No. 22-

IN THE

Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION,

Petitioner,

v.

WINDSTREAM HOLDINGS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The judge-made doctrine of "equitable mootness" allows Article III courts to shirk their bankruptcy oversight duties as mandated by this Court in *Northern Pipeline v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Under it, a court can decline to exercise its jurisdiction to review the legality of a consummated bankruptcy reorganization plan if the court somehow determines that it would be inequitable to disturb the plan, regardless of whether such plan is unlawful. This doctrine has no common law, statutory, or constitutional basis, contradicts the Bankruptcy Code's language, overrides this Court's directive that Article III courts have an unflagging duty to exercise their jurisdiction, undermines fundamental principles of separation of powers, and is prone to abuse. In the absence of any legal justification for the doctrine, the Circuit Courts have crafted several tests to determine when an appeal should be dismissed as equitably moot. The Second Circuit has adopted rules that go further than other Circuits in sheltering bankruptcy court decisions from appeal. The questions presented are:

1. Does the lack of statutory and constitutional basis for the equitable mootness doctrine, combined with its demonstrated potential for abuse, require it to be abolished?

2. Does the Second Circuit's rule that an appeal from a substantially consummated plan is automatically equitably moot if the appellant did not pursue a stay, regardless of a stay's availability or any other equitable factors, undermine any prudential purpose for the doctrine?

3. Does the Second Circuit's rule that the appellant bears the burden of proof in showing lack of equitable mootness cause reviewing courts to speculate that effective relief is unavailable without any evidence?

CORPORATE DISCLOSURE STATEMENT

Petitioner U.S. Bank National Association hereby certifies that U.S. Bank National Association is 100% owned by U.S. Bancorp.

RELATED PROCEEDINGS BELOW

In re Windstream Holdings, Inc. et al., No. 19-22312. United States Bankruptcy Court for the Southern District of New York. Confirmation Order entered June 26, 2020.

U.S. Bank Nat'l Ass'n v. Windstream Holdings, Inc. (In re Windstream Holdings, Inc.), Nos. 20-cv-4276, 20-cv-5440, 20-cv-5529. United States District Court for the Southern District of New York. Motion for stay pending appeal denied November 2, 2020; judgment entered June 22, 2021.

U.S. Bank Nat'l Ass'n v. Windstream Holdings, Inc. & Elliott Inv. Mgmt. L.P., First Lien Ad Hoc Group (In re Windstream Holdings, Inc.), No. 21-1754. United States Court of Appeals for the Second Circuit. Judgment entered October 25, 2022; petition for rehearing denied December 16, 2022.

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The opinion of the United States Court of Appeals for the Second Circuit (the "Second Circuit"), dated October 25, 2022, is not reported and can be found at No. 21-1754, 2022 U.S. App. LEXIS 29630 (2d Cir. Oct. 25, 2022) and attached as App'x A (1a-7a). The opinions of the United States District Court for the Southern District of New York (the "District Court"), dated June 22, 2021, November 2, 2020, and August 3, 2020, are not reported and can be found at No. 20-CV-4276 (VB), 2021 U.S. Dist. LEXIS 117256 (June 22, 2021) and attached as App'x B (8a-25a); No. 20-CV-4276 (VB), 2020 U.S. Dist. LEXIS 204199 (Nov. 2, 2020) and attached as App'x C (26a-34a); and No. 20-CV-4276 (VB), 2020 U.S. Dist. LEXIS 204199 (Aug. 3, 2020) and attached as App'x D (35a-45a). The orders of the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"), dated June 26, 2020, and May 12, 2020, are not reported and are attached as App'x E (46a-142a) and App'x F (143a-182a). The Second Circuit's denial of rehearing, dated December 16, 2022, is not reported and is attached as App'x G (183a-184a).

JURISDICTION

The judgment of the Second Circuit was entered on October 25, 2022, and the Second Circuit denied Petitioner's petition for rehearing on December 16, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent portions of the Constitution, and Title 11 and Title 28 of the United States Code are reprinted in the appendix to this petition. *See* App'x. H (185a-215a). The constitutional and statutory provisions involved in this case include:

U.S. Const. art. I

11 U.S.C. § 363

11 U.S.C. § 364

11 U.S.C. § 1127

28 U.S.C. § 157

28 U.S.C. § 158

28 U.S.C. § 1291

28 U.S.C. § 1334

STATEMENT OF THE CASE

The court-made doctrine of equitable mootness has expanded to become a scourge on the proper functioning of the constitutionally mandated court system in bankruptcy cases. It goes far beyond any limit placed on Article III court review by the Constitution or by Congress, represents a sweeping delegation of authority from

Congress to the courts, and, in application, wrongfully and unevenly deprives bankruptcy litigants of their constitutional and statutory rights to Article III court review. As such, it is entirely inappropriate.

It is for Congress and Congress alone, subject to the framework set forth in the Constitution, to place limits on the matters that are to be heard by Article III courts with respect to bankruptcy matters and the review thereof. Congress has done so by enacting The Bankruptcy Reform Act of 1978 (as amended, the "Bankruptcy Code"), which this Court has held to be a comprehensive statutory scheme. That is important because, as this Court has also held, when presented with a comprehensive statutory scheme, a court's job is to construe it as written, not to modify it in the name of equity or for any other reason.

Congress's comprehensive statutory scheme for bankruptcy cases establishes specific parameters for original and appellate jurisdiction. It does not include any provision that could be construed as granting the courts discretion not to exercise that jurisdiction based on equitable or fairness considerations. The doctrine of equitable mootness has been made and fashioned by the courts from whole cloth, is based on courts' speculation about the financial markets' need for certainty regarding bankruptcy transactions, and has been unevenly applied by the various Circuits. It should be eliminated or materially pared back, leaving it for Congress to assess the risks it purports to address and—only if Congress deems necessary or appropriate—to fashion limits on judicial review of bankruptcy rulings.

The harm caused by the doctrine is very real, given the billions of dollars that flow through today's Article I bankruptcy system. The magnitude of the abuse made possible by the doctrine is amply illustrated here, where erroneous rulings of the Bankruptcy Court have been permitted to stand because they were shielded from appellate review. Legal error that can be remedied has instead been allowed to stand, depriving Petitioner and the holders of more than $1 billion of unsecured notes it represents of the rights the Bankruptcy Code provides them.

In 2015, Windstream split itself in two in a sale-leaseback transaction that gave rise to the existence of Uniti, a real estate investment trust that took ownership of Windstream's real estate assets and leased them back to Windstream at a rental rate that enabled Uniti to raise billions of dollars of its own new debt. *See* App'x B at 10a. This transaction, which breached the contracts governing Windstream's unsecured notes and left it insolvent, was not immune from suit. Nevertheless, the public debt markets provided Uniti with financing and its stock became publicly traded. Investors assessed and took the risk that the transaction could be upset in subsequent litigation.

U.S. Bank, trustee for Windstream's unsecured noteholders, brought an action in the District Court, alleging that the transaction breached the noteholders' contract. App'x B at 11a. On February 15, 2019, the District Court ruled in U.S. Bank's favor. *See U.S. Bank Nat'l Ass'n v. Windstream Servs., LLC*, No. 17-CV-7857, 2019 U.S. Dist. LEXIS 26129, at *5 (S.D.N.Y. Feb. 15, 2019). But before the District Court issued judgment,

Windstream and its affiliates commenced their chapter 11 cases. App'x B at 11a. Windstream then pursued and consummated a chapter 11 plan that canceled more than $1 billion of unsecured notes without allowing any recovery. *Id.* at 13a-14a.

This outcome is akin to Purdue Pharmaceuticals filing chapter 11 because of its opioid liability and then using the chapter 11 process to eliminate opioid claims without any consideration. Such a use of chapter 11 would obviously not be permitted. Yet that is exactly what happened here. Unsecured noteholders may not be as sympathetic as people whose lives have been destroyed by opioids, but their rights as unsecured creditors are equally enforceable under the law.

Windstream implemented its strategy to wipe out the very creditors the District Court determined it had swindled by obtaining two orders from the Bankruptcy Court, each of which was based on legal error and erroneous fact-finding. In the first, the Bankruptcy Court granted Windstream's request to approve what it described as a billion dollar settlement of its bankruptcy claims against Uniti without even determining the range of outcomes for the settled claims, as required under the test established by this Court in *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968). *See* App'x F at 154a.

In the second, Windstream obtained court approval of its plan of reorganization premised on two key errors of fact and law. *First*, the Bankruptcy Court found that the settlement proceeds became subject to the liens of Windstream's prepetition secured creditors even though

(i) the settling debtor—the lessee under the master lease with Uniti—was not an issuer or guarantor of the secured debt and did not provide collateral to secure payment of those obligations; and (ii) the settlement resolved claims that only arose from Windstream's bankruptcy filing, and therefore could not, as a matter of law, be included in the prepetition secured lenders' collateral package. *See* App'x F at 154a; Tr. of Hearing at 81:3-21, 85:3-92:24, *In re Windstream Holdings*, No. 19-22313 (S.D.N.Y. Bankr. June 25, 2022) (ECF No. 2250) (the "Conf. Tr.").

Second, after the Bankruptcy Court found that Windstream also had at least $200 million of unencumbered assets—the value of which must go to unsecured creditors—it found that the unencumbered value was absorbed by the secured lenders' "adequate protection" claims without determining the change in the value of their collateral from the date of the bankruptcy until the date Windstream's plan was confirmed, as required by law. App'x F at 154a; Conf. Tr. at 79:25-81:21, 100:1-3, 108:24-109:9.

Petitioner timely appealed from each of these orders and sought to have its appeals expedited so they could be decided before Windstream consummated its plan, which all parties understood would take several months because of the need for various regulatory approvals. App'x D at 37a-40a. When that request was denied, U.S. Bank sought to have the confirmation order stayed both in the Bankruptcy Court and in the District Court. App'x B at 16a-17a. The Bankruptcy Court promptly denied the stay request. *Id.* The District Court failed to act on the stay request before Windstream's chapter 11 plan was consummated. App'x C at 32a. More than one month after

the plan's consummation, the District Court denied the stay request as moot, but determined that it nevertheless retained jurisdiction over the matter and that it could fashion a remedy. *Id.* at 32a-33a. In doing so, it reserved on the issue of equitable mootness, raised for the first time in Windstream's answering brief weeks before it consummated its plan. The District Court stated that it would address mootness in conjunction with consideration of the merits of U.S. Bank's appeals. *Id.* at 32a.

Nearly a year after the Petitioner appealed from the Bankruptcy Court's plan confirmation order, without receiving full briefing on the issue of equitable mootness, without receiving any evidence on whether or not reversal would "knock the props out from under" Windstream's chapter 11 plan, and without considering the merits of the appeals, the District Court determined that U.S. Bank did not diligently seek a stay and that reversal would in fact knock the props out from under Windstream's plan. On that basis, and without considering remedies that would not affect the consummated plan or the reorganized debtors' emergence, the District Court dismissed the appeals as equitably moot. App'x B at 21a-25a.

That ruling was subsequently affirmed by the Second Circuit, and U.S. Bank's request for en banc review was denied. App'x A; App'x G.

There is nothing equitable about this outcome, and to the extent that the Second Circuit's equitable mootness rule permits it, the rule should be set aside. As applied, it makes it too easy to strip a bankruptcy court litigant of its constitutional and statutory right to Article III review, and it permits—or more accurately, *requires*—a

reviewing court to make factual determinations without evidence.

Rather than relying on any statutory predicate for this practice of depriving parties of their rights, the courts have instead rooted their power to do so in some fabricated notion that the reorganization process will fail unless it comes with finality and insulation from post-chapter 11 litigation. But outside of bankruptcy, transactions that are subject to post-closing litigation risk can be, and regularly are, consummated with new money lenders and public equity offerings. The markets can, and do, assess litigation risk, as they did here with respect to the pre-bankruptcy transaction that breached the noteholders' contract and created Uniti. There is no rationale for courts purporting to exercise their equitable powers to eliminate litigation risk with respect to chapter 11 plan transactions. Certainly there is nothing that rises to the level of allowing the courts to avoid their bankruptcy oversight obligations and to deprive parties of rights expressly provided by Congress. Equitable mootness assumes a sweeping delegation of authority from Congress to an unelected judiciary to balance competing interests and make policy determinations in bankruptcy matters. It ignores fundamental principles of separation of powers, and this Court should abolish or limit any safe harbor the doctrine currently enjoys.

REASONS FOR GRANTING THE WRIT

Review by the Supreme Court is necessary for two reasons. *First*, the Second Circuit based its decision on an important question of federal law that this Court has never settled: whether Article III courts can decline to

exercise their jurisdiction by deeming an appeal of an Article I bankruptcy court's confirmation order equitably moot. *Second*, the Second Circuit relied on two aspects of its equitable mootness analysis that conflict with the laws of the other Circuits. These conflicts are the rule that an appeal from a substantially consummated plan is automatically equitably moot if the appellant does not diligently seek a stay of the confirmation order, and the placement of the burden of all proofs on the appellant.

I. Review is Necessary to Determine Whether Article III Courts Can Decline to Exercise Jurisdiction Expressly Assigned to Them by Congress

A. Equitable Mootness Undermines Congress's Express Intent that Confirmation Appeals be Heard by Article III Courts

Equitable mootness is a judicially created "prudential doctrine" that "allows appellate courts to dismiss bankruptcy appeals when, during the pendency of an appeal, events occur such that even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable." *Apollo Glob. Mgmt., LLC v. Bokf, NA (In re MPM Silicones, L.L.C.)*, 874 F.3d 787, 804 (2d Cir. 2017) (cleaned up). But there is no statutory or constitutional basis for this "judge-made abstention doctrine." *In re SemCrude, L.P.*, 728 F.3d 314, 317 (3d Cir. 2013).

The doctrine of equitable mootness conflicts with the very structure of the Bankruptcy Code and related jurisdictional statutes. Congress has the authority to establish "uniform Laws on the subject of Bankruptcies

throughout the United States." U.S. Const. Art. I, § 8, Cl. 4. Congress exercised that authority to implement the Bankruptcy Code. In 1984, Congress overhauled the Bankruptcy Code in response to this Court's opinion in *Northern Pipeline v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Before *Northern Pipeline*, the Article I bankruptcy court judges had nearly unlimited authority to decide bankruptcy cases, with appeals heard by a panel of three other bankruptcy judges. In *Northern Pipeline*, this Court determined that the framework of the 1978 Act offended the separation of powers because it vested "all 'essential attributes' of the judicial power of the United States in the 'adjunct' bankruptcy court." *Id.* at 84-85. The Court ruled that "[s]uch a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts." *Id.* at 85.

Congress responded by creating a system of Article III oversight for bankruptcy court decisions. The district court has "original and exclusive jurisdiction" of all bankruptcy cases, 28 U.S.C. § 1334, but may refer those cases to a bankruptcy judge, 28 U.S.C. § 157(a). The bankruptcy court "may hear and determine" all bankruptcy cases and related core proceedings, and "may enter appropriate orders and judgments, subject to review under section 158 of this title." 28 U.S.C. § 157(b)(1). Under Congress's revised statutory scheme, a bankruptcy court's decisions are subject to two levels of Article III appellate review. Section 158(a) provides: "The district courts of the United States ***shall*** have jurisdiction to hear appeals . . . from final judgments, orders, and decrees . . . ." 28 U.S.C. § 158(a) (emphasis added). In turn, "[t]he courts of appeals . . . ***shall*** have jurisdiction of appeals from all final decisions of the district courts . . . ." 28 U.S.C. § 1291

(emphasis added). The availability of Article III review ensures that the bankruptcy court is subject to oversight by the independent judiciary, correcting the constitutional deficiencies recognized in *Northern Pipeline*.

The relevant statutes place only specific limits on the relief appellate courts may craft on appeal of certain bankruptcy court orders. Section 363(m) of the Bankruptcy Code provides that the sale of property to a good faith purchaser shall not be disturbed by an appellate decision, 11 U.S.C. § 363(m), and section 364(e) of the Bankruptcy Code does the same for good faith extensions of credit, 11 U.S.C. § 364(e). Courts have cited the predecessor to these provisions in determining not to consider appeals from orders approving asset sales. *See, e.g, In re Combined Metals Reduction Co.*, 557 F.2d 179, 187-194 (9th Cir. 1977) (citing former Bankruptcy Rule 805). But these statutory provisions by their terms merely limit the remedy available on appeal, not the right to appeal itself, and Congress authorized no other exceptions to the appellate courts' ability to review or provide relief. Applying the maxim of "*expressio unius est exclusio alterius*," the express inclusion of only these two situations shows Congress did *not* intend to limit appellate review or relief of any other bankruptcy court order. *Ochadleus v. City of Detroit (In re City of Detroit)*, 838 F.3d 792, 809 (6th Cir. 2016) (Moore, J., dissenting); *see also One2One Communs., LLC v. Quad/Graphics, Inc.*, 805 F.3d 428, 444 (3d Cir. 2015) (Krause, J., concurring) ("Because Congress specified certain orders that cannot be disturbed on appeal absent a stay, basic canons of statutory construction compel us to presume that Congress did *not* intend for other orders to be immune from appeal.") (emphasis in original).

Congress also specified bases for mandatory and permissive abstention by the district court in bankruptcy cases—but not in situations relevant to the equitable mootness doctrine. 28 U.S.C. § 1334(c)(1) allows district courts to refrain from exercising their original jurisdiction over bankruptcy cases if abstention is "in the interest of justice" or "in the interest of comity with State Courts or respect for State law." The district court is also required to abstain from hearing certain motions "based upon a State law claim or State law cause of action," upon motion of a party, where a state court action has "commenced." 28 U.S.C. § 1334(c)(2); *see also Stern v. Marshall*, 564 U.S. 462, 502 (2011). Both sections provide for abstention so that another court may hear an appeal. Equitable mootness, in contrast, cuts off the right to appeal *entirely*.

This Court has neither overturned *Northern Pipeline* nor found unconstitutional the jurisdictional regime Congress created in its aftermath to correct the infirmities of the 1978 Act, as identified by this Court, and to ensure Article III oversight of bankruptcy matters. But equitable mootness effectively restores the pre-*Northern Pipeline* landscape by putting exclusive authority over bankruptcy matters back in Article I courts. It does so by creating an exception to Congress's explicit mandate that Article III courts "shall" have jurisdiction over appeals from bankruptcy court rulings.

B. Equitable Mootness Conflicts with Article III Courts' Inherent Duty to Adjudicate Cases

In addition to contradicting Congress's express written intent, equitable mootness allows courts to avoid deciding appeals, and therefore conflicts with the "virtually

unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Indeed, this Court has recently questioned the application of other "prudential" doctrines that allow courts to refuse to decide cases within their jurisdiction. For example, in *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S 118 (2014), this Court rejected a party's request to decline adjudication on prudential grounds, stating the request was "in some tension with our recent reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Id.* at 126-27 (cleaned up); *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (questioning the "continuing vitality of the prudential ripeness doctrine" for the same reason).

Even Circuit Courts that apply the doctrine of equitable mootness have recognized this tension. The Fifth Circuit has termed equitable mootness a "judicial anomaly" because federal courts "have a virtually unflagging obligation" to exercise their jurisdiction. *In re Pacific Lumber*, 584 F.3d 229, 240 (5th Cir. 2009) (quoting *Colo. River*, 424 U.S. at 817); *see also In re Charter Commc'ns, Inc.*, 691 F.3d 476, 481 (2d Cir. 2012) (quoting *In re Pacific Lumber* for this language). The Fifth Circuit acknowledged criticism of the doctrine, but ignored it because "[t]he doctrine is firmly rooted in Fifth Circuit jurisprudence[.]" *In re Pacific Lumber*, 584 F.3d at 240. But that jurisprudence (like the jurisprudence of all other Circuits applying the doctrine) lacks foundation.

C. The Entire Doctrine of Equitable Mootness is Based on Faulty Reasoning

In affirming the dismissal of the appeals in this case, the Second Circuit acknowledged that the doctrine of equitable mootness has "enigmatic origins." App'x A at 4a. One jurist put the issue less delicately: "as courts and litigants [] have struggled to identify a statutory basis for the doctrine, it has become painfully apparent that there is none." *One2One Communs.*, 805 F.3d at 438 (Krause, J., concurring). Judge Krause is correct. Equitable mootness is built on faulty reasoning, which makes its widespread adoption particularly problematic.

Then-Judge Alito, dissenting in *In re Continental Airlines*, 91 F.3d 553 (3d Cir. 1996), identified two separate theories for the doctrine's origins. The first, endorsed at the Circuit level by *In re Roberts Farms, Inc.*, 652 F.2d 793, 796-97 (9th Cir. 1981), bases equitable mootness on former Bankruptcy Rule 805. The second, articulated by the Seventh Circuit in *In re UNR Industries, Inc.*, is an effort to fill the "interstices of the Code" with the policy reflected in sections 363(m) and 1127(b) of the Bankruptcy Code. 20 F.3d 766, 769 (7th Cir. 1994). Neither theory can bear the weight placed upon it by courts' modern embrace of the doctrine.

In *In re Roberts Farms*, parties appealed from an order disallowing their claims and confirming a plan. 652 F.2d at 794. Affirming the dismissal of the appeals, the Ninth Circuit focused on appellants' procedural ineptitude and failure to seek a stay pending appeal. *Id.* at 795. The court cited former Bankruptcy Rule 805 (now reflected in sections 363(m) and 364(e) of the Bankruptcy Code),

which stated that "[u]nless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser or holder knows of the pendency of the appeal." *Id.* at 796. While former Bankruptcy Rule 805 dealt solely with a sale to a good faith purchaser or issuance of debt to a good faith holder, the innovation of the *In re Roberts Farms* court was to evince a "policy of the law" that "strongly supports a requirement that a stay be obtained if review on appeal is not to be foreclosed because of mootness." *Id.*

This broad new rule—that the failure to seek a stay coupled with substantial change of circumstances make it inequitable to reverse a *plan confirmation order*—had no basis in common law precedent. Every case the Ninth Circuit relied on in *In re Roberts Farms* dealt with appeals from sale orders—not confirmation orders—and therefore focused on Bankruptcy Rule 805 or the common law rules it codified. *See Valley Nat'l Bank v. Trustee for Westgate-California Corp.*, 609 F.2d 1274, 1283 (9th Cir. 1979) (stating in dicta that the appeal from an order approving a merger was moot); *In re Combined Metals*, 557 F.2d at 187-195 (holding appeals from sale orders were moot because the court could not provide relief, but an appeal from a plan confirmation order was not because the restrictions of former Bankruptcy Rule 805 did not apply); *In re Abingdon Realty Corp.*, 530 F.2d 588, 590 (4th Cir. 1976) (holding an appeal from an order approving the sale of a building to a good faith purchaser was moot). These cases held, incorrectly, that appeals from sale orders were *constitutionally* moot. *See, e.g.*, *In re Combined*

Metals, 557 F.2d at 187-89 (holding that there was no case or controversy given lack of remedy against purchaser). But former Bankruptcy Rule 805 only restricted the remedies available on appeal. It did not eliminate the case or controversy, nor modify the basic statutory right to appeal. The leap that the Ninth Circuit took in *In re Roberts Farms*—from the premise that an appeal of a bankruptcy sale order was constitutionally moot to the conclusion that an appeal of an unstayed confirmation order was equitably moot—was faulty from its inception.

Over time, other courts picked up the unprecedented ruling and extended it even further. For example, the Second Circuit stated that an appeal should be dismissed where, "even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable." *In re Chateaugay Corp.*, 988 F.2d 322, 325 (2d Cir. 1993). In one extreme example, an appeal was dismissed as equitably moot even though appellants had done everything in their power to properly preserve the appeal, including by seeking a stay. *Manges v. Seattle-First Nat'l Bank (In re Manges)*, 29 F.3d 1034, 1039-40 (5th Cir. 1994). These cases are a far cry from the facts of *In re Roberts Farms* and cannot be squared with the narrow (though misapplied) authority on which that decision relied.

The Seventh Circuit identified a second potential basis for the doctrine in *In re UNR Industries, Inc.* 20 F.3d at 769. The Seventh Circuit cites to section 363(m) of the Bankruptcy Code as signifying "courts should keep their hands off consummated transactions." *Id.* It also cites to section 1127(b) of the Bankruptcy Code as a provision that "dramatically curtails the power of a bankruptcy court

to modify a plan of reorganization after its confirmation and 'substantial consummation.'" *Id.* (quoting 11 U.S.C. § 1127(b)). According to the Seventh Circuit, the reasons animating these sections—preserving reliance interests and avoiding the pain of undoing a consummated transaction—are "so plain and so compelling that courts fill the interstices of the Code with the same approach." *Id.*

As then-Judge Alito observed with respect to sections 363(m) and 364(e) of the Bankruptcy Code, though, from these "narrow provisions—which merely prevent the upsetting of certain specific transactions if stays are not obtained—I do not see how one can derive the broad doctrine of 'equitable mootness' . . . ." *In re Cont'l Airlines*, 91 F.3d at 570 (Alito, J., dissenting). Other jurists have pointed out that the narrowness of these provisions pushes *against* their validity as a basis for equitable mootness through application of the "*expressio unius est exclusio alterius*" doctrine. *See, e.g.*, *Ochadleus*, 838 F.3d at 809 (Moore, J., dissenting); *see also One2One Communs.*, 805 F.3d at 444 (Krause, J., concurring). And section 1127(b) of the Bankruptcy Code is no more availing. It limits a debtor or plan proponent from modifying a plan after confirmation and before substantial consummation, but says nothing about a reviewing court's ability to do so. 11 U.S.C. § 1127(b).

But the fundamental error of *In re UNR Industries, Inc.* transcends its problematic statutory analysis and judicial policymaking by prioritizing the finality of confirmation orders and reliance interests over appellate rights. Its real error is that it authorizes courts to disregard explicit instruction from Congress in a comprehensive statutory scheme based on the courts' preference to apply

a different rule. Equitable mootness, as recognized by the Seventh Circuit, thus assumes a sweeping delegation of authority from Congress to the courts. This is the height of judicial activism, and any safe harbor the doctrine previously enjoyed cannot be aligned with recent decisions of this Court overturning administrative agency actions on "major questions" that ignored fundamental principles of separation of powers. *See, e.g, Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661, 664-65 (2022) (holding that Congress had not empowered the Occupational Safety and Health Administration to impose a COVID-19 vaccine mandate); *West Virginia v. EPA*, 142 S. Ct. 2587, 2609-10, 2613 (2022) (holding that Congress had not empowered the Environmental Protection Agency through a statutory "gap filler" provision to "substantially restructure the American energy market" by implementing regulations phasing out coal-based power plants). As this Court has explained, policy determinations, as embedded in the language of the statutes, are the outgrowth of "the balancing of competing values and interests, which in our democratic system is the business of elected representatives . . . [and] should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts." *Tex. Indus. v. Radcliff Materials*, 451 U.S. 630, 647 (1981). Equitable mootness is simply a policy determination by the courts regarding a subject that has been reserved for Congress. *See Ochadleus*, 838 F.3d at 810 (Moore, J. dissenting) (equitable mootness "purports to authorize the making of federal common law despite the complete lack of evidence that Congress intended to delegate such authority to the courts.").

Though every Circuit Court has now endorsed the equitable mootness doctrine, none has offered a more compelling justification, and few have even sought to defend the shoddy foundation formulated by the Seventh Circuit in *In re UNR Industries, Inc.* and the Ninth Circuit in *In re Roberts Farms*. The Second Circuit, for example, applying the doctrine in *Chateaugay*, 988 F.2d at 325-326, cited the principle that appeals are *constitutionally* moot when a court cannot fashion effective relief and to vague concepts of equity, but never cited a statutory basis for the doctrine. The Third Circuit described the doctrine as "widely recognized and accepted," but also never mentioned a statutory basis. *In re Cont'l Airlines*, 91 F.3d at 558-59; *see also In re Semcrude, L.P.*, 728 F.3d at 318 (describing the statutory theory from *In re UNR Industries, Inc.* as "plausible" but declining to "consider whether federal common law can support its use"). Of the other Circuits, the Fourth, Fifth, Sixth, Eighth, Tenth, and D.C. Circuits each similarly adopted the doctrine without even discussing a statutory basis. *See, e.g.*, *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 841 F.2d 92, 96 (4th Cir. 1988); *In re Crystal Oil Co.*, 854 F.2d 79, 82 (5th Cir. 1988); *City of Covington v. Covington Landing Ltd. P'ship*, 71 F.3d 1221, 1226 (6th Cir. 1995); *In re VeroBlue Farms USA, Inc.*, 6 F.4th 880, 888-89 (8th Cir. 2021); *Sw. Bell Tel. Co. v. Long Shot Drilling (In re Long Shot Drilling)*, 224 B.R. 473, 478-79 (10th Cir. 1998); *In re Aov Indus.*, 792 F.2d 1140, 1147-48 (D.C. Cir. 1986). The result has been the widespread adoption of a doctrine that denies appellants' express statutory and constitutional rights based on an extraordinarily weak legal foundation that courts cannot defend.

D. The Court Should Exercise its Supervisory Power to Rein In the Doctrine

The time has come for this Court to exercise its supervisory power and overturn the doctrine of equitable mootness. It has no statutory basis, it is unnecessary to achieve equitable aims, and, as applied by the Circuit Courts, it encourages inequitable conduct and facilitates inequitable results.

First, the lack of statutory basis for the doctrine renders this Court's intervention particularly necessary. It is the job of the courts to interpret the "comprehensive scheme" that governs the confirmation of plans based on the statute itself. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). As this Court has explained, "[t]he Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law, and it is our obligation to interpret the Code clearly and predictably using well established principles of statutory construction." *Id.* at 649. And as this Court stated in interpreting another section of the Bankruptcy Code, "[w]e cannot alter the balance struck by the statute." *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 471 (2017). Yet that is precisely what the Circuit Courts have done in instituting equitable mootness: alter the balance of the Bankruptcy Code by ignoring express statutory rights in favor of vague, extra-statutory considerations.

Second, the equitable nature of bankruptcy does not justify the "judicial anomaly," *In re Pacific Lumber*, 584 F.3d at 240, of foreclosing Article III review. Many courts have referred to equitable mootness as an application of the courts' equitable powers. *See, e.g, Chateaugay*,

988 F.2d at 326 ("An appeal should also be dismissed as moot when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable."). As noted by one bankruptcy judge, though, "the bankruptcy court is no more a court of equity than any other court applying statutory law or the Federal Rules of Civil Procedure." Hon. Marcia S. Krieger, *"The Bankruptcy Court is a Court of Equity": What Does That Mean?*, 50 S.C. L. REV. 275, 276 (1999). In accordance with Federal Rule of Civil Procedure 2, *any* court may administer "both law and equity in the same action." *Ross v. Bernhard*, 396 U.S. 531, 540 (1970). Courts routinely act in equity in considering subjects from patent law, to ERISA, to civil rights. *See, e.g.*, *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 580 U.S. 328, 333-35 (2017) (discussing equitable defenses in patent suits); *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996) (analyzing the availability of equitable relief under the Employee Retirement Income Security Act of 1974); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763-64 (1976) (discussing the availability of equitable relief under the Civil Rights Act of 1964).

But in no other area of law may courts citing principles of equity simply refuse to hear an appeal. *See In re SemCrude L.P.*, 728 F.3d at 317 ("Equitable mootness comes into play in bankruptcy (so far as we know, its only playground)[.]") Nor does the citation to equitable principles justify defying the clear statutory and constitutional requirements. *See Law v. Siegel*, 571 U.S. 415, 421-22 (2014) (explaining that bankruptcy courts may not "override explicit mandates" in the Bankruptcy Code, and that the Bankruptcy Code is subject to "the normal rules of statutory construction"); *Norwest*

Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988) ("[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."); *INS v. Pangilinan*, 486 U.S. 875, 883 (1988) (quoting *Hedges v. Dixon Cnty.*, 150 U.S. 182, 192 (1893)) ("Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.").

What appears to be happening is that the lower courts have decided to prioritize parties that purport to rely on plan confirmation above all others. That judicial preference is not permitted in the face of conflicting legislation, and it is flawed in any event. Outside of bankruptcy, parties routinely close transactions in the face of potential litigation, pricing that risk into the transaction. That is exactly what Windstream did in 2015 when it spun off certain subsidiaries in the face of significant litigation risk. The District Court did not refuse to hear U.S. Bank's challenge to Windstream's spin-off transaction under the theory that such a challenge could upset Windstream's corporate reorganization, and the Second Circuit could not have refused to hear an appeal on that basis. *See generally Windstream Servs., LLC*, 2019 U.S. Dist. LEXIS 26129. To assume that parties in bankruptcy cannot make decisions in the face of risk "assume[s] an extraordinary degree of naiveté on the part of [investors] and the others who are said to have relied on the plan." *In re Cont'l Airlines*, 91 F.3d at 572 (Alito, J., dissenting). This assumption certainly does not justify special and unique equitable protections.

This is particularly true because the policies of facilitating reorganization and protecting reliance

interests can be addressed entirely through a court's choice of *remedies*. As then-Judge Alito noted, even when reviewing an appeal related to a consummated plan, courts "retain the ability to craft, or to instruct the district or bankruptcy courts to craft, a remedy that is suited to the particular circumstances of the case." *Id.* at 571. A court may also protect reasonable reliance interests in the same manner—by crafting an appropriate remedy if the appellant wins on the merits. *Id.* The proper remedy in any particular case is, of course, an empirical question. *Id.* But once a reviewing court decides an appeal is equitably moot, it has "little remedial flexibility"; it must dismiss the case. *Id.* Equitable Mootness thus functions as a doctrine of judicial laziness—freeing courts from crafting an effective and available remedy where a plan was confirmed in error.

Third, far from promoting fairness, equitable mootness actually encourages inequitable conduct by reducing the opportunity for appellate review, giving the debtors themselves the ability to moot appeals, and inviting a rush to consummate unlawful plans. The result is doubly inequitable; the doctrine can both remove an appellant's ability to pursue an appeal, and encourage the plan proponent to cut corners.

Here, Windstream, operating in the heavily regulated telecommunications industry, was required under its confirmed plan to secure federal and state permission for the transfer of its broadcast licenses to the reorganized debtors to go effective and emerge from bankruptcy. This was important enough to the plan's success that the secured creditors (the new equity owners of the business) bargained for it as a condition precedent to emergence.

A352.[1] Yet in their hurry to consummate the plan before the District Court considered appeals, Windstream, and its secured creditors waived (without notice to the unsecured noteholders) this crucial condition months before the Texas Public Utility Commission's approval of the license.[2] Windstream and its secured creditors thereby exposed themselves to dramatic risk for the sole purpose of evading appellate review.

Such conduct illustrates the courts' warnings about the potential to abuse the equitable mootness doctrine—that "[p]roponents of reorganization plans now rush to implement [chapter 11 plans] so they may avail themselves of an equitable mootness defense," *In re VeroBlue Farms*, 6 F.4th at 889 (quoting *One2One Communs.*, 805 F.3d at 446-47 (Krause, J., concurring)) and that the "equitable mootness doctrine can easily be used as a weapon to prevent any appellate review of bankruptcy court orders confirming reorganization plans[,] . . . plac[ing] far too much power in the hands of bankruptcy judges." *Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 192 (3d Cir. 2001) (Alito, J., concurring).

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1. Citations taking the form "A_ _ _" refer to entries in the Appendix filed in the Second Circuit for Case No. 21-1754.

2. *See* Tex. Pub. Util. Comm'n, *Application of Windstream Holdings, Inc., Windstream Services, LLC, and Subsidiaries to Amend Service Provider Certificates of Operating Authority or Certificates of Operating Authority*, Docket No. 50911 (Sep. 3, 2020), http://interchange.puc.texas.gov/Documents/50911_19_1084584.PDF (letter from Windstream Applicants to Administrative Law Judge); Tex. Pub. Util. Comm'n, *Application of Windstream Holdings, Inc., Windstream Services, LLC, and Subsidiaries to Amend Service Provider Certificates of Operating Authority or Certificates of Operating Authority*, Docket No. 50911, (Dec. 17, 2020), https://interchange.puc.texas.gov/Documents/50911_23_1102060.PDF (granting application).

The Eighth Circuit has warned that "[i]f equitable mootness instead becomes the rule of appellate bankruptcy jurisprudence, rather than an exception to the Article III-based rule that jurisdiction should be exercised, we predict the Supreme Court, having up to now denied petitions for certiorari to review the doctrine, will step in and severely curtail—perhaps even abolish—its use[.]" *In re VeroBlue* Farms, 6 F.4th at 891. This case is a poster child for the abuses of the doctrine, and this Court should exercise its supervisory authority to abolish it.

II. There is a Circuit Split as to the Relevance of a Stay

Even if this Court does not determine that the doctrine of equitable mootness must be abolished entirely, it should grant certiorari to curtail the doctrine's worst excesses by resolving two aspects of the doctrine where the Second Circuit is out of step with the other Circuits in a manner that prevents appellate review. The first of these is the requirement that appellant diligently seek a stay, which the Second Circuit relied on in affirming the lower court's dismissal of the current case. This requirement undermines the equitable inquiry and has no statutory basis.

The Second Circuit places paramount importance on the fifth factor of the five-factor test from *In re Chateauguay Corp.*, 10 F.3d 944, 952-53 (2d Cir. 1993) (the "*Chateaugay* factors")[3]—whether the appellant diligently

3. The five *Chateaugay* factors are whether: "(i) effective relief can be ordered; (ii) relief will not affect the debtor's re-emergence; (iii) relief will not unravel intricate transactions; (iv) affected third-parties are notified and able to participate in the appeal; and (v) [the] appellant diligently sought a stay of the

sought a stay of the confirmation order. *See* App'x A at 4a. The Second Circuit has described the fifth *Chateaugay* factor as the "chief consideration" in the analysis. *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 144 (2d Cir. 2005). Reflecting the law of the Circuit, here the panel ruled that U.S. Bank's decision not to seek a stay at an earlier time was itself sufficient grounds to affirm dismissal on equitable mootness grounds. App'x A at 4a-6a.

The Second Circuit's emphasis on a stay as the "chief consideration" conflicts with the law of the other Circuits. The First, Third, Fourth, Fifth, Sixth, Eighth, Tenth, Eleventh, and D.C. Circuits consider whether an appellant has sought or obtained a stay as one factor in evaluating whether an appeal is equitably moot, but there is no bright-line rule that seeking a stay is required to avoid equitable mootness. *See Cooperativa de Ahorro y Credito v. Fin. Oversight & Mgmt. Bd. (In re Fin. Oversight & Mgmt. Bd.),* 989 F.3d 123, 129 (1st Cir. 2021); *In re Tribune Media Co.*, 799 F.3d 272, 278 (3d Cir. 2015); *Bate Land Co. LP v. Bate Land & Timber LLC (In re Bate Land & Timber LLC)*, 877 F.3d 188, 195 (4th Cir. 2017); *Nexpoint Advisors, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Capital Mgmt., L.P.)*, 48 F.4th 419, 429-30 (5th Cir. 2022); *Ochadleus*, 838 F.3d at 798; *In re VeroBlue Farms*, 6 F.4th at 889; *Dill Oil Co. v. Stephens (In re Stephens)*, 704 F.3d 1279, 1282-83 (10th Cir. 2013); *In re Club Assocs.*, 956 F.2d 1065, 1069 n.11 (11th Cir. 1992); *In re Aov Indus.*, 792 F.2d at 1147. The Seventh Circuit does not even identify whether a stay was sought

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reorganization plan." *In re MPM Silicones, LLC.*, 874 F.3d 787, 804 (2d Cir. 2017) (citing *Chateaugay*, 10 F.3d at 952-53).

and obtained in evaluating whether an appeal is equitably moot. *See Duff v. Cent. Sleep Diagnostics, LLC,* 801 F.3d 833, 840 (7th Cir. 2015). Only the Ninth Circuit, like the Second, requires an appellant to seek a stay, and even there the requirement is subject to exceptions in which the failure to seek a stay is excusable. *Rev Op Group v. ML Manager LLC (In re Mortgs. Ltd.)*, 771 F.3d 1211, 1217 (9th Cir. 2014); *Yang Jin Co. v. Miller (In re Kong)*, No. CC-15-1371-KiTaL, 2016 Bankr. LEXIS 2209, at *17 (9th Cir. B.A.P. June 6, 2016) (excusing appellant's lack of seeking a stay and finding no equitable mootness).

The Circuits have crafted these inconsistent tests even though they have the same putative goal—ensuring equitable mootness applies only where necessary to avoid an unmanageable situation for the bankruptcy court. As then-Judge Alito noted, the seeking of a stay is relevant to the inquiry because a stay may prevent "reliance on the plan of reorganization [] that would be difficult or painful to undo if the appeal were to succeed." *In re Cont'l Airlines*, 91 F.3d at 572 (Alito, J., dissenting). Yet he also noted that no statute makes the seeking of a stay *mandatory*: "neither the Bankruptcy Code nor the Bankruptcy Rules contain any such sweeping provision." *Id.* Thus, most Circuits consider the stay as part of a broad inquiry into the equity of upsetting the confirmed plan, rather than "a censurable event to be punished by refusal to adjudicate the merits." *In re UNR Indus., Inc.*, 20 F.3d at 769.

For example, the Tenth Circuit in *Dill Oil Company* reversed an equitable mootness dismissal where appellant had not sought a stay upon determining that creditors would not be adversely affected in a significant manner.

704 F.3d at 1283. Similarly, the Third Circuit in *In re SemCrude, L.P.* allowed a party that had not sought a stay to prosecute its appeal upon determining that the relief sought would not upset the plan. 728 F.3d at 323-25. Applying the same reasoning, the Fifth Circuit also refused to dismiss an appeal as moot, notwithstanding that appellant had not sought a stay and that the plan had been substantially consummated, where the requested relief would not upset the plan. *Hilal v. Williams (In re Hilal)*, 534 F.3d 498, 500-01 (5th Cir. 2008). All these Circuits approached the determination by weighing the facts and the ability to grant relief under the circumstances, not blindly following a checklist.

The Second Circuit's test, however, requires appellants to seek a stay, no matter how futile or counter-productive, in order to avoid dismissal. In complex bankruptcy transactions with conditions to effectiveness that may take months to satisfy, the requirement to seek a stay may be little more than a check-the-box exercise. This case serves as a prime example.

At the time of the appeals to the District Court, U.S. Bank likely could not demonstrate irreparable harm in the absence of a stay because Windstream needed months to satisfy regulatory conditions to emergence. Requesting a stay would have been pointless as the Bankruptcy Court would have simply denied it. The Bankruptcy Court stated this plainly when it denied U.S. Bank's later request for a stay. A920-921. If at the time of its appeals U.S. Bank had pursued a stay doomed to denial, the effect on Windstream would have been the same. After all, "[a] stay not sought, and a stay sought and denied, lead equally to the implementation of the plan of reorganization." *In re*

UNR Indus., Inc., 20 F.3d at 770. So seeking a stay would have been irrelevant to the outcome. The Second Circuit's application of the *Chateaugay* test, though, invites appellants to engage in this futile exercise, whether or not there is any basis for granting a stay. This test is easier for courts to adjudicate than the tests employed by other Circuits, but the cost of convenience is the dismissal of cases like this one that ought to be heard on the merits.

Instead, U.S. Bank determined that the most practical approach was to seek expedited appeals, so the matter could be fully briefed and decision-ready before Windstream was ready to emerge. Though the District Court denied the request, U.S. Bank filed its briefs well ahead of the briefing schedule to allow the District Court ample time to consider the appeals. U.S. Bank also requested a stay once Windstream made clear that it intended to waive closing conditions and emerge early to moot the appeals. At every turn, U.S. Bank attempted to limit the possibility that any party could reasonably believe that there was no appellate risk, satisfying the same concern the stay requirement is intended to address—to avoid upsetting confirmation where an appellant took no "initiative," but passively allowed the plan transactions to close. *Chateaugay*, 10 F.3d at 954. Windstream and the secured creditors could not have justifiably relied on the plan's confirmation with U.S. Bank's appeals fully briefed and pending. The litigation risk was clear. As Windstream acknowledged in its brief filed weeks before the plan consummation, what they were actually relying on was their own ability to engineer equitable mootness. A729-734. Equitable mootness was "part of the Plan." *In re VeroBlue Farms*, 6 F.4th at 889 (quoting *One2One Communs.*, 805 F.3d at 446) (Krause, J., concurring)).

The Second Circuit's requirement to seek a stay that was unavailable here allowed that plan to succeed.

If a stay is mandatory to avoid equitable mootness, entire classes of plans in bankruptcy effectively cannot be appealed. This is the case wherever, because of legal or practical factors, the appellant's pursuit of a stay would be unavailing. While the tests for equitable mootness in other Circuits are flexible enough to accommodate such scenarios, the Second Circuit's is not. This Court should resolve the split between Circuits to avoid making the pursuit of a stay mandatory to avoid equitable mootness.

III. There is a Circuit Split as to the Burden

There is also a Circuit split on which party bears the burden with respect to the equitable mootness determination. The Second Circuit's assignment of the burden to appellants is out of step with other Circuits in and encourages district courts to make factual findings without any evidence.

In the Second Circuit, "a bankruptcy appeal is presumed equitably moot when the debtor's reorganization plan has been substantially consummated." App'x A at 3a (quoting *Beeman v. BGI Creditors' Liquidating Tr. (In re BGI, Inc.)*, 772 F.3d 102, 108 (2d Cir. 2014)). The appellant bears the burden of overcoming this presumption by showing satisfaction of each of the five *Chateaugay* factors. App'x A at 3a-4a.

In contrast, other Circuits that have considered the matter place the burden of proof on the party seeking dismissal. *See In re SemCrude, L.P.*, 728 F.3d at 321

("Dismissing an appeal over which we have jurisdiction, as noted, should be the rare exception and not the rule. It should also be based on an evidentiary record, and not speculation. To encourage this, we join other Courts of Appeals in placing the burden on the party seeking dismissal.") (citing *In re Lett*, 632 F.3d 1216, 1226 (11th Cir. 2011)); *In re Paige*, 584 F.3d 1327, 1339-40 (10th Cir. 2009); *In re Focus Media, Inc.*, 378 F.3d 916, 923 (9th Cir. 2004); *see also Ohio v. Madeline Marie Nursing Homes # 1 & # 2*, 694 F.2d 449, 463-64 (6th Cir. 1982).

The effect of the Second Circuit's placement of the burden of proof on the appellant is that the courts must rule on equitable dismissal without a developed evidentiary record. That is exactly what happened here. U.S. Bank filed its opening brief more than seven weeks before Windstream ultimately emerged from bankruptcy. Windstream first raised equitable mootness in its answering brief as its primary defense to the appeals, still weeks before it was ready to emerge from bankruptcy. It did not move to dismiss the appeals, leaving U.S. Bank only seven days to address the new issue of equitable mootness in its reply brief. That is insufficient time to develop an evidentiary record regarding available relief and the potential impact on the reorganized business, the plan, and the parties who have relied on confirmation. And because the Second Circuit does not require an evidentiary hearing concerning equitable mootness, the District Court did not hold one.

Accordingly, when considering the critical and fact-intensive second and third *Chateaugay* factors—which concern whether the relief will affect the debtor's emergence or unravel intricate transactions—the

District Court did not have the benefit of any factual record. Addressing these factors, it ruled that U.S. Bank's requested relief "would both jeopardize debtors' emergence from bankruptcy and require unravelling numerous complex transactions," App'x B at 22a, as well as "'knock the props out from under' the Plan" because "relief would require unwinding consummated transactions that have already vested equity and other rights in creditors," *id.* at 24a. The District Court cited little evidence to back up these conclusions. It neither identified transactions it would need to unwind, nor discussed how such relief would affect emergence from bankruptcy. This is because there was no evidence to cite. Windstream did not bear the burden of proof, so had little incentive to develop the record, while U.S. Bank was hamstrung by the lack of an evidentiary hearing and short briefing schedule.

The result was an unworkable situation: U.S. Bank bore the burden of proof, but did not have the opportunity to meet that burden. By shifting the burden, courts can assess the actual limitations on relief after reviewing available evidence. *See In re SemCrude, L.P.*, 728 F.3d at 321 (placing the burden of proof on the party seeking dismissal because equitable mootness should be "based on an evidentiary record, and not speculation."). After all, that a particular request for relief would upset a plan is "an empirical proposition that is not self-evident." *In re Cont'l Airlines*, 91 F.3d at 571 (Alito, J., dissenting). This empirical proposition should not be resolved with a hand-wave, and this Court should foreclose such a doctrine of speculation.

The purpose of equitable mootness is, ultimately, to prevent injustice and inequity. *In re SemCrude, L.P.*, 728

F.3d at 326. Accordingly, the doctrine should not itself be used to advance inequitable means. *One2One Communs.*, 805 F.3d at 446-448 (Krause, J., concurring). This is particularly true because the doctrine operates through the Article III courts' avoidance of their "unflagging obligation" to decide cases, meaning its application should be reserved for "extremely rare circumstances." *In re VeroBlue Farms,* 6 F.4th at 891. If equitable mootness is to have any legitimacy, then, the doctrine must require that when a district court states it would be inequitable to hear an appeal, that district court does so based only on a fully developed factual record. Placing the burden of proof on the appellant does not achieve this.

This Court should resolve the Circuit split by shifting to the appellee the burden of producing evidence of the harm to parties who have justifiably relied on confirmation and the lack of any potential relief.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED OCTOBER 25, 2022

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of October, two thousand twenty-two.

Present:

PIERRE N. LEVAL,
DENNY CHIN,
EUNICE C. LEE,
Circuit Judges.

Appendix A

21-1754

IN RE: WINDSTREAM HOLDINGS, INC.

U.S. BANK NATIONAL ASSOCIATION,

Appellant,

v.

WINDSTREAM HOLDINGS, INC.,

Debtor-Appellee,

ELLIOTT INVESTMENT MANAGEMENT L.P.,
FIRST LIEN AD HOC GROUP,

Intervenors-Appellees.

Appeal from the United States District Court for the Southern District of New York (Vincent L. Briccetti, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the district court is **AFFIRMED**.

U.S. Bank National Association ("U.S. Bank") appeals an order of the district court (Briccetti, *J.*) dismissing as equitably moot U.S. Bank's appeals of two orders of the bankruptcy court (Drain, *Bankr. J.*), one approving a settlement between debtor Windstream Holdings, Inc. (together with its debtor subsidiaries) ("Windstream") and Uniti Group, Inc. (the "Settlement Order"), and another confirming Windstream's Chapter 11 plan of

reorganization (the "Confirmation Order"). U.S. Bank argues primarily that the equitable mootness doctrine must be limited because the doctrine's overbroad application has no basis in either the Constitution or Bankruptcy Code and contravenes the federal courts' strong obligation to exercise jurisdiction. U.S. Bank also argues that, even on the doctrine's own terms, the district court misapplied the test for equitable mootness.

We assume the parties' familiarity with the underlying facts, procedural history, and issues and arguments on appeal.

DISCUSSION

This Court reviews a district court's equitable mootness determination for abuse of discretion. *See In re Charter Commc'ns, Inc.*, 691 F.3d 476, 483 (2d Cir. 2012). The prudential doctrine of equitable mootness allows a court to dismiss a bankruptcy appeal "when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable." *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 143 (2d Cir. 2005) (internal quotation marks omitted). Its purpose is "to avoid disturbing a reorganization plan once implemented," *id.* at 144, and accordingly, "a bankruptcy appeal is presumed equitably moot when the debtor's reorganization plan has been substantially consummated," *In re BGI, Inc.*, 772 F.3d 102, 108 (2d Cir. 2014).

To overcome that presumption, an appellant must show all five of the so-called *Chateaugay* factors. *See Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*,

10 F.3d 944, 952-53 (2d Cir. 1993) ("*Chateaugay II*"). These factors are whether: "(i) effective relief can be ordered; (ii) relief will not affect the debtor's re-emergence; (iii) relief will not unravel intricate transactions; (iv) affected third-parties are notified and able to participate in the appeal; and (v) [the] appellant diligently sought a stay of the reorganization plan." *In re MPM Silicones, L.L.C.*, 874 F.3d 787, 804 (2d Cir. 2017) (internal quotation marks omitted). "Although we require satisfaction of each *Chateaugay II* factor to overcome a mootness presumption, we have placed significant reliance on the fifth factor, concluding that a chief consideration under *Chateaugay II* is whether the appellant sought a stay of confirmation." *Id.*

U.S. Bank's first argument—that the doctrine's application must be limited because it lacks a basis in the Constitution or Bankruptcy Code and contravenes federal courts' obligation to exercise jurisdiction—is foreclosed by this Court's precedent. As an initial matter, U.S. Bank has not suggested any principled rule by which we should limit the doctrine or determine when its application is overbroad. U.S. Bank appears instead to invite us to carve out the facts of this case ad hoc. We must decline this invitation. While we have acknowledged the doctrine's "enigmatic origins," *In re Motors Liquidation Co.*, 829 F.3d 135, 167 (2d Cir. 2016), equitable mootness is now firmly established by this Court's caselaw, *see, e.g., MPM Silicones*, 874 F.3d at 804-05; *BGI*, 772 F.3d at 107-09; *Charter*, 691 F.3d at 481-82; *Metromedia*, 416 F.3d at 143-44. Whatever merit there may be to U.S. Bank's criticisms of the doctrine and of the bankruptcy process in general,

a panel of this Court "is bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court." *Springfield Hosp., Inc. v. Guzman*, 28 F.4th 403, 421 (2d Cir. 2022) (internal quotation marks omitted).

Of course, the doctrine's application requires a court "to carefully balance the importance of finality in bankruptcy proceedings against the appellant's right to review and relief." *Charter*, 691 F.3d at 481. The *Chateaugay* factors serve to guide that balancing act and, contrary to U.S. Bank's second argument, the district court did not abuse its discretion in applying them.

U.S. Bank filed the notice of appeal to the district court approximately a week after the bankruptcy court entered its Confirmation Order but waited two months before requesting a stay. Even then, U.S. Bank's request was awkwardly appended to an unrelated motion and demonstrated little serious effort to show that the requirements for issuing a stay were met. The request's timing and presentation caused the bankruptcy judge to describe it as "a sham and procedural gambit," App'x at 918, noting also that U.S. Bank "made such a half-hearted attempt to prosecute [the stay request]," App'x at 925. U.S. Bank nevertheless argues that dismissal for equitable mootness is "only appropriate" if an appellant makes "*no effort*" at all to obtain a stay. Appellant's Br. at 44. That is incorrect. To avoid dismissal for equitable mootness, an appellant must have sought a stay "with diligence." *Chateaugay II*, 10 F.3d at 953.

U.S. Bank further argues that a stay was initially unnecessary because Windstream had to complete time-consuming regulatory requirements before the plan could be consummated. This argument was not raised below and is forfeited. *See Browe v. CTC Corp.*, 15 F.4th 175, 190-91 (2d Cir. 2021). It also fails because Windstream stated during the confirmation hearing that it intended to consummate the plan in late August or early September of 2020, including sufficient time for regulatory approvals, and U.S. Bank in fact relied on that timeline in its motion to expedite the appeal in the district court. Nevertheless, U.S. Bank neglected to request a stay until September 1, 2020—well into the period in which the plan was expected to be consummated. Accordingly, we agree with the district court that U.S. Bank failed to diligently seek a stay of the plan as the fifth *Chateaugay* factor requires. Because the presumption of equitable mootness can be overcome only if an appellant meets all five of the *Chateaugay* factors, *see Charter*, 691 F.3d at 482, U.S. Bank's failure to meet the fifth factor is a sufficient ground to affirm the order of the district court.

Finally, U.S. Bank also challenges the district court's findings on the second and third *Chateaugay* factors that the relief requested would jeopardize Windstream's emergence from bankruptcy and require unraveling numerous complex transactions related to the plan. Given our conclusion above as to U.S. Bank's failure to diligently pursue a stay, we do not need to address this challenge. We note, however, that we discern no error in the district court's analysis or conclusions concerning the second and third *Chateaugay* factors.

The district court therefore did not abuse its discretion in dismissing the appeals as equitably moot.

CONCLUSION

We have considered U.S. Bank's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the order of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED JUNE 23, 2021

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

20 CV 4276 (VB)

IN RE:

WINDSTREAM HOLDINGS, INC., *et al.*,

Debtors.

U.S. BANK NATIONAL ASSOCIATION,
AND CQS (US), LLC,

Appellants,

v.

WINDSTREAM HOLDINGS, INC., *et al.*,

Appellees.

June 22, 2021, Decided;
June 23, 2021, Filed

OPINION AND ORDER

Briccetti, J.:

U.S. Bank National Association ("U.S. Bank"), as indenture trustee for certain unsecured notes of

Windstream Services, LLC, and CQS (US), LLC ("CQS") (together "appellants"), appeal from (i) a May 12, 2020, Order of the Bankruptcy Court approving a settlement between Windstream Holdings, Inc., and its debtor subsidiaries ("debtors"), and Uniti Group, Inc. (the "Settlement Order"); and (ii) a June 26, 2020, Order of the Bankruptcy Court confirming debtors' First Amended Joint Chapter 11 Plan of Reorganization (the "Confirmation Order").[1] Intervenor-appellee Elliott Investment Management L.P. ("Elliott"), the largest holder of first and second lien claims against debtors, along with other rights contemplated by the First Amended Joint Chapter 11 Plan of Reorganization (the "Plan") confirmed by the Confirmation Order, previously intervened with the consent of all parties.

For the reasons set forth below, the appeals are DISMISSED as equitably moot.

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 158(a).

BACKGROUND

1. U.S. Bank appealed both the Settlement Order (20 CV 4276) and the Confirmation Order (20 CV 5440). CQS also appealed the Confirmation Order. (20 CV 5529). By Order dated August 3, 2020, the Court consolidated these three appeals under the above caption. Unless otherwise noted, all references to documents filed on the docket (Doc. #) refer to those documents filed in *In re Windstream Holdings, Inc. et al.*, 20 CV 4276. CQS joined and relied upon U.S. Bank's consolidated opening and reply briefs. (Docs. ##21, 50).

Appendix B

I. The Uniti Transaction and Ensuing Litigation

Debtors are a collection of companies that provide telecommunications services throughout the United States. Beginning in 2013, debtors entered into a complex transaction that split their businesses into two companies, Windstream Holdings, Inc. ("Holdings"), and Windstream Services, LLC ("Services"), and spun off a real estate investment trust ("REIT") now known as Uniti Group, Inc. ("Uniti").

As part of the "Uniti Transaction," Services transferred various telecommunications operating assets, such as fiber optic cables, copper wires, and real estate, to Uniti. Holdings, which acted as the new Windstream parent company, then transferred a majority of the equity in its new subsidiaries (including Uniti) to existing shareholders. Finally, Holdings entered into a lease arrangement with Uniti, known as the "Master Lease," whereby Holdings leased the transferred assets back from Uniti and continued operating those assets through its subsidiaries. The Master Lease also required debtors to make certain improvements to the transferred assets, called "tenant capital improvements," and to maintain those assets at debtors' expense.

The structure of the Master Lease proved problematic for debtors' finances. For instance, debtors' rent payments remained unchanged even if portions of the networks and assets became unusable or destroyed. And although the assets naturally depreciated in value, debtors were obligated to pay rents that increased at a contractually set rate. After just two years, debtors' financial performance

began to decline, their market capitalization became drastically reduced, and ratings agencies issued decreased ratings for debtors' bonds.

In 2017, Aurelius Capital Master, Ltd. ("Aurelius"), acquired a controlling interest in certain of Services's senior unsecured notes, for which U.S. Bank served as indenture trustee. Aurelius directed U.S. Bank to sue debtors in its capacity as indenture trustee. In that suit, filed in this district, U.S. Bank alleged Services breached a covenant contained in a governing bond indenture that restricted Services from entering into sale and leaseback transactions. *See U.S. Bank Nat'l Ass'n v. Windstream Servs., LLC*, 2019 U.S. Dist. LEXIS 26129, 2019 WL 948120, at *1 (S.D.N.Y. Feb. 15, 2019). After a bench trial, Judge Furman found the Master Lease violated the sale and leaseback restrictions in the bond indentures, and therefore Services was in default of those agreements. 2019 U.S. Dist. LEXIS 26129, [WL] at *23. The court awarded Aurelius a $310 million judgment on February 25, 2019. 2019 U.S. Dist. LEXIS 26129, [WL] at *23-24.

II. Chapter 11 Proceedings and the Uniti Settlement

Debtors commenced Chapter 11 proceedings the same day.

After conducting an independent investigation, debtors commenced an adversary proceeding against Uniti in the Bankruptcy Court seeking to recharacterize the Master Lease as a financing agreement. Debtors and Uniti engaged in protracted litigation while also

participating in parallel mediation before Bankruptcy Judge Shelley C. Chapman. Prior to trial in the adversary proceeding, debtors reached a settlement with Uniti (the "Uniti Settlement"), which they submitted to the Bankruptcy Court for approval.

The Uniti Settlement included a complex series of transactions (the "Uniti Settlement Transactions") that provided debtors with more than $1.2 billion in present value. The Uniti Settlement Transactions required Uniti to: (i) commit to fund an aggregate of $1.75 billion of "Growth Capital Improvements"—investments in long-term fiber network assets constructed by debtors; (ii) provide up to $125 million in loans for equipment purchases by debtors; (iii) purchase certain of debtors' assets and contracts in exchange for roughly $244 million in payments to debtors, which would be funded through a purchase of Uniti's stock by Elliott and an ad hoc group of first lien lenders; and (iv) pay roughly $490 million to debtors in quarterly installments. (*See* Doc. #15-6 at ECF 52-57).[2]

In addition to the Uniti Settlement Transactions, the Uniti Settlement contemplated another agreement between debtors, Uniti, Elliott and its affiliated funds, and an ad hoc group of first lien lenders called the "Plan Support Agreement." The Plan Support Agreement memorialized debtors' and key creditors' acceptance of the Uniti Settlement and detailed a series of restructuring

2. "ECF" refers to the page numbers automatically assigned by the Court's Electronic Filing System.

transactions embodied in the Plan.

Between May 7 and 8, 2020, the Bankruptcy Court held a hearing on the Uniti Settlement. The court found the proposed settlement was "intertwined" with debtors' eventual plan of reorganization and was "critical to [their] ability to successfully reorganize." (Doc. #15-4 at ECF 347). And, after reviewing the litigation risks debtors faced in their adversary proceeding against Uniti, the Bankruptcy Court approved the Uniti Settlement, finding it was "favorable to Windstream and well above the lowest range of reasonableness." (*Id.* at ECF 358).

III. The Confirmation Order and the Plan

Debtors proposed their First Amended Chapter 11 Plan of Reorganization (the "Plan") on May 14, 2020. The Plan partially repaid debtors' pre-petition first lien lenders and partially converted those lenders' claims to equity. The Plan also canceled debtors' junior debt, thereby reducing their debt burden by roughly $3.6 billion and improving their cash flow by around $300 million per year. In addition, the Plan provided for the retention of certain employee pension benefits and permitted debtors to continue operating.

The Uniti Settlement forms an inextricable part of the Plan. For example, consummation of the Uniti Settlement Transactions was an express condition precedent to the Plan. And the cash value of the settlement was distributed to various classes of creditors through the Plan. Absent settlement of debtors' claims against Uniti, the Bankruptcy Court believed "there [was] serious doubt . . . as to whether third-party financing would be available for" necessary upgrades to Windstream's telecommunications network. (Doc. #15-4 at ECF 365).

The Plan also provided for certain transactions to occur on its effective date: (i) existing equity in debtors would be canceled and reorganized equity would be issued to first lien claimants; (ii) proceeds from a new senior secured credit facility would be distributed to first lien claimants and used to pay other allowed claims and fund various claim reserves;[3] (iii) liens granted under the new credit facility would be deemed approved; and (iv) debtors would consummate a $750 million rights offering to first lien claimants for reorganized equity interests.

The Plan contemplated full recovery for holders of secured and priority claims, and impaired recovery for other classes of creditors, including holders of first and second lien claims, holders of certain pre-petition notes claims, and general unsecured claims. Debtors' secured creditors and a majority of unsecured voting creditors

3. A credit facility is an agreement permitting a borrower to borrow money over an extended period from one or multiple lenders. A senior secured credit facility guarantees the loans with the borrower's collateral and specifies the priority of those debts.

voted to accept the plan. However, some unsecured creditors—including appellants—opposed the plan, which prevented debtors from reaching the two-thirds-by-amount threshold required for acceptance by the class of unsecured creditors. *See* 11 U.S.C. § 1126(c).

The Bankruptcy Court confirmed the Plan on June 25, 2020, after a two-day hearing. In its oral decision, the court undertook an exhaustive analysis of the requirements of 11 U.S.C. § 1129 and discussed each of the objections presented by various parties. The court rejected the objection that the Plan unfairly paid secured creditors more than the aggregate value of their collateral and adequate protection claims at the expense of unsecured creditors.[4] Specifically, the court found there was no unencumbered value to distribute to unsecured creditors given the value of the secured creditors' pre-petition and adequate-protection liens and superpriority adequate-protection claims.

In addition, objectors to the Plan, including appellants, argued the proceeds of the Uniti Settlement were unencumbered assets that should have been distributed to unsecured creditors like themselves. However, the Bankruptcy Court found more senior classes of creditors had a lien on the Uniti Settlement itself by virtue of a general lien on intangibles, because cash derived from the Uniti Settlement constituted proceeds of a litigation

4. Adequate protection claims compensate secured creditors for the post-petition decline in the value of their collateral. Adequate protection claims are typically provided either in cash payments or replacement liens on a debtor's property.

claim. In short, according to the Bankruptcy Court, the claims asserted by the secured creditors far exceeded "any reasonable assumption of unencumbered assets in an order of magnitude of hundreds of millions of dollars." (Doc. #15-9 at ECF 110).

On June 26, 2020, the Bankruptcy Court issued the Confirmation Order. (Doc. #15-9 at ECF 130-266).

IV. Procedural History of the Appeals

Appellants timely appealed from both the Settlement and Confirmation Orders. They filed notices of appeal from the Confirmation Order on July 3, 2020. Thereafter, appellants moved to expedite and consolidate the appeals. The Court denied the motion to expedite but granted the motion to consolidate, and then set a briefing schedule, pursuant to which the appeals were to be fully briefed by September 16, 2020.

On September 1, 2020, appellants filed a "response" in the Bankruptcy Court to a motion seeking to establish procedures in furtherance of certain distributions under the Plan. In their "response," appellants included a "request" to "stay the effective date" of the Plan pending resolution of the appeals. (Doc. #56-1 at ECF 13-14).

On September 2, 2020, appellees filed their opening briefs on the merits of the appeals, arguing, among other grounds, that the Court should dismiss the appeals as equitably moot.

Two days later, U.S. Bank filed, and CQS joined, a motion for "a determination of post-effective date jurisdiction," or in the alternative, a stay of the Confirmation Order pending appeal (hereinafter, the "Equitable Mootness Motion"). (Docs. ##44, 45).

On September 17, 2020, the Bankruptcy Court denied appellants' request to stay consummation of the Plan. The Bankruptcy Court believed appellants' request for a stay was a "sham and a procedural gambit," filed in "response" to an unrelated motion. (Doc. #56-1 at ECF 22). The Bankruptcy Court also denied appellants' request for a stay on the merits because they failed to demonstrate irreparable harm, ignored any potential harm to other parties, and there was "a strong public interest in proceeding to conclude and permit [the Plan] to go effective." (*Id.* at ECF 24-25, 27).

By letter dated September 21, 2020, appellees informed the Court the Plan became effective and was substantially consummated that day. And by Memorandum Opinion and Order dated November 2, 2020, the Court denied the Equitable Mootness Motion, including appellants' request for a stay.

DISCUSSION

I. Standard of Review

The Court has jurisdiction to hear these appeals pursuant to 28 U.S.C. § 158(a). The Court also has discretion to determine whether an appeal from a

bankruptcy court is equitably moot. *See In re Charter Communs., Inc.*, 691 F.3d 476, 483 (2d Cir. 2012).[5] In so doing, the Court "may rely on the bankruptcy court's factual findings, unless clearly erroneous, and if necessary receive additional evidence." *Id.*

II. Equitable Mootness

First, debtors argue the Court should dismiss these appeals as equitably moot because vacating, reversing, and remanding either the Settlement Order or Confirmation Order would require "unscrambling" a plan of reorganization that was consummated several months ago, and would "devastat[e] the [d]ebtors' hopes of emerging from bankruptcy as a going concern and disrupt[] countless complex financial transactions." (Doc. #37 at ECF 25). Second, debtors argue appellants "made no meaningful effort to avoid that risk by [seeking to stay] the" Confirmation Order or Settlement Order. (*Id.*). Third, in the Equitable Mootness Motion appellants proposed several forms of relief that they now argue will be effective without vacating the Settlement and Confirmation Orders. Debtors argue those forms of relief are inequitable.

The Court agrees with debtors.

A. Legal Standard

In bankruptcy cases, "an appeal should be dismissed as moot when, even though effective relief could conceivably

5. Unless otherwise indicated, case quotations omit all internal citations, quotations, footnotes, and alterations.

be fashioned, implementation of that relief would be inequitable." *Official Comm. of Unsecured Creditors of LTV Aerospace & Def. Co. v. Official Comm. of Unsecured Creditors of LTV Steel Co. (In re Chateaugay Corp.)*, 988 F.2d 322, 325 (2d Cir. 1993) (hereinafter *Chateaugay I*). "As a practical matter, completed acts in accordance with an unstayed order of the bankruptcy court must not thereafter be routinely vulnerable to nullification if a plan of reorganization is to succeed." *Id.* at 326.

In the Second Circuit, "an appeal is presumed equitably moot where the debtor's plan of reorganization has been substantially consummated." *In re Charter Communs., Inc.*, 691 F.3d at 482. A plan of reorganization is "substantially consummated" upon: "[i] transfer of substantially all of the property proposed by the plan to be transferred; [ii] the reorganized debtor's assumption of the debtor's business; and [iii] commencement of distribution under the plan." *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 144 (2d Cir. 2005) (quoting 11 U.S.C. § 1101(2)).

An appellant can only overcome this presumption by demonstrating all five "*Chateaugay* factors" are met. *In re Charter Communs., Inc.*, 691 F.3d at 482. These factors are whether:

> (1) the court can still order some effective relief;
>
> (2) such relief will not affect the re-emergence of the debtor as a revitalized corporate entity;

> (3) such relief will not unravel intricate transactions so as to knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the bankruptcy court;
>
> (4) the parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings; and
>
> (5) the appellant pursued with diligence all available remedies to obtain a stay of execution of the objectionable order if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.

Id. (quoting *Frito-Lay, Inc. v. LTV Steel Co.* (*In re Chateaugay Corp.*), 10 F.3d 944, 952-53 (2d Cir. 1993) (hereinafter *Chateaugay II*)).

"A chief consideration under *Chateaugay II* is whether the appellant sought a stay of the confirmation." *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136 at 144. Even if an appellant failed to seek a stay, however, a district court must still perform "an analytical inquiry into the likely effects of the relief an appellant seeks" to determine whether failure to seek a stay renders the relief sought inequitable. *In re Charter Communs., Inc.*, 691 F.3d at 482. However, the "question is not solely whether [a court] *can* provide relief without unraveling the Plan, but also

whether [the court] *should* provide such relief in light of fairness concerns." *In re Metromedia Fiber Network, Inc.*, 416 F.3d at 145 (emphasis in original).

B. Application

Because the Plan was substantially consummated on September 21, 2020, the appeals are presumed moot and appellants must establish *all* five of the *Chateaugay* factors to avoid dismissal. *See In re Charter Communs., Inc.*, 691 F.3d at 482. They cannot. Appellants waited more than two months to seek a stay pending appeal in the Bankruptcy Court, and they did so only three days before seeking a stay in this Court. Moreover, even if appellants' lack of diligence were not fatal to their appeals, the Plan has been substantially consummated for months and vacating the Orders or granting appellants any of the alternative requested relief would both jeopardize debtors' emergence from bankruptcy and upset—if not unravel—the numerous complex transactions underlying the Plan.

Appellants' failure to diligently seek a stay of the Confirmation Order or implementation of the Plan is fatal to their appeals. The Bankruptcy Court issued an oral ruling confirming the Plan on June 25, 2020, and entered the Confirmation Order one day later. Appellants filed their notices of appeal on July 3, 2020, but waited two months before first "request[ing]" to stay implementation of the Plan before the Bankruptcy Court in connection with an unrelated motion. (*See* Doc. #56-1 at ECF 13-14). When, as here, a party has failed to "diligently pursue[] a stay of execution of the plan throughout proceedings," the Court

must presume the appeals are equitably moot. *See Aetna Cas. & Sur. Co. v. LTV Steel Co. (In re Chateaugay Corp.)*, 94 F.3d 772, 776 (2d Cir. 1996) (*Chateaugay III*). Other courts in this circuit have found failure to take prompt action to obtain a stay, alone, warranted dismissing an appeal as equitably moot. *See, e.g., In re Kassover*, 28 F. App'x 100, 101 (2d Cir. 2002) (summary order).

In addition, the alternative relief appellants request, if granted, would both jeopardize debtors' emergence from bankruptcy and require unravelling numerous complex transactions agreed to in connection with the Plan. Appellants do not contend vacatur and remand of either the Settlement Order or Confirmation Order is practical or appropriate.[6] Instead, they argue the Court could fashion effective relief without unraveling the Plan by ordering several remedies: (i) requiring debtors to issue additional shares of stock for unsecured creditors and diluting the value of shares issued to secured creditors, like Elliott; (ii) disgorging stock from secured creditors; or (iii) earmarking cash payments due to debtors under the Uniti Settlement to instead compensate appellants and other unsecured creditors.[7]

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6. Appellants requested vacatur and remand in their opening memorandum of law. However, in their reply memorandum of law, appellants instead argue the Court can grant effective relief without unraveling the Plan or Settlement Order. In fact, the relief appellants propose is predicated on the Settlement Order remaining in effect because appellants suggest distributing funds obtained from the Uniti Settlement.

7. In appellants' reply brief, they direct the Court to the remedies argued for in the Equitable Mootness Motion. (*See* Doc. #47

Appendix B

Appellants seek to prioritize the claims of unsecured creditors over those of secured and first lien creditors. According to appellants, "[t]he fact that the Intervenors may receive less than they expected if the Court adopts . . . these remedies is irrelevant." (Doc. #47 at ECF 43). But appellants are wrong because the Court must consider whether it "*should* provide such relief in light of fairness concerns." *In re Metromedia Fiber Network, Inc.*, 416 F.3d at 145 (emphasis in original). Fairness compels this Court to deny appellants the relief they seek.

The success of the Plan—and debtors' corresponding emergence from bankruptcy—is predicated upon financial support from secured creditors and holders of first lien claims, including Elliott, who were compensated with equity in debtors' reorganized entities. Disgorging or diluting the value of that equity would "knock the props out from under" the Plan by devaluing support from critical parties. And that relief would require unwinding consummated transactions that have already vested equity and other rights in creditors like Elliott. *See Chateaugay II*, 10 F.3d at 952-53. Similar proposals have been rejected by courts in this district. *See, e.g., In re Calpine Corp.*, 390 B.R. 508, 518-19 (S.D.N.Y. 2008) (finding proposal to issue new shares of stock reserved for old shareholders would not have "only minimal interference to other interests [and would] disturb numerous consummated transactions and further transactions taken in reliance thereon").

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at ECF 40). By directing the Court to the arguments made in that motion, appellants sought to circumvent the stipulated-to 9,000-word limit for their reply brief. The Court does not appreciate having its time wasted in this fashion.

Moreover, the cash value of the Uniti Settlement was distributed to debtors and and thus to creditors recovering under the Plan. Earmarking that cash for appellants would jeopardize debtors' emergence from bankruptcy by diminishing their reemergent liquidity, and devaluing cash and equity distributions that have already been made to secured and first lien creditors. Accordingly, the alternative relief appellants propose would both knock the props out from under debtors' plan of reorganization and require unwinding the numerous complex transactions forming the Plan.

Finally, the Second Circuit has already dismissed an appeal from this bankruptcy as equitably moot. *See GLM DFW, Inc. v. Windstream Holdings, Inc. (In re Windstream Holdings, Inc.)*, 838 F. App'x 634, 637-38 (2d Cir. 2021) (summary order). The appellant in that case challenged a bankruptcy court order granting debtors the authority to pay various pre-petition debts while still in bankruptcy. *Id.* at 635-36. Not only did the Circuit find appellant's failure to seek a stay fatal to its appeal, but also that "fairness concerns strongly counsel[ed] in favor of dismissing" the appeal because "granting GLM the relief it [sought] could cause tens of millions of dollars in previously satisfied claims to spring back to life, thereby potentially requiring the bankruptcy court to reopen the plan of reorganization." *Id.* at 637. Moreover, forcing creditors who had received funds to return them more than a year later would have been "highly disruptive," and thus "it would [have been] inequitable to grant GLM relief at this belated stage." *Id.* at 637-38. So too here.

Accordingly, the appeals are equitably moot.

CONCLUSION

The appeals are DISMISSED as equitably moot.

The Clerk is directed to terminate the appeals and close these cases. (20 CV 4276, 20 CV 5440, and 20 CV 5529 (VB)).

Dated: June 22, 2021
White Plains, NY

SO ORDERED:

/s/ Vincent L. Briccetti
Vincent L. Briccetti
United States District Judge

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED NOVEMBER 2, 2020

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

20 CV 4276 (VB)

IN RE:

WINDSTREAM HOLDINGS, INC., *et al.*,

Debtors.

U.S. BANK NATIONAL ASSOCIATION
AND CQS (US), LLC,

Appellants,

v.

WINDSTREAM HOLDINGS, INC., *et al.*,

Appellees.

November 2, 2020, Decided;
November 2, 2020, Filed

Appendix C

MEMORANDUM OPINION AND ORDER

Briccetti, J.:

U.S. Bank National Association ("U.S. Bank"), as indenture trustee for certain unsecured notes of Windstream Services, LLC, and CQS (US), LLC ("CQS"), appeal from (i) a May 12, 2020, Order of the Bankruptcy Court approving a settlement between Windstream Holdings, Inc., and its debtor subsidiaries ("debtors"), and Uniti Group, Inc. (the "Settlement Order"); and (ii) a June 26, 2020, Order of the Bankruptcy Court confirming the debtors' Chapter 11 plan of reorganization (the "Confirmation Order"). Intervenor-appellee Elliott Investment Management L.P. ("Elliott"), the largest holder of first and second lien claims against debtors, along with other rights contemplated by the Chapter 11 plan of reorganization (the "Plan") confirmed by the Confirmation Order, previously intervened in the appeal with the consent of all parties. (Doc. #31).

Before the Court is appellants' motion for "a determination of post-effective date jurisdiction," or, in the alternative, a stay of the effectiveness of the Confirmation Order pending the appeal. (Doc. #44). Debtors and Elliott oppose the motion.

For the reasons set forth below, the motion is DENIED.

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 158(a).

Appendix C

BACKGROUND

The Court assumes the parties' familiarity with the relevant facts and procedural history, except as recited herein.

Appellants timely appealed from both the Settlement Order and the Confirmation Order. Thereafter, they moved to expedite the appeals, and to consolidate the several appeals relating to the Settlement Order and the Confirmation Order. The Court denied the motion to expedite, but granted the motion to consolidate. (Doc. #18). The Court then set a briefing schedule, pursuant to which the appeals were to be fully briefed by September 16, 2020. (Doc. #22).

On September 2, 2020, appellees filed their opening briefs on the merits of the appeals, arguing, among other things, that the Court should dismiss the appeals as equitably moot.

Two days later, U.S. Bank filed, and CQS joined, the instant motion. Appellants request that the Court determine, in the first instance and in advance of deciding the appeal on the merits, that it will retain jurisdiction over the appeals if and when the Plan becomes effective. In other words, appellants ask the Court to rule on whether the appeals are equitably moot in light of the then-impending consummation of the Plan. In the alternative, appellants request that the Court order appellees to stay implementation and consummation of the Plan pending resolution of the appeals. On September

17, 2020, Bankruptcy Judge Robert D. Drain denied a similar request to stay consummation of the Plan. (Doc. #56-1 at ECF 21-29).[1]

By letter dated September 21, 2020, appellees informed the Court that the Plan became effective and was substantially consummated that day.

DISCUSSION

I. Post-Effective Date Jurisdiction

Appellants seek a determination that "the appeals will not be rendered equitably moot if and when the debtors consummate the Plan." (Doc. #44 at ECF 5). They implore the Court to "preserve its jurisdiction and assure the parties that the Bankruptcy Court's decisions below will be reviewed" by either deciding the appeal before consummation of the Plan, determining that consummation does not equitably moot the appeal, or staying the effectiveness of the Plan. (*Id.* at ECF 4-5).

The Court declines to determine the issue of equitable mootness in advance of the deciding the merits of the appeal, and will rule on that question in due course.

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1. "ECF" refers to the page numbers automatically assigned by the Court's Electronic Filing System.

Appendix C

A. Legal Standard

Equitable mootness does not deprive a court of jurisdiction over a case in the same way that constitutional mootness does. Constitutional mootness stems from a court's "inability" to grant effective relief, but the doctrine of equitable mootness describes a court's "unwillingness to alter the outcome" of a bankruptcy proceeding. *See In re UNR Indus.'s, Inc.,* 20 F.3d 766, 769 (7th Cir. 1994). "Equitable mootness is a prudential doctrine that is invoked to avoid disturbing a reorganization plan once implemented." *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.),* 416 F.3d 136, 144 (2d Cir. 2005). "Unlike constitutional mootness, which turns on the threshold question of whether a justiciable case or controversy exists, equitable mootness in the context presented here is concerned with whether a particular remedy can be granted without unjustly upsetting a debtor's plan of reorganization." *In re Charter Communs., Inc.,* 691 F.3d 476, 481 (2d Cir. 2012). Equitable mootness "applies to specific claims, not entire appeals," and courts must apply the doctrine "with a scalpel rather than an axe." *Id.* at 481-82. "Because equitable mootness bears only upon the proper remedy, and does not raise a threshold question of our power to rule, a court is not inhibited from considering the merits before considering equitable mootness." *Deutsche Bank AG v. Metromedia Fiber Network, Inc,* 416 F.3d at 144. "Often, an appraisal of the merits is essential to the framing of an equitable remedy." *Id.* "Equitable mootness in the bankruptcy setting . . . requires the district court to carefully balance the importance of finality in bankruptcy

proceedings against the appellant's right to review and relief." *In re Charter Communs., Inc.,* 691 F.3d at 481.

B. Application

The Court declines to determine whether the bankruptcy appeal is equitably moot in advance of, and separate from, the merits of the appeal. Appellants' motion appears to be an attempt to force seriatim expedition of one of the issues implicated in their appeal of the Settlement and Confirmation Orders. It is black-letter law that this Court is not deprived of jurisdiction over a bankruptcy appeal by the consummation of a debtor's plan of reorganization alone. *See e.g., In re Charter Communs., Inc.,* 691 F.3d at 481. Although appellees have argued that the appeal should be dismissed as equitably moot, neither that argument, nor the fact that the Plan has been consummated, deprives the Court of jurisdiction over the merits of the appeal. There is no indication that this Court will be unable to grant appellants effective relief should they prevail on the merits of the appeal. Appellees have merely argued that any relief granted by this Court would be inequitable in light of their consummation of the Plan. *See In re UNR Indus.'s, Inc.,* 20 F.3d at 769. Even if appellees are correct, the fact that this Court could still fashion a partial remedy should appellants prevail on the appeal, regardless of how inequitable or incomplete that remedy is, "is sufficient to prevent [this] case from being moot" under Article III of the Constitution. *See Calderon v. Moore,* 518 U.S. 149, 150, 116 S. Ct. 2066, 135 L. Ed. 2d 453 (1996) ("[E]ven the availability of a partial remedy is sufficient to prevent a case from being moot.") (internal

quotation marks and alterations omitted). Therefore, it is unnecessary for this Court to determine that it will retain jurisdiction over the appeal now that the Plan has been consummated.

In an effort to "carefully balance the importance of finality in [the] bankruptcy proceedings [below] against [appellants'] right to review and relief," the Court will reserve decision on whether consummation of the Plan renders the appeal equitably moot until the Court can give due attention to the parties' arguments on the merits of the appeal. *See In re Charter Communs., Inc.,* 691 F.3d at 481.

II. Stay of the Confirmation Order

In the alternative, appellants seek a stay of enforcement of the Confirmation Order, and thus implementation of the Plan, pending resolution of the appeal. On September 21, 2020, debtors informed the Court that the Plan had become effective and was substantially consummated.

Appellants request for a stay is moot.

A. Legal Standard

In contrast to equitable mootness, this Court lacks jurisdiction over a proceeding under Article III of the Constitution when "the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome" of a given proceeding. *Murphy v. Hunt,* 455 U.S. 478, 481-82, 102 S. Ct. 1181, 71 L. Ed. 2d 353 (1982)

(per curiam) (finding claim related to pretrial bail moot once defendant was convicted because "even a favorable decision on [the claim] would not have entitled [the defendant] to bail.") (internal quotation marks omitted). A claim becomes moot "if an event occurs while a case is pending . . . that makes it impossible for the court to grant any effectual relief whatever to a prevailing party." *See ABC, Inc. v. Stewart,* 360 F.3d 90, 97 (2d Cir. 2004) (internal quotations omitted).

B. Application

Appellants' request to stay enforcement of the Confirmation Order and consummation of the Plan is moot. *See, e.g., In re Gucci,* 105 F.3d 837, 839 (2d Cir. 1997) (noting motion for stay pending appeal was moot in light of consummation of sale and conveyance of assets). Appellees notified this Court by letter dated September 21, 2020, six days after appellants submitted their reply in support of this motion, that Windstream Holdings, Inc., and its debtor subsidiaries effectuated and substantially consummated the Plan. The Court cannot stay the implementation of a plan of reorganization after debtors have substantially reorganized. The issue presented is no longer live and appellants' request is denied as moot.

CONCLUSION

The motion is DENIED.

The Clerk is directed to terminate the motion. (Doc. #44).

Appendix C

Dated: November 2, 2020
White Plains, NY

SO ORDERED:

/s/ Vincent L. Briccetti
Vincent L. Briccetti
United States District Judge

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED AUGUST 3, 2020

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE:

WINDSTREAM HOLDINGS, INC. *et al.*,

Debtors.

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20 CV 4276 (VB)

U.S. BANK NATIONAL ASSOCIATION,

Appellant,

v.

WINDSTREAM HOLDINGS, INC. *et al.*,

Appellees.

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20 CV 5440 (VB)

U.S. BANK NATIONAL ASSOCIATION,

Appellant,

Appendix D

v.

WINDSTREAM HOLDINGS, INC. *et al.*,

Appellees.

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20 CV 5529 (VB)

CQS (US), LLC,

Appellant,

v.

WINDSTREAM HOLDINGS, INC. *et al.*,

Appellees.

August 3, 2020, Decided;
August 3, 2020, Filed

MEMORANDUM OPINION AND ORDER

Briccetti, J.:

Appellant U.S. Bank National Association ("U.S. Bank"), as indenture trustee for certain unsecured Windstream Services, LLC ("Services") notes, appeals from (i) a May 12, 2020, Order of the U.S. Bankruptcy Court for the Southern District of New York (19 BR

22312 Doc. #1807), approving a settlement between Windstream Holdings, Inc. and its debtor subsidiaries ("appellees" or "Debtors"), and Uniti Group, Inc. ("Uniti") (the "Settlement Order"); and (ii) from a June 26, 2020, Order of the Bankruptcy Court confirming the Debtors' Chapter 11 plan of reorganization (the "Confirmation Order") (19 BR 22312 Doc. #2243).

Before the Court is appellants' motion to consolidate and expedite the appeals. (20 CV 5440 Doc. #4).[1]

For the reasons set forth below, the motion is GRANTED to the extent it seeks to consolidate the appeals and DENIED to the extent it seeks to expedite the appeals.

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 158(a).

BACKGROUND

In 2015, Debtors spun off from their core business a real estate investment trust, Uniti. In connection with that spinoff, Services, a subsidiary of Windstream Holdings, Inc., transferred certain assets to Uniti, which Uniti then leased to Debtors.

In 2017, Aurelius Capital Master, Ltd. ("Aurelius"), acquired a controlling position in certain notes issued by

1. Appellant CQS (US), LLC also appeals the Confirmation Order and joins in this motion to consolidate and expedite the appeals. (*See* 20 Civ. 5529 Doc. #4).

Services, for which U.S. Bank serves as trustee. U.S. Bank commenced litigation against Services in this District, claiming that Services had breached its obligations under the notes. On February 25, 2019, after U.S. Bank obtained a judgment against Services, Debtors filed a voluntary petition for Chapter 11 bankruptcy protection. (*See* 19 BR 22312 Doc. #1).

In bankruptcy court, Debtors brought claims against Uniti to recharacterize the 2015 transaction as a financing rather than a sale and lease, for breach of contract, and to set aside certain transfers by Uniti as fraudulent. After months of litigation, Debtors and Uniti reached a settlement agreement resolving Debtors' claims in exchange for a $1.2 billion payment from Uniti to Debtors. On May 12, 2020, following a two-day hearing, Bankruptcy Judge Robert D. Drain issued the Settlement Order, thereby approving the settlement. U.S. Bank timely appealed the Settlement Order. (20 Civ. 4276 Doc. #1).

On June 26, 2020, following another two-day hearing, Judge Drain confirmed the Debtors' Chapter 11 plan of reorganization, which hinged on the Debtors' settlement with Uniti, and issued the Confirmation Order. According to appellants, confirmation of the plan will result in no payments to unsecured creditors, including appellants. U.S. Bank and CQS timely appealed the Confirmation Order. (*See* 20 CV 5440 Doc. #1, 20 CV 5529 Doc. #1).

On July 15, 2020, U.S. Bank filed the instant motion to consolidate and expedite the appeals. (20 CV 5440 Doc. #4). On July 20, 2020, CQS joined in the motion. (20 Civ.

5529 Doc. #4). On July 22, 2020, Debtors opposed the motion inasmuch as it seeks to expedite the appeals but consented to the application to consolidate the appeals. (20 CV 5440 Doc. #12). The following day, U.S. Bank filed its reply. (20 CV 5440 Doc. #13).

DISCUSSION

I. Consolidation

Appellants argue the appeals should be consolidated because they are brought by the same appellant, U.S Bank, and involve interrelated orders from the bankruptcy court.

The Court agrees.

Pursuant to Federal Rule of Civil Procedure 42(a), a court may consolidate multiple cases that "involve a common question of law or fact." Indeed, "[w]hen parties have separately filed timely notices of appeal, the district court . . . may join or consolidate the appeals." Fed. R. Bankr. P. 8003(b)(2).

Here, the Settlement Order and Confirmation Order respect the same facts, involve the same or similar parties, and were issued by the same Judge. *See In re Mergenthaler*, 2015 U.S. Dist. LEXIS 56257, 2015 WL 13227954, at *5 (E.D.N.Y. Apr. 29, 2015) (consolidating bankruptcy appeals). Moreover, because Debtors do not oppose the motion inasmuch as it seeks consolidation, and because the Court is persuaded that consolidation is appropriate given the interrelated nature of the orders

on appeal, the Court finds these captioned appeals should be consolidated.

II. Expedition

Appellants argue the Court should expedite the appeals because, following consummation of the plan of reorganization, which is expected to occur in either August or September 2020, Debtors likely will argue the pending appeals have become equitably moot.

The Court is not persuaded.

A. Legal Standard

Federal Rule of Bankruptcy Procedure 8013(d) allows a movant to file an emergency motion to request "expedited action on a motion because irreparable harm would occur during the time needed to consider a response." Fed. R. Bankr. P. 8013(d)(1); *see also In re Premier Operations*, 293 B.R. 334, 335 (S.D.N.Y. 2003) (discussing Fed. R. Bankr. P. 8011(d), the predecessor rule to 8013(d)). Here, appellants argue they *may* suffer irreparable harm if the Court does not expedite the appeals because Debtors *could*, at a later time, argue the appeals have been rendered equitably moot. (*See* 20 CV 5440 Doc. #5 ("Winters Decl.") ¶ 3).

Equitable mootness is "a prudential doctrine under which the district court may dismiss a bankruptcy appeal when, even though effective relief could conceivably be fashioned, implementation of that relief would be

inequitable." *In re Charter Commc'ns, Inc.*, 691 F.3d 476, 481 (2d Cir. 2012).[2] "Unlike constitutional mootness, which turns on the threshold question of whether a justiciable case or controversy exists, equitable mootness in the context presented here is concerned with whether a particular remedy can be granted without unjustly upsetting a debtor's plan of reorganization." *Id.* "Equitable mootness in the bankruptcy setting thus requires the district court to carefully balance the importance of finality in bankruptcy proceedings against the appellant's right to review and relief." *Id.* In this Circuit, "an appeal is presumed equitably moot where the debtor's plan of reorganization has been substantially consummated." *Id.* at 482. "Because equitable mootness bears only upon the proper remedy, and does not raise a threshold question of [a Court's] power to rule, a court is not inhibited from considering the merits before considering equitable mootness." *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 144 (2d Cir. 2005).

"Courts are divided, and the Second Circuit has not yet spoken, on the issue of whether the risk that an appeal may become moot in the absence of a stay pending appeal satisfies the irreparable injury requirement." *In re Adelphia Commc'ns Corp.*, 361 B.R. 337, 347 (S.D.N.Y. 2007) (discussing equitable mootness and irreparable harm in the context of a stay application). Indeed, "[a] majority of courts have held that a risk of mootness, standing alone, does not constitute irreparable harm." *Id.* (collecting cases).

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2. Unless otherwise indicated, case quotations omit all internal citations, quotations, footnotes, and alterations.

Other courts in this District have reasoned that the "threat of mootness of an appeal from a confirmation order is not alone sufficient to establish a threat of irreparable injury," but rather "the loss of the right to appeal *vel non* that gives rise to the Court's irreparable injury finding." *In re St. Johnsbury Trucking Co.*, 185 B.R. 687, 690 n.1 (S.D.N.Y. 1995) (granting the government's application for a stay and expediting appeal because confirmation of the plan would preclude recovery of environmental response costs and of income and social security taxes withheld from employee wages).

"However, merely invoking equitable mootness as the [appellants] have done here—a risk that is present in any post-confirmation appeal of a chapter 11 plan—is not sufficient to demonstrate irreparable harm." *In re Calpine Corp.*, 2008 Bankr. LEXIS 217, 2008 WL 207841, at *4 (Bankr. S.D.N.Y. Jan. 24, 2008). "If the Court were to credit this kind of argument for every such expedite request, it would be forced to review nearly every bankruptcy appeal on an expedited basis because, as a matter of course, all liquidation plans can be contingent on the resolution of all outstanding creditor claims." *In re Premier Operations*, 293 B.R. at 336.

B. Application

Based on the affidavit U.S. Bank filed in support of the motion, the Court is not persuaded the reasons put forward by appellants demand expedited review. The only argument appellants make with respect to irreparable injury is that their appeals could become equitably moot

if Debtors consummate the reorganization plan and effectuate the settlement with Uniti in late August or early September. (*See* Winters Decl. ¶ 2).[3] But equitable mootness is a risk present in any post-confirmation appeal of a Chapter 11 plan; merely invoking that risk in a demand for expedition is not enough to show irreparable harm. *See In re Calpine Corp.*, 2008 Bankr. LEXIS 217, 2008 WL 207841, at *4.

Appellants assert that if the Court does not hear their appeals before the plan is consummated, the Court would allow the bankruptcy court's determination, which "violate[s] the Bankruptcy Code," to stand. (*See* 20 CV 5440 Doc. #4 ¶ 11). Appellants' further assert that if the Court does not expeditiously hear their appeals and overturn the bankruptcy court orders, appellants would suffer monetary losses. (*See, e.g., id.* ¶ 9 (noting Debtor and Uniti "reached a settlement that would result in *zero recovery* for the injured noteholders.")). But "[m]onetary loss alone will generally not amount to irreparable harm." *Borey v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 934 F.2d 30, 34 (2d Cir. 1991); *cf. id.* ("[W]hen a party can be fully compensated for financial loss by a money judgment, there is simply no compelling reason why the extraordinary equitable remedy of a preliminary injunction should be granted.").

Appellants further argue the Second Circuit has said it is "generous in granting motions to expedite," *In re*

3. Although appellants note that "Plan consummation could occur as late as October 2020." (20 CV 5440 Doc. #4 at 9).

Iceland Inc., 112 F.3d 504 (2d Cir. 1997) (summary order), but they present this proposition out of context. First, the Second Circuit was discussing *its* willingness to expedite, and second, importantly, the Circuit was reprimanding an appellant who made no "effort to expedite his appeal to the district court but was in fact responsible for considerable delay in its being heard. . . . As a result, the reorganization has gone forward, rendering the present challenge moot." *Id.*

Finally, appellants argue the relief they are seeking—expedition—is not "extraordinary." (20 CV 5440 Doc. #13 ¶ 6). However, appellants have failed to explain why the mere *possibility* of equitable mootness, on its own, merits an expedited appeal. The instant appeals involve complex bankruptcy matters. Indeed, "given the weighty nature of the issues involved, due time and consideration should be given to their briefing and argument by the parties and the measuring thereof by this Court." *See In re United Pan-Europe Commc'ns N.V.*, 2003 U.S. Dist. LEXIS 1297, 2003 WL 221819, at *4 (S.D.N.Y. Jan. 30, 2003).

CONCLUSION

The motion is GRANTED only to the extent it seeks to consolidate the appeals. The motion is DENIED to the extent it seeks expedition.

Because appellant U.S. Bank has already filed its consolidated brief, by August 4, 2020, appellants U.S. Bank and CQS shall advise the Court whether they intend to file an amended brief in the now-consolidated action.

Appendix D

After appellants advise the Court on whether they intend to file an amended brief in the consolidated action, the Court—which is in receipt of the Debtors' motions to strike (20 CV 4276 Doc. #17 and 20 CV 5440 Doc. #19)—will set a briefing schedule for the consolidated appeal.

The conference scheduled for August 26, 2020, is cancelled. In the event the Court decides to hold oral argument, it will so notify counsel.

The Clerk is directed to consolidate the cases 20 CV 4276, 20 CV 5440, and 20 CV 5529, with the lead case being 20 CV 4276.

The Clerk is further directed to terminate the motion. (20 CV 5440 Doc. #4).

Dated: August 3, 2020
White Plains, NY

SO ORDERED:

/s/ Vincent L. Briccetti
Vincent L. Briccetti
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK, FILED JUNE 26, 2020 (EXHIBITS OMITTED)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11
Case No. 19-22312 (RDD)
(Jointly Administered)

In re:

WINDSTREAM HOLDINGS, INC., *et al.*,[1]

Debtors.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER CONFIRMING THE FIRST AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION OF WINDSTREAM HOLDINGS, INC. *ET AL.*, PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

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

WHEREAS the above-captioned debtors and debtors in possession (collectively, the "*Debtors*") have, among other things:[2]

a. commenced the above-captioned chapter 11 cases (collectively, the "*Chapter 11 Cases*") by filing voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "*Bankruptcy Code*") on February 25, 2019 (the "*Petition Date*");

b. continued to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code;

c. (i) filed, on April 1, 2020, the *Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al., Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 1631], (as subsequently revised, the "*Plan*"), (ii) filed, on April 1, 2020, the *Disclosure Statement for the Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al., Pursuant to*

2. All capitalized terms used and not otherwise defined in this *Findings of Fact, Conclusions of Law, and Order Confirming the First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc., et al., Pursuant to Chapter 11 of the Bankruptcy Code* shall have the meanings ascribed to them in the Plan (as defined herein). The rules of interpretation set forth in Article I, Section B of the Plan shall apply to this Confirmation Order (as defined herein).

Chapter 11 of the Bankruptcy Code [Docket No. 1632], (as subsequently revised, the "*Disclosure Statement*"), and (iii) filed, on April 1, 2020, the *Debtors' Motion to Approve (I) the Adequacy of Information in the Disclosure Statement, (II) Solicitation and Notice Procedures, (III) Forms of Ballots and Notices in Connection Therewith, and (IV) Certain Dates with Respect Thereto* [Docket No. 1633] which order and related documents were subsequently revised (as subsequently revised, the "*Disclosure Statement Motion*");

d. filed, on May 6, 2020, the revised versions of (i) the *Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al., Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 1781], and (ii) the *Disclosure Statement for 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. 1782];

e. filed, on May 14, 2020, the solicitation versions of (i) 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. 1812], and (ii) the *Disclosure Statement for 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. 1813];

f. caused solicitation materials and notice of the deadline for objecting to confirmation of the Plan to be distributed by May 18, 2020, and continuing thereafter, consistent with the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure (the "*Bankruptcy Rules*"), and the Disclosure Statement Order (as defined herein), which Disclosure Statement Order also approved, among other things, solicitation procedures (the "*Solicitation Procedures*") and related notices, forms, Ballots, and Master Ballots (collectively, the "*Solicitation Packages*"), as evidenced by, among other things, the *Certificate of Service* [Docket No. 1842];

g. caused notice of the Confirmation Hearing (the "*Confirmation Hearing Notice*") to be published on May 21, 2020 in *The Wall Street Journal*, and on May 21, 2020 and May 24, 2020 in the *Arkansas-Democrat Gazette*, as evidenced by the *Notice of Filing of Affidavits of Publications* [Docket No. 1918];

h. (i) filed, on June 3, 2020, the *Notice of Filing of Plan Supplement* [Docket No. 1973], which included the Assumed Executory Contract/Unexpired Lease Schedule; (ii) filed on June 8, 2020, the *Notice of Filing of First Amended Plan Supplement* [Docket No. 2010], which included the following documents: (B) Rejected Executory Contract/ Unexpired Lease Schedule, and (B) Schedule of Retained Causes of Action; (iii) filed on June 15,

2020, the *Notice of Filing Second Amended Plan Supplement* [Docket No. 2039], which included the following documents: (A-1) First Amendment to the Assumed Executory Contracts/Unexpired Leases Schedule, (B-1) First Amendment to the Rejected Executory Contracts/Unexpired Leases Schedule, (D) Ownership Certification Form, (E) Special Warrant Agreement, (F) Governance Term Sheet, (G) Description of Restructuring Transactions, (H) Rights Offering Procedures, (H-1) Rights Offering Procedures, (H-2) Subscription Agreement, (H-3) Subscription Forms; and (iv) filed on June 22, 2020 the Notice of Filing the Third Amended Plan Supplement [Docket No. 2199], which included the following document: (J) Identity and Members of the Reorganized Board (together with each *Notice of Filing of Plan Supplement* and as amended or supplemented thereafter, the "*Plan Supplement*");

i. filed, on June 21, 2020, the *Declaration of David Hartie of Kurtzman Carson Consultants LLC Regarding the Solicitation of Votes and Tabulation of Ballots Cast on 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. 2171] (as may be amended, modified, or supplemented, the "*Voting Certification*");

j. filed, on June 21, 2020, the *Declaration of Nicholas Grossi 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* [Docket No. 2175] (the "*Grossi Declaration*");

k. filed, on June 21, 2020, the *Declaration of Nicholas Leone 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* [Docket No. 2174] (the "*Leone Declaration*");

l. filed, on June 21, 2020, the *Declaration of Anthony Thomas 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* [Docket No. 2176] (the "*Thomas Declaration*," and together with the Grossi Declaration and the Leone Declaration, the "*Confirmation Declarations*");

m. filed, on June 22, 2020, *Debtors' (A) 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 (B) Omnibus Reply to Objections to Confirmation of the Plan* [Docket No. 2180] and the *Notice of*

Appendix E

Filing of Corrected Table to 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 [Docket No. 2194] (the "*Confirmation Brief*");

n. filed, on June 22, 2020, the revised version of (i) the *Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al., Pursuant to Chapter 11 of the Bankruptcy Code (Technical Modifications)* [Docket No. 2201]; and

o. filed, on June 22, 2020, the *Notice of Filing of Proposed Findings of Fact, Conclusions of Law, and Order Confirming the First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al., Pursuant to Chapter 11 of the Bankruptcy Code* (this "*Confirmation Order*").

This Court having:

a. entered the *Order Approving (I) Disclosure Statement, (II) Solicitation and Notice Procedures, (III) Forms of Ballots and Notices in Connection Therewith, and (IV) Certain Dates with Respect Thereto* [Docket No. 1814] (the "*Disclosure Statement Order*");

b. reviewed the Plan, the Plan Supplement, the Disclosure Statement, the Confirmation Brief, the Confirmation Declarations, the Voting Certification, and all pleadings, exhibits, statements, responses, and comments regarding Confirmation, including all objections, statements, and reservations of rights filed by parties in interest on the docket of the Chapter 11 Cases;

c. held the Confirmation Hearing;

d. heard the statements, arguments, and objections made by counsel in respect of Confirmation;

e. considered all testimony, documents, filings, and other evidence admitted at Confirmation; and

f. for the reasons stated by the Court in its bench ruling at the conclusion of the Confirmation Hearing, overruled any and all objections to the Plan and to Confirmation and all statements and reservations of rights not consensually resolved or withdrawn unless otherwise indicated herein.

NOW, THEREFORE, the Court having found that notice of the Confirmation Hearing and the opportunity for any party in interest to object to Confirmation has been due, adequate and appropriate as to all parties affected or to be affected by the Plan and the transactions contemplated thereby, and the legal and factual bases set forth in the documents filed in support of Confirmation and all evidence proffered or adduced by counsel at the

Confirmation Hearing establish good and sufficient cause for the relief granted herein, the Court hereby makes and issues the following Findings of Fact and Conclusions of Law and Orders:

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

IT IS HEREBY DETERMINED FOUND, ADJUDGED, DECREED, AND ORDERED THAT:

A. Findings and Conclusions.

1. The findings and conclusions set forth herein and on the record of the Confirmation Hearing constitute the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding by Bankruptcy Rule 9014. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

B. Jurisdiction, Venue, Core Proceeding (28 U.S.C. §§ 157(b)(2) and 1334(a)).

2. The Court has jurisdiction over the Chapter 11 Cases pursuant to 28 U.S.C. §§ 157(a)-(b) and 1334. Confirmation of the Plan is a core proceeding pursuant to 28 U.S.C. § 157(b) with respect to which the Court has the power under the U.S. Constitution to issue this final Order, and the Court has jurisdiction to enter a Final

Appendix E

Order determining that the Plan and the Plan Documents, including the Description of Restructuring Transactions and the transactions and mergers contemplated in connection therewith and set forth in greater detail therein, comply with the applicable provisions of the Bankruptcy Code and should be confirmed and approved. Venue is proper before the Court pursuant to 28 U.S.C. § 1408.

C. Eligibility for Relief.

3. The Debtors are entities eligible for relief under section 109 of the Bankruptcy Code.

D. Judicial Notice.

4. The Court takes judicial notice of (and deems admitted into evidence for Confirmation) the docket of the Chapter 11 Cases maintained by the Clerk of the Court and/or its duly appointed agent, including all pleadings and other documents filed, all orders entered, all hearing transcripts, and all evidence and arguments made, proffered or adduced at, the hearings held before the Court during the pendency of the Chapter 11 Cases, including, without limitation, the hearing to consider the adequacy of the Disclosure Statement and the Confirmation Hearing. Any resolutions of any objections explained on the record at the Confirmation Hearing are incorporated herein by reference.

E. Notice and Transmittal of Solicitation Materials; Adequacy of Solicitation Notices.

5. The Plan, the Disclosure Statement, the Disclosure Statement Order, the ballots for voting on the Plan (the "*Ballots*"), the Confirmation Hearing Notice, the Non-Voting Status Notices, the Debtors' Cover Letter, and the other materials distributed by the Debtors in connection with Confirmation of the Plan (collectively, the "*Solicitation Materials*") were transmitted and served in compliance with the Bankruptcy Rules, including Bankruptcy Rules 3017 and 3018, with the Local Bankruptcy Rules for the Southern District of New York (the "*Local Rules*"), and with the procedures set forth in the Disclosure Statement Order. Notice of the Confirmation Hearing was appropriate and satisfactory based upon the circumstances of the Chapter 11 Cases. The transmittal and service of the Solicitation Materials complied with the approved Solicitation Procedures, were appropriate and satisfactory based upon the circumstances of the Chapter 11 Cases, were conducted in good faith, and were in compliance with the provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and any other applicable rules, laws, and regulations. Because such transmittal and service were adequate and sufficient, no other or further notice is necessary or shall be required.

F. Voting.

6. On June 22, 2020, the Debtors filed the Voting Certification. As evidenced thereby, votes to accept or reject the Plan have been solicited and tabulated

fairly, in good faith, and in a manner consistent with the Bankruptcy Code, the Bankruptcy Rules, the Solicitation Procedures, and the Local Rules.

G. Good-Faith Solicitation (11 U.S.C. § 1125(e)).

7. Based on the record before the Court in the Chapter 11 Cases, the Debtors and each of their respective current and former Affiliates, and such Entity's and its current and former Affiliates' current and former Interest holders (regardless of whether such interests are held directly or indirectly), subsidiaries, officers, directors, managers, principals, members, employees, agents, advisory board members, financial advisors, partners, controlling persons, attorneys, accountants, investment bankers, consultants, representatives, and other professionals, each in their capacity as such, together with their respective successors and assigns, have acted in "good faith" within the meaning of section 1125(e) of the Bankruptcy Code and in compliance with the applicable provisions of the Solicitation Procedures, the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules in connection with all of their respective activities relating to the offer, issuance, sale, solicitation, and/or purchase of the securities offered, issued, sold, solicited, and/or purchased under the Plan, their participation in these Chapter 11 Cases, and the activities described in section 1125 of the Bankruptcy Code and therefore are entitled to the protections afforded by section 1125(e) of the Bankruptcy Code.

H. Plan Supplement.

8. The filing and notice of the Plan Supplement, and any modifications or supplements thereto, were proper and in accordance with the Plan, the Bankruptcy Code, the Bankruptcy Rules, and the Disclosure Statement Order, and no other or further notice is or shall be required.

I. Modifications to the Plan.

9. Pursuant to section 1127 of the Bankruptcy Code, any modifications to the Plan since the commencement of Solicitation described or set forth herein constitute technical changes or changes with respect to particular Claims or Interests made pursuant to the agreement of the holders of such Claims or Interests and do not materially and adversely affect or change the treatment of any other Claims or Interests. Pursuant to Bankruptcy Rule 3019, these modifications do not require additional disclosure under section 1125 of the Bankruptcy Code or the resolicitation of votes under section 1126 of the Bankruptcy Code, nor do they require that the holders of Claims or Interests be afforded an opportunity to change previously cast acceptances or rejections of the Plan.

10. This Confirmation Order contains modifications to the Plan that were made to address objections and informal comments received from various parties-in-interest. Modifications to the Plan since the entry of the Disclosure Statement Order, if any, are consistent with the provisions of the Bankruptcy Code. The disclosure of any Plan modifications prior to or on the record at the

Confirmation Hearing constitutes due and sufficient notice of any and all Plan modifications. The Plan as modified shall constitute the Plan submitted for Confirmation.

J. Objections.

11. To the extent that any objections, reservations of rights, statements, or joinders to Confirmation have not been resolved, withdrawn, waived, adjourned, or settled prior to entry of this Confirmation Order or otherwise resolved herein or as stated on the record of the Confirmation Hearing, they are hereby overruled on the merits based on the record before this Court.

K. Burden of Proof.

12. The Debtors, as the proponents of the Plan, have met their burden of proving the elements of sections 1129(a) and (b) of the Bankruptcy Code by a preponderance of the evidence.

L. Bankruptcy Rule 3016.

13. The Plan is dated and identifies the Debtors as the Plan proponents, thereby satisfying Bankruptcy Rule 3016(a). The filing of the Disclosure Statement satisfied Bankruptcy Rule 3016(b).

M. Plan Distributions Consistent with Bankruptcy Code.

14. The prepetition lenders have properly perfected senior liens at each obligor entity, including general

intangibles, intercompany receivables, and equity pledges in non-obligor subsidiaries. Further, to the extent that the prepetition lenders' claims do not encumber the Debtors' assets, the DIP Facilities and the prepetition lenders' adequate protection claims encumber such assets to the extent that all Uniti Settlement proceeds are fully encumbered. Accordingly, the distribution of the proceeds of the settlement with Uniti (the "*Uniti Settlement*") pursuant to the Plan complies with the absolute priority rule and section 507 of the Bankruptcy Code.

N. Plan Compliance with the Bankruptcy Code (11 U.S.C. § 1129(a)(1)).

15. The Plan complies with the applicable provisions of the Bankruptcy Code, thereby satisfying section 1129(a)(1) of the Bankruptcy Code.

a. *Proper Classification (11 U.S.C. §§ 1122 and 1123(a)(1))*. As required by section 1123(a)(1), in addition to Administrative Claims, DIP Facilities Claims, Professional Fee Claims, and Priority Tax Claims, which need not be classified, Article III of the Plan designates 10 Classes of Claims and Interests. As required by section 1122(a) of the Bankruptcy Code, the Claims and Interests placed in each Class are substantially similar to other Claims and Interests, as applicable, in each such Class. Valid business, factual, and legal reasons exist for separately classifying the various Classes of Claims and Interests created under the Plan, and such Classes do not unfairly discriminate between holders of Claims and

Interests. Thus, the Plan satisfies sections 1122 and 1123(a)(1) of the Bankruptcy Code.

b. *Specified Unimpaired Classes (11 U.S.C. § 1123(a)(2))*. Article III of the Plan specifies that Classes 1, 2, and 6B are Unimpaired under the Plan, and Classes 7 and 8 are either deemed Unimpaired or Impaired under the Plan, thereby satisfying section 1123(a)(2) of the Bankruptcy Code.

c. *Specified Treatment of Impaired Classes (11 U.S.C. § 1123(a)(3))*. Article III of the Plan specifies that Classes 3, 4, 5, 6A, and 9 are Impaired under the Plan, and that Classes 7 and 8 are either deemed Unimpaired or Impaired under the Plan, thereby satisfying section 1123(a)(3) of the Bankruptcy Code.

d. *No Discrimination (11 U.S.C. § 1123(a)(4))*. Article III of the Plan provides for the same treatment by the Debtors for each Claim or Interest in each respective Class except to the extent that a holder of a particular Claim or Interest has agreed to a less favorable treatment of such Claim or Interest, thereby satisfying section 1123(a)(4) of the Bankruptcy Code.

e. *Implementation of the Plan (11 U.S.C. § 1123(a)(5))*. The Plan and the various documents included in the Plan Supplement provide adequate and proper means for implementation of the Plan, including, without limitation: (i) the consummation of the

Restructuring Transactions; (ii) the execution and delivery of Restructuring Documents, as applicable, including those agreements or other documents of merger, amalgamation, consolidation, contribution, restructuring, conversion, disposition, transfer, arrangement, continuance, dissolution, sale, purchase, or liquidation containing terms that are consistent with the terms of the Plan; (iii) the execution and delivery of appropriate instruments of transfer, assignment, assumption, or delegation of any asset, property, right, liability, debt, or obligation on terms consistent with the terms of the Plan and the Plan Supplement (as may be modified pursuant to the terms of the Plan); (iv) the filing of appropriate certificates or articles of incorporation, reincorporation, merger, consolidation, contribution, conversion, amalgamation, arrangement, continuance, or dissolution pursuant to applicable state or local law; (v) the issuance of the Reorganized Windstream Equity Interests; (vi) the distribution of the Uniti Settlement Proceeds (defined herein); (vii) the cancellation of certain existing agreements, obligations, instruments, and Interests; (viii) the continued vesting of the assets of the Debtors' Estates, including all Executory Contracts and Unexpired Leases assumed by the Debtors in the Reorganized Debtors; and (ix) all other actions that the Debtors determine, with the consent of the Required Consenting Creditors (and the Required Consenting Midwest Noteholders

(as defined in the Plan Support Agreement) to the extent required under the Plan Support Agreement), not to be unreasonably withheld, conditioned, or delayed, to be necessary, including making filings or recordings that may be required by applicable law in connection with the Plan, thereby satisfying section 1123(a)(5) of the Bankruptcy Code.

f. *Non-Voting Equity Securities (11 U.S.C. § 1123(a)(6))*. As required by section 1123(a)(6) of the Bankruptcy Code, the Reorganized Windstream Organizational Documents include, among other things, a provision prohibiting the issuance of non-voting equity Securities and provide for an appropriate distribution of voting power among the classes of Securities possessing voting power.

g. *Designation of Directors and Officers (11 U.S.C. § 1123(a)(7))*. The Plan satisfies the requirements of section 1123(a)(7) of the Bankruptcy Code. The Plan and Plan Supplement disclose the individuals who will serve as the Reorganized Debtors' officers and directors. The Plan and the Reorganized Windstream Organizational Documents, as applicable, are consistent with the interests of the creditors and equity security holders and with public policy with respect to the manner of selection of the Reorganized Debtors' officers and directors. Accordingly, the Debtors have satisfied section 1129(a)(5) of the Bankruptcy Code.

h. *Additional Plan Provisions (11 U.S.C. § 1123(b)).* The additional provisions of the Plan are appropriate and consistent with the applicable provisions of the Bankruptcy Code and, therefore, are consistent with section 1123(b) of the Bankruptcy Code.

(i) *Impairment/Unimpairment of Any Class of Claims or Interests (11 U.S.C. § 1123(b)(1)).* As contemplated by section 1123(b)(1) of the Bankruptcy Code, pursuant to the Plan, Classes 1, 2 and 6A are Unimpaired, Classes 3, 4, 5, 6B and 9 are Impaired, and Classes 7 and 8 are either deemed Unimpaired or Impaired.

(ii) *Assumption and Rejection of Executory Contracts and Unexpired Leases (11 U.S.C. § 1123(b)(2)).* Article V of the Plan provides that all Executory Contracts and Unexpired Leases not otherwise assumed or rejected will be deemed assumed by the applicable Reorganized Debtor in accordance with the provisions and requirements of sections 365 and 1123 of the Bankruptcy Code, other than: (a) those that are identified on the Rejected Executory Contracts and Unexpired Leases Schedule; (b) those that have been previously rejected by a Final Order; (c) those that have been previously assumed by a Final Order; (d) those that are the subject of a motion to reject Executory Contracts or Unexpired

Leases that is pending on the Confirmation Date; or (e) those that are subject to a motion to reject an Executory Contract or Unexpired Lease pursuant to which the requested effective date of such rejection is after the Effective Date.

(iii) *Compromise and Settlement (11 U.S.C. § 1123(b)(3)(A))*. In accordance with section 1123(b)(3)(A) of the Bankruptcy Code and Bankruptcy Rule 9019, and in consideration for the distributions and other benefits provided under the Plan, the provisions of the Plan, the Verizon Global Settlement, and the Zayo Settlement constitute a good-faith compromise of all Claims, Interests, and controversies relating to the contractual, legal, and subordination rights that all holders of Claims or Interests may have with respect to any Allowed Claim or Allowed Interest or any distribution to be made on account of such Allowed Claim or Allowed Interest. The compromise and settlement of such Claims and Interests embodied in the Plan, the Verizon Global Settlement, and the Zayo Settlement and reinstatement and unimpairment of other Classes identified in the Plan are in the best interests of the Debtors, the Estates, and all holders of Claims and Interests, and are fair, equitable, and reasonable.

(iv) *Retention of Claims (11 U.S.C. § 1123(b)(3)(B)).* In accordance with section 1123(b)(3)(B) of the Bankruptcy Code, Article IV, Section P, of the Plan provides that, among other things, the Reorganized Debtors shall retain and may enforce all rights to commence, prosecute, pursue, and settle any and all Causes of Action, whether arising before or after the Petition Date, including any actions specifically enumerated in the Plan Supplement, and such rights to commence, prosecute, or settle such Causes of Action shall be preserved notwithstanding the occurrence of the Effective Date. Unless any Causes of Action of the Debtors against an Entity are expressly waived, relinquished, exculpated, released, compromised, or settled in the Plan or a Final Order, the Reorganized Debtors expressly reserve all Causes of Action, for later adjudication. Additionally, in accordance with section 1123(b)(3) of the Bankruptcy Code, any Causes of Action preserved pursuant to Article IV, Section P of the Plan that a Debtor may hold against any Entity shall vest in the Reorganized Debtors.

(v) *Other Appropriate Provisions (11 U.S.C. § 1123(b)(5)–(6)).* The Plan's other provisions are appropriate and consistent with the applicable provisions of the Bankruptcy Code, including, without limitation, provisions for

(1) distributions to holders of Claims and Interests, including holders of Secured Claims, (2) resolution of Disputed Claims and Interests, (3) allowance of certain Claims, (4) releases by the Debtors of certain parties, (5) releases by certain third parties, (6) exculpation of certain parties, (7) the injunction of certain Claims and causes of action in order to implement the discharge, release and exculpation provisions, and (8) retention of this Court's jurisdiction, thereby satisfying the requirements of sections 1123(b)(5) and (6) of the Bankruptcy Code.

i. *Cure of Defaults (11 U.S.C. § 1123(d)).* Article V, Section C, of the Plan, provides for the satisfaction of monetary defaults under each Executory Contract and Unexpired Lease to be assumed (or assumed and assigned) pursuant to the Plan. The Debtors have provided notice of such assumption (or assumption and assignment) and proposed cure amounts to the applicable third parties. As such, the Plan provides that the Debtors will cure, or provide adequate assurance that the Debtors will promptly cure, defaults with respect to assumed Executory Contracts and Unexpired Leases in compliance with section 365(b)(1) of the Bankruptcy Code. Thus, the Plan complies with section 1123(d) of the Bankruptcy Code.

O. The Debtors' Compliance with the Bankruptcy Code (11 U.S.C. § 1129(a)(2)).

16. The Debtors have complied with the applicable provisions of the Bankruptcy Code, as required by section 1129(a)(2) of the Bankruptcy Code. Specifically:

a. the Debtors are eligible debtors under section 109 of the Bankruptcy Code and are proper proponents of the Plan under section 1121(a) of the Bankruptcy Code;

b. the Debtors have complied with applicable provisions of the Bankruptcy Code, except as otherwise provided or permitted by orders of the Bankruptcy Court; and

c. the Debtors have complied with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and the Disclosure Statement Order in transmitting the Solicitation Materials and related notices and in soliciting and tabulating the votes on the Plan.

P. Good Faith Proposal of the Plan (11 U.S.C. § 1129(a)(3)).

17. The Debtors have proposed the Plan (including the Plan Documents (defined herein) and all other documents necessary or appropriate to effectuate the Plan) in good faith and not by any means forbidden by law. In determining that the Plan has been proposed in

good faith, the Court has examined the totality of the circumstances surrounding the filing of the Chapter 11 Cases and the formulation of the Plan. The Debtors' good faith is evident from the facts and record of the Chapter 11 Cases, the Disclosure Statement, the Confirmation Declarations, and the record of the Confirmation Hearing. The Plan was proposed with the legitimate and honest purpose of maximizing the value of the Debtors' Estates and to effectuate a successful restructuring of the Debtors. The Plan was the product of extensive negotiations conducted at arm's length among the Debtors and their key stakeholders. Further, the Plan's classification, indemnification, settlement, discharge, exculpation, release, and injunction provisions have been negotiated in good faith and at arm's length, are consistent with sections 105, 1122, 1123(b)(6), 1129, and 1142 of the Bankruptcy Code, and are each necessary for the Debtors to consummate their value-maximizing Plan. Accordingly, the requirements of section 1129(a)(3) of the Bankruptcy Code are satisfied.

Q. Payment for Services or Costs and Expenses (11 U.S.C. § 1129(a)(4)).

18. Payments made or to be made by the Debtors for services or for costs and expenses in or in connection with the Chapter 11 Cases, or in connection with the Plan and incident to the Chapter 11 Cases, including all Professional Fee Claims, have been approved by, or are subject to the approval of, the Court as reasonable, thereby satisfying section 1129(a)(4) of the Bankruptcy Code.

R. Directors, Officers, and Insiders (11 U.S.C. § 1129(a)(5)).

19. The Debtors have disclosed the identity and affiliations of all persons proposed to serve on the Reorganized Windstream Board and the officers of the Reorganized Debtors at or prior to the Confirmation Hearing. The Plan complies with section 1129(a)(5)(A)(ii) of the Bankruptcy Code because the appointment of the identified members of the Reorganized Windstream Board and officers of the Reorganized Debtors is consistent with the interests of the creditors and equity security holders and with public policy. Accordingly, the Debtors have satisfied section 1129(a)(5) of the Bankruptcy Code.

S. No Rate Changes (11 U.S.C. § 1129(a)(6)).

20. Section 1129(a)(6) of the Bankruptcy Code is not applicable to the Chapter 11 Cases. The Plan proposes no rate change subject to the jurisdiction of any governmental regulatory commission.

T. Best Interests of Holders of Claims and Interests (11 U.S.C. § 1129(a)(7)).

21. Each holder of an Impaired Claim or Interest either has accepted the Plan or will receive or retain under the Plan, on account of such Claim or Interest, property of a value, as of the Effective Date, that is not less than the amount that such holder would receive or retain if the Debtors were liquidated under chapter 7 of the Bankruptcy Code on such date.

22. The liquidation analysis attached as **Exhibit B** to the Disclosure Statement (the "*Liquidation Analysis*") and the other evidence related thereto in support of the Plan that was proffered or adduced at or prior to the Confirmation Hearing, including in the Grossi Declaration:

(a) are reasonable, persuasive, credible, and accurate as of the dates such analyses or evidence was prepared, presented, or proffered; (b) utilize reasonable and appropriate methodologies and assumptions; (c) have not been controverted by other evidence; and (d) establish that holders of Allowed Claims and Allowed Interests in every Class will recover as much or more under the Plan on account of such Claim or Interest, as of the Effective Date, than the amount such holder would receive if the Debtors were liquidated under chapter 7 of the Bankruptcy Code. Accordingly, the Plan satisfies the "best interest of creditors" test under section 1129(a)(7) of the Bankruptcy Code.

U. Acceptance by Certain Classes (11 U.S.C. § 1129(a)(8)).

23. Classes 1, 2, and 6B are Unimpaired by the Plan pursuant to section 1124 of the Bankruptcy Code and, accordingly, holders of Claims in such Classes are conclusively presumed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code. As reflected in the Voting Certification, Classes 3, 4, 5, 6A, and 9 are Impaired by the Plan. Classes 3, 4, and 5 have voted to accept the Plan. Classes 7 and 8 are deemed Impaired or Unimpaired by the Plan pursuant to section 1124 of the

Bankruptcy Code and, accordingly, holders of Claims in Classes 7 and 8 are conclusively presumed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code or are conclusively deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code. Accordingly, the Plan satisfies the requirements of section 1129(a)(8) of the Bankruptcy Code as to all Debtors.

V. Treatment of Administrative Claims, Professional Fee Claims, Priority Tax Claims, Other Secured Claims, and Other Priority Claims (11 U.S.C. § 1129(a)(9)).

24. The treatment of Administrative Claims, Professional Fee Claims, DIP Facilities Claims, Other Secured Claims, Priority Tax Claims, and Other Priority Claims pursuant to Articles II and III of the Plan satisfies the requirements of, and complies in all respects with, section 1129(a)(9) of the Bankruptcy Code. Accordingly, the Debtors have satisfied the requirements of section 1129(a)(9) of the Bankruptcy Code.

W. Acceptance By at Least One Impaired Class of Claims (11 U.S.C. § 1129(a)(10)).

25. Claims in Classes 3, 4, 5, 6A, and 9 are Impaired and entitled to vote under the Plan. Classes 3, 4, and 5 have voted to accept the Plan, as established by the Voting Certification. Accordingly, the Plan satisfies section 1129(a)(10) of the Bankruptcy Code.

Appendix E

X. Feasibility (11 U.S.C. § 1129(a)(11)).

26. The Plan satisfies the requirements of section 1129(a)(11) of the Bankruptcy Code. The evidence supporting the feasibility of the Plan proffered or adduced by the Debtors at or before the Confirmation Hearing, including the Confirmation Declarations: (a) is reasonable, persuasive, credible, and accurate as of the dates such evidence was prepared, presented, and/or proffered; (b) utilizes reasonable and appropriate methodologies and assumptions; (c) has not been controverted by other evidence; (d) establishes that the Plan is feasible and Confirmation is not likely to be followed by the liquidation, or the need for further financial reorganization, of the Debtors or the Reorganized Debtors, as applicable; and (e) establishes the Debtors or the Reorganized Debtors, as applicable, will have sufficient funds to meet their obligations under the Plan.

Y. Payment of Statutory Fees (11 U.S.C. § 1129(a)(12)).

27. As set forth in Article II, Section E of the Plan, all fees payable pursuant to section 1930(a) of title 28 of the U.S. Code prior to the Effective Date shall be paid by the Debtors. On and after the Effective Date, the Reorganized Debtors shall pay any and all such fees when due and payable, and shall file with the Bankruptcy Court quarterly reports in a form reasonably acceptable to the U.S. Trustee. Each Debtor shall remain obligated to pay the U.S. Trustee Fees until the earliest of that particular Debtor's case being closed, dismissed, or converted to a case under Chapter 7 of the Bankruptcy

Code. Accordingly, the Plan satisfies the requirements of section 1129(a)(12) of the Bankruptcy Code.

Z. Retiree Benefits (11 U.S.C. § 1129(a)(13)).

28. As set forth in Article IV, Section S of the Plan, from and after the Effective Date, all "retiree benefits" (as such term is defined in section 1114 of the Bankruptcy Code), if any, shall continue to be paid by the Reorganized Debtors in accordance with applicable law. Accordingly, the Plan satisfies the requirements of section 1129(a)(13) of the Bankruptcy Code.

AA. Non-Applicability of Certain Sections (Sections 1129(a)(14), (15), and (16)).

29. Sections 1129(a)(14), 1129(a)(15), and 1129(a)(16) of the Bankruptcy Code do not apply to the Chapter 11 Cases. The Debtors owe no domestic support obligations, are not individuals, and are moneyed, business, or commercial corporations or trusts.

BB. Confirmation of Plan Over Non-Acceptance of Impaired Classes (11 U.S.C. § 1129(b)).

30. The Plan may be confirmed as to Classes 6A and 9 (the "*Rejecting Classes*") pursuant to section 1129(b) of the Bankruptcy Code, notwithstanding that the requirements of section 1129(a)(8) have not been met with respect to the Rejecting Classes, because the Debtors have demonstrated by a preponderance of the evidence that the Plan (a) satisfies all of the other requirements

of section 1129(a) of the Bankruptcy Code and (b) does not "discriminate unfairly" and is "fair and equitable" with respect to the holders of Claims and Interests in the Rejecting Classes.

31. The Plan does not "discriminate unfairly" against any holders of Claims and Interests in the Rejecting Classes. The treatment of such holders is proper because all similarly situated holders of Claims and Interests will receive substantially similar treatment, and the Debtors have a valid rationale, including for the rationales articulated in the Confirmation Brief, for the Plan's classification scheme and the treatment provided for different Classes.

32. The Plan is also "fair and equitable" with respect to the Rejecting Classes. Specifically, no holder of any Claim or Interest that is junior to Class 6A (Obligor General Unsecured Claims) is receiving a distribution under the Plan, and no Class of Claims or Interests senior to Class 6A is receiving more than full recovery on account of its Claims or Interests.

33. The Plan, therefore, satisfies the requirements of section 1129(b) of the Bankruptcy Code and may be confirmed despite the fact that the Rejecting Classes are deemed to reject the Plan.

CC. Only One Plan (11 U.S.C. § 1129(c)).

34. The Plan is the only plan filed in the Chapter 11 Cases, and, accordingly, satisfies section 1129(c) of the Bankruptcy Code.

DD. Principal Purpose of the Plan (11 U.S.C. § 1129(d)).

35. The principal purpose of the Plan is not the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933, and there has been no filing by any Governmental Unit asserting any such attempted avoidance. The Plan, therefore, satisfies section 1129(d) of the Bankruptcy Code.

EE.Not Small Business Cases (11 U.S.C. § 1129(e)).

36. None of the Chapter 11 Cases are small business cases, as that term is defined in the Bankruptcy Code, and accordingly, section 1129(e) of the Bankruptcy Code is inapplicable.

FF. Satisfaction of Confirmation Requirements.

37. Based on the foregoing and all other pleadings and evidence proffered or adduced at or prior to the Confirmation Hearing, the Plan and the Debtors, as applicable, satisfy all of the requirements for Confirmation set forth in section 1129 of the Bankruptcy Code.

GG. Valuation.

38. The valuation analysis attached as **Exhibit D** to the Disclosure Statement (the "*Valuation Analysis*") and the evidence adduced at the Confirmation Hearing, including in the Leone Declaration, including the estimated post-emergence enterprise value of the Reorganized Debtors,

are reasonable and credible. All parties in interest have been given a fair and reasonable opportunity to challenge the Valuation Analysis. The Valuation Analysis (a) is reasonable, persuasive, and credible as of the date such analysis was prepared, presented, or proffered, and (b) uses reasonable and appropriate methodologies and assumptions.

HH.Plan Documents.

39. The terms of the Plan, including, without limitation, the Plan Supplement and all exhibits and schedules thereto, and all other documents filed in connection with the Plan, or executed or to be executed in connection with the transactions contemplated by the Plan and the Plan Supplement, including the Restructuring Transactions, and all amendments and modifications of any of the foregoing made pursuant to the provisions of the Plan governing such amendments and modifications (collectively, the "*Plan Documents*") are incorporated by reference, are approved in all respects, and constitute an integral part of this Confirmation Order.

II. Binding and Enforceable.

40. The Plan and the Plan Documents have been negotiated in good faith and at arm's length and, subject to the occurrence of the Effective Date, shall bind any holder of a Claim or Interest and such holder's respective successors and assigns, whether or not the Claim or Interest is Impaired under the Plan, whether or not such holder has accepted the Plan, and whether or not such

holder is entitled to a distribution under the Plan. The Plan and the Plan Documents constitute legal, valid, binding, and authorized obligations of the respective parties thereto and shall be enforceable in accordance with their terms. Pursuant to section 1142(a) of the Bankruptcy Code, the Plan and the Plan Documents shall apply and be enforceable notwithstanding any otherwise applicable nonbankruptcy law.

JJ. Vesting of Assets.

41. Except as otherwise provided in the Plan or any agreement, instrument, or other document incorporated in the Plan or the Plan Supplement, on the Effective Date, all property in each Estate, all Causes of Action, all Executory Contracts and Unexpired Leases assumed by any of the Debtors, and any property acquired by any of the Debtors, including Interests held by the Debtors in non-Debtor subsidiaries, pursuant to the Plan shall vest in each respective Reorganized Debtor, free and clear of all Liens, Claims, charges, or other encumbrances unless expressly provided otherwise by the Plan or Confirmation Order. On and after the Effective Date, except as otherwise provided in the Plan, including with respect to the waiver of Avoidance Claims, each Reorganized Debtor may operate its business and may use, acquire, or dispose of property, and compromise or settle any Claims, Interests, or Causes of Action without supervision or approval by the Bankruptcy Court and free of any restrictions of the Bankruptcy Code or Bankruptcy Rules.

Appendix E

KK.Executory Contracts and Unexpired Leases.

42. The Debtors have exercised sound business judgment in determining whether to reject, assume, or assume and assign each of their Executory Contracts and Unexpired Leases pursuant to sections 365 and 1123(b)(2) of the Bankruptcy Code, Article V of the Plan, and as set forth in the Plan Supplement. Except as set forth herein and/or in separate orders entered by the Court relating to assumption of Executory Contracts or Unexpired Leases, consistent with the Plan Supplement, the Debtors have cured or provided adequate assurances that the Debtors and/or the Reorganized Debtors will cure defaults (if any) under or relating to each Executory Contract or Unexpired Lease assumed under the Plan and, for each Executory Contract or Unexpired Lease being assumed and assigned under the Plan, including pursuant to the Restructuring Transactions, such assignee has provided adequate assurance of future performance as required under section 365(f)(2)(B).

LL.Uniti Settlement.

43. The Debtors' independent directors conducted an extensive, good-faith investigation into potential estate claims and causes of action arising out of the Uniti Arrangement. Shortly after the Petition Date, the Windstream Board created an independent committee—the Restructuring Committee—to oversee the claims investigation and Chapter 11 proceedings. The Windstream Board and management met regularly and extensively to consider the risks of litigation, the

costs of litigation, the potential benefits if the litigation was completely successful, and the value of the proposed settlement. The Windstream Board reviewed the settlement with Uniti (the "*Uniti Settlement*") at length and approved the Uniti Settlement at the unanimous recommendation of the Debtors' advisors. As approved by the Court on May 12, 2020, the Uniti Settlement is: (i) fair and equitable, (ii) in the best interests of the Debtors' estates, and (iii) falls well above the lowest rung in the range of reasonableness with respect to all litigation related to the Uniti Settlement. The Uniti Settlement is appropriate in the light of the facts and circumstances and is in the best interests of the Debtors, the Debtors' estates, and the holders of Claims and Interests.

MM. Discharge, Compromise, Settlement, Release, Exculpation, and Injunction Provisions.

44. The Court has jurisdiction under sections 1334(a) and (b) of title 28 of the United States Code to approve the discharge, compromises, settlements, releases, exculpations, and injunctions set forth in Article VIII of the Plan. Sections 105(a) and 1123(b) of the Bankruptcy Code permit the issuance of the injunctions and approval of the releases, exculpations, and injunctions set forth in Article VIII of the Plan. Based upon the record of the Chapter 11 Cases and the evidence proffered or adduced at the Confirmation Hearing, the Court finds that the discharge, compromises, settlements, releases, exculpations, and injunctions set forth in Article VIII of the Plan are consistent with the Bankruptcy Code and applicable law. Further, the discharge, compromises,

settlements, releases, exculpations, and injunctions contained in Article VIII of the Plan are integral components of the Plan. The discharge, compromises, settlements, releases, exculpations, and injunctions set forth in Article VIII of the Plan are hereby approved and authorized in their entirety.

NN.Debtor Release.

45. The releases of claims and causes of action by the Debtors described in Article VIII, Section C of the Plan, in accordance with section 1123(b) of the Bankruptcy Code (the "Debtor Release"), represent a valid exercise of the Debtors' business judgment under Bankruptcy Rule 9019. The Debtors' or the Reorganized Debtors' pursuit of any such claims against the Released Parties is not in the best interest of the Estates' various constituencies because the costs involved would likely outweigh any potential benefit from pursuing such claims. The Debtor Release is fair and equitable and complies with the absolute priority rule.

46. The Debtor Release is furthermore an integral part of the Plan and is in the best interests of the Debtors' Estates. The low probability of success in litigation with respect to the released causes of action supports the Debtor Release. The Plan, including the Debtor Release, was negotiated before and after the Petition Date by sophisticated parties represented by able counsel and financial advisors. The Debtor Release is therefore the result of an arm's-length negotiation process.

47. The Debtor Release appropriately offers protection to parties that participated in the Debtors' restructuring process. Specifically, the Released Parties under the Plan made significant concessions and contributions to the Chapter 11 Cases, including, as applicable, providing postpetition financing, exit financing, backstop commitments, actively supporting the Plan and the Chapter 11 Cases, and waiving substantial rights and Claims against the Debtors under the Plan. The Debtor Release for the Debtors' directors and officers is appropriate because the Debtors' directors and officers share an identity of interest with the Debtors, supported the Plan and the Chapter 11 Cases, actively participated in meetings, negotiations, and implementation during the Chapter 11 Cases, and have provided other valuable consideration to the Debtors to facilitate the Debtors' reorganization.

48. The scope of the Debtor Release is appropriately tailored to the facts and circumstances of the Chapter 11 Cases. In light of, among other things, the value provided by the Released Parties to the Debtors' Estates and the critical nature of the Debtor Release to the Plan and the Debtor Release is appropriate.

OO.Third Party Release.

49. The release by the Releasing Parties (the "*Third Party Release*"), set forth in Article VIII, Section D of the Plan is an essential provision of the Plan. The Third Party Release is: (a) consensual; (b) essential to the Plan; (c) given in exchange for the good and valuable

consideration provided by the Released Parties; (d) a good-faith settlement and compromise of the claims and causes of action released by the Third Party Release; (e) materially beneficial to, and in the best interests of, the Debtors, their Estates and their stakeholders, and important to the overall objectives of the Plan; (f) fair, equitable, and reasonable; (g) given and made after due notice and opportunity for a hearing; (h) a bar to any of the Releasing Parties asserting any claim or cause of action released pursuant to the Third Party Release against any of the Released Parties; and (i) consistent with sections 105, 524, 1123, 1129, and 1141 and other applicable provisions of the Bankruptcy Code.

50. The Third Party Release is an integral part of the Plan. Like the Debtor Release, the Third Party Release facilitated participation in both the Plan and the Debtors' chapter 11 process generally. The Third Party Release was instrumental in developing a Plan that maximizes value for all of the Debtors' stakeholders, and was critical in incentivizing the parties to support the Plan and preventing potentially significant and time-consuming litigation regarding the parties' respective rights and interests. As such, the Third Party Release appropriately offers certain protections to parties who constructively participated in the Debtors' restructuring process by, among other things, supporting the Plan. Furthermore, the Third Party Release is consensual or is otherwise appropriate under controlling law.

51. The scope of the Third Party Release is appropriately tailored to the facts and circumstances of

the Chapter 11 Cases, and parties in interest received due and adequate notice of the Third Party Release. Among other things, the Plan provides appropriate and specific disclosure and notice with respect to the claims and causes of action that are subject to the Third Party Release, and no other disclosure or notice is necessary. The Third Party Release is specific in language, integral to the Plan, and given for adequate consideration. In light of, among other things, the value provided by the Released Parties to the Debtors' Estates and the critical nature of the Third Party Release to the Plan, the Third Party Release is appropriate.

PP. Exculpation.

52. The exculpation provisions set forth in Article VIII, Section E of the Plan were proposed in good faith and are essential to the Plan. The record in the Chapter 11 Cases fully supports the exculpation provisions, and such provisions are appropriately tailored to protect the Exculpated Parties from inappropriate litigation and to exclude actions determined by Final Order to have constituted actual fraud, gross negligence or willful misconduct.

QQ.Injunction.

53. The injunction provisions set forth in Article VIII, Section F of the Plan (a) are essential to the Plan; (b) are necessary to preserve and enforce the discharge and releases set forth in Article VIII, Sections B, C, and D of the Plan, the exculpation provisions in Section E of the

Plan, and the compromises and settlements implemented under the Plan, the Verizon Global Settlement, and the Zayo Settlement; and (c) are appropriately tailored to achieve that purpose.

54. The injunction provisions set forth in Article VIII, Section F of the Plan: (a) are within the jurisdiction of this Court under 28 U.S.C. §§ 1334(a), 1334(b), and 1334(d); (b) are an essential means of implementing the Plan pursuant to section 1123(a)(5) of the Bankruptcy Code; (c) are an integral element of the transactions incorporated into the Plan, the Verizon Global Settlement, and the Zayo Settlement; (d) confer material benefits on, and are in the best interests of, the Debtors, the Estates, and their creditors and other stakeholders; (e) are important to the overall objectives of the Plan, the intent of which is to finally resolve all claims or causes of action among or against the parties in interest in the Chapter 11 Cases with respect to the Debtors; and (f) are consistent with sections 105, 1123, and 1129 of the Bankruptcy Code, other provisions of the Bankruptcy Code, and other applicable law. The record of the Confirmation Hearing and the Chapter 11 Cases is sufficient to support the injunction provisions set forth in Article VIII, Section F of the Plan.

RR. Retention of Jurisdiction.

55. Except as otherwise provided in any of the Plan Documents, the Court shall retain jurisdiction over the Chapter 11 Cases and all matters arising out of, or related to, the Chapter 11 Cases and the Plan, including, but not limited to, the matters set forth in Article XI of the Plan.

BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

A. Confirmation.

56. The Plan, together with the other Plan Documents, shall be, and hereby are, confirmed under section 1129 of the Bankruptcy Code. The terms of the Plan Documents are incorporated by reference into, and are an integral part of, the Plan and this Confirmation Order and are authorized and approved, and the Debtors are authorized to implement their provisions and consummate the Plan, including taking all actions necessary, advisable, or appropriate to finalize the Plan Documents (with the consent of the Requisite First Lien Creditors (and to the extent their economic interests are adversely affected, the Required Consenting Midwest Noteholders), not to be unreasonably withheld, conditioned, or delayed) and to effectuate the Plan and the Restructuring Transactions, without any further authorization except as may be expressly required by the Plan or this Confirmation Order.

B. Objections.

57. All objections, responses, reservations, statements, and comments in opposition to the Plan, other than those resolved, adjourned, or withdrawn with prejudice prior to, or on the record at, the Confirmation Hearing are overruled on the merits in all respects. All withdrawn objections, if any, are deemed withdrawn with prejudice.

C. Omission of Reference to Particular Plan Provisions.

58. The failure to specifically describe or include any particular provision of the Plan or the Plan Documents in this Confirmation Order shall not diminish or impair the effectiveness of such provision, and such provision shall have the same validity, binding effects, and enforceability as every other provision of the Plan and the Plan Documents.

D. Deemed Acceptance of the Plan as Modified.

59. In accordance with section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, all holders of Claims who voted to accept the Plan or who are conclusively presumed to have accepted the Plan are presumed to accept the Plan, subject to modifications, if any. No holder of a Claim or Interest shall be permitted to change its vote as a consequence of the Plan or Plan Supplement modifications. All modifications to the Plan or Plan Supplement made after the Voting Deadline are hereby approved, pursuant to section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019.

E. Plan Implementation.

60. *General Authorization*. The transactions described in the Plan, the Plan Support Agreement, the Plan Documents, and this Confirmation Order, including the Restructuring Transactions, are hereby approved. On or before the Effective Date, and after the Effective

Date, as necessary, and without any further order of the Court, other authority, or corporate action, the Debtors or the Reorganized Debtors (or any agent on behalf of parties entitled to receive Reorganized Windstream Equity Interests), as applicable, and their respective directors, managers, officers, employees, members, agents (including stock transfer agents and Distribution Agents), attorneys, financial advisors, and investment bankers are authorized and empowered pursuant to section 1142(b) of the Bankruptcy Code and other applicable laws to and shall (a) grant, issue, execute, deliver, file, or record any agreement, document, or security, and the documents contained in the Plan or the Plan Documents or described in the definition of Restructuring Transactions (as modified, amended, and supplemented pursuant to the provisions of the Plan governing such modifications, amendments, and supplements), or any other documents related thereto and (b) take any action necessary, advisable, or appropriate to implement, effectuate, and consummate the Plan, the Plan Documents, the Restructuring Transactions (as set forth in the Description of Restructuring Transactions or otherwise), or this Confirmation Order, including, but not limited to, the Reorganized Windstream Organizational Documents, Special Warrant Agreement, any documentation related to the Reorganized Windstream Equity Interests or the Restructuring Transactions, and any actions necessary, advisable, or appropriate to effectuate the issuance and/or distribution of any shares of the Reorganized Windstream Equity Interests to be issued pursuant to the Plan (including issuing such shares of Reorganized Windstream Equity Interests to any stock transfer agent

as a nominee for the Persons entitled to receive such shares to be held in a reserve account until such Persons are identified, whereupon such stock transfer agent shall be authorized to distribute such shares to such Persons in accordance with such instructions as are agreed upon between such stock transfer agent and the Reorganized Debtors (or any of them)). All such actions taken or caused to be taken shall be deemed to have been authorized and approved by the Court without further approval, act, or action under any applicable law, order, rule, or regulation, including, among other things, (x) the incurrence of all obligations contemplated by the Plan, the Restructuring Transactions, the Plan Documents, or this Confirmation Order and the making of all distributions under the Plan, the Plan Documents, or this Confirmation Order; and (y) entering into any and all transactions, contracts, leases, instruments, releases, and other documents and arrangements permitted by applicable law, order, rule, or regulation. The approvals and authorizations specifically set forth in this Confirmation Order are nonexclusive and are not intended to limit the authority of the Debtors, or the Reorganized Debtors, as applicable, or any officer, director, agent, or manager thereof to take any and all actions necessary, advisable, or appropriate to implement, effectuate, and consummate any and all documents or transactions contemplated by the Plan, the Plan Documents, or this Confirmation Order pursuant to section 1142(b) of the Bankruptcy Code. Pursuant to section 1142 of the Bankruptcy Code, to the extent that, under applicable nonbankruptcy law or the rules of any stock exchange, any of the foregoing actions that would otherwise require approval of the equity holders, directors,

or managers (or any equivalent body) of the Debtors or the Reorganized Debtors, as applicable, such approval shall be deemed to have occurred and shall be in effect from and after the Effective Date without any further action by the equity holders, directors, or managers (or any equivalent body) of the Debtors or the Reorganized Debtors. Prior to, on, or as reasonably practicable after the Effective Date, the Debtors or the Reorganized Debtors shall, if required, file any documents required to be filed in such jurisdictions so as to effectuate the provisions of the Plan, the Plan Documents, and the Restructuring Transactions. Any or all documents contemplated herein shall be accepted by each of the respective filing offices and recorded, if required, in accordance with applicable law. All counterparties to any documents described in this paragraph are hereby directed to execute such documents as may be required or provided by such documents, without any further order of the Court. Each of the Plan Documents, once executed, constitutes a legal, valid, binding, and authorized obligation of the respective parties thereto, enforceable in accordance with its terms, and the terms contained in each such executed Plan Document shall supersede any description of such terms contained in the Plan or the Plan Supplement or otherwise set forth in a term sheet or unexecuted version of such document.

61. *No Action*. Pursuant to section 1142(b) of the Bankruptcy Code and other applicable law, this Confirmation Order shall constitute authorization for the Debtors or the Reorganized Debtors (or any agent on behalf of parties entitled to receive Reorganized

Windstream Equity Interests), as applicable, to enter into, execute, deliver, file, adopt, amend, restate, consummate, or effectuate, as the case may be, the Plan, the Plan Documents, the Restructuring Transactions (as set forth in the Description of Restructuring Transactions or otherwise), this Confirmation Order, and any contract, instrument, or other document to be executed, delivered, adopted, or amended in connection with the implementation of the Plan, the Plan Documents, the Restructuring Transactions, or this Confirmation Order, and the respective directors, managers, stockholders, or members of the Debtors or the Reorganized Debtors shall not be required to take any actions in connection with the implementation of the Plan, the Plan Documents, the Restructuring Transactions, or this Confirmation Order. The Plan Documents are hereby approved, adopted, and effective upon the Effective Date.

F. Binding Effect.

62. On the date of and after entry of this Confirmation Order and subject to the occurrence of the Effective Date, the Plan, the Plan Documents, and this Confirmation Order shall bind any holder of a Claim or Interest and such holder's respective successors and assigns, whether or not: (a) the Claim or Interest is Impaired under the Plan; (b) such holder has accepted or rejected the Plan; (c) such holder has failed to vote to accept or reject the Plan; (d) such holder is entitled to a distribution under the Plan; (e) such holder will receive or retain any property or interests in property under the Plan; and (f) such holder has filed a Proof of Claim in the Chapter 11 Cases.

The Plan, the Plan Documents, and this Confirmation Order constitute legal, valid, binding, and authorized obligations of the respective parties thereto and shall be enforceable in accordance with their terms. Pursuant to section 1142(a) of the Bankruptcy Code, the Plan, the Plan Documents, and this Confirmation Order shall apply and be enforceable notwithstanding any otherwise applicable nonbankruptcy law.

G. Plan Classification Controlling.

63. The terms of the Plan shall solely govern the classification of Claims and Interests for purposes of the distributions to be made thereunder. The classifications set forth on the Ballots tendered to or returned by the holders of Claims or Interests in connection with voting on the Plan: (a) were set forth on the Ballots solely for purposes of voting to accept or reject the Plan; (b) do not necessarily represent, and in no event shall be deemed to modify or otherwise affect, the actual classification of such Claims and Interests under the Plan for distribution purposes; (c) may not be relied upon by any holder of a Claim or Interest as representing the actual classification of such Claim or Interest under the Plan for distribution purposes; and (d) shall not be binding on the Debtors except for voting purposes. All rights of the Debtors and the Reorganized Debtors, as applicable, to challenge, object to, or seek to reclassify Claims and Interests are expressly reserved.

H. Effective Date.

64. Upon the occurrence of the Effective Date, the terms of the Plan, the Plan Documents, and this Confirmation Order shall be immediately effective and enforceable and deemed binding upon the Debtors, the Reorganized Debtors, and any and all holders of Claims against or Interests in the Debtors (irrespective of whether their Claims or Interests are presumed to have accepted or deemed to have rejected the Plan), all Entities that are parties to or are subject to the settlements, compromises, releases, discharges, and injunctions described in the Plan, each Entity acquiring property under the Plan, and any and all non-Debtor parties to Executory Contracts and Unexpired Leases with the Debtors or the Reorganized Debtors.

I. Restructuring Transactions.

65. The Debtors or the Reorganized Debtors are authorized to implement and consummate the Restructuring Transactions (as may be modified, amended, and supplemented pursuant to the provisions of the Plan governing such modifications, amendments, and supplements) pursuant to the Plan, the Plan Documents, and this Confirmation Order and are authorized to execute and deliver all necessary documents or agreements required to perform their obligations thereunder. The Restructuring Transactions pursuant to the Plan and the Plan Documents are approved and authorized in all respects. The Debtors or the Reorganized Debtors, (and any agent on behalf of parties entitled to receive

Reorganized Windstream Equity Interests), as applicable, are authorized and directed, without the need for any future corporate action, to take all actions necessary, appropriate, or desirable to enter into, implement, and consummate the contracts, instruments, releases, agreements, or other documents created or executed in connection with the Plan, the Plan Documents, and the Restructuring Transactions, including, without limitation, the mergers and transactions set forth in the Description of Restructuring Transactions. In accordance with section 1142 of the Bankruptcy Code and applicable nonbankruptcy law, such actions may be taken without further action by stockholders, members, partners, managers, or directors.

J. Distributions.

66. All distributions pursuant to the Plan shall be made in accordance with Article VI of the Plan, and such methods of distribution are approved. The Reorganized Debtors shall have no duty or obligation to make distributions to any holder of an Allowed Claim unless and until such holder executes and delivers, in a form acceptable to the Reorganized Debtors, any and all documents applicable to such distributions in accordance with Article VI of the Plan.

K. Securities Registration Exemption.

67. Except with respect to the Reorganized Windstream Equity Interests underlying the Management Incentive Plan and Reorganized Windstream Equity Interests not

subscribed for in the Rights Offering issued to the Backstop Parties pursuant to the Backstop Commitment Agreement, all shares or units of Reorganized Windstream Equity Interests and Special Warrants issued under the Plan will be issued without registration under the Securities Act or any similar federal, state, or local law in reliance upon section 1145 of the Bankruptcy Code. All shares or units of Reorganized Windstream Equity Interests and Special Warrants issued under the Plan in reliance upon section 1145 of the Bankruptcy Code are exempt from, among other things, the registration requirements of Section 5 of the Securities Act and any other applicable U.S. state or local law requiring registration prior to the offering, issuance, distribution, or sale of Securities. The Reorganized Windstream Equity Interests and Special Warrants issued pursuant to section 1145 of the Bankruptcy Code: (a) are not "restricted securities" as defined in Rule 144(a)(3) under the Securities Act, and (b) are freely trade and transferable by any holder thereof that (i) is not an "affiliate" of the Reorganized Debtors as defined in Rule 144(a)(1) under the Securities Act, (ii) has not been such an "affiliate" within ninety (90) days of such transfer, (iii) has not acquired the Reorganized Windstream Equity Interests from an "affiliate" within one year of such transfer, and (iv) is not an entity that is an "underwriter" as defined in subsection (b) of section 1145 of the Bankruptcy Code. Reorganized Windstream Equity Interests shall be issued in reliance on section 1145 of the Bankruptcy Code, as applicable hereunder. Reorganized Windstream Equity Interests underlying the Management Incentive Plan will be issued pursuant to an effective registration statement or pursuant to an exemption from registration under the Securities

Act and other applicable law. Reorganized Windstream Equity Interests not subscribed for in the Rights Offering issued to the Backstop Parties pursuant to the Backstop Commitment Agreement will be issued pursuant to Section 4(a)(2) of the Securities Act and other applicable law.

L. Retained Assets.

68. To the extent that the retention by the Debtors or the Reorganized Debtors of assets held immediately prior to emergence in accordance with the Plan is deemed, in any instance, to constitute a "transfer" of property, such transfer of property to the Debtors or the Reorganized Debtors (a) is or shall be a legal, valid, and effective transfer of property; (b) vests or shall vest the Debtors with good title to such property, free and clear of all liens, charges, Claims, encumbrances, or interests, except as expressly provided in the Plan or this Confirmation Order; (c) does not and shall not constitute an avoidable transfer under the Bankruptcy Code or under applicable nonbankruptcy law; and (d) does not and shall not subject the Debtors or the Reorganized Debtors to any liability by reason of such transfer under the Bankruptcy Code or under applicable nonbankruptcy law, including by laws affecting successor or transferee liability.

M. Treatment of Executory Contracts and Unexpired Leases.

69. The assumption (or assumption and assignment) and rejection of Executory Contracts and Unexpired Leases as set forth in Article V of the Plan is hereby

authorized. Assumption (or assumption and assignment) of the Executory Contracts and Unexpired Leases listed in the Assumed Executory Contracts and Unexpired Leases Schedule are hereby authorized.

70. To the extent any dispute with respect to the assumption or cure of any assumed Executory Contract or Unexpired Lease set forth in the Assumed Executory Contract/Unexpired Lease Schedule remains outstanding, such dispute shall be heard on July 21, 2020, at 10:00 a.m. prevailing Eastern Time (or such later date as directed by the Court or set by mutual agreement of the parties). Sufficiently in advance of such hearing, the parties to any such dispute shall meet and confer and coordinate with the Court regarding the nature of such hearing, including whether they propose an evidentiary hearing or a non-evidentiary hearin. The parties may agree to consensual resolutions of such disputes in writing without further order of the Court, which resolution may be set forth in an amended Assumed Executory Contract/Unexpired Lease Schedule. Notwithstanding entry of this Confirmation Order, all parties' rights with respect to assumption and/or cure regarding Executory Contracts or Unexpired Leases for which disputes remain outstanding are hereby reserved until such dispute is resolved by agreement of the parties or entry of a Final Order by the Bankruptcy Court.

71. To the extent any provision in any Executory Contract or Unexpired Lease assumed pursuant to the Plan restricts or prevents, or purports to restrict or prevent, or is breached or deemed breached by, the assumption of

such Executory Contract or Unexpired Lease (including, without limitation, any "change of control", "assignment", or similar provision), then such provision shall be deemed modified such that the transactions contemplated by the Plan, including the Restructuring Transactions shall not entitle the non-Debtor party thereto to terminate such Executory Contract or Unexpired Lease or to exercise any other default, breach, violation or acceleration rights with respect thereto. For the avoidance of doubt, no Restructuring Transaction shall be deemed to violate the terms of any assumed Unexpired Lease of non-residential real property. Any motions to assume Executory Contracts or Unexpired Leases pending on the Effective Date shall be subject to approval by a Final Order of the Bankruptcy Court on or after the Effective Date but may be withdrawn, settled, or otherwise prosecuted by the Reorganized Debtors.

72. Notwithstanding anything to the contrary in the Plan, the Debtors or the Reorganized Debtors, as applicable, reserve the right to alter, amend, modify, or supplement the Assumed Executory Contracts and Unexpired Leases Schedule and the Rejected Executory Contracts and Unexpired Leases Schedule at any time up to forty-five (45) days after the Effective Date.

73. Assumption of any Executory Contract or Unexpired Lease pursuant to the Plan or otherwise shall result in the full release and satisfaction of any Claims or defaults, whether monetary or nonmonetary, including defaults of provisions restricting the change in control or ownership interest composition or other bankruptcy-

related defaults, arising under any Assumed Executory Contract or Unexpired Lease at any time before the date that the Debtors assume such Executory Contract or Unexpired Lease. The portions of any Proofs of Claim filed with respect to an Executory Contract or Unexpired Lease that has been assumed shall be deemed disallowed and expunged, without further notice to or action, order, or approval of the Bankruptcy Court, and any remaining portions of such Proofs of Claim shall remain unaffected unless otherwise specifically objected to.

74. **Proofs of Claim with respect to Claims arising from the rejection of Executory Contracts or Unexpired Leases, if any, must be filed with the Bankruptcy Court within thirty (30) days after the date of service of the order approving such rejection.** Any Claims arising from the rejection of an Executory Contract or Unexpired Lease not Filed within such time will be disallowed upon an order of the Bankruptcy Court, forever barred from assertion, and shall not be enforceable against, as applicable, the Debtors, the Reorganized Debtors, the Estates, or property of the foregoing parties, without the need for any objection by the Debtors or the Reorganized Debtors, as applicable, or further notice to, or action, order, or approval of the Bankruptcy Court or any other Entity, and any Claim arising out of the rejection of the Executory Contract or Unexpired Lease shall be deemed fully satisfied, released, and discharged, notwithstanding anything in the Schedules, if any, or a Proof of Claim to the contrary. Claims arising from the rejection of the Debtors' Executory Contracts or Unexpired Leases shall be classified as General Unsecured Claims and shall be treated in accordance with of the Plan, as applicable.

75. Notwithstanding anything to the contrary in the Plan or this Confirmation Order, to the extent the Communications License Agreement dated June 25, 2018 between debtor BOB, LLC and IREIT Wilson Marketplace, LLC is assumed or assumed and assigned pursuant to the Plan, it shall be assumed or assumed and assigned "as is" and in accordance with all of its terms.

76. By the provisions of this Confirmation Order, Windstream Communications, LLC hereby has exercised its business judgment with respect to and shall assume the Element Fleet Agreements with Element Fleet Corporation ("*Element Fleet*") pursuant to confirmation of this Plan.[3] The Debtors' decisions to assume the Element Fleet Agreements are hereby approved by this Confirmation Order under and pursuant to 11 U.S.C. § 365(a) and assumption of the Element Fleet Agreements shall become effective upon the Effective Date of the Plan. Notwithstanding anything to the contrary in the Plan or in this Confirmation Order, the assumption of the Element Fleet Agreements shall be irrevocable and the Debtors shall have no right hereafter to reject the Element Fleet Agreements; *provided* that, notwithstanding anything to

3. The "*Element Fleet Agreements*" are: (i) the *Motor Vehicle Fleet Open-End Lease Agreement* (together with related documents and amendments), dated January 29, 2014, and executed by Element Fleet's affiliate, D. L. Peterson Trust, as lessor, and Windstream Communications, LLC, as lessee, and (ii) the *Master Services Agreement* dated October 25, 2010 (together with related documents and amendments), executed by Element Fleet's predecessor-in-interest, PHH Vehicle Management Services, LLC and Windstream Communications, LLC.

the contrary herein, nothing in this Confirmation Order shall require the Debtors to take any action or refrain from taking any action to the extent that such action or inaction would be inconsistent with applicable law or the Debtors' fiduciary obligations under applicable law. Element shall have until seven (7) calendar days after entry of this Confirmation Order to file with the Court and serve on the Debtors a pleading setting forth its position with respect to the cure claims applicable to assumption of the Element Fleet Agreements and Debtors shall have seven (7) calendar days after Element Fleet files and serves such pleading in which to file and serve its response thereto. Element Fleet and the Debtors will work together in good faith both to attempt to consensually resolve issues with respect to cure claims and to promptly bring such claims to the Court for determination if all cure related issues cannot be resolved consensually. Element Fleet fully reserves its right to file any and all Administrative Claims under the Element Fleet Agreements, if any, by the Administrative Claims Bar Date. Nothing contained in the Plan or this Confirmation Order shall enhance the Debtors' claims, rights, remedies, or defenses under the Element Fleet Agreements. Nothing contained in Article XI of the Plan shall be deemed to provide the Court with personal, subject matter or other jurisdiction over Element Fleet or the Element Fleet Agreements and performance thereunder, with respect to any Claim arising after the Effective Date relating to the Element Fleet Agreements or performance thereunder.

77. At the election of the Requisite Backstop Parties, in consultation with the Debtors, holders of Class 6B

claims will either be (a) Reinstated or (b) paid in full in Cash. Solely in the event Saetec's Class 6B Claims are Reinstated, all of its legal, equitable and contractual rights shall be fully restored and unaltered, including all of its claims, defenses, crossclaims and counterclaims related to the Saetec Litigation and possible litigation with Debtors. Saetec shall not be a Releasing Party as defined under the Plan and Debtors waive the right to assert, and will not assert in the Saetec Litigation or elsewhere, that Saetec is a Releasing Party. The Settlement, Release, Injunction, and Related Provisions contained in Article VIII of the Plan shall be of no force or effect on Saetec.

78. The Debtors are parties to certain non-residential leases and unexpired executory contracts in which Digital Realty Trust, L.P. and/or certain of its subsidiaries and affiliates is a counterparty (each and all of these counterparties being collectively defined as "*Digital Realty*", and each such unexpired lease or contract to which Digital Realty is a counterparty being defined each as a "*Digital Agreement*" and collectively as the "*Digital Agreements*"). The Debtors and Digital Realty are currently addressing the terms and conditions upon which the Digital Agreements may be assumed or rejected pursuant to the Plan and shall resolve any disputes concerning those Digital Agreements pursuant to the process established by the Plan or by mutual agreement or stipulation. Digital Realty reserves the right to object to the Debtors' ability to reject any Digital Agreement after the Effective Date under Article V.A. of the Plan and the right to seek all remedies available to it. To the extent that the Debtors seek to reject any Digital

Agreement after the Effective Date, the Debtors agree that they shall (i) continue to be bound by all terms and conditions of each and every Digital Agreement, and (ii) be obligated to perform all payment obligations owed to Digital Realty under the rejected Digital Agreement, each through the later of (a) the date such Digital Agreement is designated as rejected by Debtors or (b) the date on which the Debtors vacate any premise pursuant to such rejected Digital Agreement. Notwithstanding any release, discharge, or similar provision in the Plan, this Confirmation Order, or the Bankruptcy Code, at the conclusion of the term of each lease or executory contract being assumed by the Debtors in which Digital Realty (each such lease, a "*Digital Realty Lease*"), the Debtors will continue to be obligated to redeliver possession of each of the premises subject to each Digital Realty Lease ("*Digital Realty Leased Premises*") to Digital Realty according to the terms of such Digital Realty Lease and in the condition prescribed by such Digital Realty Lease and applicable non-bankruptcy law. The Debtors' obligation to redeliver each Digital Realty Leased Premises in such condition shall not be discharged and shall survive both (i) the assumption of each Digital Realty Lease and (ii) confirmation of the Plan, even if any damages to the Digital Realty Leased Premises had occurred prior to the Effective Date.

79. The American Arbitration Association has filed a non-obligor unsecured claim. The Debtors have contested the claim. The parties have agreed that this claim dispute shall continue post-confirmation and nothing in this Court's orders or this Confirmation Order shall modify

the parties' respective rights. Further, in the event a consensual resolution cannot be reached, the parties have agree to see a prompt resolution of the claim contest before the bankruptcy court, subject to the court's timing and availability.

80. The CBRE, Inc. Executory Contracts shall be assumed by the applicable Reorganized Debtors effective as of the Effective Date, and shall not be thereafter rejected by the Debtors or Reorganized Debtors.

81. Notwithstanding anything set forth in the Plan or this Order to the contrary, nothing in the Plan, or this Confirmation Order, shall impair, release, discharge, preclude, or enjoin any obligations of the Debtors to the Sureties (being Aspen American Insurance Co., Aspen Insurance UK Limited, and Aspen Specialty Insurance Co. (collectively, "*Aspen*") and Berkley Insurance Company and Berkley Regional Insurance Company (collectively, "*Berkley*" and together with Aspen, the "*Sureties*")) in connection with: (a) any surety bonds issued, or renewed, by any of the Sureties on behalf of any of the Debtors (either prior to or after the petition date) (the "*Bonds*"), (b) any indemnity agreements executed by any of the Debtors in favor of any of the Sureties (prior to the petition date) (the "*Indemnity Agreements*"), or (c) under the common law of suretyship, and such obligations are unimpaired and are not being released, discharged, precluded, or enjoined by the Plan, this Confirmation Order, or any agreements with third parties. For the avoidance of doubt, the Sureties are deemed to have opted out of the releases and are not Releasing Parties or Released Parties under the Plan.

82. Notwithstanding anything set forth in the Plan or this Order to the contrary, nothing in the Plan or this Confirmation Order shall be deemed to limit any Surety's rights or interests in any collateral or the proceeds of such collateral securing the Bonds and/or the Indemnity Agreements, including, without limitation, the right to draw or use any such collateral to reimburse any claim of such Surety under or in respect of the Bonds and/or the Indemnity Agreements.

83. For the avoidance of doubt, notwithstanding anything in the Plan (or any document related thereto) or this Confirmation Order to the contrary, United Call Center Solutions LLC ("*UCCS*") shall be entitled to receive payment in full on account of, and nothing in the Plan (or any document related thereto) or this Confirmation Order shall release or result in the satisfaction of: (a) all Cure Claims of UCCS arising under any Executory Contract between any of the Debtors and UCCS and existing as of date such contract is assumed; and (b) all claims of UCCS that have accrued or otherwise arisen (but are not in default) under any Executory Contract between any of the Debtors and UCCS and existing as of the date such contract is assumed.

N. Exemption from Transfer Taxes.

84. Pursuant to section 1146(a) of the Bankruptcy Code, any transfer from a Debtor to a Reorganized Debtor or to any Entity pursuant to or under the Plan pursuant to: (i) the issuance, distribution, transfer, or exchange of any debt, securities, or other interest in the

Debtors or the Reorganized Debtors; (ii) the creation, modification, consolidation, or recording of any mortgage, deed of trust or other security interest, or the securing of additional indebtedness by such or other means; (iii) the making, assignment, or recording of any lease or sublease; or (iv) the making, delivery, or recording of any deed or other instrument of transfer pursuant to or under the Plan, including any deeds, bills of sale, assignments, or other instrument of transfer executed in connection with any transaction arising out of, contemplated by, or in any way related to the Plan, shall not be subject to any document recording tax, stamp tax, conveyance fee, intangibles or similar tax, mortgage tax, stamp act, real estate transfer tax, mortgage recording tax, or other similar tax or governmental assessment, and upon entry of the Confirmation Order, the appropriate state or local governmental officials or agents shall forgo the collection of any such tax or governmental assessment and accept for filing and recordation any of the foregoing instruments or other documents pursuant to such transfers of property without the payment of any such tax, recordation fee, or governmental assessment..

O. Governmental Approvals Not Required.

85. Except for the FCC Approval and the State PUC Approvals, this Confirmation Order shall constitute all approvals and consents required, if any, by the laws, rules, or regulations of any state or any other governmental authority with respect to the implementation or consummation of the Plan and any other acts that may be necessary or appropriate for the implementation or consummation of the Plan.

P. Filing and Recording.

86. This Confirmation Order is, and shall be, binding upon and shall govern the acts of all persons or entities including, without limitation, all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, registrars of deeds, administrative agencies, governmental departments, secretaries of state, federal, state, and local officials, and all other persons and entities who may be required, by operation of law, the duties of their office, or contract, to accept, file, register, or otherwise record or release any document or instrument. Each and every federal, state, and local government agency is hereby directed to accept any and all documents and instruments necessary, useful, advisable, or appropriate (including financing statements under the applicable uniform commercial code) to effectuate, implement, and consummate the transactions contemplated by the Plan and this Confirmation Order without payment of any stamp tax or similar tax imposed by state or local law.

Q. Tax Withholding.

87. In connection with the Plan, to the extent applicable, the Debtors, Reorganized Debtors or the Distribution Agent, as applicable, shall comply with all tax withholding and reporting requirements imposed on them by any Governmental Unit, and all distributions pursuant to the Plan shall be subject to such withholding and reporting requirements. Notwithstanding any provision in the Plan to the contrary, the Debtors, Reorganized

Debtors or the Distribution Agent, as applicable, shall be authorized to take all actions necessary or appropriate to comply with such withholding and reporting requirements, including liquidating a portion of the distribution to be made under the Plan to generate sufficient funds to pay applicable withholding taxes, withholding distributions pending receipt of information necessary to facilitate such distributions, or establishing any other mechanisms they believe are reasonable and appropriate.

R. Frontier Settlement Agreement.

88. Upon the Effective Date, the Debtors are authorized to enter into that certain Settlement Agreement (the "*Settlement Agreement*"), dated as of December 12, 2019, by and among the Debtors and Frontier Communications Corporation on behalf of itself and each of its subsidiaries (collectively, "*Frontier*"); *provided* that notwithstanding anything contained in this Confirmation Order, the Chapter 11 Plan or any other document filed with the Court or served on Frontier, the Settlement Agreement and the terms and conditions therein shall be deemed null and void if Frontier seeks authority to reject the Settlement Agreement and/or the accompanying Commercial Agreement, dated as of December 11, 2019, by and among the Debtors and Frontier (the "*Commercial Agreement*") in connection with Frontier's Chapter 11 cases pending in this Court under the caption *In re Frontier Communications Corporation et al.*, Case No. 20-22476 (RDD).

S. Verizon Global Settlement.

89. Pursuant to section 1123(b)(3) of the Bankruptcy Code and Bankruptcy Rule 9019, the Verizon Global Settlement (as defined below) is hereby approved. As described in and pursuant to the settlement agreement (the "*Verizon Settlement Agreement*") between the Debtors and Verizon Communications, Inc. and its affiliates including Verizon Business Network Services Inc. (collectively, "*Verizon*" and, such settlement contemplated by the Verizon Settlement Agreement, the "*Verizon Global Settlement*"): (a) all agreements with Verizon shall be assumed, as amended, on the Effective Date; (b) that certain June 1, 2018 custom solution product schedule, effective December 31, 2019, shall be terminated on the Effective Date; (c) the Debtors and Verizon shall execute a new custom solution product schedule to be effective as of January 1, 2020; (d) the Debtors shall make the payments to Verizon in the total amount of $116,640,000.00 of which (i) a payment in the amount of $69,980,000.00 shall be made not later than June 30, 2020 if the effective date of the Verizon Settlement Agreement (the "*Verizon Effective Date*") occurs on or before June 30, 2020, otherwise no later than ten (10) days following the Verizon Effective Date and (ii) a payment in the amount of $46,660,000.00 shall be made not later than ten (10) days after the Effective Date; (e) Verizon shall make payment to the Debtors in the amount of $4,700,000.00 not later than ten (10) days after the Verizon Effective Date (collectively the payments described in (d) and (e), the "*Payments*"); (f) the Debtors and Verizon shall reflect a $0.00 balance as of January 1, 2020, after receipt of the Payments; and

(g) with no further action by either Party, the Debtors and Verizon shall irrevocably remise, release and forever discharge the other Party of and from any and all manner of claims, demands, rights, liabilities, damages, potential actions, actions, causes of action, suits, judgments, decrees and controversies of any kind and nature whatsoever, at law, in equity, or otherwise, whether known or unknown, which have arisen or might arise, out of the Settled Disputes (as defined in the Verizon Settlement Agreement) on the Verizon Effective Date upon the occurrence of (f).

90. The Verizon Global Settlement (a) confers material benefits on, and are in the best interests of, the Debtors, the Estates, and their creditors; (b) is important to the overall objectives of the Plan to finally resolve all Claims among or against the parties in interest in the Chapter 11 Cases with respect to the Debtors; (c) is fair and equitable and represent a resolution within the range of reasonableness; and (d) is consistent with sections 105, 365, 1123, and 1129 of the Bankruptcy Code, other provisions of the Bankruptcy Code, Bankruptcy Rule 9019, and other applicable law.

91. The Verizon Global Settlement (a) confers material benefits on, and are in the best interests of, the Debtors, the Estates, and their creditors; (b) is important to the overall objectives of the Plan to finally resolve all Claims among or against the parties in interest in the Chapter 11 Cases with respect to the Debtors; (c) is fair and equitable and represent a resolution within the range of reasonableness; and (d) is consistent with sections 105, 365, 1123, and 1129 of the Bankruptcy Code, other provisions

of the Bankruptcy Code, Bankruptcy Rule 9019, and other applicable law.

T. Zayo Settlement

92. Pursuant to section 1123(b)(3) of the Bankruptcy Code and Bankruptcy Rule 9019, the Zayo Settlement (as defined below) is hereby approved. As described in and pursuant to the settlement term sheet (the "*Zayo Settlement Term Sheet*") between the Debtors and Zayo Group, LLC and certain of its subsidiaries and affiliates (collectively, "*Zayo*" and, such settlement contemplated by the Zayo Settlement Term Sheet, the "*Zayo Settlement*"): (a) all agreements with Zayo shall be assumed, as amended, on the Effective Date; (b) the Debtors shall pay $3,750,147 to Zayo on account of prepetition disputed and undisputed balances within thirty (30) calendar days of the Effective Date; (c) the Debtors shall pay $720,264.81 to Zayo to resolve all postpetition accounts receivable through May 1, 2020 within ten (10) calendar days after the effective date of the settlement agreement (the "*Zayo Settlement Effective Date*") incorporating the terms of the Zayo Settlement Term Sheet; (d) Zayo shall credit $536,000 to the Debtors' accounts to resolve certain postpetition disputes; (e) the Debtors shall enact the agreed to Ethernet Take or Pay (ToP) Revenue contract modifications; (f) the Debtors shall pay $200,000 to settle the outstanding proofof claim pertaining to the sale of the McLean Data Center within thirty (30) calendar days of the Effective Date; (g) the Debtors will purchase three dark fiber IRUs; (h) and the Debtors agree to sell Zayo three 1G Ethernet circuits. Orders must be placed by the

dates outlined in the Zayo Settlement Term Sheet. With no further action by either Party, the Debtors and Zayo shall irrevocably remise, release, and forever discharge the other Party of and from any and all manner of claims, demands, rights, liabilities, damages, potential actions, actions, causes of action, suits, judgments, decrees and controversies of any kind and nature whatsoever, at law, in equity, or otherwise, whether known or unknown, which have arisen or might arise, out of such disputes prior to the Zayo Settlement Effective Date.

93. The Debtors and Zayo will enter into a long form settlement agreement based on the terms enumerated in the Settlement Term Sheet (the "*Zayo Settlement Agreement*), however each parties' rights are reserved if such Zayo Settlement Agreement is not agreed upon. The Zayo Settlement Agreement shall be effective upon agreement by the Debtors and Zayo and is not premised upon approval from the Court; *provided*, *however*, the parties agree to use reasonable efforts to enter into the Zayo Settlement Agreement on or before June 30, 2020.

94. The Zayo Settlement (a) confers material benefits on, and are in the best interests of, the Debtors, the Estates, and their creditors; (b) is important to the overall objectives of the Plan to finally resolve all Claims among or against the parties in interest in the Chapter 11 Cases with respect to the Debtors; (c) is fair and equitable and represent a resolution within the range of reasonableness; and (d) is consistent with sections 105, 365, 1123, and 1129 of the Bankruptcy Code, other provisions of the Bankruptcy Code, Bankruptcy Rule 9019, and other applicable law.

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U. Charter Communications Operating, LLC

95. Notwithstanding any provision of the Plan to the contrary regarding assumption of executory contracts and payment of cure obligations, if the Debtors decide to assume any executory contract with Charter Communications Operating, LLC ("*Charter*" and such contracts collectively, the "*Charter Contracts*"), neither the confirmation of the Plan nor the Debtors' decision to defer listing the Charter Contracts on the Assumed Executory Contract/Unexpired Lease Schedule or the Rejected Executory Contracts and Unexpired Leases Schedule shall prejudice the rights of Charter (a) to object to any cure amount proposed by the Debtors if the Debtors propose a cure amount; (b) to assert a cure amount owed on the Charter Contracts; and (c) to enforce the obligations of the Debtors or, as applicable, the Reorganized Debtors under any assumed Charter Contract, including the obligation to satisfy any cure amount owed on any such assumed Charter Contract; *provided*, that the foregoing reservation shall not prejudice the rights of the Debtors to assume or reject the Charter Contracts in accordance with 11 U.S.C. §§ 365, 1123 and the Plan or to contest any cure amount proposed by Charter, including the "Cure Claim" asserted by Charter in Dkt. No. 2059.

V. Securities Litigation Plaintiffs

96. Holders of Claims against the Debtors in connection with the Securities Litigation, which Claims are subordinated pursuant to section 510(b) of the Bankruptcy Code, shall receive no distribution under the

Plan on account thereof, *provided* that such Claims shall be preserved solely to the extent of, and any recovery on account thereof shall be limited to, proceeds of available insurance, if any.

W. Discharge of Claims and Termination of Interests; Compromise and Settlement of Claims, Interests, and Controversies.

97. Pursuant to section 1141(d) of the Bankruptcy Code, and except as otherwise specifically provided in the Plan, this Confirmation Order, or in any contract, instrument, or other agreement or document created pursuant to the Plan, including the Plan Documents, the distributions, rights, and treatment that are provided in the Plan shall be in complete satisfaction, settlement, discharge, and release, effective as of the Effective Date, of Claims (including any Intercompany Claims resolved or compromised after the Effective Date by the Reorganized Debtors), Interests, and causes of action of any nature whatsoever, including any interest accrued on Claims or Interests from and after the Petition Date, whether known or unknown, against, liabilities of, liens on, obligations of, rights against, and interests in, the Debtors or any of their assets or properties, regardless of whether any property shall have been distributed or retained pursuant to the Plan on account of such Claims and Interests, including demands, liabilities, and causes of action that arose before the Effective Date, any contingent or non-contingent liability on account of representations or warranties issued on or before the Effective Date, and all debts of the kind specified in sections 502(g), 502(h), or 502(i) of

the Bankruptcy Code, in each case whether or not: (a) a Proof of Claim based upon such debt, right, or Interest is Filed or deemed Filed pursuant to section 501 of the Bankruptcy Code; (b) a Claim or Interest based upon such debt, right, or Interest is Allowed pursuant to section 502 of the Bankruptcy Code; or (c) the holder of such a Claim or Interest has accepted the Plan. Any default or "event of default" by the Debtors or their Affiliates with respect to any Claim or Interest that existed immediately before, or on account of, the filing of the Chapter 11 Cases shall be deemed cured (and no longer continuing) as of the Effective Date. The Confirmation Order shall be a judicial determination of the discharge of all Claims and Interests, subject to the Effective Date occurring.

98. Pursuant to Bankruptcy Rule 9019 and section 1123(b)(3) of the Bankruptcy Code, and in consideration for the classification, distributions, releases, and other benefits provided pursuant to the Plan, on the Effective Date, the provisions of the Plan, the Verizon Global Settlement, and the Zayo Settlement shall constitute a good faith compromise and settlement of all Claims (including those subject to the Investigation), causes of action, Interests, controversies, or issues relating to the contractual, legal, and subordination rights that a holder of a Claim or Interest may have with respect to any Allowed Claim or Allowed Interest, or any distribution to be made on account of such Allowed Claim or Allowed Interest, all as reflected in the Plan, the Verizon Global Settlement, and the Zayo Settlement.

99. Upon the Effective Date, except as otherwise provided by the Plan or this Confirmation Order, all ongoing litigation against the Debtors, including any contested matters in the Chapter 11 Cases (including the Investigation) pending as of the Confirmation Date, shall be deemed dismissed with prejudice.

X. The Releases, Injunction, Exculpation, and Related Provisions Under the Plan.

100. The releases, injunctions, exculpations, and related provisions set forth in Article VIII of the Plan are incorporated herein in their entirety, are hereby approved and authorized in all respects, are so ordered, and shall be immediately effective on the Effective Date without further order or action on the part of this Court or any other party. Notwithstanding anything to the contrary in this Confirmation Order or the Plan, the release, discharge and injunction provisions of the Confirmation Order and the Plan shall not waive, discharge, release, impair or otherwise affect any debts or other obligations of any non-Debtor Subsidiary of any Debtor, Reorganized Debtor, and/or any of their respective Estates to any Debtor, Reorganized Debtor, and/or any of their respective Estates.

101. Pursuant to Bankruptcy Rule 3020(c)(1), the following provisions of the Plan will be immediately effective on the Effective Date:

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Article VIII. Section F: EXCEPT AS OTHERWISE EXPRESSLY PROVIDED IN THE PLAN OR FOR OBLIGATIONS ISSUED OR REQUIRED TO BE PAID PURSUANT TO THE FINAL DIP ORDER, THE PLAN, OR THE CONFIRMATION ORDER, ALL ENTITIES WHO HAVE HELD, HOLD, OR MAY HOLD CLAIMS OR INTERESTS THAT HAVE BEEN RELEASED, DISCHARGED, OR ARE SUBJECT TO EXCULPATION ARE PERMANENTLY ENJOINED, FROM AND AFTER THE EFFECTIVE DATE, FROM TAKING ANY OF THE FOLLOWING ACTIONS AGAINST, AS APPLICABLE, THE DEBTORS, THE REORGANIZED DEBTORS, THE EXCULPATED PARTIES, OR THE RELEASED PARTIES: (A) COMMENCING OR CONTINUING IN ANY MANNER ANY ACTION OR OTHER PROCEEDING OF ANY KIND ON ACCOUNT OF OR IN CONNECTION WITH OR WITH RESPECT TO ANY SUCH CLAIMS OR INTERESTS; (B) ENFORCING, ATTACHING, COLLECTING, OR RECOVERING BY ANY MANNER OR MEANS ANY JUDGMENT, AWARD, DECREE, OR ORDER AGAINST SUCH ENTITIES ON ACCOUNT OF OR IN CONNECTION WITH OR WITH RESPECT TO ANY SUCH CLAIMS OR INTERESTS; (C) CREATING, PERFECTING, OR ENFORCING ANY ENCUMBRANCE OF

ANY KIND AGAINST SUCH ENTITIES OR THE PROPERTY OR THE ESTATES OF SUCH ENTITIES ON ACCOUNT OF OR IN CONNECTION WITH OR WITH RESPECT TO ANY SUCH CLAIMS OR INTERESTS; (D) ASSERTING ANY RIGHT OF SETOFF, SUBROGATION, OR RECOUPMENT OF ANY KIND AGAINST ANY OBLIGATION DUE FROM SUCH ENTITIES OR AGAINST THE PROPERTY OF SUCH ENTITIES ON ACCOUNT OF OR IN CONNECTION WITH OR WITH RESPECT TO ANY SUCH CLAIMS OR INTERESTS UNLESS SUCH HOLDER HAS FILED A MOTION REQUESTING THE RIGHT TO PERFORM SUCH SETOFF ON OR BEFORE THE EFFECTIVE DATE, AND NOTWITHSTANDING AN INDICATION OF A CLAIM OR INTEREST OR OTHERWISE THAT SUCH HOLDER ASSERTS, HAS, OR INTENDS TO PRESERVE ANY RIGHT OF SETOFF PURSUANT TO APPLICABLE LAW OR OTHERWISE; AND (E) COMMENCING OR CONTINUING IN ANY MANNER ANY ACTION OR OTHER PROCEEDING OF ANY KIND ON ACCOUNT OF OR IN CONNECTION WITH OR WITH RESPECT TO ANY SUCH CLAIMS OR INTERESTS RELEASED OR SETTLED PURSUANT TO THE PLAN.

102. Notwithstanding anything to the contrary in this Confirmation Order or the Plan (including the Releases set forth in the Plan), nothing contained in this Confirmation Order or the Plan shall impair, effect, modify, or release (a) postpetition Administrative Claims that are (1) Professional Fee Claims (subject to Allowance pursuant to the Plan and/or the Interim Compensation Order if such Claims have not already been allowed as of the Effective Date) or (2) Administrative Claims that may be Allowed for which requests for payment are timely Filed and served on the Reorganized Debtors pursuant to the procedures specified in this Confirmation Order and the notice of entry of the Confirmation Order no later than the Administrative Claims Bar Date, (b) Administrative Claims that are not required to be Filed and served on the Reorganized Debtors in accordance with Article II.A of the Plan and, in each case, that may be allowed, including, but not limited to, (1) Administrative Expense Claims incurred by the Estates in the ordinary course of business after the Petition Date, which are required, pursuant to the Plan, to be paid by the Debtors or the Reorganized Debtors, as applicable, in accordance with the terms and conditions of the particular transaction giving rise to such Claim in the ordinary course as set forth in Article II.A of the Plan, or (2) in accordance with the Claims Bar Date Order, a Claim allowable under sections 503(b) and 507(a)(2) of the Bankruptcy Code, asserted in accordance with the Claims Bar Date Order.

103. For the avoidance of doubt, SLF Holdings, LLC is not one of the Releasing Parties under the Plan and any claims or defenses of SLF Holdings, LLC against

the Uniti Parties (as defined in the Plan), Uniti Fiber Holdings, Inc., Uniti Group, Inc., Kenneth Gunderman, or John P. Fletcher, asserted in the litigation pending before the United States District Court for the District of Delaware styled SLF Holdings, LLC v. Uniti Fiber Holdings, Inc., C.A. No. 1:19-cv-01813-LPS are not subject to the release in Article VIII.D of the Plan and are not otherwise barred, released, prohibited or enjoined by the Plan, this Confirmation Order, the Restructuring Transactions, or other documents or transactions related thereto or approved pursuant to this Confirmation Order.

Y. Certain Government Matters.

104. As to any governmental unit (as defined in section 101(27) of the Bankruptcy Code) (a "*Governmental Unit*"), nothing in the Plan or Confirmation Order shall limit or expand the scope of discharge, release or injunction to which the Debtors or Reorganized Debtors are entitled to under the Bankruptcy Code, if any. In addition, the discharge, release, and injunction provisions contained in the Plan and Confirmation Order are not intended and shall not be construed to bar any Governmental Unit from, subsequent to the Confirmation Order, pursuing any police or regulatory action.

105. Notwithstanding anything to the contrary in this Confirmation Order or the Plan, with respect to the claims filed by certain taxing authorities (the "Taxing Authorities"),[4] the tax claims shall be paid by

4. The Taxing Authorities means the County of Anderson, Texas, Bell County Tax Appraisal District, Texas, the County

of Bosque, Texas, Bowie Central Appraisal District, Texas, the County of Brazos, Texas, Brown Central Appraisal District, Texas, The County of Callahan, Texas, the County of Cherokee, Texas, Cherokee Central Appraisal District, Texas, Eastland Central Appraisal District, Texas, the County of Comal, Texas, the County of Coryell, Texas, the County of Comanche, Texas, the County of Denton, Texas, the County of Erath, Texas, Floyd Central Appraisal District, Texas, the County of Freestone, Texas, Grimes Central Appraisal District, Texas, Groesbeck I.S.D., Texas, the County of Guadalupe, Texas, Harrison Central Appraisal District, Texas, the County of Harrison, Texas, the County of Hays, Texas, the County of Henderson, Texas, Hill Central Appraisal District, Texas, the County of Hill, Texas, Jasper County Tax Units, Texas, Lynn Central Appraisal District, Texas, Mexia I.S.D., Texas, Midland Central Appraisal District, Texas, the County of Milam, Texas, the County of Newton, Texas, Newton I.S.D., Texas, Reeves County Tax Districts, Texas, Shackelford County Appraisal District, Texas, Taylor County Central Appraisal District, Texas, City of Waco, Texas, the County of Wharton, Texas, the County of Williamson, Texas, the County of Leon, Texas, the County of Stephens, Texas, Terry County Appraisal District, Austin County Appraisal District, Chambers County Tax Office, Channelview Independent School District, City of Bellaire, City of Friendswood, Clear Creek Independent School District, Crosby Independent School District, Fort Bend County Levee Improvement District #2, First Colony Levee Improvement District, First Colony Municipal Utility District #9, Fort Bend Independent School District, Harris County Municipal Utility District #144, Harris County Municipal Utility District #149, Harris County Municipal Utility District #157, Harris County Municipal Utility District #165, Harris County Municipal Utility District #186, Harris County Municipal Utility District #264, Harris County Municipal Utility District #33, Harris County Municipal Utility District #342, Harris County Municipal Utility District #344, Harris County Municipal Utility District #49,

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Harris County Municipal Utility District #61, Harris County Municipal Utility District #70, Harris County Utility District #14, Harris County Water Control & Improvement District #145, Humble Independent School District, Klein Independent School District, La Porte Independent School District, Magnolia Independent School District, Northwest Harris County Municipal Utility District #16, San Jacinto County, Sheldon Independent School District, Sheldon Road Municipal Utility District, Spring Branch Independent School District, Spring Independent School District, West Sabine Independent School District, Woodlands Metro Center Municipal Utility District, Woodlands Road Utility District #1, Richardson Independent School District, Carrollton-Farmers Branch Independent School District, Dallas County Utility & Reclamation District, City of Garland, Garland Independent School District, Wylie Independent School District, Johnson County, City of Grandview, Grandview Independent School District, City of Godley, Godley Independent School District, Cleburne Independent School District, Joshua Independent School District, City Rio Vista, Rio Vista Independent School District, City of Cleburne, City of Burleson, Burleson Independent School District, Arlington Independent School District, City of Haslet, City of Haltom City, City Lake Worth, Crowley Independent School District, Mansfield Independent School District, City of Grapevine, Grapevine-Colleyville Independent School District, Kopperl Independent School District, Avalon Independent School District, Whitney Independent School District, Forney Independent School District, Mitchell County, City of Loraine, Loraine Independent School District, Colorado Independent School District, Nolan County, City of Blackwell, Blackwell Independent School District, Roscoe Independent School District, Somervell County, City of Glen Rose, Glen Rose Independent School District, City of Elkhart, Elkhart Independent School District, Zavalla Independent School District, Cass County, Houston County, Nacogdoches County, et al., Panola County, Tyler Independent School District, Trinity County, Trinity/Groveton

Consolidated Tax Office, Mineola Independent School District, Andrews County Tax Office, Andrews Independent School District, Cochran County Tax Office, Haskell County Appraisal District, Hockley County Tax Office, Kent County Appraisal District, Lubbock Central Appraisal District , Yoakum County Tax Office, Kimble County Appraisal District, Midland County, Buena Vista Independent School District, Kermit Independent School District, Wichita County Tax Office, Burkburnett Independent School District Tax Office, Iowa Park Tax Office, Archer County Tax Assessor/Collector, Young Central Appraisal District, Knox County Appraisal District, Montague County Appraisal District, Cooke County Appraisal District, Throckmorton County Appraisal District, Montague County Tax Office, Bellevue Independent School District, City of Chillicothe, Chillicothe Independent School District, Quanah Independent School District, Armstrong County Appraisal District, Briscoe County Appraisal District, Carson County Appraisal District, Carson County Tax Office, Dallam County Appraisal District, Gray County Tax Office, Hale County Appraisal District, Hall County Appraisal District, Hartley County Appraisal District, Hemphill County Tax Office, Canadian Independent School District, Lipscomb County Tax Office, Moore County Tax Office, Ochiltree County Appraisal District, Oldham County Appraisal District, Randall County Tax Office, Roberts County Appraisal District, Sherman County Appraisal District, Sherman County Tax Office, Ft. Elliott Consolidated Independent School District, Luling Independent School District, Copperas Cove Independent School District, Colorado County Appraisal District, Burleson County Tax Office, Falls County Tax Office, Rosebud-Lott Independent School District, Fayette County Appraisal District, City of Rosebud, Kendall Appraisal District, Kerr County Tax Office, Thorndale Independent School District, Cameron Independent School District, Buckholts Independent School District, Karnes County Tax Office, the Maricopa County Treasurer, the Texas Comptroller of Public Accounts, the Mississippi Department of Revenue, and the Pennsylvania Department of Revenue.

the Reorganized Debtors (a) within thirty (30) days of the Effective Date or as soon as reasonably practicable thereafter; or (b) in the ordinary course of business following the Effective Date as such tax debt becomes due and in the amounts billed in accordance with applicable state law. The Taxing Authorities shall retain statutory liens securing prepetition claims, if applicable, and postpetition claims, until such claims are paid in full. The Allowed Priority and Secured Claims of the Taxing Authorities shall include all accrued interest properly charged under applicable non-bankruptcy law through the date of payment of such Allowed Priority or Secured Claims. For the avoidance of doubt, with respect to any postpetition ad valorem or applicable state tax liabilities incurred by the Debtors after the Petition Date, the Taxing Authorities shall not be required to file an administrative expense claim and/or request for payment by the Administrative Expense Bar Date. All such postpetition taxes shall be paid in the ordinary course of business prior to delinquency under applicable state law. In the event of a default, the Taxing Authorities shall provide written notice of the default to Debtors' or Reorganized Debtors' counsel. If the default is not cured within thirty (30) days of receipt of the notice by paying the amount due together with interest at the applicable non-bankruptcy rate, the Taxing Authorities are authorized to take any and all collection actions in state court under applicable state law without further order of the Court.[5] Nothing in

5. The Texas Comptroller will continue to provide written notice of any post-confirmation tax delinquencies to the affected Debtor at its address on record with the Texas Comptroller, in accordance with its ordinary course of operations. With respect to

the Plan or this Confirmation Order shall be construed as an admission as to the validity of any claim asserted by the Taxing Authorities against the Debtors or a waiver of the Debtors' rights to subsequently dispute such claim on any grounds. The Debtors' and the Reorganized Debtors' (as applicable) rights and defenses under applicable state law and the Bankruptcy Code with respect to the foregoing are fully preserved.

106. Nothing contained in the Plan or Confirmation Order shall be deemed to determine the tax liability of any person or entity, including but not limited to the Debtors and the Reorganized Debtors, nor shall the Plan or Confirmation Order be deemed to have determined the federal tax treatment of any item, distribution, or entity, including the federal tax consequences of this Plan, nor shall anything in this Plan or Confirmation Order be deemed to have conferred jurisdiction upon the Bankruptcy Court to make determinations as to federal tax liability and federal tax treatment except as provided under 11 U.S.C. § 505.

107. Nothing in this Confirmation Order or the Plan discharges, releases, impairs, enjoins or otherwise precludes: (i) any liability to any Governmental Unit that is not a Claim as defined in 11 U.S.C. § 101(5); (ii) any Claim of any Governmental Unit arising on or after the Effective Date; (iii) any valid right of setoff or recoupment of any Governmental Unit against any of the Debtors; or (iv) any

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any post-confirmation liabilities, the Texas Comptroller reserves all rights to take any and all collection actions under applicable state law without further order of this Court.

police or regulatory liability to a Governmental Unit that any entity would be subject to as the owner, lessor, lessee or operator of property that such entity owns, operates or leases after the Effective Date, notwithstanding when conduct leading to liability under the Governmental Unit's police and regulatory power occurred or was discovered by the Governmental Unit. Nor shall anything in this Confirmation Order or the Plan enjoin or otherwise bar a Governmental Unit from asserting or enforcing, outside this Court, any liability described in the preceding sentence. Nothing in this Confirmation Order or the Plan divests any court, commission, or tribunal of jurisdiction to determine whether any liabilities asserted by any Governmental Unit are discharged or otherwise barred by this Confirmation Order, the Plan, or the Bankruptcy Code.

108. Moreover, nothing in the Confirmation Order or the Plan shall release or exculpate any non-debtor, including any Released Parties and/or Exculpated Parties, from any liability to any Governmental Unit, including but not limited to any liabilities arising under the Internal Revenue Code, applicable state tax codes, the environmental laws, or the criminal laws against the Released Parties and/or Exculpated Parties, nor shall anything in this Confirmation Order or the Plan enjoin any Governmental Unit from bringing any claim, suit, action or other proceeding against any non-debtor for any liability whatsoever; *provided* that the foregoing sentence shall not limit the scope of discharge granted to the Debtors under sections 524 and 1141 of the Bankruptcy Code.

Z. Post-Confirmation Notices, Professional Compensation, and Bar Dates.

109. In accordance with Bankruptcy Rules 2002 and 3020(c), no later than seven days (7) after the Effective Date, the Debtors shall cause a notice of Confirmation and occurrence of the Effective Date, substantially in the form attached hereto as **Exhibit 2** (the "*Notice of Confirmation and Effective Date*") to be served by United States mail, first-class postage prepaid, by hand, or by overnight courier service to all parties served with the Confirmation Hearing Notice. To supplement the notice procedures described in the preceding sentence, no later than fourteen (14) days after the Effective Date, the Reorganized Debtors must cause the Notice of Confirmation and Effective Date, modified for publication, to be published on one occasion in the *Wall Street Journal* and the *Arkansas-Democrat Gazette*. Mailing and publication of the notices described in this paragraph in the time and manner set forth in this paragraph will be good, adequate, and sufficient notice under the particular circumstances and in accordance with the requirements of Bankruptcy Rules 2002 and 3020(c). No further notice is necessary.

110. The Notice of Confirmation and Date will have the effect of an order of the Court, will constitute sufficient notice of the entry of this Confirmation Order and occurrence of the Effective Date to filing and recording officers, and will be a recordable instrument notwithstanding any contrary provision of applicable non-bankruptcy law.

111. Professionals or other Entities asserting a Professional Fee Claim for services rendered before the Effective Date must File an application for final allowance of such Professional Fee Claim no later than 45 days after the Effective Date. The Reorganized Debtors shall pay Professional Fee Claims in Cash in the amount this Court allows, including from the Professional Fee Escrow, which the Reorganized Debtors will establish in trust for the Professionals and fund with Cash equal to the Professional Fee Claims Estimate on the Effective Date and otherwise in accordance with the Plan.

112. Except as otherwise provided in the Plan, requests for payment of Administrative Claims, other than Administrative Claims arising under section 503(b)(9) of the Bankruptcy Code which were required to be Filed by the Claims Bar Date, must be Filed and served on the Debtors or the Reorganized Debtors, as applicable, no later than the Administrative Claims Bar Date. Holders of Administrative Claims that are required to File and serve a request for such payment of such Administrative Claims, but do not File and serve such a request by the Administrative Claim Bar Date shall be forever barred, estopped, and enjoined from asserting such Administrative Claims against the Debtors, the Reorganized Debtors or their property, and such Administrative Claims shall be deemed discharged as of the Effective Date without the need for any objection from the Debtors or the Reorganized Debtors, as applicable, or any action by the Court.

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AA.Release of Liens.

113. Except (a) with respect to the Liens securing (1) the New Exit Facility and (2) to the extent elected by the Debtors, with respect to an Allowed Other Secured Claim in accordance with, or (b) as otherwise provided in, the Plan or in any contract, instrument, release, or other agreement or document created pursuant to the Plan, on the Effective Date, all mortgages, deeds of trust, Liens, pledges, or other security interests against any property of the Estates, shall be fully released and discharged, and the holders of such mortgages, deeds of trust, Liens, pledges, or other security interests shall execute such documents as may be reasonably requested by the Debtors or the Reorganized Debtors, as applicable, to reflect or effectuate such releases, and all of the right, title, and interest of any holder of such mortgages, deeds of trust, Liens, pledges, or other security interests shall revert to the Reorganized Debtor and its successors and assigns.

BB.DIP Facilities Claims.

114. All DIP Facilities Claims shall be deemed Allowed as of the Effective Date in an amount equal to (a) the principal amount outstanding under the DIP Credit Agreement on such date, (b) all accrued and unpaid interest thereon to the date of payment and (c) all accrued and unpaid fees, expenses and noncontingent indemnification obligations payable under the DIP Credit Agreement and the DIP Orders.

115. Except to the extent that a holder of an Allowed DIP Facilities Claim agrees to a less favorable treatment, each Allowed DIP Facilities Claim, as well as any other fees, interest or other obligations owing to third parties under the DIP Credit Agreement and/or the DIP Orders, shall be indefeasibly paid in full, in Cash, by the Debtors on the Effective Date in accordance with the terms of the DIP Credit Agreement and the DIP Orders, including without limitation, the execution and delivery of a release agreement, on terms and conditions acceptable to the DIP Agent and the DIP Lenders, and contemporaneously with the foregoing payment and delivery of the release agreement, the DIP Facilities shall be deemed cancelled, all Liens on property of the Debtors and the Reorganized Debtors arising out of or related to the DIP Facilities shall automatically terminate, and all collateral subject to such Liens shall be automatically released, in each case without further action by the DIP Agent or the DIP Lenders and all guarantees of the Debtors and Reorganized Debtors arising out of or related to the DIP Facilities Claims shall be automatically discharged and released, in each case without further action by the DIP Agent or the DIP Lenders pursuant to the terms of the DIP Facilities. The DIP Agent and the DIP Lenders shall take all actions to effectuate and confirm such termination, release and discharge as reasonably requested by the Debtors or the Reorganized Debtors. For the avoidance of doubt, to the extent that any obligations under the DIP Credit Agreement and/or the DIP Orders remain unsatisfied as of the Effective Date, any unsatisfied claims thereunder shall not be released by the terms of this Plan until such obligations are indefeasibly paid in full, in Cash.

Appendix E

CC. Cancellation of Existing Securities and Agreements.

116. On the later of the Effective Date and the date on which distributions are made pursuant to the Plan (if not made on the Effective Date), except as otherwise specifically provided for in the Plan or set forth in the Description of Restructuring Transactions: (a) the obligations of the Debtors under the Credit Agreement, the First Lien Notes Indenture, the Midwest Notes Indenture, the Second Lien Notes Indentures, the Unsecured Notes Indentures, and any other certificate, equity security, share, note, bond, indenture, purchase right, option, warrant, or other instrument or document directly or indirectly evidencing or creating any indebtedness or obligation of or ownership interest in the Debtors giving rise to any Claim or Interest (except such agreements, certificates, notes, or other instruments or documents evidencing indebtedness or obligation of or ownership interest in the Debtors that are reinstated or amended and restated pursuant to the Plan), shall be cancelled solely as to the Debtors, and the Reorganized Debtors, the DIP Agent, JPMorgan Chase Bank, N.A. in its capacity as agent under the Credit Agreement (including Cortland Capital Market Services LLC, in its capacity as successor agent), the First Lien Notes Indenture Trustee, the Midwest Notes Indenture Trustee, the Second Lien Notes Indenture Trustees, and the Unsecured Notes Indenture Trustees shall not have any continuing duties or obligations thereunder and shall be discharged; and (b) the obligations of the Debtors pursuant, relating, or pertaining to any agreements, indentures, certificates of designation, bylaws or certificate or articles of incorporation or similar

documents governing the shares, certificates, notes, bonds, indentures, purchase rights, options, or other instruments or documents evidencing or creating any indebtedness or obligation of or ownership interest in the Debtors (except such agreements, certificates, notes or other instruments evidencing indebtedness or obligation of or ownership interest in the Debtors that are specifically reinstated, amended and reinstated, or entered into pursuant to the Plan) shall be released and discharged; except that the applicable indentures and credit agreements shall continue in effect solely for the purpose of: (i) allowing the applicable agents and indenture trustees to receive distributions from the Debtors and to make further distributions to the applicable holders of Claims (subject to any applicable charging liens, including any Second Lien Notes Indenture Trustee Charging Lien and any Unsecured Notes Indenture Trustee Charging Lien), and allowing such holders to accept distributions, on account of such Claims; (ii) preserving the applicable agents' and indenture trustees' rights to payment of fees and expenses, including any Second Lien Notes Indenture Trustee Fees and any Unsecured Notes Indenture Trustee Fees, and allowing the maintenance, exercise, and enforcement of any applicable charging lien, including any Second Lien Notes Indenture Trustee Charging Lien and any Unsecured Notes Indenture Trustee Charging Lien, for the payment of fees and expenses, including any Second Lien Notes Indenture Trustee Fees and any Unsecured Notes Indenture Trustee Fees, and for indemnification as against any money or property distributed to holders; (iii) preserving the right of applicable agents and indenture trustees to exculpation and indemnification

from the Debtors pursuant and subject to the terms of the applicable credit agreements and indentures; and (iv) preserving the applicable agents' and indenture trustees' right to appear and be heard in the Chapter 11 Cases or in any other proceeding in the Bankruptcy Court, including but not limited to enforcing any obligations owed to it under the Plan or Confirmation Order; *provided* that nothing in this Plan shall affect the discharge of Claims pursuant to the Bankruptcy Code, the Confirmation Order, or the Plan, or result in any liability or expense to the Reorganized Debtors.

117. On the Effective Date, each holder of a certificate or instrument evidencing a Claim that is discharged by the Plan shall be deemed to have surrendered such certificate or instrument in accordance with the applicable indenture or agreement that governs the rights of such holder of such Claim. Such surrendered certificate or instrument shall be deemed cancelled as set forth in, and subject to the exceptions set forth in the Plan. On and after the Effective Date, the duties and responsibilities of the indenture trustees under their respective indenture(s) shall be discharged and released, except (i) to the extent required to effectuate the Plan including, but not limited to, making distributions under the Plan to the holders of Allowed Claims under their respective indenture(s) and (ii) with respect to any rights of the First Lien Indenture Trustee, Midwest Notes Indenture Trustee, or the Second Lien Indenture Trustees to payment of fees, expenses, and indemnification obligations as against any money or property distributable to holders of the First Lien Claims under the First Lien Notes Indenture, Midwest

Notes Claims under the Midwest Notes Indenture, or to holders of the Second Lien Claims under the Second Lien Notes Indentures, as applicable, including any rights to priority of payment and/or to exercise charging liens. After the performance by the applicable agents' and indenture trustees and their respective representatives and professionals of any obligations and duties required under or related to the Plan or the Confirmation Order, the agents and the indenture trustees shall be relieved of and released from any obligations and duties arising thereunder.

DD.Return of Deposits.

118. All utilities, including any Person who received a deposit or other form of "adequate assurance" of performance pursuant to section 366 of the Bankruptcy Code during the Chapter 11 Cases (collectively, the "*Deposits*"), whether pursuant to the *Final Order (I) Prohibiting Utility Providers from Altering, Refusing, or Discontinuing Utility Services, (II) Determining Adequate Assurance of Payment for Future Utility Services, and (III) Establishing Procedures for Determining Adequate Assurance of Payment* [Docket No. 384] or otherwise, including, water, sewer service, telecommunications, data, cable, waste disposal, gas, electric, and other similar services, are directed to return such Deposits to the Reorganized Debtors, either by setoff against postpetition indebtedness or by Cash refund, on the Effective Date, and the Reorganized Debtors are also entitled to withdraw and keep any and all Deposits.

Appendix E

EE.Effect of Confirmation Order on Other Orders.

119. Unless expressly provided for herein, nothing in the Plan or this Confirmation Order shall affect any orders entered in the Chapter 11 Cases pursuant to section 365 of the Bankruptcy Code or Bankruptcy Rule 9019.

FF. Inconsistency.

120. In the event of any inconsistency between the Plan and the Disclosure Statement, the terms of the Plan shall control in all respects. In the event of any inconsistency between the Plan (including the Plan Supplement) and this Confirmation Order, this Confirmation Order shall govern. To the extent any provision of any final Plan Supplement document may conflict or is inconsistent with any provision in the Plan, the terms of the final Plan Supplement document shall govern and be binding and exclusive.

GG.Injunctions and Automatic Stay.

121. Unless otherwise provided in the Plan or in this Confirmation Order, all injunctions or stays in effect in the Chapter 11 Cases pursuant to sections 105 or 362 of the Bankruptcy Code or any order of the Court, and extant on this Confirmation Date (excluding any injunctions or stays contained in the Plan or the Confirmation Order) shall remain in full force and effect through and including the Effective Date. All injunctions or stays contained in the Plan or this Confirmation Order shall remain in full force and effect in accordance with their terms.

HH.Authorization to Consummate.

122. The Debtors are authorized to consummate the Plan and the Restructuring Transactions and finalize and implement the Plan Documents at any time after the entry of this Confirmation Order subject to satisfaction or waiver (by the required parties) of the conditions precedent to consummation set forth in Article IX of the Plan.

II. Substantial Consummation.

123. On the Effective Date, the Plan shall be deemed to be substantially consummated under section 1101(2) of the Bankruptcy Code.

JJ. No Waiver.

124. The failure to specifically include any particular Plan document or provision of the Plan or Plan Document in this Confirmation Order will not diminish the effectiveness of such document or Plan provision nor constitute a waiver thereof, it being the intent of this Court that the Plan is confirmed in its entirety, the Plan Documents are approved in their entirety, and all are incorporated herein by this reference.

KK.Severability.

125. Each term and provision of the Plan, as it may have been altered or interpreted in accordance with the foregoing, is: (a) valid and enforceable pursuant to its

terms; (b) integral to the Plan and may not be deleted or modified (including any Plan Document) without consent from the Debtors, the Required Consenting Creditors, and the Requisite Backstop Parties, and, to the extent required under section 3.02 of the Plan Support Agreement, the Required Consenting Midwest Noteholders; and (c) nonseverable and mutually dependent.

LL. Effect of Non-Occurrence of Effective Date.

126. If the Effective Date does not occur, the Plan shall be null and void in all respects and nothing contained in the Plan or the Disclosure Statement shall: (a) constitute a waiver or release of any Claims by or Claims against or Interests in the Debtors; (b) prejudice in any manner the rights of the Debtors, any holders of a Claim or Interest, or any other Entity; or (c) constitute an admission, acknowledgment, offer, or undertaking by the Debtors, any holders, or any other Entity in any respect.

MM. Dissolution of the Committee.

127. On the Effective Date, the Committee will dissolve; *provided* that following the Effective Date, the Committee shall continue in existence and have standing and a right to be heard for the following limited purposes: (a) applications, and any relief related thereto, for compensation by Professionals and requests for allowance of Administrative Expense Claims for substantial contribution pursuant to section 503(b)(3)(D) of the Bankruptcy Code; and (b) any appeals of the Confirmation Order or other appeal to which the Committee is a party. Upon the dissolution of the Committee, the Committee

Members and their respective Professionals will cease to have any duty, obligation, or role arising from or related to the Chapter 11 Cases and shall be released and discharged from all rights and duties from or related to the Chapter 11 Cases. The Reorganized Debtors shall not be responsible for paying any fees or expenses incurred by the Committee Members or advisors to the Committee after the Effective Date, except for the limited purposes identified above.

NN.Continued Effect of Stays and Injunction.

128. Unless otherwise provided in the Plan or this Confirmation Order, all injunctions or stays in effect in the Chapter 11 Cases under sections 105 or 362 of the Bankruptcy Code or any order of the Court that is in existence on the Confirmation Date shall remain in full force and effect until the Effective Date.

OO.Conditions to Effective Date.

129. The Plan shall not become effective unless and until the conditions set forth in Article IX of the Plan have been satisfied or waived pursuant to Article IX, Section B of the Plan. Each of the conditions set forth in Article IX of the Plan is reasonably likely to be satisfied or waived in accordance with the Plan.

PP. Assumption of Plan Support Agreement.

130. Upon entry of this Confirmation Order, the Plan Support Agreement will be deemed assumed by the Debtors pursuant to section 365 of the Bankruptcy Code.

Appendix E

QQ.Waiver of 14-Day Stay.

131. Notwithstanding any Bankruptcy Rule (including, without limitation, Bankruptcy Rules 3020(e), 6004(h), 6006(d), and 7062), this Confirmation Order is effective immediately and not subject to any stay, sufficient cause having been shown.

RR.Modification of Plan Supplement.

132. Subject to the terms of the Plan, this Confirmation Order and the Plan Support Agreement, the Debtors are authorized to modify and amend the Plan Supplement through and including the Effective Date, and to take all actions necessary and appropriate to effect the transactions contemplated therein through, including and following the Effective Date.

SS. Post-Confirmation Modification of the Plan.

133. The Debtors are hereby authorized to amend or modify the Plan at any time prior to the substantial consummation of the Plan, but only in accordance with section 1127 of the Bankruptcy Code and Article X, Section A of the Plan, without further order of this Court.

TT. Local Bankruptcy Rules 3021-1(b) and 3022-1

134. Pursuant to Local Bankruptcy Rule 3021-1(b), the time-table for achieving substantial consummation of the Plan and entry of a final decree closing the Chapter 11 Cases is as follows:

a. *Substantial Consummation of the Plan*. The Debtors anticipate that the Effective Date and substantial consummation of the Plan will occur in September 2020, or as soon as reasonably practicable thereafter.

b. *Distributions*. The Debtors or Reorganized Debtors, as applicable, in consultation with the Committee, as applicable, anticipate completing the distributions required under the Plan on or as soon as reasonably practicable after the Effective Date consistent with the provisions of Article IV of the Plan.

c. *Resolution of Claims*. The Debtors or Reorganized Debtors, as applicable, in consultation with the Committee, as applicable shall resolve Disputed Claims against the Debtors' Estates consistent with the provisions of Article VII of the Plan.

d. *Avoidance Actions*. Pursuant to Article IV, Section S of the Plan, as of the Effective Date, all Avoidance Actions shall be waived by the Debtors and the Reorganized Debtors and their respective Estates.

e. *Post-Confirmation Status Reports*. The Reorganized Debtors shall file post-Confirmation disbursement and status reports every six (6) months until the Chapter 11 Cases are closed by means of a final decree, converted to a case under chapter 7, or dismissed, whichever happens earlier.

f. *Motion for Final Decree*. Consistent with Bankruptcy Rule 3022 and Local Bankruptcy Rule 3022-1, within fourteen (14) days following the full administration of the Debtors' Estates, the Reorganized Debtors shall file, on notice to the United States Trustee, an application and a proposed order for a final decree.

UU.Retention of Jurisdiction

135. Notwithstanding the entry of this Confirmation Order, from and after the Effective Date, this Court shall, to the fullest extent legally permissible, retain exclusive jurisdiction over the Chapter 11 Cases and all matters arising under, arising out of, or related to, the Chapter 11 Cases, including all matters listed in Article IX of the Plan, as well as for the purposes set forth in section 1142 of the Bankruptcy Code. To the extent it is not legally permissible for the Court to have exclusive jurisdiction over any of the foregoing matters, the Court shall have non-exclusive jurisdiction over such matters to the fullest extent legally permissible. Notwithstanding anything to the contrary in this Confirmation Order or the Plan, from and after the Effective Date, the Court shall not retain jurisdiction over the Reorganized Windstream Organizational Documents except to the extent that this Confirmation Order has been vacated or reversed, but instead, such enforcement shall be governed as set forth in the Reorganized Windstream Organizational Documents, as applicable.

Appendix E

VV.Final Order.

136. This Confirmation Order is a Final Order and the period in which an appeal must be filed will commence upon entry of this Confirmation Order.

White Plains, New York
Dated: June 26, 2020

/s/ Robert D. Drain
THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

APPENDIX F — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED MAY 12, 2020 (EXHIBITS OMITTED)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11
Case No. 19-22312 (RDD)
(Jointly Administered)

In re:

WINDSTREAM HOLDINGS, INC., *et al.*

Debtors.

ORDER APPROVING THE SETTLEMENT BETWEEN THE DEBTORS AND UNITI, INCLUDING (I) THE SALE OF CERTAIN OF THE DEBTORS' ASSETS, PURSUANT TO SECTIONS 363(B) AND (F) OF THE BANKRUPTCY CODE AND (II) THE ASSUMPTION OF THE LEASE, AS MODIFIED, AND THE ASSUMPTION AND ASSIGNMENT OF CERTAIN CONTRACTS, PURSUANT TO SECTION 365 OF THE BANKRUPTCY CODE

Upon the motion (the "*Motion*") of Windstream Holdings, Inc. ("*Holdings*"), Windstream Services, LLC ("*Services*"), and their affiliates that are debtors and debtors in possession (each, a "*Debtor*" or "*Windstream Entity*" and, collectively, the "*Debtors*" or "*Windstream*") in the above-captioned cases (the "*Chapter 11 Cases*") for

entry of an order, pursuant to sections 105, 363, 364, and 365 of title 11 of the United States Code (the "*Bankruptcy Code*"), Rules 2002, 4001, 6004, 6006, and 9019 of the Federal Rules of Bankruptcy Procedure (the "*Bankruptcy Rules*") and the Local Bankruptcy Rules for the Southern District of New York (the "*Local Rules*"), (i) approving and authorizing (a) the Debtors to enter into and perform under the Settlement Agreement,[1] the CLEC Lease, the ILEC Lease, the APA, and any and all related Definitive Documentation, including, without limitation, mortgages, deeds, memoranda, financing statements, guaranties, certificates, and any other documentation that may be reasonably necessary or desirable to implement the transactions contemplated by the Settlement Agreement, the CLEC Lease, the ILEC Lease, and the APA, in each case as amended, restated, supplemented, or otherwise modified from time to time consistent with the terms hereof and thereof (collectively, the "*Settlement Documents*" and the transactions contemplated thereby, the "*Settlement Transactions*"), (b) the assumption and amendment of the Master Lease, (c) the assumption and assignment of certain executory contracts to Uniti, and (d) the transfer of certain assets to Uniti, (ii) granting protective liens on all of the property leased pursuant to the CLEC Lease (the "*CLEC Leased Property*") and all of the property leased pursuant to the ILEC Lease (the "*ILEC Leased Property*") to Uniti, and (iii) granting related relief; and the Court having jurisdiction to consider the Motion and the relief requested

1. The Settlement Agreement is attached hereto as ***Exhibit A***. Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Motion or the Settlement Agreement, as applicable.

therein pursuant to 28 U.S.C. §§ 157(a)-(b) and 1334(b) and the *Amended Standing Order of Reference M-431*, dated January 31, 2012 (Preska, C.J.); and consideration of the Motion and the relief requested therein being a core proceeding under 28 U.S.C. § 157(b); and venue being proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided, and it appearing that no other or further notice need be provided; and upon all of the pleadings filed in response to the Motion and the replies thereto; and the Court having held an evidentiary hearing to consider the relief requested in the Motion on May 7 and 8, 2020 (the "*Hearing*"); and upon the record of the Hearing and all of the proceedings herein; and after due deliberation and for the reasons stated by the Court in its bench ruling at the conclusion of the Hearing, the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish good and sufficient cause for the relief granted herein and that such relief is in the best interests of the Debtors, their estates, creditors and all parties in interest; now, therefore,

IT IS HEREBY FOUND AND CONCLUDED THAT:[2]

A. *Final Order.* This Order constitutes a final and appealable order within the meaning of 28 U.S.C. § 158(a).

2. The findings and conclusions set forth herein constitute the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent that any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

Notwithstanding Bankruptcy Rules 6004(h) and 6006(d), and to any extent necessary under Bankruptcy Rule 9014 and Federal Rule of Civil Procedure 54(b), as made applicable by Bankruptcy Rule 7054, there is no just reason for delay in the implementation of this Order or entry of judgment is directed as set forth herein.

B. *Debtors' Stipulations.* Effective as of the Settlement Effective Date (it being understood that if the Settlement Effective Date does not occur, the Debtors' stipulations contained in this paragraph B shall not be binding on the Debtors and shall not be admissible for any purpose in any judicial or administrative proceeding), the Debtors, on behalf of themselves, their estates, and any of their respective past, present and future predecessors, successors in interest and assigns, and any party acting or purporting to act on behalf of the foregoing including, for the avoidance of doubt, the Windstream Successors, admit, stipulate and agree that:

(i) *CLEC Lease*. The CLEC Lease is a "true lease" and is not a financing lease, capital lease, mortgage, equitable mortgage, deed of trust, trust agreement, security agreement or other financing or trust arrangement, or any other economic arrangement other than a true lease. The economic realities of the CLEC Lease are those of a true lease. The tenants under the CLEC Lease have only the temporary right of possession and use of the CLEC Leased Property upon the terms and conditions of the CLEC Lease. The business relationship created by the CLEC Lease and any related documents is and at all times was that of landlord and

tenant. None of the agreements contained in the CLEC Lease create a partnership between any Windstream Entity and any Uniti Entity, makes them joint venturers, makes any Windstream Entity an affiliate, agent, legal representative, partner, subsidiary, or employee of any Uniti Entity, or makes any Uniti Entity in any way responsible for the debts, obligations or losses of any Windstream Entity. The CLEC Leased Property does not constitute property of any of the Debtors' estates within the meaning of section 541(a) of the Bankruptcy Code. The tenants under the CLEC Lease have no interest in the CLEC Leased Property of any kind beyond that of a tenant. Ownership of the CLEC Leased Property is presently vested in the Uniti Entities.

(ii) *ILEC Lease*. The ILEC Lease is a "true lease" and is not a financing lease, capital lease, mortgage, equitable mortgage, deed of trust, trust agreement, security agreement or other financing or trust arrangement, or any other economic arrangement other than a true lease. The economic realities of the ILEC Lease are those of a true lease. The tenants under the ILEC Lease have only the temporary right of possession and use of the ILEC Leased Property upon the terms and conditions of the ILEC Lease. The business relationship created by the ILEC Lease and any related documents is and at all times was that of landlord and tenant. None of the agreements contained in the ILEC Lease create a partnership between any Windstream Entity and any Uniti Entity, makes them joint venturers, makes any Windstream Entity an affiliate, agent, legal representative, partner, subsidiary, or employee of any

Uniti Entity, or makes any Uniti Entity in any way responsible for the debts, obligations or losses of any Windstream Entity. The ILEC Leased Property does not constitute property of any of the Debtors' estates within the meaning of section 541(a) of the Bankruptcy Code. The tenants under the ILEC Lease have no interest in the ILEC Leased Property of any kind beyond that of a tenant. Ownership of the ILEC Leased Property is presently vested in the Uniti Entities.

(iii) *Protective Liens*. The Protective Liens (as defined below) on the CLEC Leased Property and ILEC Leased Property are valid, binding, enforceable, non-avoidable, and properly perfected and were granted to, or for the benefit of, Uniti for fair consideration and reasonably equivalent value.

C. *Findings Regarding the Settlement Documents*.

(i) The boards of directors of Holdings and Services have authorized the execution and delivery of the Settlement Documents. The Debtors and their affiliates (a) have full corporate power and authority to execute and deliver the Settlement Documents, and (b) have all of the power and authority necessary to consummate the Settlement Transactions. Holdings and Services have taken all action necessary to authorize and approve the Settlement Documents and to consummate the Settlement Transactions, and no further consents or approvals are required for the Debtors to consummate the Settlement Transactions except as otherwise set forth in the Settlement Documents.

(ii) The Settlement Documents were negotiated, proposed, and entered into by Holdings and Services, Uniti, the boards of directors of Holdings and Services, the board of directors of Uniti, and each of their respective members, officers, directors, employees, agents, attorneys, advisors, and representatives at arm's length, in good faith, and without collusion or fraud. The terms and conditions set forth in the Settlement Documents are fair and reasonable under the circumstances and are not being entered into for the purpose of, nor do they have the effect of, hindering, delaying, or defrauding any of the Debtors or any of their creditors under any applicable laws.

(iii) The consideration to be paid by Uniti under the Settlement Documents was negotiated at arm's length, in good faith, and without collusion or fraud and constitutes (a) fair and reasonable consideration and (b) reasonably equivalent value and fair and adequate consideration under the Bankruptcy Code, the Uniform Fraudulent Conveyance Act, the Uniform Fraudulent Transfer Act, the Uniform Voidable Transactions Act, and under the laws of the United States and each state, territory, and, possession, and the District of Columbia.

(iv) The Settlement Documents and the Settlement Transactions contemplated thereby, including the Releases (as defined below), the Bar Order (as defined below), and the other injunctive provisions contained herein barring certain claims against Uniti and certain related persons, (a) meet the standards applied by bankruptcy courts for the approval of a compromise and

settlement pursuant to Rule 9019, (b) are reasonable, fair and equitable and supported by adequate consideration, and (c) are in the best interests of the Debtors, their estates, their creditors, and all other parties in interest. Entry into the Settlement Documents and consummation of the Settlement Transactions represents the reasonable exercise of sound and prudent business judgment by the Debtors.

(v) The Settlement Transactions (subject to the conditions thereof including the sale of common stock under agreements with certain third parties) and the rights, interests, and obligations of each party to the Settlement Documents are mutually dependent and are all part of a single, integrated transaction which is not severable in any respect or circumstance.

(vi) Each of the Settlement Documents and the Settlement Transactions contemplated thereby is integral to the compromise and settlement of the Released Claims. The entry of this Order, including the Releases, the Bar Order, and the other injunctive provisions contained herein barring certain claims against Uniti and certain related persons, is a condition precedent to the effectiveness of the Settlement Documents and the receipt by the Debtors of the benefits conferred in the Settlement Documents.

D. *Findings Regarding the Released Claims.* The Released Claims are property of the Debtors' estates and personal to the Debtors, and the Debtors have the sole and exclusive authority to commence and prosecute

the Released Claims and any other matter arising out of the Released Claims, including without limitation any claims seeking to characterize the Master Lease, CLEC Lease, and/or ILEC Lease as anything other than a true lease. The Debtors have the exclusive right and authority to negotiate, settle, and release the Released Claims, including without limitation any claims seeking to characterize the Master Lease as anything other than a true lease, and, upon the effectiveness of the Releases, neither the Debtors nor any other person (including, for the avoidance of doubt, the Windstream Successors) shall have standing, direct or derivative, to commence or prosecute any Released Claim. All parties acting or purporting to act on behalf of the Debtors or their estates (including, for the avoidance of doubt, the Windstream Successors) shall be bound by the Releases and the Debtors' other stipulations, admissions, and agreements contained in this Order and in the Settlement Documents upon their effectiveness and no such party shall assert any Released Claim, including without limitation any claims seeking to characterize the Master Lease, CLEC Lease, and/or ILEC Lease as anything other than a true lease.

E. *Findings Regarding the Purchased Assets.*

(i) The Motion and the Assumption and Assignment Notice (as defined below) are reasonably calculated to provide counterparties to the IRU Contracts (as defined below) with proper notice of the intended assumption and assignment of their executory contracts, any Cure Amount (as defined below), and the Assumption and Assignment Procedures (as defined below).

(ii) The IRU Contracts and the other Windstream-owned assets to be assigned or transferred to Uniti pursuant to the Settlement Documents, including the APA (collectively, the "*Purchased Assets*" and, the assignment and transfer of the Purchased Assets, the "*Sale*") currently constitute property of the Debtors' estates within the meaning of section 541(a) of the Bankruptcy Code and title thereto is presently vested in the Debtors' estates.

(iii) Consummation of the Sale outside of a plan of reorganization neither impermissibly restructures the rights of the Debtors' creditors nor impermissibly dictates the terms of a plan of reorganization or liquidation for the Debtors.

(iv) Uniti is a "good faith purchaser" of the Purchased Assets within the meaning of section 363(m) of the Bankruptcy Code, and, as such, is entitled to all the protections afforded thereby.

(v) Uniti is not a continuation of the Debtors or their respective estates and Uniti is not holding itself out to the public as a continuation of the Debtors or their respective estates, and neither the Sale nor any other transaction contemplated by the Settlement Documents amounts to a consolidation, merger, or de facto merger of Uniti and the Debtors.

(vi) The Sale satisfies the applicable provisions of section 363(f) of the Bankruptcy Code such that Uniti will acquire the Purchased Assets free and clear of any and all liens, claims, interests, and encumbrances

of whatever kind or nature, and will not subject Uniti to any liability for any liens, claims, interests, and encumbrances whatsoever (including, without limitation, under any theory of equitable law, antitrust, or successor or transferee liability. All holders of liens, claims, interests, and encumbrances are adequately protected—thus satisfying section 363(e) of the Bankruptcy Code—by having their liens, claims, interests, and encumbrances, if any, attach to the proceeds of the Sale ultimately attributable to the property against or in which they assert liens, claims, interests, and encumbrances, or other specifically dedicated funds, in the same order of priority and with the same validity, force, and effect that such holder had prior to the Sale, subject to any rights, claims, and defenses of the Debtors or their estates, as applicable.

F. *Relief Is Warranted.* The legal and factual bases set forth in the Motion establish just and sufficient cause to grant the relief requested therein.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. The relief requested in the Motion is hereby granted as set forth herein. Any and all objections to the Motion not previously withdrawn, waived, settled or resolved as set forth herein, and all reservation of rights included therein, are hereby overruled.

2. The Debtors are authorized and directed to enter into the Settlement Documents pursuant to sections 105(a) and 363(b) of the Bankruptcy Code.

3. The Debtors are authorized and directed to fully perform their obligations under the Settlement Documents and to execute and deliver any and all such other instruments, documents, and agreements, and take any and all actions, necessary or appropriate to perform their obligations under the Settlement Documents.

Settlement Agreement

4. The settlements and compromises contained within the Settlement Agreement, including, without limitation, the releases set forth therein, as modified by paragraph 5 hereof (the "Releases"), are approved in their entirety pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019. All of the terms of the Settlement Agreement, including, without limitation, the Releases, are incorporated herein by reference as if fully set forth herein (and the failure to specifically describe or include herein any particular term or provision of the Settlement Agreement shall not diminish or impair the effectiveness of any such term or provision).

5. Notwithstanding anything to the contrary set forth in the Settlement Agreement, the term "Uniti Release Parties" shall be amended and restated to read as follows:

> "Uniti Release Parties" means, collectively, and in each case solely in its capacity as such, (i) the Uniti Entities, (ii) any current and former Affiliates of the Uniti Entities (other than the Debtors), and (iii) each of the Uniti Entities' and their current and former Affiliates' (other than

the Debtors') current and former directors, managers, officers, equity holders (regardless of whether such interests are held directly or indirectly), predecessors, successors, assigns, Affiliates, managed accounts or funds, and each of their respective current and former equity holders, officers, directors, managers, principals, shareholders, members, management companies, fund advisors, employees, agents, advisory board members, financial advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, and other professionals. The Windstream Release Parties and Uniti Release Parties, in their capacities as parties providing releases, are together referred as the "Releasing Parties" herein and the Windstream Release Parties and the Uniti Release Parties, in their capacities as parties receiving releases, are together referred as the "Released Parties" herein.

6. The Debtors are authorized to indemnify and hold harmless each of the Uniti Entities on the terms and conditions set forth in the Settlement Documents, without notice, hearing, or further order of this Court as, when, and to the extent such obligation becomes due and payable under the terms of the Settlement Documents. Such indemnities shall not be discharged, modified, or otherwise affected by any chapter 11 plan of the Debtors or related confirmation order, dismissal of these Chapter 11 Cases, or conversion of these Chapter 11 Cases to chapter 7 cases, nor shall any of such amounts be required to be disgorged.

Appendix F

Bar Order

7. Any party who is not a signatory to the Settlement Agreement, and each of these parties' direct and indirect parent companies, subsidiaries, affiliates, members, partners and joint ventures, each of their respective predecessors, successors, and assigns, and all of each of their respective past and present employees, general partners, officers, directors and managers, in each case to the extent not released under the Settlement Agreement (each, a "*Non-Settling Party*" and, collectively, the "*Non-Settling Parties*") is hereby permanently barred, enjoined and restrained from commencing, prosecuting, or asserting in this Court, in any federal or state court, or in any other court, arbitration proceeding, administrative agency, or other forum in the United States or elsewhere any claim for non-contractual indemnity or contribution against any Released Party arising out of or reasonably flowing from any of the Released Claims (including any non-contractual claim against such Released Party, whether or not brought for contribution or indemnity, where the injury to the Non-Settling Party is the liability of the Non-Settling Party to a Plaintiff (as defined below) on account of any Released Claims), whether arising under state, federal or foreign law as claims, cross-claims, counterclaims, or third-party claims (collectively, the "*Barred Claims*"). If a court or tribunal determines that Barred Claims exist that would have given rise to liability of any such Released Party to a Non-Settling Party but for this Order, the Non-Settling Party will also be entitled to the Judgment Reduction (as defined below) provisions set forth herein. This Order (the "*Bar Order*") is without

prejudice to the position of any party as to the existence, in the absence of this Bar Order, of any Barred Claim.

8. In the event any person acting on behalf of the Debtors' estates, including any successor to the Debtors (including any chapter 7 trustee or litigation trustee), any committee appointed in the bankruptcy cases or any estate representative appointed or selected pursuant to section 1123(b)(3) of the Bankruptcy Code (any of the above, a "*Plaintiff*") asserts a claim against any Non-Settling Party with respect to one or more causes of action based upon, arising from, or related to the facts, allegations, or transactions underlying any of the Released Claims (the "*Action*"), then, as soon as practicable but in any event prior to entry of any judgment or arbitration award ("*Judgment*") in the Action, the Plaintiff shall provide notice of this Bar Order to the court or tribunal hearing the Action if the Action is reasonably related to the Barred Claims. Such court or tribunal shall determine whether the Action gives rise to Barred Claims on which any Released Party would have been liable to the Non-Settling Party in the absence of this Bar Order. If the court or tribunal so determines, it shall reduce any Judgment against such Non-Settling Party in an amount equal to (a) the amount of the Judgment against any such Non-Settling Party times (b) the aggregate proportionate share of fault (expressed as a percentage) of the Released Party that would have been liable on a Barred Claim in the absence of this Bar Order expressed as a percentage of the aggregate fault of (i) the Non-Settling Party, (ii) such Released Party or Parties, and (iii) all other Persons determined by such court or tribunal to be liable to the

Plaintiff in connection with the Action, whether or not such Persons are sued in such Action ("*Judgment Reduction*"). Nothing herein shall prejudice or operate to preclude the right of any defendant in such Action to (x) provide notice of this Bar Order to the court or tribunal hearing the Action at any point, or (y) raise any issues, claims or defenses regarding judgment reduction or proportionate share of fault in the court or tribunal hearing the Action at any point in accordance with this Bar Order.

9. Nothing in this Bar Order shall prejudice or operate to preclude the rights of any Non-Settling Party to assert any claims or causes of action (including, without limitation, any direct or personal claims or causes of action), other than Barred Claims against any of the Parties as set forth above.

10. If any Plaintiff enters into a settlement with any Person with respect to one or more causes of action based upon, arising from, or related to the Released Claims or any transaction underlying any of the Released Claims, then such Plaintiff shall use reasonable efforts to cause to be included, and, in all events, the settlement shall be deemed to include, a dismissal, release and waiver of any Barred Claims with respect to such settlement.

11. Each Plaintiff is hereby enjoined and restrained from seeking relief or collecting judgments against any Non-Settling Party in any manner that fails to conform to the terms of this Bar Order, including, without limitation, the proportionate judgment reduction provision set forth herein.

12. Upon the Settlement Effective Date, the agreements contained in Section 13(b) of the Settlement Agreement create a legal, valid, binding, enforceable trust under the laws of the State of New York upon (i) any legal title or a beneficial interest that the Debtors or Windstream Successors may have in any of the MLA Leased Property, CLEC Leased Property, or ILEC Leased Property (collectively, the "*Subject Property*") and (ii) any right or interest that the Debtors or Windstream Successors may have in the Subject Property exceeding the tenant's existing temporary right of possession and use of the Subject Property. Upon the Settlement Effective Date, the Subject Property is not and shall not constitute property of any of the Debtors' estates within the meaning of section 541(a) of the Bankruptcy Code.

Protective Liens

13. In order to protect Uniti if, notwithstanding (a) the form and substance of the CLEC Lease and ILEC Lease as true leases of all of the CLEC Leased Property and ILEC Leased Property, (b) the intent of the parties thereto for the CLEC Lease and ILEC Lease to be true leases of all of the CLEC Leased Property and ILEC Leased Property, and (c) the findings of fact contained herein providing, among other things, that the CLEC Lease and ILEC Lease each create a true lease of all of the CLEC Leased Property and ILEC Leased Property, the CLEC Lease and/or ILEC Lease is ever treated in any context as a financing arrangement or otherwise not a true lease, as security for obligations owed to Uniti under the CLEC Lease and ILEC Lease, effective and perfected

upon the execution of the CLEC Lease and ILEC Lease and without the necessity of the execution, recordation or filing by Uniti of mortgages, security agreements, control agreements, pledge agreements, financing statements or other similar documents, Uniti is hereby granted, as of the Settlement Effective Date, a valid, binding, continuing, enforceable, fully-perfected first priority senior secured interest in and lien upon all of the CLEC Leased Property and ILEC Leased Property (the "*Protective Liens*") pursuant to section 364 of the Bankruptcy Code securing any and all claims Uniti asserts or may assert under or related in any way to the CLEC Lease and/or ILEC Lease. Such Protective Liens shall (i) be senior in all respects to any and all other liens on such property and (ii) not be discharged, modified, or otherwise affected by any chapter 11 plan of the Debtors or related confirmation order, dismissal of these Chapter 11 Cases, conversion of these Chapter 11 Cases to chapter 7 cases, or any other event other than payment in full in cash of any claims that Uniti asserts under or relating in any way to the CLEC Lease and/or ILEC Lease.

14. Uniti is hereby authorized, but not required, to file or record (and to execute in the name of Uniti, as their true and lawful attorneys, with full power of substitution, to the maximum extent permitted by law) financing statements, mortgages, notices of lien or similar instruments in any jurisdiction, or take any other action in order to validate and perfect the liens and security interests granted to them hereunder. Whether or not Uniti shall, in its sole discretion, choose to file such financing statements, mortgages, notices of lien or similar instruments, or

otherwise confirm perfection of the liens and security interests granted to them hereunder, such liens and security interests shall be deemed valid, perfected, allowed, enforceable, non-avoidable and not subject to challenge, dispute or subordination, at the time and on the date of entry of this Order.

15. A certified copy of this Order may, in the discretion of Uniti, be filed with or recorded in filing or recording offices in addition to or in lieu of such financing statements, mortgages, notices of lien or similar instruments, and all filing offices are hereby authorized and directed to accept such certified copy of this Order for filing and/or recording, as applicable.

16. If any or all of the provisions of this Order are hereafter reversed, modified, vacated or stayed, such reversal, modification, vacation or stay shall not affect: (i) the validity, priority or enforceability of any obligations under the Settlement Documents incurred prior to the actual receipt of written notice by Uniti of the effective date of such reversal, modification, vacation or stay; or (ii) the validity, priority or enforceability of the Protective Liens. Notwithstanding any such reversal, modification, vacation or stay of any Protective Liens incurred by the Debtors to Uniti, prior to the actual receipt of written notice by Uniti of the effective date of such reversal, modification, vacation or stay shall be governed in all respects by the original provisions of this Order, and Uniti shall be entitled to all the rights, remedies, privileges and benefits granted in section 364(e) of the Bankruptcy Code, this Order and the Settlement Documents with respect to all obligations under the Settlement Documents.

Appendix F

Assumption of Leases

17. Holdings is authorized and directed to assume the Master Lease and amend the Master Lease such that the Master Lease will be divided into the ILEC Lease and CLEC Lease pursuant to sections 105(a), 363(b), and 365(a) of the Bankruptcy Code, and all of the Debtors are authorized to become obligors/guarantors thereunder, in all events consistent with the Settlement Agreement. Holdings' assumption and amendment of the Master Lease is an exercise of its sound business judgment and is in the best interest of its estate and creditors.

Assumption and Assignment

18. The Debtors are authorized and directed to assume and assign the IRU Contracts to Uniti pursuant to sections 105(a) and 365 of the Bankruptcy Code and Bankruptcy Rule 6006, subject to the Assumption and Assignment Procedures and the terms of the APA.

19. The procedures set forth below regarding the assumption and assignment of the executory contracts proposed to be assumed by the Debtors pursuant to section 365(b) of the Bankruptcy Code and assigned to Uniti pursuant to section 365(f) of the Bankruptcy Code (the "*Assumption and Assignment Procedures*") are hereby approved to the extent set forth herein.[3] The

3. The Assumption and Assignment Procedures are substantially similar to the procedures contained in the *Order Authorizing and Approving Procedures to Reject or Assume Executory Contracts and Unexpired Leases* [Docket No. 393].

Assumption and Assignment Procedures shall govern the assumption and assignment of any and all executory contracts of the Debtors to be assumed and assigned to Uniti in connection with the Settlement Agreement (each, an "*IRU Contract*," and, collectively, the "*IRU Contracts*").

(a) *Assumption and Assignment Notice.* No later than three business days after entry of this Order (the "*Assumption and Assignment Service Deadline*"), the Debtors shall file and serve via overnight delivery on each counterparty to an IRU Contract a notice of assumption and assignment (the "*Assumption and Assignment Notice*"). The Assumption and Assignment Notice shall inform each recipient of the timing and procedures relating to such assumption and assignment, and, to the extent applicable, (i) the title of the IRU Contract, (ii) the name of the counterparty to the IRU Contract, (iii) a description of the type of IRU Contract, (iv) the date of the IRU Contract, (v) the Debtors' good faith estimate of the amount necessary to cure any default arising under the IRU Contract (as the same may be fixed pursuant to the Assumption and Assignment Procedures, the "*Cure Amount*"), (vi) the identity of the assignee, and (vii) the Assumption and Assignment Objection Deadline (as defined below); *provided*, *however*, that service of an Assumption and Assignment Notice does not constitute an admission that the agreement described therein is an executory contract or that the estimated Cure Amount constitutes a claim or right against the Debtors or any Uniti Entity, and the Debtors and Uniti expressly reserve their rights with respect thereto. Inclusion of an IRU Contract on the Assumption Notice is not a guarantee

that such IRU Contract will ultimately be assumed and/or assigned.

(b) *Cure Payments*. The payment of the Cure Amount by the Debtors to the counterparty to any IRU Contract shall be deemed to (i) effect a cure of any and all defaults existing in such IRU Contract, (ii) compensate such counterparty for any actual pecuniary loss to the counterparty resulting from such default, and (iii) subject to any additional requirement imposed under the Assumption and Assignment Procedures, together with the assumption of the IRU Contracts by the Debtors and the assignment of the IRU Contracts to Uniti, constitute adequate assurance of future performance under such IRU Contract. After the payment of the Cure Amount, neither the Debtors nor Uniti shall have any further liabilities to the counterparties to the IRU Contracts, other than Uniti's obligations under the IRU Contracts that accrue and become due and payable on or after the date that such IRU Contracts are assumed and assigned.

(c) *Additions*. Although the Debtors and Uniti intend to make a good faith effort to identify all IRU Contracts to be assumed and assigned, the Debtors and/or Uniti may discover certain executory contracts inadvertently omitted from the list of IRU Contracts to be assumed and assigned. Accordingly, the Debtors and Uniti reserve the right, at any time after the Assumption and Assignment Service Deadline and before the Settlement Effective Date, to (i) supplement the list of IRU Contracts with previously omitted executory contracts, (ii) remove executory contracts from the list of IRU Contracts,

and/or (iii) modify the previously stated Cure Amount associated with any IRU Contract. If the Debtors and/or Uniti exercise any of these reserved rights, the Debtors will promptly serve a supplemental notice of assumption and assignment (a "*Supplemental Assumption and Assignment Notice*") on each of the counterparties to such IRU Contracts and their counsel of record, if any. Each Supplemental Assumption and Assignment Notice will include the same information as was included in the Assumption and Assignment Notice.

(d) *Eliminations*. The Debtors and Uniti may agree to remove any executory contract to be assumed by the Debtors and assigned to Uniti at any time prior to the Settlement Effective Date. Upon the removal of any executory contract, the Debtors shall serve a notice on each of the impacted counterparties and their counsel of record, if any, indicating that the Debtors no longer intend to assume and assign the counterparty's contract to Uniti and such contract shall thereafter not constitute an IRU Contract.

(e) *Objections*. Objections, if any, to the proposed assumption and assignment, including to the Cure Amount must (i) be in writing, (ii) comply with the applicable provisions of the Bankruptcy Rules, the Local Rules, and the Case Management Order, (iii) state with specificity the nature of the objection and, if the objection pertains to the estimated Cure Amount, the Cure Amount alleged by the objecting counterparty to be the correct Cure Amount, together with any applicable and appropriate documentation in support thereof, and (iv) be filed with

the Court and served upon, so as to be actually received by, (w) counsel to the Debtors, (x) counsel to Uniti, and (y) any other party that has filed a notice of appearance in the Chapter 11 Cases, on or prior to 14 days after the Debtors file and serve the Assumption and Assignment Notice (the "*Assumption and Assignment Objection Deadline*") or any later deadline set forth in a Supplemental Assumption and Assignment Notice.

(f) *Dispute Resolution*. In the event that the Debtors and the contract counterparty cannot resolve any objection to the Debtors' proposed assumption and assignment, including the estimated Cure Amount, the Debtors shall segregate the disputed amount pending a resolution of the dispute by the Court or mutual agreement by the parties. Any objection that remains unresolved as of the next regularly-scheduled Omnibus Hearing shall be heard at such Omnibus Hearing (or at another date fixed by the Court or by mutual agreement of the Debtors and the IRU Contract counterparty).

(g) *Contract Assumption*. No IRU Contract shall be deemed assumed and assigned pursuant to section 365 of the Bankruptcy Code until the later of (i) the Settlement Effective Date and (ii) the date on which all objections to the applicable Cure Amount and/or to the proposed assumption and assignment of such IRU Contract have been resolved and the applicable Cure Amount has been paid or provided to be promptly paid by the Debtors.

(h) *Failure to Object*. Any counterparty failing to timely file an objection to the Cure Amount or the proposed

assumption and assignment of an IRU Contract listed on the Assumption and Assignment Notice is deemed to have consented to (a) such Cure Amount, (b) the assumption and assignment of such IRU Contract, and (c) the related relief requested in the Motion. Such party shall be forever barred and estopped from objecting to the Cure Amount, the assumption and assignment of the IRU Contract, adequate assurance of future performance, the relief requested in the Motion, whether applicable law excuses such counterparty from accepting performance by, or rendering performance to, Uniti for purposes of section 365(c)(1) of the Bankruptcy Code, and from asserting any additional cure or other amounts against the Debtors and any Uniti Entity, as applicable, with respect to such party's IRU Contract.

20. Upon the assumption and assignment of the IRU Contracts, the IRU Contracts shall be deemed valid and binding and in full force and effect in accordance with their respective terms, notwithstanding any provision in any such IRU Contract or applicable non-bankruptcy law (including of the type described in sections 365(b)(2) and (f) of the Bankruptcy Code) that prohibits, restricts, or conditions such assignment or transfer, or requires any counterparty to consent to assignment.

21. Pursuant to section 365(f) of the Bankruptcy Code, the assumption and assignment of the IRU Contracts to Uniti shall not be a default thereunder. After the payment or provision for prompt payment of the relevant Cure Amount as provided for herein, neither the Debtors nor Uniti shall have any further liabilities to the contract counterparties to the Assumed Contracts, other than

Uniti's obligations under the Assumed Contracts that accrue and become due and payable on or after the date that such Assumed Contracts are assumed.

22. Any provision in any assumed and assigned IRU Contract that prohibits or conditions the assignment of such IRU Contract or allows the party to such IRU Contract terminate, recapture, impose any penalty or condition on renewal or extension, purport to require the consent of any counterparty, or modify any term or condition upon the assignment of such IRU Contract constitute unenforceable anti-assignment provisions that are void and of no force and effect.

23. All counterparties to the IRU Contracts shall cooperate and expeditiously execute and deliver, upon the reasonable requests of Uniti, and shall not charge Uniti for, any instruments, applications, consents, or other documents which may be required or requested by any public or quasi-public authority or other party or entity to effectuate the applicable transfers in connection with the Sale.

Transfer of the Purchased Assets

24. The Debtors are authorized to (a) take any and all actions necessary or appropriate to perform, consummate, implement, and close the Sale in accordance with the terms and conditions set forth in the Settlement Documents and this Order and (b) take all further actions and execute and deliver the Settlement Documents and any and all additional instruments and documents that may be

necessary or appropriate to implement the Settlement Documents and consummate the Sale in accordance with the terms thereof, all without further order of the Court.

25. All persons and entities are prohibited and enjoined from taking any action to adversely affect or interfere with, or which would be inconsistent with, the ability of the Debtors to transfer the Purchased Assets to Uniti in accordance with the Settlement Documents and this Order.

26. Pursuant to sections 105 and 363 of the Bankruptcy Code, each of the Debtors is hereby authorized and directed to perform its obligations under the Settlement Documents, comply with the terms of the APA, and implement and consummate the Sale in accordance with the Settlement Documents and this Order.

27. On the Settlement Effective Date, all of the Debtors' right, title, and interest in and to, and possession of, the Purchased Assets shall be immediately vested in Uniti pursuant to sections 105(a), 363(b), 363(f), and 365 of the Bankruptcy Code. Such transfer shall constitute a legal, valid, binding, and effective transfer of the Purchased Assets. All persons or entities, presently or on or after the Settlement Effective Date, in possession of some or all of the Purchased Assets, are directed to surrender possession of any and all portions of the Purchased Assets to Uniti or its respective designees on the Settlement Effective Date or at such time thereafter as Uniti may request.

28. This Order (a) shall be effective as a determination that, as of the Settlement Effective Date, (i) no claims will be assertable against any of the Uniti Entities with respect to the Purchased Assets or against the Purchased Assets, (ii) the Purchased Assets shall have been transferred to Uniti free and clear of all liens, claims, interests, and encumbrances, and (iii) the conveyances described herein have been effected, and (b) is and shall be binding upon and govern the acts of all entities, including, without limitation, all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, registrars of deeds, administrative agencies, governmental departments, secretaries of state, federal and local officials, and all other persons and entities who may be required by operation of law, the duties of their office, or contract, to accept, file, register, or otherwise record or release any documents or instruments, or who may be required to report or insure any title or state of title in or to any lease; and each of the foregoing persons and entities is hereby directed to accept for filing any and all of the documents and instruments necessary and appropriate to consummate the transactions contemplated by the Settlement Documents. The Purchased Assets are sold free and clear of any reclamation rights. All liens, claims, interests, and encumbrances on the Purchased Assets shall attach to the proceeds of the Sale ultimately attributable to the property against which such liens, claims, interests, and encumbrances applied or other specifically dedicated funds, in the same order of priority and with the same validity, force, and effect that such liens, claims, interests, and encumbrances applied prior to the Sale, subject to any rights, claims, and defenses of the

Debtors or their estates, as applicable, or as otherwise provided herein.

29. Except as otherwise provided in the Settlement Documents, all persons and entities (and their respective successors and assigns), including, but not limited to, all debt security holders, equity security holders, affiliates, governmental, tax, and regulatory authorities, lenders, customers, vendors, employees, trade creditors, litigation claimants, and other creditors holding or asserting claims arising under or out of, in connection with, or in any way relating to, the Debtors, the Purchased Assets, and the ownership, Sale, or operation of the Purchased Assets prior to the Settlement Effective Date or the transfer of the Purchased Assets to Uniti, are hereby forever barred, estopped, and permanently enjoined from asserting such claims against Uniti, its property, or the Purchased Assets. Following the Settlement Effective Date, no holder of any claim or interest shall interfere with Uniti's title to or use and enjoyment of the Purchased Assets based on or related to any such claim or interest, or based on any action the Debtor may take in the Chapter 11 Cases.

30. If any person or entity that has filed financing statements, mortgages, mechanic's claims, *lis pendens*, or other documents or agreements evidencing claims against or in the Debtors or the Purchased Assets shall not have delivered to the Debtors prior to the Settlement Effective Date, in proper form for filing and executed by the appropriate parties, termination statements, instruments of satisfaction, releases of all claims that the person or entity has with respect to the Debtors or the Purchased

Assets or otherwise, then only with regard to the Purchased Assets that are purchased by Uniti pursuant to the Settlement Documents and this Order, then (a) the Debtors are hereby authorized and directed to execute and file such statements, instruments, releases, and other documents on behalf of the person or entity with respect to the Purchased Assets, (b) Uniti is hereby authorized to file, register, or otherwise record a certified copy of this Order, which, once filed, registered, or otherwise recorded, shall constitute conclusive evidence of the release of all liens, claims, interests, and encumbrances against Uniti and the Purchased Assets, and (c) upon consummation of the Sale, Uniti may seek in this Court or any other court to compel appropriate parties to execute termination statements, instruments of satisfaction, and releases of all claims and liens that are extinguished or otherwise released pursuant to this Order under section 363 of the Bankruptcy Code, and any other provisions of the Bankruptcy Code, with respect to the Purchased Assets. This Order is deemed to be in recordable form sufficient to be placed in the filing or recording system of each and every federal, state, or local government agency, department, or office. Notwithstanding the foregoing, the provisions of this Order authorizing the Sale and assignment of the Purchased Assets free and clear of claims and liens shall be self-executing and neither the Debtors nor Uniti shall be required to execute or file releases, termination statements, assignments, consents, or other instruments to effectuate, consummate, and implement the provisions of this Order.

Appendix F

No Successor or Transferee Liability

31. Neither Uniti nor any of its affiliates, members, officers, directors, shareholders, or any of their respective successors and assigns (each such entity individually and taken together, the "*Uniti Buyer Group*") shall be deemed, as a result of any action taken in connection with the Settlement Documents, the consummation of the Sale contemplated by the Settlement Documents, or the transfer, operation, or use of the Purchased Assets to (a) be a legal successor, or otherwise be deemed a successor to the Debtors (other than, for Uniti, with respect to any obligations as an assignee under the IRU Contracts arising after the Settlement Effective Date), (b) have, *de facto* or otherwise, merged with or into the Debtors, or (c) be an alter ego or a mere continuation or substantial continuation of the Debtors or the enterprise of the Debtors including, without limitation, within the meaning of any foreign, federal, state, or local revenue law, pension law, ERISA, tax law, labor law, products liability law, employment law, environmental law, or other law, rule, or regulation (including without limitation filing requirements under any such laws, rules or regulations), or under any products liability law or doctrine with respect to the Debtors' liability under such law, rule, or regulation.

32. Uniti shall not have any responsibility for (a) any liability or other obligation of the Debtors or related to the Purchased Assets other than as expressly set forth in the Settlement Documents or (b) any claims against the Debtors or any of their predecessors or affiliates. Except as expressly provided in the Settlement Documents with

respect to Uniti, Uniti shall have no liability whatsoever with respect to the Debtors' (or their predecessors' or affiliates') respective businesses or operations or any of the Debtors' (or their predecessors' or affiliates') obligations (as defined herein, "*Successor or Transferee Liability*") based, in whole or part, directly or indirectly, on any theory of successor or vicarious liability of any kind or character, or based upon any theory of antitrust, environmental, successor, or transferee liability, de facto merger or substantial continuity, labor and employment or products liability, whether known or unknown as of the Settlement Effective Date, now existing or hereafter arising, asserted or unasserted, fixed or contingent, liquidated or unliquidated, including liabilities on account of any taxes arising, accruing, or payable under, out of, in connection with, or in any way relating to the Purchased Assets prior to the Settlement Effective Date. Uniti shall have no liability or obligation under (a) the WARN Act (29 U.S.C. §§ 2101 *et seq.*), (b) the Comprehensive Environmental Response Compensation and Liability Act, (c) the Age Discrimination and Employment Act of 1967 (as amended), (d) the Federal Rehabilitation Act of 1973 (as amended), (e) the National Labor Relations Act (29 U.S.C. §§ 151 *et seq.*), or (f) any foreign, federal, state, or local labor, employment (including any rights under any pension, multiemployer plan (as such term is defined in section 3(37) or 4001(a)(3) of the Employee Retirement Income Security Act of 1974, health or welfare, compensation or other employee benefit plans, agreements, practices, and programs, including, without limitation, any pension plans of the Debtors or any multiemployer plan to which the Debtors have at any time contributed to or had any liability

or potential liability)) or environmental law, by virtue of Uniti's purchase of the Purchased Assets. Without limiting the foregoing, the Uniti Buyer Group shall have no liability or obligation with respect to any environmental liabilities of the Debtors or any environmental liabilities associated with the Purchased Assets arising prior to the Settlement Effective Date. Uniti shall have no liabilities on account of any taxes arising, accruing, or payable under, out of, in connection with, or in any way relating to the Purchased Assets prior to the Settlement Effective Date.

33. Effective upon the Settlement Effective Date, all persons and entities are forever prohibited and enjoined from commencing or continuing in any matter any action or other proceeding, whether in law or equity, in any judicial, administrative, arbitral, or other proceeding against Uniti or its assets (including the Purchased Assets), with respect to any (a) claim or (b) Successor or Transferee Liability including, without limitation, the following actions with respect to clauses (a) and (b): (i) commencing or continuing any action or other proceeding pending or threatened; (ii) enforcing, attaching, collecting, or recovering in any manner any judgment, award, decree, or order; (iii) creating, perfecting, or enforcing any lien, claim, interest, or encumbrance; (iv) asserting any setoff, right of subrogation, or recoupment of any kind; (v) commencing or continuing any action, in any manner or place, that does not comply with, or is inconsistent with, the provisions of this Order or other orders of this Court, or the agreements or actions contemplated or taken in respect hereof; or (vi) revoking, terminating, failing, or refusing to renew any license, permit, or authorization to

operate any business in connection with the Purchased Assets or conduct any of the businesses operated with respect to such assets.

Good Faith Purchaser

34. The Sale contemplated by the Settlement Documents is undertaken by Uniti without collusion and in good faith, as that term is defined in section 363(m) of the Bankruptcy Code, and accordingly, the reversal or modification on appeal of the authorization provided herein to consummate the Sale shall not affect the validity of the Sale, unless such authorization and consummation of such Sale are duly and properly stayed pending such appeal.

35. Neither the Debtors nor Uniti have engaged in any action or inaction that would cause or permit the Sale to be avoided or costs or damages to be imposed under section 363(n) of the Bankruptcy Code. The consideration provided by Uniti for the Purchased Assets under the Settlement Documents is fair and reasonable and the Sale may not be avoided under section 363(n) of the Bankruptcy Code.

Licenses

36. To the maximum extent permitted by applicable law, and in accordance with the Settlement Documents, Uniti shall be authorized, as of the Settlement Effective Date, to operate under any license, permit, registration, and governmental authorization or approval (collectively, the "*Licenses*") of the Debtors with respect to the Purchased

Assets. To the extent Uniti cannot operate under any Licenses in accordance with the previous sentence, such Licenses shall be in effect while Uniti, with assistance from the Debtors, works promptly and diligently to apply for and secure all necessary government approvals for new issuance of Licenses to Uniti. The Debtors shall maintain the Licenses in good standing to the fullest extent allowed by applicable law for Uniti's benefit until equivalent new Licenses are issued to Uniti.

37. To the extent provided by section 525 of the Bankruptcy Code, no governmental unit may revoke or suspend any permit or License relating to the Purchased Assets sold, transferred, or conveyed to Uniti on account of the filing or pendency of these chapter 11 cases or the consummation of the Sale contemplated by the Settlement Documents.

Settlement Binding

38. Effective as of the Settlement Effective Date, the Debtors' stipulations, admissions, agreements, and Releases contained in this Order and in the Settlement Documents, including, without limitation, in paragraph B of this Order, shall be binding upon the Debtors and any and all other parties in interest, including, without limitation, any party or entity which has intervened in the Adversary Proceeding, any statutory or non-statutory committees appointed or formed in these Chapter 11 Cases (including the official committee of unsecured creditors) and any other person or entity acting or seeking to act on behalf of the Debtors' estates, including any

chapter 7 or chapter 11 trustee or examiner appointed or elected for any of the Debtors, in all circumstances and for all purposes.

39. Uniti shall not be required to seek or obtain relief from the automatic stay under section 362 of the Bankruptcy Code to enforce any of its remedies under the Settlement Documents. The automatic stay imposed by section 362 of the Bankruptcy Code is modified solely to the extent necessary to implement the preceding sentence; *provided*, *however*, that this Court shall retain exclusive jurisdiction over any and all disputes with respect thereto.

40. The terms and provisions of the Settlement Documents and this Order shall be binding in all respects upon the Debtors, their affiliates, their estates, all creditors of (whether known or unknown) and holders of equity interests in any Debtor and any other stakeholder of any Debtor, any holders of claims against or on all or any portion of the Purchased Assets, all counterparties to the IRU Contracts, Uniti, and all of their respective successors and assigns including, but not limited to, any subsequent trustee(s), examiner(s), or receiver(s) appointed in any of the Chapter 11 Cases or upon conversion to Chapter 7 under the Bankruptcy Code, as to which trustee(s), examiner(s), or receiver(s) such terms and provisions likewise shall be binding. The Settlement Documents shall not be subject to rejection or avoidance by the Debtors, their estates, their creditors, their shareholders, or any trustee(s), examiner(s), or receiver(s). For the avoidance of doubt, the provisions and effect of this Order, and any actions taken pursuant to this Order

or the Settlement Documents and the Parties' respective rights, obligations, remedies and protections provided for herein and in the Settlement Agreement shall survive the conversion, dismissal or closing of the Chapter 11 Cases, appointment of a trustee therein, confirmation of a plan or plans of reorganization or liquidation, or the substantive consolidation of these Chapter 11 Cases with any other case or cases, and the terms and provision of this Order and the Settlement Documents shall continue in full force and effect notwithstanding the entry of any such order; *provided* that notwithstanding anything in this paragraph, the Settlement Agreement (including, without limitation, Section 8(a) of the Settlement Agreement), or in paragraph 49, the rights of all parties are fully reserved with respect to the allocation of any proceeds of the Settlement among the Debtors and regarding any objections to confirmation of the Debtors' chapter 11 plan, subject in any event to each party's rights as such rights would otherwise exist under applicable law.

41. For the avoidance of doubt, SLF Holdings, LLC is not one of the Releasing Parties under the Settlement Agreement and any claims or defenses of SLF Holdings, LLC against Uniti (as defined in the Motion), Uniti Fiber Holdings, Inc., Uniti Group, Inc., Kenneth Gunderman, or John P. Fletcher, asserted in the litigation pending before the United States District Court for the District of Delaware styled *SLF Holdings, LLC v. Uniti Fiber Holdings, Inc.*, C.A. No. 1:19-cv-01813-LPS are not Released Claims and are not otherwise barred, released, prohibited or enjoined by this Order, the Settlement Documents, the Settlement Transactions, or other

documents or transactions related thereto or approved pursuant to this Order.

42. Each and every federal, state, and local governmental agency, department, or official is hereby directed to accept any and all documents and instruments necessary and appropriate to consummate the transactions contemplated by the Settlement Documents.

43. Notwithstanding any other provision of this Order or any other Order of this Court, no sale, transfer or assignment of any rights and interests of the Debtor in any federal license or authorization issued by the Federal Communications Commission (the "FCC"), nor any sale, transfer or assignment of any Debtor assets subject to the prior authorization of the FCC, shall take place prior to the issuance of any FCC approval required for such sale, transfer or assignment pursuant to the Communications Act of 1934, as amended, and the rules and regulations promulgated thereunder. The FCC's rights and powers to take any action pursuant to its regulatory authority, including, but not limited to, imposing any regulatory conditions on such sales, transfers and assignments and setting any regulatory fines or forfeitures, are fully preserved, and nothing herein shall proscribe or constrain the FCC's exercise of such power or authority to the extent provided by law.

44. The Settlement Documents and the Sale contemplated thereunder shall not be subject to any bulk sales laws or any similar law of any state or jurisdiction.

45. The Settlement Documents may be modified, amended, or supplemented by the parties thereto in accordance with the terms thereof, without further order of the Court, provided that any such modification, amendment, or supplement does not, based on the Debtors' business judgment, have a material or an adverse effect on the Debtors' estates or their creditors. The Debtors shall provide counsel to the Consenting Creditors (as defined in the PSA) and counsel to the creditors' committee with prior notice of any such modification, amendment, or supplement of the Settlement Documents.

46. Section headings used herein are for convenience only and are not to affect the construction of or to be taken into consideration in interpreting this Order.

47. All time periods set forth in this Order shall be calculated in accordance with Bankruptcy Rule 9006(a).

48. Notwithstanding the possible applicability of Bankruptcy Rules 6004(h), 6006(d), 7062, and 9014 or any other Bankruptcy Rule, the terms and conditions of this Order shall be effective immediately upon entry and the Debtors and Uniti are authorized to consummate the transactions contemplated in the Settlement Documents immediately upon entry of this Order.

49. To the extent there is any conflict between the terms of this Order and the Settlement Documents, the terms of this Order shall control. Nothing contained in any plan of reorganization or liquidation hereinafter confirmed in these Chapter 11 Cases or any order confirming such

plan, or any other order of the Court, shall conflict with or derogate from the terms of the Settlement Documents or this Order.

50. The requirements set forth in Local Bankruptcy Rule 9013-1 are satisfied by the contents of the Motion.

51. The Debtors are authorized and empowered to take all actions necessary to implement the relief granted in this Order.

52. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation or interpretation of this Order.

Dated: White Plains, New York
May 13, 2020

/s/Robert D. Drain
THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

APPENDIX G — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED DECEMBER 16, 2022

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 21-1754

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of December, two thousand twenty-two.

In Re: WINDSTREAM HOLDINGS, INC.,

Debtor,

US BANK NATIONAL ASSOCIATION,

Appellant,

v.

WINDSTREAM HOLDINGS, INC.,

Debtor-Appellee.

Appendix G

ELLIOTT INVESTMENT MANAGEMENT L.P,
FIRST LIEN AD HOC GROUP,

Intervenors-Appellees.

ORDER

Appellant, US Bank National Association, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/

APPENDIX H — CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Article I

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all

Appendix H

Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings;-And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Appendix H

11 U.S.C. § 363

§ 363. Use, sale, or lease of property

(a) In this section, "*cash collateral*" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in *section 552(b) of this title*, whether existing before or after the commencement of a case under this title.

(b)

(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless—

(A) such sale or such lease is consistent with such

policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease—

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then—

(A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended—

(i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section; or

(iii) by the court after notice and a hearing.

(c)

(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1183, 1184, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section—

(1) in the case of a debtor that is a corporation or trust that is not a moneyed business, commercial corporation, or trust, only in accordance with nonbankruptcy law applicable to the transfer of property by a debtor that is such a corporation or trust; and

(2) only to the extent not inconsistent with any relief granted under subsection (c), (d), (e), or (f) of section 362.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this

section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before

the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(l) Subject to the provisions of section 365, the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter *11*, *12*, or *13* of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(o) Notwithstanding subsection (f), if a person purchases any interest in a consumer credit transaction that is subject to the *Truth in Lending Act* or any interest in a consumer credit contract (as defined in *section 433.1* of title 16 of the Code of Federal Regulations (January 1, 2004), as amended from time to time), and if such interest is purchased through a sale under this section, then such person shall remain subject to all claims and defenses that are related to such consumer credit transaction or such consumer credit contract, to the same extent as such

person would be subject to such claims and defenses of the consumer had such interest been purchased at a sale not under this section.

(p) In any hearing under this section—

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

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11 U.S.C. § 364

§ 364. Obtaining credit

(a) If the trustee is authorized to operate the business of the debtor under section 721, 1108, 1183, 1203, 1204, or 1304 of this title, unless the court orders otherwise, the trustee may obtain unsecured credit and incur unsecured debt in the ordinary course of business allowable under section 503(b)(1) of this title as an administrative expense.

(b) The court, after notice and a hearing, may authorize the trustee to obtain unsecured credit or to incur unsecured debt other than under subsection (a) of this section, allowable under section 503(b)(1) of this title as an administrative expense.

(c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt—

(1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;

(2) secured by a lien on property of the estate that is not otherwise subject to a lien; or

(3) secured by a junior lien on property of the estate that is subject to a lien.

(d)

(1) The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if—

(A) the trustee is unable to obtain such credit otherwise; and

(B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

(2) In any hearing under this subsection, the trustee has the burden of proof on the issue of adequate protection.

(e) The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

(f) Except with respect to an entity that is an underwriter as defined in section 1145(b) of this title, section 5 of the Securities Act of 1933, the Trust Indenture Act of

1939, and any State or local law requiring registration for offer or sale of a security or registration or licensing of an issuer of, underwriter of, or broker or dealer in, a security does not apply to the offer or sale under this section of a security that is not an equity security.

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11 U.S.C. § 1127

§ 1127. Modification of plan

(a) The proponent of a plan may modify such plan at any time before confirmation, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. After the proponent of a plan files a modification of such plan with the court, the plan as modified becomes the plan.

(b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

(c) The proponent of a modification shall comply with section 1125 of this title with respect to the plan as modified.

(d) Any holder of a claim or interest that has accepted or rejected a plan is deemed to have accepted or rejected, as the case may be, such plan as modified, unless, within the time fixed by the court, such holder changes such holder's previous acceptance or rejection.

(e) If the debtor is an individual, the plan may be modified at any time after confirmation of the plan but before the completion of payments under the plan, whether or not the plan has been substantially consummated, upon request of the debtor, the trustee, the United States trustee, or the holder of an allowed unsecured claim, to—

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

(2) extend or reduce the time period for such payments; or

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim made other than under the plan.

(f)

(1) Sections 1121 through 1128 and the requirements of section 1129 apply to any modification under subsection (e).

(2) The plan, as modified, shall become the plan only after there has been disclosure under section 1125 as the court may direct, notice and a hearing, and such modification is approved.

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28 U.S.C. § 157

§ 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)

(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims

against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)

(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy

judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

Appendix H

28 U.S.C. § 158

§ 158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees;

of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)

(1) The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that—

(A) there are insufficient judicial resources available in the circuit; or

(B) establishment of such service would result in undue delay or increased cost to parties in cases under title 11.

Not later than 90 days after making the finding, the judicial council shall submit to the Judicial Conference of the United States a report containing the factual basis of such finding.

(2)

(A) A judicial council may reconsider, at any time, the finding described in paragraph (1).

(B) On the request of a majority of the district judges in a circuit for which a bankruptcy appellate panel service is established under paragraph (1), made after the expiration of the 1-year period beginning on the date such service is established, the judicial council of the circuit shall determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(C) On its own motion, after the expiration of the 3-year period beginning on the date a bankruptcy appellate panel service is established under paragraph (1), the judicial council of the circuit may determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(D) If the judicial council finds that either of such circumstances exists, the judicial council may provide for the completion of the appeals then pending before such service and the orderly termination of such service.

(3) Bankruptcy judges appointed under paragraph (1) shall be appointed and may be reappointed under such paragraph.

(4) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(5) An appeal to be heard under this subsection shall be heard by a panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

(6) Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.

(c)

(1) Subject to subsections (b) and (d)(2), each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b)(1) unless—

(A) the appellant elects at the time of filing the appeal; or

(B) any other party elects, not later than 30 days after service of notice of the appeal;

to have such appeal heard by the district court.

(2) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d)

(1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

(2)

(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first

sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel—

(i) on its own motion or on the request of a party, determines that a circumstance specified

in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A);

then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

(C) The parties may supplement the certification with a short statement of the basis for the certification.

(D) An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal.

(E) Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.

Appendix H

28 U.S.C. § 1291

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Appendix H

28 U.S.C. § 1334

§ 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)

(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent

jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section *158(d)*, *1291*, or *1292* of this title or by the Supreme Court of the United States under *section 1254 of this title*. Subsection (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction—

(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.