Docket #195 Date Filed: 3/23/2023

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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In re	**Chapter 11** **Case No. 23-10219 (KBO)**
STARRY GROUP HOLDINGS, INC., et al.,	**Jointly Administered**
Debtors.	**Objection Deadline: March 23, 2023** **Hearing Date: March 31, 2023**

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LIMITED OBJECTION OF THE U.S. SECURITIES AND EXCHANGE COMMISSION TO APPROVAL OF THE DISCLOSURE STATEMENT AND CONFIRMATION OF THE DEBTORS' JOINT PLAN OF REORGANIZATION

The U.S. Securities and Exchange Commission ("SEC" or "Commission"), a statutory party to these proceedings,[1] and the federal agency responsible for enforcement of the federal securities laws, objects to approval of the Disclosure Statement ("Disclosure Statement") and confirmation of the Chapter 11 Joint Plan of Reorganization ("Plan") of Starry Group Holdings, Inc. and its debtor affiliates (collectively, "Starry Group" or the "Debtors"), filed February 20, 2023. In support of its limited objection, the SEC respectfully states as follows:[2]

INTRODUCTION

As a general matter, non-debtor third party releases contravene Section 524(e) of the Bankruptcy Code, which provides that only debts of the debtor are affected by the Chapter 11 discharge provisions. Such releases have special significance for public investors because they enable non-debtors to benefit from a debtor's bankruptcy by obtaining their own releases with respect to past misconduct, including

[1] As a statutory party in corporate reorganization proceedings, the Commission "may raise and may appear and be heard on any issue[.]" 11 U.S.C. § 1109(a).

[2] Unless separately defined herein, capitalized terms have the meanings ascribed to them in the Plan.

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violations of the federal and state securities laws, which would *not* be discharged or released had the non-debtors filed their own bankruptcy cases. *See* 11 U.S.C. §523(a)(19) (denying discharge to an individual Chapter 7 or Chapter 11 debtor for debts arising from violations of federal and state securities laws). This concern is implicated here, where the Debtors are seeking to bar public shareholders and holders of subordinated claims from asserting claims against the released parties.

While such releases may be allowed in the Third Circuit in "extraordinary cases," no extraordinary facts are present here. *Gillman v. Continental Airlines (In re Continental Airlines),* 203 F.3d 203, 212 (3d Cir. 2000). In the absence of such extraordinary circumstances, courts in this Circuit have held that third party releases of non-debtors may be allowed if they are consensual. *Emerge Energy Servs. LP,* No. 19-11563 (KBO), 2019 WL 7634308*,* at *18-19 (Bankr. D. Del. 2019) (Court denied confirmation of plan where third party releases bound creditors and interest holders who did not return a ballot or opt-out form; releases were held to be non-consensual); *In re Washington Mutual, Inc*., 442 B.R. 314, 352 (Bankr. D. Del. 2011); *In re Zenith Electronics Corp*., 241 B.R. 92, 111 (Bankr. D. Del. 1999)).

Although the Debtors may claim that the inclusion of an opt-out provision renders the releases consensual with respect to public shareholders and holders of subordinated claims, silence does not constitute "consent" to third party releases. Here, the nonconsensual character of the releases is especially troubling because they apply to public shareholders and holders of subordinated claims who are not receiving any consideration and are not entitled to vote on the Plan.

The releases should be deleted from the Plan, or, alternatively, the Plan should be amended to state that the releases will not bind shareholders and subordinated claimants who are deemed to reject the Plan.[3]

BACKGROUND

On February 20, 2023, Starry Group filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code and also filed its Plan. Starry Group's stock was previously publicly traded on the New York Stock Exchange ("NYSE"), but Starry Group was delisted by the NYSE on January 9, 2023 due to its financial condition. The stock is currently trading Over-The-Counter under the symbol "STRYQ."

Pursuant to the Disclosure Statement and Plan, the Debtors are pursuing a dual-track process of either: (a) a Restructuring where the Prepetition Lenders have agreed to a debt for equity swap under the Plan; or (b) a Sale Transaction involving substantially all of their assets or reorganized equity. (*Disclosure Statement* at 2; *Plan* at 26). According to the Disclosure Statement, under either track, unsecured creditors will share $250,000 to $2,000,000 pro rata. While the expected return to unsecured creditors is not clear at this time since there is no stalking horse bidder, under either track, the Debtors anticipate the pro rata distribution to be in the range of $250,000 to $2,000,000. Equity will be cancelled and shareholders are deemed to reject the Plan. (*Disclosure Statement* at 7-10; *Plan* at 23-4, 27).

[3] In response to the SEC Staff's request, the Debtors have agreed to incorporate the SEC's proposed language providing it with a carve-out from the non-debtor releases. The SEC reserves its right to supplement this objection in the event that the Debtors fail to incorporate the proposed carve-out language.

The proposed non-debtor third party releases (the "Releases") in the Plan provide releases in favor of the (a) Debtors, (c) the Reorganized Debtors, (c) the DIP Agent and the Prepetition Agent; (d) the DIP Lenders and the Prepetition Lenders; (e) any Successful Bidder, if any; and the Related Persons[4] for each of the forgoing. (*Disclosure Statement* at 38; *Plan* at 12, 46-7). The Releases purport to bind any public shareholder and subordinated claimant who fails to check a box to opt out of the Releases on an Exhibit to the "Notice Of Non-Voting Status" (the "Notice"). (*Disclosure Statement* at 38; *Motion of Debtors for Order Approving the Disclosure Statement and Related Relief* at 22-3). The Notice itself does not inform shareholders of the need to opt out of the Releases until the bottom of page 9. (*Motion of Debtors for Order Approving the Disclosure Statement and Related Relief* at Exhibit 3). Under these circumstances, shareholders and subordinated claimants cannot be fairly characterized as giving "consent" to the Releases.

DISCUSSION

I. The Releases are not consensual and do not satisfy the standard to be approved as non-consensual releases.

A. The Releases are not consensual.

[4] Related Persons: means collectively with respect to Persons, such Person's predecessors, successors, assigns, present and former Affiliates (whether by operation of law or otherwise) and subsidiaries, and each of their respective current and former officers, directors, principals, employees, shareholders, members (including ex officio members and managing members), mangers, managed accounts or funds, management companies, fund advisors, advisory or subcommittee board members, partners, agents, financial advisors, attorneys, accountants, investment bankers, investment advisors, consultants, representatives, and other professionals, in each case acting in such capacity at any time on or after the date of the Restructuring Support Agreement, and any Persons claiming by or through any of them, including such Related Persons' respective heirs, executors, estates, servants, and nominees; provided however, that no Insurer of any Debtor shall constitute a Related Persons. (*Plan* at 12).

The Releases here are not consensual because the Plan deems consent to the Releases to be established based on silence or a failure to opt out. In the SEC's view, in order for releases to be considered consensual, parties should *opt in* to the release to be bound. *See Emerge Energy*, 2019 WL 7634308*, at *18* ("the Court cannot on the record before it find that the failure of a creditor or equity holder to return a ballot or Opt-Out Form manifested their intent to provide a release. ***Carelessness, inattentiveness, or mistake are three reasonable alternative explanations.***") (emphasis added); *Washington Mutual*, 442 B.R. at 355 ("[f]ailing to return a ballot is not a sufficient manifestation of consent to a third party release"); *In re Exide Techs.,* 303 B.R. 48, 74 (Bankr. D. Del. 2003) (court found releases consensual and binding only on creditors and interest holders voting to accept the plan); *cf. In re Spansion, Inc.*, 426 B.R. 114, 144-45 (Bankr. D. Del. 2010) (court found releases consensual only with respect to parties voting to accept the Plan, and unimpaired creditors deemed to have accepted the Plan). Thus, neither failing to return an opt-out form, nor abstaining from voting, nor voting to reject a plan but failing to opt out of the releases constitutes "consent." *But see In re Indianapolis Downs*, LLC, 486 B.R. 286, 304-6 (Bankr. D. Del. 2013) (in nonpublic company case that sets forth the minority view among published opinions in this district, nondebtor releases deemed consensual with respect to impaired creditors who abstained from voting on the Plan, and those who voted to reject the Plan and did not otherwise opt out of the releases. Creditors that were deemed to reject the Plan were not subject to the release.).

"Courts generally apply contract principles in deciding whether a creditor consents to a third party release." *In re SunEdison, Inc.,* 576 B.R. 453, 458 (Bankr.

S.D.N.Y. 2017)*, citing Washington Mutual, Inc*., 442 B.R. at 352; *Emerge Energy*, 2019 WL 7634308*,* at *18.

This Court in *Emerge Energy* enumerated the basic contract principles under which consent to the Release may be implied from silence:

> For the Court to infer consent from the nonresponsive creditors and equity holders, the Debtors must show under basic contract principles that the Court may construe silence as acceptance because (1) the creditors and equity holders accepted a benefit knowing that the Debtors, as offerors, expected compensation; (2) the Debtors gave the creditors and equity holders reason to understand that assent may be manifested by silence or inaction, and the creditors and equity holders remained silent and inactive intending to accept the offer; or (3) acceptance by the creditors and equity holders can be presumed due to previous dealings between the parties.

Emerge Energy, 2019 WL 7634308*,* at *18.

None of the situations enumerated above apply here. The Debtors cannot rely on the silence of Starry Group's public shareholders and holders of subordinated claims, who are receiving no consideration, as a manifestation of their acceptance of the Releases. Indeed, there can be no contractual consent by silence because the Debtors are not offering anything of benefit to these parties. Rather, they are extinguishing a right these investors may have against non-debtor third parties unless they affirmatively submit an opt-out form. This is a particularly onerous requirement to place on public investors, many of whom must rely on broker-dealer intermediaries to deliver the appropriate forms and instructions to them.

B. The Non-Debtor Releases do not satisfy the standard to be approved as non-consensual because they are not: (i) fair to the releasing parties; (ii) necessary to the reorganization; and (iii) supported by the facts of this case.

The Debtors cannot show that the Releases are "consensual," nor can they justify the imposition of the Releases on a non-consensual basis. The Third Circuit

has indicated that allowing non-consensual non-debtor releases is an "extraordinary remedy" that should only be used sparingly. *See In re Continental Airlines*, 203 F.3d at 217.[5] The hallmarks of permissible non-consensual non-debtor releases include: (i) fairness, particularly whether the release was given in exchange for fair consideration, beyond what the class was entitled to as creditors under the Plan; (ii) necessity to the reorganization; and (iii) specific factual findings to support these conclusions. *Id.* at 214-15. Specifically, courts in this circuit have considered the following factors in determining whether non-consensual releases satisfies the "hallmarks" discussed in Continental: "(i) the non-consensual release is necessary to the success of the reorganization; (ii) the releasees have provided a critical financial contribution to the debtor's plan; (iii) the releasees' financial contribution is necessary to make the plan feasible; and (iv) the release is fair to the non-consenting creditors, i.e., whether the non-consenting creditors received reasonable compensation in exchange for the release." *In re Spansion, Inc.*, 426 B.R. at 144-145.

When applying the *Continental* factors to the facts of this case, it is abundantly clear that the release provisions contained in the Release contravene

[5] In *In re Continental Airlines*, 203 F.3d at 211, the Third Circuit rejected a plan provision that released and permanently enjoined shareholder lawsuits against present and former officers and directors who were not in bankruptcy. The court held that the release and injunctive provisions fell squarely into the Section 524(e) prohibition because they amounted to nothing more than a lockstep discharge of nondebtor liability. The Court held open the possibility that "there are circumstances under which [it] might validate a non-consensual release that is both necessary and given in exchange for fair consideration," *Id*. at 214, n. 11, but made this comment in light of releases and permanent injunctions issued in such extraordinary cases as *Robins*, *Manville*, and *Drexel*. 524(e). *See Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694 (4th Cir. 1989); *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89 (2d Cir.1988); *Drexel Burnham Lambert Trading Corp. v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.)*, 960 F.2d 285 (2d Cir. 1992); *see also Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 143 (2d. Cir. 2005) (Second Circuit held a "nondebtor release in a plan of reorganization should not be approved absent the finding that truly unusual circumstances render the release terms important to the success of the plan. . . .").

Bankruptcy Code Section 524(e) and applicable Third Circuit law. The release is unfair and lacks any consideration whatsoever. In the present case, as in *Continental*, there is no evidence of any consideration specifically in exchange for the release of claims against non-debtors or that the non-debtors made any contributions to the Plan. Therefore, the Debtors have not shown that the releases are fair to the Debtors' shareholders and subordinated claimants. Based on the above, it is the Commission's position that the Releases should be deleted from the Plan or the Plan should be amended to provide that shareholders and subordinated claimants are not bound by the Releases.

CONCLUSION

For all of the foregoing reasons, the SEC requests that the Court deny approval of the Disclosure Statement and confirmation of the Plan unless the Plan is amended to provide that either (a) the Releases are deleted from the Plan or (b) that public shareholders and holders of subordinated claims be required to opt in to the Releases in order to be bound.

Dated: New York, New York
March 23, 2023

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

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