No. 22-926

# In the Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION, PETITIONER

*v.*

WINDSTREAM HOLDINGS, INC. ET AL.

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

## BRIEF OF RESPONDENT ELLIOTT INVESTMENT MANAGEMENT L.P. IN OPPOSITION


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## CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondent Elliott Investment Management L.P. respectfully states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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## STATEMENT[1]

The Petition, like dozens of others before it, provides no basis for this Court take up petitioner's request to "abolish" the firmly established, decades-old doctrine of equitable mootness, which every circuit court of appeals has adopted. At its core, the doctrine of equitable mootness is a manifestation of this Court's directive that bankruptcy proceedings "are inherently proceedings in equity." *Katchen* v. *Landy*, 382 U.S. 323, 336 (1966). And it is an established principle of equity that equitable

[1] Respondent Elliott Investment Management L.P. (Elliott) joins the arguments in the Brief in Opposition of Respondents Windstream Holdings, Inc., *et al.* (Windstream Brief in Opp.), but writes separately to further address certain of petitioner's arguments.

relief must consider "the expectations of innocent parties." *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 375 (1977). Thus, an appellate court considering a request to set aside a plan of reorganization that has already been substantially consummated must necessarily consider whether doing so would be impractical or inequitable, especially to third parties who have already acted in reliance on the plan and its finality. In light of the appellate courts' universal agreement on this principle, this Court has repeatedly declined to consider issues like those presented by petitioner. There is even less reason to do so here; petitioner did not present to the court of appeals any of the questions on which it petitions for this Court's review, and equitable mootness would have barred the relief petitioner sought under any formulation of the doctrine.

Elliott will not reiterate the points that are already well made in the principal brief in opposition filed by Windstream. Rather, Elliott seeks to underscore the extent of the inequity that would be done to third parties like Elliott, who both accepted considerable impairment of their claims against the estate and invested considerable additional resources to enable Windstream to emerge successfully from bankruptcy and continue serving the customers of its communications business. Petitioner, in contrast to Elliott and other creditors, was not part of that solution.

Windstream's chapter 11 plan exemplifies how complex a successful exit from bankruptcy can be, and how parties like petitioner can threaten such a reorganization. Windstream's chapter 11 plan was the product of months of extensive negotiations, not only with Elliott, but with countless other third parties not before this

Court. As part of Windstream's confirmed and consummated plan, the capital structure and ownership structure of Windstream has been completely overhauled and hundreds of millions of dollars have been disbursed to creditors. The reorganized company has now been operating in the marketplace for more than two-and-a-half years under this court-approved new ownership and capital structure and has engaged in countless additional transactions in reliance thereon. These successes were possible only because first lien creditors like Elliott were willing to accept the cancellation of their liens and invest a total of $750 million in the reorganized entity. These transactions simply cannot be unwound or impaired without causing significant hardship and injustice to Windstream's current stakeholders. Petitioner seeks either to unscramble eggs that were thoroughly mixed nearly three years ago, or to participate in the success of a reorganized Windstream to which petitioner did not contribute.

Worse yet, as the lower courts held, petitioner made only a "sham" of an effort to stay consummation of these steps, which could not later be unwound on appeal. The combined effect of petitioner's own lack of diligence in protecting its interests, and the harm that petitioner's requested relief would impose on innocent third parties who contributed to Windstream's successful reorganization demonstrate that petitioner would not be entitled to equitable relief under any formulation of the equitable mootness doctrine, or even more general principles of equity. Even assuming that this Court might wish some day to consider the contours of the equitable mootness doctrine, this case does not afford the Court an appropriate opportunity to do so.

## REASONS FOR DENYING THE PETITION

### I. THE HARMS THAT PETITIONER'S APPEAL WOULD CAUSE THOSE WHO CONTRIBUTED TO WINDSTREAM'S SUCCESSFUL REORGANIZATION EXEMPLIFY WHY THE EQUITABLE MOOTNESS DOCTRINE EXISTS

As this Court has often observed, it "is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction." *Bank of Marin* v. *England*, 385 U.S. 99, 103 (1966); see also *Katchen* v. *Landy*, 382 U.S. 323, 336 (1966) (bankruptcy proceedings "are inherently proceedings in equity"). And it is equally well established that equitable relief must consider "the expectations of innocent parties." *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 375 (1977). Congress's grant of appellate jurisdiction over bankruptcy matters incorporates the "discretion that was part of the common-law background against which the statutes conferring jurisdiction were enacted." *New Orleans Pub. Serv., Inc.* v. *Council of the City of New Orleans*, 491 U.S. 350, 359 (1989).

The equitable mootness doctrine, which "is embraced in every circuit," 7 *Collier on Bankruptcy* ¶ 1129.09 n.6 (16th ed. 2020), is simply "an application of the age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties." *In re Envirodyne Indus., Inc.*, 29 F.3d 301, 304 (7th Cir. 1994) (Posner, J.); *In re Tribune Media Co.*, 799 F.3d 272, 287 (3d Cir. 2015) (Ambro, J., joined by Vanaskie, J., concurring) (quoting same); *Mac Panel Co.* v. *Virginia Panel Corp.*, 283 F.3d 622, 625 (4th Cir.

2002) ("[T]he doctrine of *equitable* mootness is a pragmatic principle, grounded in the notion that, with the passage of time after a judgment in equity and implementation of that judgment, effective relief on appeal becomes impractical, imprudent, and therefore inequitable.").

The successful exit of a debtor enterprise from bankruptcy is the paradigmatic circumstance in which equitable principles have priority. By definition, when a company enters bankruptcy, it is unable to pay all of its creditors. While some may have security or be entitled to priority that will permit their full recovery, many classes of creditors are left without assets against which to fully recover and thus will sustain some impairment of their rights. Chapter 11 proceedings, moreover, often involve hundreds, if not thousands, of parties in interest being thrust into a single forum and working on a compressed timeframe to achieve a comprehensive restructuring that maximizes value under the circumstances. See *Tribune Media Co.*, 799 F.3d at 288 (Ambro, J. concurring) (complex bankruptcies "reorganize thousands of relationships among countless parties").

Often, as here, in the absence of a significant infusion of new capital and reorganization of the capital structure, the debtor will be forced to liquidate, with even worse consequences for unsecured creditors and the many others, including employees, retirees, and the local community, who would suffer considerable loss if the entity were to dissolve. In this case, Windstream estimated that, under a liquidation scenario, even holders of administrative and priority claims would recover only 26.8% of their claims, first lien creditors would recover

only 8.7%, and second lien creditors would recover nothing. Bankr. Ct. Doc. 1813, Ex. B at 5. Unsecured creditors such as petitioner also would have recovered nothing. *Ibid.* Elliott held first lien claims against Windstream and was the estate's largest creditor. Pet. App. 27a. Thus, Elliott and others stood to lose a very significant, and perhaps all, of their stake in Windstream.

The Windstream plan of reorganization, which was negotiated over a lengthy period among many parties, presented an opportunity to avoid these catastrophic losses, including to Windstream's employees. But avoiding (or at least reducing) those harms required supporters to do far more than simply accept some impairment of their claims. Windstream could only emerge successfully from bankruptcy if there was a wholesale reorganization of its capital structure, and the infusion of significant new resources. First lien creditors, such as Elliott, stepped up to fill this need, not only accepting cancellation of their liens, but further contributing hundreds of millions of dollars in new liquidity into Windstream, in exchange for an equity stake in the reorganized entity.

More specifically, in furtherance of Windstream's restructuring involving nearly $6 billion in prepetition debt, and in reliance on the unstayed plan confirmation order, Elliott and various other creditors and stakeholders, as applicable:

- provided critical funding and liquidity for reorganized Windstream's go-forward telecommunications operations and plan payment obligations by participating in and backstopping a $750 million rights offering;

- entered into a new $2.5 billion senior secured term loan exit facility to provide additional funding for reorganized Windstream's operations and to fund plan distributions;
- entered into a new $750 million senior secured revolving credit exit facility, which included two letter of credit sub-facilities totaling $400 million;
- accepted newly issued equity in reorganized Windstream in partial satisfaction of secured claims, with all prior equity interests in Windstream canceled;
- accepted warrants and subscription rights with respect to additional equity interests in reorganized Windstream; and
- received cash payments or new debt instruments from reorganized Windstream on account of their claims.

Bankr. Ct. Doc. 2201, at 24-28.

These are heavily negotiated, intertwined, and intricate transactions on which Elliott and numerous third parties have relied and continue to rely. As the district court properly concluded, the "numerous complex transactions underlying the Plan" made it entirely impracticable to provide effective relief once the plan was substantially consummated. Pet. App. 21a.

More than 30 months have now passed since the plan was substantially consummated, and scores of additional transactions have taken place in reliance thereon. To attempt to unwind and nullify those transactions now

would not only be grossly inequitable, but practically impossible. As the district court held, "[d]isgorging 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." Pet. App. 23a. Petitioner has not offered a single viable remedy that could be fashioned that would not nullify or upset these transactions. Petitioner's initial gambit was to ask the appellate courts to blow up and unwind the Uniti settlement and plan of reorganization. After the numerous steps that accompanied the plan's going into effect, in which new money was invested and claims paid (that would not have been paid in a liquidation), that approach was a non-starter.

Only in its reply before the district court did petitioner offer as an alternative to take a share of the equity in the reorganized entity. Pet. App. 22a. In other words, after first lien creditors such as Elliott had invested new money in an effort to save and recover some value, petitioner, which had not made any similar new investment, suggested that it be granted a piece of the upside opportunity that it had no role in creating.

Abolishing the equitable mootness doctrine, as petitioner requests, would not simply work an inequitable outcome in the present bankruptcy, it would, in many other future cases, jeopardize the framework of restructurings and the objectives of bankruptcy law. If equitable principles are disregarded on the appellate level and junior, out-of-the-money creditors can threaten to unravel a confirmed plan and the restructuring transac-

tions consummated in reliance thereon without obtaining (or even seriously pursuing) a stay, lenders would be reluctant to provide financing, investors would be less willing to invest in a reorganized entity, and creditors would be less willing to negotiate claim settlements.

Eliminating equitable mootness "could effectively hold up emergence from bankruptcy for years" and "every day that a company remains in bankruptcy is a day when it will have a hard time attracting the investors, employees, and, in some industries, customers that it needs to exist and prosper." *Tribune Media Co.*, 799 F.3d at 288-289. Debtors would be forced to linger in bankruptcy until all appeals, regardless of the merits, are finally resolved while disgruntled appellants are able to effectively bypass the ordinary safeguards that a stay and supersedeas bond afford.

The equitable mootness doctrine thus aligns perfectly with basic bankruptcy principles and furthers Congress's intent to preserve finality in bankruptcy proceedings. See *In re Chateaugay Corp.*, 988 F.2d 322, 325 (2d Cir. 1993) ("[T]he ability to achieve finality is essential to the fashioning of effective remedies.").

As one court has aptly explained:

> [I]t is the reliance interests engendered by the plan, coupled with the difficulty of reversing the critical transactions, that counsels against attempts to unwind things on appeal. Every incremental risk of revision on appeal puts a cloud over the plan of reorganization, and derivatively over the assets of the reorganized firm. People pay less for assets that may be snatched back or otherwise affected by subsequent events. * * *

> By protecting the interests of persons who acquire assets in reliance on a plan of reorganization, a court increases the price the estate can realize *ex ante*, and thus produces benefits for creditors in the aggregate.

*In re UNR Indus., Inc.*, 20 F.3d 766, 769-770 (7th Cir. 1994) (J. Easterbrook); see also *In re Continental Airlines*, 91 F.3d 553, 565 (3d Cir. 1996) ("[T]he importance of allowing approved reorganizations to go forward in reliance on bankruptcy court confirmation orders may be the central animating force behind the equitable mootness doctrine.").

If the Court were to take up a case in order to consider the appropriate contours of the equitable mootness doctrine, it should do so in a circumstance in which the equities do not lie so decidedly on one side of the equation. Preserving, as the appellate courts did here, the benefit to third parties, such as Elliott, who made considerable new investments in order to facilitate Windstream's successful emergence from bankruptcy is an unremarkable exercise of well-established equitable principles. Petitioner thus does not present an appropriate case for this Court to evaluate the doctrine or its application.

## II. Petitioner's Failure To Exercise Diligence Also Makes This Case A Poor Vehicle For Reviewing The Equitable Mootness Doctrine

This case is an inappropriate vehicle for taking up the equitable mootness doctrine for the further reason that petitioner did not diligently pursue a stay of the bankruptcy court's confirmation order.

Petitioner appealed to the district court one week after the bankruptcy court entered the plan confirmation order, but then waited two months before requesting a stay. Pet. App. 5a. Even then, petitioner's stay request was procedurally improper. Instead of filing a motion, as required under Fed. R. Bankr. P. 8007, petitioner buried its stay request in a response to a separate motion filed by Windstream. *Ibid.* (petitioner's stay request was "awkwardly appended to an unrelated motion and demonstrated little serious effort to show that the requirements for issuing a stay were met").

Petitioner contends "there was no urgency to stay" because it believed it "unlikely that the Plan could be consummated before the district court ruled on the appeals." Pet. 13. But petitioner's feigned surprise at the timing of the plan effective date is at odds with the facts. Windstream stated on the record during its confirmation hearing that it intended to consummate the plan in late August or early September 2020, and the Confirmation Order expressly provides that "Debtors anticipate that the Effective Date and substantial consummation of the Plan will occur in September 2020." Pet. App. 140a. Windstream consummated the plan on the precise schedule announced to petitioner from the outset.

Requesting a stay in a timely fashion was also not a "pointless" endeavor as petitioner claims, particularly since the law is clear on the importance of seeking such relief when appealing a confirmation order. Pet. 28. Chapter 11 debtors have no incentive to voluntarily delay their own restructuring, to the detriment of potentially thousands of other stakeholders relying on the debtor's fresh start under a confirmed plan, just to facilitate an attack by an out-of-the-money creditor.

The bankruptcy court considered petitioner's stay request despite the procedural infirmities and late timing, but recognized the significant harm a delay in consummation would cause Windstream, its go-forward business, and various creditors and third parties. Bankr. Ct. Doc. 2520, at 24-26. The court advised petitioner that concern over these potential harms "could potentially be ameliorated by the issuance of a bond" pending appeal. *Id.* at 25 (also discussing similar bond requirements in other large bankruptcies, necessitated by the risks to parties in interest "in the event of the denial of the appeal" and "the harm to the Debtors' estates from their plan not going effective"). But petitioner made "no offer of posting such a bond." *Ibid.*

Petitioner had the means to diligently pursue a stay of Windstream's plan and restructuring transactions before all parties' reliance interests became vested. But petitioner delayed an unreasonable length of time, made a belated "half-hearted" attempt at a stay in a procedurally improper pleading, and never offered to post a bond to protect Windstream and third parties. Pet. App. 5a. Even now, petitioner continues to act with little urgency, waiting until the end of the ninety-day period allowed under this Court's rules before filing its petition for a writ of certiorari.

Equity aids the vigilant, and it is remarkable that petitioner now seeks to eradicate a cornerstone equitable principle and unravel the plan and multiple restructuring transactions when it chose to not diligently protect its rights. Litigants that take such a dilatory approach to bankruptcy appeals assume the risk that their appeals will be declared equitably moot. See, e.g., *In re SemCrude L.P.*, 456 F. App'x 167, 171 (3d Cir. 2012)

(non-precedential) ("[I]t is obligatory upon appellant . . . to pursue with diligence all available remedies to obtain a stay of execution of the objectionable order (even to the extent of applying to the Circuit Justice for relief . . .), if the failure to do so creates a situation rending [sic] it inequitable to reverse the orders appealed from.") (brackets in original) (internal quotations omitted); *In re Public Serv. Co. of N.H.*, 963 F.2d 469, 473 (1st Cir. 1992) (the "absence of a stay allowed performance under the PSNH reorganization plan to proceed to a point well beyond any practicable appellate annulment").

Petitioner's own failure to exercise diligence in seeking a stay that could have ameliorated the inequity of appellate relief makes this an exceptionally poor case for this Court to take up the issue of equitable mootness.

## CONCLUSION

For the foregoing reasons, as well as those in the Windstream Brief in Opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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