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RICHARD W. WIEKING
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NORTHERN DISTRICT OF CALIFORNIA

Handwritten signature and initials

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9 Attorneys for Plaintiff Oak Point Partners, Inc.
10 [10688]

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION

14 OAK POINT PARTNERS, INC.,

15 Plaintiff,

16 v.

17 DR. HOLGER LESSING, not individually,
18 but only in his capacity as the insolvency
19 administrator in charge of the assets of
20 Exodus Communications GmbH,

21 Lessing Trebing Bert
22 Hanauer Landstrasse 289
23 D-60314 Frankfurt am Main
24 Frankfurt am Main,
25 GERMANY

26 Defendant.

Case No: **CV 11-0332 8**

**COMPLAINT FOR BREACH OF
PROMISSORY NOTE**

HRL

DEMAND FOR JURY TRIAL

27 Plaintiff Oak Point Partners, Inc. ("Oak Point" or "Plaintiff"), as successor in interest to
28 certain assets of EXDS, Inc. f/k/a Exodus Communications, Inc. ("EXDS"), brings this
complaint against defendant Dr. Holger Lessing, not individually, but only in his capacity as
the insolvency administrator ("Lessing" or "Defendant") in charge of the assets of Exodus

1 Communications GmbH ("Exodus GmbH"), upon personal knowledge as to itself and its own
2 actions and upon information and belief as to all other matters, as follows:

3 **PRELIMINARY STATEMENT**

4 1. While in operations, EXDS and its related entities were providers of internet
5 infrastructure outsourcing services for enterprises with mission-critical internet operations.
6 Through their worldwide network of Internet Data Centers ("IDCs"), the companies offered
7 sophisticated system and network management solutions, along with technology professional
8 services to provide optimal performance for customers' web sites. In order to continue the
9 build-out of IDCs throughout Germany, Exodus GmbH, a wholly-owned subsidiary of Exodus
10 Internet Limited, which itself was a wholly-owned subsidiary of EXDS, entered into a Term
11 Loan Agreement and Promissory Note (each defined herein and collectively referred to as the
12 "Note") for an amount in excess of \$23 million with EXDS. Although Exodus GmbH used the
13 disbursements under the note to complete its build-out of IDCs, Exodus GmbH did not satisfy
14 its indebtedness to EXDS.

15 **PARTIES**

16 **Plaintiff**

17 2. EXDS, which was based in Santa Clara, California, operated its business
18 through its multiple domestic and foreign subsidiaries.

19 3. On September 26, 2001, EXDS and certain of its domestic subsidiaries filed
20 petitions for relief under chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101, et seq., in the
21 United States Bankruptcy Court for the District of Delaware ("Bankruptcy Court"), assigned
22 Case No. 01-10539.

23 4. By an order dated June 5, 2002, the Bankruptcy Court confirmed the Second
24 Amended Joint Plan of Reorganization of EXDS, as amended by the modifications set forth in
25 the confirmation order (as confirmed, "Plan"). Pursuant to the Plan, Alvarez & Marsal, LLC,
26 assignee of Alvarez & Marsal, Inc. ("A&M"), was appointed as Plan Administrator, which, in
27 turn, designed Richard M. Williamson ("Williamson") to act as the sole officer and director of
28 EXDS.

1 5. On September 6, 2007, A&M, through Mr. Williamson, sold the remaining
2 assets of EXDS, including all right, title, and interest in and to the Note, to Oak Point pursuant
3 to that certain Purchase Agreement and Assignment of Claims and Interests ("APA"),
4 attached as **Exhibit 1**.

5 6. Oak Point is an Illinois corporation with a place of business in Palatine, Illinois.

6 **Defendant**

7 7. On or about May 23, 2002, Dr. Holger Lessing was appointed insolvency
8 administrator in charge of the assets of Exodus GmbH and charged with liquidating the
9 assets for the benefit of creditors of Exodus GmbH. In that capacity, Dr. Lessing is
10 authorized to sue and be sued on behalf of and in connection with claims by and against
11 Exodus GmbH. Under German insolvency law, the insolvency administrator is the only
12 authority entitled to manage and dispose of the debtor's assets, regardless of whether these
13 assets are located in Germany or abroad. Consequently, the debtor's management loses the
14 ability to represent the insolvent debtor. Insolvency administrators act in their own name.
15 Therefore, any claim a creditor has against the insolvent debtor must be asserted against the
16 insolvency administrator.

17 8. A creditor's claims against a German debtor must be acknowledged
18 ("festgestellt") by the German insolvency administrator. Therefore, in this case Plaintiff seeks
19 to obtain Acknowledgement ("Feststellung") of the principal amount due and owing to Oak
20 Point of \$23,725,623, plus applicable interest and costs (hereinafter also "the Claim") to the
21 insolvency table ("Insolvenztabelle") as a claim according to Article 38 of the German
22 Insolvency Act ("Insolvenzordnung").

23 **JURISDICTION AND VENUE**

24 9. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332, in that
25 this is an action between citizens of a State and citizens of a foreign state where the matter in
26 controversy exceeds the amount of \$75,000, exclusive of interest and costs.

27 10. Venue of this action is proper in this District pursuant to 28 U.S.C. § 1391, in
28 that a substantial part of the events giving rise to the claims alleged herein occurred in this

1 District. The Note was negotiated and entered into in California, and the Note contains
2 jurisdiction-consent and venue-selection provisions for the Northern District of California, San
3 Jose Division.

4 **NATURE OF THE ACTION**

5 11. This Complaint arises out of Exodus GmbH's failure to pay amounts due to Oak
6 Point, as successor to EXDS, under the Note, and further the refusal of the Defendant to
7 acknowledge the Claim of the Plaintiff as a valid debt against Exodus GmbH and
8 acknowledge said claim in the official list of creditors' claims, the insolvency table, for the
9 insolvency proceedings of Exodus GmbH.

10 **COUNT 1 – BREACH UNDER THE NOTE**

11 12. Plaintiff repeats and realleges each of the allegations above identified as
12 Paragraphs 1 through 11 of this Complaint as though fully set forth herein.

13 13. On or about January 1, 2000, EXDS and Exodus GmbH entered into the Term
14 Loan Agreement dated January 1, 2000 ("Term Loan Agreement"), with a related and
15 incorporated Term Loan Sheet. True and correct copies of the Term Loan Agreement and
16 Loan Term Sheet are attached hereto as **Exhibit 2**.

17 14. On or about October 1, 2000, EXDS and Exodus GmbH executed that certain
18 Promissory Note ("Promissory Note") in the amount of \$23,725,634.00. A true and correct
19 copy of the Promissory Note is attached hereto as **Exhibit 3**.

20 15. Pursuant to the Term Loan Agreement, the Term Loan Sheet and Promissory
21 Note are incorporated into the Term Loan Agreement by specific reference.

22 16. Pursuant to the Note, EXDS financed and disbursed not less than
23 \$23,725,634.00 on or about the dates set forth on the Term Loan Sheet.

24 17. In exchange and in consideration for EXDS disbursing the loan for the purpose
25 of financing IDCs for Exodus GmbH, Exodus GmbH agreed to repay the principle amount
26 due under the Note by the tenth anniversary of the Promissory Note and to make semi-
27 annual interest payments to EXDS. Accordingly, the principle amount due under the Note
28 was due on October 1, 2010.

1 18. EXDS performed all of its obligations under the Note.

2 19. Exodus GmbH has defaulted on the terms of the Note by failing and refusing to
3 remit the payment due under the Note.

4 20. Due to the default of Exodus GmbH, Oak Point is entitled to a claim against the
5 assets of Exodus GmbH for the entire amounts due and owing under the Note.

6 21. As of the date of this Complaint, the principle amount due and owing to Oak
7 Point is \$23,725,634.00, plus all applicable interest and costs. Between the date of the loan
8 disbursements and May 23, 2002, the presumed date that Exodus GmbH commenced its
9 insolvency proceeding, interest accrued semi-annually at the stated rate of 11.375% totaling
10 \$4,933,736.00 of accrued interest for that period.

11 22. On or about October 25, 2010, Oak Point timely lodged a claim against
12 Dr. Lessing and the insolvency proceeding of Exodus GmbH for the full amount due under
13 the Note. Oak Point registered the Claim with the Defendant in his capacity as insolvency
14 administrator over Exodus GmbH's assets, attached as **Exhibit 4**.

15 23. Upon information and belief, assets of Exodus GmbH currently exist to satisfy,
16 in whole or part, the amount due and owing under the Note to Oak Point.

17 24. Defendant objected to the claim, as evidenced by an official note of the
18 insolvency court at Frankfurt am Main. Upon information and belief, Dr. Lessing has without
19 a satisfactory basis refused to include Oak Point's claim for payment due under the Note in
20 the insolvency table of Exodus GmbH.

21 25. Oak Point is entitled to have its claim against Exodus GmbH included in the
22 insolvency table for the insolvency proceedings of Exodus GmbH for the full amount due
23 under the Note, as a claim with rank according to Article 38 German Insolvency Act
24 ("Insolvenzordnung").


25 **PRAYER FOR RELIEF**

26 WHEREFORE, Oak Point respectfully requests that this Court award Oak Point the
27 following relief:

- 1 (a) Entered judgment in favor of Oak Point, against Defendant, for all amounts due
2 under the Note, including \$23,725,634.00 principal, plus all interest accruing
3 through and up to May 22, 2002, plus applicable costs and attorneys' fees
4 ("Judgment");
- 5 (b) An order directing Dr. Lessing to include the Judgment as an allowed claim in
6 favor of Oak Point in the insolvency table for the insolvency proceedings of
7 Exodus GmbH with a rank according to Article 38 German Insolvency Act
8 (German Law on Insolvency Proceedings); and
- 9 (c) Such other and further relief, at law or in equity, which this Court deems
10 reasonable and just and to which Oak Point may be entitled.

11
12 Dated: July 6, 2011

THE GUERRINI LAW FIRM

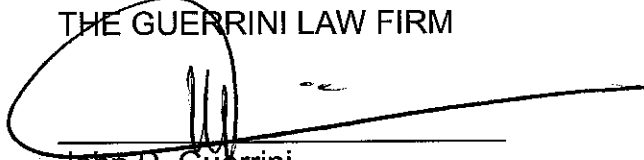

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20 **DEMAND FOR JURY TRIAL**

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22 Plaintiff hereby demands trial by jury.

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24 Dated: July 6, 2011

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