



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

In re: NII Holdings, Inc.,)
)
) C.A. No. 2020-0863-JTL____
)
Petitioner)

**PETITIONER NII HOLDINGS, INC.’S MOTION FOR
A DISTRIBUTION TO STOCKHOLDERS
AND FOR APPROVAL OF RESERVES**

Petitioner NII Holdings, Inc. (“NII”), by and through its undersigned counsel, hereby moves for an order, in the form attached hereto, approving a distribution to the stockholders and an approval of its reserves. The grounds for this Motion are as follows:

BACKGROUND

1. NII is a dissolved Delaware corporation that had its principal place of business in Reston, Virginia. Prior to dissolution, NII was a public company, and its common stock traded on the NASDAQ Global Select Market under the symbol “NIHD.” Pet. ¶3. Through its subsidiaries, NII provided wireless communication services under the Nextel brand in Mexico, Brazil, Peru, Argentina and Chile. *Id.*

2. On September 15, 2014, NII and certain subsidiaries filed voluntary petitions seeking relief under Chapter 11 of Title 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York

(the “Bankruptcy Court”). *See In re NII Holdings, Inc. et al.*, C.A. No. 14-12611-SCC (Bankr. S.D.N.Y.) Pet. ¶6. The Bankruptcy Court entered an order approving and confirming the First Amended Joint Plan of Reorganization, and the plan became effective on June 26, 2015. Ex. 1¹; Ex. 2; Pet. ¶11.

3. On January 26, 2015, NII and certain NII subsidiaries entered into a Purchase and Sale Agreement with New Cingular Wireless Services, Inc., an indirect subsidiary of AT&T, Inc., Nextel International (Uruguay) LLC and Comunicaciones Nextel de México, S.A. de C.V. (the “Mexico Purchase Agreement”) for the sale of NII’s operations in Mexico (“Nextel Mexico”). *See* Ex. 3; Pet. ¶8. The sale was completed on April 30, 2015 for a purchase price of \$1.875 billion, including \$187.5 million deposited in escrow (the “Mexico Escrow”) to satisfy potential indemnification claims, including those relating to potential tax liabilities. Ex. 3 §§ 1.1, 9.5(e); Pet. ¶10.

4. On January 27, 2016, NII completed the sale of its outstanding equity interests in its operations in Argentina (“Nextel Argentina”) to Grupo Clarin. *See* Pet. ¶13.

¹ Citations to “Ex. ___” shall refer to Exhibits 1-41 to the Unsworn Transmittal Declaration Pursuant to 10 *Del. C.* § 3927 of Elizabeth A. Heise in Support of Petitioner NII Holdings, Inc.’s Motion for a Distribution to Stockholders and for Approval of Reserves, filed contemporaneously herewith.

5. On March 17, 2019, the Board of Directors of NII (the “NII Board”) approved the consummation of a sale of substantially all of NII’s assets via the execution of a purchase agreement pursuant to which NII and AI Brazil Holdings B.V. (“AI Brazil”) would sell their jointly-owned wireless operations in Brazil (“Nextel Brazil”) to América Móvil, S.A.B. de C.V (“AMX”) for an aggregate purchase price of \$905.0 million, less net debt and subject to certain adjustments at closing (the “Brazil Purchase Agreement”). *See* Ex. 4; Pet. ¶14. Pursuant to the terms of the Brazil Purchase Agreement, NII would receive its share of the final net proceeds after deducting a preferred share return due to AI Brazil, and AMX would place \$30.0 million of NII’s portion of the net proceeds into an 18-month escrow account to secure NII’s indemnification obligations under the Brazil Purchase Agreement. Ex. 4 § 10.

6. The NII Board determined that, following the sale of substantially all of the assets of NII in the Nextel Brazil transaction, it was advisable and in the best interests of NII, its stockholders, its creditors, its employees and others to voluntarily liquidate and dissolve NII and distribute its remaining assets. Pet. ¶15. Accordingly, on March 17, 2019, the NII Board authorized the dissolution of NII pursuant to 8 *Del. C.* § 275 and approved the Plan of Complete Liquidation and Dissolution (the “Plan”). Ex. 5; Pet. ¶15.

7. At a special meeting of stockholders held on June 27, 2019, the stockholders of NII approved the Brazil Purchase Agreement and the liquidation and dissolution of NII, pursuant to the Plan, following the consummation of the Nextel Brazil transaction (the “Dissolution”). Ex. 6; Pet. ¶16.

8. NII filed a certificate of dissolution pursuant to 8 *Del. C.* § 275(a) and (b) on January 13, 2020. Ex. 7; Pet. ¶18. NII also reported the Dissolution in a Form 8-K filed with the SEC on January 13, 2020. Ex. 8; Pet. ¶18.

9. A Notice of Dissolution to All Claimants (the “Dissolution Notice”) was published on February 3 and 10, 2020 in *The News Journal*, a newspaper of general circulation in New Castle County, Delaware. Ex. 9; Pet ¶22. It was also published on February 5, 2020 in all editions of *USA Today*, a daily newspaper with a national circulation and on February 8 and 14, 2020 in *Fairfax County Times*, a newspaper of general circulation in Fairfax County, Virginia. Ex. 10; Pet. ¶23-24.

10. Pursuant to and in accordance with 8 *Del. C.* § 280, on February 3, 2020, NII mailed the Dissolution Notice to 240 potential creditors of NII, requesting that those receiving such notice present any claims within 60 days as directed therein and advising such parties that any claims against NII not presented in accordance therewith would be barred under Delaware law. Ex. 11; Pet. ¶21.

11. By the time the claims period expired on April 3, 2020, NII had received a total of eight claims, each of which is discussed in more detail below.

12. On October 8, 2020, NII filed its Verified Petition for Determination pursuant to 8 *Del. C.* § 280(c) (the “Petition”) seeking, among other things, the determination of an amount that will constitute sufficient security to provide compensation for: (a) its currently estimated wind down costs and expenses; (b) prospective claimants with claims that are the subject of a pending action, suit or proceeding to which NII is a party; (c) claimants that have accepted NII’s offer of security; (d) other prospective claimants; and (e) claims that have not been made known to NII or that have not arisen, but that, based upon facts known to NII, may arise or become known within five years from the date of Dissolution.

13. NII sent notice of this action to all eight claimants identified in the Petition via FedEx on October 23, 2020. *See* Unsworn Declaration of Elizabeth A. Heise Regarding Notice of Action Pursuant to 10 *Del. C.* § 3927, filed contemporaneously herewith. The notice included the Petition and all publicly filed exhibits thereto. NII additionally sent notice to the claimants via email on October 26, 2020. *Id.*

ARGUMENT

I. NII HAS COMPLIED WITH THE NOTICE REQUIREMENTS OF 8 *DEL. C. § 280*

14. NII has provided notice to all potential claimants as required by 8 *Del. C. § 280(a)(1)*. The Dissolution Notice informed claimants that their claims “must be presented in writing and must contain sufficient information reasonably to inform the corporation or successor entity of the identity of the claimant and the substance of the claim.” 8 *Del. C. § 280(a)(1)(a)*; Pet. ¶3; Ex. 11. The Dissolution Notice additionally stated the mailing address to which the claim must be sent, the date by which the claim must be received, that the claim would be barred if not received by the date referred to in the notice, that NII may make distributions to other claimants, and “[t]he aggregate amount, on an annual basis, of all distributions made by the corporation to its stockholders for each of the 3 years prior to the date the corporation dissolved.” 8 *Del. C. § 280(a)(1)(b-f)*; Ex. 11.

15. In accordance with 8 *Del. C. § 280(a)(1)*, NII published notice of the dissolution in newspapers of general circulation for two consecutive weeks in the county in which NII’s registered agent and principal place of business were located. Pet. ¶22, ¶24; Ex. 9, 10. NII also published the Dissolution Notice in *USA Today*, a

daily newspaper with national circulation, because it had more than \$10,000,000 in total assets. Pet. ¶23; Ex. 9.

16. Accordingly, NII has complied with the notice procedures set forth in 8 *Del. C.* § 280, and has provided adequate notice to potential claimants under 8 *Del. C.* § 280.

II. THE COURT SHOULD ENTER AN ORDER ESTABLISHING A RESERVE OF \$125.7 MILLION.

17. NII seeks approval for a total reserve of \$125.7 million.² NII believes this amount will be sufficient to provide security for all of its remaining known claimants and potential future unknown claimants, and to provide for the remaining costs and expenses associated with the completion of the winding-up of NII's remaining affairs.

18. As of November 30, 2020 the total assets of NII were approximately \$287.0 million,³ and the total accrued liabilities of NII were approximately \$3.0

² In the Petition, NII requested approval for a total reserve of \$70,630,894, which included a proposed reserve of \$18,735,727 for AT&T (as defined below). As described herein, since the filing of the Petition, NII and AT&T have agreed that NII will reserve \$75.0 million for AT&T's claim. In addition, since filing the Petition, NII incurred and paid certain wind down expenses consistent with the reserve requested in the Petition, which has decreased the reserve needed for future wind down expenses. *See infra* ¶¶69-75.

³ As of November 30, 2020, this consisted of \$164.9 million of cash and cash equivalents, \$87.1 million of cash held in the Mexico Escrow, \$30.0 million of cash

million, which are included in the total reserve of approximately \$125.7 million. Mulieri Decl. ¶2.⁴ Therefore, NII requests authority from the Court to make one or more pro rata liquidating distributions to its stockholders of not more than \$161.0 million in the aggregate.

A. The Reserve Constitutes Sufficient Security for Known Claimants

i. The Reserve Constitutes Sufficient Security for Claimants Who Have Accepted NII’s Offer of Security or Otherwise Reached a Resolution With NII

19. Of the eight claimants who responded to the Dissolution Notice, NII believes that it has reached mutually satisfactory resolutions regarding a reserve with six claimants: (a) Wilmington Trust National Association (“Wilmington Trust”); (b) Cruz Bencomo y Meza Sánchez Asociados, S.C. (“Cruz Bencomo”); (c) Deloitte Tax LLP (“Deloitte”); (d) AI Brazil; (e) Jones Day; and (f) AT&T Mobility Holdings B.V.; New Cingular Wireless Services, Inc.; AT&T Holdings Mexico, S. de R.L. de

held in the Brazil Escrow, as well as a \$5.0 million receivable from AT&T (as defined below) originating on January 12, 2021. Mulieri Decl. ¶2; *see* Ex. 12 ¶2(b). As of January 15, 2021, NII estimated that its total assets were \$286.4 million, which consisted of \$181.4 million of cash and cash equivalents, \$75.0 million of cash held in the 2021 Escrow, and \$30.0 million of cash held in the Brazil Escrow. Mulieri Decl. ¶2; *see* Ex. 12 ¶2(b).

⁴ Citations to “Mulieri Decl. ¶__” shall refer to the Unsworn Declaration of Timothy Mulieri, filed contemporaneously herewith.

C.V. (formerly known as Nextel International (Uruguay) LLC); and AT&T Comunicaciones Digitales, S. de R.L. de C.V. (formerly known as Comunicaciones Nextel de México, S.A. de C.V.) (collectively, “AT&T”). The Court may accept the mutually agreed upon reserves with these claimants as sufficient with respect to these claimants. *Cf. In re Altaba, Inc.*, 2020 WL 6122126, at *1 (Del. Ch. Oct. 19, 2020) (finding that, as to claimants where “there is no dispute regarding the amount of security,” there is “no obstacle to an interim distribution based on those amounts”).

20. Specifically, the reserve of \$125.7 million requested by NII includes the following amounts related to mutually agreed upon reserves: (a) security of \$1.0 million for Wilmington Trust; (b) security of \$385,000 for Cruz Bencomo; (c) security of \$1.0 million for Deloitte; (d) security of \$0 for AI Brazil; (e) security of \$0 for Jones Day; and (f) security of \$75.0 million for AT&T. The bases for such agreed upon amounts are described below.

a) *Wilmington Trust*

21. On or about March 20, 2020, NII received a claim from Wilmington Trust which asserted a contractual claim against NII for the payment of principal and interest on behalf of 4.25% Convertible Senior Notes due 2023 (the “Notes”). Ex. 13; Pet. ¶27a. In addition, Wilmington Trust asserted a claim for Wilmington Trust’s

fees, expenses and indemnification in connection with its role as trustee, paying agent, note registrar, conversion agent, escrow agent and tender agent in connection with the Notes pursuant to certain agreements, namely, (i) an Indenture, dated August 14, 2018, between Wilmington Trust and NII (the “Indenture”), (ii) an Escrow Agreement, dated December 18, 2019, between Wilmington Trust and NII, providing for escrow account no. 137534-000 related to the Notes (the “Notes Escrow Agreement”), and (iii) a Tender Agent Agreement, dated December 19, 2019, between Wilmington Trust and NII (the “Tender Agent Agreement” and together with the Indenture and Notes Escrow Agreement, the “Agreements”). Ex. 13; Pet. ¶27a.

22. Pursuant to the Indenture, in connection with the closing of the sale of Nextel Brazil, NII was required to place \$134.8 million of the proceeds of the sale in an escrow for the Notes, representing principal and interest through maturity (the “Notes Escrow”). *See* Ex. 14 at 4, §§11.01, 11.04; Pet. ¶27a. NII utilized \$128.3 million of cash held in the Notes Escrow to repurchase all \$115.0 million aggregate principal amount of the Notes (including accrued interest). Ex. 15. As a result, of the \$134.8 million cash held in the Notes Escrow to secure NII’s obligations related to the Notes, \$6.9 million was released to NII in May 2020. *Id.*

23. On May 20, 2020, less than 90 days after receipt of Wilmington Trust's claim, NII sent Wilmington Trust an offer of security pursuant to 8 *Del. C.* § 280(b)(2). Ex. 16; Pet. ¶27a. In the offer of security letter, NII (i) noted that it repurchased all \$115.0 million aggregate principal amount of the Notes issued pursuant to the Indenture, that all of the Notes authenticated and delivered have been delivered to Wilmington Trust, as trustee, for cancellation, and that, as of May 6, 2020, all fees and expenses have been paid and the Notes Escrow has been closed, with the remaining funds released to NII, and (ii) offered \$1.0 million as security to Wilmington Trust for the NII's indemnification obligation pursuant to the Agreements, under the terms set forth in the letter. Ex. 16; Pet. ¶27a.

24. NII and Wilmington Trust entered into a Release of Claims, dated as of June 8, 2020, pursuant to which Wilmington Trust agreed not to object to NII's offer of \$1.0 million as security for Wilmington Trust's claim. Ex. 17 at 1; Pet. ¶27a.

b) *Cruz Bencomo*

25. NII received a claim from Cruz Bencomo on or about March 26, 2020. Ex. 18; Pet. ¶ 27b. The claim asserted the right to payment from NII, pursuant to the terms of the Mexico Purchase Agreement, for Cruz Bencomo's representation of AT&T Comunicaciones Digitales, S. de R.L. de C.V. ("AT&T Mexico") in the litigation of two tax liability cases relating to tax audits of former Nextel Mexico

entities, described below. Ex. 18; Pet. ¶ 27b. Cruz Bencomo asserted that its fees would be a maximum of \$270,000 and \$100,000 in the event of a final favorable resolution in each case. Ex. 18; Pet. ¶ 27b.

26. On May 11, 2020, less than 90 days after receipt of the claim, NII sent an offer of security pursuant to 8 *Del. C.* § 280(b)(2) to Cruz Bencomo. NII offered security of \$385,000. Ex. 19; Pet. ¶ 27b. This amount was determined to be sufficient to provide compensation to Cruz Bencomo if favorable resolution is obtained in both tax liability litigations, and to cover potential additional expenses, if any, such as experts' fees, travel expenses, or certified copies issued by notaries or courts, which are necessary, appropriate, timely submitted and approved by NII. Ex. 19; Pet. ¶ 27b.

27. On May 13, 2020, NII received an email from a partner of Cruz Bencomo agreeing with the offer of \$385,000 as security for Cruz Bencomo's claim. Ex. 20; Pet. ¶ 27b.

c) *AI Brazil*

28. On or about March 27, 2020, NII received a claim from AI Brazil asserting certain unmatured contractual claims. Ex. 21; Pet. ¶ 27c.

29. On June 11, 2020, NII and AI Brazil entered into a Settlement and Release Agreement to resolve these claims in exchange for a settlement payment,

subject to potential adjustment as set forth in the Settlement and Release Agreement. Mulieri Decl. ¶6; Pet. ¶27c.

30. Also on June 11, 2020, less than 90 days after receipt of the claim, NII sent a letter to AI Brazil that constituted an offer of security pursuant to 8 *Del. C.* § 280(b)(2). Ex. 22; Pet. ¶27c. Through the offer of security letter, NII offered a reserve for AI Brazil through September 11, 2020, should an additional payment mature as a result of the adjustment provision in the Settlement and Release Agreement. Ex. 22; Pet. ¶27c.

31. The reserve period has expired without any additional payments being made to AI Brazil as a result of the adjustment provision in the Settlement and Release Agreement, and by email dated September 18, 2020, AI Brazil confirmed that, as a result, a reserve is no longer required for its claims. Ex. 23; Pet. ¶27c.

d) *Deloitte*

32. On or about April 2, 2020, NII received a claim from Deloitte asserting the right to payment of fees and expenses in connection with services rendered and future services, and potential contingent contractual claims such as indemnification obligations under Deloitte's engagement letter with NII. Ex. 24; Pet. ¶27e.

33. On May 20, 2020, less than 90 days after receipt of the claim, NII offered Deloitte \$250,000 in an offer of security pursuant to 8 *Del. C.* § 280(b)(2).

Ex. 25; Pet. ¶27e. Deloitte and NII discussed the appropriate reserve for Deloitte's claim and timeline for the release of such reserve from September 9, 2020 through September 15, 2020. On September 15, 2020, NII agreed to reserve \$1.0 million as security for Deloitte's claim and proposed a release schedule for such amount to be periodically reduced through the expiration of NII's corporate existence. On September 16, 2020, the parties reached agreement on the timeline for the release of the reserve for Deloitte's claim, and on September 16, 2020, Deloitte submitted a letter to NII memorializing in writing this agreement. Ex. 26; Pet. ¶27e.

e) *Jones Day*

34. NII received a claim from Jones Day on or about April 2, 2020 asserting the right to payment for legal services in the amount of \$148,784.52 and for payment for future legal services. Ex. 27; Pet. ¶27g. On May 11, 2020, NII sent Jones Day a letter confirming that the outstanding invoices had been paid in full and that NII would continue to process any invoices for future services. Ex. 28; Pet. ¶27g. NII has done so and expects to continue to do so. Mulieri Decl. ¶3.

35. While Jones Day has not asked for, and NII has not provided, a specific reserve amount for amounts that may be payable to Jones Day for future legal services, NII has proposed to reserve \$5.0 million for potential tax, accounting and legal costs and potential additional personnel costs that could be incurred in

connection with the Dissolution (which such amount includes a reasonable estimate of the potential legal expenses that may be attributable to Jones Day during the Dissolution). NII expects that Jones Day will continue to assist with the indemnification claims related to the sale of Nextel Mexico, and will assist NII with indemnification matters relating to the sale of Nextel Brazil. NII has budgeted for these potential matters based on the fees for similar prior matters and through discussions with partners at Jones Day. Mulieri Decl. ¶3.

(f) AT&T

36. On or about April 3, 2020, NII received a claim letter from AT&T asserting potential contingent contractual claims relating to audits being conducted by the tax administration in Mexico, Servicio de Administración Tributaria (the “SAT”). Ex. 29; Pet. ¶27h. Pursuant to the Mexico Purchase Agreement, AT&T had certain indemnification rights for tax liabilities and damages that might be assessed by the SAT. *See* Ex. 3. § 11.4; Ex. 12 at 3.

37. On June 1, 2020, NII sent a letter to AT&T that constituted an offer of security pursuant to 8 *Del. C.* § 280(b)(2). Ex. 41.

38. In a letter dated September 28, 2020, AT&T rejected NII’s offer of security as inadequate to address its claims. Ex. 30; Pet. ¶27h.

39. AT&T and NII continued discussions regarding the appropriate reserve for AT&T's claim and the timeline for the release of such reserve from October 2020 through early January 2021. AT&T and NII agreed upon a reserve of \$75.0 million for AT&T's claim and the timeline for release of such reserve, and such agreement is memorialized in a Settlement Agreement dated January 12, 2021, by and between AT&T, NII and NIU Holdings LLC (the "AT&T Settlement Agreement"), and a 2021 Escrow Agreement by and among AT&T, NII and Citibank, N.A. (the "2021 Escrow Account"). Ex. 12. The reserve will be held in the new 2021 Escrow Account. Ex. 12. \$70.0 million of the reserve was funded from the Mexico Escrow, and \$5.0 million was funded by AT&T. *Id.* ¶¶ 2(a)-(b). The remainder of the Mexico Escrow was released to NII.

40. The AT&T reserve provides funds for AT&T's potential indemnification claims that may arise in connection with the SAT Audits. *See* Ex. 12 ¶1(a). For each of the seven audits, AT&T has agreed to a reserve amount as set forth in the AT&T Settlement Agreement, and when an audit is finalized, the related funds are released either to AT&T to reimburse for any payments made to the SAT, or to NII if, after required payments are made, there are additional funds associated with that audit. *See* Ex. 12 ¶5.

41. The first \$3.0 million released from the 2021 Escrow Account will be held in a general reserve for AT&T until the conclusion of five of the seven audits. Any funds released from the 2021 Escrow Account to NII after the first \$3.0 million are no longer subject to the reserve and are immediately available to NII. Ex. 12 at Ex. A.

42. In no event will indemnification to AT&T exceed the \$75.0 million agreed upon in the Settlement Agreement. Ex. 12 ¶1.

ii. The Reserve Constitutes Sufficient Security for Claimants Whose Claims NII Has Rejected in Whole or in Part

a) *Norigin Media AS*

43. On or about March 31, 2020, NII received a claim from Norigin Media AS (“Norigin”). Ex. 31; Pet. ¶27d. No reserve is needed for this claim.

44. On May 11, 2020, less than 90 days after receipt of the claim, for the reasons set forth *infra*, NII sent a letter to Norigin that constituted a notice of rejection pursuant to 8 *Del. C.* § 280(a)(3). Ex. 32; Pet. ¶27d. NII did not receive a response from Norigin, and Norigin did not institute an action, suit or proceeding with respect to its claims within 120 days after the mailing of the notice of rejection. Mulieri Decl. ¶4. The consequences of Norigin’s failure to timely institute such an action are clearly set forth in Section 280(a)(4): “[a] claim against a corporation is *barred* if a claimant whose claim is rejected pursuant to paragraph (a)(3) of this

section does not commence an action, suit or proceeding with respect to this claim no later than 120 days after the mailing of the rejection notice.” 8 *Del. C.* § 280(a)(4) (emphasis added). Accordingly, Norigin’s claim is statutorily barred.

45. Even if Norigin’s claim was not barred pursuant to Section 280(a)(4), it is non-meritorious, and no reserve is warranted. Norigin asserted that it is owed \$2,357,812.95, calculated by subtracting the amount paid by NII pursuant to the Confirmation Order and Plan of Reorganization in the Bankruptcy Proceedings (\$140,929.05) from the original Norigin claim of \$2,498,742. *See* Ex. 32; Pet. ¶27d.

46. In January 2016, pursuant to Sections II.C.8b(A), IX.B and IX.C of the Plan of Reorganization, the Reorganized Debtors (as defined in the Plan of Reorganization) accepted and paid Norigin’s claim, which in accordance with the Plan of Reorganization was paid at 5.64% of the amount due as required under NII’s Plan of Reorganization for pre-petition matters. *See* Ex. 2; Pet. ¶27d. The Plan of Reorganization was binding on holders of claims, including Norigin. Ex. 2 at Ex. A page 32; Pet. ¶27d. Norigin’s claim was therefore discharged under the Plan of Reorganization and cannot now be asserted as part of the Dissolution.

b) AMX

47. On or about April 2, 2020, NII received a claim from AMX. Ex. 33; Pet. ¶ 27f. Security of \$30.0 million is sufficient for this claim.

48. AMX asserted (i) that the Dissolution Notice constituted a breach of Section 10.1(b) of the Brazil Purchase Agreement; (ii) potential contingent contractual claims based on certain on-going contractual indemnification obligations of NII to AMX under Sections 10.2 and 10.3 of the Brazil Purchase Agreement (the “Contingent Contractual Obligations”); (iii) a claim for losses arising from the Dissolution Notice; and (iv) a claim of actual fraud under the Brazil Purchase Agreement. Ex. 33; Pet. ¶27f.

49. On May 20, 2020, less than 90 days after receipt of such claim, NII sent a letter to AMX rejecting claims (i), (iii), and (iv) (the “Rejected Claims”) under 8 *Del. C.* § 280(a)(3) and offering \$30.0 million as security for the Contingent Contractual Obligations pursuant to 8 *Del. C.* § 280(b)(2). Ex. 34; Pet. ¶ 27f. The \$30.0 million is currently being held in an escrow account pursuant to the escrow agreement, dated as of December 18, 2019, between AMX, NII and Citibank N.A. that was entered into in connection with the transactions contemplated by the Brazil Purchase Agreement (the “Brazil Escrow”). Ex. 35; Pet. ¶ 27f, and the proposed reserve of \$125.7 million requested by NII includes the \$30.0 million in the Brazil Escrow as security for AMX.

50. NII did not receive a response regarding the offer of security for the Contingent Contractual Obligations, and AMX failed to initiate an action, suit or

proceeding with respect to the Rejected Claims within 120 days. Mulieri Decl. ¶5. Accordingly, pursuant to 8 *Del. C.* § 280(a)(4), the Rejected Claims are barred. Pursuant to Section 280(b)(2), the security offer shall be deemed accepted. *See* 8 *Del. C.* § 280(b)(2) (“If the claimant offered [security in accordance with this subsection] does not deliver in writing to the corporation . . . a notice rejecting the offer within 120 days after receipt of such offer for security, the claimant shall be deemed to have accepted such security as the sole source from which to satisfy the claim against the corporation.”).

51. Even if AMX’s Rejected Claims are not barred pursuant to Section 280(a)(4), they are non-meritorious for several reasons, and no reserve is warranted. First, the Dissolution Notice did not constitute a breach of Section 10.1(b) of the Brazil Purchase Agreement, which provides that if NII adopts a plan of dissolution, then the representations, warranties, covenants and agreements set forth in certain provisions of the Brazil Purchase Agreement terminate on June 18, 2021, the 18-month anniversary of the closing of the Nextel Business transaction (the “Limitation Period”). Ex. 4 § 10.1. Under the Brazil Purchase Agreement, AMX has the right to bring indemnification claims for damages arising from failures or breaches of such representations, warranties, covenants and agreements through the Limitation Period. *See* Ex. 4 § 10.2. Such rights remain available and are adequately protected

by the offer of security provided by NII and are deemed to have been accepted by AMX, as detailed in paragraph 53.

52. Second, there are no actual losses or loss of rights arising from the Dissolution Notice. AMX has no right under the Brazil Purchase Agreement for indemnification for losses arising under the Dissolution Notice, if such losses existed. *See* Ex. 4. Finally, there has been no fraud under the Brazil Purchase Agreement. NII rejected the Rejected Claims because they are not viable claims, and AMX's failure to file a lawsuit to pursue such claims as required by Section 280(a)(4) -- despite receiving notice from NII of the applicable bar date and consequences for failing to do so -- underscores this point. As a result, AMX does not have any rights or losses under the Rejected Claims.

53. Moreover, NII's offer of \$30.0 million security for the Contingent Contractual Obligations is sufficient, even setting aside AMX's deemed acceptance of such offer under Section 280(b)(2) as a result of its failure to respond to the offer. The matters subject to indemnification, including the amount of time during which indemnification claims may be brought and the amount of security to cover such potential indemnification claims, was agreed to by the Board of Directors of AMX and the NII Board, and memorialized in the Brazil Purchase Agreement. *See* Ex. 4 § 10. NII's offer of \$30.0 million as security for the Contingent Contractual

Obligations was thus agreed to by AMX and NII in the Brazil Purchase Agreement, (Ex. 4 at 11), and as a result, these funds were deposited in the Brazil Escrow in connection with the closing of the Nextel Brazil transaction. Further, in connection with approving the Nextel Brazil transaction as contemplated in the Brazil Purchase Agreement, the stockholders of NII approved the indemnification obligations and security as set forth therein. Providing additional security for AMX at this time would essentially allow AMX to renegotiate the Brazil Purchase Agreement after the terms of the agreement have been approved by all of the relevant parties and the transaction has already closed.

iii. The Reserve Constitutes Sufficient Security for Unknown Claims

54. Pursuant to 8 *Del. C.* § 280(c)(3), a dissolved corporation that has properly given notice to potential claimants “shall petition the Court of Chancery to determine the amount and form of security that will be reasonably likely to be sufficient to provide compensation for claims that have not been made known to the corporation or that have not arisen but that, based on facts known to the corporation or successor entity, are likely to arise or become known to the corporation or successor entity within 5 years after the date of dissolution.”

55. Based on facts known to NII as of the date hereof, NII does not anticipate that it is likely that any material claims against it will arise or become known within five years from the date of Dissolution.

56. Nevertheless, NII has determined, out of an abundance of caution, to reserve \$3.0 million to provide for such claims in the event that unforeseeable claims do arise against NII during the Dissolution. This determination should be affirmed by the Court for a number of reasons.

57. First, as described herein, NII has followed the statutorily proscribed procedure for unearthing potential claims against NII. In order to prepare its list of potential claimants, NII reviewed all business activity and payments made on behalf of NII and its subsidiaries since June 26, 2015, the date NII emerged from bankruptcy. Mulieri Decl. ¶7. All advisors, retailers and service providers identified in this review of business activity since NII's emergence from bankruptcy were included in its list of potential claimants that were sent the Notice of Dissolution. Mulieri Decl. ¶7. Of the 240 potential claimants identified by NII to receive the Notice of Dissolution, only a small number (8, or approximately 3%) responded and each of those claims are described in detail herein. Moreover, the universe of potential unknown claims against the Company has been dramatically reduced as a result of the Company's broad dissemination of the Notice of Dissolution because

any of the potential claimants who received the Notice of Dissolution and failed to submit a claim to NII in response to the Notice of Dissolution are now statutorily barred from bringing those claims. *See 8 Del. C. § 280(a)(2)*.

58. Second, NII has been in the process of selling off its assets for many years, (*see* Pet. ¶¶ 4-14), and the length of time that has passed since completion of a number of these transactions suggests that new, previously unknown claims are unlikely to emerge. *See In re Altaba, Inc.*, 2020 WL 6122126, at *2 (considering undisputed fact of “the Company's sale of its operating business three years ago, which resulted in the Company not having an operating business since then” as a factor in determining sufficiency of reserve for claims that have not been made known to the company or that have not yet arisen).

59. Prior to dissolution, NII, through its subsidiaries, provided wireless communication services under the Nextel brand in Mexico, Brazil, Peru, Argentina and Chile. Pet. ¶3.

60. In August 2013, two of NII’s wholly owned, indirect subsidiaries completed the sale of all of the outstanding equity interests in NII’s wholly owned operations in Peru to Empresa Nacional de Telecomunicaciones S.A. and one of its subsidiaries, Entel Inversiones, S.A. (together, “Entel”). Ex. 36; Pet. ¶4. In December 2016, NII settled all indemnification obligations with Entel, entering into

a Settlement Agreement and Mutual Release to resolve then-existing indemnity claims as well as “any additional indemnity claims which may hereafter arise under the Stock Purchase Agreement”. Ex. 37 at 1. NII has no further obligations in connection with the Peru transaction. *See* Ex. 37.

61. In August 2014, three of NII’s wholly owned, indirect subsidiaries completed the sale of all of the outstanding equity interests of NII’s wholly owned operations in Chile to Fucata, S.A. for a de minimus amount. Ex. 38; Pet. ¶5. NII has no further obligations in connection with this transaction. *See* Ex. 38 § 9.2.

62. On January 27, 2016, NII completed the sale of Nextel Argentina to Grupo Clarin. Pet. ¶13. In the second half of 2016, NII entered into a mutual release agreement with Grupo Clarin for all current and future claims under the purchase agreement and, as a result, NII has no further obligations in connection with this transaction. *See* Ex. 39 ¶2.

63. Any obligations NII may have to AMX pursuant to the Brazil Purchase Agreement are provided for in the proposed reserve. *See supra* ¶53. In addition, any obligations NII may have to AT&T stemming from the Mexico Purchase Agreement are covered by the AT&T Settlement Agreement and therefore provided for in the proposed reserve. *See supra* ¶40.

64. Fourth, while there are three actions,⁵ suits or proceedings currently pending, or which may be filed in the near term, as to which a wholly owned subsidiary of NII (but not NII itself) is a party or as to which NII, though not a party, could potentially be liable as the result of contractual indemnification obligations to AT&T, (*see* Pet. ¶¶28-29), NII does not currently anticipate that any of these matters will result in material claims or liability against NII.

a. *Pending AT&T Actions Against Mexican Tax Administration.* As described in paragraphs 28b and 28c of the Petition, AT&T Mexico has two pending tax disputes with the SAT. While NII is not a party to either of these actions, NII is obligated to indemnify AT&T for these matters pursuant to the terms of the Mexico Purchase Agreement. *See* Ex. 3 § 11.4. These matters are covered by the AT&T Settlement Agreement, and any payment due is

⁵ In paragraph 28a of the Petition, NII described a dispute pending in the United States Bankruptcy Court of the Southern District of New York between NIU Holdings LLC (“NIU Holdings”), a wholly owned subsidiary of NII, and AT&T regarding the release of \$65.8 million from the Mexico Escrow that would be payable to NIU Holdings, *NIU Holdings LLC v. AT&T Mobility Holdings, B.V.*, Case No. 10-1099-SCC (S.D.N.Y.). (Pet. ¶28a). On October 14, 2020, the Bankruptcy Court issued a memorandum decision granting summary judgment in favor of NIU Holdings and NII, holding that NIU Holdings is entitled to immediate disbursement of the \$65.8 million from the Mexico Escrow, plus prejudgment interest, and dismissing AT&T’s counterclaims. *See In re NIU Holdings LLC*, 2020 WL 6066270 (Bankr. S.D.N.Y. Oct. 14, 2020). This dispute was resolved as part of the AT&T Settlement Agreement. *See* Ex. 12 ¶¶15-16.

included in the reserve for AT&T described in Section A.i.(f) above and would be paid out of funds currently held in the 2021 Escrow Account. *See* Ex. 12 ¶5. NII is also obligated to pay certain amounts to Cruz Bencomo in connection with these matters under certain circumstances, but as described in paragraphs 25 through 27 above, NII has agreed to reserve the full amounts that could be payable to Cruz Bencomo. Accordingly, if the proposed reserves for AT&T and Cruz Bencomo are approved, NII does not believe that it is reasonably likely that NII will face any material claims or liability from these actions.

b. *Potential AT&T Action Against Mexico Tax Administration.* As described in paragraph 29a of the Petition, based on facts currently known to NII, AT&T Mexico may dispute an additional tax matter with the SAT upon receipt of a tax assessment challenging an income tax deduction related to an upfront lease payment made to a related party in Mexico in 2013. While NII would not be a party to such an action, NII would be obligated to indemnify AT&T for this matter pursuant to the terms of the Mexico Purchase Agreement, if it is initiated. *See* Ex. 3 § 11.4. Pursuant to the AT&T Settlement Agreement, any payment that may become due in connection with this matter would be covered by the funds held in the 2021 Escrow Account. *See* Ex. 12 ¶6(D)(i)(c). As a result, NII believes, based on currently available information, that the proposed reserve for

AT&T described in Section A.i.(f) above would fully cover this matter and that, if the proposed reserve for AT&T is approved, it is reasonably likely that NII will not face any material claims or liability from this matter. Nevertheless, NII believes that any legal fees or other costs to NII relating to this matter could be paid out of NII's proposed reserve for legal fees for general wind-down costs and expenses described in paragraphs 69-73 below or NII's proposed \$3.0 million reserve for unknown claims as described in paragraph 56 above.

65. For these reasons, the proposed reserve of \$3.0 million is more than sufficient to provide for any unforeseeable claims that arise against NII during the Dissolution.

66. Because NII does not anticipate that it will have significant unknown future claims and its known potential future claims are attributable to identifiable persons, entities or government agencies, NII does not believe that is necessary to appoint a guardian *ad litem* for purposes of proceeding in this action under 8 *Del. C.* § 280(c)(3).

B. No Reserve With Respect To Any Pending Actions, Suits or Proceedings is Necessary

67. Pursuant to 8 *Del. C.* § 280(c)(1), a dissolved corporation that has properly given notice to potential claimants “shall petition the Court of Chancery to determine the amount and form of security that will be reasonably likely to be

sufficient to provide compensation for any claim against the corporation that is the subject of a pending action, suit or proceeding to which the corporation is a party... .”

68. NII is not itself currently party to any actions, suits or proceedings, Mulieri Decl. ¶8, and, therefore, no additional reserve for pending actions, suits or proceedings is required.

C. \$15.3 Million is Sufficient for Any Wind Down Expenses

69. At the time the Petition was filed, NII expected that it would incur not more than approximately \$16.8 million of wind down costs and expenses. That figure included \$11.8 million of budgeted costs and expenses,⁶ which the Board determined was sufficient to provide for currently forecasted future costs to be incurred by NII in connection with the Dissolution, as well as a \$5.0 million reserve for potential additional tax, accounting and legal costs and potential additional personnel costs that could be incurred in connection with the Dissolution. Pet. ¶¶33-34; Mulieri Decl. ¶10.

70. In reaching that determination, the NII Board reviewed and approved a detailed budget for 2020, 2021 and 2022 consisting of estimated future expenses,

⁶ Included within this amount was \$3.5 million of accrued liabilities.

which are primarily comprised of professional fees for legal, tax, and accounting services, personnel costs, and amounts for insurance costs and other administrative expenses. Mulieri Decl. ¶11. The \$5.0 million reserve for potential additional costs was determined to be sufficient to provide for any costs should the Dissolution take up to an additional two years. Mulieri Decl. ¶11.

71. Since filing the Petition, NII incurred and paid certain wind down expenses consistent with the reserve requested in the Petition, which has decreased the reserve needed for future wind down expenses to an aggregate of \$15.3 million. Mulieri Decl. ¶12.

72. Accordingly, included within the \$125.7 million proposed reserve is \$15.3 million for various wind down expenses that may be incurred by NII in connection with the Dissolution should the Dissolution take up an additional two years.

73. Of that amount, \$10.3 million is now intended to provide for currently forecasted future costs to be incurred by NII in connection with the Dissolution. Mulieri Decl. ¶9. Included in the \$10.3 million of expenses are \$3.0 million of accrued liabilities, as of November 30, 2020, which consisted of \$2.1 million in accrued severance costs, \$0.4 million of accrued employee costs and \$0.5 million of other accrued expenses and accounts payable. Mulieri Decl. ¶9; Pet. ¶31.

74. Additionally, within the \$15.3 million proposed reserve for wind down expenses, NII still proposes a \$5.0 million reserve for potential additional tax, accounting and legal costs and potential additional personnel costs that could be incurred in connection with the Dissolution.

75. The \$5.0 million reserve for wind down costs and expenses may include, but is not limited to, the following: professional service fees, including fees to recover cash held in the 2021 Escrow Account and the Brazil Escrow; salaries, retention bonuses and benefits; taxes, including payroll taxes; fees for bookkeeping and file storage; costs of telephone and internet services; insurance; director fees; bank fees; and distribution costs offset by interest income. Mulieri Decl. ¶14.

D. No Reserve Required for Potential Claimants Who Failed to Respond to the Dissolution Notice

76. As described in paragraph 10 above, the Dissolution Notice was mailed to 240 potential claimants on February 3, 2020 and informed them that “[a]ll claims must be received . . . on or before April 3, 2020.” Ex. 11 ¶c. The Dissolution Notice and claim period complied with Section 280(a)(1)(c), which provides that the notice of dissolution to potential claimants “shall state[] . . . [t]he date by which such claim must be received by the corporation or successor entity, which date shall be no earlier than 60 days from the date thereof.” The 232 potential claimants to whom NII sent the Dissolution Notice and who did not respond and submit a claim by the deadline

(see Ex. 40) should therefore be deemed barred pursuant to 8 *Del. C.* § 280(a)(2).

Accordingly, no reserve is warranted for these potential claimants.

CONCLUSION

For the reasons stated herein, NII respectfully requests that the Court enter the accompanying [Proposed] Order granting its Motion for Distribution and Approval of Reserves.

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