

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION,	:	
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Plaintiff,	:	15 Civ. 9764 (WHP)
	:	
- against -	:	ECF Case
	:	
ATLANTIC ASSET MANAGEMENT, LLC,	:	
	:	
Defendant.	:	
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**PROONENTS' RESPONSE TO OBJECTIONS TO THE JOINT AMENDED  
PLAN OF DISTRIBUTION AND MEMORANDUM IN SUPPORT OF AN  
ORDER APPROVING A REVISED JOINT PLAN OF DISTRIBUTION**

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Pursuant to this Court's Order of August 2, 2016, Plaintiff Securities and Exchange Commission (the "Commission") and Marti P. Murray, as Receiver for Atlantic Asset Management LLC (the "Receiver," and collectively with the Commission, the "Proponents") respectfully submit this Response to Objections to the Joint Amended Plan of Distribution and Memorandum in Support of an Order Approving a Revised Joint Plan of Distribution (the "Response"). As further discussed below, the Proponents have revised the amended joint plan of distribution for Atlantic Asset Management, LLC (the "July 26 Plan") in response to objections submitted by investors and other creditors (the "Revised Plan").

The Revised Plan, attached in both clean and redlined form as Exhibit A, is substantially similar to its predecessors and continues to attempt to fairly balance the competing interests of investors and other creditors. The Proponents have modified the July 26 Plan at the request of the Tribal Bond investors to include language making express their right under the Revised Plan to pursue claims related to the Wakpamni Bonds against Atlantic Asset Management, LLC ("AAM") or third parties outside of the Receivership. They further have modified the schedules to the July 26 Plan to include claims or claim adjustments approved by the Receiver upon her review of objections. The Revised Plan is both fair and reasonable and the Proponents respectfully request that this Court issue an Order approving it.

#### I. BACKGROUND<sup>1</sup>

On July 7, 2016, the Proponents first submitted a Joint Plan of Distribution to this Court. (DE 114, Ex. A.) By Order entered July 22, 2016, this Court directed the Proponents to submit a

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<sup>1</sup> The Proponents incorporate by reference the Procedural History included in its Memorandum of Law in Support filed on July 7, 2016, Docket Entry ("DE") 115, supplementing it herein. All capitalized terms used herein have the meanings ascribed to them in the Revised Plan.

revised proposed plan that: (1) clearly advises payroll tax authorities that they will recover 33% of their claims under the “General Distribution” section of the plan as proposed; and (2) provides an up-to-date estimate of the remaining cash-on-hand after accounting for receivership expenses. DE 126. In accordance with the July 22, 2016 Order, on July 26, 2016, the Proponents filed the July 26 Plan. (DE 128-1.) On August 2, 2016, this Court entered a scheduling order for the distribution of the July 26 Plan to known AAM creditors and investors, submission of objections to that plan, and submission of the Proponents’ response to the same (the “August 2 Order”). (DE 131.)

**II. THE CURRENT STATE OF THE ESTATE AND THE CLAIMS OF INVESTORS AND CREDITORS**

As of September 30, 2016, the Receiver has cash on hand of approximately \$861,910.74. After accounting for outstanding expenses of the receivership, the Proponents expect that approximately \$816,766.70 will be available for distribution, less expenses of the receivership for October 2016 and any reserves held to implement the Proposed Plan as determined necessary by the Proponents.

Claims against the Receivership Estate from former employees, investors, taxing authorities and unsecured creditors total \$50,699,582.70, with claims from Tribal Bond investors amounting to \$43,277,436.00, or approximately 85% of the total claims against the Receivership Estate.

**III. NOTICE OF THE JULY 26 PLAN AND OBJECTIONS RECEIVED**

In compliance with the August 2 Order, on August 12, 2016, counsel for the Commission sent the July 26 Plan, the Proponents’ Motion for Approval of that plan, and the August 2 Order to known creditors and investors by first class mail, postage prepaid. (*See* DE 133.) On August 8, 2016, counsel for the Commission posted the July 26 Plan and the August 2, 2016 Order on

the SEC's website, <https://www.sec.gov/divisions/enforce/claims/atlantic-asset-management.htm>.<sup>2</sup>

The Proponents received eight objections to the July 26 Plan: three from AAM former employees dissatisfied with their proposed distribution, four from creditors seeking inclusion or adjustment of their claims, and one from Tribal Bond investors seeking to make express their right to pursue claims based on AAM's conduct related to the Wakpamni Bonds against third parties outside of the Receivership.<sup>3</sup> The Proponents have modified the July 26 Plan in response to these objections, as further described below.

#### **IV. THE PROPONENTS' MODIFICATIONS TO JULY 26 PLAN IN RESPONSE TO OBJECTIONS**

##### **A. The AAM Employees' Objections**

Under the July 26 Plan, AAM employees have a priority claim through which they will receive full compensation for the time that they worked from January 1 through January 8, 2016, the date the Receiver was appointed ("Employee Priority Claim"). Three former AAM employees, Michael T. Allen, Elaine S. Hunt, and Donald W. Trotter, object to the amount of

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<sup>2</sup> The Proponents had four packages returned to them as undeliverable. As detailed in the Declaration of Nancy A. Brown, executed October 13, 2016 and submitted herewith ("Brown Decl."), three of the four were re-directed to new addresses, and to date those resent packages have not been returned. With respect to the fourth, Surewest/Everest Connections, the Receiver advised that that entity had merged with Consolidated Communications, a creditor who was listed separately in the July 26 Plan's schedules, and that package appears to have been delivered.

<sup>3</sup> The Proponents received two other communications related to the July 26 Plan. By letter dated August 16, 2016, Core Solutions, Inc., listed on Exhibit D to the Plan as an approved unsecured creditor, informed the receiver that it has no record of doing business with AAM or of having a claim against the same. Core Solutions' approved unsecured claim has been removed from the schedules attached to the Revised Plan. *See* Brown Decl., Ex. 2. In addition, by electronic mail dated August 22, 2016, Beverly Teape, a former AAM employee, informed the Proponents that she has no objection to the July 26 Plan. *See* Brown Decl., Ex. 3.

their approved claims, seeking severance payments pursuant to their employee contracts.<sup>4</sup> Upon consideration of these objections, the Proponents believe it appropriate to recognize the contractual severance claims as unsecured claims, but, in order to treat all former AAM employees equally, the Proponents have modified Schedule A to the Revised Plan to include the severance payments due to *all* AAM employees with employment contracts known to the Receiver as unsecured claims, an aggregate increase of \$672,152.26 to the existing unsecured claims.

Mr. Allen asserts three other claims to additional compensation.<sup>5</sup> He seeks inclusion of an additional four days of pay in his Employee Priority Claim, but if the Plan were to do so, it would be treating Mr. Allen on more favorable terms than other employees. The Proponents believe that paying employees off the top – prior to paying any other AAM creditors – already provides them sufficient benefit given the limited funds available to distribute. Mr. Allen also seeks payment of unused vacation time and incentive compensation. In view of the Proponents' decision to include Mr. Allen's entire severance pay amount due under his contract as an unsecured creditor claim, the Proponents view this claim as inconsistent with Mr. Allen's employment contract. Specifically, Mr. Allen's employment contract provides that the employer may, in its sole discretion, choose to give Mr. Allen severance pay, defined as base salary

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<sup>4</sup> The objections submitted by Mr. Allen, Ms. Hunt, and Mr. Trotter are attached as Exhibits 4, 5, and 6, to the Brown Decl.

<sup>5</sup> Mr. Allen suggests that the Receiver has been unresponsive to his attempts to contact her. The Receiver has no record of unreturned calls to Mr. Allen, and one record of a telephone conversation during which she informed him of the treatment of employees under the then-proposed distribution plan. Mr. Allen did not, at that time, complain of his inability to contact the Receiver. The Receiver also maintained contact with Mr. LaRosa at the Connecticut Department of Labor. On July 12, 2016, the Receiver sent to Mr. LaRosa a copy of the proposed distribution plan.

excluding benefits or other forms of compensation, instead of continued employment.<sup>6</sup> *See* Brown Decl., Ex. 4.

**B. The Unsecured Creditors' Objections**

Under the July 26 Plan, unsecured creditors receive *pro rata* distributions if there is a Supplemental Distribution. (DE 128-1 ¶ J.1.) Four purported creditors filed objections to the July 26 Plan, seeking inclusion or adjustment of their claim and/or priority. As discussed below, the Proponents have generally allowed the new or adjusted unsecured claims but have made no adjustment to the priority of those claims.

**1. *Diane Ferrone Objection***

Diane Ferrone (“Ferrone”), former local legal counsel to AAM, does not have an approved claim in the July 26 Plan. By electronic mail dated September 13, 2016, Ferrone submitted an invoice for \$1,680 for services performed on January 8, 2016, prior to notification by the Receiver to stop work. (*See* Brown Decl., Ex. 7.) The Proponents approved this claim in full and it is included as an unsecured creditor claim on Schedule D to the Revised Plan.

**2. *Interactive Data Objection***

Interactive Data Corporation and Interactive Data Pricing and Reference Data LLC (collectively, “Interactive Data”) supplied electronic financial market data to AAM. Under the July 26 Plan, Interactive Data has an approved unsecured creditor claim of \$73,386.82. (DE 128-1 ¶¶ D.40, D.41, and Exhibit D.) By letter dated September 6, 2016, Interactive Data objected to the amount of its approved claim, submitting documentation supporting a claim of \$89,124.38 for services provided through the Receiver’s March 3, 2016 notice to stop services.

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<sup>6</sup> The Receiver also rejects the incentive compensation claim as insufficiently supported. She has been unable to locate any documentation of any agreement with Mr. Allen setting forth the terms he recites in his Objection.

(See Brown Decl., Ex. 8.) The Proponents have approved this claim in full and it is included, as adjusted, on Schedule D to the Revised Plan.

**3. *Lighttower Fiber Networks Objection***

Lighttower Fiber Networks (“Lighttower”), a former supplier of information technology services to AAM, does not have an approved claim in the July 26 Plan. By electronic mail dated September 9, 2016, Lighttower submitted an invoice for \$13,012.40 for services performed through September 2016. (See Brown Decl., Ex. 9.) Based on AAM’s contractual obligations with Lighttower, the Proponents have approved \$6,506.50 of this amount as an unsecured creditor claim, or that portion of the total amount that represents amounts billed for services provided 30 days after notification to stop services. This amount is reflected on Schedule D to the Revised Plan.

**4. *Chamowitz & Chamowitz, P.C. Objection***

Under the July 26 Plan, Chamowitz & Chamowitz, P.C. (“Chamowitz”), former legal counsel to AAM, has an approved unsecured creditor claim in the amount of \$32,646.50. (DE 128-1 ¶¶ D.40, D.41, and Exhibit D.) By letter dated September 13, 2016, Chamowitz objects to the classification of its invoice for \$32,646.50 (for services rendered during the month of December 2015) as an unsecured claim, claiming that it should have been paid in the due course of AAM’s operations in early January, when it submitted the invoice prior to the appointment of the Receiver. Chamowitz further objects to being classified as an unsecured creditor because its work advanced the interests of the Receivership. Finally, Chamowitz seeks payment of an additional \$14,360.50 for services rendered in early January 2016. (See Brown Decl., Ex. 10.)

The Proponents find no distinction between Chamowitz’s \$32,646.50 claim and other invoices concurrently submitted and being treated as unsecured creditor claims. Accordingly,

the priority of that claim remains the same in the Revised Plan. The Proponents further reject Chamowitz's claim for priority based on services rendered that assisted the Receivership insofar as those services were not performed at the request of the Receiver. However, and consistent with treatment of invoices submitted by other counsel, the Proponents have approved the Chamowitz claim for \$47,006.50 in full and it is included as an unsecured creditor claim on Schedule D of the Revised Plan.

**C. The Bond Investors' Objection**

By electronic mail dated August 29, 2016, counsel for certain of the Tribal Bond investors ("Investors" as defined in Paragraph D.31 of the Plan) expressed concern about the implications of paragraph M.2. (Plan Injunction) of the July 26 Plan on the Investors' right to pursue claims related to AAM's pre- Receivership conduct in connection with the Investors' investment in the Wakpamni Bonds. (Brown Decl., Ex. 11.) The Proponents and the Investors have since agreed to revisions to paragraphs M.2. and N of the July 26 Plan expressly permitting the Investors to pursue claims related to AAM's pre- Receivership wrongful conduct with respect to the Wakpamni Bonds against third parties outside of the Receivership. (See Exhibit A ¶¶ M.2, N.1.) The revision is designed to permit the Investors to pursue full recovery without disturbing the Plan's intent to enjoin further claims against the Receivership estate or the Receiver or delaying the termination of the Receivership Estate.

**V. MODIFICATION OF THE JULY 26 PLAN TO PROTECT THE RECEIVER'S GOOD FAITH EXECUTION OF HER OBLIGATIONS**

The Proponents have further modified the July 26 Plan to include Paragraph O.1, a provision designed to carry forward the provisions in the Amended Order Granting Preliminary Injunction and Other Relief (DE 26), protecting the Receiver from liability for good faith compliance with Orders of the Court and the provisions of the Plan, as follows:

## O. General Release

1. The Receiver is entitled to rely on all outstanding rules of law and court orders, and shall not be liable to anyone for good faith compliance with any order, rule, law, judgment, or decree, including the orders of this Court. In no event shall the Receiver be liable to any person or entity for good faith compliance with the Receiver's duties and responsibilities under the Plan except upon a finding by this Court that the Receiver acted or failed to act as a result of misfeasance, bad faith, gross negligence, or in reckless disregard of the Receiver's duties under the Plan.

## VI. THE REVISED PLAN IS FAIR AND REASONABLE AND SHOULD BE APPROVED.

District Courts have broad authority to approve plans of distribution proposed by the Commission or a federal receiver in enforcement cases. *SEC v. Orgel*, 407 F. App'x 504, 505 (2d Cir. 2010); *SEC v. Wang*, 944 F.2d 80, 85 (2d Cir. 1991). The standard of review is whether the distribution plan "fairly and reasonably distribute[s] the limited [] proceeds among the potential claimants." *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 85 (2d Cir. 2006); *SEC v. CR Intrinsic Investors, LLC*, Civ. Act. 164 F. Supp. 3d 433, 435 (S.D.N.Y. 2016). In reviewing proposed plans, the Second Circuit instructs that courts should defer to the "experience and expertise" of the Commission in determining how to distribute the funds. *WorldCom*, 467 F.3d at 84. *See also SEC v. Amerindo Inv. Advisors Inc.*, Civ. Act. No. 05-5231, 2014 U.S. Dist. LEXIS 66446, \*44 (S.D.N.Y. May 6, 2014) (a court should give substantial weight to the SEC's views regarding a plan's merits). Once the district court "satisfies itself that the distribution of proceeds in a proposed SEC disgorgement plan is fair and reasonable, its review is at an end." *Wang*, 944 F.2d at 85.

The Revised Plan is both fair and reasonable in its attempt to divide limited Receivership property equitably among multiple competing interests. Like its predecessors, the Revised Plan continues to propose returning to the Investors as much of their principal investment as possible on a *pro rata* basis in the first distribution, and in any supplemental distribution that may occur if

the Receiver successfully recovers other distributable funds.<sup>7</sup> At the request of those Investors, it also expressly permits them to pursue third parties for bond related claims outside of the Receivership, exempting them from any release of those claims. Moreover, it fully compensates AAM employees for their assistance to the Monitor and allows those employees unsecured claims for severance pay, if any, owed to them by AAM pursuant to specific employment contracts. It further partially pays payroll taxing authorities in full satisfaction of their claims against AAM. Finally, in the hope of compensating unsecured creditors, the Revised Plan provides for a distribution of any funds obtained by the Receiver subsequent to the General Distribution to those creditors on a *pro rata* basis up to the percentage of recovery obtained by Investors. Once unsecured creditors have obtained the same percentage of recovery on their claims as the Investors, then both unsecured creditors and Investors will share *pro rata* any amounts remaining. This type of “line drawing” is the type approved by the Second Circuit in *WorldCom* so long as the Court is satisfied that “in the aggregate, the plan is equitable and reasonable.” *WorldCom*, 467 F.3d at 83. *See also SEC v. Byers*, 637 F. Supp. 2d 166, 168, 172 (S.D.N.Y. 2009) (finding a plan setting a priority of administrative claims, tax liabilities, secured, followed by investors and unsecured creditors fair and reasonable), *aff’d sub nom. SEC v. Malek*, 397 F. App’x 711 (2d Cir. 2010).

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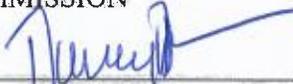
<sup>7</sup> The Revised Plan provides that the Investors will be able to participate in the supplemental distribution, if any, once Unsecured Creditors receive the same percentage of their respective claims as the Investors have in the General Distribution and the Insurance Policy Recovery Distribution. *See* Exhibit A ¶ J.1.

VII. CONCLUSION

For all the foregoing reasons, the Proponents respectfully request that the Court enter an Order approving the Revised Plan.

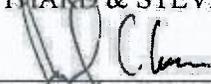
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