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**UNITED STATES BANKRUPTCY COURT
 SOUTHERN DISTRICT OF NEW YORK**

In re:)	
)	Chapter 11
WINDSTREAM HOLDINGS, INC., <i>et al.</i> , ¹)	Case No. 19-22312 (RDD)
)	
Debtors.)	(Jointly Administered)
)	

**DEBTORS’ REPLY IN SUPPORT OF
 DEBTORS’ MOTION FOR ENTRY OF INTERIM AND
 FINAL ORDERS AUTHORIZING THE DEBTORS TO PAY
 CERTAIN PREPETITION CLAIMS OF (I) CRITICAL VENDORS,
 (II) LIEN CLAIMANTS, AND (III) SECTION 503(B)(9) CLAIMANTS
 IN THE ORDINARY COURSE OF BUSINESS ON A POSTPETITION BASIS**

The above-captioned debtors and debtors in possession (collectively, the “Debtors”) hereby submit this reply in support of the *Debtors’ Motion for Entry of Interim and Final Orders Authorizing the Debtors to Pay Certain Prepetition Claims of (I) Critical Vendors (II) Lien Claimants, and (III) Section 503(B)(9) Claimants in the Ordinary Course of Business on a*

¹ The last four digits of Debtor Windstream Holdings, Inc.’s tax identification number are 7717. Due to the large number of Debtors in these chapter 11 cases, for which joint administration has been granted, a complete list of the debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors’ proposed claims and noticing agent at <http://www.kccllc.net/windstream>. The location of the Debtors’ service address for purposes of these chapter 11 cases is: 4001 North Rodney Parham Road, Little Rock, Arkansas 72212.



Postpetition Basis [Docket No. 16] (the “Vendor Motion”) ² and in response to the *Objection of GLM DFW, Inc. to Debtors’ Motion for Authority to Pay Critical Vendors and Lien Claimants* [Docket No. 204] (the “Objection”) to the Vendor Motion. In support of this reply, the Debtors respectfully state as follows:

Introduction

1. On February 25, 2019, the Debtors filed the Vendor Motion seeking entry of interim and final orders authorizing the Debtors to pay certain prepetition claims of Critical Vendors, Lien Claimants, and 503(b)(9) Claimants. As described in the Vendor Motion, this relief is essential to the Debtors’ smooth transition into and operation in chapter 11, all of which ultimately preserves and maximizes value for the benefit of all stakeholders. In an effort to garner consensus for the relief sought in the Vendor Motion, the Debtors engaged with the office of the United States Trustee for the Southern District of New York (the “U.S. Trustee”) and the official committee of unsecured creditors appointed in these chapter 11 cases (the “Creditors’ Committee”), both of which support entry of the proposed final order filed contemporaneously herewith. Other than GLM (defined below), no other party in interest has raised a formal or informal objection to the Vendor Motion.

2. On March 28, 2019, GLM DFW, Inc. (“GLM”) filed the Objection. Throughout the Objection, GLM indiscriminately criticizes both the Debtors and this Court for, among other things, contradicting the principles and spirit of the Bankruptcy Code. While the Debtors contacted GLM in an effort to address its objections, it is clear in both GLM’s actions and the Objection itself that GLM is primarily focused on pressuring the Debtors into paying GLM’s

² Capitalized terms used but not otherwise defined herein shall have the meanings given to them in the Vendor Motion.

prepetition claim. In other words, if GLM is not treated as a Critical Vendor, no vendor may be treated as a Critical Vendor. That is simply not the law and the Debtors respectfully submit that the Court should overrule the Objection. This reply focuses on the primary arguments made by GLM, specifically that: (a) the Debtors are seeking extraordinary and unprecedented relief through the Vendor Motion which fails the standards governing the doctrine of necessity, and (b) GLM should be accorded Critical Vendor status. *See* Obj. ¶¶ 10–18.

3. ***First***, the relief sought under the Vendor Motion is well within precedent from this Court and others and comports with the applicable requirements of the Bankruptcy Code. Where, as here, Debtors have shown that the payment of prepetition claims is critical to maximize the value of their estates, courts in this district and other jurisdictions have routinely authorized payments on account of similar prepetition claims. Contrary to GLM’s argument, it is not necessary that the Debtors publish a list of Critical Vendors. Indeed, discreetly selecting and negotiating with Critical Vendors greatly aids (and has aided) the Debtors’ bargaining power in seeking reductions in claim amounts and favorable trade terms. Publication of a Critical Vendors list would eliminate this bargaining advantage. Moreover, the Debtors have devoted significant time in developing criteria to assess which vendors are truly critical to the Debtors’ reorganization efforts. The Court need not examine each and every claim that the Debtors elect to pay, but instead must assess and approve the criteria (and aggregate cap) for the claims that the Debtors are requesting authority to pay as Critical Vendor Claims. The Debtors’ evidence is more than sufficient to demonstrate that the relief requested in the Vendor Motion is appropriate under the circumstances.

4. ***Second***, through the application of the Debtors’ business judgment and analysis of the aforementioned criteria, the Debtors have determined that GLM does not qualify as a Critical

Vendor. Central to the Debtors' determination was that GLM's services as a waste management service were not sufficiently necessary to the Debtors' reorganization efforts and could be replaced. Indeed, the Debtors have already replaced GLM with an alternative services provider. Even if GLM did satisfy some or all of the applicable criteria, the Debtors are not **required** to pay its prepetition claim—the Vendor Motion seeks authority, but not direction, to pay Critical Vendor Claims.

5. Absent approval of the Vendor Motion, the Debtors' smooth transition into chapter 11 may be threatened, which in turn could negatively affect the Debtors' business operations and potentially destroy enterprise value to the detriment of all stakeholders. For these reasons, the Debtors respectfully submit that the Court should overrule the Objection and approve the Vendor Motion.

Reply

I. The Relief Being Sought In The Vendor Motion Is Routinely Granted By Bankruptcy Courts.

6. As detailed in the Vendor Motion, it is appropriate for courts to authorize the payment of prepetition obligations, including payments to prepetition vendors, where necessary to protect and preserve the estate. *See, e.g., Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 985 (2017) (noting that courts “have approved . . . ‘critical vendor’ orders that allow payment of essential suppliers’ prepetition invoices”); *In re C.A.F. Bindery, Inc.*, 199 B.R. 828, 835 (Bankr. S.D.N.Y. 1996); *see also In re Fin. News Network Inc.*, 134 B.R. 732, 735–36 (Bankr. S.D.N.Y. 1991). In so doing, these courts acknowledge that several legal theories rooted in sections 105(a) and 363(b) of the Bankruptcy Code, among others, support the payment of prepetition claims.

7. Section 363(b) of the Bankruptcy Code allows payment of prepetition claims where such payment represents a sound exercise of the Debtors business judgement. *See In re Ionosphere*

Clubs, Inc., 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (noting that section 363(b) provides “broad flexibility” to authorize a debtor to honor prepetition claims where supported by an appropriate business justification); *see also James A. Phillips*, 29 B.R. at 397 (relying upon section 363(b) as a basis to allow a contractor to pay the prepetition claims of suppliers who were potential lien claimants). Additionally, under section 105(a) of the Bankruptcy Code courts may authorize payments of prepetition obligations when essential to the continued operation of a debtor’s businesses. *See C.A.F. Bindery, Inc.*, 199 B.R. at 835. Courts use the power given to them under section 105(a) of the Bankruptcy Code to authorize payment of prepetition obligations pursuant to the “necessity of payment” rule (also referred to as the “doctrine of necessity”). *Ionosphere Clubs, Inc.*, 98 B.R. at 176. Under the doctrine of necessity, the Debtors must demonstrate the payment of the claims are critical to the Debtors’ organization. *See Fin. News Network Inc.*, 134 B.R. at 735–36.

8. Here, the Debtors are seeking relief to pay a highly selective population of Critical Vendor claims identified because the vendors holding those claims are essential to the Debtors’ businesses and necessary to enable the Debtors to continue operations. In the Vendor Motion, the Debtors have laid out in detail the criteria used to identify Critical Vendor claims for purposes of the relief requested in the Vendor Motion. Vendor Mot. ¶¶ 13-14. This relief falls well within the bounds of the foregoing legal principles and relief routinely granted by courts in this jurisdiction and others.

9. Contrary to GLM’s suggestion that the Vendor Motion is an aberration without precedent, courts in this jurisdiction regularly approve motions seeking relief nearly identical to the relief sought in the Vendor Motion. Specifically, courts have approved critical vendor relief without requiring publication of a list of critical vendors. *See, e.g., In re Aegean Marine Petrol.*

Network Inc., Case No. 18-13374 (MEW) (Bankr. S.D.N.Y. Dec. 6, 2018) (critical vendor order providing trade claimant matrix to professionals of the committee of unsecured creditors under the condition that the matrix is kept confidential); *In re Avaya Inc.*, Case No. 17-10089 (SMB) (Bankr. S.D.N.Y. Feb. 10, 2017) (critical order motion providing creditor matrix on a “confidential and professionals’-eyes-only basis”); *In re BCBG Max Azria Glob. Holdings, LLC*, Case No. 17-10466 (SCC) (Bankr. S.D.N.Y. Mar. 29, 2017) (critical vendor order providing creditor matrix to committee of unsecured creditors and counsel to DIP lender on condition that these parties “shall not disclose any of the information in the matrix to anyone...without prior written consent”); *In re Hawker Beechcraft, Inc.*, Case No. 12-11873 (SMB) (Bankr. S.D.N.Y. May 30, 2012) (critical vendor order providing creditor matrix to U.S. Trustee and professionals retained by committee of unsecured creditors on the condition that these parties “keep the matrix confidential and shall not disclose to anyone” the names of critical vendors and the amount they are being paid). Moreover, the quantum of relief requested is well within precedent for cases of this size and complexity. *See, e.g., In re Sears Holdings Corporation*, Case No. 18-23538 (RDD) (Bankr. S.D.N.Y. Nov. 16, 2018) (granting aggregate critical vendor relief of \$90 million on a final basis); *In re SunEdison*, Case No. 16-10992 (SMB) (Bankr. S.D.N.Y. June 8, 2016) (granting aggregate critical vendor relief of \$52 million); *In re Great Atlantic & Pacific Tea Co., Inc.*, Case No. 10-24549 (RDD) (Bankr. S.D.N.Y. Jan. 13, 2011) (granting aggregate critical vendor relief of \$62 million, which constituted approximately 29% of outstanding accounts payable as of the petition date).

10. For these reasons, the Debtors respectfully submit that the Court should overrule the Objection and grant the Vendor Motion.

II. The Debtors Have Provided Sufficient Evidence In Support of the Vendor Motion.

11. The Debtors are not seeking relief to pay all prepetition vendors. Under the Vendor Motion, the Debtors are only seeking a limited portion of prepetition vendor claims that the

Debtors' management, with the assistance of their advisors, deem to be truly critical. Vendor Mot. ¶ 14. Indeed, the Debtors, with the assistance of their advisors, examined each of their vendor relationships using a specific set of criteria to select those vendors that were absolutely essential to the Debtors' estates, including:

- whether certain specifications or contract requirements prevent, directly or indirectly, the Debtors from obtaining goods or services from alternative sources;
- whether a vendor is a sole-source, limited-source, or high-volume supplier of goods or services critical to the Debtors' business operations;
- whether an agreement exists by which the Debtors could compel a vendor to continue performing on prepetition terms;
- whether alternative vendors are available that can provide requisite volumes of similar goods or services on equal (or better) terms and, if so, whether the Debtors would be able to continue operating while transitioning business thereto;
- the degree to which replacement costs (including, pricing, transition expenses, professional fees, and lost sales or future revenue) exceed the amount of a vendor's prepetition claim;
- whether the Debtors' inability to pay all or part of the vendor's prepetition claim could trigger financial distress for the applicable vendor;
- the likelihood that a temporary break in the vendor's relationship with the Debtors could be remedied through use of the tools available in these chapter 11 cases;
- whether failure to pay all or part of a particular vendor's claim could cause the vendor to hold goods owned by the Debtors, or refuse to ship inventory or to provide critical services on a postpetition basis;
- the location and nationality of the vendor; and
- whether failure to pay a particular vendor could result in contraction of trade terms as a matter of applicable non-bankruptcy law or regulation.

See Vendor Mot. ¶ 13.

12. The Debtors take critical vendor relief very seriously, both on an interim, and going forward, a final basis. Furthermore, the Debtors take seriously their duty and commitment to pay only vendor claims that fall within the foregoing criteria pursuant to the Critical Vendor relief

requested in the Vendor Motion. Further still, the Debtors have been active in negotiating with various vendors to select only those that are absolutely critical to the Debtors' operations at the best deal for the Debtors. Indeed, to date the Debtors have used only a limited portion (less than 10 percent) of the requested Critical Vendor cap amount. However, it is important for the Debtors to maintain flexibility to pay Critical Vendor claims in the future to preserve the value of their business. The Debtors' evidence firmly demonstrates that the relief requested in the Vendor Motion is necessary and appropriate.

13. Contrary to GLM's assertion, the Debtors should not be required to publicly disclose either a list of potential Critical Vendors or actual Critical Vendor payments to support the relief requested in the Vendor Motion. If the Debtors were required to make such disclosures, the Debtors' businesses would potentially be harmed. For example, releasing such information could provide an unfair advantage to the Debtors' competitors by providing such competitors with information as to the Debtors' commercial operations. Additionally, such disclosure could impair the Debtors' ability to reach fair settlements with each vendor on claim amounts and trade terms. Notably, the Debtors have successfully extracted certain concessions from vendors by leveraging this position. Nevertheless, to balance the competing interests of transparency and confidentiality, the Debtors have agreed to provide a matrix with the complete list of the Debtors' Critical Vendors to the U.S. Trustee, the Creditors' Committee, and to the Bankruptcy Court for an in camera review. The Debtors have also agreed to provide reporting regarding payments made to Critical Vendors to the U.S. Trustee and the creditors' committee.

14. For these reasons, the relief requested in the Vendor Motion is appropriate and the Debtors respectfully submit that the Court should overrule the objection.

III. GLM Does Not Qualify As A Critical Vendor.

15. The Debtors' decision to not designate GLM as a critical vendor was a proper exercise of its business judgment. As described above, section 363(b) provides "broad flexibility" to authorize a debtor to honor prepetition claims where supported by an appropriate business justification. *See Ionosphere Clubs*, 98 B.R. at 175. GLM acts as a broker for waste removal groups to dispose of the Debtors' waste. *See* Obj. ¶ 6. The Debtors applied the above-described factors and the Debtors' business judgment to assess whether GLM's role justifies designation of critical vendor status. *See* Vendor Mot. ¶ 13. While third party waste management is obviously helpful to the functioning of any business, such services are not indispensable for the operation of a telecommunications company. Nor are those services irreplaceable. Indeed, the Debtors were able to secure a replacement waste services provider.

16. While the Debtors are sympathetic to the financial difficulty that the critical vendor classifications may pose to some vendors, it does not override the Debtors' duty to closely examine all claims and carefully apply the Critical Vendor Criteria. The Debtors take the fiduciary role seriously, including the unenviable position of making difficult decisions when exercising business judgment to preserve the estate. The determination of Critical Vendors is no exception and the Debtors simply determined that GLM is not a Critical Vendor. Even if GLM did meet certain of the Critical Vendor criteria, since the Debtors are seeking authority but not direction to pay Critical Vendor claims, there would be no guarantee of payment. Ultimately, the Objection is nothing more than an effort to secure payment of GLM's prepetition claim—an effort that must fail.

Conclusion

17. For the reasons set forth above and in the Vendor Motion, the Debtors respectfully request that the Bankruptcy Court overrule the Objection and grant approval of the Vendor Motion.

WHEREFORE, the Debtors respectfully request that the Bankruptcy Court enter the Orders granting the Vendor Motion, and such other relief as the Bankruptcy Court deems appropriate under the circumstances.

Dated: April 12, 2019
New York, New York

/s/ Stephen E. Hessler

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