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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
21st CENTURY ONCOLOGY HOLDINGS, INC., *et al.*,[1]	Case No. 17-22770 (RDD)
Debtors.	(Jointly Administered)

OBJECTION OF DATA BREACH PLAINTIFFS TO APPROVAL OF PROPOSED DISCLOSURE STATEMENT FOR THE JOINT CHAPTER 11 PLAN OF REORGANIZATION OF 21st CENTRY ONCOLOGY HOLDINGS, INC. AND ITS DEBTOR AFFILIATES

The plaintiffs (the "Plaintiffs")[2] in the consolidated class action styled as *In re: 21st Century Oncology Customer Data Security Breach Litigation*, Case No. 8:16-md-2737-MSS-AEP, MDL No. 2737 (the "Data Breach Litigation"), pending in the United States District Court for the Middle District of Florida, Tampa Division (the "Florida District Court"), on behalf of themselves and the putative class they represent (the "Putative Class"), hereby submit this

[1] Each of the Debtors in the above-captioned jointly administered chapter 11 cases and their respective tax identification numbers are set forth in the *Order Directing Joint Administration of Chapter 11 Cases* [Docket No. 30]. The location of 21st Century Oncology Holdings, Inc.'s corporate headquarters and the Debtors' service address is: 2270 Colonial Boulevard, Fort Myers, Florida 33907.

[2] "Plaintiffs" refers collectively to Plaintiffs Matthew Benzion, Steven Brehio, Judith Cabrera, Valerie Corbel on behalf of the estate of James Corbel, Veneta Delucchi, Jackie Griffith, Roxanne Haatvedt, Kathleen LaBarge, Sharon MacDermid, Timothy Meulenberg, Robert Russell, Carl Schmitt, Stacey Schwartz, and Stephen Wilbur.

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objection (the "Objection") to approval of the proposed disclosure statement (the "Disclosure Statement") [Doc. No. 311] for the joint chapter 11 plan (the "Plan") [Doc. No. 205] proposed by the debtors in possession (the "Debtors") in the above-captioned chapter 11 cases (the "Chapter 11 Cases") and respectfully state as follows:

PRELIMINARY STATEMENT

Notwithstanding the fact that the Plaintiffs and the Putative Class collectively comprise one of the largest constituencies of unsecured claims in these Chapter 11 Cases other than the holders of the Debtors' prepetition notes and bank facilities – the Disclosure Statement fails to even mention the pendency of the Data Breach Litigation. The Disclosure Statement does not provide any information regarding the size of the Putative Class (approximately 2.2 million victims), the nature and scope of its claims against the Debtors ($123.2 million or more), or the treatment of their claims under the Plan. The Disclosure Statement also fails to provide adequate disclosure (or any disclosure) regarding the value of the potential distributions under the Plan on account of the Data Breach Claims, let alone unsecured claims generally. Finally, the Disclosure Statement and Plan have not been revised to reflect any of the terms of the Settlement Term Sheet between the Debtors and the Creditors Committee filed with the Court on September 15, 2017 [Doc. No. 425]. On those bases alone, the Disclosure Statement cannot be approved.

In addition, the Disclosure Statement cannot be approved because even if it contained adequate disclosure, the Plan that it describes is unconfirmable on its face for at least five reasons:

- First, the proposed release of claims of non-Debtors against numerous other non-Debtors is excessively broad and unjustified under the Metromedia standard.

- Second, by providing vastly different treatment for general unsecured claims within Class 6, the Plan impermissibly and arbitrarily discriminates among claims in the same class with no justification based on administrative convenience.
- Third, the "Convenience Class" treatment of substantially every individual claim in Class 6 is illusory and will likely result in the discharge of many claims without any distribution.
- Fourth, the Plan violates the absolute priority rule by providing for a distribution to holders of equity interests in two of the Debtors (including the Debtor Defendant) without all claims senior thereto being paid in full.
- Fifth, the Plan improperly precludes creditors whose claims are potentially covered by the Debtors' insurance policies from receiving distributions on account of such claims without first exhausting all remedies with respect to the applicable insurance policies – remedies that creditors may not have standing to pursue in the absence of an unsatisfied judgment and/or an assignment of the right to receive proceeds under the insurance policies (and would potentially be barred from pursuing by operation of the Plan injunction).

Because the Disclosure Statement lacks adequate information to enable creditors to make an informed voting decision and describes a Plan that cannot be confirmed, the Disclosure Statement should not be approved.

BACKGROUND

The Data Breach Litigation

1. The Data Breach Litigation is a class action against 21st Century Oncology Investments, LLC (the "Debtor Defendant") and its non-Debtor affiliate, 21st Century Oncology

of California, a Medical Corporation ("21CO California" and together with the Debtor Defendant, the "Defendants"),[3] arising out of a massive patient data breach that occurred in the Debtors' business on or around October 3, 2015 (the "Data Breach"), which was discovered by the FBI, not by the Defendants themselves.

2. Breaching their duties under numerous federal and state laws, the Defendants (and potentially others) failed to implement reasonable and adequate security measures and protocols to protect patients' sensitive personal information and prevent, detect, and address such a breach. As a result, the personally identifiable information and protected health information ("PII/PHI") of Plaintiffs and approximately 2.2 million of the Debtors' then-current and former patients was released. Many of the Data Breach victims are, or were at the time of the Data Breach, undergoing treatment for cancer.

3. On October 7, 2016, the United States Judicial Panel on Multidistrict Litigation entered a Transfer Order (the "MDL Transfer Order") [DC Doc. No. 1][4] consolidating thirteen actions pending in the Middle District of Florida, two actions pending in the Northern District of California, and one action pending in the Central District of California into the Data Breach Litigation.

4. On January 17, 2017, Plaintiffs filed a consolidated class action complaint in the Data Breach Litigation (the "Complaint") [DC Doc. No. 100]. The Complaint alleges that the Data Breach occurred as a result of, among other things, Defendants' failure to maintain reasonable and adequate security measures to protect the PII/PHI of Plaintiffs and the Putative Class from unauthorized access and disclosure, thereby allowing millions of victims' PII/PHI to be

[3] Plaintiffs reserve the right to name additional defendants in the Data Breach Litigation as appropriate.

[4] Citations to "DC Doc. No. __" refer to pleadings, orders, and other documents filed on the docket in the Data Breach Litigation.

compromised and obtained by an unauthorized third party. The Complaint asserts claims and causes of action against the Defendants on behalf of Plaintiffs themselves and the Putative Class, which consists of all other persons (approximately 2.2 million in total) whose PII/PHI was compromised as a result of the Data Breach. One of Plaintiffs' statutory claims alone carries a fine of at least $1,000 for each of the approximately 57,000 Californians whose information was negligently released. See Confidentiality of Medical Information Act, Cal. Civ. Code § 56, *et seq.*

5. Plaintiffs' and Class members' PII/PHI compromised in the Data Breach included their names, Social Security numbers, physicians' names, medical diagnoses, treatment information, and insurance information. Although the Data Breach occurred in early October 2015, the Debtors failed to detect the Data Breach and only learned of it when the FBI notified them, on or about November 13, 2015, that it had found evidence the information was being offered for sale on the "Dark Web," an internet marketplace for buying and selling illegally obtained personal and health information.

6. All Plaintiffs allege actual injuries as a result of the Data Breach, in that a database containing their PII/PHI was accessed and viewed by unauthorized parties and their PII/PHI was offered for sale to unauthorized parties. Many Plaintiffs also allege other instances of identity theft, fraud, and other harm caused by the Data Breach, including fraudulent attempts to open credit card accounts (Plaintiffs Schmitt, Schwartz, Meulenberg, and Brehio); unauthorized charges using existing financial and ecommerce accounts (Plaintiffs Meulenberg and Griffith); fraudulent attempts to change addresses and other contact information (Plaintiffs Schmitt and Griffith); notification that PII/PHI was "given away, traded or sold" on the "Dark Web, Deep Web, or Peer-to-Peer File Sharing Networks" (Plaintiff Cabrera); and medical

identity theft resulting in the temporary cancellation of health insurance coverage, significant out-of-pocket costs, and potential tax penalties (Plaintiff Wilbur). Complaint, ¶¶ 37, 53, 59, 62, 63, 65, 71, 72, 77, 88. All of these instances of identity theft, fraud, and other harm involved the same PII/PHI that was compromised in the Data Breach. Id.

7. In addition, Plaintiffs and the Putative Class have been harmed by being forced to spend significant amounts of time and money mitigating their damages and attempting to protect themselves from future harm, suffering emotional distress because of the release of their PII/PHI, overpaying for medical services received from Defendants, and having the value of their PII/PHI diminished. Id. ¶¶ 3, 4, 11, 37, 53, 59, 62, 71, 77, 86, 181-212.

8. All Plaintiffs also allege imminent injuries, such as the substantial risk of identity theft, fraud, and other harm in the future, as well as personal, professional, and financial harm stemming from the exposure of their PII/PHI. Id. ¶¶ 4, 13, 181-212. Because their PHI was compromised, all Plaintiffs are threatened by the risk of bodily injury or death because of being misdiagnosed or mistreated as a result of medical identity theft or fraud.[5] The Debtors have already recognized that the injuries and risks to Plaintiffs and the Putative Class are real, having offered them twelve months of credit monitoring and identity theft insurance after the Data Breach, and warning them to monitor their medical and financial statements for unauthorized activities. Id. ¶¶ 185-86, 206, 209-10.The Debtors exacerbated these substantial risks by waiting nearly four months, until March 4, 2016, to notify Data Breach victims that their PII/PHI had

[5] Misuse of PHI can result in misdiagnosis, mistreatment, and even Medicare fraud, which could exhaust a patient's Medicare funds used towards medical treatment. As the FBI has warned, PHI can "be used to file fraudulent insurance claims, obtain prescription medication, and advance identity theft," and medical identity theft and fraud "is also more difficult to detect, taking almost twice as long as normal identity theft." ¶¶ 190-95 (quoting Federal Bureau of Investigation, *FBI Cyber Division Private Industry Notification* (Apr. 8, 2014), https://info.publicintelligence.net/FBI-HealthCareCyberIntrusions.pdf).

been stolen and posted for sale. Id. ¶¶ 11, 117-20. The notice itself was also inadequate and ineffective, and many patients thought it was a scam. Id. ¶¶ 7, 124.

9. As remedies for these damages, Plaintiffs seek (on behalf of themselves and the Putative Class) actual and statutory money damages, restitution, a declaratory judgment, and a permanent injunction, among other relief, as fully set forth in the Data Breach Complaint.

10. On February 21, 2017, the Defendants filed a motion to dismiss (the "Motion to Dismiss") the Complaint. [DC Doc. No. 116]. On April 21, 2017, Plaintiffs filed their opposition to the Motion to Dismiss. [DC Doc. No. 142]. On May 16, 2017, the Florida District Court heard oral argument on the Motion to Dismiss. On May 22, 2017, Plaintiffs filed a supplemental memorandum in opposition to the Motion to Dismiss. [DC Doc. No. 156]. On May 26, 2017, the Defendants filed a response to the Plaintiffs' supplemental opposition. [DC Doc. No. 157].

11. On May 26, 2017, the Debtor Defendant notified the Florida District Court of its bankruptcy filing. As a result, on June 1, 2017, the Florida District Court entered an order (the "Stay Order") staying and administratively closing the entire Data Breach Litigation until otherwise ordered by the Florida District Court or until the conclusion of these Chapter 11 Cases. Plaintiffs have not moved to lift the stay imposed by the Stay Order. Instead, since the commencement of these Chapter 11 Cases, Plaintiffs have attempted to negotiate a consensual resolution of the Data Breach Litigation based upon available insurance.

The Debtors and the Chapter 11 Cases

12. The Debtors describe their business as "a leading, global, physician-led provider of integrated cancer care services operating the largest network of cancer treatment centers and affiliated physicians in the world." Disclosure Statement at 4. According to the Disclosure

Statement, the Debtors and approximately 50 of their affiliated non-Debtor entities operate 179 locations in seven Latin American countries and 17 U.S. states. Id.

13. The Debtors commenced the Chapter 11 Cases on May 25, 2017 (the "Petition Date"). According to the Disclosure Statement, the primary purpose of the Chapter 11 Cases is for the Debtors "to undertake a balance sheet restructuring and deleverage their capital structure" by shedding approximately $500 million in net debt. Id. at 4-5.

14. Thirteen of the fourteen Plaintiffs timely filed individual proofs of claim (the "Individual Claims"), as well as class proofs of claim (Claim Nos. 2279, 2281, 2283, 2284, 2285, 2286) on behalf of the Putative Class (the "Class Claims" and collectively with the Individual Claims, the "Data Breach Claims"). On September 12, 2017, the Debtors filed their Motion to Disallow Class Proofs of Claim and Estimate the Customer Data Security Breach Litigation Claims at Zero Dollars [Doc. No. 414] (the "Motion"). On September 19, 2017, the Debtors filed with the Court the Stipulation and Agreed Order Bifurcating Consideration of the Debtors' Motion to Disallow Class Proofs of Claim and Estimate the Customer Data Security Breach Litigation Claims at Zero Dollars (the "Scheduling Order") whereby the Debtors and the Plaintiffs agreed, *inter alia*, to have only the Rule 7023 Issue (as defined in the Scheduling Order) heard by the Court on October 16, 2017 [Doc. No. 438]. The Plaintiffs' Opposition to the Motion and Plaintiffs' Cross-Motion relevant to the Rule 23 Issue are being filed and served contemporaneously with this Objection.

15. As more fully set forth in the Plaintiff's Opposition to the Motion, the Class Claims are the only means by which most of the Putative Class will realize any recovery, whether through available insurance or otherwise. Although the Debtors undertook a postcard-mailing campaign to notify certain former patients of the Chapter 11 Cases, neither the postcards

themselves nor the web page to which they directed recipients provided any information whatsoever regarding the Data Breach Litigation or the fact that patients might have claims against the Debtors arising out of the Data Breach. Neither the bar date ("Bar Date") notice nor proof of claim form provided any indication that former or current patients might have claims arising out of the Data Breach. Therefore, patients receiving a vague postcard from "21st Century Oncology Holdings, Inc." full of dense legalese, with no reference to the Data Breach Litigation (despite specifically mentioning other, unrelated litigation pending against the Debtors) likely had no idea they had any relationship with the Debtors who also operate under a multitude of names throughout the country and elsewhere.[6]

16. The failure of the Debtors' postcard campaign to provide actual notice to all Data Breach victims is best reflected in the claims register. As detailed in Plaintiffs' Opposition to the Motion, despite the Debtors' assertion that "hundreds of individuals who are not named plaintiffs in the Data Breach Litigation . . . filed a total of 1,063 proofs of claim" (Motion to Disallow, ¶ 17), 1,043 (i.e., substantially all) of those proofs of claim were filed by 174 members of the Putative Class *to whom Plaintiffs' counsel, not the Debtors, provided notice of the Bar Date and a template for a proof of claim with filing instructions*. By contrast, only *twenty* other Data Breach victims – fewer than nine out of every one million members of the Putative Class – filed proofs of claim potentially on their own. See Declaration of Robert Jordan [Doc. No. 415] (the "Jordan Decl."), ¶ 9; Motion to Disallow, Sch. 1 to Ex. A. Clearly, the Debtors' notification efforts have not been sufficient to inform members of the Putative Class of their right to assert Data Breach Claims against the Debtors.

[6] Given the nature of the Debtors' relationship with the Data Breach victims, it would not have been a significant undertaking to customize the Postcard Notice with the name of the applicable facility or entity.

The Plan and Disclosure Statement

17. The Debtors filed the Plan on July 14, 2017 and the Disclosure Statement on August 13, 2017. The Plan contains several key provisions relevant to Plaintiffs and the Putative Class including but not limited to the following:

- the classification and treatment of their claims against the Debtors and the treatment of equity interests that are junior to their claims (Art. 3.1, 3.2),
- the supposedly "consensual" release of numerous non-Debtors' claims against numerous other non-Debtors (Art. 8.3) and the related injunction against the pursuit of claims and causes of action released under the Plan (Art. 8.5),
- the treatment of the Debtors' insurance policies (Art. 5.5) and a requirement that holders of claims payable from any such policies "exhaust[] all remedies with respect" thereto before receiving any distributions under the Plan (Art. 6.4).

As discussed below, the Disclosure Statement fails to provide adequate information in part related to certain of these provisions, while defects in others render the Plan unconfirmable on its face. The Disclosure Statement cannot be approved unless these defects in the Disclosure Statement and Plan are appropriately remedied.

OBJECTION

18. The proponent of a chapter 11 plan may not solicit votes to accept or reject the plan until a Bankruptcy Court has approved the debtor's 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).

I. THE DISCLOSURE STATEMENT DOES NOT PROVIDE ADEQUATE INFORMATION FOR CREDITORS TO MAKE AN INFORMED VOTING DECISION.

19. The purpose of a disclosure statement for a chapter 11 plan "is to give the creditors the information they need to decide whether to accept the plan." In re Monnier Bros., 755 F.2d 1336, 1342 (8th Cir. 1985). Courts assess adequacy on a case-by-case basis. See, e.g., Abel v. Shugrue (In re Ionosphere Clubs, Inc.), 179 B.R. 24, 29 (S.D.N.Y. 1995), aff'd in part by 184 B.R. 648 (S.D.N.Y. 1995). However, at a minimum, 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 In re Zenith Electronics Corp., 241 B.R. 92, 99 100 (Bankr. D. Del. 1999) (the disclosure statement must contain information that is "reasonably practicable [to permit an] informed judgment" by holders of claims or interests to vote on the plan). 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." In re Feretti, 128 B.R. 16, 19 (Bankr. D.N.H. 1991). In its current form, the Disclosure Statement fails all of these criteria with respect to Plaintiffs, the Putative Class, and the Data Breach Claims as well as Class 6 unsecured creditors generally.

A. The Disclosure Statement fails to provide *any* information, much less adequate information, regarding the Data Breach Litigation.

20. As noted above, the Data Breach Claims are significant claims against the Debtors. The Class Claim is asserted on behalf of Plaintiffs and the Putative Class in a base amount not less than $123.2 million, a significant portion of which reflects liquidated statutory damages that do not require individualized proof of loss and thus are essentially beyond any reasonable dispute. See, e.g., Claim No. 2279. Yet, the Disclosure Statement does not even mention the Data Breach Litigation or the Data Breach Claims *at all*. The only mention in the Disclosure Statement that the Data Breach even occurred is a passing reference to inquiries from the Department of Justice and offices of various states' attorneys general. See Disclosure Statement at 26 ("The inquiries from the Office of Civil Rights and the states' attorney general's offices relate to potential violations of the Health Insurance [] Portability [and Accountability] Act ("HIPAA") arising out of a 2.2 million patient data breach in 2015."). This throwaway statement is far from the adequate information needed for creditors to assess the scope of other claims against the Debtors and make an informed voting decision.

21. Moreover, the absence of any information in the Disclosure Statement regarding the Data Breach Litigation or the Data Breach Claims is likely to prevent members of the Putative Class, to the extent they are entitled to vote on the Plan, from realizing that the Plan potentially affects their claims against any non-Debtors in the Data Breach Litigation or that they also have claims against the Debtors.

B. The Disclosure Statement fails to provide adequate information regarding the potential distributions under the Plan on account of the Data Breach Claims (or any other general unsecured claims).

22. Holders of allowed general unsecured claims in class 6 under the Plan ("Class 6 Claims") in excess of $1,000,000 who do not elect "Convenience Claim" treatment, and holders

of Class 6 Claims of $1,000,000 or less who elect *out of* Convenience Claim treatment, will receive their Plan distributions in the form of common stock in the reorganized Debtors. Plan, Art. 3.2(f). Thus, it is essential for such holders, including Plaintiffs, to have sufficient information to assess the value of the distributions they stand to receive under the Plan. The Disclosure Statement provides no such information. Rather, the columns for the estimated allowed amount of Class 6 Claims and their estimated range of recovery are blank. Disclosure Statement at 7. In addition, as of the filing of this Objection, the valuation analysis referenced as Exhibit E to the Disclosure Statement is merely a placeholder reading "FILED SEPARATELY" but no such analysis has been filed. Without this crucial information, it is impossible for any holders of Class 6 Claims to make an informed judgment to accept or reject the Plan.

C. The Third Party Release is at best unclear, ambiguous, and impossible for the average creditor to decipher.

23. Article 8.3 of the Plan contains sweeping releases of non-Debtors' claims against numerous other non-Debtors (the "Third-Party Release"). The non-Debtor "Releasing Parties" deemed to grant the Third-Party Release include, among many others:

- "all holders of Claims or Interests entitled to vote on the Plan who either (1) vote to accept the Plan or (2) receive a ballot but abstain from voting on the Plan;"
- "all holders of Claims and Interests entitled to vote on the Plan who vote to reject the Plan but do not elect on their ballot to opt-out of the Third-Party Release;" and
- with respect to each category of Releasing Parties, an extraordinarily broad list of related parties including "each of such Person's current and former Affiliates, partners, Subsidiaries, officers, directors, principals, employees, agents, managed funds, advisors, attorneys, accountants, investment bankers, consultants, representatives, and other

professionals, together with their respective successors and assigns, in each case in their capacity as such."

Plan, Art. 1.1.182. The universe of Releasing Parties (which includes even more enumerated entities and categories of entities than the relevant categories listed above) is extraordinarily and impermissibly broad. Indeed, it is nearly impossible to ascertain from the Plan or the Disclosure Statement who all of the Releasing Parties even are.

24. The non-Debtor "Released Parties" benefiting from the Third-Party Release include, among numerous others, the Debtors' current and former affiliates, subsidiaries, officers, directors, principals, employees, consultants, and other professionals. Plan, Art. 1.1.181. This definition appears to include 21CO California, as well as any of the other potential non-Debtor entities Plaintiffs might later name as defendants in the Data Breach Litigation.

25. Rather than providing a clear and concise list of the myriad of persons and entities that are or might be Releasing Parties or Released Parties or the claims and causes of action that would be released by the Third-Party Release, the Disclosure Statement instead simply mirrors the Third-Party Release provisions from the Plan, placing readers in a veritable labyrinth of defined terms and requiring them to refer to the Plan for the definitions of defined terms, some of which in turn refer to definitions contained in the Bankruptcy Code. See, e.g., Disclosure Statement at 71-72, 85-88. For instance, simply analyzing the defined term "Releasing Parties" would require a creditor to review at least twenty other defined terms, all of which are defined only in the Plan and some of which require resorting to the Bankruptcy Code. See, e.g., Plan, Art. 1.1.182. This convoluted exercise in contractual interpretation is far from the "simple and clear language" courts require plan proponents to provide in disclosure statements to satisfy

section 1125. Moreover, it includes reference to Excluded Directors and Officers which are not even identified and won't be identified until the filing of the Plan Supplement.

D. The Disclosure Statement and Plan make no mention of the term sheet purportedly reflecting a settlement with the Committee of Unsecured Creditors.

26. As set forth above, on September 15, 2017, the Debtor filed the Joint Notice of Settlement with the Creditor's Committee attaching a Settlement Term Sheet which was, by its express terms, "subject to the negotiation and completion of definitive documents . . .". Neither the Disclosure Statement nor the Plan have since been revised and no definitive documents have been filed with the Court. The Disclosure Statement now before the Court, filed prior to the Settlement Term Sheet, is what the Debtors are asking this Court to approve. The Plaintiffs, or any other creditor for that matter, should not be required to speculate about any material changes to the Disclosure Statement and Plan or anticipate any objections that such changes would create. Therefore, Plaintiffs reserve their rights to supplement this Objection when and if the Disclosure Statement and Plan are modified and Plaintiffs should not be compelled to react over a compressed period of time should the Debtors amend the Disclosure Statement and Plan within days of the Disclosure Statement hearing and after the objection deadline.

II. THE DISCLOSURE STATEMENT CANNOT BE APPROVED BECAUSE IT DESCRIBES A PLAN THAT IS UNCONFIRMABLE ON ITS FACE.

27. The "adequate information" in a disclosure statement must describe a confirmable plan. See In re Quigley Co., Inc., 377 B.R. 110, 115 (Bankr. S.D.N.Y. 2007). Conversely, a disclosure statement cannot be approved if it describes a plan that is patently unconfirmable, for which solicitation of votes would be futile. See id. at 115-16 (stating that if a plan is "patently unconfirmable on its face" then solicitation of votes on the plan would be futile); see also Am. Capital Equip., LLC, 688 F.3d 145, 154 (3d Cir. 2012) ("Courts have recognized that if it

appears there is a defect that makes a plan inherently or patently unconfirmable, the Court may consider and resolve that issue at the disclosure stage before requiring the parties to proceed with solicitation of acceptances and rejections and a contested confirmation hearing.") (internal quotation omitted); In re Phoenix Petroleum Co., 278 B.R. 385, 394 (Bankr. E.D. Pa. 2001) ("[U]ndertaking the burden and expense of plan distribution and vote solicitation is unwise and inappropriate if the proposed plan could never legally be confirmed."); In re Main St. AC Inc., 234 B.R. 771, 775 (Bankr. N.D. Cal. 1999) (where a plan is not confirmable on its face, then denying approval of the disclosure statement prevents diminution of estate assets that would result from the expense of soliciting votes on the plan and proceeding with a confirmation hearing).

28. The reason for this rule is simple: allowing a debtor to expend time and estate resources soliciting votes on a plan that could never be confirmed even if unanimously accepted by creditors would be both futile and wasteful. In re Pecht, 57 B.R. 137, 139 (Bankr. E.D. Va. 1986) ("If, on the face of the plan, the plan could not be confirmed, then the court will not subject the estate to the expense of soliciting votes and seeking confirmation."). Such is the case here. Because the Plan is fatally flawed and cannot be confirmed even if creditors vote to accept it, allowing the Debtors to distribute solicitation materials would needlessly waste estate resources.

A. The Third-Party Release is excessively broad and unjustified.

29. Releases through a chapter 11 plan of non-bankruptcy claims held by non-debtors against other non-debtors, such as the Third-Party Release, are impermissible "absent the finding of circumstances that may be characterized as unique." In re Metromedia Fiber Network, Inc., 416 F.3d 136, 142 (2d Cir. 2005). Such circumstances exist where (a) a non-debtor released party provides a substantial contribution to the reorganization, (b) claims are channeled into a

settlement fund or trust, (c) the claims would indirectly impact the reorganization by way of indemnity or contribution, and (d) a plan otherwise provides for payment in full of the released claims. Id. at 141. Such releases "may also be tolerated if the affected creditors consent." Id.

30. None of the unique circumstances necessary to satisfy Metromedia exist here. Although the Debtors assert in conclusory fashion that "each of the Released Parties has afforded value to the Debtors and aided in the reorganization process, which facilitated the Debtors' ability to propose and pursue Confirmation of the Plan," Disclosure Statement at 88,[7] it is difficult to comprehend how, as just one example, a former officer, director, or employee of the Debtors contributed anything to the Debtors' reorganization. Yet, pursuant to the extremely broad definition of "Released Parties," all such individuals categorically receive the benefits of the Third-Party Release. See Plan, Art. 1.1.181. The Disclosure Statement provides no justification for this impermissible result, presumably because there is none.

31. In the absence of any actual unusual circumstances, the Debtors appear to rely primarily on the "consent" of the Releasing Parties, to justify the Third-Party Release. See Disclosure Statement at 87. However, particularly with respect to voting creditors such as Plaintiffs and any members of the Putative Class who filed individual proofs of claim, their supposed consent is illusory. With respect to creditors entitled to vote on the Plan, the "opt out" structure contemplated by the Plan is no more than a legal fiction designed to engineer consent to the Third-Party Release where no affirmative consent exists.

32. Creditors who actually vote to accept a plan that contains non-Debtor releases such as the Third-Party Release, and are properly advised as to the consequences of that affirmative vote, assuming the language of the release and the accompanying disclosures are

[7] Even if this statement were true, providing services to a debtor in the ordinary course does not rise to the level of "unusual circumstances" justifying a non-consensual non-debtor release.

clear and adequate (which, as set forth in I.C. above, the Plan and Disclosure Statement are not), are the only parties who can truly be said to consent to such a release. Here, however, the Debtors propose that (a) creditors who are entitled to vote, but do not vote, and (b) creditors who vote to reject the Plan, but fail to take the affirmative second step of opting out of the Third-Party Release, should be deemed to consent to the Third-Party Release. This provision raises a simple but important question: ***What creditor would intentionally vote to reject the Plan, yet knowingly and voluntarily consent to gratuitously release his or her non-bankruptcy claims against other non-Debtors?***

33. The obvious answer is that no creditor would do so, which demonstrates the absurdity of the "votes to reject but fails to opt out" method of manufacturing the appearance of consent where knowing and voluntary consent does not actually exist. See In re Chassix Holdings, 533 B.R. 64, 79 (Bankr. S.D.N.Y. 2015) ("The additional 'opt out' requirement, in the context of this case, would have been little more than a Court-endorsed trap for the careless or inattentive creditor.").

34. Moreover, many Releasing Parties do not even have any nexus to the Debtors or an opportunity to opt out, but rather, simply get roped into the definition of "Releasing Parties" by virtue of some relationship to another Releasing Party. See Plan, Art. 1.1.182 (including Released Parties' "current and former Affiliates, partners, Subsidiaries, officers, directors, principals, employees, agents, managed funds, advisors, attorneys, accountants, investment bankers, consultants, representatives, and other professionals, together with their respective successors and assigns, in each case in their capacity as such" as Releasing Parties themselves). It is inconceivable that any of these additional Releasing Parties will actually *know about* the

Third-Party Release, much less consent to it, particularly when they are presented with no opportunity to do so.

35. Simply put, the Third-Party Release is a massive overreach by the Debtors with no legal or factual justification, and its presence in the Plan in its current form renders the Plan unconfirmable and therefore precludes approval of the Disclosure Statement. The fix is simple: require voting creditors and any other Releasing Parties who have not expressly consented to the Third-Party Release to opt *in*.[8] That is the only means of obtaining an actual, meaningful indication of a non-Debtor's knowing and voluntary decision to release valuable non-bankruptcy claims against other non-Debtor parties.

B. The Plan impermissibly discriminates among Class 6 Claims.

36. The Plan provides for two vastly different distribution mechanisms for holders of Class 6 Claims. Holders of Class 6 Claims in amounts greater than $1,000,000 will receive common stock in the reorganized Debtors unless they voluntarily reduce their claims and elect "Convenience Claim" treatment. Plan, Art. 3.2(f). Holders of Class 6 Claims in amounts of $1,000,000 or less are automatically deemed to receive Convenience Claim treatment unless they expressly elect to receive common stock (which requires submitting a ballot). Id. Holders of Class 6 Claims receiving Convenience Claim treatment participate pro rata in a cash distribution pool which currently amounts to $500,000. Plan, Art. 1.1.43.

37. By operation of the minimum distribution threshold under Article 6.4 of the Plan, distributions of $50 and under are waived, the related claims are discharged, and the holders thereof are barred from asserting such claims. The exact claim amount triggering a *de facto* discharge will vary based upon the number and dollar amount of claims receiving Convenience

[8] The expansive list of additional Releasing Parties who only become Releasing Parties through a relationship to a consensually Releasing Party must also be deleted unless the Debtors intend to solicit the affirmative consent of each and every one of them.

Claim treatment, but only a few of the proofs of claim currently on file appear to assert Class 6 Claims in liquidated amounts greater than $1,000,000, leaving substantially every filed Class 6 Claim subject to Convenience Claim treatment unless the holders thereof elect otherwise. On the other hand, holders of Class 6 Claims that exceed the seemingly arbitrary $1,000,000 threshold do not face an onerous discharge and bar of their claims by operation of luck.

38. The Disclosure Statement provides no basis for this disparate treatment of Class 6 Claims, which all – by definition – have the same priority. Although the Bankruptcy Code permits separate *classification* of "every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience[,]" see 11 U.S.C. § 1122(b), nothing in the Bankruptcy Code authorizes such radically different *treatment* of claims within the same class.

39. Moreover, where nearly *every* Class 6 Claim that was filed in a liquidated amount (and a substantial number of the unliquidated claims filed by individual members of the Putative Class, in the event they are not eventually subsumed within the Class Claims by operation of class certification) would automatically fall into the Convenience Claim definition, it is impossible for the Debtors to argue that disparate treatment or classification are "reasonable and necessary for administrative convenience" under section 1122(b).

C. The "Convenience Claim" treatment of substantially all Class 6 Claims is illusory.

40. As noted above, holders of Class 6 Claims receiving Convenience Claim treatment participate pro rata in what is currently a $500,000 cash distribution pool. Plan, Art. 1.1.43. The Disclosure Statement provides no information from which holders of Class 6 Claims, including Plaintiffs, can ascertain their potential share of the $500,000 Convenience Claim pool (or, as discussed above, ascertain the potential value of a common stock distribution). However,

one thing is certain: if members of the Putative Class had been given meaningful notice of the Bar Date and filed individual proofs of claim, the Convenience Claim "election" would stand to eviscerate their chances of a distribution. If all members of the Putative Class had claims in equal amounts (presumably no member of the Putative Class has an individual claim of more than $1,000,000), at least 2.2 million creditors would share equally in a $500,000 pot, for a potential distribution of $4.40 each. However, in that instance, the $50 minimum distribution threshold under Article 6.4 of the Plan would preclude any members of the Putative Class from receiving a distribution at all and would result in the discharge and barring of their claims. This inequitable result demonstrates that the default Convenience Claim treatment of "small" Class 6 Claims of $1,000,000 or less is merely a trap for unwary creditors.

D. The Plan violates the absolute priority rule.

41. The Plan provides the possibility, at the Debtors' election, for holders of equity interests in two of the Debtors (including the Debtor Defendant) to receive distributions in the form of warrants under certain specified conditions, regardless of whether all claims senior thereto are first paid in full. See Plan, Art. 3.2(j). Equity interest holders do not appear to be providing any new value in exchange for their distribution. See id. Permitting holders of existing equity interests to retain or receive any value under the Plan when the classes of creditors senior to equity are not all being paid in full violates the absolute priority rule under section 1129(b)(2)(B)(ii) of the Bankruptcy Code, which will preclude confirmation of the Plan if not all impaired voting classes vote to accept the Plan.

E. The Plan improperly precludes creditors from receiving distributions without first exhausting remedies for which they may not have standing.

42. Article 5.5(b) of the Plan provides, among other things, for all of the Debtors' insurance policies to be treated as executory contracts and assumed, and for all of the Debtors'

directors' and officers' liability insurance policies to remain in effect unmodified.[9] Article 6.5(b), in turn, precludes payment of distributions under the Plan "on account of an Allowed Claim . . . that is payable pursuant to one of the Debtors' insurance policies until the holder of such Allowed Claim . . . has exhausted all remedies with respect to such insurance policy." Upon information and belief, only the Debtors are likely to have standing to pursue recovery for claims made under their insurance policies unless: (a) an Allowed Claim is not satisfied by the Debtors; or (b) the holder of an Allowed Claim received an assignment of the right to pursue insurance proceeds under the policy. Although the Disclosure Statement repeats the language of Article 6.5(b), neither the Plan nor the Disclosure Statement provides any mechanism by which a holder of a claim against a Debtor could independently pursue, much less exhaust, any remedies directly against a Debtor's insurance carrier. Moreover, the injunction contained in Article 8.5 of the Plan, which prohibits creditors and others from, among other things, "commencing or continuing in any manner any action or other proceeding of any kind on account of, in connection with or with respect to any such Claims," potentially precludes creditors from ever pursuing the remedies they are required to exhaust under Article 6.5(b). Thus, Article 6.5(b) improperly discriminates among Class 6 Claims by imposing for certain creditors an insurmountable barrier to any recovery from the Debtors. The Plan cannot be confirmed without addressing this significant issue.

F. Reservation of Rights.

43. Plaintiffs reserve all rights with respect to confirmation of the Plan (as may be amended from time to time), or any other chapter 11 plan proposed in the Debtors' Chapter 11 Cases, including but not limited to objecting to confirmation of any plan on any and all grounds,

[9] Categorical treatment of insurance policies as executory contracts is not appropriate where such policies are not, in fact, executory and could instead simply ride through confirmation, another potential problem with the Plan.

regardless of whether such grounds are raised in this Objection. Plaintiffs further reserve all rights to object to any further amended Disclosure Statement or any new disclosure statement for any other plan on any basis whatsoever.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully submit that the Disclosure Statement should not be approved because (a) the Disclosure Statement lacks adequate information to enable creditors to make an informed judgment to accept or reject the Plan and (b) even if the Disclosure Statement contained adequate information, the Plan is unconfirmable on its face.

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