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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)

DEBTORS' OMNIBUS REPLY TO OBJECTIONS TO APPROVAL OF THE DISCLOSURE STATEMENT FOR THE JOINT CHAPTER 11 PLAN OF REORGANIZATION OF WINDSTREAM HOLDINGS, INC., *ET AL.*, PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

Windstream Holdings, Inc. and its debtor affiliates as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the "Debtors"), respectfully submit this

[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' 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.

omnibus reply (this "Reply") to the objections[2] to the *Disclosure Statement for the Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al., Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 1632] (including all exhibits and other supplements thereto, the "Disclosure Statement" and as modified, amended, or supplemented, the "Amended Disclosure Statement"),[3] and in support of the *Debtors' Motion to Approve (I) the Adequacy of Information in the Disclosure Statement, (II) Solicitation and Notice Procedures, (III) Forms of Ballots and Notices in Connection Therewith, and (IV) Certain Dates with Respect Thereto* [Docket No. 1633] (the "Motion") seeking entry of an order, substantially in the form filed in connection herewith (the "Disclosure Statement Order"). In further support of approval of the Amended Disclosure Statement and entry of the Revised Disclosure Statement Order, the Debtors respectfully state as follows:

Preliminary Statement

1. It is well-settled that the purpose of a hearing to approve a disclosure statement is to determine whether the information provided is adequate as required by section 1125 of the Bankruptcy Code. While this determination includes considerations of accuracy and fairness, it does not include the consideration of specialized, substantive issues a creditor may have with the plan. In the present case, the Debtors are providing clear, accurate, and fair information regarding

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[2] The objections include the following: (a) the U.S. Securities and Exchange Commission (the "SEC") [Docket No. 1724], (b) Element Fleet Corporation ("Element Fleet") [Docket No. 1719], (c) the Lead Plaintiff in the Debtors' Securities Litigation ("Securities Lead Plaintiff") [Docket No. 1726], and (d) the unsecured notes indenture trustees (the "Unsecured Indenture Trustees") [Docket No. 1734] (collectively, the "Objectors"). The unsecured creditors' committee filed a statement and reservation of rights [Docket No. 1735]. Certain tax jurisdictions in Texas (the "Texas Taxing Jurisdictions") filed a formal objection [Docket No. 1641] that was subsequently withdrawn [Docket No. 1717].

[3] Capitalized terms used but not defined herein have the meaning given to them in the *Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al., Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 1631] (the "Plan" and as modified, amended, or supplemented and including all exhibits and other supplements thereto, the "Amended Plan").

the treatment afforded their various creditor constituencies, and, therefore, respectfully submit that the Amended Disclosure Statement be approved.

2. The Debtors received five formal objections and one reservation of rights to the approval of the Disclosure Statement, as well as a number of informal comments. The objections generally fall into three categories: (a) objections to the adequacy of the information contained in the Disclosure Statement; (b) objections to specific Plan provisions, that, although premature and more appropriately addressed in connection with confirmation of the Plan, are invalid; and (c) objections to the proposed settlement with Uniti Group, Inc. (the "Uniti Settlement"). As further described herein, the Amended Disclosure Statement satisfies the applicable standards and the remaining arguments amount to thinly-veiled attempts to litigate confirmation or Uniti Settlement issues that should not preclude the Court's approval of the Amended Disclosure Statement and entry of the Disclosure Statement Order.

3. The Debtors have worked, and will continue to work, with each of the Objectors to resolve their objections consensually prior to the Disclosure Statement Hearing. Indeed, the Debtors have already reached consensual resolution with multiple parties, each of whom have represented that their objections are resolved. Notably, the Debtors have resolved the objections to the disclosure statement (and related reservation of rights) of the official committee of unsecured creditors. Of the remaining objections, those that raise disclosure deficiencies have been addressed through additional language in the Amended Disclosure Statement. Those remaining objections that seek to address alleged deficiencies of the Plan or Uniti Settlement are not properly before the court at this juncture, and their consideration would be premature. Accordingly, the Amended Disclosure Statement satisfies the relevant disclosure standards under section 1125 of the

Bankruptcy and the Debtors therefore respectfully request that the Court overrule the objections and enter the Revised Disclosure Statement Order.

Reply

I. The Amended Disclosure Statement Resolves the Disclosure Objections.

4. The Securities Lead Plaintiff objected on the grounds of inadequate disclosure with respect to the releases, information concerning pending litigation, and treatment of securities litigation claims under the Plan. As reflected by revisions in the Amended Disclosure Statement, the Debtors have provided enhanced disclosure to the extent practicable, including information regarding the securities litigation and case status, these parties' beliefs surrounding releases and Exculpation sought under the Amended Plan, and projected recoveries under the Amended Plan. Further, the Debtors have included language noting that the securities litigation plaintiffs are in Class 9 pursuant to section 510(b) of the Bankruptcy Code and provided language demonstrating that the Securities Lead Plaintiff believes that it should be allowed to act on behalf of the securities litigation plaintiffs to opt-out of the releases. The Debtors continue to work with counsel to the Securities Lead Plaintiff regarding any additional disclosure-related objections and are hopeful that the Securities Lead Plaintiff's objection will be fully resolved prior to the Disclosure Statement Hearing.

5. The Unsecured Indenture Trustees similarly argues that the Amended Disclosure Statement lacks adequate disclosure, but its assertions are inappropriate attempts to litigate issues concerning the Uniti Settlement and confirmation. The Unsecured Indenture Trustees argue that the information provided to Class 6A holders concerning voting options is inadequate, as unencumbered assets are not identified. However, the Debtors are under no obligation to identify all encumbered and unencumbered assets with respect to each voting class, and the standard for approval for a disclosure statement lacking this information—as most do—must simply contain

adequate information for a holder of a claim or interest to make an informed decision in casting its vote. Further, the Unsecured Indenture Trustees have previewed this exact issue before the Court in relation to the Uniti Settlement discovery and approval, and the decision on approval of the Amended Disclosure Statement should not be used as a vehicle to litigate issues wholly unrelated to the adequacy of information contained therein. The Debtors continue to work with counsel to the Unsecured Indenture Trustees regarding their disclosure-related objections and are hopeful such objections will be fully resolved prior to the Disclosure Statement Hearing.

6. Ultimately, the Debtors believe that each of these objections, to the extent relevant, have been addressed by the inclusion of additional disclosures regarding the Objectors' positions, and should therefore be overruled.

II. Other Objections Raise Confirmation Issues and Should be Overruled as Premature.[4]

7. The remaining objections are premature confirmation objections, and none present any basis for the Court to delay solicitation of the Amended Plan.

8. A disclosure statement is intended to serve as the means to educate voting constituents, thereby enabling them to make informed judgments about whether to accept or to reject a plan of reorganization. The hearing to approve a disclosure statement is not meant to address confirmation objections. *See In re Monroe Well Serv., Inc.*, 80 B.R. 324, 333 n. 10 (Bankr. E.D. Pa. 1987) (stating that deciding confirmation issues before disclosure may have a disenfranchising effect because the disclosure statement itself is not mailed to all creditors until after court approval is obtained); *In re Copy Crafters Quickprint*, 92 B.R. 973, 980 (Bankr. N.D.N.Y. 1988) ("[C]are must be taken to ensure that the hearing on the disclosure statement does

[4] For the avoidance of doubt, the Debtors reserve the right to respond to any and all objections asserted in connection with confirmation of the Amended Plan.

not turn into a confirmation hearing, due process considerations are protected and objections are restricted to those defects that could not be cured by voting . . . ."). Rather, the hearing to approve a disclosure statement is solely to determine whether the information provided is adequate under section 1125 of the Bankruptcy Code. *See, e.g.*, *In re Calpine Corp.*, No. 05-60200 (BRL), 2007 WL 2908200, at *1 (Bankr. S.D.N.Y. Oct. 4, 2007) (noting that the court would determine the debtor's enterprise value based on the evidence presented at the confirmation hearing, not earlier).

9. The existence of disputed issues related to confirmation are no bar to a finding that a disclosure statement contains "adequate information." *See, e.g.*, *In Quigley Co., Inc.*, 377 B.R. 110, 119 (Bankr. S.D.N.Y. 2007) (approving the disclosure statement while acknowledging that settlements with the debtors' non-debtor former parent "implicate several confirmation issues" regarding the rights and incentives of certain claimants under the proposed plan); *In re Hyatt*, 509 B.R. 707, 711 (Bankr. D.N.M. 2014) (approving the disclosure statement because questions about the debtor's proposed classification scheme required "additional evidence that may be presented at a confirmation hearing" and, therefore, the "proposed classification scheme does not render the Plan patently unconfirmable as a matter of law.") In fact, the only time a court may entertain plan objections at a disclosure statement hearing is when any subsequent solicitation would be futile because the proposed plan is "patently unconfirmable." *See, e.g.*, *In re Cardinal Congregate I*, 121 B.R. 760, 763-64 (Bankr. S.D. Ohio 1990) (review of issues affecting confirmation of the plan at the disclosure statement phase is permitted only if the proposed plan is "patently" or "facially" unconfirmable); *In re Monroe Well Service, Inc.*, 80 B.R. at 333 (holding that objections bearing on confirmability must be limited to defects that could not be overcome by creditor voting results and must also concern matters upon which all material facts are not in dispute or have been fully developed).

10. A plan is not patently unconfirmable where the debtor can show that "the plan is confirmable or that defects might be cured or involve material facts in dispute." *In re Am. Capital Equip., LLC*, 688 F.3d 145, 155 (3d Cir. 2012). Rather, "a plan is patently unconfirmable where (1) confirmation defects [cannot] be overcome by creditor voting results and (2) those defects concern matters upon which all material facts are not in dispute or have been fully developed at the disclosure statement hearing." *In re Am. Capital Equip.*, LLC, 688 F.3d at 155 (citing *In re Monroe Well Service, Inc.*, 80 B.R. at 333); *see also In re Phoenix Petroleum Co.*, 278 B.R. 385, 394 (Bankr. E.D. Pa. 2001) (finding that unless "the disclosure statement describes a plan that is so fatally flawed that confirmation is impossible" the Court should approve a disclosure statement that otherwise adequately describes the chapter 11 plan at issue).

11. The Debtors submit that none of the objections demonstrate that the Amended Plan is "patently unconfirmable." They therefore are premature at this stage and should be overruled.

1. The Objections to Releases are Confirmation Issues.

12. The SEC's and Securities Litigation Plaintiffs' objections allege that the release, injunction, and exculpation provisions proposed under the Amended Plan are unduly broad and/or do not comport with case law addressing the applicable standards for each provision. Each of these arguments are classic confirmation objections. *See In re Drexel Burnham Lambert Grp.*, No 90-10421, 1992 WL 62758, at *1 (Bankr. S.D.N.Y. Mar. 5, 1992) (stating that objections to a plan of reorganization's releases and injunction provisions were in the nature of confirmation objections and therefore improperly raised as objections to the disclosure statement); *Nielsen v. Specialty Equip. Cos., Inc.*, No. 92-20142, 1992 WL 279262, at *3 (N.D. Ill. Sept. 25, 1992) (noting that the bankruptcy court below held that "the validity of releases [is] a plan confirmation issue" and overruled objections to the disclosure statement regarding the appropriateness of third-party releases). Such issues will be addressed at the Confirmation Hearing, at which the Debtors will

demonstrate that these releases are consensual and otherwise satisfy the applicable standards for granting releases in this Circuit.

13. However, even if the Court were to address the objections to the releases, injunctions, and exculpation in the Amended Plan now, it should find that the Amended Plan's provisions are nonetheless valid. First, the Debtors are granting releases, which is within their business judgement. *See, e.g.*, *In re Glob. Crossing Ltd.*, 295 B.R. 726, 747 (Bankr. S.D.N.Y. 2003) (approving, as exercise of reasonable business judgment, a decision by debtors to enter into mutual releases). Second, the Amended Plan only grants *consensual* non-debtor third-party releases. As set forth in the Amended Plan and Amended Disclosure Statement, all holders of claims or interests have the opportunity to vote to not be bound by the non-debtor third-party releases. As a result, the releases in the Amended Plan satisfy the standard provided under the Second Circuit's decision in *Metromedia. See In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d Cir. 2005) ("Nondebtor releases may be tolerated if the affected creditor consents.").

14. Further, the Court has the ability to enjoin a creditor from suing a third party, even without the creditor's consent, provided the injunction plays an important part in the debtor's reorganization plan. *See, e.g.*, *In re Metromedia Fiber Network, Inc.*, 416 F.3d at 141 (citing *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 293 (2d Cir. 1992)). What constitutes an "important" role in a debtor's reorganization has not been clearly defined in the case law and involves a highly-specific, case-by-case analysis. *See In re Karta Corp.*, 342 B.R. 45, 54-55 (S.D.N.Y. 2006) (noting absence of cases in the Second Circuit addressing when a non-debtor release is "important" to a debtor's plan); *In re Metromedia*, 416 F.3d at 142 ("But this is not a matter of factors and prongs.").

15. Moreover, it is clear that in this district and others, non-debtor third party releases are permissible where the requisite consent is given, ***including*** where eligible voting creditors fail to opt out of the release, so long as they receive adequate notice of the release on the ballot. *See, e.g.*, *In re DBSD North America, Inc.*, 419 B.R. 179, 218 (Bankr. S.D.N.Y. 2009) (holding that creditors who abstained from voting and failed to opt out were deemed to have consented to the third party releases because the ballot contained, in bold font, notice of the release provisions and an opportunity to opt out), *judgment aff'd in part and reversed in part, on other grounds*, 627 F.3d 496 (2d Cir. 2010); *In re MPM Silicones, LLC*, No. 14-22503-RDD, 2014 WL 4436335, ay *32 (Bankr. S.D.N.Y. Sept. 9, 2014) (finding that stakeholders who voted in favor of the plan, regardless of whether they checked the opt-out box on the voting ballot, were deemed to have consented to the third-party release), *judgment aff'd in part and reversed in part, on other grounds*, 874 F.3d 787 (2d Cir. 2019); *In re Legend Parent Inc.*, No. 14-10701 (RG) (Bankr. S.D.N.Y. 2014) (approving the grant of releases under a plan for holders of claims that (i) are unimpaired by the plan, (ii) have not voted to reject the plan, or (iii) have voted to reject the plan but have not opted out of the releases); *In re Eastman Kodak Co.*, No. 12-10202 (ALG) (Bankr. S.D.N.Y. Aug. 23, 2013) (order confirming plan with a third-party release structured as a consensual, opt-out release); *In re Calpine*, 2007 WL 4565223, at *10 (approving third-party releases where those "who abstain from voting and choose not to opt out of the releases, or who have otherwise consented to give a release," are consensual); *In re Metromedia*, 416 F.3d at 142 ("Nondebtor releases may also be tolerated if the affected creditors consent.").

16. Here, the Amended Plan's third party releases are structured in such a manner that parties providing the third party release are consenting to release claims against the Released Parties. All holders of Claims and Interests are afforded the opportunity not to be bound by the

third party release by opting out. Further, the ballots and disclosure materials clearly set forth in bold font the terms of the proposed releases and the parties that benefit from them. Accordingly, the Amended Plan's release provisions do not render the Amended Plan patently unconfirmable, and similar release structures have been approved in this district. *See, e.g.*, *In re 21st Century Oncology Holdings, Inc.*, No. 17-22770 (RDD) (Bankr. S.D.N.Y. Jan. 11, 2018); *In re Sabine Oil & Gas Corp.*, No. 15-11835 (SCC) (Bankr. S.D.N.Y. July 27, 2016); *In re Legend Parent Inc.*, No. 14-10701 (RG) (Bankr. S.D.N.Y. July 21, 2014).

17. Finally, the scope of the exculpation provisions in the Amended Plan are appropriately limited to the exculpated parties' participation in the restructuring cases and has no effect on liability that results from gross negligence or willful misconduct. *See, e.g., In re DJK Residential LLC*, No. 08-10375 (JMP) (Bankr. S.D.N.Y. May 7, 2008); *In re Calpine Corp.*, No. 05-60200 (BRL) (Bankr. S.D.N.Y. Dec. 19, 2007); *In re Bally Total Fitness of Greater New York, Inc.*, No. 07-12395 (BRL), 2007 WL 2779438, at *8 (Bankr. S.D.N.Y. Sept. 17, 2007) (finding the exculpation, release, and injunction provisions appropriate because they were fair and equitable, necessary to successful reorganization, and integral to the plan).

18. In any event, these objections are more appropriately addressed at the confirmation hearing and should not affect the approval of the Amended Disclosure Statement. The Debtors are prepared to meet their burden at the confirmation hearing. Accordingly, the Court should overrule the SEC and the Securities Litigation Plaintiffs' objections.

2. The Objection to Assumption of Executory Contracts is Likewise an Issue for Confirmation.

19. The Elite Fleet objection alleges that the Amended Plan does not provide adequate mechanisms and timing for assumption and rejection of executory contracts. As demonstrated in the Disclosure Statement Order, the issues with respect to the timing of filing the executory

contract assumption and rejection schedules have been resolved, and the Debtors intend to file the Plan Supplement on May 27, 2020. The Debtors are providing parties in interest with ample time for consideration of the information contained therein to determine how to vote on the Amended Plan.

20. Importantly, the Debtors have no obligation, in statute or case law, to reject contracts or leases prior to the deadline to vote on the Plan. The Elite Fleet objection also improperly characterizes the confirmation date as an inflexible barrier beyond which assumptions cannot be made. This is similarly inconsistent with case law addressing section 365(d)(2) of the Bankruptcy Code, and courts have confirmed plans of reorganization that permit debtors to determine whether to assume or reject executory contracts or unexpired leases post-confirmation. *See e.g.*, *In re Greater Se. Cmty. Hosp. Corp. I*, 327 B.R. 26, 34 (Bankr. D.D.C. 2005) (holding that "[t]the Bankruptcy Code permits questions of assumption or rejection under a plan to be determined after confirmation of a plan calling for such post-confirmation determination"); *DJS Props., L.P. v. Simplot*, 397 B.R. 493, 498 (D. Idaho 2008) (interpreting sections 365(d)(2) and 1123(b)(2) of the Bankruptcy Code to permit a debtor to determine whether to assume or reject a particular contract post-confirmation); *In re Kroh Bros. Dev. Co.*, 100 B.R. 480, 484 (W.D. Mo. 1989) (holding that while section 365(d)(2) of the Bankruptcy Code clearly sets forth time limitations in which the trustee must act, there "is no such limitation on the Court, and with the proper retention of jurisdiction contained in the confirmation Plan, the Court may properly consider pending motions post-confirmation."); *In re Gunter Hotel Assocs.*, 96 B.R. 696, 699–700 (Bankr. W.D. Tex. 1988) (permitting debtor to make decision regarding assumption or rejection of executory contract up to sixty (60) days following the effective date of its plan); *see also In re Dynamic Tooling Sys., Inc.*, 349 B.R. 847, 854 (Bankr. D. Kan. 2006) ("Collier notes that, under

pre-Code practice, courts frequently allowed plans to fix deferred dates to assume or reject contracts.").

21. The Elite Fleet objection also raises related executory contract issues including cure of defaults and setoff rights. Both issues are confirmation issues and are not appropriate to be addressed at this time. For these reasons the Debtors believe that Elite Fleet's issues are premature and should not be considered prior to confirmation, though the Debtors will continue to work with Elite Fleet to resolve their Objection to the extent possible.

III. The Remaining Objections are Premature.

22. The Unsecured Indenture Trustees' objection raises a number of issues that are not ripe for determination in connection with approval of the Amended Disclosure Statement, including allocation of proceeds to unsecured creditors, the approval of the Uniti Settlement, and emergence obligations under the ILEC and CLEC leases. Again, the Unsecured Indenture Trustees use the Disclosure Statement to preview issues related to Uniti Settlement, which is set to be heard separately.[5] These issues are not before the Court with respect to the Disclosure Statement and should not be considered when evaluating whether the Amended Disclosure Statement contains adequate information. Rather, these issues should be considered in connection with the Uniti Settlement or the Amended Plan, to the extent applicable.

[5] The Joint Letter states, "[i]n other words, the Court can only confirm a plan that allocates settlement proceeds in a manner that the Debtors and supporting creditors approve of. In an effort to resolve this problem, the Objectors suggested amending the proposed Settlement Order to reserve the rights of all the parties and the Court to revisit the issue of allocation at the time of plan confirmation but efforts to confer with the Debtors, Elliott and the First Liens over the past few days have not resulted in an agreement on the language of an amendment. Without that reservation of rights, there is little doubt that the proposed settlement does, in fact, seek to allocate the settlement proceeds, and the Objectors therefore need discovery concerning the allocation of settlement proceeds." *See Letter to the Court by the Official Committee of Unsecured Creditors re: Request for Telephonic Conference Regarding Certain Discovery Disputes* dated April 1, 2020 [Docket No. 1630].

Conclusion

23. For the reasons set forth herein, the Debtors respectfully request that the Court: (a) approve the Amended Disclosure Statement; (b) overrule the objections (to the extent that they remain pending as of the hearing on the Amended Disclosure Statement); (c) enter the Disclosure Statement Order; and (d) grant such other relief as the Court deems appropriate under the circumstances.

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Dated: May 5, 2020
New York, New York

/s/ Stephen E. Hessler, P.C.

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