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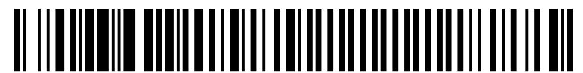
UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

DEBTORS' (I) BRIEF IN SUPPORT OF CONFIRMATION OF THE FIRST AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION OF WINDSTREAM HOLDINGS, INC. *ET AL.*, PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE, AND (II) OMNIBUS REPLY TO CONFIRMATION OBJECTIONS

[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 kcc llc 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.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I. INTRODUCTION[2]

1. After nearly sixteen months in chapter 11, the Debtors have brought these cases to the brink of confirmation. The Debtors' proposed chapter 11 plan (the "Plan") offers the best and ***only*** path to emergence from bankruptcy, would allow the Debtors the opportunity to achieve their go-forward business plan, and maximizes recoveries for the Debtors' creditors. The Plan is the product of many months of negotiations across creditor classes, including more than seven months of mediation overseen by the Honorable Shelley C. Chapman. Irrespective of views at the outset of these Chapter 11 Cases, it is undisputed today that the Debtors' first lien creditors are the fulcrum creditor class. And the Debtors' first lien creditors are the only creditor class willing or able to facilitate the confirmation of a plan and emergence from chapter 11. The Debtors' first lien creditors have, among other things, agreed to fund a $750 million equity investment to fund the Debtors' emergence and equitize a substantial portion of their more than $3 billion in secured claims.

2. And, contrary to the assertions of the Unsecured Notes Indenture Trustees, the Plan is not only supported by or for the benefit of the Debtors' first lien creditors. The second lien creditor class also voted to accept the plan, as did the Midwest Notes Claims. And more than 50 percent (although not two-thirds) of Unsecured Notes voted to accept the Plan. Further, parties to more than 11,500 assumed executory contracts will benefit from consummation of the Plan, more than 11,000 employees will keep their jobs, thousands of vendors will continue to transact with the Reorganized Debtors, and more than 1.4 million residential and small business customers (many in rural areas without other options) will continue to have telephone, and internet services.

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[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Plan or the Disclosure Statement (each as defined herein), as applicable.

Moreover, the Plan offers favorable treatment to most unsecured creditors other than Unsecured Noteholders—in fact, the plan offers significant benefits even to nearly all members of the creditors' committee, including the PBGC (assumption of the Debtors' pension plan), the CWA labor union (assumption of applicable collective bargaining agreements), and the trade vendors on the Committee (assumption of applicable executory contracts).

3. It seems that ***only*** the Unsecured Notes Indenture Trustees (individually and through participation on the Committee), evidently without a mandate from a majority of holders of Unsecured Notes (which voted in favor of the Plan),, oppose confirmation. Unlike the Debtors' first lien creditors or other supporting stakeholders, the Unsecured Notes Indenture Trustees have made no substantive contribution to the success of these Chapter 11 Cases and have made no commitment to facilitate the Debtors' emergence. They have simply asked for a larger slice of the pie they did not help bake. Ultimately, the Unsecured Notes Indenture Trustees' objections to confirmation must fail. The Plan is fair and equitable, in the best interests of all of the Debtors' creditors, and satisfies all other applicable Bankruptcy Code requirements. Accordingly, the Debtors respectfully request that the Court overrule all objections and confirm the Plan.

* * * * *

4. The Plan is the product of many months of arm's-length and good faith negotiations among the Debtors and their key stakeholders. The Restructuring Transactions contemplated by the Plan not only significantly deleverage the Debtors' balance sheet (and allows Windstream to make significant investment into its business to remain competitive in the years ahead) but also contemplate exit financing that will support the Reorganized Debtors' business. Through this streamlined capital structure and influx of new money, the Reorganized Debtors will have the liquidity and flexibility to pursue and achieve their go-forward business plan. In short, the Debtors, through the Plan, are fulfilling their fiduciary duty to maximize value for all stakeholders

5. The Debtors received the following objections to confirmation (in addition to a number of informal objections that the Debtors resolved prior to the applicable objection deadline) all as more fully set forth on **Exhibit A** attached hereto:

- ***Committee:*** Arguing that confirmation should be denied because the Plan does not satisfy the requirements of section 1129(b) of the Bankruptcy Code.[3]
- ***Unsecured Notes Indenture Trustees:*** Arguing that confirmation should be denied because the Plan was not proposed in good faith and does not satisfy the requirements of sections 1129(a)(7) and 1129(b) of the Bankruptcy Code.[4]
- ***United States Trustee:*** Arguing that confirmation should be denied because the Plan's third-party release provision is too broad.[5]
- ***Other Confirmation Objectors:*** 4 objections from parties arguing claim or interest-specific issues related to confirmation of the Plan, each of which have been or will be consensually resolved.[6]
- ***Cure and Assumption Objectors:*** 44 objections from parties arguing that the cure proposed by the Debtors in the Assumed Executory Contract/Unexpired Lease Schedule is incorrect, certain of which the Debtors have consensually resolved and others which they hope and expect to resolve in the near term.

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3 *See Objection of the Official Committee of Unsecured Creditors to the Confirmation of the First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al., Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 2159] (the "Committee Objection").

4 *See Objection of UMB Bank, National Association and U.S. Bank National Association, as Indenture Trustees, to the First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al., Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 2162] (the "Unsecured Indenture Notes Trustees Objection") *see also* CQS's *Joinder to Objection of UMB Bank, National Association and U.S. Bank National Association, as Indenture Trustees, to the First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings,* et al.*, Pursuant to Chapter 11 of the Bankruptcy Code [Docket No. 2162]* [Docket No. 2177].

5 *See Objection of United States Trustee to First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc.,* et al.*, Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 2021] (the "United States Trustee Objection")

6 *See Limited Objection of Saetec, Inc. to the Debtors' First Amended Joint Chapter 11 Plan* [Docket No. 2024] (the "Saetec Objection"); the *Objection of Commonwealth of Pennsylvania, Department of Revenue to First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al., Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 2027] (the "PA DOR Objection"); the *Texas Taxing Jurisdiction Objection to Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc., et al., Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 1641] (the "Texas Taxing Objection");; and the *Securities Lead Plaintiff's Limited Objection to Confirmation of the First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al.* [Docket No. 2165] (the "Securities Lead Plaintiff Objection").

6. The Debtors respectfully submit that the outstanding confirmation objections from the Committee, the Unsecured Notes Indenture Trustees, and the United States Trustee should be overruled. ***First***, it appears to be undisputed as an evidentiary matter that the Plan satisfies the "best interest of creditors" test set forth in section 1129(a)(7) of the Bankruptcy Code. As set forth in the declaration of Nicholas Grossi, distributable value is substantially reduced in a hypothetical chapter 7 liquidation scenario, and even the Debtors' first lien creditors would receive only approximately 9 cents on the dollar. There is no material distributable value attributable to unencumbered assets in a hypothetical chapter 7 liquidation. But even if there were some significant distributable value attributable to unencumbered assets, such value would be absorbed by the substantial adequate protection claims of the Debtors' secured lenders, which have ***already been granted and allowed*** under the Final DIP Order to the extent of any diminution in value in the first lien creditors' collateral. As set forth in Ex. 1, the Leone Declaration, there has been substantial diminution in value of the first lien creditors' collateral (in excess of $1.2 billion) even in a going concern scenario, which claims would be substantially greater in a chapter 7 liquidation. Even the Committee's expert witness agreed in a deposition that the Plan satisfies section 1129(a)(7) of the Bankruptcy Code. For these reasons and the additional reasons set forth below, any argument to the contrary must fail.

7. ***Second***, the Plan satisfies the requirements of section 1129(b) of the Bankruptcy Code. The Committee and Unsecured Notes Indenture Trustees focus much of their briefing on arguments that the Plan violates the Bankruptcy Code's absolute priority rule to the extent even $1 of unencumbered value is distributed to the first lien creditor class. Not so. As an initial matter, for the reasons set forth in detail below, substantially all of the Debtors' assets (including any value attributable to the Uniti settlement) are subject to the first lien creditors' prepetition liens. The

Debtors' first lien creditors have a security interest in the profits of the Debtors' enterprise through their perfected security interest in accounts receivable, cash, goodwill, and substantially all other assets, except for certain specific asset classes that have no discernable "going concern" value apart from the Windstream enterprise. Under the Uniform Commercial Code, these profits are not "proceeds" of the Uniti lease or any other unencumbered asset—they are the profits of the Debtors' business, which is to provide telecommunications services to customers across the country. And even if there were significant value not encumbered by the prepetition first lien security interests (there is not), that value would be encumbered by DIP Facility liens and the first lien creditors' ten-figure secured adequate protection claim. Allocating Uniti settlement value as between purported unencumbered versus encumbered claims does not alter the analysis—allocating value to unencumbered claims only increases the first lien creditors' adequate protection claim on a dollar-for-dollar basis.

8. And even if there were unencumbered value not absorbed by DIP Facility or first lien adequate protection claims and liens, the Plan would ***still*** not violate the absolute priority rule. All claims arising under the first lien credit documents (whether secured or unsecured) are classified together in Class 3 under the Plan. It is undisputed that this class is receiving a recovery less than the aggregate amount of all First Lien Claims (setting aside the extent to which such Claims are secured). Thus, the Plan cannot violate the corollary to the absolute priority rule that a creditor must not be paid more than the amount of their claim. Nor is any Claim or Interest junior to the 6A Unsecured Claims receiving a distribution under the Plan. Accordingly, any argument that the Plan does not satisfy the requirements of section 1129(b) must fail as well.

9. ***Third***, the undisputed evidence will demonstrate that the Plan was proposed in good faith and was the product of a good faith process. The Unsecured Notes Indenture Trustees'

arguments to the contrary are based on irrelevant or incorrect facts. For the reasons set forth herein, the Debtors respectfully submit that such arguments should be overruled.

10. ***Fourth***, for the reasons set forth herein, the Plan's third-party release provision is consensual and complies with the applicable provisions of the Bankruptcy Code and the guidance of this Court and other courts in this district. Thus, the Debtors respectfully submit that the United States Trustee's objection should be overruled.

11. The Debtors have worked to resolve informal comments and formal objections of various other stakeholders and are optimistic that the majority of the objections will be addressed in advance of the Confirmation Hearing as a result of (a) certain immaterial modifications to the Plan and/or Plan Supplement, (b) the inclusion of certain language in the Proposed Confirmation Order and/or (c) modifications to cure amounts. As it relates to any unresolved contract cure and assumption objections, the Debtors would propose that the Court hear such objections at a later date, either at the currently scheduled July 21, 2020 omnibus hearing date or another date as the Court may direct. All parties' rights under section 365 of the Bankruptcy Code and the applicable contracts are expressly preserved pending such hearing. The Debtors have included language in the proposed Confirmation Order to this effect.

12. For these reasons and the reasons set forth below, the Plan satisfies all requirements of the Bankruptcy Code. Accordingly, the Debtors respectfully submit that the Court should confirm the Plan.

II. RELEVANT BACKGROUND

13. Much of the Debtors' time spent in chapter 11 was spent investigating and prosecuting claims against Uniti and the treatment of the document called the "Master Lease", a component of the 2015 transactions referred to in these Chapter 11 Cases as the "Uniti Arrangement." Following an independent investigation, the Debtors asserted that the Uniti

Arrangement was in fact a disguised financing agreement for purposes of applicable bankruptcy law and should be recharacterized as such. Accordingly, on July 25, 2019, certain of the Debtors commenced an adversary proceeding (the "Uniti Adversary Proceeding") against Uniti and certain of its subsidiaries (the "Uniti Defendants") asserting, among other things, that the Uniti Arrangement should be recharacterized as a financing and that certain rent payments and tenant capital improvements made by the Debtors were constructive fraudulent transfers. Extensive litigation ensued after the commencement of the Uniti Adversary Proceeding, finally cumulating in a settlement of such claims with Uniti.

14. In an attempt to consensually resolve issues relating to the Uniti Arrangement with all stakeholders, on July 12, 2019, the Debtors and Uniti filed a motion to appoint a mediator and to include mediation parties from across the Debtors' capital structure [Docket No. 803]. The Debtors proposed that mediation and litigation proceed in parallel to most efficiently reach a global resolution of the Uniti disputes. On July 30, 2019, the Court entered an order appointing the Honorable Judge Chapman to mediate issues regarding the Uniti Arrangement [Docket No. 874].

15. Over the course of late 2019 and early 2020, the Uniti Adversary Proceeding proceeded in parallel with the mediation process, including substantial document discovery and depositions of key potential witnesses. Ultimately, with the aid of the mediator, just before the trial in the Uniti Adversary Proceeding, the Debtors were able to reach a settlement with Uniti (the "Uniti Settlement") that was submitted to the Court on March 6, 2020 [Docket No. 1558] (the "Uniti 9019 Motion") and approved on May 12, 2020 [Docket No. 1807].

16. The months spent in mediation facilitated a parallel negotiation on the terms of a restructuring with certain of the Debtors' creditor constituencies. These parties reached an agreement on the terms of a plan support agreement filed on March 2, 2020 [Docket No. 1533] (as

amended, the "Plan Support Agreement"). Holders of more than 94 percent of First Lien Claims, including the Debtors' largest creditor, Elliott Investment Management, L.P. and its affiliated funds ("Elliott"), 54 percent of Second Lien Claims, 39 percent of unsecured claims, and 72 percent of Midwest Notes Claims agreed to support the Uniti Settlement and the Plan.

A. The Plan.

17. The proposed Plan provides for the partial equitization and partial repayment of the Debtors' prepetition first lien debt and cancellation of junior debt—all told, reducing the Debtors' debt burden from approximately $5.6 billion (before accounting for an additional nearly $1 billion of debtor-in-possession financing) to just approximately $2 billion after emergence. This substantial deleveraging, coupled with other costs savings (including the rejection of burdensome contracts during these cases and under the Plan) and the benefits of the already approved Uniti Settlement, put the Debtors in a position for post-bankruptcy success by improving cash flow by approximately $300 million per year—a significant accomplishment in today's telecommunications market. The Plan also contemplates a new money senior secured credit facility (the "Exit Facility"), which may include a revolving credit facility in an aggregate principal amount of $750 million (the "New Exit Facility Revolver") and a term loan facility or notes in an aggregate principal amount of up to $2.5 billion million (the "New Exit Term Facility").

18. In addition, certain members of the first lien ad hoc group (the "First Lien Ad Hoc Group") and Elliott (together, the "Backstop Parties") have agreed to backstop a rights offering to fund the Debtors' obligations under the Plan, including the repayment of DIP loans and

administrative expenses. The Court entered an order approving the Backstop Commitment Agreement on May 12, 2020 [Docket No. 1806].[7]

19. Finally, the Plan includes certain customary debtor and third-party releases.[8] Holders of Claims or Interests in the Debtors who (a) vote in favor of the Amended Plan or (b) do not vote in favor of the Plan and do not opt out of the Third Party Release on a timely submitted Ballot will be deemed to have consented to the release and discharge of all claims and causes of action against the Released Parties. By opting out of the Third-Party Release, such Holder will forgo the benefit of obtaining the releases set forth in Article VIII of the Plan if such party would otherwise be a Released Party.

B. Plan Solicitation and Voting Results.

20. On May 14, 2020, the Court entered the order approving the Disclosure Statement [Docket No. 1814] (the "Disclosure Statement Order"), and the Debtors commenced solicitation of votes on the Plan in compliance with the Disclosure Statement Order. The following table summarizes the voting rights of each Class under the Plan:

Class	Claims and Interests	Status	Voting Rights
Class 1	Other Secured Claims	Unimpaired	Deemed to Accept
Class 2	Other Priority Claims	Unimpaired	Deemed to Accept
Class 3	First Lien Claims	Impaired	Entitled to Vote
Class 4	Midwest Notes Claims	Impaired	Entitled to Vote
Class 5	Second Lien Claims	Impaired	Entitled to Vote
Class 6A	Obligor General Unsecured Claims	Impaired	Entitled to Vote

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7 The Court approved the Backstop Commitment Agreement but limited the Equity Backstop Premium to $30 million in the event that the Plan is not confirmed.

8 Each of the Consenting Creditors, the Backstop Parties, the Uniti Parties, the Unsecured Notes Indenture Trustees and administrative agents under the Debtors' prepetition Secured credit agreement and Secured notes indentures, the DIP Agent, the DIP Lenders, the Reorganized Debtors, and each of the Debtors' current and former directors or officers shall be Released Parties.

Class	Claims and Interests	Status	Voting Rights
Class 6B	Non-Obligor General Unsecured Claims	Unimpaired	Deemed to Accept
Class 7	Intercompany Claims	Impaired or Unimpaired	Deemed to Reject or Deemed to Accept
Class 8	Intercompany Interests	Impaired or Unimpaired	Deemed to Reject or Deemed to Accept
Class 9	Interests in Windstream	Impaired	Deemed to Reject

21. The Debtors submit that solicitation of the Plan pursuant to the procedures established in the Disclosure Statement Order conformed to the requirements of Bankruptcy Rule 3017(a) and Local Bankruptcy Rule 3017-1(a) and (b) with respect to the contents and transmittal of the Disclosure Statement.

22. The deadline for all holders of Claims to vote on the Plan was June 17, 2020, at 4:00 p.m., prevailing Eastern Time. On June 21, 2020, the Debtors filed the voting certification of the Court-appointed solicitation agent, Kurtzman Carson Consultants, LLC [Docket No. 2171] (the "Voting Certification."). The voting results are summarized in the table below:

Class / Description		Class Result	Members Accepted	Members Rejected	% Members Accepted	Amount Accepted	Amount Rejected	% Amount Accepted
3	First Lien Claims (Lenders)	Accept	223	17	92.92%	$1,991,601,685.96	$22,799,379.28	98.87%
3	First Lien Claims (Notes)	Accept	107	20	84.25%	$566,042,000.00	$5,164,000.00	99.10%
3	TOTALS	Accept	330	37	89.92%	$2,557,643,685.96	$27,963,379.28	98.92%
4	Midwest Notes Claims	Accept	68	10	87.18%	$78,717,000.00	$115,000.00	99.85%
5	Second Lien Notes Claims	Accept	100	35	74.07%	$649,579,000.00	$226,786,000.00	74.12%
6A	Unsecured Notes Claims	Reject	521	254	67.23%	$505,179,777.00	$393,768,080.00	56.20%
6A	Obligor General Unsecured Claims	Reject	105	66	61.40%	$20,325,924.64	$27,439,144.61	42.55%
6A	TOTALS	Reject	626	320	66.17%	$525,505,701.64	$421,207,224.61	55.51%

23. As reflected in the voting certification and summarized above, holders of Claims entitled to vote in Classes 3, 4, and 5 with respect to each Debtor voted to accept the Plan. Because the Plan meets the requirements of section 1129(b) as described below, the Court should confirm the Plan over the classes that were deemed to reject the Plan and Class 6A, the one class that voted to reject the plan.

III. SATISFACTION OF CONFIRMATION REQUIREMENTS

24. To confirm the Plan, the Court must find that the Debtors have satisfied the provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence.[9] As set forth below, the Plan satisfies all applicable elements of section 1129 and otherwise complies with all applicable sections of the Bankruptcy Code, the Bankruptcy Rules, and non-bankruptcy law. Accordingly, the Debtors respectfully request that the Court confirm the Plan.

A. The Plan Satisfies Each Requirement for Confirmation.

i. The Plan Complies with Section 1129(a)(1) of the Bankruptcy Code

25. Section 1129(a)(1) of the Bankruptcy Code requires that a chapter 11 plan comply with the applicable provisions of chapter 11 of the Bankruptcy Code.[10] The legislative history indicates that a principal objective of this provision is to ensure compliance with the requirements of sections 1122 and 1123 of the Bankruptcy Code, which govern the classification of claims and the contents of a plan of reorganization, respectively.[11] The Plan complies with both sections 1122 and 1123 in all respects.

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[9] *See In re Bally Total Fitness of Greater N.Y., Inc.*, 2007 WL 2779438, at *3 (Bankr. S.D.N.Y. Sept. 17, 2007).

[10] 11 U.S.C. § 1129(a)(1).

[11] *See In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 757 (Bankr. S.D.N.Y. 1992).

ii. The Plan Satisfies the Classification Requirement of Section 1122 of the Bankruptcy Code.

26. The Plan complies with section 1122(a) by classifying claims and interests into classes based upon the legal rights, priority, and business considerations underlying such claims and interests, including the specific Debtor against which the claims and interests are held.[12] The Plan's classification scheme reflects the Debtors' capital and corporate structure, thereby taking into account the relative priority among claims and interests, as well as the relative priority between secured and unsecured status. For example, the classification scheme distinguishes between holders of claims under the Debtors' first lien, second lien, and unsecured credit instruments and claims at Obligor and Non-Obligor Debtors. Accordingly, the Debtors can establish a legitimate basis for the classification scheme under the Plan that "does not offend one's sensibility of due process and fair play."[13] Because the Debtors' classifications are premised on the legitimate reasons set forth above, the Plan satisfies the classification requirements of section 1122 of the Bankruptcy Code.

iii. The Plan Satisfies the Mandatory Plan Requirements of Section 1123(a) of the Bankruptcy Code.

27. Section 1123(a) of the Bankruptcy Code sets forth seven criteria that every chapter 11 plan must satisfy. The Plan satisfies each of these requirements.

28. ***Specification of Classes, Impairment, and Treatment.*** The first three requirements of section 1123(a) are that a plan specify: (a) the classification of claims and interests, (b) whether such claims and interests are impaired or unimpaired, and (c) the precise nature of

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[12] *See* Plan, Art. III.A.

[13] *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 247 (Bankr. S.D.N.Y. 2007) (quoting *In re One Times Square Assocs. Ltd. P'ship*, 159 B.R. 695, 703 (Bankr. S.D.N.Y. 1993)).

their treatment under the plan.[14] The Plan properly designates classes of claims and interests, identifies which classes are impaired and unimpaired, and specifies the treatment of each class.[15]

29. ***Equal Treatment.*** Section 1123(a)(4) of the Bankruptcy Code requires that a plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest."[16] The Plan satisfies this requirement because holders of allowed claims or interests will receive the same rights and treatment as other holders of allowed claims or interests within such holders' respective class.[17]

30. ***Means for Implementation.*** Section 1123(a)(5) of the Bankruptcy Code requires that a plan provide "adequate means" for its implementation.[18] The Plan satisfies this requirement by providing for:

- the sources for distributions under the Plan;[19]
- the consummation of the Restructuring Transactions and entry into various agreements contemplated by the Plan;[20]
- the terms of future governance for the Reorganized Debtors as well as the names and identities of the new board members, which were filed in the Plan Supplement;[21]

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[14] 11 U.S.C. § 1123(a)(1)–(3).

[15] *See* Plan, Art. III.A.

[16] 11 U.S.C. § 1123(a)(4).

[17] *See* Plan, Art. III.B.

[18] 11 U.S.C. § 1123(a)(5).

[19] *See* Plan, Art. IV.B.

[20] *See id.*, Art. IV.J.

[21] *See id.*, Art. IV.K.

- the cancellation of existing securities and agreements;[22] and
- the authorization for the Debtors or the Reorganized Debtors, as applicable, to take corporate actions necessary to effectuate the Plan.[23]

31. The Plan thus complies with section 1123(a)(5) and the Debtors should be authorized to implement all transactions and pay all related necessary payments contemplated by the Plan and Plan Supplement.

32. ***Non-Voting Stock.*** Section 1123(a)(6) of the Bankruptcy Code requires that a debtor's corporate constituent documents prohibit the issuance of nonvoting equity securities.[24] The Governance Term Sheet, the form of which was filed in the Plan Supplement, will prohibit the issuance of non-voting equity securities to the extent required by section 1123(a)(6) of the Bankruptcy Code.[25]

33. ***Selection of Officers and Directors.*** Section 1123(a)(7) of the Bankruptcy Code requires that the manner of selection of any director, officer, or trustee, or any other successor thereto, be "consistent with the interests of creditors and equity security holders and with public policy."[26] The manner of selection of officers and directors and the names and identities of known directors of the Reorganized Windstream Board will be disclosed in the Plan Supplement. The Plan thus complies with section 1123(a)(7) of the Bankruptcy Code.

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[22] *See id.*, Art. IV.H..

[23] *See id.*, Art. IV.I.

[24] 11 U.S.C. § 1123(a)(6).

[25] *See* Plan, Art. IV.K.

[26] 11 U.S.C. § 1123(a)(7).

iv. The Plan Complies with the Discretionary Provisions of Section 1123(b) of the Bankruptcy Code

34. Section 1123(b) of the Bankruptcy Code sets forth various discretionary provisions that may be incorporated into a chapter 11 plan. As is most relevant here, section 1123(b) of the Bankruptcy Code provides that a plan may provide for release and exculpation provisions, as discussed below.[27] While the United States Trustee argues that the Third-Party Release (defined below) is overly broad and should not be approved, for the reasons set forth below, the Plan's release and exculpation provisions are within the guidelines set by the Bankruptcy Code and courts in this district. Accordingly, the Debtors respectfully submit that the court should approve the Plan's release and exculpation provisions.

a. The Debtor Release Is Appropriate

35. Article VIII.C of the Plan provides for releases by the Debtors (the "Debtor Release") of claims and causes of action against the Released Parties.[28] The Debtor Release is the product of arm's-length negotiations, critical to obtaining support for the Plan from various constituencies, and in the best interests of the estates. The Debtor Release was heavily negotiated

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[27] 11 U.S.C. § 1123(b)(1)–(6).

[28] *See* Plan, Art. I.A., "Released Parties" means, collectively, and in each case in its capacity as such: (a) the Consenting Creditors; (b) the Backstop Parties; (c) the Uniti Parties; (d) the indenture trustees and administrative agents under the Debtors' prepetition Secured credit agreement and Secured notes indentures; (e) the DIP Lenders; (f) the DIP Agent; and (g) with respect to each of the Debtors, the Reorganized Debtors, and each of the foregoing Entities in clauses (a) through (f), such Entity and its current and former Affiliates and subsidiaries, and such Entities' and their current and former Affiliates' and subsidiaries' current and former directors, managers, officers, equity holders (regardless of whether such interests are held directly or indirectly), predecessors, successors, and assigns, subsidiaries, and each of their respective current and former equity holders, officers, directors, managers, principals, members, employees, agents, advisory board members, financial advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, and other professionals.

in connection with other terms of the Plan and is an indispensable component to achieving final resolution of potentially extensive litigation that would otherwise negatively affect these cases.

36. It is well settled that a debtor is authorized to settle or release its claims in a chapter 11 plan.[29] Section 1123(b)(3)(A) specifically provides that a plan of reorganization may provide for the settlement or adjustment of any claim or interest belonging to the debtor or the estate. Accordingly, pursuant to section 1123(b)(3)(A), the Debtors may release estate causes of action as consideration for concessions made by their various stakeholders pursuant to the Plan.[30]

37. Settlements under a plan generally are subject to the same standard as settlements under Bankruptcy Rule 9019.[31] In considering the appropriateness of debtor releases, courts use the "best interests of the estate" standard for approval of a settlement under Bankruptcy Rule 9019 or require a showing that granting such releases is a valid exercise of the debtor's business judgment.[32] In determining whether such a release is within a debtor's business judgment, the court need not conduct a "'mini-trial' of the facts or the merits underlying [each] dispute" and the

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[29] *In re Adelphia Commc'ns Corp,* 368 B.R. at 263 n.289, 269 ("The Debtors have considerable leeway in issuing releases of any claims the Debtors themselves own . . . .").

[30] *See, e.g.*, *In re Charter Commc'ns*, 419 B.R. 221, 257 (Bankr. S.D.N.Y. 2009) ("Debtors are authorized to settle or release their claims in a chapter 11 plan"); *In re WCI Cable, Inc.*, 282 B.R. 457, 469 (Bankr. D. Or. 2002) ("[A] chapter 11 plan may provide for the settlement of any claim belonging to the debtor or to the estate").

[31] *See generally In re Sabine Oil & Gas Corp.*, 555 B.R. 180, 309 (Bankr. S.D.N.Y. 2016) ("With respect to the Debtor Release, the Court finds that this release by the Debtors represents a valid settlement and release of claims the Debtors may have against the Released Parties and the RBL Released Parties pursuant to section 1123(b)(3)(A) of the Bankruptcy Code, is a valid exercise of the Debtors' business judgment, and is in the best interests of the estates."); *In re Bally Total Fitness of Greater N.Y, Inc.*, 2007 WL 2779438, at *12 ("[t]o the extent that a release or other provision in the Plan constitutes a compromise of a controversy, this Confirmation Order shall constitute an order under Bankruptcy Rule 9019 approving such compromise."); *In re Spiegel, Inc.*, 2005 WL 1278094, at *11 (Bankr. S.D.N.Y. May 25, 2005) (approving releases pursuant to section 1123(b)(3) of the Bankruptcy Code and Bankruptcy Rule 9019(a)).

[32] *In re DBSD N. Am., Inc.*, 419 B.R. 179, 217 (Bankr. S.D.N.Y. 2009) *aff'd in part, rev'd in part on other grounds*, 627 F.3d 496 (2d. Cir. 2010) ("[T]he releases and discharges of claims and causes of action by the Debtors, pursuant to section 1123(b)(3)(A) of the Bankruptcy Code represent a valid exercise of the Debtors' business judgment, and are fair, reasonable and in the best interests of the estate.").

settlement "need not be the best that the debtor could have obtained."[33] Under this standard, the "court should instead canvass the [settled] issues [to] see whether the settlement falls below the lowest point in the range of reasonableness."[34]

38. The Debtor Release is in the best interests of Debtors' estates and a sound exercise of Debtors' business judgment, as it reflects the important contributions, concessions, and compromises made by the Released Parties in the process of formulating and supporting the Plan. As an initial matter, without the Debtors' agreement to provide releases, the Debtors' stakeholders likely would not have participated in the negotiations and compromises that led to the Uniti Settlement, the Plan Support Agreement, and ultimately, the Plan. Early in these Chapter 11 Cases, the Debtors determined that the most valuable cause of action related to the Uniti Arrangement. Indeed, settlement of this litigation provided $1.224 billion in net present value to the Debtors' estates. The Debtors undertook an analysis of other claims and causes of action, determining that the cost and delay of pursuing any such actions was not justified.

39. The Debtors believe the Debtor Release is in their sound business judgment because: (a) the Debtor Release is a fundamental component of the Uniti Settlement and other compromises incorporated into the Plan; (b) the inclusion further reflects the Debtors' own analysis of various claims and causes of action subject to the releases in question; and (c) the Debtors' assessment as to the cost, expense, and inevitable delay required to prosecute such claims or causes of action.

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33 *In re NII Holdings*, 536 B.R. 61, 99 (Bankr. S.D.N.Y. 2015).

34 *Id.* at 100.

b. The Third-Party Release Is Appropriate.

40. In addition to the Debtor Release, the Art. VIII.D of the Plan includes a provision that releases certain non-debtor, third party claims against other non-debtor, third parties (the "Third-Party Release") The Third-Party Release will be provided to parties who have played a significant role in these Chapter 11 Cases. As with the Debtor Release, the Third-Party Release was a material inducement for the support of the Plan and the concessions made therein, and is narrowly tailored to preserve claims and causes of action against Non-Released Parties.

41. The Debtors received a single objection from the United States Trustee that centers on the inclusion of the Third-Party Release, claiming that a third-party release is inappropriate because creditors who do not affirmatively vote cannot be deemed to consent to the releases in the Plan.[35] However, a third-party release implemented through a debtor's plan of reorganization is entirely appropriate where, as here, the third parties consent to such release. The United States Trustee acknowledges that in several cases this Court overruled a similar objection,[36] but argues that this case is somehow exceptional because unencumbered proceeds from the Uniti Settlement will not be distributed to Obligor General Unsecured Claims.[37] The argument about distributable proceeds is inapposite, and the treatment of these proceeds is addressed at length elsewhere in this brief. What is important is that the parties in question, and all Releasing Parties, were provided maximum notice of the presence of the Third-Party Releases and were permitted ample opportunity to opt-out of granting such releases. As is the majority view in this district, parties

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[35] United States Trustee Obj. at page 4.

[36] *See, e.g.*, *In re Sears Holdings Corporation, et al.*, No. 18-23538 (Order Confirming Modified Amended Joint Chapter 11 Plan); *In re Cenveo Inc., et al.,* No. 18-22178 (Order Approving Third Amended Disclosure Statement)

[37] United States Trustee Obj. at FN1.

consent to give releases when they vote in favor of the plan or when they abstain from voting but do not opt out of releases.[38]

42. In soliciting votes for the Plan, the Debtors took great efforts to ensure that all voting holders of Claims and Interests with the opportunity to grant a Third-Party Release affirmatively consented to become Releasing Parties. Fully impaired holders of Interests were expressly carved out of the definition of Releasing Parties. At this Court's request, the language was made unambiguous on the approved Ballots that were provided to voting creditors, and provided, in bolded, capital letters, that the "release will be binding on you, *i.e.,* you will be deemed to have given it unless you opt out as instructed immediately below."[39] Further, the Ballots distributed to holders of Claims and Interests entitled to vote on the Plan quoted the entirety of the Third-Party Release and related provisions and definitions of the Plan, clearly informing holders of Claims and Interests entitled to vote of the steps they should take if they disagreed with the scope of the Third-Party Release.[40] Rather than provide non-voting parties with a chance to opt-out of the Third-Party Release, the Debtors removed parties deemed to accept or reject from the definition of Releasing Parties.[41] Accordingly, the Third-Party Release is consensual with respect

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[38] *See In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d Cir. 2005) ("Nondebtor releases may also be tolerated if the affected creditors consent."); *In re Calpine Corp.*, 2007 WL 4565223, at *10 (Bankr. S.D.N.Y. Dec. 19, 2007) ("Such releases by Holders of Claims and Interests provide for the release by Holders of Claims and Interests that vote in favor of the Plan, who abstain from voting and choose not to opt out of the releases, or who have otherwise consented to give a release, and are consensual."); *In re DBSD N. Am., Inc.*, 419 B.R. at 218–19 ("Except for those who voted against the Plan, or who abstained and then opted out, I find the Third Party Release provision consensual and within the scope of releases permitted in the Second Circuit."); *In re Adelphia Commc'ns Corp.*, 368 B.R. at 268 (upholding non-debtor releases for creditors who voted to accept the plan because creditors consented to the releases through their vote to support the plan); *In re Lear Corp.*, 2009 WL 6677955, at *7 (Bankr. S.D.N.Y. Nov. 5, 2009) (finding that non-debtor releases for creditors who voted to accept the plan were permissible).

[39] *See* Disclosure Statement Order, Exhibits 2A, 2C; Ex. 2, 5/8/2020 Hr'g Tr. 99:25-100:3.

[40] *Id.*

[41] The Debtors made these revisions at the request of the Court at the May 8, 2020 hearing. Ex. 2, Hr'g Tr. 85:5-20 ("In the definition, releasing parties, it includes in G in the list, 'All holders of claims or interest that vote to accept or are deemed to accept the plan' One would think that someone who is unimpaired under a plan wouldn't mind

to all of the Releasing Parties. The Debtors therefore respectfully submit that the Third-Party Release is consensual and should be approved.[42]

43. In addition to being fully consensual, the Third-Party Release is warranted for the Released Parties. Throughout the pendency of these Chapter 11 Cases, the Released Parties worked constructively with the Debtors to negotiate and implement a value-maximizing reorganization embodied in the Plan that enables the Reorganized Debtors to emerge from these cases with an efficient capital structure and the ability to continue to provide their customers with the highest quality of telecommunications services. Finally, throughout these cases and the related mediation and negotiations, the Debtors' directors and officers steadfastly maintained their duties to maximize value for the benefit of all stakeholders, investing countless hours in addition to performing their ordinary course responsibilities, and any objection to their inclusion in the Plan should be overruled.

44. For these reasons, the Debtors respectfully submit that the Court should approve Third-Party Release and overrule the United States Trustee's objection.

c. The Exculpation Provision Should Be Approved.

45. Article VIII.E of the Plan provides that each Exculpated Party[43] shall be released and exculpated from any causes of action arising out of acts or omissions in connection with these

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giving a release. But there's a technical point here. Unless you're going to pay someone in full in cash, then forcing a release on them I believe is --or leaving it up to an opt-out approach renders them impaired. And I think you should take it out, therefore. I don't think the opt-out mechanism works for someone who is unimpaired, because it raises the starting issue that you in fact are impaired, and then you would have to vote. And you don't want them to vote. So I think you need to take that out of the plan, and similarly out of the disclosure statement.")

[42] *See, e.g.*, *In re Crabtree & Evelyn, Ltd.*, 2010 WL 3638369, at *8 (Bankr. S.D.N.Y. Jan 14. 2010) (finding that where creditors have accepted the plan and the non-debtor releases were appropriately disclosed by the debtors in both the disclosure statement and the ballot, the creditors have expressly consented to the non-debtor releases and therefore, the non-debtor releases satisfy the standards set forth in *Metromedia* for granting non-debtor releases and are fair to the releasing parties); *see In re Metromedia Fiber Network, Inc.*, 416 F.3d at 142.

[43] *See* Plan, Art. I.A., "Exculpated Parties" means collectively, and in each case in its capacity as such: (a) the Debtors; (b) any official committees appointed in the Chapter 11 Cases and each of their respective members; (c)

Chapter 11 Cases and certain related transactions, except for acts or omissions that are found to have been the product of actual fraud, gross negligence or willful misconduct (the "Exculpation"). The Exculpation is intended to prevent collateral attacks against estate fiduciaries or parties that have acted in good faith to help facilitate the Debtors' reorganization. The Exculpation is an integral part of the Plan and otherwise satisfies the governing standards in the Second Circuit. This provision provides necessary and customary protections to those parties in interest (whether estate fiduciaries or otherwise) whose efforts were and continue to be vital to implementing the Plan.

46. Exculpation provisions are important to facilitate open and fair chapter 11 negotiations among disparate parties. Exculpation provisions "do[] not affect the liability of [the Exculpated Parties], but rather states the standard of liability under the Code."[44] Exculpation provisions are appropriate because a "bankruptcy court has exclusive jurisdiction over parties and their conduct in the bankruptcy proceedings."[45] Courts evaluate exculpation provisions based upon a number of factors, including whether the beneficiaries of the exculpation have participated in good faith in negotiating the plan and bringing it to fruition, and whether the provision is integral to the plan.[46]

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the Consenting Creditors; (d) the DIP Lenders; (e) the DIP Agent; (f) the Backstop Parties; and (g) with respect to each of the foregoing, such Entity and its current and former Affiliates, and such Entity's and its current and former Affiliates' current and former equity holders, subsidiaries, officers, directors, managers, principals, members, employees, agents, advisory board members, financial advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, and other professionals, each in their capacity as such.

[44] *In re PWS Holding Corp.*, 228 F.3d 224, 245 (3d Cir. 2000).

[45] *Meritage Homes of Nev., Inc. v. JPMorgan Chase Bank, N.A. (In re South Edge LLC)*, 478 B.R. 403, 415 (D. Nev. 2012).

[46] *See In re Bally Total Fitness of Greater N.Y., Inc.*, 2007 WL 2779438, at *8 (finding exculpation, release, and injunction provisions appropriate because they were fair and equitable, necessary to successful reorganization, and integral to the plan); *In re WorldCom, Inc.*, 2003 WL 23861928, at *28 (Bankr. S.D.N.Y. Oct. 31, 2003) (approving an exculpation provision where it "was an essential element of the Plan formulation process and negotiations"); *Upstream Energy Servs. v. Enron Corp. (In re Enron Corp.)*, 326 B.R. 497, 503 (S.D.N.Y. 2005)

47. Here, the Exculpation provision is proper because, among other things, it is appropriately tailored to the facts and circumstances of these Chapter 11 Cases and is the product of good faith, arm's-length negotiations, is in exchange for substantial consideration, and was critical and indispensable to obtaining the support of various constituencies for the Plan. The Exculpated Parties have participated in good faith in mediation proceedings and negotiations around the Uniti Settlement and the Plan and should be entitled to protection from exposure to lawsuits filed by unsatisfied parties. Indeed, practice recognizes that such provisions are essential inducements to cause parties (including estate fiduciaries and others) to participate collaboratively and constructively in a restructuring process. And as noted above, exculpation for parties participating in the plan process is appropriate where plan negotiations could not have occurred without protection from liability. Accordingly, the Debtors respectfully submit that the Court should approve the Exculpation.

d. The Injunction Is Narrowly Tailored and Should Be Approved.

48. Article VIII.F of the Plan generally enjoins all persons or entities from commencing or continuing any suit, action, or other proceeding related to Claims, Interests, or Liens discharged by, released by, or subject to exculpation under the Plan (the "Injunction"). An injunction is a standard provision of any plan with releases and is authorized by the Bankruptcy Code.[47] The Injunction is necessary to effectuate the releases contained in the Plan and to protect the Debtors from any potential litigation from prepetition creditors after the Effective Date. Any such litigation would hinder the efforts of the Debtors to fulfill their responsibilities effectively as contemplated

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(excising similar exculpation provisions would "tend to unravel the entire fabric of the Plan, and would be inequitable to all those who participated in good faith to bring it into fruition").

[47] 11 U.S.C. § 524(g).

in the Plan and thereby undermine the Debtors' efforts to maximize value for all stakeholders. Without the Injunction, the Plan's release and exculpation provisions would be substantially weakened. The Debtors respectfully submit that the Injunction should be approved together with the Debtor Release, the Third-Party Releases, and the Exculpation.

B. The Debtors Have Complied with the Applicable Provisions of the Bankruptcy Code as Required by Section 1129(a)(2).

49. Section 1129(a)(2) requires that a debtor comply with the solicitation provisions of the Bankruptcy Code, including those of sections 1125 and 1126 of the Bankruptcy Code.[48] As set forth in the Disclosure Statement Order and the Voting Certification, the Debtors have complied with these provisions.

C. The Plan Has Been Proposed in Good Faith and Not by Any Means Forbidden by Law in Compliance with Section 1129(a)(3) of the Bankruptcy Code.

50. Section 1129(a)(3) of the Bankruptcy Code requires that a chapter 11 plan be "proposed in good faith and not by any means forbidden by law."[49] As discussed above, the Plan is a result of extensive negotiations among the Debtors and all of their major stakeholders to resolve issues central to these Chapter 11 Cases and permit the Debtors to emerge from chapter 11 as a going concern.[50] The Plan provides for significant recoveries that were negotiated by sophisticated parties all represented by counsel and is designed to facilitate the Debtors'

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[48] 11 U.S.C. § 1129(a)(2). *See In re Johns-Manville Corp.*, 68 B.R. 618, 630 (Bankr. S.D.N.Y. 1986), *aff'd in part, rev'd in part on other grounds*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd*, *Kane v. Johns Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636 (2d Cir. 1988) ("Objections to confirmation raised under § 1129(a)(2) generally involve the alleged failure of the plan proponent to comply with § 1125 and § 1126 of the [Bankruptcy] Code.") (citations omitted); *In re Toy & Sports Warehouse, Inc.*, 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984) (stating that to comply with section 1129(a)(2), "the proponent must comply with the ban on postpetition solicitation of the plan unaccompanied by a written disclosure statement approved by the court in accordance with [Bankruptcy] Code §§ 1125 and 1126.") (citation omitted); s*ee also* H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978) ("Paragraph (2) [of section 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure.").

[49] 11 U.S.C. § 1129(a)(3).

[50] Ex. 3, Thomas Decl. at ¶¶ 5–6, 21, 43.

reorganization for the benefit of all of the Debtors' stakeholders.[51] The development of the Plan occurred over many months, and the Plan is the Debtors' only viable path to emergence.[52]

51. The Unsecured Notes Indenture Trustees' assertion that the Debtors have not set forth evidence that the Plan is proposed in good faith is baseless.[53] "Good faith is 'generally interpreted to mean that there exists a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code.'"[54] "Whether a reorganization plan has been proposed in good faith must be viewed in the totality of the circumstances, and the requirement of Section 1129(a)(3) 'speaks more to the process of plan development than to the content of the plan.'"[55]

52. As shown in his declaration, Mr. Thomas, as the Chief Executive Officer of Windstream, has been personally involved in nearly every aspect of these chapter 11 proceedings.[56] At his deposition, Mr. Thomas provided testimony of his involvement in the Plan, Plan Support Agreement, and discussions with creditors.[57] Mr. Thomas also provided testimony regarding the Debtors' evaluation and approval of the Plan, including that the Debtors sought and

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[51] *Id.*

[52] *Id.*

[53] Unsecured Indenture Notes Trustees Obj. at ¶ 35 [Docket No. 2162].

[54] *In re Chemtura Corp.*, 439 B.R. 561, 608 (Bankr. S.D.N.Y. 2010) (citations omitted).

[55] *Id.* (citations omitted).

[56] Ex. 3, Thomas Decl. at ¶ 53.

[57] *See, e.g.,* Ex. 4, Thomas Tr. at 137:12–15; 24:11–18, 24:25–16; 26:2–27:6; 37:8–17; 34:3–12.

considered all necessary information for approval of the Plan.[58] He also provided extensive testimony regarding negotiations of the terms of the exit financing.[59]

53. In fact, all testimony provided by the Debtors' professionals in this case demonstrates that it is undeniable that the Plan is the result of extensive, good faith negotiations with the Debtors' stakeholders. Mr. Thomas was clear in his testimony that the Plan was negotiated at arm's-length and the Plan was proposed for the legitimate purpose of reorganizing.[60] Moreover, Mr. Leone, who was heavily involved in negotiating the key terms of the Plan, provided testimony regarding PJT's extensive analysis during the course of plan negotiations and dates of proposed term sheets.[61] This evidence is more than sufficient to satisfy the requirements of section 1129(a)(3) of the Bankruptcy Code.

54. The Unsecured Notes Indenture Trustees' attempts to challenge the Debtors' good faith by focusing on irrelevant and inaccurate assertions about the process that ultimately led to the Plan must fail. The undisputed evidence is that the Debtors engaged in good faith with their stakeholders to formulate a Plan that complies with the Bankruptcy Code and have proposed that plan for the legitimate purpose of reorganizing. The cases cited by the Unsecured Notes Indenture Trustees are factually inapposite—there is no evidence of similar behavior here (*e.g.*, manipulation of the voting process, inadequate disclosure, or other failures to comply with the Bankruptcy Codes' requirements). The Unsecured Notes Indenture Trustees' arguments around subsidiary governance are misguided and wholly irrelevant—and substantially similar arguments made by

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[58] *Id.* at 150:5–151:4.

[59] *See, e.g., Id.* at 39:6–43:18.

[60] Ex. 3, Thomas Decl. at ¶¶ 5, 6, 21.

[61] Ex. 5, Leone Tr. at 146:7–149:19; 234:14-24

the Unsecured Notes Indentures Trustees in connection with their objection to the Uniti Settlement hearing already been rejected by this Court. Ultimately, the Plan represents the Debtors ***only*** viable alternative and complies with the Bankruptcy Code's confirmation requirements. The process to arrive at the Plan (which spanned the better part of a year) was transparent, overseen by a Court-appointed mediator, and reflective of the Debtors' ongoing desire to engage with their stakeholders in good faith. For these reasons, the Debtors respectfully submit that the Unsecured Notes Indenture Trustee's objections should be overruled.

D. The Plan Provides for Bankruptcy Court Approval of Certain Administrative Payments in Compliance with Section 1129(a)(4) of the Bankruptcy Code.

55. Section 1129(a)(4) of the Bankruptcy Code requires that certain professional fees and expenses be subject to court approval.[62] The Plan satisfies section 1129(a)(4). All previous payments by the Debtors for services, costs, or expenses in connection with these Chapter 11 Cases, including all claims of retained professionals, have been approved by the Court as reasonable, and all final requests for payment of unpaid Professional Fee Claims must be filed no later than the first business day that is 45 days after the Effective Date, which will allow the Court to review those fees as well.[63]

E. The Debtors Have Complied with the Governance Disclosure Requirement in Compliance with Section 1129(a)(5) of the Bankruptcy Code.

56. Section 1129(a)(5) requires that prior to confirmation, the proponent of a plan disclose the identity and affiliations of the proposed officers and directors of the reorganized debtor, as well as the identity of any "insider" who will be employed or retained by the reorganized

[62] 11 U.S.C. § 1129(a)(4); *See, e.g., In re WorldCom, Inc.*, 2003 WL 23861928, at *54; *In re Drexel Burnham Lambert*, 138 B.R. at 760.

[63] *See* Plan, Art. II.C.1.

debtor and any compensation they will receive.[64] Additionally, the Bankruptcy Code requires that the appointment or continuance of such officers and directors be consistent with the interests of creditors and equity security holders and with public policy.[65]

57. The Plan satisfies section 1129(a)(5). On the Effective Date, the Reorganized Holdings Board will be appointed in accordance with the Plan and in accordance with the governance term sheet.[66] The Debtors will have made all known and necessary disclosures regarding the identity of their directors and officers and the status and compensation of any insiders in the Plan Supplement prior to the commencement of the Confirmation Hearing.

F. The Plan Does Not Require Governmental Regulatory Approval of Rate Changes and Therefore Complies with Section 1129(a)(6) of the Bankruptcy Code.

58. Section 1129(a)(6) of the Bankruptcy Code permits confirmation only if any regulatory commission with jurisdiction over the debtor has approved any rate change provided for in the plan.[67] The Plan does not provide for any rate changes; therefore, section 1129(a)(6) of the Bankruptcy Code is inapplicable here.

G. The Plan Is in the Best Interests of Creditors and Interest Holders in Compliance with Section 1129(a)(7) of the Bankruptcy Code.

59. The "best interests of creditors" test requires that, with respect to each impaired class of claims or interests, each individual holder of a claim or interest has either accepted the plan or will receive or retain property having a present value, as of the effective date of the plan, of not less than the value such holder would receive if the debtor were liquidated under chapter 7

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[64] 11 U.S.C. § 1129(a)(5).

[65] 11 U.S.C. § 1129(a)(5)(A)(i)–(ii).

[66] *See* Plan, Art. IV.G; IV.M.

[67] 11 U.S.C. § 1129(a)(6).

of the Bankruptcy Code at that time.[68] The best interests test is satisfied where the estimated recoveries for a debtor's stakeholders in a hypothetical chapter 7 liquidation are less than or equal to the estimated recoveries for a holder of an impaired claim or interest under the debtor's plan of reorganization that rejects the plan.[69]

60. The Plan satisfies the best interests test because it provides recoveries equal to or greater than what impaired creditors under the Plan would receive in a hypothetical chapter 7 liquidation. The Debtors' liquidation recovery analysis was attached as Exhibit B to the Disclosure Statement [Dkt. No. 1813] (the "Liquidation Analysis") and is described in detail in the Grossi Declaration. The projected recoveries for classes that are impaired under the Plan and the results of the Debtors' Liquidation Analysis are as follows:

Class	Type of Claim or Interest	Estimated % Recovery Under Plan	Estimated % Recovery in Chapter 7
Class 1	Other Priority Claims	100%	100%
Class 2	Other Secured Claims	100%	100%
Class 3	First Lien Claims	67.1%	8.7%
Class 4	Midwest Notes Claims	100%	2.0%
Class 5	Second Lien Claims	0.1%	0%
Class 6A	Obligor General Unsecured Claims	0.1%	0%
Class 6B	Non-Obligor General Unsecured Claims	100%	100%
Class 7	Intercompany Claims	0%	N/A
Class 8	Intercompany Interests	0%	N/A
Class 9	Interests in Windstream	0%	N/A

[68] *See* 11 U.S.C. § 1129(a)(7)(A)(ii).

[69] *In re Adelphia Commc'ns Corp*, 368 B.R. at 252 ("In determining whether the best interests standard is met, the court must measure what is to be received by rejecting creditors in the impaired classes under the plan against what would be received by them in the event of liquidation under chapter 7.").

61. Under a hypothetical chapter 7 liquidation, the Debtors estimate that the proceeds available for distribution (net of required costs and expenses) would total between approximately $1.295 billion and $1.907 million, subject to the assumptions set forth in the Liquidation Analysis. and the Grossi Declaration. Thus, in a liquidation scenario, only the classes that the Plan already treats as unimpaired would be paid in full all other holders of Claim or Interests would be impaired and receive a substantially reduced level of recovery, if any, as compared to the recoveries provided to these holders of Claims and Interests under the Plan.

62. Perhaps the best proof that the best interests test is met in this case is the fact that the Committee's own expert witness (and their only witness) agrees that it is met. The Committee relied on Kevin Nystrom, a managing director of AlixPartners, to analyze potential unsecured creditors' recoveries attributable to unencumbered assets. He unambiguously testified the Plan satisfies the best interests test based on a hypothetical liquidation of the Debtors' estate:

63. That should be the end of the matter. Two experienced restructuring professionals, one representing the Debtors and the other representing the Committee, have looked at the Debtors' potentially unencumbered assets and have concluded that in a hypothetical liquidation, the unsecured creditors would do no better than their recoveries under the Plan.[71]

64. This conclusion makes sense, given that substantially all of the Debtors' assets are subject to perfected liens or are owned by Non-Obligor Debtors (over which the Debtors' secured lenders have an equity pledge). While the Obligor Debtors' unencumbered assets may generate some *de minimis* value in a liquidation, after payment of administrative and priority claims (which are substantial in a chapter 7 liquidation scenario) they do not result in any distributable value to holders of general unsecured claims in excess of their Plan recoveries.[72]

65. The Committee and Unsecured Notes Indenture Trustees point to the book value of several groups of unencumbered assets. But as the Committee's own expert agreed, "book value is going to vary substantially from liquidation value."[73] As the Debtors' expert, Mr. Grossi, notes in his report, that is especially true for these specific unencumbered assets. The parties are in agreement that there are likely six categories of unencumbered assets: (a) buildings, (b) construction work in progress ("CWIP") (c) land, (d) leased facilities deferral, (e) leasehold improvements, and (f) vehicles.

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[70] Ex. 6, Nystrom Tr. 14:16-15:16 (emphasis added)

[71] *Id*; Ex. 7, Grossi Rep. ¶¶ 23–38

[72] *Id*.

[73] Ex. 6, Nystrom Tr. 23:7–11.

66. Mr. Nystrom did not determine a liquidation analysis for any of these groups of property.[74] However, contrary to the assertions that Mr. Grossi did not evaluate the Obligor General Unsecured Creditors' alleged unencumbered property, Mr. Grossi determined that this property was extremely unlikely to result in ***any*** distributable value to unsecured creditors, and in no event would it lead to recoveries greater than those provided for by the Plan.[75]

67. This is because (a) the large majority of these unencumbered assets are owned by the Non-Obligor Debtors (where unsecured claims will receive a full recovery under the Plan), and (b) much of these "assets" are just products of accounting conventions that have no actual value in a liquidation.[76] For example, over 50% of the unencumbered book value of these "assets" is attributable to CWIP. This includes items such as labor costs associated with constructing a fixed asset, materials associated with the installation of fiber and copper cable, and routers, switches, and other telecommunications equipment in the field or at a customer site but not yet placed in service.[77] Based on conversations with management[78] and applying his judgment as an experienced restructuring professional, Mr. Grossi determined that there is likely no value to be realized from these assets in a chapter 7 liquidation because any costs needed to complete CWIP projects or to retrieve these assets from the field would exceed their liquidation value.[79] Likewise, leased facilities deferral are just prepaid contracts for certain expenses and costs that would be

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[74] Ex. 6, Nystrom Tr. 25:12-26:5.

[75] Ex. 7, Grossi Rep. ¶¶ 47–55.

[76] *Id.*

[77] *Id.* ¶ 49.

[78] Mr. Nystrom did not discuss the likely liquidation value of any of the unencumbered assets with management. Ex. 6, Tr. 35:21-36:13.

[79] *Id.*

worthless in a liquidation,[80] and leasehold improvements are capital improvements that would revert to the landlords in a liquidation.[81]

68. To calculate the potential distributable value from these assets, Mr. Grossi made multiple assumptions that heavily favored the unsecured creditors.[82] He assumed that the DIP Lenders would choose not to recover any value from the alleged unencumbered assets and that unsecured claims would not be diluted by Intercompany Claims.[83] Further, he based his calculations on net book value rather than liquidation value and excluded any adequate protection claim.[84] Even with these conservative assumptions, Mr. Grossi determined that ***at most***, these assets would result in approximately $1.1 million in distributable value for Non-Obligor General Unsecured Claims, which is less than their recoveries under the Plan and before considering first lien adequate protection claims that would absorb any remaining value.[85]

69. The Committee and Unsecured Notes Indenture Trustees contend that there are three other categories of unencumbered value: (a) approximately $18 million of value that they argue will be awarded to Services as part of the litigation with Charter Communications, Inc. et al. (the "Charter Litigation"), (b) approximately $8.4 million of property they claim was in unencumbered accounts as of the Petition Date, and (c) the value of the Uniti Settlement proceeds. None of these categories of value withstands scrutiny.

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[80] Ex. 7, Grossi Rep. ¶ 50; Ex. 6, Nystrom Tr. 29:5-24.

[81] Ex. 7, Grossi Rep. ¶ 51.

[82] *Id.* ¶ 46; Ex. 8, Grossi Decl. ¶¶ 19–20.

[83] *Id.*

[84] *Id.*

[85] Ex. 7, Grossi Rep. ¶ 53; Ex. 8, Grossi Decl. ¶¶6, 21

70. As the Court is aware, there has been no award of any damages in the Charter Litigation. While the Debtors certainly hope they are able to obtain $18 million, that amount is speculative and is subject to the risks and costs of contested litigation. Further, there are numerous separate plaintiffs in that case, many of them non-obligors.[86] No decision has yet been made determining what portion, if any, of an eventual award will be allocated to obligor debtors, and Mr. Nystrom admitted he has not conducted any analysis into either the liquidation value or likely allocation of the claims in the Charter Litigation.[87] Moreover, Mr. Grossi testified that any potential value from the Charter litigation (which is highly speculative) would not contribute to the obligor unsecured creditors' recovery and therefore would not change his opinion that the Plan is in the best interest of the creditors.[88]

71. The Committee's belief that there were approximately $8.4 million in cash in unencumbered accounts is due to a simple misreading of a perfection certificate. To begin with, this cash sits overwhelmingly in the accounts of ***Non-Obligor*** Debtors.[89] The only reason the Committee believe they are entitled to this cash is because, they claim, it was pledged by Obligor Debtors, but those pledges were never perfected.[90] The ***only*** evidence offered by the Committee that the accounts at issue were actually pledged is the conclusory testimony of Mr. Nystrom. Yet Mr. Nystrom admitted that he was not aware of any evidence that shows that the accounts were

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[86] *See* Complaint, *Windstream Holdings Inc., et al. v. Charter Communications, Inc.*, No. 19-08246 (RDD) (Bankr. S.D.N.Y. filed April 5, 2019).

[87] Ex. 6, Nystrom Tr. 19:24-20:1; 64:5-15.

[88] Ex. 8, Grossi Decl. ¶¶ 23–24.

[89] *See* Ex. 9, Nystrom Rep. Appendix 2; Ex. 8, Grossi Decl. ¶ 24..

[90] Ex. 6, Nystrom Tr. 59:9-15.

actually pledged.[91] Instead, he relied entirely on information from attorneys at Morrison & Foerster for his conclusion that the accounts are unencumbered.[92]

72. Respectfully, this information was incorrect. Morrison & Foerster read in the perfection certificate that ***some*** Debtor accounts were pledged by Obligor Debtors, and assumed (without basis), that ***all*** of the accounts listed in the perfection certificate were pledged by those obligor debtors.[93] The document is clear on its face: where no pledgor is listed, it is because the account was not pledged. *Id.* There are no security documents or other documents whatsoever showing that these non-obligor accounts were ever pledged by an Obligor Debtor.[94]

73. Finally, as previously discussed, the Committee and Unsecured Notes Indenture Trustees are incorrect that the settlement proceeds are unencumbered. However, it is worth noting that even if they were correct, it would not change the results of the best interests test or the liquidation analysis. As the Unsecured Notes Indenture Trustees themselves have noted time and time again, in a liquidation there would ***be*** no settlement value—the Uniti Settlement is entirely premised on (and its value substantially tied to) Windstream continuing to operate as a going concern.[95] Certainly, the Unsecured Notes Indenture Trustees expert did no analysis of the

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[91] *Id.* at 62:20-63:8.

[92] *Id.*

[93] *See* Ex. 10, Nystrom Dep Ex. 3.

[94] *See, e.g.* Ex. 6, Nystrom Dep. Tr. 51:9-12 *see also id.* at 62:20-63:

[95] Ex. 11, 9019 Hr'g Tr. 126:7–20.

liquidation value of the Uniti claim,[96] other than agreeing with Mr. Grossi's analysis and conclusion that the Plan satisfies the best interests test.[97]

74. For these reasons, the Plan satisfies the Best Interests Test and the Debtors respectfully submit that the objections of the Creditors' Committee and Unsecured Notes Indenture Trustees should be overruled.

H. The Plan Can Be Confirmed Notwithstanding the Requirements of Section 1129(a)(8) of the Bankruptcy Code.

75. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests must either accept a plan or be unimpaired thereby.[98] Pursuant to section 1126(c) of the Bankruptcy Code, a class of claims accepts a plan if holders of at least two thirds in amount and more than one half in number of the allowed claims in that class vote to accept the plan. Pursuant to section 1126(d) of the Bankruptcy Code, a class of interests accepts a plan if holders of at least two thirds in amount of the allowed interests in that class vote to accept the plan. A class that is not impaired under a plan, and each holder of a claim or interest in such a class, is conclusively presumed to have accepted the plan. On the other hand, a class is deemed to have rejected a plan if the plan provides that the claims or interests of that class do not receive or retain any property under the plan on account of such claims or interests.

76. As set forth above and as reflected in the Voting Certification, Classes 3, 4, and 5 voted to accept the Plan. Notwithstanding that Classes 6A, 7, 8, and 9 voted to reject or are

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[96] Ex. 6, Nystrom Tr. 67:11-17.

[97] *Id.* at 14:16-15:16.

[98] 11 U.S.C. § 1129(a)(8).

presumed to reject the Plan, as discussed more fully below, the Debtors meet the requirements of section 1129(b) of the Bankruptcy Code to "cram down" these Rejecting Classes.

I. The Plan Provides for Payment of Priority Claims in Compliance with Section 1129(a)(9) of the Bankruptcy Code.

77. Section 1129(a)(9) of the Bankruptcy Code requires that certain priority claims be paid in full and that holders of certain other priority claims receive deferred cash payments.[99] In particular, holders of claims of a kind specified in section 507(a)(2) of the Bankruptcy Code—administrative expenses allowed under section 503(b) of the Bankruptcy Code—must receive on the effective date cash equal to the allowed amount of such claims.[100]

78. The Plan here provides that:

- Allowed Administrative Claims will be paid in full, consistent with section 1129(a)(9)(A);
- Allowed Priority Tax Claims will be treated in accordance with the terms set forth in section 1129(a)(9)(C); and
- Allowed Other Priority Claims will be treated in accordance with the terms set forth in section 1129(a)(9).

79. Further, the Plan satisfies section 1129(a)(9)(B) of the Bankruptcy Code because no holders of the types of claims specified in this section were impaired under the Plan, and such claims have been paid in the ordinary course. Accordingly, the Debtors submit that the Plan satisfies all of the requirements of section 1129(a)(9) of the Bankruptcy Code.

J. The Plan Has Been Accepted by at Least One Impaired Class.

80. Section 1129(a)(10) of the Bankruptcy Code is an alternative requirement to section 1129(a)(8), which requires that each class of claims or interests either accept a plan or be

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[99] 11 U.S.C. § 1129(a)(9).

[100] 11 U.S.C. § 1129(a)(9)(A).

unimpaired thereunder. Section 1129(a)(10) of the Bankruptcy Code provides that a plan may be confirmed (subject to the other requirements set forth herein) if a class of claims is impaired under the plan and at least one impaired class of claims accepts the plan, excluding acceptance by any insider[101]. Here, Impaired Classes 3, 4, and 5 voted to accept the Plan.[102] Therefore, the Plan satisfies the requirements of section 1129(a)(10) of the Bankruptcy Code.

K. The Plan Is Feasible in Compliance with Section 1129(a)(11) of the Bankruptcy Code.

81. Section 1129(a)(11) of the Bankruptcy Code requires that a court find that a plan is feasible before confirming it. Specifically, the court must conclude that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan."[103] To demonstrate that a plan is feasible, it is only necessary to show that there is a reasonable prospect that the reorganized entity will be successful.[104] Importantly, "the feasibility inquiry is peculiarly fact intensive and requires a case-by-case analysis, using as a backdrop the relatively broad parameters articulated in the statute. . . . [T]here is a relatively low threshold of proof necessary to satisfy the feasibility requirement."[105] Section 1129(a)(11) does not require the Debtors to guarantee the Plan's complete success. Instead, and to satisfy the feasibility requirement, the Debtors must show that the Plan has a

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[101] 11 U.S.C. § 1129(a)(10).

[102] *See* Exhibit A, Voting Certification [Docket No. 2171].

[103] 11 U.S.C. § 1129(a)(11).

[104] *See In re Johns-Manville Corp.*, 843 F.2d at 649 ("[T]he feasibility standard is whether the plan offers a reasonable assurance of success. Success need not be guaranteed."); *see also In re Briscoe Enters., Ltd., II*, 994 F.2d 1160, 1166 (5th Cir. 1993) ("Only a reasonable assurance of commercial viability is required.") (citation omitted).

[105] *In re Eddington Thread Mfg. Co.*, 181 B.R. 826, 833 (Bankr. E.D. Pa. 1995); *see Mercury Capital Corp. v. Milford Conn. Assocs., L.P.*, 354 B.R. 1, 9 (D. Conn. 2006) ("A 'relatively low threshold of proof' will satisfy the feasibility requirement.") (quoting *In re Brotby*, 303 B.R. 177, 191 (B.A.P. 9th Cir. 2003)).

reasonable chance of success.[106] In evaluating feasibility, courts have identified the following probative factors:

- the prospective earnings of the business or its earning power;
- the soundness and adequacy of the capital structure and working capital for the business which the debtor will engage in post-confirmation;
- the prospective availability of credit;
- whether the debtor will have the ability to meet its requirements for capital expenditures;
- economic and market conditions;
- the ability of management, and the likelihood that the same management will continue; and
- any other related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.[107]

82. The Plan satisfies the feasibility requirements of section 1129(a)(11) of the Bankruptcy Code by providing for a clear path to emergence from these Chapter 11 Cases and the ability of the Debtors to satisfy all of their obligations under the Plan. The Debtors, together with their creditor constituents—which include the future owners of the reorganized business—have thoroughly analyzed the Debtors' ability to meet its obligations under the Plan and submit that confirmation of the Plan is not likely to be followed by liquidation or the need for further reorganization. The Debtors have reliable sources of liquidity and, upon emerging, will have secured valuable exit financing commitments, all of which were considered and taken into account

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[106] *See Kane*, 843 F.2d at 649 ("[T]he feasibility standard is whether the plan offers a reasonable assurance of success. Success need not be guaranteed.") (citations omitted); *see also In re Aleris Int'l, Inc.*, 2010 WL 3492664, at *27–29 (Bankr. D. Del. May 13, 2010) (collecting cases holding that the feasibility standard requires a showing of a reasonable likelihood of success).

[107] *See, e.g.*, *In re WorldCom.*, 2003 WL 23861928, at *58; *In re Texaco Inc.*, 84 B.R. 893, 910 (Bankr. S.D.N.Y. 1988); *In re Prudential Energy Co.*, 58 B.R. 857, 862–63 (Bankr. S.D.N.Y. 1986).

in the preparation of the financial projections (the "Financial Projections") for the fiscal years 2019 through 2026, as described in Exhibit C to the Disclosure Statement [Dkt. No. 1813].

83. Through the Plan, the Debtors will meaningfully reduce their funded debt by more than $4 billion and best position the Debtors' business operations for future success. The Debtors also expect to obtain the financing necessary to fund plan distributions and to provide liquidity for their business going forward through the New Exit Facility, which is anticipated to be sufficient to satisfy all Cash payment obligations under the Plan.

84. As set forth in the Thomas Declaration and the Financial Projections, the Debtors' business will be positioned for stability and success after emergence from bankruptcy. The Debtors have therefore established that the Reorganized Debtors will have sufficient funds to satisfy all requirements and obligations under the Plan. Accordingly, the Debtors submit that the Plan fully complies with and satisfies all of the requirements of section 1129(a)(11) of the Bankruptcy Code.

L. The Plan Provides for the Payment of All Fees under 28 U.S.C. § 1930 in Compliance with Section 1129(a)(12) of the Bankruptcy Code.

85. Section 1129(a)(12) of the Bankruptcy Code requires the payment of all fees payable under 28 U.S.C. § 1930.[108] Article II.E of the Plan provides that such fees will be paid until the Debtors' cases have been converted, dismissed, or closed pursuant to a final decree. Accordingly, the Plan complies with section 1129(a)(12) of the Bankruptcy Code.

M. The Plan Complies with Section 1129(a)(13) of the Bankruptcy Code.

86. Section 1129(a)(13) of the Bankruptcy Code requires that retiree benefits are paid post-confirmation at any levels established in accordance with section 1114 of the Bankruptcy

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[108] 11 U.S.C. § 1129(a)(12).

Code.[109] Article IV.S of the Plan satisfies this requirement by providing that "all retiree benefits (as such term is defined in section 1114 of the Bankruptcy Code), if any, shall continue to be paid in accordance with applicable law."

N. Sections 1129(a)(14)–(16) of the Bankruptcy Code Are Inapplicable to the Debtors.

87. The Debtors are not required by a judicial or administrative order, or by statute, to pay a domestic support obligation. Accordingly, section 1129(a)(14) of the Bankruptcy Code is inapplicable in these cases.[110] The Debtors are not an individual, and, accordingly, section 1129(a)(15) of the Bankruptcy Code is inapplicable. Finally, each of the Debtors are a moneyed, business, or commercial corporation or trust, and therefore, section 1129(a)(16) of the Bankruptcy Code, which provides that property transfers by a corporation or trust that is not a moneyed, business, or commercial corporation or trust be made in accordance with any applicable provisions of nonbankruptcy law, is not applicable to the Debtors.

O. The Principal Purpose of the Plan Is Not Avoidance of Taxes or Section 5 of the Securities Act, as Required by Section 1129(d) of the Bankruptcy Code.

88. Section 1129(d) of the Bankruptcy Code states that "the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933."[111] The purpose of the Plan is not to avoid taxes or the application of section 5 of the Securities Act of 1933. Moreover, no party that is a governmental unit, or any other entity, has requested that the Court decline to confirm the Plan on the grounds that the principal purpose of the Plan is the avoidance of taxes or the avoidance of the application

[109] 11 U.S.C. § 1129(a)(13).

[110] 11 U.S.C. § 1129(a)(14).

[111] 11 U.S.C. § 1129(d).

of section 5 of the Securities Act of 1933. Accordingly, the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code.

P. The Plan Is the Only Plan Before the Court (Section 1129(c)).

89. Section 1129(c) of the Bankruptcy Code provides that the bankruptcy court may confirm only one plan.[112] Because the Plan is the only plan before the Court, section 1129(c) is satisfied.

IV. REPLY TO OBJECTIONS OF THE COMMITTEE AND UNSECURED NOTES INDENTURE TRUSTEES' ABSOLUTE PRIORITY OBJECTION.

90. There is no dispute that the holders of First Lien Claims have agreed to accept a substantial impairment on the aggregate face value of their claims to facilitate the Debtors' exit from chapter 11. And there can be no dispute that the Plan satisfies the best interests test, as the Committee's own expert, its sole witness, concedes. The Bankruptcy Code provides, as a baseline, that creditors are entitled to at least what they would receive in a liquidation—no more. Here, the Debtors' undisputed evidence demonstrates that, in a liquidation, holders of General Unsecured Claims are not entitled to a recovery.

91. Yet the Committee and Unsecured Notes Indenture Trustee nonetheless argue, somehow, that the Plan fails section 1129(b)(1)'s cram down test because the holders of First Lien Claims are recovering more than the value of those claims. This is ultimately little more than an attempt to write into the Bankruptcy Code an entitlement that does not exist—*i.e.*, that unsecured creditors are entitled to a share of the going concern value of unencumbered assets. That is simply not the case. The Bankruptcy Code provides ***only*** that all creditors are entitled to at least what they would receive in a liquidation. The Bankruptcy Code does not include a mandate with respect

[112] 11 U.S.C. § 1129(c).

to allocation of value in excess of liquidation value—that is left to the debtor and its creditors to negotiate.

92. But even if unsecured creditors were entitled to a pro rata share of unencumbered, going concern value as a legal matter, that would not change the result here. The evidence at the Confirmation Hearing will show that the holders of First Lien Claims have direct and indirect liens on the Debtors' entire enterprise value, and no value will flow to unsecured creditors following the payment of administrative claims, the DIP Facilities Claims, and the holders of First Lien Claims' secured, deficiency, and adequate protection claims. And, even if unencumbered value remained under the Plan (it does not), it is undisputed that holders of First Lien Claims are receiving less than a full recovery on the aggregate face amount of their claims and that no class junior to General Unsecured Claims is receiving a recovery under the Plan, so the Plan cannot violate the absolute priority rule. For these reasons, the Plan should be confirmed.

A. There is s No Unencumbered Value Not Covered by the First Lien Security Agreement.

93. The Committee's and Unsecured Notes Indenture Trustees' objections turn on one principal issue: whether there is unencumbered value that flows to unsecured creditors. There is none.

94. Under their April 2015 Security Agreement, the holders of First Lien Claims have sweeping liens in the Debtors' income-generating cash flows (the electronics used to transmit voice and data signals), contracts, goodwill, non-tort litigation claims, and other tangibles and general intangibles.[113] 128 of the Debtors are Obligors under the Security Agreement; the other

[113] Ex. 12, Amended and Restated Security Agreement ("Security Agreement") § 2(a) (defining the scope of the first lien lenders' collateral, including "Accounts," "Equity Interests," "Equipment," and "General Intangibles").

78 (including Holdings) are not.[114] Services and most of its subsidiaries, moreover, pledged 100% of their subsidiary equity interests (including the equity in Non-Obligor Debtors), thus granting the holders of First Lien Claims' liens in the Debtors' entire enterprise below Services, which includes all of the Debtors' operating entities.[115]

95. The holders of First Lien Claims, in short, have direct and indirect liens in the Debtors' entire enterprise value. And this is not contested, as the Committee's own expert witness (as discussed above) concedes that none of this alleged unencumbered value undermines the Debtors' liquidation analysis and that the Plan satisfies the best interests test.[116]

96. Against these blanket liens, the exceptions and omissions are minimal and immaterial. The holders of First Lien Claims did not have liens in the assets transferred to Uniti as part of the Uniti Arrangement (which the Debtors could no longer pledge because they did not own them), the Master Lease, and miscellaneous other categories where the value of the collateral often was not worth the price of encumbering it. The real value of a bucket truck, for example, is the income it helps the Debtors generate—not its Kelly Blue Book resale price, which has little value. Yet, once these unencumbered assets generate income, that income and any cash received becomes encumbered. Nor were the settlement proceeds of the Debtors' recharacterization claim—the principal focus of the two objections—unencumbered.

i. Almost All of the Debtors' Operating Assets Are Encumbered.

97. Because almost all of the Debtors' assets are encumbered, the Committee and the Unsecured Notes Indenture Trustees turn to stray assets in their search for unencumbered value.[117]

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[114] *See* Disclosure Statement Exhibits 1-2.

[115] Ex. 12, Amended and Restated Security Agreement ("Security Agreement") § 2(a), Schedule I.

[116] Ex. 6, Nystrom Dep. Tr. 14:16–15:16.

[117] *See* Committee Obj. ¶¶ 15, 90 [Docket No. 2159]; Trustees Obj. ¶ 75 [Docket No. 2162].

In total and based on book value, there are just $125 million of unencumbered book value—not fair market value—and the Committee does not even attempt to value other miscellaneous assets (which the Debtors have concluded have *de minimis* or no value):

Obligor Debtors' Unencumbered Collateral[118]

Real Property	$94.018 million[119]
Commercial Tort Claims	$19.9 million
Unencumbered bank accounts	$8.424 million
Motor vehicles	$3.98 million
Copyrights and licenses	*De minimis*
Foreign subsidiaries	*De minimis*
Certain non-Obligor subsidiaries	*De minimis*
Avoidance actions	None
Tax attributes	No value ascribed, but any such value is encumbered[120]

98. These assets are worth far less than their book value.[121] There is little demand, for example, for late model bucket trucks specialized for telecom use.

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[118] For the unencumbered assets held at the Non-Obligor Debtors subject to equity pledges (*i.e.*, all Non-Obligor Debtors except for Holdings), the holders of First Lien Claims obtained the economic value of those assets through Services and the other Obligor Debtors' pledges of their equity interests. These Equity Interests roll up the value of the encumbered and unencumbered assets that the businesses owns. *See Ion Media Networks*, 419 B.R. 585, 588–89, 592, 602–03 (Bankr. S.D.N.Y. 2009) (overruling a second lien lender's plan objection and finding that the FCC licenses were *de facto* encumbered because, among other reasons, the first lien lenders had "a security interest in the economic value of the FCC Licenses" through the pledges of the equity interests in the special purpose subsidiaries that held those licenses).

[119] Though the book value of the Debtors' unencumbered property is approximately $598 million, much of that is either at non-Obligors or attributable to the accounting treatment of in progress construction, and the actual value of the unencumbered real property is far less. *See* Ex. 7, Grossi Rep. ¶¶ 47–53, Appendix D; Ex. 8, Grossi Decl. ¶ 21.

[120] Tax attributes are encumbered "General Intangibles." *In re Protocol Servs., Inc.*, 2005 WL 6485180, at *2 (Bankr. S.D. Cal. 2005) (tax refunds generated from net operating loss were encumbered General Intangibles); *In re TMCI Elecs.*, 279 B.R. 552, 558 (Bankr. N.D. Cal. 1999) (same); *In re Castle Ventures, Ltd.*, 167 B.R. 758, 764 (Bankr. E.D.N.Y. 1994) (tax refunds were General Intangibles).

[121] *See* Ex. 8, Grossi Decl. ¶ 25.

99. But even adopting the book value, the highest value that could be ascribed to these assets is just 3.4 percent of the Debtors' total enterprise value ($3,750 million midpoint valuation) as of the Effective Date (and the percentage would be even lower as of the Petition Date, a $4,125 million mid-point valuation).[122]

ii. The Economic Value from the Master Lease Is Encumbered.

100. The Unsecured Creditors also have emphasized the Master Lease at Holdings, where the holders of First Lien Claims have no liens.[123] But the Master Lease too has *de minimis* value standing alone.

101. ***First***, Holdings' leasehold interest under the Master Lease in itself has little value. The Unsecured Creditors cannot now assign significant value to the same Master Lease that was described as a "disaster for the Debtors," and which the Unsecured Notes Indenture Trustees assigned a "current market rate of rent … [of] approximately $30 to $33 million per month"—tens of millions less than Holdings' actual rent.[124]

102. ***Second***, the value of the Master Lease derives from the income generated from Services' subsidiaries use of the leased assets—not the lease or the leased assets themselves (which Holdings could not operate on its own). These cash flows were encumbered through the holders of First Lien Claims' liens in "Accounts," among other collateral.[125] The holders of First Lien

[122] Ex. 1, Leone Decl. ¶¶ 5, 10, 17.

[123] Committee Obj. ¶¶ 53, 67–70 [Docket No. 2159]; Unsecured Notes Indenture Trustees Obj. ¶ 55 [Docket No. 2162].

[124] 11/18/19 Unsecured Notes Indenture Trustees' Objection to Debtors' Motion to Stay Section 365(d)(4) Deadline [Docket No. 1219] ¶ 15; 5/2/20 Unsecured Notes Indenture Trustees' 9019 Opposition [Docket No. 1744] ¶ 8.

[125] Under the New York UCC, "Accounts" means: "a right to payment of a monetary obligation, whether or not earned by performance … for services rendered or to be rendered." N.Y. UCC § 9-102(2). "Accounts" encompass the "income generated from the debtor's own use and possession of goods." *1st Source Bank v. Wilson Bank & Trust*, 735 F.3d 500, 504 (6th Cir. 2013) (defining "Accounts" under the similar Tennessee UCC).

Claims, for this reason, had liens in the economic value of the Master Lease, even if not in the Master Lease itself.[126]

103. *Third*, the Committee's focus on Holdings as the lessee under the Master Lease is a red herring because Services' subsidiaries are the ones operating the leased assets. A going concern valuation (which is appropriate, as discussed below) picks up Services' subsidiaries access to the assets leased from Uniti in the normal course of business.[127]

104. Further, the holders of First Lien Claims' collateral, which includes "General Intangibles," covers Services' subsidiaries' access to the assets under the Master Lease, however that arrangement is described. In focusing on the Master Lease, the objections ignore the intracompany arrangements to use the same assets.

iii. The Debtors' Settlement of their Recharacterization Claim is Encumbered.

105. As a final argument, the Committee and Unsecured Notes Indenture Trustees focus on the Uniti Settlement proceeds, arguing that those proceeds are unencumbered.[128] But their arguments are predicated on mistakes of law. Controlling Second Circuit law shows that recharacterization arises prepetition, the proceeds from recharacterization falls within the holders of First Lien Claims' lien in "General Intangibles" (a catch-all), and nothing in section 552(b)(1) eliminates the holders of First Lien Claims' lien in the liquidated proceeds of a recharacterization claim that was encumbered prepetition.

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[126] *See Ion Media Networks*, 419 B.R. at 602–03 (finding that the economic value of FCC licenses was encumbered, even though the licenses themselves were not).

[127] *See In re Kim*, 130 F.3d 863, 864–66 (9th Cir. 1997) (reversing the bankruptcy court's valuation of a secured lender's collateral (dry cleaning equipment and the lease of the business premises), which should have valued the equipment "on location, not off location," because "the valuation is to depend on the use or disposition to be made of the interest, which in this case means the continued operation of the business in the same location").

[128] Committee Obj. ¶¶ 35–60 [Docket No. 2159]; Unsecured Notes Indenture Trustees Obj. ¶¶ 62–74 [Docket No. 2162].

a. The Debtors' Recharacterization Claim Arose Prepetition.

106. The Committee and Unsecured Notes Indenture Trustees argue that recharacterization as a cause of action does not arise until chapter 11 cases are commenced and thus could not have been encumbered prepetition.[129] But recharacterization addresses the legal effect of a purported lease, and thus is a contract action that arises from the execution of the arrangement. The Second Circuit thus adopted this rationale and rejected the premise of the Committee's and Unsecured Notes Indenture Trustees' argument in its seminal *In re PCH Associates* decision, which involved a hotel sale-leaseback arrangement.[130]

107. There, once the purported lessee entered chapter 11 and stopped paying rent on its ground lease, the lessor sought relief under sections 363(e) and 365 for an order compelling the lessee to perform and for adequate protection.[131] The lessee, in response, commenced an adversary proceeding to recharacterize the sale-leaseback arrangement as a financing or joint venture.[132] The bankruptcy court agreed that the arrangement was a disguised joint venture and the Second Circuit affirmed in part, concluding that the lease was not a true lease but declining to characterize the precise relationship between the parties.[133]

108. Following that loss, the hotel was sold at a foreclosure sale and the lessor brought an adversary proceeding of its own relating to its interest in the sale proceeds, which required the bankruptcy court to to determine the parties' relationship and the legal effect of recharacterization.[134] The lessee responded that it was too late for the lessor to bring that claim

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[129] Committee Obj. ¶¶ 3, 46 [Docket No. 2159]; Unsecured Notes Indenture Trustees Obj. ¶ 66 [Docket No. 2162].

[130] 949 F.2d 585, 590 (2d Cir. 1991) ("*PCH II*").

[131] *Id.* at 591.

[132] *Id.*

[133] *See In re PCH Assocs.*, 804 F.2d 193 (2d Cir. 1986) ("*PCH I*").

[134] *PCH II*, 949 F.2d at 591.

because it was a compulsory counterclaim that should have been brought earlier in response to the lessee's original adversary proceeding.[135] The Second Circuit, however, found the lessor-turned-lender's rights against the lessee-turned-borrower under a recharacterized lease arose prepetition—not post:

> [A]ny claim that Liona [the purported lessor] possessed against the PCH [the purported lessee] estate arose prior to the initiation of the PCH bankruptcy proceedings and accordingly the compulsory counterclaim rule was inoperative. The Sale Agreement and the Ground Lease were both executed well before the Chapter 11 petition was filed; therefore, any claims stemming from those agreements did not arise after the bankruptcy commenced. The mere fact that PCH challenged the nature of Liona's interest does not negate the fact that Liona's claim, if any, arose prior to the filing of the petition.[136]

109. *PCH II* ends the Committee's and Unsecured Notes Indenture Trustees' arguments, and is consistent with the extensive authorities finding that recharacterization exists both in and out of bankruptcy.[137] If a disguised lessor's rights under a recharacterized lease exist prepetition, so too must the lessee's rights. The Committee and Unsecured Notes Indenture Trustees have asked the Court to defy the Second Circuit without bringing that to the Court's attention, and nothing in their principal lower court case—which preceded *PCH II* and did not involve a recharacterization claim —is binding or otherwise warrants a different conclusion.[138]

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[135] *Id.* at 594.

[136] *Id.*

[137] *See Matter of Pioneer Health Servs., Inc.*, 739 F. App'x 240, 243 (5th Cir. 2018) (unpublished) ("We look to state law to determine whether a contract is in fact a lease."); *United Airlines, Inc. v. HSBC Bank USA, N.A.*, 416 F.3d 609, 615 (7th Cir. 2005) ("Because nothing in the Bankruptcy Code says which economic features of a transaction have what consequences, we turn to state law. All of the states have devoted substantial efforts to differentiating leases from secured credit in commercial and banking law."); *In re CIS Corp.*, 172 B.R. 748, 756 (S.D.N.Y. 1994) ("There is nothing unique to the bankruptcy code involved in an action for recharacterization of a sales transaction as a financing arrangement. Such an action generally involves application of principles of contract interpretation.").

[138] *See Capital National Bank of New York v. McDonald's Corp.*, 625 F. Supp. 874, 879 (S.D.N.Y. 1986) (finding that claims that arose after liens were granted were not part of the secured lenders' collateral package, and conceding that, as here, "a claim that has already accrued or is fully matured is assignable").

110. The Committee's last argument is that the Debtors would have been estopped from bringing a recharacterization claim prepetition.[139] But whether a lease was a true lease for bankruptcy purposes arose upon the lease's execution. That such a claim may not have had value until the Debtors filed for chapter 11 (and the Bankruptcy Code often affects the value of claims) does not deny its existence prepetition. Courts, moreover, look at substance over form when determining the true legal character of a purported lease, and estoppel is not a viable defense in this context.[140] This is true whether recharacterization is brought under the UCC, federal and state tax laws, or for other reasons as here.

b. The Debtors' Recharacterization Claim Is a "General Intangible."

111. The Committee next makes the baseless assertion that claims requesting declarations cannot be a "General Intangible," which is covered under the holders of First Lien Claims' Security Agreement.[141]

112. "General Intangibles," however, is a sweeping term intended to capture assets that are not otherwise categorized, and thus encompasses non-tort claims, including contract-based

139 Committee Obj. ¶ 46 [Docket No. 2159]; Unsecured Notes Indenture Trustees Obj. ¶ 66 [Docket No. 2166]; Section 2(vi) of the Amended and Restated Security Agreement (Ex. 12) grants "[a] continuing security interest in all of its right, title and interest in the following property of the Borrower or such Guarantor, as the case may be, whether now owned or existing or hereafter acquired or arising and regardless of where located: … all General Intangibles (including any Equity Interests in other Persons that do not constitute Investment Property."

140 *See, e.g.*, *Albion Indus. Ctr. v. Town of Albion (Orleans City)*, 62 A.D.2d 478, 482–83, (4th Dep't 1978) (finding the parties' labels to not be dispositive); *Travelers Prop. & Cas. Co. v. Gen. Elec. Capital Auto Lease, Inc.*, 2001 WL 1673432, at *1 (N.Y. Sup. Ct. Sept. 28, 2001) (same).

141 Committee Obj. ¶¶ 3, 41, 43 [Docket No. 2159].

claims,[142] and the settlement proceeds from those litigation claims.[143] Given its catch-all status, "courts have determined that the general intangible classification is quite broad."[144]

113. The Debtors' recharacterization claim, which derives from its contractual arrangements with Uniti, therefore is a non-tort "General Intangible." No different than a contracting party seeking a declaration that it did not breach its contract, which of course is not a tort claim, neither is the Debtors' seeking a declaration about the legal effect of its contracts with Uniti.

c. Section 552(b) Does not Bar the Holders of First Lien Claims' Lien in the Recharacterization Claim.

114. The Committee then argues, based on *In re Residential Capital, LLC*, that the expenditure of "estate resources" to prosecute the recharacterization claim against Uniti exempts the Uniti Settlement proceeds from the First Lien Creditors' liens under section 552(b)(1).[145]

115. *First*, the DIP Order's section 552(b) "equities of the case" waiver bars the Committee's reliance on section 552(b)(1)'s carve out for prepetition liens.[146]

116. *Second*, the Committee has overstated the holding from *Residential Capital*. There, the Committee found there was no lien on "any goodwill generated in connection with [an asset sale]" because that goodwill was created postpetition by the Debtors; the goodwill did not exist as

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142 *See, e.g.*, *In re Griffith*, 146 B.R. 262, 266–67 (Bankr. E.D. Okla. 1996) (finding that a contractual covenant not to compete with a "General Intangible").

143 *Insurance Co. of N. Am. v. Della Indus., Inc.*, 229 F.3d 1135, (2d Cir. 1999) (unpublished); *In re Doctors Hosp. of Hyde Park, Inc.*, 504 B.R. 900, 907 (Bankr. N.D. Ill. 2014).

144 4 UCC Trans Gd § 32:5.10.

145 Committee Obj. ¶¶ 49–50 [Docket No. 2159] (citing *In re Residential Capital, LLC*, 501 B.R. 549, 612 (Bankr. S.D.N.Y. 2013)).

146 The *Final Order (A) Authorizing the Debtors to Obtain Postpetition Financing, (B) Authorizing the Debtors to Use Cash Collateral, (C) Granting Liens and Providing Superpriority Administrative Expense Status, (D) Granting Adequate Protection to the Prepetition Secured Parties, (E) Modifying the Automatic Stay, and (F) Granted Related Relief* [Docket No. 376] (the "DIP Order") ¶ 10 (stating that "in no event shall the 'equities of the case' exception in section 552(b) of the Bankruptcy Code apply to the secured claims of the Prepetition Secured Parties or to the liens and security interests securing such claims").

an asset prepetition.[147] In contrast, when assets, such as the litigation claims here, existed prepetition, courts have found the proceeds from the postpetition liquidation of those assets is encumbered pursuant to Section 552(b)(1).[148] *Residential Capital* thus does not stand for the illogical rule that the proceeds from liquidating prepetition encumbered assets become un-encumbered when estate time, effort, and funds are involved in their liquidation (as its normally the case).

117. Here, as in *Endresen* and unlike *Residential Capital*, the Debtors' recharacterization claim existed prepetition for the reasons discussed above. The proceeds from the liquidation of that claim are encumbered.

118. Further, even assuming the Court accepts the Committee's standard (which it should not do), the First Lien Claims' security interest still attaches to the Uniti Settlement's recharacterization proceeds under § 552(b)(1). Estate resources expended during the litigation of the Debtors' recharacterization claim came from encumbered assets, and the contribution of encumbered assets to generate postpetition collateral does not prevent a security interest from attaching pursuant under § 552(b)(1).[149]

d. The Objectors' Remaining Arguments Likewise Fail.

119. The Objectors' remaining arguments do not establish that the proceeds of the Debtors' recharacterization claim are unencumbered:

- The Objectors argue that, had there been a successful recharacterization, the "leased assets" would have been deemed owned by the Debtors and excluded from the First

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[147] *Residential Capital*, 501 B.R. at 610, 612.

[148] *In re Endresen*, 530 B.R. 856, 868–69 (Bankr. D. Or. 2015) (holding that the proceeds from the postpetition settlement of litigation that arose prepetition was encumbered under Section 552(b)); *see also In re Delco Oil, Inc.*, 365 B.R. 246, 250 (Bankr. M.D. Fla. 2007) (finding that postpetition collateral constitutes proceeds "when one asset is disposed of and another is acquired as its substitute") (internal quotation omitted).

[149] *Delco Oil*, 365 B.R. at 250–51.

Lien Lenders' Security Agreement.[150] But the First Lien Lenders did not release their liens on those assets unless they were in fact "contributed or otherwise transferred," which would not have occurred had the Debtors prevailed.[151] Further, the Objectors' hypothetical never materialized, and cannot be used to defeat liens in litigation claims that might not have succeeded. And the First Lien Lenders also have liens in the economic value from the use of the assets (*i.e.*, the income generated from the provision of services), as discussed below.

- That multiple parties have standing to assert recharacterization in the chapter 11 context does not somehow change the ownership of recharacterization claims.[152] Creditors asserting recharacterization as a defense on the Debtors' behalf, in this context, is analogous to shareholders bringing derivative actions. Further, the Court's prior ruling reinforces that recharacterization is unlike avoidance claims, so it should not be treated like one.[153]

- Because the First Lien Lenders obtained equity pledges, which continue to have value at the Debtors' non-Obligors entities, the Objectors argue that those entities could not have benefited from recharacterization because they were not plaintiffs.[154] But this ignores that the Court could have deemed the assets never to have been transferred, and that Uniti's counterclaim brought in the Debtors' subsidiaries (who purported to transfer the assets) as defendants on the recharacterization issue.

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120. For these reasons, the Debtors' recharacterization claim is an encumbered "General Intangible"—a contract-based litigation claim that, under Second Circuit law, arose prepetition. Even if the Debtors' recharacterization claim was *un*encumbered, the result does not change for unsecured creditors. The practical result is that the First Lien Lenders' adequate protection claim will that much greater, as discussed below. As Mr. Leone's expert testimony lays out (and for which the Committee and Unsecured Notes Indenture Trustees offer no expert rebuttal), the First and Second Lien's adequate protection claim would increase from approximately $658 million–

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[150] Committee Obj. ¶ 39 [Docket No. 2159]; Unsecured Notes Indenture Trustees Obj. ¶¶ 63–64 [Docket No. 2162].

[151] Ex. 12, Amended and Restated Security Agreement §§ 1(c), "Contributed Assets," 2(a).

[152] Unsecured Indenture Notes Trustees Obj. ¶ [Docket No. 2162]..

[153] 12/12/19 Hr'g Tr. at 68:21–69:8 (rejecting the suggestion that recharacterization is like "a preference claim, a fraudulent transfer claim, or a veil-piercing claim")..

[154] Unsecured Indenture Notes Trustees Obj. ¶ 72 [Docket No. 2162].

$727 million to approximately $1,899 million–$1,971 million if the Uniti Settlement proceeds were encumbered.[155]

iv. The Debtors' Settlement of their Remaining Claims against Uniti has Negligible Value.

121. The Committee and Unsecured Notes Indenture Trustees also argue that the portion of the Uniti Settlement attributable to the Debtors' fraudulent transfer and breach of contract claims are unencumbered.[156] But these claims were an insignificant piece of the Uniti Settlement, and, in any event, none of their value flows to unsecured creditors.

122. ***First***, there should be no dispute that the Debtors' fraudulent transfer and breach of contract claims against Uniti were no more than 5 to 10 percent of the total value of the Uniti Settlement, at best.[157] As the Court recognized at the section 9019 hearing last month, the Debtors' non-recharacterization claims "carr[ied] with them significant problems on the merits," and fraudulent transfer was an "uphill fight."[158]

123. Whereas the recharacterization claim posed an "existential threat to Uniti" (the Committee's own words),[159] the Debtors' fraudulent transfer claim supported far less in damages—rent overpayments for seven quarters and the marginal value of forfeited Tenant Capital Improvements remaining at the end of the initial lease term in 2030—and the breach of contract

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[155] Leone Expert Report ¶¶ 70–72.

[156] *See* Committee Obj. ¶¶ 36, 51–53 [Docket No. 2159]; Unsecured Indenture Notes Trustees Obj. ¶¶ 24, 73–74 [Docket No. 2162].

[157] *See* Committee Obj. ¶ 36 [Docket No. 2159] ("Although there does not appear to be any analysis supporting the Debtors' contention that at least 90% of the Settlement Value is attributable to the recharacterization claim, the Committee does not dispute that a significant portion of the $1.2 billion in Settlement Value should be allocated to the settlement of that claim."); Unsecured Indenture Notes Trustees Obj. ¶ 24 [Docket No. 2162] (arguing that there is "no record" from which the Court can determine how to allocate the Uniti Settlement value, but not challenging Mr. Thomas' assignment of more than 90% to 95% of the Uniti Settlement value to the recharacterization claim).

[158] Ex. 2, 5/8/20 Hr'g Tr. at 32:25–33:22.

[159] Committee Obj. ¶ 36 [Docket No. 2159].

claim was far less than that. These claims also raised disputed issues of fact and law, including around Holdings' solvency, the fair market value of the Master Lease rent, Uniti's good faith defense, and whether the Debtors could obtain damages for rent payments under a lease executed while the Debtors were solvent.[160] From this record, it is no surprise that no one involved in negotiating the Uniti Settlement, from Windstream's management and advisors to the Court itself, has found that the fraudulent transfer and breach of contract claims should be assigned anything other than a minor percentage of the Uniti Settlement value.[161]

124. ***Second***, unsecured creditors have no entitlement to unencumbered portion of the Uniti Settlement, and the Committee and Unsecured Notes Indenture Trustees are incorrect that such value "*must* … be applied to satisfy claims of general unsecured creditors."[162] Instead, those proceeds are for the "benefit of the estate" as a whole—not particular classes of creditors.[163] For this reason, courts have allowed avoidance action proceeds to benefit just secured creditors or administrative claims.[164]

125. The result is no different here. Any value from the fraudulent transfer and breach of contract claims will flow to the claims ahead of the unsecured creditors: administrative claims,

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160 *See* 5/8/20 Hr'g Tr. at 32:25–33:22 (the Court identifying some of these and other factual and legal challenges).

161 *See* Ex. 4, Thomas Tr. at 82:19–83:6; Ex. 5, Leone Tr. at 121:15–19.

162 Unsecured Indenture Notes Trustees Obj. ¶ 74 [Docket No. 2162] (emphasis added).

163 *See* 11 U.S.C. § 550(a); *In re Calpine Corp.*, 377 B.R. 808, 813 (Bankr. S.D.N.Y. 2007) (finding that "section 550(a) does not say that some benefit must flow to unsecured creditors, instead section 550(a) speaks of benefit to the estate—which in bankruptcy parlance denotes the set of all potentially interested parties—rather than to any particular class of creditors") (internal quotations and brackets omitted).

164 *E.g.*, *Mellon Bank, N.A. v. Dick Corp.*, 351 F.3d 290, 292–93 (7th Cir. 2003) (finding that the secured creditors, who were funding the chapter 11 cases and the preference action litigation, were entitled to any proceeds); *In re Payless Cashways*, 290 B.R. 689, 692–97 (Bankr. W.D. Mo. 2003) (allowing the trustee of a deeply insolvent debtor to bring preference actions to recover funds that would satisfy administrative expenses, not unsecured creditors).

the DIP Lenders' claims, and the holders of First Lien Claims. The Debtors' fraudulent transfer and breach of contract claims do not generate a recovery for unsecured creditors.

B. The Debtors' Total Enterprise Value Is the Appropriate Benchmark for Valuing the Holders of First Lien Claims' Collateral.

126. It is settled law that a going concern valuation of collateral is appropriate when the debtor intends to reorganize, as here. Under section 506(a)(1), the value of a secured claim "shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property." Based on this plain language, the Supreme Court and lower courts following its lead (including this one) have placed "paramount importance" on the "proposed disposition or use of the collateral."[165] For debtors who intend to continue as a going concern, as here, that means "fair market value in the hands of the Debtors," not "the foreclosure value of the collateral in the hands of the secured creditor."[166]

127. Here, the Debtors stated their intention to reorganize from the outset,[167] and the Plan embodies that intention. The Debtors told the Court and its stakeholders on the Petition Date: "Windstream intends to utilize the chapter 11 process to preserve and maximize value and as expediently as possible, negotiate and implement a financial restructuring for the benefit of all stakeholders, while maintaining existing operations."[168] Consistent with this message, at all

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165 *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 962 (1997); *see also In re Heritage Highgate, Inc.*, 679 F.3d 132, 140–43 (3d Cir. 2012) (applying *Rash* to determine if a creditor had a secured claim); *In re Scopac*, 624 F.3d 274, 285 (5th Cir. 2010) (applying *Rash* to determine the amount of a creditor's secured claim); *In re Sabine Oil & Gas Corp.*, 555 B.R. 180, 264 (Bankr. S.D.N.Y. 2016) (applying *Rash* to a secured creditor's adequate protection and diminution in value claim); *In re SK Foods, L.P.*, 487 B.R. 257, 260-61 (E.D. Cal. 2013) (in connection with review of settlement, finding that bankruptcy court properly applied *Rash* and noting bankruptcy court holding that "going concern value appears more likely appropriate measure where, as here, the debtor intended to and did retain and use the collateral up to the time of a § 363 sale."); *In re Residential Capital, LLC*, 501 B.R. 549, 592–93 (Bankr. S.D.N.Y. 2013) (applying *Rash* to a secured creditor's diminution in value claim); *In re Sears Holding Corp.*, Case No. 18-23538 (RDD) (Bankr. S.D.N.Y.), 7/31/19 Hr'g Tr. at 225:8–22 (same).

166 *ResCap*, 501 B.R. at 556, 591–92, 595.

167 Ex. 3, Thomas Decl. ¶¶ 7, 50.

168 2/25/19 First Day Declaration [Docket No. 27] ¶ 14.

relevant times between the Petition Date and the Effective Date, the Debtors have sought to hold and operate their assets through consummation of a chapter 11 plan of reorganization.[169]

128. When a going concern valuation is appropriate, as here, courts then have relied on a debtor's total enterprise value as the baseline for valuing its secured lenders' collateral, including when there are cram down disputes. Though every last bucket truck might not be encumbered, the holders of First Lien Claims have liens in the income generated from the Debtors' assets, which is the foundation for an enterprise valuation for a going concern business like the Debtors'. The Committee and Unsecured Notes Indenture Trustees focus on tallying which assets are encumbered or not ignores that the holders of First Lien Claims can capture the entire economic value of an asset without have a lien in that asset itself.[170]

129. Here, the holders of First Lien Claims' collateral includes "Accounts" (a defined term under the New York UCC), and "Accounts" means: "a right to payment of a monetary obligation, whether or not earned by performance … for services rendered or to be rendered."[171] "Accounts," therefore, captures the "income generated from the debtor's own use and possession of goods."[172]

130. At worst, the Court should just subtract no more than the minimal amount of unencumbered value from the Debtors' total enterprise value in order to calculate the worth of the holders of First Lien Claims' collateral. *In re Hawaiian Telecom Communications*, which involved

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[169] *See* Ex. 3, Thomas Decl. ¶¶ 49, 50.

[170] Committee Obj. ¶¶ 67–68 [Docket No. 2159]; Unsecured Indenture Notes Trustees Obj. ¶¶ 49–50 [Docket No. 2162]; *see In re Ion Media Networks*, 419 B.R. 585, 592, 602–03 (Bankr. S.D.N.Y. 2009) (finding that the secured lenders had "a security interest in the economic value of the FCC licenses," including through liens on the FCC licenses' proceeds and the equity in the subsidiaries that held the licenses, but not the licenses themselves); *Urban Communicators PCS Ltd. P'ship v. Gabriel Capital, LP*, 394 B.R. 325, 335, 337 (S.D.N.Y. 2008) (similar).

[171] N.Y. UCC § 9-102(2).

[172] *1st Source Bank v. Wilson Bank & Trust*, 735 F.3d 500, 504 (6th Cir. 2013).

another telecom carrier, is instructive on this point, and the court there applied this formula to value a collateral package with far more significant gaps than the one here:

[a] the debtor's total enterprise value

minus

[b] the value of the debtor's unencumbered assets.[173]

131. The creditors' committee in *Hawaiian Telecom* objected to the plan, arguing that unsecured creditors could not be crammed down because the secured lenders' collateral was worth less than their proposed recovery.[174] The secured lenders had liens in most of the debtors' assets, but not all: motor vehicles, land and buildings (including central offices, an important component of providing telecom services), and easements were excluded.[175] To argue against a total enterprise valuation of collateral, the committee, as here, emphasized the significance of these unencumbered assets to the debtors' business operations ("critical elements of the Debtors' network") and asserted that, "[w]ithout their easements and unencumbered central offices, the Debtors have no mechanism by which to supply their services to customers."[176]

132. That court confirmed the plan over the committee's objection. It found, based on the Supreme Court's decision in *Rash*, that a going concern valuation was appropriate.[177] The court further canvassed decisions nationwide, including from this district, involving secured creditors with liens in most, but not all, of a debtor's assets, and concluded that total enterprise

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173 *In re Hawaiian Telecom Communications, Inc.*, 430 B.R. 564, 599, 606 (Bankr. D. Haw. 2009).

174 *Id.* at 569–70, 576, 599, 605–06.

175 *Id.* at 574–75, 580–83.

176 *In re Hawaiian Telecom Communications, Inc.*, Case No. 08-2005 (RDD) (Bankr. D. Haw.), 11/2/09 UCC Confirmation Objection [Docket No. 1336] at 5–6, 17, ¶¶ 5, 32. The UCC further argued that the secured lenders did "not have a perfected security interest in 55 out of 86 central offices in the Debtors' network, and nearly all of the Company's 19,000 easements necessary to operate the Debtors' business. These are substantial assets (both in value and in utility) that are critically important to the functioning of a telecom network." *Id.* at 14, ¶ 29.

177 *Hawaiian Telecom*, 430 B.R. at 602–03.

value remained an appropriate benchmark: "There is no precedent that supports the conclusion that a secured creditor with a lien on a debtor's primary assets is not entitled to the debtor's enterprise value when the debtor proposed to use that collateral in its business under a plan of reorganization."[178] The court thus found that "the value of the collateral securing the Secured Parties' claims is equal to the enterprise value of Hawaiian Telecom less the value of the Debtors' unencumbered assets."[179] The secured lenders had agreed, as here, to receive less than that amount.[180]

133. Likewise, in the *Chateaugay* decision from this district, the court found that it could consider the going concern value of the debtor's tin and steel mills to fix the unsecured and secured portions of the creditor's claim, even though the creditor's liens covered just the hard assets at the mills and not the intangibles there.[181]

134. The Committee's response repeats the same unsuccessful arguments from *Hawaiian Telecom*: enterprise value is inappropriate unless there is a "turn-key" collateral package.[182] The court in *Hawaiian Telecom* considered the ***same three cases*** that the Committee cites now (and cited back then) and found that, "[i]n each of these cases, the courts rejected an asset-by-asset valuation of the collateral."[183]

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[178] *Id.* at 603–04. The court likewise observed: "In each case cited by the parties, the court found that enterprise value was relevant to a valuation of the secured creditor's collateral where such collateral consistent of the debtor's primary assets and would be used by the debtor to operate its business post-emergence." *Id.* at 603.

[179] *Id.* at 599, 606.

[180] *Id.* at 606.

[181] *In re Chateaugay Corp.*, 154 B.R. 29, 30–34 (Bankr. S.D.N.Y. 1993) (denying a debtor's motion for partial judgment, which sought to establish the legal standard for valuing the secured lenders' collateral).

[182] Committee Obj. ¶ 69 [Docket No. 2159].

[183] *Hawaiian Telecom*, 430 B.R. at 603–04 (citing *In re Kim*, 130 F.3d 863 (9th Cir. 1997); *In re Chateaugay Corp.*, 154 B.R. 29, 30, 34 (Bankr. S.D.N.Y. 1993); and *In re Oklahoma City Broadcasting Co.*, 112 B.R. 425 (Bankr. W.D. Ok. 1990)); *see also* Committee Obj. ¶ 69 (citing the same three cases).

135. In fact, the rationale for using total enterprise value is even more compelling here than it was in *Hawaiian Telecom*. In *Hawaiian Telecom*, the value of the unencumbered assets ($33.1 million) was about 8.5 percent of the debtors' total enterprise value ($387.5 million).[184] Here, the highest value that likely could be ascribed to unencumbered assets—about $125 million—is just 3.4 percent of the Debtors' total enterprise value ($3.75 billion midpoint valuation) as of the Effective Date (and the percentage drops even lower as of the Petition Date, which has a $4.125 billion mid-point valuation).[185] To surpass the 8.5 percent threshold from *Hawaiian Telecom*, therefore, the Committee and Unsecured Notes Indenture Trustees would have to present evidence establishing more than $320 million in unencumbered assets (and they cannot do so).

136. Even if the Committee and Unsecured Notes Indenture Trustees could establish material gaps in the holders of First Lien Claims' collateral package (which they cannot do), a total enterprise valuation still remains appropriate. *Hawaiian Telecom*—where almost all of the easements and most of the central offices, without which a telecom company cannot transmit voice and data, were unencumbered—and further decisions still applied total enterprise value as a starting point when there are material gaps in the collateral package.[186]

137. Here, then, the holders of First Lien Claims' collateral is broad enough to warrant a total enterprise valuation. The first liens cover the Debtors' most valuable assets: its income generating cash flows, equipment, goodwill, and equity from Services on down.

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[184] *See Hawaiian Telecom*, 430 B.R. at 569, 577, 580.

[185] Ex. 1, Leone Decl. ¶¶ 5, 10, 17.

[186] *See also Oklahoma City Broadcasting*, 112 B.R. at 429 (finding that the enterprise value of a debtor television broadcasting station may need to be determined if the debtor intended to continue as a going concern, even though the debtor's FCC license, without which the business could not operate, was unencumbered).

138. For all of these reasons, the holders of the First Lien Claims have direct and indirect liens in the Debtors' entire enterprise. There is zero unencumbered value that flows to unsecured creditors.

C. The DIP Order Encumbers Any Value Unencumbered Prepetition.

139. Even assuming some value slipped through the Security Agreement, and it has not, that value is encumbered under the Final DIP Order, including the adequate protection claims and liens of the Debtors' first lien creditors. So, even if there is value not encumbered by the secured lenders' prepetition liens, such value would be encumbered by the liens and obligations arising under the Final DIP Order.

i. The Uniti Settlement Proceeds Are DIP Collateral.

140. In addition to all unencumbered assets, the DIP Collateral includes all collateral of the Company's prepetition secured creditors.[187] The DIP Lenders thus can look to the Uniti Settlement proceeds, among other unencumbered value, to recover on their secured, superpriority claims, which may approach $1 billion by the Effective Date (and are estimated at $930 million in the Grossi Declaration). The Committee and Unsecured Notes Indenture Trustees make two principal responses.

[187] DIP Order § 8(a)(i) [Docket No. 376] (providing a "valid, binding, continuing, enforceable, fully perfected first priority senior security interest in and lien upon all prepetition and postpetition property of the DIP Loan Parties, whether existing on the Petition Date or thereafter acquired, that, on or as of the Petition Date, is not subject to a valid, perfected and non-avoidable lien, including, without limitation, any and all unencumbered cash of the DIP Loan Parties (whether maintained with the DIP Agent or otherwise) and any investment of such cash, inventory, accounts receivable, other rights to payment whether arising before or after the Petition Date, contracts, properties, plants, fixtures, machinery, equipment, general intangibles, documents, instruments, securities, chattel paper, interests in leaseholds, real properties, deposit accounts, patents, copyrights, trademarks, trade names, rights under license agreements and other intellectual property, capital stock of subsidiaries, wherever located, and the proceeds, products, rents and profits of the foregoing").

141. The Committee and Unsecured Notes Indenture Trustees first argue that the DIP Order excludes the Uniti Settlement from the DIP Collateral based on footnote 9 of the DIP Order, which provides as follows:[188]

> Notwithstanding the foregoing and any rights granted by Holdings to and accepted by the DIP Lenders under the DIP Credit Agreement or otherwise provided in this Final Order with respect to Holdings (including releases), the DIP Lenders, the Prepetition Secured Parties, the Creditors' Committee, the Debtors' creditors and equity holders, 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 (the "Uniti Spin-off"), and nothing in this Final Order shall impact or prejudice the rights of any such party to benefit from any adjudication or settlement of any claims arising from, asserted or that could have been asserted on account of the Uniti Spin-Off (but without limiting the effects and requirements of paragraph 21). (Emphasis added.)

142. This footnote operates as a reservation of rights that does not prevent liens (including adequate protection liens) from attaching to DIP Collateral. The inclusion of the critical phrase "if any" (which is emphasized above) underscores that rights are only preserved to the extent they would otherwise exist under applicable law. To the extent that the DIP Lenders and the Debtors' other secured creditors has intended to completely carve such a substantial asset out of the definition of DIP Collateral, they would have done so in a much more conspicuous way. Instead, the definition of DIP Collateral clearly encompasses all assets of the Obligor Debtors, including unencumbered assets. Footnote 9 of the Final DIP Order merely preserves rights as they may exist and does not affirmatively create a carve out from the bargained-for collateral package that was necessary to secure $1 billion in debtor-in-possession financing at the outset of these

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[188] Committee Obj. ¶¶ 5, 54–58 [Docket No. 2159]; Unsecured Notes Indenture Trustees Obj. ¶¶ 17, 57–59 [Docket No. 2162].

chapter 11 cases and the consent of the Debtors' secured creditors to use of their collateral (including Cash Collateral) over the past sixteen months.

143. The Committee and Unsecured Notes Indenture Trustees also argue that the DIP Order imposes a soft marshalling requirement, requiring the DIP Lenders to look to encumbered first.[189] Whatever merit this argument might have, marshaling is irrelevant here because there is not enough value in the Debtors' estates to satisfy the DIP Claims, the Adequate Protection Claims (described below), and the Prepetition Secured Claims such that recoveries would flow to unsecured creditors. Thus, this argument is ultimately little more than a red herring.

ii. The First Lien Lenders' Adequate Protection Lien Covers any Remaining Unencumbered Value.

144. As shown above, there are no meaningful unencumbered assets. Because the Committee's own witness agrees that the First Lien Claims are impaired under the Plan and that the Plan satisfies the best interests test, the Court can end its analysis here. It need not go further.

145. Yet, even assuming that unfinished construction projects and late model bucket trucks somehow might have more value than the Debtors' management and advisors have found, this value is subject to the holders of First Lien Claims' substantial adequate protection claim. Under the Final DIP Order, the holders of First Lien Claims have ***already allowed*** superpriority administrative expense adequate protection claims to the extent of any diminution in value of their collateral[190] and adequate protection liens in all of the DIP Collateral (to the extent set forth in the

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[189] DIP Order § 10(d) [Docket No. 376].

[190] DIP Order § 15(d) ("First Lien Section 507(b) Claims. (i) The Prepetition Agent, for itself and for the benefit of the other Prepetition Credit Facility Secured Parties (ii) the Prepetition First Lien Notes Indenture Trustee, for itself and for the benefit of the Prepetition First Lien Noteholders, ***are each hereby granted, subject to the Carve Out, an allowed superpriority administrative expense claim*** as provided for in section 507(b) of the Bankruptcy Code in the amount of the Prepetition Credit Facility Secured Parties' Prepetition Adequate Protection Claims (in the case of the Prepetition Agent) and the First Lien Notes Secured Parties' Prepetition Adequate Protection Claims (in the case of the Prepetition First Lien Notes Indenture Trustee), in each case with, except as set forth

DIP Order) in the amount of such claims.[191] These claims and liens are in an amount far in excess of the remaining value of unencumbered assets available to unsecured creditors. And since these claims are already allowed under the Final DIP Order, the arguments of the Committee and Unsecured Notes Indenture Trustees that there is some procedural deficiency because the first lien creditors have not filed a motion seeking allowance of adequate protection claims fail on their face. The Debtors' secured creditors need not file a motion seeking allowance of adequate protection claims—they were allowed on a final basis more than a year ago at the outset of these cases. The Debtors' evidence merely demonstrates the substantial magnitude of the diminution giving rise to those claims to eliminate any doubt that the Plan complies with both the best interests test and the absolute priority rule.

146. Here, the evidence from the Debtors' valuation expert—against whom the Committee and Unsecured Notes Indenture Trustees have propounded no competing expert— will show that, using a going concern valuation (as is appropriate here, as discussed above[192]) and comparing the market value of the collateral assets and the prepetition claims as of the Petition Date and expected Effective Date, the First and Second Lien Lenders have an adequate protection lien and claim of at least $654 million and as high as $1,971 million.[193]

147. The Committee's assertion that the Debtors have not conducted an analysis of the value of the First Lien Creditors' collateral ignores Mr. Leone's 25-page expert report analyzing

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in this Final Order, priority in payment over any and all administrative expenses of the kind specified or ordered pursuant to any provision of the Bankruptcy Code. . . .") (emphasis added).

[191] DIP Order § 15 [Docket No. 376].

[192] *See, e.g.*, *Rash*, 520 U.S. at 962. The Unsecured Notes Indenture Trustees thus are incorrect that no "text, treatise, or authoritative source" supports Mr. Leone's use of the Debtors' enterprise value. Unsecured Indenture Notes DIP Order § 15 [Docket No. 376]. Mr. Leone applied the settled legal standard for conducting valuations.

[193] *See* Ex. 13, Leone Rep. ¶¶ 70–72.

exactly that.[194] To support its argument, the Committee cites Mr. Thomas' deposition testimony that he did not personally know the value of the holders of First Lien Claims' collateral, a topic for which he was neither designated as a corporate representative nor offering an expert opinion. Mr. Leone, on the other hand, analyzed the value of the encumbered collateral and concluded that total diminution is (1) approximately $1.154 billion to approximately $1.198 billion assuming that all of the Uniti Settlement is encumbered; and (2) approximately $2.399 billion to approximately $2.443 billion assuming that none of the Uniti settlement is encumbered.[195] Moreover, a decline in value is corroborated by Mr. Leone's further analysis of market value, which shows that the total collateral diminution is $1.658 billion.[196] As Mr. Leone concluded, this Collateral Diminution results in an adequate protection claim by the First Lien and Second Lien lenders of (1) approximately $654 million to approximately $727 million assuming that all of the Uniti Settlement consideration is encumbered; and (2) approximately $1,899 million to approximately $1,971 million assuming that none of the Uniti Settlement consideration is encumbered.[197]

148. The adequate protection claims and liens that would arise as a result of the diminution described in the preceding paragraph are far in excess of any unencumbered value that may exist in the Debtors' estates (even if the Uniti Settlement proceeds are completely unencumbered). And the level of diminution is evidently a conclusion the Committee or Unsecured Notes Indenture Trustees are unable to counter as an evidentiary matter—notwithstanding the fact that both the Committee and the Unsecured Notes Indenture Trustees have

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[194] Committee Obj. ¶ 75 [Docket No. 2159]; *see generally* Ex. 13, Leone Rep.

[195] Ex. 13, Leone Rep. ¶ 67.

[196] *Id.* ¶¶ 62–72. Mr. Leone determined that the total value of the First Lien and Second Lien debt was approximately $3.626 billion as of the Petition Date and approximately $1.908 billion as of June 10, 2020. *Id.* ¶ 66. Accordingly, the total Collateral Diminution is approximately $1.658 billion.

[197] Ex. 13, Leone Rep. at ¶¶ 70–72.

retained investment bankers, neither submitted an expert report in connection with confirmation. So, even if the Committee and Unsecured Notes Indenture Trustees were correct with respect to encumbrance (or lack thereof) of the Uniti Settlement proceeds or other material assets, it would be little more than a pyrrhic victory since the secured creditors' adequate protection claims and liens would attach to and completely absorb any such value.

149. The Committee and Unsecured Notes Indenture Trustees' argument is based on the incorrect assertion that the Debtors' Petition Date valuation should have been lower because the Debtors' EBIDTA was immediately affected by Judge Furman's ruling in the Aurelius litigation.[198] The Committee and Unsecured Notes Indenture Trustees challenge Mr. Leone's use of the Debtors' EBITDA projections finalized on February 6, 2019 to value the enterprise three weeks later, on the Petition Date (February 25th).[199]

150. But the Committee's and Unsecured Indenture Notes Trustees' objections are undercut by the fact that they cannot offer any alternative methodology or evidence. Indeed, the Committee offers no expert on valuation or diminution in value, despite being advised by capable professionals that have testified as experts before. Valuation is a fact-specific exercise, and the facts of this case warrant the weight Mr. Leone gave to the the February 6th projections:

- Just 10 days before the Petition Date, the Debtors had no plans to file for chapter 11. They had positive EBITDA of approximately $1.2 billion and had no impending credit maturities. It was the *Aurelius* decision that caused a sudden liquidity crisis and precipitated the Debtors' chapter 11 filings.

- Mr. Thomas has testified that, although Windstream faced a liquidity shortfall due to Judge Furman's ruling, there was no substantial disruption in the Debtors' operations from the time the EBITDA projections were finalized to the Petition Date.[200]

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198 Committee Obj. ¶ 66 [Docket No. 2159]; Unsecured Indenture Notes Trustees Obj. ¶ 54 [Docket No. 2162]..

199 Committee Obj. ¶ 66 [Docket No. 2159]; Unsecured Notes Indenture Trustees Obj. ¶¶ 54–55 [Docket No. 2162].

200 Ex. 3, Thomas Decl. ¶¶ 7, 50.

- Based on their review of the nearly identical EBITDA projections as the February 6th projections (among other materials), the First and Second Lien Lenders elected to enter into a cash collateral order allowing the Debtors' to continue operations while in chapter 11) consented to being primed by $1 billion of DIP financing.[201]

151. As Mr. Leone and Mr. Thomas explained, the erosion in the Debtors' enterprise value was the result of the operational difficulties of operating while in bankruptcy that occurred over time ***after*** the Petition Date.[202]

152. Further, the facts of this case are a world apart from what the Court faced in *Sears* (and the Committee and Unsecured Notes Indenture Trustees' reliance on the Court's earlier decision is thus inapplicable).[203] ***First***, the collateral package in *Sears* was far narrower. Here, the holders of First Lien Claims have direct and indirect liens in the Debtors' entire enterprise value (including income-generating cash flow, goodwill, and equity). In contrast, the collateral of the asset-based lenders in *Sears* was limited to inventory and accounts receivables located in a mix of operating and liquidating retail stores, and there was no evidence as to the mix of eligible or ineligible collateral included in the valuation.[204]

153. ***Second***, the purpose of the valuation was different. Here, there is no dispute about the Debtors' intention (and ability) to continue operating as a going concern.[205] In *Sears*, however, it was "quite clear" early in the case that "the Debtors would need a financial reorganization that was premised upon … either a going concern sale in the context of competing liquidation bids, or

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[201] *Id.* at ¶ 50.

[202] Ex. 5, Leone Tr. 282:6–12 [redacted] Ex. 14, Thomas Decl. ¶¶ 51–52.

[203] Committee Obj. ¶ 66 [Docket No. 2159]; Trustees Obj. ¶¶ 6, 55 [Docket No. 2162].

[204] *In re Sears Holding Corp.*, Case No. 18-23538 (RDD) (Bankr. S.D.N.Y.), 7/31/19 Hr'g Tr. at 22:21–25, 226:4–6.

[205] Ex. 3, Thomas Decl. ¶ 7.

no going concern bid acceptable, and pivoting to a liquidation."[206] As the Court itself observed: "it seems to me the nature of this case at the start was one where everyone knew—none more than ESL—but everyone knew, that the Debtors were going to dispose of substantially all of their assets in a very short time, and that that was the only way that the secured creditors would realize any value."[207]

154. ***Third***, the valuation experts applied different methodologies to address the effects from bankruptcy on collateral value. Here, Mr. Leone applied substantial discounts to the Debtors' enterprise value when comparing their earnings with comparable companies, and when conducting a precedent transaction valuation based on LTM EBITDA.[208] The valuation expert in *Sears*, however, failed to apply any of the normal and customary discounts in valuing the collateral.[209] The court thus rejected a valuation of the Sears inventory that assumed "an immediate sale" at "retail value."[210]

155. In short, valuing what an asset-based lender will receive from liquidating inventory (the situation in *Sears*) is nowhere close to determining the going concern value of a telecommunications company that has pledged the economic value of its enterprise (the situation here).

D. The Plan Satisfies the Absolute Priority Rule.

156. Even assuming substantial unencumbered value remains despite the holders of First Lien Claims' liens under the Security Agreement and the Final DIP Order (including adequate

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[206] Ex. 14, *Sears* 7/31/19 Hr'g Tr. at 227:23–228:5.

[207] *Id.* at 247:14–19.

[208] Ex. 13, Leone Rep. ¶¶ 48, 54.

[209] Ex. 14, *Sears* 7/31/19 Hr'g Tr. at 229:19–232:1.

[210] *Id.* at 231:10–18.

protection liens) ***and*** the DIP Lenders' own liens, the Court still can confirm the Plan without violating section 1129(b)(1)'s absolute priority rule. The Trustees' argument that the plan violates the absolute priority rule "if there is even one dollar of unencumbered value" is wrong on both the law and the facts.[211]

157. To begin, no class junior to general unsecured creditors is getting any recovery, and the Committee's own expert admitted that the 1L lenders are not receiving any recovery greater than the aggregate face value of their claim:

[redacted][212]

158. That should end the inquiry. Under these undisputed facts there can be no violation of the Bankruptcy Code's absolute priority rule. The Creditors' Committee and Unsecured Notes Indenture Trustees cite no case law for the proposition that somehow the Court should consider only the secured portion of a secured creditors' claim and unilaterally waive the deficiency claim for recovery purposes. Indeed, the Plan provides that "all claims derived from or based upon the Credit Agreement and First Lien Notes Indenture" constitute First Lien Claims in Class 3. There is no bifurcation between secured and unsecured and there is no dispute that those claims are receiving less than payment in full in the aggregate. Moreover, in response to the technical arguments raised by the Committee and Unsecured Notes Indenture Trustees, the Debtors intend

[211] Unsecured Notes Indenture Trustees Obj. ¶ 3 [Docket No. 2162].

[212] Ex. 13, Nystrom Dep. Tr. 72:16–22.

to include a modification to the definition of "First Lien Claims" in the Plan to, for the avoidance of doubt, expressly include adequate protection claims.[213]

159. Under these circumstances, there should be no dispute that the Plan satisfies the absolute priority rule. Accordingly, the Debtors respectfully submit that the Committee's and Unsecured Notes Indenture Trustees' arguments to the contrary should be overruled.

V. CONCLUSION

160. The Debtors' Plan allows the company to emerge as a viable enterprise, delivers significant value to creditors, and satisfies the Bankruptcy Code's confirmation requirements. Accordingly, the Debtors respectfully request that the Court confirm the proposed Plan and overrule the objections.

[*Remainder of page intentionally left blank.*]

[213] Even assuming the holders of First Lien Claims are recovering more than the current value of their secured collateral (and to be clear, they are not), that would not violate section 1129(b) of the Bankruptcy Code. Allocating value to any secured lender deficiency claims (so long as recoveries for other unsecured creditors still satisfies the best interests test, as it does here) does not unfairly discriminate against other unsecured claims under section 1129(b)(1) of the Bankruptcy Code. Courts in this Circuit consider four factors to permit the separate treatment of claims: (1) there is a reasonable basis for discrimination, (2) the debtor cannot consummate the plan without the discrimination, (3) the discrimination is proposed in good faith, and (4) the degree of discrimination is proportional to its rationale. *In re Buttonwood Partners, Limited*, 111 B.R. 57, 63 (Bankr. S.D.N.Y. 1990). Of these factors, one of the "hallmarks" has been "whether the debtor can confirm and consummate a plan without the proposed discrimination." *In re Lernout & Hauspie Speech Products, N.V.*, 301 B.R. 6512, 660 (Bankr. D. Del. 2003). In light of the substantial contributions of the Debtors' first lien creditors to these chapter 11 cases, these factors would be satisfied such that any purported discrimination would not be unfair in violation of the Bankruptcy Code.

Dated: June 22, 2020
New York, New York

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

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Exhibit A

Comments and Objection Chart

In re Windstream Holdings, Inc., Case No. 19-22312 (RDD)

Plan of Reorganization Comments and Objection Chart[1]

No.	Party	Summary of Objection	Status
		Substantive Filed Objections	
1.	Texas Taxing Jurisdictions [Docket No. 1641]	Objects to the treatment of their claims because the Plan does not specifically provide for retention of their liens against their collateral. Contends that the Plan does not provide for: (a) the payment of penalties and interest on their Secured claims; (b) the retention of liens that secure all base tax, penalties and interest that may accrue on their Secured claims; (c) the Texas Taxing Authorities to retain the liens that secure their claims and administrative expense claims and it avoids their liens without an adversary proceeding; (d) when The Texas Taxing Authorities will receive payment of their claims; and (e) the retention of liens that secure all base tax, penalties and interest that may accrue on their administrative expense claims and that they be paid in the ordinary course.	Resolved through the addition of language to the Confirmation Order.
2.	U.S. Trustee [Docket No. 2021]	Arguments summarized in Debtors' confirmation and reply brief.	Unresolved. Arguments addressed in the Debtors' confirmation and reply brief.
3.	Saetec [Docket No. 2024]	Saetec has 6B claims, which under the Plan, are subject to reinstatement or paid in full in cash. The claims are based largely on pre-petition civil litigation. The Schedule of Retained Causes of Action noted that the Saetec litigation was preserved. • Saetec is concerned that the 6B claims and reservation of litigation contrast with the releasing party language. Seeks clarification that it is not releasing its claims.	Unresolved. The Debtors anticipate resolving through addition of language to the Confirmation Order.
4.	Pennsylvania Department of Revenue [Docket No. 2027]	Plan provides for the Allowed Priority Tax Claims but not the secured claims. • Plan should provide for the retention of PA DOR's liens that secure its claims. The Plan attempts to restrict PA DOR's ability to exercise its state court remedies against non-debtor parties that are properly assessed for trust fund taxes.	Resolved through the addition of language to the Confirmation Order.

[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Chapter 11 Plan, Disclosure Statement, or the relevant objection, as applicable.

No.	Party	Summary of Objection	Status
5.	Securities Lead Plaintiff's Limited Objection to Confirmation of the First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al. [Docket No. 2165]	Requests: • preservation of the Debtors' books, records, electronic information, and evidence related to Securities Litigation; • modification of footnotes 2 and 3 of the Plan for third party release language; • language noting that securities litigation claims are reserved to the extent insurance proceeds are available.	Resolved through the addition of language to the Confirmation Order.
6.	Official Committee of Unsecured Creditors [Docket No. 2159]	Arguments summarized in Debtors' confirmation and reply brief.	Unresolved. Arguments addressed in the Debtors' confirmation and reply brief.
7.	Unsecured Notes Indenture Trustees [Docket No. 2162]	Arguments summarized in Debtors' confirmation and reply brief.	Unresolved. Arguments addressed in the Debtors' confirmation and reply brief.
Cure and Assumption Related Filed Objections			
8.	First Energy Companies [Docket No. 2022]	The Plan Supplement lists 23 contracts for FirstEnergy. • the Debtors currently owe $2,599,440.60 in prepetition charges and $644,131.04 in post-petition charges. • Assert that an Amended Plan Supplement will be filed to reflect an agreement to list the full amount of cures due. • request that the Debtors clarify which FirstEnergy agreements are being assumed and give counterparties sufficient time to investigate the appropriate cure amount	Company review and negotiations are underway.
9.	Florida Power & Light Company [Docket No. 2023]	Two contracts listed on the Assumption and Cure List and $371.87 cure listed for both contracts. • Debtors owe $156,828.96 in outstanding billed prepetition charges and $163,747.11 in outstanding billed post-petition charges. • Requests clarification on which agreements are being assumed and give counterparties time to assess cure amounts.	Company review and negotiations are underway.
10.	AppDirect Canada [Docket No. 2034]	Disputes that the Proposed Rejection Date is appropriate. Contends that Windstream is contractually prohibited from using any AppDirect property or derivative works. Seeks (a) establishment of a rejection date that is only effective after the Debtors' comply with affirmative acts to remove AppDirect's property, (b) preservation of AppDirect's right to seek equitable or injunctive relief for intellectual property infringement, and (c) protection from any potential liability from AppDirect's election to exercise rights under the contract and delete Windstream's content.	Company review and negotiations are underway.
11.	Joink LLC [Docket No. 2042]	Proof of claim asserts $250,000 for fiber optic work that was not performed. Joink currently owed $21,086 as contract damages, $118,030 for failing to perform repairs and more than $120,000 in additional maintenance and repairs to the network before the contract expires in 2023.	Company review and negotiations are underway.

No.	Party	Summary of Objection	Status
12.	American Electric Power Companies [Docket No. 2045]	The Plan Supplement lists a total of 35 contracts with AEP and an aggregate cure of $1,150,690.87. AEP cannot adequately identify the contracts that are being assumed. Further, AEP contends that $2,229,902.91 is owed on account of prepetition charges and $1,342,173.44 is owed in post-petition charges.	Company review and negotiations are underway.
13.	Glasgow Electric Plant Board [Docket No. 2044]	Glasgow does not oppose the assumption of the contract but asserts that $6,890.13 must be paid as the cure.	Resolved.
14.	United Call Center Solutions LLC [Docket No. 2046]	Debtors owe UCCS $837,211.72 for post-petition services. Of this amount, $18,852.69 is currently in default and $346,649.08 will be past due as of the Confirmation Hearing. The remaining $490,562.64 that has been invoiced constitutes Accruals. The Bankruptcy Code dictates that cures must be paid, and Accruals are akin to cure amounts and must be included.	Company review and negotiations are underway.
15.	Experian Information Solutions, Inc. [Docket No. 2050]	Experian has a number of agreements and asserts prepetition charges of $30,450.40. The Debtors listed the cure amount as $0.	Company review and negotiations are underway.
16.	CenturyLink [Docket No. 2055]	Centurylink filed 19 proofs of claim valued at over $47m in prepetition interest. Unpaid postpetition amounts accrued are $15m and increase by $2 million each month. CenturyLink objects based on the following: • the Debtors ability to assume or reject contracts up to 45 days post-Effective Date violates the Bankruptcy Code; • the Non-Obligor and Exit Facility are unfunded, rendering the Plan not feasible; and • the Releases should be amended to exclude any reinstated claims.	Company review and negotiations are underway.
17.	GTT Communications, Inc. [Docket No. 2057]	GTT asserts prepetition cure amount of $2,025,457.86 and postpetition amounts $184,357.23. GTT and the Debtors have been in negotiations to resolve the cure amounts of several months and have yet to come to an agreement. The Plan Supplement lists the cure amount as TBD.	Company review and negotiations are underway.
18.	DataBank Holdings, Ltd. [Docket No. 2058]	DataBank has 11 contracts listed in the Plan Supplement, each with TBD listed for the cure amount. DataBank believes the cure amount should total $93,793.95.	Company review and negotiations are underway.
19.	Charter Communications Operating, LLC [Docket No. 2059]	The Charter contracts have not been listed in the Plan Supplement, thus Charter assumes they are deemed assumed. However, Charter asserts that the cure amount is $19,856,636.97, including $13,672,332.97 in prepetition obligations and post-petition obligations of $6,184,304.00.	Language added to confirmation order for reservation of rights.
20.	Microsoft Corporation [Docket No. 2060]	Microsoft asserts that the cure amounts associated with assumed contracts is $5,284,825.59, rather than the $0 that the Debtors assert.	Company review and negotiations are underway.

No.	Party	Summary of Objection	Status
21.	PPL Electric Utilities Corporation [Docket No. 2061]	PPL is party to six agreements with the Debtors and asserts a cure amount of $210,534.94.	Company review and negotiations are underway.
22.	Constellation NewEnergy, Inc. [Docket No. 2062]	CNE is party to a number of agreements, none of which were expressly assumed. CNE asserts a cure amount of $23,187.66 under the Earthlink Carrier Contract and $45,637.41 under the PaeTec contract.	Company review and negotiations are underway.
23.	Linkedin Corporation [Docket No. 2063]	The Debtors listed $36,624.45 as the proposed cure amount. LinkedIn asserts that the correct cure amount is $226,200.00.	Company review and negotiations are underway.
24.	U.S. TelePacific Corp. [Docket No. 2067]	U.S. TelePacific Corp is party to executory contracts with several debtors. O April 24, 2019, the Debtors paid $279,000 as a utility deposit to secure postpetition claims. U.S. TelePacific assert that $1,009,322.00 is owed in cure amounts, with $580,322.00 being owed prepetition and the rest totaling post-petition claims and reasonable attorney's fees of at least $50,000. Further, the Debtors have not offered adequate assurance of future performance on the not-yet-assumed contracts. U.S. TelePacific requests the full cure amount plus $279,000 as a utility deposit rollover.	Company review and negotiations are underway.
25.	ScanSource, Inc. [Docket No. 2073]	Scheduled cure amount in Plan Supplement of $289,104.25. ScanSource believes accurate cure amount is $1,278,030.97.	Company review and negotiations are underway.
26.	Element Fleet Corp. [Docket No. 2080]	Requests clarification on the contracts being assumed and further objects to the proposed cure amount. Believes prepetition claims total $7,313,163.10. Takes issue with 45 days post-effective date to assume or reject.	Reservation of rights added to confirmation order.
27.	Niagara Mohawk Power Corporation [Docket No. 2079]	The contract descriptions are not descriptive and asserts cure amounts in $1,493,491.00 for field complete JPP and $52,508.00 for field incomplete JPPs. Invoices haven't been provided because WIN failed to accept the JPPs.	Company review and negotiations are underway.
28.	New York State Electric & Gas Corp. and Rochester Gas & Electric Corp. [Docket No. 2081]	The Debtors currently owe a sum of $678,581.28 in outstanding prepetition and post-petition in NYSEG Agreements, $24,729.71 in RGE agreements.	Company review and negotiations are underway.
29.	Georgia Transmission Corp. [Docket No. 2082]	Asserts cure amount of $12,242.88 which leaves a delta of $2,100.84.	Resolved.
30.	CBRE, Inc. [Docket No. 2084]	Asserts prepetition cure amount of $2,238,192.47 and postpetition amount of $2,174,938.19. Additionally, any assumption of the Agreement should not extinguish CBRE's pre-effective-date indemnification claims. Finally, objects to	Company review and negotiations are underway.

No.	Party	Summary of Objection	Status
		Article V.A. of the Plan that allows for the Debtor to supplement or amend contracts within 45 days of the Effective Date.	
31.	Ad Hoc EMC Group [Docket No. 2094]	Has 7 pole attachment agreements that were included in the assumption list and disputes cure amount.	Company review and negotiations are underway.
32.	Kentucky Utilities Company [Docket No. 2091]	Asserts that contracts were listed incorrectly, listing amendments as if they were contracts. Further, asserts correct cure amount of $34,223.66.	Company review and negotiations are underway.
33.	KCST USA, Inc. [Docket No. 2098]	The assumption notice lists an aggregated cure amount of $63,253.46. KCST does not object to the proposed cure so long as the Debtors remain current on their obligations.	Company review and negotiations are underway.
34.	NG-KIH Design Build LLC [Docket No. 2099]	No cure amount listed and appropriate amount is $1,314,864.73.	Company review and negotiations are underway.
35.	Kentucky Energy Corp. [Docket No. 2100]	Reservation of rights to any additional cure amounts that the entities may deem necessary.	Company review and negotiations are underway.
36.	TierPoint [Docket No. 2106]	Asserts correct cure amount of $540,357.91.	Company review and negotiations are underway.
37.	First Electric Cooperative [Docket No. 2107]	Asserts that appropriate cure amount under the Wood Poles Agreement is $273,208.00	Company review and negotiations are underway.
38.	Oracle [Docket No. 2108]	Cure listed as zero; Oracle believes that appropriate cure is no less than $516,627.84.	Resolved pending determination of payment method.
39.	Johnson Controls, Inc. [Docket No. 2109]	Cannot positively identify such contracts. Asserts that correct cure amount is $476,984.38.	Company review and negotiations are underway. Counsel sent invoices 6/18/20 and those were forwarded to A&M.
40.	Altec Capital Services, LLC [Docket No. 2110]	Requests Debtors supplement to add additional 8 Altec contracts. Plan Supplement also must add the $42,938 on account of property tax payments made by Altect with regard to the equipment that is due to be paid by Debtors.	Company review and negotiations are underway. Sent additional information to Altec on 6/18/20.
41.	AT&T Corp. [Docket No. 2122]	The Debtors indicated cure amounts as TBD. Reconciliation of cure amounts is ongoing and AT&T reserves the right to object to cure amounts.	Company review and negotiations are underway.

No.	Party	Summary of Objection	Status
42.	CoreSite [Docket No. 2113]	Cure amount proposed by the Debtors is $22,485.85. Believes cure amount is $68,922.11.	Company review and negotiations are underway.
43.	Aspen Insurance [Docket No. 2116]	The Debtors have not provided the cure amounts under the surety bonds.	Company review and negotiations are underway.
44.	Berkley Insurance [Docket No. 2115]	The Debtors have not provided the cure amounts under the surety bonds.	Company review and negotiations are underway.
45.	Zayo [Docket No. 2117]	The Debtors listed cure amounts as TBD but actual cure amount is $4,375,735.18.	Company review and negotiations are underway.
46.	Louisville Gas [Docket no. 2097]	Asserts that an additional $13,916.38 is owed and another $13,916.38 will come due in July.	Company review and negotiations are underway.
47.	Knoxville Utilities Board [Docket No. 2151]	Aggregate cure amount of $12,896.76 listed, however believe that amount should be $51,053.17.	Company review and negotiations are underway.
48.	United Electric Cooperative Services [Docket No. 2153]	Asserts $89,939.20 for the prepetition claims, plus late fees totaling $2689.45. United asserts that postpetition fees total $98,179.95 and $31,121.45 in audit charges.	Company review and negotiations are underway.
49.	Crown Castle Fiber LLC [Docket No. 2160]	Debtors should be required to assume or reject executory contracts at Effective Date, not 45 days after. Debtors owe $15,449,618.98. Debtors have admitted that they cannot properly fund their post-confirmation obligations, as demonstrated in the DIP Amendment Motion.	Company review and negotiations are underway.
50.	Alabama Power Company [Docket No. 2167]	Believes that prepetition claims are $486,136.89 and postpetition claims are $688,237.29.	Company review and negotiations are underway.
51.	Entergy Services, LLC [Docker No. 2166]	Believes that the Entergy contracts are not adequately identified. Asserts cure amount of $2,352,436.05.	Company review and negotiations are underway.

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