



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 TO AMEND CERTAIN RESERVE AMOUNTS AND FOR FIRST LIQUIDATING DISTRIBUTION

Petitioner NII Holdings, Inc. (“NII” or the “Company”), by and through its undersigned counsel, hereby moves for an order, in the form attached hereto, (i) approving a modified reserve of \$0 for AMX, and (ii) authorizing and approving the Company’s First Liquidating Distribution (as such terms are defined herein). The grounds for this Motion are as follows:

BACKGROUND

A. Relevant NII Transactions

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. Motion for a Distribution to Stockholders and for Approval of Reserves (the “Original Motion”) ¶ 1. Through its subsidiaries, NII provided wireless communication services under the Nextel brand in Mexico, Brazil, Peru, Argentina and Chile. *Id.*

2. Over the course of several years, NII divested its assets in operating subsidiaries in Mexico, Brazil, Peru, Argentina and Chile. *See id.* ¶¶ 3-5, 60-62.

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. *Id.* ¶ 3. 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. *Id.*

4. On March 17, 2019, the Board of Directors of NII (the “NII Board”) approved 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”). *Id.* ¶ 5. 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. 1 §§ 2.3(c), 10.¹

5. The \$30.0 million was held in an escrow account pursuant to the escrow agreement, dated as of December 18, 2019, between AMX, NII and Citibank N.A. (the “Brazil Escrow Agreement”) that was entered into in connection with the transactions contemplated by the Brazil Purchase Agreement (the “Brazil Escrow”). Original Motion ¶ 49; Ex. 2.²

B. The Company’s Dissolution Process

6. 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”). Original Motion ¶ 6.

¹ Citations in the form “Ex. __” refer to exhibits to the Unsworn Transmittal Affidavit Pursuant to 10 *Del. C.* § 3927 of Susan M. Hannigan in Support of Petitioner NII Holdings, Inc.’s Motion to Amend Certain Reserve Amounts and for First Liquidating Distribution. The Brazil Purchase Agreement was previously attached as Exhibit 4 to the Original Motion. For the convenience of the Court, it is attached again hereto as Exhibit 1.

² The Brazil Escrow Agreement was previously attached as Exhibit 35 to the Original Motion. For the convenience of the Court, it is attached again hereto as Exhibit 2.

7. 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”). *Id.* ¶ 7.

8. NII filed a certificate of dissolution pursuant to 8 *Del. C.* § 275(a) and (b) on January 13, 2020. *Id.* ¶ 8.

9. A Notice of Dissolution to All Claimants (the “Dissolution Notice”) was published in *The News Journal*, *Fairfax County Times*, and *USA Today*. *Id.* ¶

9. On February 3, 2020, NII mailed the Dissolution Notice to 240 potential creditors of NII. *Id.*

10. On or about April 2, 2020, NII received a claim from AMX. *Id.* ¶ 47. 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. *Id.* ¶ 48.

11. On May 20, 2020, NII sent a letter to AMX rejecting claims (i), (iii), and (iv) (the “Causes of Action”) 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). *Id.* ¶ 49.

12. 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 Causes of Action within 120 days. *Id.* ¶ 50.

13. On or about April 3, 2020, NII received a claim letter from AT&T Mobility Holdings B.V.; New Cingular Wireless Services, Inc.; AT&T Holdings Mexico, S. de R.L. de 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”) asserting potential contingent contractual claims relating to audits being conducted by the tax administration in Mexico, Servicio de Administración Tributaria (the “SAT”). 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 id.* ¶ 36.

14. 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). *Id.* ¶ 37. In a letter dated September 28, 2020, AT&T rejected NII’s offer of security as inadequate to address its claims. *Id.* ¶ 38.

15. AT&T and NII ultimately 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"). The reserve is held in the 2021 Escrow Account. \$70.0 million of the reserve was funded from the Mexico Escrow, and \$5.0 million was funded by AT&T. The remainder of the Mexico Escrow was released to NII. *Id.* ¶ 39.

16. The AT&T reserve provides funds for AT&T's potential indemnification claims that may arise in connection with the SAT Audits. *See* Ex. 3 ¶ 1(a).³ 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 id.* ¶ 5; Original Motion ¶ 40.

³ The AT&T Settlement Agreement was previously attached as Exhibit 12 to the Original Motion. For the convenience of the Court, it is attached again hereto as Exhibit 3.

17. Pursuant to the AT&T Settlement Agreement, the first \$3.0 million released from the 2021 Escrow Account must 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. 3 ¶ 6(e), Ex. A; Original Motion ¶ 41.

C. The Present Action

18. 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 (the “Unknown Claims”). Trans. ID 66002240.

19. On January 15, 2021, the Company filed the Original Motion. Trans. ID 66261771.

20. On March 16, 2021, the Court entered an Order Appointing Guardian Ad Litem for Unknown Future Claimants (the “Guardian Order”). Trans. ID 66425267. The Guardian Order appointed Rolin P. Bissell, Esquire as guardian ad litem (the “Guardian”) to represent the interests of potential holders of Unknown Claims. Guardian Order ¶ 2. Among other things, the charge of the Guardian included evaluating the sufficiency of the \$3 million proposed reserve for Unknown Claims (the “Unknown Claims Reserve”). *Id.*

21. On March 22, 2021, in partial resolution of the Original Motion, the Court entered an Order Approving Notice and Certain Reserve Amounts and Barring Certain Claims (the “Notice and Reserve Order”) that, among other things, (i) approved the Company’s proposed reserves for certain claimants identified in the Petition; (ii) barred certain claims of claimants identified in the Petition and certain potential claimants who did not timely respond to the Company’s Dissolution Notice; and (iii) approved the Company’s proposed reserves for wind-down expenses. Trans. ID 66443944.

22. Specifically, the Notice and Reserve Order found that AMX was deemed to have accepted the Company’s offer of security for the Contingent Contractual Obligations, and the Court approved a \$30 million reserve, *i.e.*, the amount held in the Brazil Escrow, for the Contingent Contractual Claims (the “AMX

Reserve”). Notice and Reserve Order ¶ 16(b). The Notice and Reserve Order also barred AMX from asserting the Causes of Action. *Id.* ¶ 16(c).

23. The Notice and Reserve Order additionally approved the agreed-upon reserve of \$75.0 million for AT&T’s claim (the “AT&T Reserve”) and acknowledged that the parties had agreed to a timeline for release of the AT&T Reserve. *Id.* ¶ 14(f).

24. On September 2, 2021, the Guardian filed The Report of Rolin P. Bissell, as Guardian *Ad Litem* Appointed by the Court Pursuant to 8 *Del. C.* § 280(c)(3) (the “Guardian Report”). Trans. ID 66900672. The Report concluded that the \$3 million Unknown Claims Reserve proposed by the Company “is more than adequate as a reasonable reserve.” Guardian Report at 2.

25. On September 8, 2021, the Court entered an Order Approving Unknown Claims Reserve, which ordered that a reserve in the amount of \$3 million constitutes security that will be reasonably likely to be sufficient to provide compensation for Unknown Claims that may arise or become known within five years of the date of the Dissolution. Trans. ID 66914594.

D. Recent Developments

26. As of June 18, 2021, the indemnification claim termination date set forth in the Brazil Purchase Agreement and the Brazil Escrow Agreement, AMX had

not made any indemnification claims. As a result, Citibank, N.A., as escrow agent, released the entire balance of the Brazil Escrow to NII, in the amount of \$30.1 million, which includes \$0.1 million of interest. Ex. 4; Ex. 5.

27. In addition, three of the seven SAT audits have been resolved. On June 14, 2021, as contemplated by the agreed-upon release schedule in the AT&T Settlement Agreement, \$6.5 million of the 2021 Escrow Account was released to NII at the joint direction of AT&T and NII. Ex. 4; Ex. 6. Separately, \$4.0 million of the 2021 Escrow Account was released to AT&T to fund a payment to the SAT related to the settlement of one of the other seven audits. Ex. 4; Ex. 7.

28. On September 7, 2021, an additional \$5.2 million of the 2021 Escrow Account was released to NII at the joint direction of AT&T and NII. Ex. 8. As a result, \$59.3 million remains in the 2021 Escrow Account today.

29. Because the AT&T Settlement Agreement requires that the first \$3 million in funds released from the 2021 Escrow Account be retained until five of the seven SAT audits have been concluded (Ex. 3 ¶ 6(e)), only \$8.7 million of the \$11.7 million in funds released from the 2021 Escrow Account are now available for distribution to NII's stockholders.

ARGUMENT

30. As of June 30, 2021, the total assets of NII are approximately \$279.8 million, which consist of \$215.2 million of cash and cash equivalents, \$64.6 million of cash held in the 2021 Escrow and \$0 of cash held in the Brazil Escrow. As of June 30, 2021, the total accrued liabilities of NII are approximately \$2.8 million. Ex. 1 to Guardian Report (Mulieri Declaration).

I. THE COURT SHOULD ENTER AN ORDER ESTABLISHING A REVISED RESERVE OF \$0 FOR AMX

31. Pursuant to the Notice and Reserve Order, the AMX Reserve is currently \$30 million. Notice and Reserve Order ¶ 16(b). The Company respectfully requests that the Court modify the Notice and Reserve Order to decrease the AMX Reserve from \$30 million to \$0.

32. The Brazil Escrow provided security for the Contingent Contractual Claims, which were contractual indemnification obligations NII potentially owed to AMX under the Brazil Purchase Agreement. Ex. 2 at 1 (stating that the parties to the Brazil Purchase Agreement “have agreed to establish an escrow arrangement . . . to secure [NII]’s indemnification obligations under the Purchase Agreement.”); Ex. 1 §§ 10.2, 10.3. The 18-month time period contemplated by the escrow agreement expired on June 17, 2021 at 5:00 pm (Ex. 2 § 2(a)(i)), and AMX did not submit any claims against the escrow. See Ex. 5. Therefore, the window of time for AMX to

assert its Contingent Contractual Claims (*i.e.*, indemnification claims under the Brazil Purchase Agreement) is now closed. *See* Ex. 2 § 2(a)(i); *see also* Ex. 1 § 10(a) (“The covenants and agreements contained in this Agreement that are to be performed in full on or prior to the Closing will survive the Closing (together with any right to assert any claim with respect thereto) and will thereafter terminate at 5:00 p.m., New York City time, on the date that is the 18-month anniversary of the Closing Date.”). Because no indemnification claims were submitted, pursuant to the terms of the Brazil Escrow Agreement, the escrow agent released the entirety of the \$30 million Brazil Escrow to the Company on June 18, 2021. Ex. 2 § 2(b)(ii); Ex. 5.

33. No further security is needed for the Contingent Contractual Claims because NII’s indemnification obligations under the Brazil Purchase Agreement have expired. Accordingly, the Company respectfully requests that the AMX Reserve be modified to \$0 and that the Company be permitted to distribute these funds to its stockholders as part of the First Liquidating Distribution (as defined below).

II. THE COURT SHOULD ENTER AN ORDER PERMITTING A LIQUIDATING DISTRIBUTION OF UP TO \$200.1 MILLION

34. The Company respectfully requests that the Court authorize and approve a liquidating distribution to the Company's stockholders of up to \$200.1 million (the "First Liquidating Distribution").

35. Included within the proposed First Liquidating Distribution is \$8.7 million formerly held as part of the AT&T Reserve of \$75 million.

36. To date, \$11.7 million in total has been released to NII from the 2021 Escrow Account. The AT&T Settlement Agreement requires that \$3 million of that amount must continue to be held by NII in a general reserve for AT&T until the conclusion of five of the seven SAT audits. Ex. 3 ¶ 6(e). Because only three of the audits have been completed, \$3 million of the \$11.7 million is not presently available for distribution. \$8.7 million, however, is available for immediate distribution pursuant to the timeline agreed upon in the AT&T Settlement Agreement, and is no longer subject to the reserve. *See id.* ¶¶ 6(b)(ii), 6(e). Accordingly, upon approval of the First Liquidating Distribution, the AT&T Reserve will decrease from \$75 million to \$62.3 million.

37. After the proposed First Liquidating Distribution, NII will continue to reserve the following amounts:

- a. AT&T claim: \$62.3 million

- b. AMX claim: \$0
- c. Cruz Bencomo: \$385,000
- d. Deloitte claim: \$1 million
- e. Wilmington Trust claim: \$1 million
- f. Remaining expenses in connection with the continued wind-up of NII's business and affairs: \$12.0 million⁴
- g. Unknown Claims Reserve: \$3 million.

Notice and Reserve Order ¶¶ 14(a), (b), (d), 19; Order Approving Unknown Claims Reserve.

CONCLUSION

For the reasons stated herein, NII respectfully requests that the Court enter the accompanying [Proposed] Order approving (i) a modified reserve of \$0 for AMX and (ii) the First Liquidating Distribution.

⁴ From December 1, 2020 through June 30, 2021, NII has incurred \$3.3 million of wind down expenses, consistent with the reserve requested in the Original Motion.

/s/ Susan M. Hannigan _____
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Words: 2,835

Dated: September 9, 2021

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 9, 2021, a copy of the foregoing Motion to Amend Certain Reserve Amounts and for First Liquidating Distribution and Transmittal Declaration was served by File & Serve*Xpress* on the following attorneys of record:

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/s/ Susan M. Hannigan
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