debtors and various third-parties related to post-petition conduct. Plan at Article 10.6. These provisions, as currently drafted, violate Second Circuit precedent related to third-party releases and render the Plan unconfirmable.

14. In the Second Circuit, "a Court may enjoin a creditor from suing a third-party, provided the injunction plays an important part in the Debtors' reorganization plan . . . [in] truly unusual circumstances . . . that render the release terms important to the success of the plan." *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.*), 416 F. 3d 136, 141-43 (2d Cir. 2005) (internal quotation omitted). Notwithstanding Section 524(e) of the Bankruptcy Code, third party releases are "permissible only in rare cases, *with appropriate consent* or under circumstances that can be regarded as unique, some of which the Circuit listed." *In re Motors Liquidation Co.*, 477 B.R. 198, 220 (Bankr. S.D.N.Y. 2011) (emphasis added).

15. As this Court wisely noted, "[n]onconsensual releases are not supposed to be granted unless barring a particular claim is important in order to accomplish a particular feature of the restructuring." *In re Aegean Marine Petroleum Network, Inc.*, 599 B.R. 717, 727 (Bankr. S.D.N.Y 2019). In *Aegean*, the debtors' initial disclosure statement required releasing parties to "opt-out" of the plan releases in order to preserve their claims. This Court modified the release to apply solely to released parties who affirmatively "opt-in" to the release. *See* Bankr. S.D.N.Y., Case No. 18-13374 [DKT 385]. At the confirmation hearing, this Court took the additional step of stripping the nonconsensual third parties releases from the confirmed plan, reasoning "third-party

releases are not a merit badge that somebody gets in return for making a positive contribution to a restructuring. They are not a participation trophy, and they are not a gold star for doing a good job." *Aegean*, at 726–27.

16. The Plan releases non-debtor third-parties (including Locke, a defendant in the Desmond Lawsuit) from various claims and liabilities and enjoins claims against non-debtor third parties without the consent of creditors, in contravention of Second Circuit precedent and this Court's disposition in *Aegean*. Worse than *Aegean*, the Plan does not offer any mechanism for claimants to "opt-out" of the releases. In fact, the only way to opt out is to file an objection to the Plan. To make matters worse, paragraph 48 of the Confirmation Order purports to deem these releases and exculpations as consensual, even though the vast majority of creditors are not entitled to vote on the Plan. To be clear: Desmond *does not*, and *will not*, consent to the Plan's release and exculpation provisions. Notably, there is no evidence that any of the Released Parties contributed in any way to the Debtors' liquidation pursuant to the Plan, let alone "substantial financial contributions" or "substantial consideration."

17. Because under Second Circuit precedent, the Plan violates Section 524(e), the Plan does not comply Section 1129(a)(1) and cannot be confirmed with respect to *any and all creditors* of the Debtors in these Chapter 11 cases. The Court should deny confirmation of the Plan. Going forward, the Debtors may render the Plan confirmable by either (i) entirely deleting the release provisions, or (ii) modifying the Plan so that all claimants have presumptively "opted-out" of the releases, resoliciting approval of the Plan, and circulating ballots to all claimants offering the opportunity to "opt-in" to the releases.

iv. *The Plan's Discharge of, and Grants of Equivalent Relief to, Various Liquidating Debtors Violates Section 1141(d)(3) of the Bankruptcy Code*

18. Article 10.2 of the Plan provides that as of the Effective Date and except as provided in the Plan: (i) the Debtors are discharged from all obligations in connection with Claims and Causes of Action, (ii) the Plan binds all Holders of Claims and Interests, whether they voted for or against the Plan,

> [(iii)] all Claims and Interests shall be satisfied, discharged, and released in full, and the Debtors' liability with respect thereto shall be extinguished completely . . . ; and
>
> [(iv)] all Entities shall be precluded from asserting against the Debtors, the Estates, the Wind-Down Debtors, the Plan Administration Trust, the GUC Recovery Trust, their successors and assigns, and their assets and properties any other Claims or Interests based upon any documents, instruments, or any act or omission, transaction, or other activity of any kind or nature that occurred prior to the Effective Date.

Plan at Article 10.2.

19. Article 10.7 of the Plan further permanently enjoins "all Entities who have held, hold, or may hold Claims or interests that have been released pursuant to . . . Article 10.5 of the Plan, [or] discharged pursuant to Article 10.2 of the Plan" from, among other things, commencing and continuing lawsuits, enforcing any judgments, or enforcing any lien or encumbrance against any the Debtors. Plan at Article 10.7.

20. Article 10.2's discharge, Article 10.5's release, Article 10.6's exculpation, and Article 10.7's injunction apply equally to Wind-Down Debtors, which will survive the Effective Date, and non-Wind-Down Debtors, which "shall be dissolved upon the Effective Date . . . without any further notice to or action, order, or approval of the Bankruptcy Court or any other court of competent jurisdiction[.]" Plan at Article 6.12(c). The Plan essentially seeks to discharge the liquidating Debtors notwithstanding the fact that (i) pursuant to Article 10.10 of the Plan, substantially all of the assets of such Debtors will be transferred to, and liquidated by, the Plan Administration Trustee, and (ii) such liquidating Debtors will be dissolved on the Effective Date pursuant to Article 6.12(c) of the Plan. Article 10.2's discharge violates Section 1141(d)(3).

21. ***Moreover (and independent of Article 10.2's discharge and deemed satisfaction of claims), Article 10.5's release, Article 10.6's exculpation, and Article 10.7's injunction, and various other provisions throughout the Plan each improperly attempts to effect relief substantially equivalent to a discharge in violation of Section 1141(d)(3).***

22. Section 1141(d)(3) of the Bankruptcy Code prohibits a discharge (or equivalent relief) for debtors that (i) liquidate substantially all property of their estates, (ii) will not engage in business after consummation of the Chapter 11 plan, and (iii) would be denied discharge under Section 727(a). *See* 11 U.S.C. 1141(d)(3). Section 727(a)(1), in turn, mandates a denial of discharge if "the debtor is not an individual[.]" Because the Plan calls for the liquidation and dissolution of the non-Wind-Down Debtors (including The N&O, a defendant in the Desmond Lawsuit), and because such organizations are not individuals entitled to a discharge pursuant to Section 727, Section 1141(d)(3) mandates that these liquidating Debtors cannot receive a discharge upon consummation of the Plan. *Dutcher v. Reorganized Pettibone Corp.*, 193 B.R. 667, 668 (Bankr. S.D.N.Y. 1996) ("Confirmation of a plan discharges a corporation of all its debts unless it is a liquidating plan."); *See In re Bigler* LP, 442 B.R. 537, 545-46 (Bankr. S.D. Tex. 2010) (noting a Plan's injunction provision "would certainly operate as a discharge of the" debtor); *see also In re Sis Corp.*, 120 B.R. 93, 96 (Bankr. N.D. Ohio 1990) (noting a Plan's language would effectively "discharge on those specific obligations which are not otherwise treated in the" Plan). Notably, 1141(d)(3) prevents The N&O from liquidating and dissolving and, thus, it cannot be among the non-Wind-Down Debtors.

23. For this reason, each of Article 10.2's discharge, Article 10.5's release, Article 10.6's exculpation, and Article 10.7's injunction independently violates Section 1129(a)(1). The

Plan cannot be confirmed with respect to *any and all creditors* of the Debtors in these Chapter 11 cases. The Court should deny confirmation of the Plan.

B. The Disclosure Statement Cannot be Approved

i. *Governing Law*

24. Section 1125 of the Bankruptcy Code provides that a disclosure statement must contain "adequate information" describing a confirmable plan. 11 U.S.C. § 1125; see also *In re Quigley Co.*, 377 B.R. 110, 115 (Bankr. S.D.N.Y. 2007). The Bankruptcy Code defines "adequate information" as:

> Information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan . . . .

11 U.S.C. § 1125(a)(1).

25. To be approved, a disclosure statement must include sufficient information to apprise creditors of the risks and financial consequences of the proposed plan. *See In re McLean Indus., Inc.*, 87 B.R. 830, 834 (Bankr. S.D.N.Y. 1987) ("[S]ubstantial financial information with respect to the ramifications of any proposed plan will have to be provided to, and digested by, the creditors and other parties in interest in order to arrive at an informed decision concerning the acceptance or rejection of a proposed plan."). Although the adequacy of the disclosure is determined on a case-by-case basis, the disclosure must "contain simple and clear language delineating the consequences of the proposed plan on [creditors'] claims and the possible [Bankruptcy Code] alternatives . . . ." *In re Copy Crafters Quickprint, Inc.*, 92 B.R. 973, 981 (Bankr. N.D.N.Y. 1988). The disclosure statement must inform the average creditor what it is

going to get and when, and what contingencies there are that might intervene. *In re Ferretti*, 128 B.R. 16, 19 (Bankr. D.N.H. 1991).

ii. *The Disclosure Statement Does Not Provide Adequate Information "for Creditors to Make an Informed Judgment about the Plan"*

26. The Disclosure Statement includes no financial information related to the Debtors' existence or wind down – information necessary for claimants to "make an informed judgment about the Plan." *See* Section 1125(a) of the Bankruptcy Code. Notably, the Disclosure Statement does not provide an explanation as to why only *six creditors* – all affiliated with the buyer of the Debtors – out of *more than one hundred thousand creditors*, were given an opportunity to vote for or against the Plan, in violation of Section 1122 and 1126(g) of the Bankruptcy Code. Therefore the Disclosure Statement cannot be approved.

27. In an identical situation involving a combined hearing on approval of the disclosure statement and related plan, Judge Gonzalez denied approval of a disclosure statement due to lack of adequate information and required the debtors to resolicit based on a modified disclosure statement. In doing so, the court stated that "although a denial of the relief herein will result in added costs to the Debtors to resolicit, the Debtors proceeded at their own risk and must have been aware of such risks." *In re Source Enters.*, 2007 Bankr. LEXIS 4770 (S.D.N.Y. 2007).

iii. *The Disclosure Statement Does Not Provide Adequate Information Concerning the Treatment of Desmond's Claim*

28. The Disclosure Statement as currently drafted provides *absolutely no* information related to the treatment of Desmond's secured claim. The Disclosure Statement does not categorize her claim as secured or unsecured as required by Sections 1122 and 1123. The Disclosure Statement does not discuss the Plan's impact on the Bond or any insurance policy applicable to the Desmond Lawsuit. The Disclosure Statement does not discuss the Plan's impact on the

Desmond Lawsuit. Again, the Disclosure Statement discloses *nothing* as to the treatment of Desmond's claim. At this point, Desmond has no idea what will happen to her claim upon confirmation of the Plan. As such the Disclosure Statement cannot be approved. The Debtors must (i) modify the Disclosure Statement to address the informational deficiencies related to Desmond's claim, the Bond, and the Desmond lawsuit, (ii) circulate the modified Disclosure Statement, and (iii) resolicit acceptance of the Plan. *See In re Source Enters.*, 2007 Bankr. LEXIS 4770 (S.D.N.Y. 2007).

29. Neither the Disclosure Statement or the Plan categorizes or provides for Desmond's claim, which is secured by the Bond. Based on the current Disclosure Statement and Plan, Desmond cannot ascertain if the Debtors are proposing that she receive full payment as a Holder of an Other Secured Claim, or that she receive, at most, 3.1% of her claim as a Holder of a General Unsecured Claim. As such, Desmond has not received the adequate information necessary for her to understand her rights and treatment under the Plan.

iv. *The Disclosure Statement Does Not Provide Adequate Information Concerning the Treatment of the Bond*

30. As discussed above, Article 6.11 of the Plan purports to cancel the Old McClatchy Securities and similar instruments, Article 10.1 of the Plan purports to vest certain assets, and Article 10.10 of the Plan purports to release liens. Neither the Disclosure Statement or the Plan explain the impact of these provisions on the Bond. Neither document discusses whether the Bond constitutes: (i) Wind-Down Debtors' Rights, Plan Administration Trust Assets, or GUC Recovery Trust Assets for purposes of Article 10.1, (ii) Property of the Estates for purposes of Article 10.10, or (iii) a "bond" or "other instrument or document creating an obligation of any of the Debtors" for purposes of Article 6.11(b) of the Plan. At this time, Desmond cannot ascertain the Plan's

treatment of the Bond, thus the Disclosure Statement does not contain adequate information, as required by Section 1125(a) of the Bankruptcy Code.

v. *The Disclosure Statement Does Not Provide Adequate Information Concerning the Plan's Impact on the Desmond Lawsuit*

31. As discussed above, a number of Plan provisions purport to discharge the Debtors, or provide them substantially equivalent relief, and ultimately dissolve them. These provisions include: (i) Article 6.12(c)'s dissolution provisions, (ii) Article 10.2's discharge, (iii) Article 10.5's release, and (iv) Article 10.7's injunction. The Disclosure Statement does not discuss the impact of these provisions on the Desmond Lawsuit. The Disclosure Statement does not clarify the Plan's impact on the automatic stay with respect to the Desmond Lawsuit. At this point Desmond cannot even determine whether The N&O will survive the Effective Date in sufficient capacity to continue the Desmond Lawsuit and honor any obligations arising therefrom or with respect to the Bond. Desmond has not received adequate information to determine the Plan's impact on the Desmond Lawsuit or any resulting efforts to collect on the Bond and any insurance policies applicable to the Desmond Lawsuit.

vi. *The Disclosure Statement Cannot be Approved Because the Plan is Patently Unconfirmable*

32. If a plan is patently unconfirmable on its face, the application to approve the disclosure statement must be denied. See *In re GSC, Inc.*, 453 B.R. 132, 157, n.27 (Bankr. S.D.N.Y. 2011) (holding (i) an unconfirmable plan is grounds for rejection of the disclosure statement, and (ii) a disclosure statement that describes a plan patently unconfirmable on its face should not be approved) (citing *Quigley*, 377 B.R. at 115). As discussed herein, the Plan is patently unconfirmable with respect to Desmond because its treatment of Desmond's secured claim and the Bond violates Sections 524(e), 1122, 1123(a), 1129(a)(1), and 1129(b)(2). Moreover, the Plan is

patently unconfirmable with respect to *any and all creditors* of the Debtors in these Chapter 11 cases because Article 10.5's release and the elusive paragraph 48 of the Confirmation Order require creditors to affirmatively "opt-out" of the release, in violation Second Circuit precedent and this Court's decision in *Aegean*. The Plan is further patently unconfirmable with respect to *any and all creditors* of the Debtors in these Chapter 11 cases because its purported discharge, release, exculpation, and injunction (or substantially equivalent relief) provided to the liquidating Debtors violates Section 1141(d)(3). As a result, the Disclosure Statement cannot be approved and the Debtors must resolicit approval of a modified Disclosure Statement.

IV. CONCLUSION

WHEREFORE, Desmond respectfully submits that the Court (i) sustain the Objection, (ii) direct the Debtors to amend the Plan and proposed Confirmation Order as provided in Exhibit B attached hereto to cure the statutory deficiencies and to address the issues identified in the Objection, and (iii) grant such other relief as is appropriate in the circumstances.

Dated: New York, New York
September 17, 2020

Respectfully submitted,

DORSEY & WHITNEY LLP

/s/ Samuel S. Kohn
Samuel S. Kohn
51 W. 52nd Street
New York, New York 10019
Telephone: (212) 415-9200
Fax: (212) 953-7201

Monica Clark (*pro hac vice admission granted*)
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402-1498
Telephone: (612) 340-2600
Fax: (612) 340-2868

and

DEMENT ASKEW & JOHNSON

James T. Johnson (*pro hac vice admission granted*)
333 Fayetteville Street, Suite 1513
Raleigh, NC 27601
Telephone: (919) 833-5555

Attorneys for Beth Desmond

Exhibit A

The Bond

[Attached]

STATE OF NORTH CAROLINA

COUNTY OF WAKE

BETH DESMOND,

Plaintiff,

v.

THE NEWS AND OBSERVER PUBLISHING COMPANY, MCCLATCHY NEWSPAPERS, INC., AND MANDY LOCKE,

Defendants.

FILED
2017 MAR -8 P 3:37
WAKE CO., C.S.C.
BY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
12 CVS 16656

UNDERTAKING TO STAY EXECUTION

BOND # K09369776

Pursuant to N.C. Gen. Stat. § 1-289, Appellants The News & Observer Publishing Company ("News & Observer") and Mandy Locke ("Locke"), as Principals, and Westchester Fire Insurance Company, as Surety, are held and firmly bound unto Appellee Beth Desmond, as Obligee, in the sum of up to $8,109,539.41, for the payment of which the Principals and Surety jointly and severally bind themselves upon the following conditions:

WHEREAS, on or about November 18, 2016, the Superior Court of Wake County entered judgment in the above-captioned action in favor of Obligee and against Principals in the amount of $6,121,000.00 (the "Judgment"), plus prejudgment and post-judgment interest on compensatory damages until paid in full, at the legal rate, and post-judgment interest on punitive damages until paid in full, at the legal rate, and costs as set forth therein; and

WHEREAS, Principals have appealed the Judgment to the Court of Appeals of North Carolina;

NOW THEREFORE, if Principals or their insurers shall pay the amount of the Judgment if the Judgment is affirmed or if the appeal is dismissed, or shall pay any part of the amount as to

which the Judgment is affirmed, if affirmed only in part, and shall pay all damages that may be awarded or affirmed against Principals by the applicable appellate court(s), including any lawful post-judgment interest, then this Bond shall be null and void, but otherwise to remain in full force and effect until discharged by Order of the Superior Court of Wake County; under no circumstances, however, shall the Surety's liability under this Bond exceed the amount of $8,109,539.41.

Witness our hands and seals, this the 6th day of February, 2017.

THE NEWS & OBSERVER PUBLISHING COMPANY

By: _____ (SEAL)

Its: Publisher

MANDY LOCKE

By: _____

WESTCHESTER FIRE INSURANCE COMPANY

By: _____ (SEAL)
Daniel P. Dunigan

Its: Attorney in Fact

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served upon the parties in this action by U.S. Mail, postage prepaid and addressed as follows:

James T. Johnson
DEMENT ASKEW, LLP
P.O. Box 711
Raleigh, North Carolina 27602

This the 8th day of March, 2017.

THE BUSSIAN LAW FIRM, PLLC

By: John A. Bussian/ja

John A. Bussian
Wells Fargo Capitol Center
150 Fayetteville Street, 17th floor
Raleigh, North Carolina 27601
Telephone: (919) 829-4900
Telecopier: (919) 829-2165
Email: jbussian@aol.com

Counsel for Defendants

Power of Attorney

WESTCHESTER FIRE INSURANCE COMPANY

Know all men by these presents: That **WESTCHESTER FIRE INSURANCE COMPANY,** a corporation of the Commonwealth of Pennsylvania pursuant to the following Resolution, adopted by the Board of Directors of the said Company on December 11, 2006, to wit:

"RESOLVED, that the following authorizations relate to the execution, for and on behalf of the Company, of bonds, undertakings, recognizances, contracts and other written commitments of the Company entered into the ordinary course of business (each a "Written Commitment"):

(1) Each of the Chairman, the President and the Vice Presidents of the Company is hereby authorized to execute any Written Commitment for and on behalf of the Company, under the seal of the Company or otherwise.

(2) Each duly appointed attorney-in-fact of the Company is hereby authorized to execute any Written Commitment for and on behalf of the Company, under the seal of the Company or otherwise, to the extent that such action is authorized by the grant of powers provided for in such persons written appointment as such attorney-in-fact.

(3) Each of the Chairman, the President and the Vice Presidents of the Company is hereby authorized, for and on behalf of the Company, to appoint in writing any person the attorney-in-fact of the Company with full power and authority to execute, for and on behalf of the Company, under the seal of the Company or otherwise, such Written Commitments of the Company as may be specified in such written appointment, which specification may be by general type or class of Written Commitments or by specification of one or more particular Written Commitments.

(4) Each of the Chairman, the President and Vice Presidents of the Company in hereby authorized, for and on behalf of the Company, to delegate in writing any other officer of the Company the authority to execute, for and on behalf of the Company, under the Company's seal or otherwise, such Written Commitments of the Company as are specified in such written delegation, which specification may be by general type or class of Written Commitments or by specification of one or more particular Written Commitments.

(5) The signature of any officer or other person executing any Written Commitment or appointment or delegation pursuant to this Resolution, and the seal of the Company, may be affixed by facsimile on such Written Commitment or written appointment or delegation.

FURTHER RESOLVED, that the foregoing Resolution shall not be deemed to be an exclusive statement of the powers and authority of officers, employees and other persons to act for and on behalf of the Company, and such Resolution shall not limit or otherwise affect the exercise of any such power or authority otherwise validly granted or vested.

Does hereby nominate, constitute and appoint Brian C Block, Daniel P Dunigan, James L Hahn, Joseph W Kolok, Jr., Richard J Decker, William F Simkiss, all of the City of PAOLI, Pennsylvania, each individually if there be more than one named, its true and lawful attorney-in-fact, to make, execute, seal and deliver on its behalf, and as its act and deed any and all bonds, undertakings, recognizances, contracts and other writings in the nature thereof in penalties not exceeding Twenty Five million dollars & zero cents ($25,000,000.00) and the execution of such writings in pursuance of these presents shall be as binding upon said Company, as fully and amply as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its principal office,

IN WITNESS WHEREOF, the said Stephen M. Haney, Vice-President, has hereunto subscribed his name and affixed the Corporate seal of the said **WESTCHESTER FIRE INSURANCE COMPANY** this 8 day of September 2016.

WESTCHESTER FIRE INSURANCE COMPANY

Stephen M. Haney, Vice President

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA ss.

On this 8 day of September, AD. 2016 before me, a Notary Public of the Commonwealth of Pennsylvania in and for the County of Philadelphia came Stephen M. Haney ,Vice-President of the **WESTCHESTER FIRE INSURANCE COMPANY** to me personally known to be the individual and officer who executed the preceding instrument, and he acknowledged that he executed the same, and that the seal affixed to the preceding instrument is the corporate seal of said Company; that the said corporate seal and his signature were duly affixed by the authority and direction of the said corporation, and that Resolution, adopted by the Board of Directors of said Company, referred to in the preceding instrument, is now in force.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at the City of Philadelphia the day and year first above written.

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
KAREN E. BRANDT, Notary Public
City of Philadelphia, Phila. County
My Commission Expires Sept. 26, 2018

Notary Public

I, the undersigned Assistant Secretary of the **WESTCHESTER FIRE INSURANCE COMPANY,** do hereby certify that the original POWER OF ATTORNEY, of which the foregoing is a substantially true and correct copy, is in full force and effect.

In witness whereof, I have hereunto subscribed my name as Assistant Secretary, and affixed the corporate seal of the Corporation, this 6th day of February, 2017

William L. Kelly, Assistant Secretary

THIS POWER OF ATTORNEY MAY NOT BE USED TO EXECUTE ANY BOND WITH AN INCEPTION DATE AFTER September 08, 2018.

WESTCHESTER FIRE INSURANCE COMPANY

FINANCIAL STATEMENT **DECEMBER 31, 2015**

ADMITTED ASSETS

BONDS	$1,607,005,886
SHORT - TERM INVESTMENTS	23,666,123
STOCKS	3,117
REAL ESTATE	0
CASH ON HAND AND IN BANK	(68,986,083)
PREMIUM IN COURSE OF COLLECTION*	80,820,180
INTEREST ACCRUED	16,151,460
OTHER ASSETS	139,206,542
TOTAL ASSETS	$1,797,867,225

LIABILITIES

RESERVE FOR UNEARNED PREMIUMS	$203,506,626
RESERVE FOR LOSSES	848,505,624
RESERVE FOR TAXES	7,043,333
FUNDS HELD UNDER REINSURANCE TREATIES	5,739,389
OTHER LIABILITIES	1,696,960
TOTAL LIABILITIES	1,066,491,932
CAPITAL: 70,000 SHARES, $71.43 PAR VALUE	5,000,100
CAPITAL: PAID IN	301,430,636
AGGREGATE WRITE-INS FOR SPECIAL SURPLUS FUNDS	111,103,666
SURPLUS (UNASSIGNED)	313,840,891
SURPLUS TO POLICYHOLDERS	731,375,293
TOTAL	$1,797,867,225

(*EXCLUDES PREMIUM MORE THAN 90 DAYS DUE.)

STATE OF PENNSYLVANIA

COUNTY OF PHILADELPHIA

John Taylor, being duly sworn, says that he is Senior Vice President of Westchester Fire Insurance Company and that to the best of his knowledge and belief the foregoing is a true and correct statement of the said Company's financial condition as of the 31 st day of December, 2015.

Sworn before me this March 22, 2016

Senior Vice President

Notary Public

August 8, 2019
My commission expires

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Diane Wright, Notary Public
City of Philadelphia, Philadelphia County
My Commission Expires Aug. 8, 2019
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES

Exhibit B

Additions to the Plan

"***Desmond***" means Beth Desmond.

"***Desmond Appeal Bond***" means the Undertaking to Stay Execution posted in favor of Desmond in connection with the Desmond Lawsuit by Westchester Fire Insurance Company on February 6, 2017 in the amount of $8,109,539.41.

*"**Desmond Lawsuit***" means the lawsuit filed on November 29, 2012, captioned *Beth Desmond v. The News and Observer Publishing Company, McClatchy Newspapers, Inc., Mandy Locke, et. al.*, Wake County Superior Court File No. 12 CVS 16656, and all appeals, rehearings, remands, and any other proceedings resulting therefrom or related thereto.

"***Desmond Lawsuit Surety***" means Westchester Fire Insurance Company.

"***Wind-Down Debtors***" means, subject to Article 6.12(e) hereof, The McClatchy Company, The News and Observer Publishing Company, and Herald Custom Publishing of Mexico, S. de R.L. de C.V., on or after the Effective Date.

Desmond; Desmond Appeal Bond; Desmond Lawsuit. Notwithstanding anything in this Plan to the contrary, including but not limited to Articles 6.12, 10.1, 10.2, 10.5, 10.6, 10.7, and 10.10, nothing in this Plan shall in any way discharge, release, enjoin, stay, impact, impair, or otherwise affect Desmond's rights with respect to, the Desmond Appeal Bond, any insurance policy applicable to the Desmond Lawsuit, or any proceeds of any of the foregoing. The Desmond Appeal Bond and any proceeds therefrom are not property of the estate. In the event Desmond prevails in the Desmond Lawsuit, Desmond (i) is hereby deemed to be a Holder of an Allowed Secured Claim, with such Allowed Secured Claim being paid in full by the Desmond Appeal Bond and any insurance policy applicable to the Desmond Lawsuit, and (ii) shall be entitled to all proceeds from the Desmond Appeal Bond and any insurance policy applicable to the Desmond Lawsuit. Moreover, notwithstanding anything in this Plan to the contrary, including but not limited to Articles 6.12, 10.1, 10.2, 10.5, 10.6, 10.7, and 10.10, nothing in this Plan shall stay or enjoin Desmond's continued prosecution of the Desmond Lawsuit, including any action to (A) enforce against any Debtor, any Wind-Down Debtor, the Plan Administration Trust, the Plan Administration Trustee, the GUC Recovery Trust, the GUC Recovery Trustee, the Desmond Lawsuit Surety, the Released Parties, or any of their respective successors in interest or assigns, as the case may be, or against any property of any Debtor, any Wind-Down Debtor, the Plan Administration Trust, the Plan Administration Trustee, the GUC Recovery Trust, the GUC Recovery Trustee, the Desmond Lawsuit Surety, the Released Parties, or any of their respective successors in interest or assigns, as the case may be, any judgment or other relief granted in the Desmond Lawsuit; and (B) exercise any of Desmond's rights in, to, or under the Desmond Appeal Bond or any insurance policy applicable to the Desmond Lawsuit.

Additions to the Confirmation Order

No Impact on Desmond Appeal Bond; Treatment of Desmond Claim. Nothing in the Plan or in this Confirmation Order, including but not limited to Articles 6.12, 10.1, 10.2, 10.5, 10.6, 10.7, and 10.10 of the Plan, shall in any way discharge, release, enjoin, stay, impact, impair, or otherwise affect Desmond's rights with respect to, the Desmond Appeal Bond, any insurance policy applicable to the Desmond Lawsuit, or any proceeds of any of the foregoing. The Desmond Appeal Bond and any proceeds therefrom are not property of the estate. In the event Desmond prevails in the Desmond Lawsuit, Desmond (i) is hereby deemed to be a Holder of an Allowed Secured Claim, with such Allowed Secured Claim being paid in full by the Desmond Appeal Bond and any insurance policy applicable to the Desmond Lawsuit, and (ii) shall be entitled to all proceeds from the Desmond Appeal Bond and any insurance policy applicable to the Desmond Lawsuit.

No Stay of Desmond Lawsuit. Nothing in the Plan or in this Confirmation Order, including but not limited to Articles 6.12, 10.1, 10.2, 10.5, 10.6, 10.7, and 10.10 of the Plan shall stay or enjoin Desmond's continued prosecution of the Desmond Lawsuit, including any action to (A) enforce against any Debtor, any Wind-Down Debtor, the Plan Administration Trust, the Plan Administration Trustee, the GUC Recovery Trust, the GUC Recovery Trustee, the Desmond Lawsuit Surety, the Released Parties, or any of their respective successors in interest or assigns, as the case may be, or against any property of any Debtor, any Wind-Down Debtor, the Plan Administration Trust, the Plan Administration Trustee, the GUC Recovery Trust, the GUC Recovery Trustee, the Desmond Lawsuit Surety, the Released Parties, or any of their respective successors in interest or assigns, as the case may be, any judgment or other relief granted in the Desmond Lawsuit; or (B) exercise any of Desmond's rights in, to, or under the Desmond Appeal Bond or any insurance policy applicable to the Desmond Lawsuit.