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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
WESTINGHOUSE ELECTRIC COMPANY LLC, *et al.*,	:	Case No. 17-10751 (MEW)
Debtors.[1]	:	(Jointly Administered)

WIND DOWN CO'S OBJECTION TO MOTION OF TIMOTHY ELLIS TO ALLOW LATE FILING OF ADMINISTRATIVE CLAIM

[1] On September 25, 2018, many of the Debtors' Chapter 11 Cases were closed pursuant to the *Court's Order (I) Consolidating the Administration of Certain Remaining Matters at the Lead Case; (II) Entering a Final Decree Closing Certain Affiliate Cases; and (III) Granting Related Relief* [ECF No. 3956]. The Debtors in the remaining chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, if any, are: Westinghouse Electric Company LLC (0933), Stone & Webster Services LLC (5448), WEC Carolina Energy Solutions, Inc. (8735), WEC Carolina Energy Solutions, LLC (2002), WECTEC Global Project Services Inc. (8572), WECTEC LLC (6222), and WECTEC Staffing Services LLC (4135). The Debtors' principal offices are located at 1000 Westinghouse Drive, Cranberry Township, Pennsylvania 16066.

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W Wind Down Co LLC ("**Wind Down Co**"), the company established pursuant to the joint chapter 11 plan (the "**Plan**")[1] of Westinghouse Electric Company LLC and certain of its affiliates (collectively, in their capacities as chapter 11 debtors, the "**Debtors**"), which was formed for the benefit of holders of claims against the Debtors and is responsible for administering the Debtors' obligations pursuant to the Plan, files this objection (the "**Objection**") to the *Motion of Timothy Ellis to Allow Late Filing of Administrative Claim* [ECF No. 4633] (the "**Motion**"). The Motion seeks an order allowing Mr. Ellis to file an untimely Administrative Expense Claim against Wind Down Co pursuant to Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"). In support of this Objection, Wind Down Co respectfully represents as follows:

PRELIMINARY STATEMENT

1. Mr. Ellis waited to pursue his claim against the Debtors until over three years after the Court-approved deadline for doing so passed on August 31, 2018 (the "**Admin Bar Date**"). Now, after his claims against the reorganized Westinghouse Electric Company, LLC (as reorganized under the Plan, "**Reorganized Westinghouse**" and, together with its reorganized debtor affiliates, the "**Reorganized Debtors**") were dismissed with prejudice in another forum, he seeks authorization to file an untimely claim against the Debtors on the grounds that his tardiness was allegedly the result of excusable neglect. It was not.

2. Excusable neglect is established only in exceptional circumstances, such as where a claimant was incapable of timely filing his or her claim. Mr. Ellis's own allegations establish that he was not the victim of any such kind of exceptional circumstance. His Motion

[1] *Modified Second Amended Joint Chapter 11 Plan of Reorganization* [ECF No. 2986]. Capitalized terms used but not otherwise herein defined shall have the meanings ascribed to such terms in the Plan.

acknowledges that he knew the Debtors were in bankruptcy and received notice of the Plan, which established the Admin Bar Date. Even after Reorganized Westinghouse explicitly stated in its responses to Mr. Ellis's claim that such claim had been discharged and thus could only be asserted against the Debtors' estates (if at all), Mr. Ellis delayed his assertion of an Administrative Expense Claim in these Chapter 11 Cases for an additional two years.

3. Mr. Ellis took the legal position that because his claim arose after the Bankruptcy Court entered its order confirming the Debtors' Plan [ECF No. 2988] (the "**Confirmation Order**"), he was not bound by the Plan or the Admin Bar Date and thus could pursue his claim solely against Reorganized Westinghouse in his preferred forum—the United States District Court for the Western District of Pennsylvania (the "**Trial Court**")—without filing even a reservation of rights before this Court. The Motion acknowledges this was a high-risk strategy, stating that whether his claim was a claim against the Debtors' estates, on the one hand, or Reorganized Westinghouse, on the other hand, was a "novel" and "not resolved" area of the law. Now, after betting all his chips on the wrong hand, Mr. Ellis seeks to avoid the repercussions by requesting this Court to bend the rules in light of his mistaken legal strategy. It is well established that Mr. Ellis – not the Debtors' estates – must bear the consequences of his high-risk strategy. Even if Mr. Ellis's legal strategy was the result of a genuine mistake of law, courts have consistently held that a mistake of law is not a ground for excusable neglect.

4. Likely recognizing that his mistaken legal strategy does not constitute excusable neglect, Mr. Ellis attempts to divert this Court's attention by attempting to draw into question the adequacy of certain of the several notices delivered to him. These claims are without merit, have already been adjudicated and rejected by the Trial Court, and should similarly be denied by this Court.

5. Allowing Mr. Ellis to file his untimely claim more than three years after the Admin Bar Date would significantly prejudice Wind Down Co, the Debtors' chapter 11 estates, and other creditors—most notably, the Debtors' largest unsecured creditors (the holders of Class 3B General Unsecured Claims), which have not received a full recovery under the Plan. Further, Mr. Ellis's substantial delay makes it unduly expensive and difficult for Wind Down Co to, on behalf of the Debtors' estates, investigate and obtain useful discovery with respect to his claim. And permitting an untimely claim on grounds as unexceptional as Mr. Ellis's would open the floodgates for numerous others to do the same, thereby exponentially increasing the prejudice to Wind Down Co, the Debtors' estates, and creditors that timely asserted their claims. For these reasons, and the reasons discussed below, the Motion should be denied.

BACKGROUND

I. The Plan, Confirmation Order, and Admin Bar Date

6. On March 29, 2017, each Debtor filed a petition commencing a voluntary case before this Court under chapter 11 of the Bankruptcy Code (collectively, the "**Chapter 11 Cases**").

7. On March 28, 2018, the Bankruptcy Court entered its Confirmation Order. The order expressly provides that the terms of the Plan (including the Admin Bar Date) are "incorporated by reference into and are an integral part of" the Confirmation Order. *See* Confirmation Order ¶ 1.[2]

8. In turn, the Plan, which is attached to the Confirmation Order as Exhibit A, provides that other than with respect to certain inapplicable exceptions, requests for payment of

[2] *See also* Confirmation Order ¶ 5 ("The failure to specifically describe or include any particular provision of the Plan in this Confirmation Order shall not diminish or impair the effectiveness of such provision, it being the intent of this Court that the Plan be approved and confirmed in its entirety.").

Administrative Expense Claims "must be filed and served on the Debtors no later than the Administrative Expense Claims Bar Date." Plan § 2.1. The Plan further provides that holders of Administrative Expense Claims that, like Mr. Ellis, fail to file and serve their Administrative Expense Claims by the Admin Bar Date "shall be forever barred, estopped, and enjoined from asserting such Administrative Expense Claims against the Debtors, Wind Down Co, and the Reorganized Debtors, or their property, and such Administrative Expense Claims shall be deemed compromised, settled, and released as of the Effective Date." *Id.*

9. The Plan became effective on August 1, 2018 (the "**Effective Date**"), discharging and releasing the Reorganized Debtors from all claims against the Debtors' chapter 11 estates in exchange for the rights afforded to such claimants by the Plan (which rights are subject to any and all applicable bar dates). Plan § 11.1.

II. Mr. Ellis Repeatedly Receives Notice of the Admin Bar Date, Both Before and After the Termination of His Employment

10. Shortly after this Court issued the Confirmation Order, the Debtors caused that certain *Notice of Entry of Order Confirming Plan of Reorganization* [ECF No. 3035] (the "**Confirmation Order Notice**") to be served upon Mr. Ellis via first class mail. *See Aff. Service* [ECF No. 3063] at 285. The Confirmation Order Notice explained that the Confirmation Order, Plan, and other related documents were available free of charge from the Debtors' restructuring website (www.kccllc.net/westinghouse) (the "**Restructuring Website**"). Pursuant to the Confirmation Order, the form and manner of such notice were "adequate under the circumstances, and no other or further notice is necessary." Confirmation Order ¶ 46.

11. Mr. Ellis alleges that: (a) his supervisor informed him on May 16, 2018 that his group was being restructured and that he would consequently be terminated effective May 31, 2018; (b) his employment was in fact terminated on or about May 31, 2018; and (c) his

Administrative Expense Claim arose on account of such termination. *Compl. Civil Action*, Case No. 2:18cv1442 (W.D. Pa. Oct. 26, 2018) [ECF No. 1] (the "**Ellis Complaint**") ¶¶ 9, 10, 18; Mot. ¶¶ 11, 12, 16 (explaining that Mr. Ellis alleges age discrimination in connection with the termination of his employment).

12. Over two months after Mr. Ellis's Administrative Expense Claim against the Debtors allegedly arose, the Debtors caused that certain *Notice of Occurrence of Effective Date of Debtors' Modified Second Amended Joint Chapter 11 Plan of Reorganization* [ECF No. 3705] (the "**Effective Date Notice**") to be served upon Mr. Ellis via first class mail on August 1, 2018. *See Aff. Service* [ECF No. 3724] at 292.

13. The Effective Date Notice, in accordance with the Confirmation Order, stated that the Admin Bar Date was August 31, 2018 and that "[h]olders of Administrative Expense Claims that are required to file and serve a request for payment of such Administrative Expense Claims that do not file and serve such a request by the [Admin Bar Date] shall be forever barred, estopped, and enjoined from asserting such Administrative Expense Claims against the Debtors, or their property and such Administrative Expense Claims shall be deemed discharged as of the Effective Date." Effective Date Notice at 2.

14. Mr. Ellis admits that he received two notices, including the Confirmation Order Notice, prior to the termination of his employment that the Debtors sent to the same address as the Effective Date Notice, though he conveniently asserts that he cannot recall receiving the Effective Date Notice. Mot. ¶ 43. Mr. Ellis further asserts that, prior to his termination, he took the bankruptcy notices he had received to an unnamed human resources employee (the "**HR Director**") who told him that those notices did not apply to him. Mot. ¶¶ 10, 45. Notwithstanding that allegation, the Trial Court determined that even viewing the evidence in the light most

favorable to Mr. Ellis, he failed to rebut the presumption that he received the Effective Date Notice as he "offer[ed] no evidence to rebut [the receipt of notice] other than his inability to 'recall' receiving the notice despite reviewing 'all mail that is delivered to his home.'" *Ellis* v. *Westinghouse, LLC*, No. 2:18-cv-01442, 2020 WL 4499931 at *7 (W.D. Pa. Aug. 5, 2020) (the "**Trial Court Decision**"). Furthermore, the Trial Court found that such notice was proper as a matter of law. *Id.* at *9. In coming to this holding, the Trial Court rejected Mr. Ellis's claim that the Effective Date Notice's language failed to satisfy constitutional due process requirements. *Id.* at *8. The Trial Court similarly determined that the HR Director's alleged statements to Mr. Ellis were irrelevant because, among other reasons: (1) Mr. Ellis talked to the HR Director *before* he was terminated (*i.e.*, *before* he was a creditor of the Debtors) and before he received the Effective Date Notice; and (2) "to the extent the alleged comments of the HR Director could have caused the Plaintiff to lower his guard, the Plaintiff was, at the time he received the third notice, represented by counsel with whom he could have consulted upon receiving the later Notice." *Id.*

III. Mr. Ellis Elects to Pursue His Claims Against Reorganized Westinghouse Rather than Wind Down Co

15. On July 3, 2018, Mr. Ellis filed a charge of discrimination with the Equal Employment Opportunity Commission alleging age discrimination in connection with his termination. Mot. ¶ 12.

16. The Admin Bar Date occurred on August 31, 2018. Notwithstanding Mr. Ellis's receipt of multiple notices concerning the Admin Bar Date both before and after his alleged Administrative Expense Claim arose, Mr. Ellis failed to file a timely request for payment or even a reservation of rights in the Chapter 11 Cases.

17. Instead, Mr. Ellis filed the Ellis Complaint against Reorganized Westinghouse before the Trial Court on October 26, 2018. *Id.* ¶ 16. Mr. Ellis did not name Wind

Down Co as a defendant. When the case was reopened at the Trial Court on July 25, 2019, Reorganized Westinghouse argued that Mr. Ellis's claims were Administrative Expense Claims that should have been filed against Wind Down Co by the Admin Bar Date. *Id.* ¶ 18. Shortly after, Reorganized Westinghouse reiterated this argument when it filed a motion for summary judgment on November 14, 2019. Case No. 2:18cv1442 (W.D. Pa.) [ECF No. 31] (the "**Summary Judgment Motion**"). The Trial Court entered its Trial Court Decision denying the Summary Judgment Motion on August 5, 2019, and the Third Circuit Court of Appeals reversed and remanded the Trial Court Decision on August 30, 2021. *Ellis* v. *Westinghouse Electric Co., LLC*, 11 F.4th 221, 239 (3d Cir. 2021) (the "**Third Circuit Decision**"). In accordance with the Third Circuit Decision, the Trial Court granted summary judgment in favor of Reorganized Westinghouse on October 8, 2021. Case No. 2:18cv1442 (W.D. Pa.) [ECF No. 80].

18. Mr. Ellis subsequently filed his Motion before this Court on November 2, 2021—over three years after the Admin Bar Date, and more than two years after Mr. Ellis concedes he was put on actual notice of the possibility he has pursued claims against the wrong party.

ARGUMENT

19. Bankruptcy Rule 9006 governs the admissibility of proofs of claim filed after a court-ordered bar date. *Midland Cogeneration Venture Ltd. P'ship* v. *Enron Corp.* (*In re Enron Corp.*), 419 F.3d 115, 121 (2d Cir. 2005). Under Rule 9006, a bankruptcy court may permit a late filing "where the failure to act was the result of excusable neglect." Fed. R. Bankr. P. 9006(b)(1). The claimant bears the burden of proving excusable neglect. *Enron*, 419 F.3d at 121.

20. In *Pioneer*, the Supreme Court held that what constitutes excusable neglect is ultimately an equitable decision "taking account of all relevant circumstances surrounding the party's omission," including "[1] the danger of prejudice to the debtor, [2] the length of the delay

and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith." *Pioneer Inv. Serv. Co.* v. *Brunswick Assocs. L.P.*, 507 U.S. 380, 395 (1993). The Supreme Court also noted that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." *Id.* at 392.

21. As discussed below, Mr. Ellis does not meet the burden of demonstrating "excusable neglect" under *Pioneer*. While conceding he was aware of the possibility that his claim should be pursued against Wind Down Co, he mistakenly prosecuted his claim solely against Reorganized Westinghouse without filing even a reservation of rights in the Chapter 11 Cases. The fact that his chosen strategy failed and he finds himself at the Bankruptcy Court as a last resort is not a basis for this Court to permit Mr. Ellis to prejudice the Debtors' estates and other creditors by filing an Administrative Expense Claim over three years after the Admin Bar Date.

I. Mr. Ellis's Decision to Pursue His Claim Against Reorganized Westinghouse Is Not a Valid Reason for Delay

a. Mr. Ellis's Mistake of Law Does Not Constitute Excusable Neglect

22. The Second Circuit "take[s] a hard line" in applying *Pioneer*. *Enron*, 419 F.3d at 122 (quoting *Silivanch* v. *Celebrity Cruises, Inc.*, 333 F.3d 355, 368 (2d Cir. 2003)). The third factor, the reason for delay, "predominates" the analysis while the other three factors "are significant only in close cases." *In re Motors Liquidation Co.*, 600 B.R. 482, 488 (Bankr. S.D.N.Y. 2019) ("***Motors Liquidation***") (quoting *Williams* v. *KFC Nat'l Mgmt. Co*, 391 F.3d 411, 415–16 (2d Cir. 2004)).

23. Importantly, "a claimant's neglect [is] not excusable where its failure to comply with the rule was the result of a mistake of law." *In re Motors Liquidation Co.*, 576 B.R. 761, 775 (Bankr. S.D.N.Y. 2017); *see also Enron*, 419 F.3d at 127 (discussing that a claim of

inadvertence is inconsistent with a "conscious tactical decision"); *Canfield* v. *Van Atta Buick/GMC Truck, Inc.*, 127 F.3d 248, 251 (2d Cir. 1997) (per curiam) (discussing the "general rule that a mistake of law does not constitute excusable neglect"); *Mich. Self-Insurers' Sec. Fund* v. *DPH Holdings Corp.* (*In re DPH Holdings Corp.*), 434 B.R. 77, 85 (S.D.N.Y. 2010) ("Legal mistakes are usually not considered excusable neglect . . . .").

24. Here, Mr. Ellis mistakenly elected to pursue his claim solely against Reorganized Westinghouse rather than file a request for payment of an Administrative Expense Claim, or even a reservation of rights, in the Chapter 11 Cases. *DPH Holdings Corp.* and *Matter of Pac. Drilling S.A.*, 616 B.R. 634 (Bankr. S.D.N.Y. 2020) are instructive on the consequences of Mr. Ellis's mistaken legal strategy. In *DPH Holdings Corp.*, the claimant did not file a claim because the debtor was current on its payments; it was not until after the bar date that the creditor learned that the debtor would stop payments. 434 B.R. at 80, 84–85. The district court upheld the bankruptcy court's denial of the late claim, as "there was always a risk" the debtor would stop paying and the failure to file a claim before the bar date was therefore a legal mistake and not excusable neglect. *Id.* at 85. Similarly, in *Pac. Drilling*, the claimant argued that it was unaware whether it would have a claim against the debtor because the result of an arbitration was unknown. 616 B.R. at 644. The court rejected that argument, finding that if the claimant "really thought it had a contingent claim against the other debtors then [it] should have filed a claim against those debtors[.]" *Id.*

25. In this case, Mr. Ellis acknowledges that his assertion of a timely claim against only Reorganized Westinghouse was a high-risk strategy, stating that whether his claim was a claim against the Debtors' estates, on the one hand, or Reorganized Westinghouse, on the other hand, was "a novel area of the law which was not resolved until the Third Circuit issued its

decision [against Mr. Ellis] on August 30, 2021." Mot. ¶ 41. Just as in *DPH Holdings Corp.* and *Pac. Drilling*, Mr. Ellis's mistake of law is not excusable neglect. Indeed, the fact that Mr. Ellis was aware that his claim against Reorganized Westinghouse relied on an unresolved legal theory establishes that he was aware of the risk associated with asserting his claim against only Reorganized Westinghouse and yet decided to do so anyways. Now Mr. Ellis must bear the consequences of his high-risk strategy, not the Debtors' estates.

26. Furthermore, Mr. Ellis's own allegations establish that Reorganized Westinghouse specifically argued no later than July 25, 2019 that Mr. Ellis's claim against Reorganized Westinghouse should be dismissed because it arose as part of the Chapter 11 Cases. Mot. ¶ 18 (evidencing Reorganized Westinghouse's argument that Mr. Ellis's claims were Administrative Expense Claims that should have been filed against Wind Down Co by the Admin Bar Date). It is therefore uncontested that for more than two years, Mr. Ellis was aware of Reorganized Westinghouse's argument of the Admin Bar Date yet declined to file even a reservation of rights in the Chapter 11 Cases.

27. This Court rejected similar tactics in *Motors Liquidation* and should not rule otherwise here. In *Motors Liquidation* the plaintiffs filed a late claim nearly ten years after the bar date arguing that their failure to file a timely proof of claim should be excused as they were entitled to actual notice of the bar date and the notice that occurred was inadequate. 600 B.R. at 489. The Court assumed the plaintiffs' due process rights were violated but noted that the assumption "only explain[s] a portion of the [plaintiffs'] delay" because the plaintiffs' lawyer attended a case management conference where the court warned parties that they needed to file a motion seeking authorization to file a late claim promptly. *Id.* Instead of doing so, the plaintiffs waited another two years, which the Court found was an inexcusable delay. *Id.* at 489–90.

28. Mr. Ellis chose the same path as the plaintiffs in *Motors Liquidation*. Even if this Court were to disregard the several notices that the Debtors sent to Mr. Ellis, including the Confirmation Notice and the Effective Date Notice, it is uncontested that Mr. Ellis waited over two years after Reorganized Westinghouse, during a case management conference before the Trial Court, told Mr. Ellis that his claims were subject to the Plan and therefore he needed to bring a late claim against Wind Down Co. Like the plaintiffs in *Motors Liquidation*, Mr. Ellis failed to act promptly with no valid reason. The Motion should accordingly be denied.

b. Mr. Ellis's Other Claims Regarding the Reason for Delay Are Without Merit and Have Already Been Rejected

29. Likely recognizing that his mistaken legal strategy does not constitute excusable neglect, Mr. Ellis attempts to divert this Court's attention by attempting to draw into question the adequacy of certain of the several notices delivered to him. These claims are without merit, have already been adjudicated and rejected by the Trial Court, and should similarly be denied by this Court.

30. *First*, as discussed above, the Debtors provided Mr. Ellis with notice of the Admin Bar Date on multiple occasions, both before and after the conduct that allegedly gave rise to his Administrative Expense Claim (the Debtors' termination of Mr. Ellis's employment). *See Aff. Service* [ECF No. 3063] at 285; *Aff. Service* [ECF No. 3724] at 292.

31. *Second*, this Court's own orders have already confirmed that the form and manner of service of such notice was proper and adequate. *See, e.g.*, Confirmation Order ¶ 46 (form and manner of service of Confirmation Order Notice were "adequate under the circumstances, and no other or further notice is necessary"); *Id.* ¶ 47 (requiring notice of the Effective Date, in the form of the Effective Date Notice, to be provided to interested parties via first class mail).

32. *Third*, the Trial Court Decision on a motion for summary judgment viewing the evidence in the light most favorable to Mr. Ellis ruled that, (a) Mr. Ellis failed to rebut the presumption that he received the Effective Date Notice; and (b) such notice was proper as a matter of law. Trial Ct. Decision at *7–*9.[3]

33. *Fourth*, other employees who were terminated after the Debtors' bankruptcy petition timely filed requests for payment of Administrative Expense Claims. For example, after Elton Massey, Kirt Hurlburt, Patricia Adams, John Jennings, Johnnie Hall, and Katrina Baker's employment by the Debtors was terminated on or about July 31, 2017, they filed Administrative Expense Claims on behalf of themselves and other WARN Act claimants on August 31, 2018. *Massey Plaintiffs' Mot. Allowance Admin. Expense Claims* [ECF No. 3844]; *see also Mot. Seeking Allowance Payment Admin. Class Claim WARN Act Damages* [ECF No. 3865] (WARN Act claims filed by Kent Gladden, Andrew Fleetwood, and Rodney Cavalieri on behalf of themselves and other claimants). Like these claimants, Mr. Ellis was represented by counsel and was well aware of the Debtors' Chapter 11 Cases.

34. *Finally*, while Mr. Ellis alleges that the HR Director told him that he could disregard notices directed at creditors, that was *before* Mr. Ellis was terminated. According to Mr. Ellis, the effective date of the Debtors' termination of his employment occurred on May 31, 2018, and he was notified of such termination on May 16, 2018. Ellis Compl. ¶ 10. Thus, when the Effective Date Notice was served upon Mr. Ellis over two months later, Mr. Ellis was well aware

[3] In its ruling, the Trial Court cites the "stringent approach to the bankruptcy version of [the] receipt rule" and to Second Circuit case law. Trial Ct. Decision at *7. In the Second Circuit "proof that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed." *In re Great Atl. & Pac. Tea Co., Inc.*, 604 B.R. 650, 658 (Bankr. S.D.N.Y. 2019) (quoting *Hanger* v. *United States*, 285 U.S. 427, 430 (1932)) (internal quotation marks omitted). While the Trial Court acknowledged a "nuance with regard" to the presumption between the Third Circuit and Second Circuit, it explained that this nuance is inapplicable to bankruptcy cases. Trial Ct. Decision at *7 n.5.

that he had potential claims against the Debtors' estates. Indeed, on July 3, 2018—approximately one month before the Effective Date Notice was delivered to his address—Mr. Ellis filed a charge of discrimination with the Equal Employment Opportunity Commission in connection with the Debtors' termination of his employment. Mr. Ellis's allegations regarding his conversation with the HR Director prior to his termination has no bearing on the adequacy of the Effective Date Notice or any other notice provided to Mr. Ellis after his termination. Not surprisingly, the Trial Court rejected this same contention as irrelevant. Trial Ct. Decision at *8.

35. In sum, Mr. Ellis repeatedly received adequate notice of the Admin Bar Date, both before and after the termination of his employment, yet decided to pursue his claim solely against Reorganized Westinghouse. That mistaken legal strategy does not constitute excusable neglect. The Motion should accordingly be denied.

II. Mr. Ellis Waited Unreasonably Long to Assert His Claim in the Chapter 11 Cases

36. Mr. Ellis substantial delay in asserting his Administrative Expense Claim in these Chapter 11 Cases similarly weighs against granting the Motion. *See In re Tronox Inc.*, No. 09-10156, 2014 WL 5801058, at *2 (Bankr. S.D.N.Y. Nov. 7, 2014) (finding delay of two years "even after it learned the key facts on which [the creditor] relies is substantial and insufficiently explained").

37. A claims bar date is "an integral part of the reorganization process." *Enron*, 419 F.3d at 127. It is intended to enable bankruptcy estates "to identify with reasonable promptness the identity of those making claims against [them] and the general amount of the claims[.]" *Id.* at 128 (citing *In re Hooker Invs., Inc.*, 937 F.2d 833, 840 (2d Cir. 1991)). Accordingly, "a party who misses a deadline must act with reasonable promptness after its neglect

becomes clear to it, and must act promptly to take the action that should have been taken earlier." *Pac. Drilling*, 616 B.R. at 645.

38. As a result of Mr. Ellis's lack of valid reason for his delay in asserting his Administrative Expense Claim in these Chapter 11 Cases, even a short delay would have been unreasonable. *See Enron*, 419 F.3d. at 129 (discussing "where an explanation is nonexistent, or not credible, *both* the 'reason for delay' and the 'length of the delay' factors might weigh in favor of the debtor, even if the delay is, in absolute terms, quite short"). Mr. Ellis's delay, however, was substantial.

39. As discussed above, the Debtors repeatedly provided Mr. Ellis with notice of the Admin Bar Date prior to the occurrence of the same. As the Trial Court found, Mr. Ellis received notice of the Effective Date and the Admin Bar Date. Trial Ct. Decision at *7. Even if such notice was in some manner ineffective, Mr. Ellis's own Motion acknowledges that Reorganized Westinghouse specifically argued on July 25, 2019 that his claim was an Administrative Expense Claim that should have been filed in the Chapter 11 Cases. Mot. ¶ 18. Thus, Mr. Ellis waited to assert his Administrative Expense Claim in the Chapter 11 Cases until no less than 27 months after Reorganized Westinghouse explicitly informed him of the Admin Bar Date, 38 months after the occurrence of the Admin Bar Date, and even longer after he had received notice of the Admin Bar Date. This is well outside the bounds of an excusable length of delay. *See, e.g.*, *Enron*, 419 F.3d at 130 (upholding bankruptcy court's finding that six months after the bar date was an impermissible length of delay); *Motors Liquidation*, 600 B.R. at 490 (discussing two years delay from legal mistake to be significant); *In re AMR Corp.*, 492 B.R. 660, 667 (Bankr. S.D.N.Y. 2013) (finding delay of 3 months after the bar date to be "significant"); *In re Dana Corp.*,

Case No. 06-10354, 2008 WL 2885901, at *6 (Bankr. S.D.N.Y. July 23, 2008) (finding a delay of 21 months after the bar date to constitute unreasonable delay).

40. Mr. Ellis attempts to recast this delay as promptness, arguing that during his three year delay he was pursuing his claim against Reorganized Westinghouse. Mot. ¶ 31. He then blames Reorganized Westinghouse for the delay for litigating, and ultimately prevailing, on appeal. *See id.* ¶ 34–45. This, again, misses the point. Nothing prevented Mr. Ellis from asserting his Administrative Expense Claim, or at least filing a reservation of rights, in the Chapter 11 Cases, after he concedes he was aware of the issue in July 2019. He consciously declined to do so for no less than 27 months (and likely longer). The Motion should accordingly be denied.

III. Allowing Mr. Ellis to File His Untimely Claim Would Unduly Prejudice Wind Down Co and the Debtors' Estates

41. Allowing Mr. Ellis to file his claim at this late stage would unduly prejudice Wind Down Co, the Debtors' estates, and other creditors. Due to Mr. Ellis's substantial delay, it would be unduly expensive and difficult for Wind Down Co to investigate and obtain useful discovery with respect to the key underlying factual issues.

42. Furthermore, permitting the filing of an untimely claim on grounds as unexceptional as Mr. Ellis's would open the floodgates for numerous others to do the same, exponentially increasing the prejudice to Wind Down Co and the Debtors' estates. As this Court recognized in *Motors Liquidation*, "[a]llowing even a single late claim risks inspiring similar efforts from creditors who also missed the bar date." 600 B.R. at 491; *see also In re Lehman Brothers Holdings Inc.*, 433 B.R. 113, 121 (Bankr. S.D.N.Y. 2010) (prejudice to the debtor was "not traceable to the filing of any single additional claim but to the impact of permitting exceptions that will encourage others to seek similar leniency"). If a legal mistake is a sufficient basis for filing a late claim, then there will be no limit, as any party could argue it was unaware that it was

bound by a chapter 11 plan and should therefore be allowed to bring a late claim. That is why courts vigilantly guard against allowing late claims based on legal mistakes. *See Enron*, 419 F.3d at 123 (emphasizing that "the legal system would groan under the weight of a regimen of uncertainty in which time limitations were not rigorously enforced—where every missed deadline was the occasion for the embarkation on extensive trial and appellate litigation to determine the equities of enforcing the bar").

43. Mr. Ellis's disregard of the risk to Wind Down Co demonstrates a lack of appreciation of the importance and purpose of the Admin Bar Date. After years of reconciliation efforts by Wind Down Co and its professionals, Wind Down Co has almost finished reconciling the thousands of claims timely asserted against the Debtors' estates, and preparing to close these Chapter 11 Cases. The bar dates established in the Chapter 11 Cases enabled Wind Down Co to identify all timely filed claims so they could be reconciled in an efficient and organized manner. Allowing Mr. Ellis and other similarly situated claimants to file late claims would undermine this objective and the reasonable expectations of claimants that timely asserted their claims—most notably, the holders of Class 3B General Unsecured Claims, the Debtors' largest unsecured creditors, who have not received a full recovery under the Plan.

44. To avoid such unfairness and prejudicing Wind Down Co, the Debtors' Estates, and claimants, the Motion should be denied.

IV. Mr. Ellis Did Not Act in Good Faith

45. Given that Mr. Ellis fails to carry his burden with respect to the other three *Pioneer* factors, the Bankruptcy Court need not evaluate whether he acted in good faith. *See Motors Liquidation*, 600 B.R. at 491 (discussing that the good faith analysis was unnecessary given that the other three factors favored denying authorization to file a late claim).

46. If this Court does decide to evaluate the final *Pioneer* factor, it should determine that Mr. Ellis has failed to establish his good faith for the same reasons he has failed to establish the other *Pioneer* factors. Most notably, Mr. Ellis declined to assert his Administrative Expense Claim in the Chapter 11 Cases for three years after having actual notice upon the receipt of the Effective Date Notice, and it is uncontested that he failed to act for over two years after Reorganized Westinghouse informed him of the need to bring his Administrative Expense Claim at the Bankruptcy Court. That tactical decision is not good faith. *See Pac. Drilling*, 616 B.R. at 647 (discussing that the plaintiff did "not act equitably" when it waited until after the plan confirmation to file its claim); *Motors Liquidation*, 600 B.R. at 491 (discussing that "[t]he Court [did] not share [the] view" that the plaintiffs acted in good faith given their delay to file their claims despite protracted litigation and bankruptcy processes). The Motion should be denied.

RESERVATION OF RIGHTS

47. Wind Down Co reserves any and all of its rights with respect to the Motion and Mr. Ellis's Administrative Expense Claim, including, to the extent the Court does not sustain the Objection on the grounds set forth herein or any party submits new briefing or evidence, any and all rights to (a) conduct discovery related to the factual assertions made in the Motion or the merits of Mr. Ellis's Administrative Expense Claim and (b) submit additional briefing and evidence in connection with the Motion or the merits of Mr. Ellis's Administrative Expense Claim.

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WHEREFORE Wind Down Co respectfully requests entry of an order denying the Motion and such other and further relief as the Court may deem just and appropriate.

Dated: December 14, 2021
New York, New York

/s/ Kyle J. Kimpler

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