Docket #1726 Date Filed: 04/30/2020

Hearing Date: May 7, 2020 at 10:00 AM (prevailing Eastern Time)
Objection Deadline: April 30, 2020 at 4:00 PM (prevailing Eastern Time)
Re: Doc No. 1632

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
WINDSTREAM HOLDINGS, INC., *et al.*,[1]	Case No. 19-22312 (RDD)
Debtors.	(Jointly Administered)

SECURITIES LEAD PLAINTIFF'S OBJECTION TO APPROVAL OF THE DISCLOSURE STATEMENT AND SOLICITATION PROCEDURES RELATING TO THE JOINT CHAPTER 11 PLAN OF REORGANIZATION OF WINDSTREAM HOLDINGS, INC. *ET AL.*

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[1] The last four digits of Debtor Windstream Holdings, Inc.'s tax identification number are 7717. Due to the large number of Debtors in these chapter 11 cases, for which joint administration has been granted, 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' proposed claims and noticing agent at http://www.kccllc.net/windstream. The location of the Debtors' service address for purposes of these chapter 11 cases is: 4001 North Rodney Parham Road, Little Rock, Arkansas 72212.

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Robert Murray ("Lead Plaintiff"), the court-appointed lead plaintiff in the securities class action captioned as *Robert Murray v. Earthlink Holdings Corp., et al.*, Case No. 4:18-cv-00202-jm (the "Securities Litigation"), pending in the United States District Court for the Eastern District of Arkansas (the "Arkansas District Court"), for himself and the putative Class he seeks to represent in the Securities Litigation (the "Class"), hereby submits this objection (the "Objection") to (a) approval of the disclosure statement (the "Disclosure Statement") [Doc No. 1632] for the *Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al., Pursuant to Chapter 11 of the Bankruptcy Code* (the "Plan") [Doc No. 1631] and (b) approval of the procedures and forms of notice (the "Solicitation Procedures") the debtors-in-possession (collectively, the "Debtors") in the above-captioned chapter 11 cases (the "Chapter 11 Cases") have proposed for soliciting votes on the Plan, as set forth in the *Debtors' Motion to Approve (I) Adequacy of the Disclosure Statement, (II) Solicitation and Notice Procedures, (III) Forms of Ballots and Notices in Connection Therewith, and (IV) Certain Dates with Respect Thereto* (the "Motion") [Doc No. 1633]. As and for its Objection, Lead Plaintiff respectfully states as follows:

BACKGROUND

The Securities Litigation

1. The Securities Litigation is a putative class action arising from the 2017 merger (the "Merger") between Windstream Holdings Inc. ("Windstream"), now a Debtor in these Chapter 11 Cases, and EarthLink Holdings Corp. ("EarthLink" and together with Windstream, the "Debtor Defendants"). Through the Merger, which was completed on February 27, 2017, each share of EarthLink common stock was exchanged for 0.818 shares of Windstream common stock. Windstream issued approximately 93 million shares of common stock in a transaction purportedly valued at approximately $1.1 billion. Post-closing, Windstream's stockholders

owned approximately 51% of the combined company and former EarthLink stockholders owned approximately 49%.

2. The *Amended Class Action Complaint for Violations of Federal Securities Laws* (the "Securities Complaint")[2] filed in the Securities Litigation on July 27, 2018 asserts claims against the Debtor Defendants and certain of their current and former directors and officers (the "Non-Debtor Defendants" and collectively with the Debtor Defendants, the "Securities Defendants") (a) under sections 11, 12(a)(2), and 15 of the Securities Act of 1933 (the "1933 Act"), on behalf of Lead Plaintiff and all other persons or entities, except for the Securities Defendants, who purchased or otherwise acquired Windstream shares, pursuant and/or traceable to certain Merger offering documents, and (b) under sections 14(a) and 20(a) of the Securities Exchange Act of 1934, on behalf of Lead Plaintiff and all other persons or entities, except for the Securities Defendants, who held EarthLink stock on the record date for the Merger.[3] Among other things, the Securities Complaint alleges that the Windstream shares issued in connection with the Merger, though ostensibly valued at $1.1 billion at the time, were in fact almost worthless.

3. The Securities Litigation names eighteen Non-Debtor Defendants:

a. Susan D. Bowick, Kathy S. Lane, Garry K. McGuire, and R. Gerard Salemme, members of the EarthLink board at the closing of the Merger;

b. Joseph F. Eazor, EarthLink's CEO and President, and member of the EarthLink board at the closing of the Merger;

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[2] References to the Securities Complaint and the allegations therein are for informational purposes only, are qualified in their entirety by the Securities Complaint itself, and do not constitute an admission or stipulation with respect to any factual allegations in the Securities Litigation.

[3] The claims asserted in the Securities Complaint are based solely on strict liability and negligence, not on any reckless or intentionally fraudulent conduct by or on behalf of the Securities Defendants, and Lead Plaintiff has specifically disclaimed any allegation of fraud, scienter, or recklessness in connection with such claims. See Securities Complaint, ¶ 7.

c. Julie A. Shimer, Chairman and member of the EarthLink board at the closing of the Merger;

d. Marc F. Stoll and Walter L. Turek, members of the EarthLink board at the closing of the Merger and appointed to the Windstream board in connection with the Merger;

e. Carol A. Armitage, Samuel E. Beall III, Jeannie H. Diefenderfer, Jeffrey T. Hinson, William G. LaPerch, Larry Laque, and Michael G. Stoltz, members of the Windstream board at the closing of the Merger;

f. Robert E. Gunderman, Windstream's CFO at the closing of the Merger;

g. Kristi Moody, Senior Vice President and Corporate Secretary of Windstream at the closing of the Merger;

h. Tony Thomas, Windstream's CEO and President, and member of the Windstream board at the closing of the Merger; and

i. Alan L. Wells, Chairman and a member of the Windstream board at the closing of the Merger.

The Plan, Disclosure Statement, and Solicitation Procedures

4. On April 1, 2020, the Debtors filed the Plan, Disclosure Statement, and Motion. A hearing on the Disclosure Statement and Motion is presently scheduled for May 7, 2020.

The Third-Party Release and Plan Injunction

5. Article VIII 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 in relevant part:

> As of the Effective Date, each Releasing Party is deemed to have released and discharged each Debtor, Reorganized Debtor, and Released Party from any and all Causes of Action, whether known or unknown, … that such entity would have been legally entitled to assert (whether individually or collectively), based on or relating to or in any manner arising from, in whole or in part, …upon any other related act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date.

Plan. Art. VIII.D.

6. The "Releasing Parties" deemed to grant the Third-Party Release include, among numerous others:

> …all holders of Claims or Interests that vote to accept or are deemed to accept the Plan; [] all holders of Claims or Interests that abstain from voting on the Plan and who do not affirmatively opt out of the releases provided by the Plan by checking the box on the applicable ballot indicating that they opt not to grant the releases provided in the Plan; [] ***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 indicating that they opt not to grant the releases provided in the Plan***…

Plan, Art. I.A.128 (emphasis added).

7. The "Released Parties" benefiting from the Third-Party Release comprise a similarly sweeping universe including, among numerous others, the Debtors' and any current or former affiliate of subsidiary of the Debtors' current and former "directors, managers, officers, equity holders (regardless of whether such interests are held directly or indirectly), predecessors, successors, and assigns, subsidiaries, and each of their respective current and former equity holders, officers, directors, managers, principals, members, employees, agents, advisory board members, financial advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, and other professionals." See Plan, Art. I.A.127. Through the seemingly endless web of interconnected Plan provisions that a creditor or interest holder is compelled to navigate and the lists of categories of parties, related parties, and related parties' parties that the Plan defines as Released Parties, it appears that all of the Non-Debtor Defendants may be Released Parties deemed to be released by the Releasing Parties from "any and all causes of action….based on, relating to, or in any manner arising from, in whole or in part, … any [] act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date. " See Plan, Art. VIII.D.

8. The Plan also contains an injunction barring, 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" against the Released Parties by "all entities who have held, hold, or may hold Claims or Interests that have been released, discharged, or are subject to exculpation" against "the Debtors, the Reorganized Debtors, the Exculpated Parties, or the Released Parties" (the "Plan Injunction"). See Plan, Art. VIII.F.

Treatment of the Claims of Lead Plaintiff and the Class Under the Plan

9. Lead Plaintiff timely filed a class proof of claim on behalf of itself and the Class against Windstream Holdings Inc. (the "Class Claim") [Claim No. 6285] on July 15, 2019. The claims asserted in the Class Claim are subject to subordination pursuant to section 510(b) of the Bankruptcy Code.

10. The Plan does not classify the Class Claim or any other claims subordinated pursuant to section 510(b). However, claims subordinated pursuant to section 510(b) arising in connection with purchase or sale of common stock, such as the Class Claim, are given equal priority as common stock. 11 U.S.C. § 510(b). Common equity interests in the Debtors are classified in class 9 under the Plan ("Class 9"). If confirmed, the interest holders in Class 9 will have their interest "cancelled, released, and extinguished without any distribution." Members of Class 9 are impaired, deemed to have rejected the Plan, and are not entitled to vote. See Plan Art. III.

OBJECTION

I. THE DISCLOSURE STATEMENT SHOULD NOT BE APPROVED IN ITS CURRENT FORM.

11. The Disclosure Statement should not be approved for two primary reasons. First, the Disclosure Statement does not provide adequate information to enable creditors, such as Lead Plaintiff and members of the putative Class, to evaluate the Plan and decide whether, or determine how, to opt out of the Third-Party Release (a burden that should not be placed on creditors in impaired, non-voting classes in any event). Second, even if the Disclosure Statement contained adequate information, it nevertheless should not be approved because the Plan it describes cannot be confirmed in its current form. The Court should not approve the Disclosure Statement unless and until the issues identified in this Objection are resolved through appropriate revisions to the Plan and the Disclosure Statement.

A. The Disclosure Statement Should Not be Approved Because it Does Not Provide Adequate Information.

12. The proponent of a chapter 11 plan may only solicit votes to accept or reject that plan once the Court has approved the written disclosure statement for that plan as containing "adequate information." 11 U.S.C. § 1125(b). Section 1125(a) of the Bankruptcy Code defines "adequate information" as follows:

> 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 … 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); see also Sure-Snap Corp. v. State Street Bank & Trust Co., 948 F.2d 869, 873 (2d Cir. 1991) (Section 1125(b) "requires Chapter 11 petitioners to file a mandatory

disclosure statement listing all 'adequate information' which would enable holders of claims to take an informed position on a proposed reorganization plan.").

13. The purpose of a disclosure statement for a chapter 11 plan "is to provide 'adequate information' to creditors to enable them to decide whether to accept or reject the proposed plan." In re Feretti, 128 B.R. 16, 18 (Bankr. D.N.H. 1991) (citations omitted). Although courts assess adequacy on a case-by-case basis, a disclosure statement must contain "simple and clear language delineating the consequences of the proposed plan on [creditors'] claims and the possible…alternatives so that [creditors] can intelligently accept or reject the Plan." In re Copy Crafters Quickprint, Inc., 92 B.R. 973, 981 (Bankr. N.D.N.Y. 1988); see also Tex. Extrusion, 844 F.2d at 1157. In essence, a disclosure statement "must clearly and succinctly inform the average…creditor what it is going to get, when it is going to get it, and what contingencies there are to getting its distribution." Ferretti, 128 B.R. at 19.

14. The Disclosure Statement does not contain adequate information to enable Lead Plaintiff, or creditors generally, to fully assess the extent to which the Plan will impact them and, in particular, the members of the putative Class or the Securities Litigation.

1. The Disclosure Statement does not provide adequate information to advise Lead Plaintiff or the putative Class of the treatment of their claims under the Plan and the impact of the Plan on these claims.[4]

15. Neither the Plan nor the Disclosure Statement acknowledge the Class or shed light on the classification of the Class and Class Claim under the Plan. Although the Class Claim is of equal priority to the equity interests in Class 9 under the Plan, neither Class 9 nor any other class under the Plan, nor any related disclosures in the Disclosure Statement, make reference to or

[4] The Debtors have informed Lead Plaintiff that they intend to revise the Disclosure Statement and/or Plan, as applicable, to address this issue. Because the revised documents have not yet been filed, Lead Plaintiff raises this issue in this Objection in an abundance of caution, but anticipate that this issue will be resolved at or prior to the hearing on this Objection.

explicitly include claims subordinated under section 510(b) of the Bankruptcy Code. Thus, the Disclosure Statement does not provide Lead Plaintiff or any member of the putative Class with adequate information regarding the classification or treatment of their claims under the Plan.

16. Thus, the Disclosure Statement does not provide adequate information to advise the average putative Class member of the fact that they presumably are receiving nothing under the Plan or why. See Ferretti, 128 B.R. at 19. Nor does it adequately describe the potential impact of the Plan on putative Class members' claims against non-debtor third parties who are providing no consideration for the gratuitous releases that the Plan contemplates. This inadequacy of the disclosure must be corrected before the Disclosure Statement can be approved.

2. The Disclosure Statement does not contain any description of the Securities Litigation.[5]

17. In fact, the Disclosure Statement does not provide any mention of the Securities Litigation *at all*.

18. The Securities Litigation asserts claims against both the Debtor Defendants and the Non-Debtor Defendants, who are current and former insiders, officers, and/or directors of the Debtors. As such, 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 meaningful description, or even a mention, of the Securities Litigation. To resolve this omission, the following paragraph should be added to the Disclosure Statement:

[5] The Debtors have informed Lead Plaintiff that they intend to address this issue through an addition to the Disclosure Statement. Because the revised documents have not yet been filed, Lead Plaintiff raises this issue in this Objection in an abundance of caution, but anticipates that this issue will be resolved at or prior to the hearing on this Objection.

> A putative securities class action against Windstream Holdings, Inc. and certain current and former officers and directors of Windstream Holdings, Inc. and EarthLink Holdings Corp. is pending in the United States District Court for the Eastern District of Arkansas (the "Arkansas District Court"), captioned as *Robert Murray v. EarthLink Holdings Corp., et al.*, Case No. 4:18-cv-00202-jm (the "Securities Litigation"). The Securities Litigation asserts claims under Sections 11, 12(a)(2), and 15 of the Securities Act of 1933 and Sections 14(a) and 20(a) of the Securities Exchange Act of 1934 arising from the 2017 merger between EarthLink Holdings Corp. and Windstream Holdings, Inc. (the "2017 Merger") on behalf of a putative class consisting of all other persons or entities (except for the defendants in the Securities Litigation) who purchased or otherwise acquired Windstream Holdings, Inc. common shares pursuant and/or traceable to the Offering Documents in connection with the 2017 Merger and all persons or entities (except for the defendants in the Securities Litigation) who held stock in EarthLink Holdings Corp. on the record date for the 2017 Merger. At a hearing held June 17, 2019, the Bankruptcy Court granted the Debtors' motion to extend the automatic stay to the non-Debtor defendants in the Securities Litigation and granted a cross-motion by the lead plaintiff in the Securities Litigation for relief from the automatic stay to permit the Arkansas District Court to conduct oral argument and rule on the motions to dismiss the Securities Litigation that have been fully briefed since November 29, 2018, and which remain pending as of the date hereof.

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

19. 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 Lower Bucks Hosp., 471 B.R. 419, 460 (Bankr. E.D. Pa. 2012). The Lower Bucks court noted that although Bankruptcy 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) applies to the presentation of both the Third-Party Release and the Plan Injunction in the Plan and Disclosure Statement. See id.

20. The Disclosure Statement might facially comply with Bankruptcy Rule 3016(c) by presenting the language of the Third-Party Release and the Plan Injunction, copied essentially verbatim from the Plan, in bold text – but its compliance with the rule ends there. The Disclosure Statement merely parrots the convoluted and nearly incomprehensible 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 does it "describe in specific and conspicuous language … all acts to be enjoined" by the Plan Injunction. The Disclosure Statement does not describe with specificity *any* acts to be enjoined by the Plan Injunction.

21. As a glaring example, the Disclosure Statement does not make specific reference to the fact that the Third-Party Release and Plan Injunction could release and enjoin the prosecution of the claims asserted against the Non-Debtor Defendants in the Securities Litigation. Even if hypothetical members of the putative Class were aware of the Plan and located and reviewed the Disclosure Statement and Plan, there is nothing whatsoever in the Disclosure Statement to inform them of the draconian impact the Third-Party Release and Plan Injunction could have on their independent claims against the Non-Debtor Defendants.

22. Rather, to ascertain the types of claims that the Third-Party Release would release, and thus that the Plan Injunction would bar after the effective date of the Plan, a putative Class member must first ascertain whether a particular claim or remedy is one that has been

"released pursuant to . . . the Third Party Release." If the answer to that inquiry is "Yes," then the Plan Injunction would enjoin the putative Class member from asserting the claim.

23. The analysis is remarkably complicated and virtually impossible to navigate. To ascertain whether a claim has been released under the Plan, a creditor must determine (a) whether the creditor is a "Releasing Party" under the convoluted definition in the Plan, (b) whether the claim it seeks to assert is "relating to, or in any manner arising from, in whole or in part, the Debtors . . ., [or] based . . . upon any other related act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date" among myriad other potential categories of claims, and (c) whether the party against which they seek to assert the claim is a "Released Party," a definition that again incorporates multiple, extremely broad tiers of related parties and related parties' related parties, defined only by extremely broad categories, requiring cross-references among multiple defined terms, and with no explanatory disclosure in the Disclosure Statement.

24. The end result of this analysis is that it is essentially impossible for a member of the putative Class to reasonably ascertain, even after attempting to navigate numerous provisions of multiple documents, whether the Plan will release a particular claim against a particular non-Debtor. Thus, there is no way a member of the Class reading the Disclosure Statement (if they are even aware that it exists) couldmake an informed decision whether to object to or opt out of the Third-Party Release, especially where they are not even entitled to vote. Absent appropriate revisions to the Disclosure Statement and Plan to remedy the defects and issues relating to the scope and appropriateness of the Third-Party Release and Plan Injunction, the Disclosure Statement and Solicitation Procedures should not be approved. To be clear, though, the fatal defects in the Third-Party Release cannot be cured simply by additional disclosure.

4. The Disclosure Statement fails to provide any legal or factual basis for the Third-Party Release or the Plan Injunction, particularly as they relate to Lead Plaintiff, the putative Class, and the Securities Litigation.

25. As discussed in more detail in Point B below, there is no legitimate factual or legal basis for the Debtors' failure to expressly exclude the independent direct claims of Lead Plaintiff and the putative Class against numerous solvent Non-Debtor Defendants from the scope of the Third-Party Release. The Debtors' attempt to prejudice Lead Plaintiff and the putative Class is particularly onerous where Lead Plaintiff and the putative 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 Lead Plaintiff and the putative Class against the Non-Debtor Defendants, even though those claims cannot be adjudicated outside of the Arkansas District Court unless Lead Plaintiff and the putative Class consent to Bankruptcy Court adjudication (which they do not). Despite these glaring flaws, the Disclosure Statement does not even attempt to provide any justification for the gratuitous and legally impermissible deemed release by members of the putative Class, who are receiving nothing under the Plan – because there isn't one.

5. The Disclosure Statement does not disclose whether the claims of Lead Plaintiff and the putative Class will be preserved against the Debtors to the extent of available insurance coverage.

26. Claims against the Debtors arising out of purchases of their securities, including the Class Claim, do not appear to be entitled to any distribution under the Plan. However, such treatment, or even the existence of such claims, are not explicitly addressed in the Disclosure Statement. However, the Debtors' prepetition directors' and officers' liability insurance policies are left intact by the Plan and deemed assumed to the extent they are executory contracts. See Plan, Art. IV.P. The Debtors appear to have D&O insurance policies, but the Disclosure

Statement does not explain whether these or any other insurance policies cover the Class Claim, and if so, how the Plan would permit Lead Plaintiff or the putative Class to access coverage under such policies for the Class Claim to the extent of available insurance coverage, which would have no economic impact on the Debtors' estates. This omission is particularly glaring in light of Article VI.I.2 of the Plan, which provides that no distributions will be made on account of allowed claims covered by the Debtors' insurance policies until the holders thereof exhaust all remedies with respect to such insurance policies. However, the Disclosure Statement does not explain how Lead Plaintiff and the putative Class can comply with that mandate. The Disclosure Statement must provide such information.

6. The Disclosure Statement does not disclose whether or how the Debtors intend to preserve the evidence potentially relevant to the Securities Litigation after the Effective Date of the Plan.

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

28. The Debtor Defendants are parties to the Securities Litigation and thus are subject to the PSLRA's document preservation mandate. Due to the operation of the automatic stay, the Securities Litigation is currently stayed with respect to the Debtor Defendants and, by order of the Court, with respect to the Non-Debtor Defendants, except to the extent necessary for the

Arkansas District Court to rule on the pending motions to dismiss. Lead Plaintiff believes it is appropriate for the Plan to permit the continued pursuit of the Securities Litigation against the Debtor Defendants to the extent of any available residual entity coverage under the D&O Policies, in which instance the Debtor Defendants will remain parties to the Securities Litigation. In the event the Debtor Defendants cease (temporarily or otherwise) to be a party to the Securities Litigation, the PSLRA's document preservation mandate should continue to apply to the Debtors and later, the reorganized Debtors.

29. Continuing preservation of the Debtor Defendants' 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 Lead Plaintiff and the putative Class. However, the Plan does not contain and the Disclosure Statement does not describe any requirement that the Debtors take any action to preserve evidence potentially relevant to the Securities Litigation, nor does the Disclosure Statement contain any explanation of what, if any, measures the Debtors will implement to ensure such evidence is retained and preserved through the completion of the Securities Litigation. The Plan and Disclosure Statement should also make clear that the Plan Injunction will not impact the ability of Lead Plaintiff and the putative Class to obtain the Debtors' books and records that are potentially relevant to the Securities Litigation through post-confirmation discovery in the Securities Litigation.

30. Inclusion of the following provision in the Plan, along with corresponding disclosure in the Disclosure Statement, would resolve Lead Plaintiff's concerns with respect to the post-confirmation preservation of and access to 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 *Robert Murray v. Earthlink Holdings Corp., et al.*, Case No. 4:18-cv-00202-jm (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, and from every source and location, including but not limited to all hard drives, servers, and cloud-based storage located in the United States and overseas), 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. For the avoidance of doubt, the Plan Injunction shall not impact in any manner any rights of the lead plaintiff and the proposed class in the Securities Litigation to seek and obtain Potentially Relevant Books and Records through discovery in the Securities Litigation.

B. The Disclosure Statement Should Not be Approved Because the Third-Party Release Renders the Plan Unconfirmable.

31. Courts also will not approve disclosure statements that describe plans that are "so fatally flawed that confirmation is impossible." In re U.S. Brass Corp., 194 B.R. 420, 422 (Bankr. E.D. Tex. 1996). Because, as discussed more fully below, the Plan cannot be confirmed in its current form, it would be counterproductive to approve the Disclosure Statement and authorize the Debtors to expend estate resources soliciting votes on an unconfirmable Plan.

1. The Third-Party Release is improper and legally impermissible.

32. The Third-Party Release is improper to the extent it purports to release any direct claims belonging to Lead Plaintiff and the putative Class against the Non-Debtor Defendants or any other Released Parties that become non-debtor defendants. The inequity of the Third-Party Release is magnified by the fact that Lead Plaintiff and the putative Class members are not entitled to vote on the Plan, are deemed to reject the Plan, and are receiving nothing under the Plan. Indeed, the Third-Party Release will strip Lead Plaintiff and the putative Class of likely

their *only* source of compensation, the Securities Litigation against the Non-Debtor Defendants. There is no legitimate factual or legal basis for that draconian result.

33. The Plan purports to allow creditors such as Lead Plaintiff and members of the putative Class – who, even if they were properly classified in a non-voting class, nevertheless would be Releasing Parties due to their status as holders of Claims or Interests – to salvage their claims against the Non-Debtor Defendants and other Released Parties from the impact of the Third-Party Release by affirmatively opting out. However, this opt-out requirement improperly places the onus on defrauded investors – many of whom no longer hold the Debtor Defendants' securities and thus are likely unaware of the Plan, the voting deadline, the Solicitation Procedures, and are likely strangers to these Chapter 11 Cases generally – to locate and review the Plan, study its convoluted release and injunction provisions, and ascertain that even though they are receiving no economic value, they nevertheless must take affirmative steps to preserve their rights against solvent, insured third parties who are not debtors. Given the early stage of the Securities Litigation, the putative Class has not been provided with notice of the pendency of the Securities Litigation and thus most members of the putative Class likely are not yet even aware of the Securities Litigation or of the fact that they have claims against the Non-Debtor Defendants that have value and could be impacted by the Third-Party Release.

34. Even if the opt-out mechanism designed to manufacture consent could be described as consensual (which it is not), why would any reasonable, fully informed member of the putative Class ever voluntarily relinquish any independent, direct claims against Non-Debtor Defendants in exchange for absolutely nothing? The obvious answer is that they would not, and that the supposedly consensual Third-Party Release is anything but. See, e.g., In re Chassix Holdings, Inc., 533 B.R. 64, 78 (Bankr. S.D.N.Y. 2015). The Chassix court observed that

> The purpose of the "opt-out" and "deemed consent" voting rules that the Debtors proposed was to aid the parties in compiling a broader set of third party releases than might be obtained in a different, "affirmative consent" approach were adopted. The proposed procedures would have done so by ***deeming "consent" to exist in situations where no affirmative consent had actually been manifested. Finding "consent" in these circumstances is to some extent a legal fiction. We know from experience that many creditors and interest holders who receive disclosure statements and solicitation materials simply will not respond to them, either because they elect not to read them at all or for other reasons***. . . . The point is that inattentiveness, inaction and mistake are a known and expected part of the voting process.

Id. at 78 (emphasis added); see also In re SunEdison, Inc., 576 B.R. 453, 460 (Bankr. S.D.N.Y. 2017). 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 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.***

Id. at 460-61 (emphasis added).

35. The circumstances here are even more egregious than those at issue in SunEdison and Chassix. In SunEdison, unsecured creditors were receiving *something* under the plan, yet the Court noted that their miniscule recovery (not their magnanimous desire to grant a gratuitous third-party release) was a plausible explanation for the fact that they did not vote. In Chassix,

unsecured creditors faced the possibility of losing their distributions if their class did not accept the plan – but if their class did accept the plan, they stood to receive meaningful distributions.

36. Here, by contrast, Lead Plaintiff and the putative Class are not receiving anything under the Plan, and thus are not even entitled to vote on the Plan. The opt-out mechanism is designed to engineer deemed "consent" that no rational putative Class member would ever voluntarily give. Members of the putative Class – to the extent they are even aware of the Chapter 11 Cases or the Plan at all – have little reason to do anything with respect to the Plan, much less find, review, and decipher a convoluted Third-Party Release. The proposed opt-out mechanism is simply a means of engineering illusory "consent" to a release which would amount to the "Court-endorsed trap for the careless or inattentive creditor" the Chassix court decried. 533 B.R. at 79. "If . . . a Bankruptcy Court should be wary of imposing third party releases on creditors, then a Bankruptcy Court should be equally wary of approving voting procedures that effectively would impose those same releases on creditors who have not affirmatively manifested their consent to them." Id.

37. In Aegean Marine, Judge Wiles commented on the impropriety of a debtor's similar effort, by the same counsel as represents the Debtors in these Chapter 11 Cases, to use an opt-out mechanism to fabricate "judicial deemed consent" to a third-party release by, among others, holders of securities fraud claims:

> 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. . . .
>
> And to me, using an opt-out approach is not consistent with what Metromedia tells me to do. . . . 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, at 28:1-29:6 (emphasis added).[6] The Debtors' efforts to fabricate "consent" by Lead Plaintiffs and the putative Class to the Third-Party Release here, where actual, affirmative, knowing, and voluntary consent does not exist (and never would exist) are no different.

38. The illusory opt-out mechanism contained in the Plan, particularly as applied to the many members of the putative Class who likely no longer hold the Debtor Defendants' securities and likely will not receive notice of the Plan at all, effectively renders the Third-Party Release involuntary and, thus, subject to the Second Circuit's Metromedia standard. See In re Metromedia Fiber Network, Inc., 416 F.3d 136, 142-43 (2d Cir. 2005). Approval of an involuntary third-party release in a chapter 11 plan "at minimum requires" a finding that the release is "itself important to the success of the Plan[.]" Id. at 143. That standard obviously is not satisfied here, where the Disclosure Statement does not even disclose who the Released Parties are or what claims against them are being released, much less explain why gratuitously releasing them is important to the success of the Plan.

39. The Debtors cannot lean on the threat of indemnification claims as a justification for the Third-Party Release, either. Any potential indemnification claims (which would be

[6] The relevant transcript pages are annexed hereto as **Exhibit A**.

covered by insurance in any event) the Non-Debtor Defendants may have against the Debtors are, like the Class Claim, subordinated pursuant to section 510(b) of the Bankruptcy Code and thus would not receive any distributions under the Plan. Any such claims likely are also subject to disallowance pursuant to section 502(e)(1)(B). Simply put, the claims asserted against the Non-Debtor Defendants in the Securities Litigation will never have even a tangential impact on the Debtors or their estates.

2. The Court lacks jurisdiction, constitutional adjudicatory authority, or both to release or enjoin any claims of Lead Plaintiff or the putative Class against the Non-Debtor Defendants.

40. The Third-Party Release also renders the Plan unconfirmable because this Court lacks jurisdiction, constitutional adjudicatory authority, or both to release the direct, non-bankruptcy, non-core claims asserted against the Non-Debtor Defendants in the Securities Litigation pending before the Arkansas District Court. Lead Plaintiff and the putative Class are constitutionally entitled to adjudication of those claims in an Article III tribunal (the Arkansas District Court), and thus such claims cannot be summarily eviscerated by this Court through engineered non-consensual releases under the Plan.

41. To correct these fatal defects, the Plan must expressly exclude Lead Plaintiff and the putative Class, and their claims against the Non-Debtor Defendants in the Securities Litigation, from the Third-Party Release and the Plan Injunction.

42. To that end, Lead Plaintiff suggests that the following should be added to the definition of "Releasing Parties" to clarify that Lead Plaintiff and the putative Class are not deemed to grant the Third-Party Release:

> , provided that neither the plaintiffs nor the proposed class (as may be modified in the future) or any member thereof in the securities class action captioned as *Robert Murray v. Earthlink Holdings Corp., et al.*, Case No. 4:18-cv-00202 (E.D. Ark.) shall be Releasing Parties.

43. In addition, for the avoidance of any doubt, the definition of "Released Parties" should clarify that the Non-Debtor Defendants, in their capacity as such, are not Released Parties, as follows:

> , provided that none of the defendants now or hereafter named in the securities class action captioned as *Robert Murray v. Earthlink Holdings Corp., et al.*, Case No. 4:18-cv-00202 (E.D. Ark.), in their capacity as such, shall be Released Parties.

44. Finally, the Plan should expressly indicate, following the end of the Third-Party Release or the Plan Injunction, as follows:

> Notwithstanding anything to the contrary in this Plan or the Confirmation Order, nothing herein or therein does, shall, or may be construed to release, enjoin, or otherwise adversely impact the claims and causes of action now or hereafter asserted against any non-Debtor defendant now or hereafter named in the securities class action captioned as *Robert Murray v. Earthlink Holdings Corp., et al.*, Case No. 4:18-cv-00202 (E.D. Ark.).

45. Absent such revisions, the Plan is not confirmable and thus the Disclosure Statement should not be approved.

II. ALTERNATIVELY, THE PLAN AND SOLICITATION PROCEDURES SHOULD BE MODIFIED TO ACKNOWLEDGE LEAD PLAINTIFF'S AUTHORITY TO OPT OUT OF THE THIRD-PARTY RELEASE ON BEHALF OF THE PUTATIVE CLASS[7]

46. If confirmation of the Plan moves forward without the revisions set forth above, the Plan and Solicitation Procedures must expressly recognize Lead Plaintiff's authority to opt out of the Third-Party Release on behalf of the putative Class. Lead Plaintiff, like all putative

[7] Because the equity holders, whose interests are of equal priority to the claims of Lead Plaintiff and the Class, are having their interests cancelled under the Plan and are not receiving a distribution, Lead Plaintiff does not believe certification of the Class in the Chapter 11 Cases for allowance and distribution purposes is necessary at this time, if ever. Lead Plaintiff reserves the right to move, on an expedited basis if necessary, for certification of the Class under Bankruptcy Rule 7023 for the limited purpose of enabling Lead Plaintiff to opt out of the Third-Party Release on behalf of the Class in the event the Court determines that separate certification of the Class is necessary for that purpose.

class representatives in federal class-action litigation, is a fiduciary for all absent members of the putative Class. See, e.g., Schick v. Berg, 2004 WL 856298, *4 (S.D.N.Y. Apr. 20, 2004) ("The general rule is that the named plaintiff and counsel bringing the action stand as fiduciaries for the entire class, commencing with the filing of a class complaint."); cf. In re Gen. Motors Corp. Pick-Up Truck Fuel Prod. Liab. Litig., 55 F.3d 768, 801 (3d Cir. 1995) ("Beyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed.").

47. Lead Plaintiff was appointed as lead plaintiff in the Securities Litigation because, pursuant to the PSLRA, he is "most capable of adequately representing the interests of class members." See 15 U.S.C. § 78u-4(a)(3)(B)(i). As a fiduciary, Lead Plaintiff not only has the ability to take necessary actions to protect the rights of absent members of the putative Class, he has an affirmative obligation to do so. The same duty applies to lead counsel, which "must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(4).

48. Nowhere are these duties more essential than in connection with the Third-Party Release, which threatens to eviscerate the claims of Lead Plaintiff and the putative Class against numerous solvent Non-Debtor Defendants. In order to enable Lead Plaintiff to fulfill its fiduciary duty, the Court should find in any order approving the Solicitation Procedures that Lead Plaintiff has inherent authority (or, absent such a finding, expressly authorize Lead Plaintiff) to opt out of the Third-Party Release on behalf of the entire putative Class.

49. Such a finding is also consistent with the inherent powers Lead Plaintiff has prior to certification of the putative Class. For instance, Lead Plaintiff can amend the Complaint, defend against dispositive motions, take and defend discovery, and engage in numerous other litigation-related activities to preserve the claims of the putative Class without the Class being

certified. Where the Third-Party Release and Plan Injunction would have essentially the same practical effect as an order dismissing the Complaint with prejudice with respect to most or all of the Non-Debtor Defendants, the ability to opt out of that release is no different from Lead Plaintiff's inherent ability to defend a motion to dismiss.

50. The ability to opt out on behalf of the entire putative Class does not expand upon Lead Plaintiff's rights in any way or prejudice the Debtors or any other party in interest. On the contrary, it simply enables Lead Plaintiff to fulfill its duties under Fed. R. Civ. P. 23 and the PSLRA and to take the necessary steps to avoid the manifest injustice threatened by the Third-Party Release. By opting out of the Third-Party Release on behalf of the entire putative Class,[8] Lead Plaintiff will prevent the Debtors from artificially "'deeming "consent' to exist in situations where no affirmative consent ha[s] actually been manifested," see Chassix, 533 B.R. at 78, where, if given the option to affirmatively consent, no rational class member would ever consent at all. Absent revisions to the Plan and Disclosure Statement to eliminate the threat that the Third Party Release poses to Lead Plaintiff and the members of the putative Class, recognizing Lead Plaintiff's ability to opt out on behalf of the putative Class will preserve and protect the rights and claims of class members so they can decide for themselves whether to participate in the Securities Litigation when the time comes.

RESERVATION OF RIGHTS

51. Neither the filing of this Objection nor anything contained herein are intended to limit, prejudice, or otherwise impact any rights of Lead Plaintiff or the putative Class in connection with the filing, solicitation, or confirmation of the Plan (or any other plan) or

[8] For the avoidance of doubt, Lead Plaintiff respectfully submits that this Court lacks jurisdiction and/or constitutional adjudicatory authority to approve the Third-Party Release and Plan Injunction with respect to the claims of Lead Plaintiff and the Class against the Non-Debtor Defendants (or any other non-Debtor party), and reserves the right to oppose confirmation of the Plan on any basis, including but not limited to the inability of an Article I court to enter a final order releasing or enjoining such claims.

approval of the Disclosure Statement and Solicitation Procedures. Lead Plaintiff, on behalf of itself and the putative Class, hereby reserves all such rights, including but not limited to the rights to (a) object on any and all grounds to (i) approval of the disclosure statement and solicitation procedures for the Plan on other grounds and (ii) confirmation of the Plan, (b) opt out of the Third-Party Release and take any other action permitted or required under the Bankruptcy Code and other applicable law, on behalf of himself and the putative Class, and (c) seek, on behalf of itself and the putative Class, any other relief in connection with the foregoing.

52. For the avoidance of doubt, this Objection does not, shall not, and shall not be deemed to:

a. constitute a submission by Lead Plaintiff, either individually or for the putative Class or any member thereof, to the jurisdiction of the Bankruptcy Court;

b. constitute consent by Lead Plaintiff, either individually or for the Class or any member thereof, to entry by the Bankruptcy Court of any final order in any non-core proceeding, which consent is hereby withheld unless, and solely to the extent, expressly granted in the future with respect to a specific matter;

c. waive any substantive or procedural rights of Lead Plaintiff or the Class or any member thereof, including but not limited to (i) the right to challenge the constitutional authority of the Bankruptcy Court to enter a final order or judgment on any matter, (ii) the right to have final orders in non-core matters entered only after de novo review by a District Court judge, (iii) the right to trial by jury in any proceedings so triable herein, in the Debtors' chapter 11 cases, including all adversary proceedings and other related cases and proceedings (collectively, "Related Proceedings"), in the Securities Litigation, or in any other case, controversy, or proceeding related to or arising from the Debtors, their

chapter 11 cases, any Related Proceedings, or the Securities Litigation, (iv) the right to have the reference withdrawn by a United States District Court in any matter subject to mandatory or discretionary withdrawal, or (v) all other rights, claims, actions, arguments, counterarguments, defenses, setoffs, or recoupments to which Lead Plaintiff or the Class or any member thereof are or may be entitled under agreements, at law, in equity, or otherwise, all of which rights, claims, actions, arguments, counterarguments, defenses, setoffs, and recoupments are expressly reserved.

53. For the avoidance of doubt, Lead Plaintiff, on behalf of itself and the Class and the members thereof, does not consent, and expressly objects, to this Court's entry of any final order or judgment that this Court lacks jurisdiction or statutory and/or constitutional adjudicatory authority to enter without the affirmative and knowing consent of all parties affected thereby, and reserves all rights to object to confirmation of the Plan, or any other plan proposed in the Chapter 11 Cases, on any basis, including but not limited to the fact that the Court lacks constitutional adjudicatory authority pursuant to Stern v. Marshall, 564 U.S. 462 (2011), and its progeny to approve a release of the claims of Lead Plaintiff and the putative Class against the Non-Debtor Defendants.

CONCLUSION

For all of the foregoing reasons, the Disclosure Statement and Solicitation Procedures should not be approved unless the issues raised in this Objection are addressed through appropriate modifications of the Disclosure Statement, Plan, and Solicitation Procedures.

WHEREFORE, Lead Plaintiff respectfully submits that the Disclosure Statement and Solicitation Procedures should not be approved, and the Motion should not be granted, unless the issues addressed in this Objection are appropriately addressed as set forth herein.

Dated: April 30, 2020

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EXHIBIT A

Pages from Transcript of Hearing Held Feb. 14, 2019
In re Aegean Marine Petroleum Network Inc.
Case No. 18-13374-mew (Bankr. S.D.N.Y.)

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