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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
WINDSTREAM HOLDINGS, INC., *et al.*, [1]	:	Case No. 19-22312 (RDD)
Debtors.	:	(Jointly Administered)
	:	**Hearing Date: April 16, 2019** **Hearing Time: 10:00 am (est)** **Objection Deadline: April 8, 2019**

LIMITED OBJECTION OF U.S. BANK NATIONAL ASSOCIATION SOLELY IN ITS CAPACITY AS UNSECURED NOTES INDENTURE TRUSTEE, TO DEBTORS' AMENDED MOTION FOR INTERIM AND FINAL ORDERS PURSUANT TO 11 U.S.C. §§ 105, 361, 362, 363, 364, 503 AND 507 (I) AUTHORIZING THE DEBTORS TO OBTAIN SENIOR SECURED SUPERPRIORITY POSTPETITION FINANCING, (II) GRANTING LIENS AND SUPERPRIORITY ADMINISTRATIVE EXPENSE CLAIMS, (III) AUTHORIZING USE OF CASH COLLATERAL, (IV) GRANTING ADEQUATE PROTECTION, (V) MODIFYING THE AUTOMATIC STAY, (VI) SCHEDULING A FINAL HEARING AND (VII) GRANTING RELATED RELIEF

[1] The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's federal tax identification number, are set forth in the *Debtors' Motion for Entry of an Order (I) Directing Joint Administration of Chapter 11 Cases and (II) Granting Related Relief*. The location of the Debtors' service address is: 4001 North Rodney Parham Road, Little Rock, Arkansas 72212.

U.S. Bank National Association (the "**Indenture Trustee**"), solely in its capacity as unsecured notes indenture trustee under certain indentures (as amended, the "**Indentures**")[2], pursuant to which Debtor Windstream Services, LLC, as Issuer, issued and certain Debtors identified therein have guaranteed unsecured notes in excess of $1 billion in principal amount outstanding, including (i) 2020 Senior Notes - 7.750%, due October 15, 2020; (ii) 2021 Senior Notes - 7.750%, due October 1, 2021; (iii) 2022 Senior Notes - 7.500%, due June 1, 2022; (iv) 2023 Senior Notes - 7.500%, due April 1, 2023; and (v) 2023 Senior Notes - 6.375%, due August 1, 2023 (collectively, the "**Notes**" and the holders thereof, "**Noteholders**"), by and through its undersigned counsel, respectfully submits this Limited Objection (the "**Limited Objection**") to the Amended Motion of the captioned debtors (the "**Debtors**") for *Entry of Interim and Final Orders Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364, 503, and 507 (I) Authorizing the Debtors to Obtain Senior Secured Superpriority Postpetition Financing, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Authorizing the Use of Cash Collateral, (IV) Granting Adequate Protection, (V) Modifying the Automatic Stay, (VI) Scheduling a Final Hearing and (VII) Granting Related Relief* [ECF No. 42] (as amended, the "**DIP Motion**").[3] In support of its Limited Objection, the Indenture Trustee respectfully represents as follows:

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[2] The Notes are governed by the following Indentures: (i) Indenture for the 7.75% Senior Notes due 2020, dated as of October 6, 2010, among Windstream Services, LLC (as successor to Windstream Corporation) and the Indenture Trustee; (ii) Indenture for the 7.75% Senior Notes due 2021, dated as of March 28, 2011, among Windstream Services, LLC (as successor to Windstream Corporation) and the Indenture Trustee; (iii) Indenture for the 7.50% Senior Notes due 2022, dated as of November 22, 2011, among Windstream Services, LLC (as successor to Windstream Corporation) and the Indenture Trustee; (iv) Indenture for the 6 3/8% Senior Notes due 2023, dated as of January 23, 2013, among Windstream Services, LLC (as successor to Windstream Corporation) and the Indenture Trustee (the "**6 3/8 % Indenture**"); and (v) Indenture for the 7.50% Senior Notes due 2023, dated as of March 16, 2011, among Windstream Services, LLC (as successor to Windstream Corporation) and the Indenture Trustee.

[3] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the DIP Motion.

PRELIMINARY STATEMENT

1. As courts regularly observe, chapter 11 bankruptcy debtors are not the best parties to ensure that the proposed terms of a DIP facility are fair and in the best interest of all creditors, particularly unsecured creditors. *See, e.g., In re Texion Corp.,* 596 F.2d 1092, 1098 (2d Cir. 1979) ("The debtor in possession is hardly neutral. Its interest is in its own survival, even at the expense of equal treatment of creditors"). While the Debtors here have succeeded in obtaining DIP Loans at reasonable rates, they have failed in important respects to protect the interests of their Noteholders (as hereinafter defined) and other unsecured creditors. The upcoming final DIP hearing is the time for the Court, with the benefit of time and the assistance of the affected creditors, to take stock of what has transpired and to eliminate provisions in the Final Order that disproportionately favor the DIP Lenders and the Prepetition Secured Parties to the prejudice of unsecured creditors, including the Noteholders. It is also the time to correct drafting deficiencies and oversights in the Interim Order before they become permanent features of the legal landscape of these Bankruptcy Cases.

2. The Debtors secured debt as of the Petition Date was approximately $4.467 billion in principal amount, consisting of: (a) $2.575 billion of Prepetition Credit Facility Obligations; (b) $600 million in Prepetition First Lien Notes Obligations; (c) $100 million in Prepetition Midwest Notes Obligations; and (d) $1.216.9 billion in Prepetition Second Lien Notes Obligations.

3. The Indenture Trustee serves as indenture trustee for holders of more than $1 billion in principal amount of unsecured Notes issued or guaranteed by a significant number of the Debtors, including the indenture for the 6 3/8% Notes that Judge Furman held to have been violated.

4. In 2015, the Debtors engaged in a large, questionable sale-leaseback transaction that resulted in the sale of much of what is needed by all of the Debtors to operate their business to a newly formed, affiliated, public entity, Uniti Group, Inc., and the lease of such assets to a newly formed entity (Debtor Holdings) under a Master Lease dated as of April 24 , 2015 (the "Master Lease"), which requires payment of $653.1 million in annual "rent" (the "Sale-Leaseback Transaction").[4] The long term implications of the Sale-Leaseback Transaction upon these Bankruptcy Cases remains uncertain. Importantly, Holdings is not an obligor on any of the prepetition secured and unsecured debt and it had not, as of the Petition Date, pledged its rights as the lessee of the Master Lease. The Master Lease adds a fundamental element of uncertainty because it requires payment of over substantial "rent," it covers critical assets needed by the Debtors to operate and it will be heavily scrutinized by parties on all sides over the coming months. As more fully explained below, the Indenture Trustee believes that it is important to avoid inappropriately placing any unnecessary lien on Holdings' assets.

5. The Indenture Trustee respectfully submits that the Court should not approve a Final Order unless and until the Debtors and their lenders remove certain provisions, including but not limited to provisions that could prejudice the rights of the Debtors, their estates and creditors with respect to Holdings, the Sale Leaseback Transaction and the Master Lease.

6. With respect to the DIP Lenders, the Indenture Trustee's limited objections include that DIP Collateral should not extend to Avoidance Proceeds as currently provided. *See* DIP Motion, at p. 38. To the extent that the DIP Lenders are granted liens against the property of Holdings (including in the Master Lease) and other Unencumbered Property such as Avoidance

[4] The Indenture Trustee notes that the Sale-Leaseback Transaction has already been judicially determined to have violated covenants in the 6 3/8% Indenture. See U.S. Bank National Ass'n v. Windstream Services, LLC, 17-cv-7857 (S.D.N.Y., February 15, 2019) [Dkt # 245].

Proceeds, unperfected commercial tort claims and claims against directors and officers, the Indenture Trustee respectfully requests that the Final Order require the DIP Lenders to marshal their other DIP Collateral to satisfy their claims. In the alternative, the Indenture Trustee would ask that any provisions in the Final Order waiving marshaling be removed so that the rights of the Debtors, the Noteholders and other unsecured creditors to seek marshalling be preserved.

7. Moreover, in connection with any DIP Lien in Holdings' assets, including the Master Lease, the Indenture Trustee respectfully requests that the Final Order include the following language to protect the rights of the Debtors' estates and other creditors affected by the Sale-Leaseback Transaction and the status of the Master Lease:

> *Reservation of Rights Regarding Master Lease Transaction*. The DIP Agent shall be deemed a "Permitted Leasehold Mortgagee" under that certain Master Lease dated April 24, 2015, by and among CSL National, LP, the landlords party thereto and Holdings, as tenant. Notwithstanding the foregoing and any rights granted by Holdings to and accepted by the DIP Agent under the DIP Credit Agreement or otherwise provided in this Final Order with respect to Holdings (including releases and any adequate protection), the DIP Lenders, the Prepetition Secured Parties, the Creditors' Committee, each unsecured creditor and the Debtors each reserve all rights and remedies under applicable law, if any, with respect to the execution and performance of the Master Lease and the transactions giving rise to it, and nothing in this Final Order shall impact or prejudice the rights of any such party to benefit from any recoveries resulting from any adjudication or settlement of any claims arising from, asserted, or that could have been asserted, on account thereof.

8. With respect to the treatment of the Prepetition Secured Parties in the Final Order, the Indenture Trustee objects to the granting of excessive adequate protection at the expense of the Noteholders and other unsecured creditors. The Final Order inappropriately expands the scope of Adequate Protection Liens to include the broader category of all DIP Collateral, including Avoidance Actions and other Unencumbered Property. Moreover, it would grant First Lien

Adequate Protection Liens and First Lien 507(b) Claims to First Lien Secured Parties[5] on Holdings and any other Debtors that become DIP Loan Parties. The Prepetition Secured Parties have no lien rights against Holdings and the Court should not allow gratuitous Adequate Protection Liens and superpriority claims to further complicate the legal issues and claims surrounding the Sale-Leaseback Transaction, the Master Lease and Holdings. The Final Order would also improperly waive marshaling and the "equities of the case" limitations upon Section 552 post-petition liens in a case where the value of the Debtors' business may depend crucially upon the restructured rights of the Debtors in the assets covered by the Master Lease or other rights outside the purview of existing Prepetition Collateral.

9. The Final Order should also be revised so that the Indenture Trustee is added as a notice party for financial reporting and similar purposes in the Final Order, and to address the other objections herein.

10. The Indenture Trustee understands that the Official Committee of Unsecured Creditors (the "**Committee**") is negotiating certain modifications to the Final Order and that a portion of the Limited Objections addressed herein may be resolved in that manner. Additionally, the Indenture Trustee hopes to consensually resolve its Limited Objections prior to the hearing on this matter and understands that the Debtors are amenable to addressing certain of the below objections in the Final Order. Because the Indenture Trustee's objections have not yet been finally resolved as of its extended objection deadline, the Indenture Trustee files this Limited Objection to the DIP Motion based upon the following grounds.

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[5] The proposed Final Order is also ambiguous with respect to whether other Debtors not obligated on the Prepetition Secured Facilities are granting adequate protection liens to the Second Lien Secured Parties as well. *See* proposed Final Order ¶ 15(k). The Indenture Trustee recognizes that the Proposed Final Order has not been filed with the Court as of the date of this filing. Accordingly citations to portions of the proposed Final Order may be obsolete by the date of the Final DIP hearing.

BACKGROUND

11. On February 25, 2019 (the "**Petition Date**"), each of the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**") in the United States Bankruptcy Court for the Southern District of New York (the "**Court**"). No trustee or examiner has been appointed in these cases.

12. On March 1, 2019, the Court entered the Interim DIP Order approving DIP Loans up to $400 million and set April 16, 2019 for final approval of the DIP Motion, including authorization for DIP Loans in the aggregate of up to $1 billion. The Indenture Trustee received an extension from the Debtors until April 8, 2019, to file this Limited Objection.

13. Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, the Debtors continue to operate their businesses and manage their properties as debtors in possession.

14. On March 12, 2019, the Office of the United States Trustee appointed the Committee pursuant to section 1102(a)(1) of the Bankruptcy Code. [ECF No. 136]. The Indenture Trustee was not selected to serve on the Committee.

15. Information regarding the Debtors' history and business operations, capital and debt structure, and the events leading up to the commencement of these cases has been gleaned from the *Declaration of Tony Thomas, Chief Executive Officer and President of Windstream Holdings, Inc., (I) in Support of Debtors' Chapter 11 Petitions and First Day Motions and (II) Pursuant to Local Bankruptcy Rule 1007-2.* [ECF No. 27] (the "**Thomas Decl.**").

SPECIFIC OBJECTIONS

16. A court should approve a proposed debtor-in-possession financing only if such financing "is in the best interest of creditors generally." *In re Roblin Indus., Inc.*, 52 B.R. 241, 244 (Bankr. W.D.N.Y. 1985) (citing *In re Texlon Corp.*, 596 F.2d at 1098-99). In addition, a court

must review the terms of a debtor-in-possession facility to determine whether those terms are fair, reasonable and adequate given the circumstances of the debtor-borrower and the proposed lender. *See, e.g., In re Mid-State Raceway, Inc.*, 323 B.R. 40, 60 (Bankr. N.D.N.Y. 2005); *In re Ames Dep't Stores, Inc*., 115 B.R. 34, 37 (Bankr. S.D.N.Y. 1990) (court should focus on terms of proposed financing to ascertain whether they are reasonable); s*ee also In re Mid-State Raceway, Inc*., 323 B.R. 40, 60 (Bankr. N.D.N.Y 2005) (looking at several factors in considering whether to approve postpetition secured financing, including whether financing is necessary to preserve the assets of the estate).

A. <u>The Court Should Exclude Avoidance Proceeds from the DIP Collateral and Require Marshalling.</u>

i. The Court Should Exclude Avoidance Proceeds From the DIP Collateral.

17. The Interim Order grants the DIP Lenders liens and superpriority claims on previously unencumbered property including Avoidance Proceeds. *See* Interim Order [ECF No. 75], at p. 43. It is well established that avoidance actions exist for the benefit of the Debtors' estates. *See Bear Stearns Sec. Corp. v. Gredd,* 275 B.R. 190, 194 (S.D.N.Y. 2002). The intent underlying the avoidance powers is to allow a debtor's estate to recover payments on behalf of all creditors. *See In re Integrated Testing Prods. Corp.,* 69 B.R. 901, 904 (D.N.J. 1987) (finding that only the trustee, acting on behalf of all creditors, has a right to recover preference payments). Consequently, numerous courts have severely restricted a debtor-in-possession's ability to pledge avoidance actions as security for postpetition financing. This is so because avoidance actions are deemed property of the bankruptcy estate, and not property of a debtor in possession. *See, e.g., Official Comm, of Unsecured Creditors* v. *Chinerv (In re Cvbergenics, Corp.).* 226 F.3d 237, 244 (3d Cir. 2000) ("The purpose of fraudulent conveyance law is to make available to creditors those assets of the debtor that are rightfully part of the bankruptcy estate, even if they have been

transferred away. When recovery is sought under section 544(b) of the Bankruptcy Code, any recovery is for the benefit of all unsecured creditors, including those who individually had no right to avoid the transfer.").

18. It is not plausible that the DIP Lenders need to have Avoidance Proceeds included within the DIP Collateral. They are already getting priming liens on other DIP Collateral that secures over $4 billion in existing prepetition debt. The Debtors are treating the First Lien Secured Parties[6] with claims exceeding $2.5 billion as over-secured by paying their interest and professional fees during these Bankruptcy Cases.[7] The Debtors are now also treating the Second Lien Secured Creditors as oversecured by agreeing to pay their professional fees in the Final Order.

19. In light of the foregoing, the Indenture Trustee respectfully requests that the Court exclude Avoidance Proceeds from the scope of the DIP Collateral.

ii. In the Alternative, the DIP Lenders Should Marshal Away From Avoidance Proceeds.

20. To the extent that the DIP Collateral includes Unencumbered Property, including Avoidance Proceeds, the Indenture Trustee requests that the DIP Lenders should be required to use commercially reasonable efforts to seek repayment from other sources first under the marshalling doctrine. The DIP Credit Agreement and Interim Order both waive marshalling obligations of the DIP Lenders in favor of the Debtors' estates. *See* DIP Motion, at p. 44. The doctrine of marshalling requires a secured creditor first to seek recovery from its collateral before looking to common assets. The purpose of marshalling is "to prevent the arbitrary action of a senior lienor from destroying the rights of a junior lienor or a creditor having less security." *Meyer* v.

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[6] The "**First Lien Secured Parties**" consist of the Prepetition Credit Facility Secured Parties, the Prepetition First Lien Notes Secured Parties and the Prepetition Midwest Notes Secured Parties.

[7] The proposed Final Order also proposes to pay the attorneys' fees of Second Lien Secured Parties.

United States, 375 U.S. 233, 237 (1963). Application of the marshalling doctrine is available to benefit unsecured creditors in bankruptcy because the bankruptcy estate by virtue of the strong-arm powers under section 544(a) holds the status of a judicial lien creditor. *See, e.g., Kittav* v. *Atl. Bank of N.Y. (In re Global Serv. Grp. LLC),* 316 B.R. 451, 463 (Bankr. S.D.N.Y. 2004) ("The trustee has standing to invoke Marshalling because he has the status of a hypothetical lien creditor.")

21. Here, because Avoidance Proceeds should not be included at all within the DIP Collateral, it would be appropriate for the Court in the alternative as an equitable matter to require marshalling to the extent such DIP Liens are granted. In any event, the Court should not approve any affirmative waiver of the doctrine of marshalling in the Final DIP Order for the DIP Lenders as it relates to the Avoidance Proceeds.

B. The Court Should Eliminate Excessive "Adequate Protection" to Prepetition Secured Parties.

22. Adequate protection is, by statute, available only to protect prepetition secured creditors to the extent that "the stay . . . use, sale, or lease . . . results in a decrease in the value of such entity's interest in such property." 11 U.S.C. § 361. A secured creditor seeking adequate protection ordinarily has the burden to prove the "validity, priority, or extent of [its security] interest," *Wilmington Trust Co.* v. *AMR (In re AMR Corp.),* 490 B.R. 470, 477 (S.D.N.Y. 2013), and, ultimately, the amount of diminution in collateral value between the beginning and end of the bankruptcy cases. *See In re Weinstein,* 227 B.R. 284, 297 (B.A.P. 9th Cir. 1998); *In re Residential Capital, LLC,* 501 B.R. 549, 592 (Bankr. S.D.N.Y. 2013). In addition, the value of the collateral as of the Petition Date must ordinarily take into account problems that would have depressed the collateral's value if it had been sold at that time. *See id.,* 501 B.R. at 597.

23. The Indenture Trustee has several objections to the proposed adequate protection package.

i. The Adequate Protection Liens and Superpriority Claims Are Too Broad.

24. The Interim Order provides layer upon layer of adequate protection in the form of liens, superpriority claims, cash payments and procedural benefits. With respect to the Adequate Protection Liens and related superpriority claims there are several problems. First, there are drafting problems in the formulation the "diminution in value" test set forth in the Interim Order (and the draft Final DIP Order provided to the Indenture Trustee). This is important because it is the test to establish the dollar size of any Adequate Protection Liens and Superpriority Claims to be granted. Paragraph 15 of the Interim DIP Order defines a "Prepetition Adequate Protection Claim" as "an amount equal to the **aggregate** diminution in the value of the Prepetition Secured Parties' interests in the Prepetition Collateral (including Cash Collateral) from and after the Petition Date, if any, for any reason provided for under the Bankruptcy Code." *See* Interim Order, at ¶ 15 (emphasis added). The Final Order should not create a collective Prepetition Secured Parties' claim for the aggregate diminution in value of their collective interests in all Prepetition Collateral, but should be on a class by class basis for the established diminution in value of each respective class of Prepetition Secured Party's unavoidable, perfected interests in the Debtors' property as of the Petition Date on an estate by estate basis.

25. Second, the Interim Order inappropriately expands Adequate Protection Liens to include all DIP Collateral from the relevant Debtors. The additional collateral would include Avoidance Proceeds, unperfected commercial tort claims and other Unencumbered Property. For the reasons stated above, Avoidance Proceeds should remain unencumbered. There is no

articulated reason why the Prepetition Secured Parties should not each be given replacement liens having the same scope as their prepetition liens instead of broader liens.

26. Moreover, the Interim Order improperly expands the universe of Debtors who grant would First Lien Adequate Protection Liens and super-priority claims. This is so because the universe of DIP Loan Parties is greater than the universe of Debtors obligated to the Prepetition Secured Parties, and the First Lien Secured Parties have included a provision that expands their Adequate Protections Liens and section 507(b) Claims against these extra Debtors:

> *provided* that the First Lien Adequate Protection Liens shall attach to the assets of, and the First Lien 507(b) Claims shall be against, any Debtor that is or becomes a DIP Loan Party but that was not an obligor under the Prepetition Credit Facilities subject to the terms hereof; and provided, further, that the Adequate Protection Liens shall extend to and encumber any Collateral that is or becomes DIP Collateral.

See Interim Order, at ¶ 15(k).

27. The Prepetition Secured Parties currently have no prepetition lien rights against Holdings or the Master Lease. They may or may not have perfected security interests in the claims of other Debtors against Holdings and other parties related to the Sale Leaseback Transaction. While it may be necessary for the Debtors to offer up Holdings as part of the DIP Liens to induce the DIP Lenders to make the DIP Loans (with an appropriate reservation of rights), there is no corresponding justification for encumbering Holdings in favor of any of the Prepetition Secured Parties or for Holdings to give them super priority claims. This post-petition effort to patch a hole in the scope of prepetition collateral with Adequate Protection Liens and 507(b) Claims should not be permitted because it is prejudicial to the Noteholders. Even more mischief may result from granting liens and claims to a subset of the Prepetition Secured Parties as the Interim Order provides. The Court should avoid setting the stage for additional complications in these

Bankruptcy Cases as the Debtors and others address the issues relating to the Sale-Leaseback Transaction, Holdings and the Master Lease.

ii. If the Prepetition Secured Parties Are Granted Adequate Protection Liens in Previously Unencumbered Property, Marshalling Should Be Preserved.

28. Bankruptcy Courts across the country exclude unencumbered assets from the scope of adequate protection liens and superpriority claims. *See, e.g, In re Gymboree Group, Inc.,* Case No. 19-30258 (KLP), Docket No. 348 at 15, 18 (Bankr. E.D. Va. Feb. 15, 2019) (excluding avoidance actions, commercial tort claims, and the proceeds thereof from adequate protection liens and claims); *In re Promise Healthcare Group, LLC,* Case No. 18-12491 (CSS), Docket No. 218 at 12, 14 (Bankr. D. Del. Dec. 4, 2018) (excluding avoidance actions and the proceeds thereof and commercial tort claims and the proceeds thereof, in part, from adequate protection liens and claims); *In re Aralez Pharmaceuticals US Inc.,* Case No. 18-12425 (MG), Docket No. 98 at 15(i)-(ii) (Bankr. S.D.N.Y. Sept. 14, 2018) (providing that adequate protection liens only attach to Prepetition Collateral and further providing that adequate protection claims cannot be paid out of the proceeds of avoidance actions); *In re The Weinstein Company Holdings LLC,* Case No. 18-10601 (MFW), Docket No. 267 at 12(d)-(e) (Bankr. D. Del. Apr. 19, 2018) (excluding avoidance actions and commercial tort claims from adequate protection liens and claims).

29. The purpose of adequate protection is not to allow a secured lender to *enhance* its collateral. Rather, the purpose is to ensure that prepetition lenders receive the security they bargained for prior to the petition date or, in other words, to preserve the secured creditor's position following the commencement of a bankruptcy case. *In re WorldCom, Inc.*, 304 B.R. 611, 618-19 (Bankr. S.D.N.Y. 2004) (citations omitted); *In re Townley,* 256 B.R. 697, 700 (Bankr. D.N.J. 2000). If the Prepetition Secured Parties are permitted to enhance their Prepetition Collateral with

Adequate Protection Liens and superpriortiy claims, the Court should not compound the problem by including a broad waiver of marshalling in the Final Order.

ii. Equities of the Case Under Section 552 Should Be Preserved.

30. Even though there is no requirement under the DIP Credit Agreement, the proposed DIP Order would include a waiver of the bankruptcy estates' statutory entitlement to apply the "equities of the case" exception under section 552(b) of the Bankruptcy Code. That provision permits the Debtors, and other parties-in-interest to argue that equitable considerations warrant the exclusion of certain post-petition proceeds from Prepetition Collateral. *See* Interim DIP Order, at ¶ 10(d).

31. Section 552(b) permits a court to exclude a lien on postpetition "proceeds, products, offspring, or profits" of prepetition collateral based on the "equities of the case." The "equities of the case provision is intended to "prevent secured creditors from receiving windfalls and to allow bankruptcy courts broad discretion in balancing the interests of secured creditors against the general policy of the Bankruptcy Code." *See Sprint Nextel Corp. v. U.S. Bank Nat'l Ass'n (In re TerreStar Networks, Inc.),* 457 B.R 254, 270 (Bankr. S.D.N.Y. 2011) (citation omitted). "[T]he equity exception is to prevent a secured creditor from reaping benefits from collateral that has appreciated in value as a result of the trustee's/debtor in possession's use of other assets of the estate." *Marine Midland Bank v. Breeden (In re Bennett Funding Grp.)*, 255 B.R. 616, 634 (N.D.N.Y. 2000) (citations omitted).

32. Courts have declined to approve waivers of the "equities of the case" at the uncertain beginnings of complex cases. *See TerreStar Networks, Inc.,* 457 B.R. at 272-73 (request for 552(b) waiver premature because factual record not fully developed); *In re Metaldyne Corp*., No. 09-13412 (MG), 2009 WL 2883045, at *6 (Bankr. S.D.N.Y. June 23, 2009) ("[T]he Court, in

its discretion, declines to waive prospectively an argument that other parties in interest may make. If, in the event, the Committee or any other party [in] interest argues that the equities of the case exception should apply to curtail a particular lender's rights, the Court will consider it.")

33. Judicial caution is appropriate here because the value of the reorganized Debtors and of the Prepetition Collateral may depend upon unforeseeable factors or events, including possibly business or legal solutions relating to problems posed by the Sale-Leaseback Transaction, the Master Lease or related claims. The Prepetition Collateral does not include Holding's rights in the Master Lease or billions of dollars of assets that were transferred away by the Debtors in 2015, in violation of applicable covenants, but are still being used to operate the business. *See generally, Nanuet Nat 'I Bank v. Photo Promotion Assocs., Inc. (In re Photo Promotion Assocs., Inc.),* 61 B.R. 936, 939 (Bankr. S.D.N.Y. 2000) ("The equity exception is meant for the case where the trustee or debtor in possession uses other assets of the bankrupt estate (assets that would otherwise go to the general creditors) to increase the value of the collateral.") (citation omitted)); *see also In re 680 Fifth Ave. Assocs.,* 154 B.R. 38, 41 (Bankr. S.D.N.Y. 1993)("[T]he [552(b)]exception offers a bankruptcy court, essentially a court of equity, considerable latitude in balancing the rights of competing creditor entities with the overall rehabilitative scheme of bankruptcy law.").

34. If there is an increase the value of the Prepetition Secured Parties' Prepetition Collateral, then the Noteholders and other unsecured creditors should be afforded the opportunity at the appropriate time to argue that such value inures to the Debtors' estates, and not only to the Prepetition Secured Parties.

C. <u>The Indenture Trustee Should be Added as a Notice Party</u>.

35. The Indenture Trustee respectfully requests, in light of the substantial debt that it represents that the Court include the Indenture Trustee as a notice party with the same notice rights being afforded other parties in these cases, in the following instances:

- ¶ 10(d) – notice of occurrence of an Event of Default;
- ¶ 15(j) – recipient of financial report;
- ¶ 16 – recipient of the budget; and
- ¶ 32 – reasonable weekly access to advisors.

36. Because the Debtors have agreed to provide this information to other significant creditor constituencies in this case, it will not be an additional burden to provide it to the Indenture Trustee as well.

D. <u>Other Objections</u>.

***i. The Consent Fee is Inappropriate*.**

37. The "consent" payments to the Prepetition Credit Secured Parties are inappropriate. Without apparent justification beyond the Debtors' desire to avoid a DIP priming fight, the Debtors have agreed to pay consent fees to the Prepetition Lenders aggregating 1.25% of the amount owed to them, or approximately $32,187,500. *See* Interim Order, at ¶ 18. This multi-million dollar amount appears to be in response to a discretionary request by the Prepetition Lenders to seek their consent and to pay for it when the Bankruptcy court requires neither. In light of the other adequate protection being granted the Prepetition Lenders, including post-petition interest at the default rate and the payment of professional fees, this opportunistic consent fee is objectionable and the Court should not permit it in the Final Order. Significantly, the adequate protection being granted to the First Lien Notes having the same secured position includes neither default interest nor a consent

fee. If the absence of these payment are adequate for the First Lien Notes, they should also be adequate for the Prepetition Lenders. To the extent any such consent fee has been paid, it should reduce any future adequate protection payments otherwise available to the Prepetition Lenders.

ii. The Challenge Procedure Should be Revised.

38. Creditors that have standing are afforded 90 days from entry of the Final Order to raise a Challenge to the Debtors' stipulations, admissions, agreements and releases. *See* Interim DIP Order, at ¶ 21. In light of the complexities of these cases and the multiple layers of secured debt, the Final Order should provide that the Indenture Trustee will have complied with the Challenge time limitations as long as it has filed its motion for *STN* standing within such 90-day period, or such longer period as may be afforded the Committee.

iii. Events of Default.

39. The DIP Credit Agreement contains inappropriate default triggers that could drive the Debtors into a free-fall liquidation and should either be revised or eliminated. In particular, Sections 7(viii) and (x) improperly prohibit the Debtors from obtaining alternative financing. The Debtors should not be dis-incentivized from improving upon the terms of the DIP Facility in accordance with their fiduciary duties.

40. Additionally, pursuant to Section 7(x), it is an Event of Default if exclusivity is terminated. Section 7(xviii) already details the provisions that any acceptable plan must contain. As long as a plan proposed by a party other than the Debtors contains such provisions, there is no reason that such parties should be prevented from doing so if the Court determines to terminate exclusivity.

RESERVATION OF RIGHTS

41. This Limited Objection raises issues that the Indenture Trustee believes are outstanding based upon its discussions with the Debtors, but may be resolved after the filing of this Limited Objection. To the extent that any of the issues the Indenture Trustee believed were resolved remain unresolved at the time of the hearing on the DIP Motion but not addressed herein, the Indenture Trustee reserves all of its rights to raise such issues with the Court at the hearing or amend or supplement this Limited Objection, and the filing of this Limited Objection shall not be treated as a waiver of any kind of any additional arguments or objections of the Indenture Trustee to the DIP Motion.

WHEREFORE, the Indenture Trustee respectfully requests that the Court (i) sustain this Limited Objection, (ii) deny the DIP Motion as currently proposed, and (iii) grant such other and further relief as it deemed just and equitable.

Dated: April 8, 2019

Respectfully submitted,

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE	
WINDSTREAM HOLDINGS, INC., *et al.*,	Chapter 11
Debtors.[1]	Case No. 19-22312 (RDD)
	(Jointly Administered)

CERTIFICATE OF SERVICE

The undersigned certifies that on April 8, 2019, he caused a true and correct copy of the *Limited Objection of U.S. Bank National Association Solely In Its Capacity as Unsecured Notes Indentured Trustee, to Debtors ' Amended Motion for Entry of Interim and Final Orders Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364, 503, and 507 (I) Authorizing the Debtors to Obtain Senior Secured Superpriority Postpetition Financing, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Authorizing Use of Cash Collateral, (TV) Granting Adequate Protection, (V) Modifying the Automatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief* [D.N. 209], to be served (1) via the Court's electronic case filing system ("ECF") on all those parties receiving such service; (2) via email to the email addresses provided

[1] The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's federal tax identification number, are set forth in the *Debtors' Motion for Entry of an Order (I) Directing Joint Administration of Chapter 11 Cases and (II) Granting Related Relief*. The location of the Debtors' service address is: 4001 North Rodney Parham Road, Little Rock, Arkansas 72212.

on Exhibit A hereto; (3) and via first-class mail postage prepaid on the parties identified on Exhibit B hereto.

Dated: April 8, 2019

Respectfully submitted,

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Exhibit A

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