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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
WINDSTREAM HOLDINGS, INC., et al.,	Case No. 19-22312 (RDD)
Debtors.	(Joint Administration Requested)

OBJECTION OF GLM DFW, INC. TO DEBTORS' MOTION FOR AUTHORITY TO PAY CRITICAL VENDORS AND LIEN CLAIMANTS

COMES NOW GLM DFW, Inc. ("GLM"), a creditor in the above styled and numbered bankruptcy case (the "Bankruptcy Case"), and files this *Objection* (the "Objection") to the *Debtors' Motion for Entry of Interim and Final Orders Authorizing the Debtors to Pay Certain Prepetition Claims of (i) Critical Vendors; (ii) Lien Claimants, and (iii) Section 503(b)(9) Claimants in the Ordinary Course of Business On a Postpetition Basis* (the "Motion"), filed by Windstream Holdings, Inc. and its affiliated debtors and debtors-in-possession (the "Debtors"), respectfully stating as follows:

I. SUMMARY OF OBJECTION

1. The relief requested in the Motion violates three fundamental policies on which the Bankruptcy Code and this Court's jurisdiction rest: equality of creditors, transparency, and non-delegation of judicial functions, not to mention the due process rights of GLM and thousands of other creditors. At some point no business is so important, and no vendor is so

critical, and no emergency is so dire, as to do away with principles. Yet that is what the Debtors basically ask this Court to do – to let the Debtors decide, in their own unchecked discretion, to pay more than $170 million of unidentified prepetition debt. If prepetition debt is to be paid under the doctrine of necessity, then the Debtors must present their evidence to this Court, GLM and other creditors must have the ability to test that evidence and make argument, and this Court, rather than the Debtors, must decide who is and who is not a "critical" vendor. Anything less is inequitable and unconstitutional.

II. PROCEDURAL BACKGROUND

2. The Debtors filed their voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on February 25, 2019 (the "Petition Date").

3. The Debtors remain in possession of their estates. No trustee or examiner has been appointed.

4. The Court has jurisdiction over the Motion and this Objection under 28 U.S.C. § 1334. Such jurisdiction is core under 28 U.S.C. § 157(b)(2). GLM has no information, and takes no position, regarding whether venue in this District is appropriate.

III. FACTUAL BACKGROUND

5. GLM is a small business located in Dallas, Texas, in existence for almost 30 years. It holds a double minority status and is basically a family business.

6. GLM is a waste management broker, specializing in coordinating for its clients efficient and cost-effective waste removal and recycling programs. As relevant to this Objection, GLM obtains the most competitive waste management prices for its clients because it knows what the best rates obtainable are and because it has business dealings in place with the third-party waste and trash haulers such as Republic and Waste Management. In other words, it is one thing for a local branch manager to call a local trash hauler and be quoted a one-off price. The

manager will not know what an appropriate rate should be or how large a bin or unit to rent, and the hauler will be able to command a premium. It is another thing for GLM to call the haulers for the client at all the client's locations and to (usually) get far better pricing because GLM is highly knowledgeable about, and in tune with, the waste removal business, GLM can aggregate all locations into one unified invoice and business proposition, and because GLM can have the haulers essentially bid against each other.

7. Commencing in approximately 2016, the Debtors opened a request for proposal (RFP) process for a waste management broker. The RFP process was fraught with difficulties because the Debtors' centralized management did not have accurate information as to the hundreds of individual sites needing service and the servicers for the same, whether contracts were in place, what the pricing was, etc. GLM won this process and obtained the right to broker waste removal services for the Debtors at approximately 610 physical locations nationwide. Specifically, on February 12, 2018, GLM entered into that service *Waste Management Services Agreement* (the "Agreement") with Windstream Services, LLC to provide services to that entity and its affiliates; *i.e.* the Debtors. GLM immediately began providing its services, already saving the Debtors substantial sums, and has been able to finalize changes to less than half of the Debtors' locations as of this filing.

8. Thus, at present there are generally two types of arrangements involving GLM and the third party haulers. For the majority of locations, the Debtors still have in place with the haulers whatever prior business arrangements they had before GLM, but the billing has been switched over to GLM (in order for GLM to audit hundreds of individual bills and aggregate them). For the other locations, service has been switched over to GLM pursuant to its business arrangements with the haulers. In all instances, however, the haulers look to GLM to pay them: GLM is essentially a pass-through whereby GLM pays the haulers and then the Debtors

reimburse GLM (and pay fees to GLM). From the Debtors' perspective, GLM floats them the costs of trash removal.[1] As of the Petition Date, GLM was owed approximately $200,000 by the Debtor for these amounts, in addition to other amounts owed under the Agreement that are of less urgency.

9. The problem is that GLM, a very small company, lacks the funds to pay the haulers if the Debtors do not pay GLM. It does not matter that the Agreement may be an executory contract and that GLM is obligated to continue providing services postpetition—GLM will continue providing its services the best it can, but it cannot print money and without money it cannot pay the haulers.[2] Those haulers, in many instances having no contract with the Debtors and likely not being section 366 "utilities," will simply discontinue service. Even if the Debtors succeed in enforcing section 366 rights against them, by the time that the Debtors do so at hundreds of different locations service will likely have been interrupted, there will likely be governmental regulatory action, and the Debtors will have spent tens or hundreds of thousands of dollars in attorney's fees and replacement and cover costs.

IV. ARGUMENT AND AUTHORITIES

A. CRITICAL VENDOR STANDARDS NOT MET

10. The relief requested in the Motion is, without hyperbole, extraordinary and seemingly unprecedented. All critical vendor motions are extraordinary in that they rely on the doctrine of necessity. However, the Debtors' Motion—that does not disclose who the critical vendors are, that gives no opportunity for particularized analysis and objection, that keeps the whole matter *in camera*, and that allows the Debtors to decide who is a critical vendor in their absolute discretion without judicial oversight—that appears to be unprecedented. Even more

[1] The Debtors failed to pay GLM funds due upon signing of the Agreement, which has led to the present float in arrears, as opposed to the specified prepayment, and GLM reserves all rights with respect to the same.

[2] Nor can the Debtors enforce or assume an executory contract to advance funding. 11 U.S.C. § 365(c)(2).

puzzling is the sheer size of the relief sought in the Motion; namely, the payment of more than $180 million in prepetition claims even as the Debtors inform this Court of their desperate need for immediate liquidity – in fact, the Debtors seek to pay some 20% of their Petition Date accounts payable. Motion at p. 7 ¶15. Critical vendor relief is intended to ensure the continuing business operations of a struggling debtor-in-possession that is otherwise unable to obtain irreplaceable critical postpetition services. It is not intended to favor certain vendors or to confer on a debtor unfair business leverage.

11. As the Court knows, the equality of creditors of similar priority is a cornerstone policy of the Bankruptcy Code. *See, e.g., Begier v. IRS*, 496 U.S. 53, 58 (1990). This policy is so strong that the Court can force innocent creditors who received lawful prepetition payments to have to pay those payments back as preferences. The Motion upsets this fundamental policy because the Debtors propose to pay certain otherwise unsecured creditors in par or in full immediately, while others like GLM will have to wait months or years, and are highly unlikely to see a full recovery. It therefore goes without saying that, whether the Bankruptcy Code even authorizes a preconfirmation payment to an unsecured creditor under any circumstances is disputable and contentious:

> Section 105(a) allows a bankruptcy court to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the Code. This does not create discretion to set aside the Code's rules about priority and distribution; the power conferred by § 105(a) is one to implement rather than override. Every circuit that has considered the question has held that this statute does not allow a bankruptcy judge to authorize full payment of any unsecured debt, unless all unsecured creditors in the class are paid in full.

In re Kmart Corp., 359 F.3d 866, 871 (7th Cir. 2004). *Accord Official Committee of Equity Sec. Holders v. Mabey*, 832 F.2d 299, 302 (4th Cir. 1987) ("The Bankruptcy Code does not permit a distribution to unsecured creditors in a Chapter 11 proceeding except under and pursuant to a plan of reorganization that has been properly presented and approved. . . The clear language of

these statutes, as well as the Bankruptcy Rules applicable thereto, does not authorize the payment in part or in full, or the advance of monies to or for the benefit of unsecured claimants prior to the approval of the plan of reorganization").

12. There is no need for the Court to decide this ultimate issue, because the relief sought by the Debtors fails under any judicially recognized standards governing the doctrine of necessity. Assuming that the Bankruptcy Code authorizes the payment of prepetition unsecured debt to a critical vendor, the standard must be a high one and it must, at a minimum, require that: (i) the vendor be so critical that the failure to continue using that vendor will seriously and irreparably jeopardize the reorganization; (ii) the debtor has no meaningful alternative to obtain a replacement vendor; and (iii) the vendor will refuse to provide postpetition goods or services without payment of the prepetition claim. Anything less would result in a question not of necessity, but of convenience, as long ago held by this Court. *See In re Financial News Network Inc.*, 134 B.R. 732, 736 (Bankr. S.D.N.Y. 1991) (under the facts of that case, to "allow the payment would be to read the doctrine as one of convenience rather than necessity").

13. Or, stated differently, "[e]ven if a vendor is critical to the success of the debtor, the court cannot allow the position to be abused. Critical vendor status must take into account the rights of all of the creditors of the estate and the remedy must be crafted to the circumstances of the case . . . but not a windfall." *In re United Am. Inc.*, 327 B.R. 776, 784 (Bankr. E.D. Va. 2005). This is especially because of the bedrock bankruptcy policy of the equality of creditors—it is quite something to tell a large group of creditors that they cannot get paid now, and may never get paid, while a select few—otherwise of equal rights and priorities—are paid immediately and in full.

14. Those courts which accord critical vendor status, under the doctrine of necessity, therefore set a high bar:

> First, it must be critical that the debtor deal with the claimant. Second, unless it deals with the claimant, the debtor risks a probability of harm, or, alternatively, loss of economic advantage to the estate or the debtor's going concern value, which is disproportionate to the amount of the claimant's pre-petition claim. Third, there is no practical or legal alternative by which the debtor can deal with the claimant other than by payment of the claim.

In re CoServ L.L.C., 273 B.R. 487, 497 (Bankr. N.D. Tex. 2000). Thus, as phrased and analyzed by one court:

> These two cases underline the strictness of the necessity prong of the Doctrine of Necessity. There are two aspects to necessity. Necessity requires that there be no alternative. There must be no substitute vendor available even at a greater expense. Alternative means of obtaining the vendor's cooperation in supplying his goods or services must be exhausted. There must be no other 'practical or legal alternative' with which the debtor can deal with the claimant. This means that the vendors' goods or services are essential and that the critical vendor will, in fact, not provide them without exceptional treatment. Both require an evidentiary basis. The essential nature of the goods or services is a relatively straight-forward factual matter. The critical vendor's stated intent not to provide his goods or services in the future is not as straight-forward. . . His mere statement that he will not supply the goods or services is rarely sufficient. Anyone can say that. The real question is whether he means it, that is, his actual intent.

In re United Am. Inc., 327 B.R. at 782-83.

15. Again, as held by this Court, the vendor and the payment must be "critical to the debtor's reorganization." *In re Financial News Network Inc.*, 134 B.R. at 736. *See also In re Ionosphere Clubs Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989).

16. The Motion fails under any of these standards. The Debtors request blanket authority without even naming who an alleged critical vendor is. Without that, there can be no "evidentiary basis." While the Motion seems to reference a series of factors that the Debtors will take into account in awarding critical vendor status, what the Court's Interim Order actually states is that "[t]he Debtors are authorized, in their sole discretion, to continue their prepetition business operations, policies, and programs and pay any accrued but unpaid prepetition Vendor Claims, on a postpetition basis in the ordinary course of business on Customary Trade Terms . .

." "Vendor Claims" is defined simply as the "prepetition claims of certain vendors." Motion at ¶ 8. This is *carte blanche* authority; nothing less. There is zero consideration of whether any individual creditor qualifies as "critical" and there is zero consideration of any of the factors or elements identified by this and other Courts in recognizing the doctrine of necessity. It is simply whoever the Debtors want it to be, so long as "Customary Trade Terms" are met, which are simply "otherwise acceptable to the Debtors in light of customary industry practices." Motion at ¶ 25.

17. The case of GLM proves the haphazard and unprincipled nature of the Debtors' actions. According to the Motion, among the factors the Debtors will consider in granting critical vendor status are the following: (i) whether an agreement exists by which the Debtors could compel performance; (ii) whether alternative sources exist on equal or better terms; (iii) whether replacement costs exceed the amount of the prepetition claim; (iv) whether the inability to pay the prepetition claim could trigger financial distress to the vendor; (v) the likelihood that a temporary break with the vendor could be remedied through other tools in the Bankruptcy Case; (vi) and whether failure to pay could cause the vendor to halt postpetition services. In this respect:

- the failure to pay GLM will financially devastate GLM, which cannot afford to float several hundred thousand dollars to the Debtors and simply lacks the money to pay the third party trash haulers servicing the Debtors' 610 locations across the United States;

- the Debtors cannot compel those trash haulers to provide postpetition services because there is no contract in many cases between the Debtors and the hauler and because the trash haulers may not be utilities or, even if the Debtors can compel such services, they will have to do so at hundreds of locations—a massive, disruptive, and expensive undertaking at a minimum;

- meaning that those haulers will imminently stop servicing the Debtors' 610 locations nationwide;

- meaning that the Debtors will face massive internal delays and costs to obtain cover, as well as massive external cover costs, for some 610 locations, where the difficulty and complexity of doing so is evident from the fact that the recent RFP took *two years* to complete due to the disarray in the Debtors' oversight of these services;

- there are no meaningful alternatives without massive problems and delays for the Debtors, were they to try to obtain a new broker or providers across the country, as evidenced by the fact that GLM very recently won that RFP; and

- if GLM cannot pay and is out of business, then there are no tools that the Debtors can later use in the Bankruptcy Case to rectify the situation.

18. If GLM is not a critical vendor—criticality measured by both the devastation to GLM resulting from non-payment and the burdens, delays, and large costs to the Debtors resulting from having to obtain cover—then it is difficult to conceive of who may be, for if the Debtors are not able to have unimpeded trash removal services at some 610 locations, then public health and safety authorities are likely to start shutting those locations down.

19. So GLM is justifiably left wondering, as are probably hundreds of other parties, as to who exactly the alleged "critical" vendors are. Which raises the second key point: transparency.

B. CRITICAL VENDOR AND LIEN CLAIMANT INFORMATION MUST BE PUBLIC

20. The Court should reject any request that the list of critical vendors should be under seal or should be restricted from creditors. Not only does this make it impossible for the Court to weigh the matter with respect to evidence, thereby also violating GLM's due process rights (as GLM cannot meaningfully contest the Motion without the most basic information underlying the Motion), but it conflicts directly with another critical principle of the Bankruptcy Code—transparency. Creditors like GLM have a right to know who is being paid as a critical vendor or a lien claimant so that they can protect their interests by objecting, so that they can monitor how *their* fiduciary is managing *their* estate, and so that they can ensure that only

legitimate claims are being paid. Yet the Debtors propose to modify one critical policy of the Bankruptcy Code paying certain creditors in preference to others, and then to trample on another critical policy which is transparency.

21. More importantly, the Bankruptcy Code and the Bankruptcy Rules mandate that this information be public. Papers filed in a bankruptcy case, such as the list of critical vendors and lien claimants, and the amounts paid to the same, are "public records and open to examination by an entity at reasonable times without charge." 11 U.S.C. § 107(a). The only exception is for "a trade secret or confidential research, development, or commercial information." *Id*. at § 107(b). The Bankruptcy Rules enable the Court to seal matters, but only for "a trade secret or other confidential research, development, or commercial information," or "against scandalous or defamatory matter contained in any paper filed in a case under the Code," or "to protect governmental matters that are made confidential by statute or regulation." FED. R. BANKR. P. 9018. As the Second Circuit has held, the exception to the policy of public access to court records exists in "compelling or extraordinary circumstances." *Video Software Dealers Ass'n v. Orion Pictures Corp.*, 21 F.3d 24, 27 (2d Cir. 1994).

22. The Debtors do not even attempt to satisfy any of these standards, nor have the Debtors filed a motion to seal, which would require them to meet the standards outline above.[3] They present no argument, much less evidence, as to why a list of almost $200 million of claims being paid in full, violating the priorities of the Bankruptcy Code, should be secret. On the contrary, the fact that these chosen creditors are being accorded such preferential treatment makes it all the more important that the matter be public, lest the Debtors abuse the discretion afforded to them by this Court.

[3] Local Rule 9018–1 entitled *Motions to Publicly File Redacted Documents and to File Unredacted Documents Under Seal* requires the filing of a motion to seal which sets out, among other things, (i) the grounds for sealing; (ii) the identity of any parties other than the moving party who will have access to the documents to be sealed; (iii) the duration of the seal . . . .

23. It is for this reason that GLM also objects to the proposed payment of lien claimants. If a creditor has a valid and unavoidable lien, then that creditor has differing rights and differing priorities, and it is appropriate to pay that creditor differently. But first the question of validity and unavoidability of the lien must be satisfied and, to be satisfied, must be tested. And, in order to test it, the Debtors must at least disclose the facts and circumstances. As any bankruptcy professional knows, there are many avoidance actions, statutory liens, 506(a) issues, strong-arm powers, and other reasons why a lien may not be valid or why a lien may be avoided in bankruptcy. All creditors are entitled to this information, therefore, before another $90 million is paid ahead of them and the Debtors effectively release potential avoidance and other claims by voluntary payment without Rule 9019 being complied with.[4]

24. Likewise with respect to section 503(b)(9) claims. GLM does not object to such claims being paid in full, but GLM has no ability to test that validity without the Debtor providing full and complete facts and circumstances regarding the same, with this Court making the final determination in the event of any contest.

25. As to the unprecedented nature of the Debtors' attempt to keep secret the list of those vendors they deem critical, the "critical vendor" opinions cited in the Motion actually disclosed the identity of the vendor being paid and amounts at issue. Motion at p. 12 ¶ 27. *In re CoServ, LLC*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002) (identifying the name and amount to be paid to each critical vendor and analyzing whether each is critical, and *denying* critical vendor status to five of the seven critical vendors at issue); *In re Ionosphere Club, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (identifying that all employees should be paid and deemed critical); *Armstrong World Indus., Inc. v. James A. Phillips, Inc. (In re James A. Phillips, Inc.)*, 29 B.R. 391, 395 (Bankr. S.D.N.Y. 1983) (identifying the creditors to be paid and stating that "[t]hese are

[4] This is especially true because the only recovery to general unsecured creditors may come from causes of action and avoidance actions.

the sorts of issues on which creditors in the chapter 11 proceeding should have an opportunity to be heard, however summarily, before the accelerated payments are formally authorized by a Bankruptcy Court. Such an opportunity would ensure that the facts alleged by the debtor in possession are at least colorably supported, and would avoid preferential payments that may be commercially unsupportable or downright fraudulent.").

C. THE COURT CANNOT DELEGATE ITS JUDICIAL FUNCTION

26. Finally, what the Motion proposes is for this Court to abdicate its judicial function or to delegate that essential function to the Debtors. The Court has parties come before it with their positions, the Court takes evidence, and the Court issues decisions. It is for the Court to decide who is a critical vendor based on the evidence that is presented, subject to cross-examination. It is not for the Debtor to make that decision. The Court can no more tell the Debtor that the Debtor can decide who is and who is not a critical vendor than the Court can tell a plaintiff that the plaintiff can decide the credibility of a witness, or tell an expert witness that the expert witness can decide a contested question of fact. *See, e.g., Holiday v. Johnston*, 313 U.S. 342, 351-52 (1941) (holding that judge may not delegate fact finding). And, with respect to constitutional due process and delegation:

> The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given. . . It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order. For the weight ascribed by the law to the findings -- their conclusiveness when made within the sphere of the authority conferred -- rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear.

Morgan v. United States, 298 U.S. 468, 480-81 (1936).

27. Simply put, the delegation of a judicial function by this Court or any other court is unconstitutional. Yet that is precisely the relief the Debtors request, because they ask this Court for the power to decide for themselves who constitutes a critical vendor when it is for this Court to make that determination upon facts, evidence, and an opportunity to contest. In other words, it is not enough for this Court to merely say "you may pay critical vendors," for the question of who is a critical vendor under the standards that this Court establishes is itself a judicial, fact-finding question. The Court could say "you may pay anyone in your discretion," but that is not what the Debtors propose and that would be completely inconsistent with the nature of the doctrine of necessity. Instead, the Court can say "you may pay those vendors who are identified as critical pursuant to factors a, b, and c." Even then, though, it is for the Court to decide whether those factors are met with respect to any given potential critical vendor. To give the factors to the Debtors and to let the Debtors decide is a delegation of this Court's exclusive and non-delegable judicial function, the same as if this Court told a debtor to pay a professional's fees and expenses pursuant to the section 330 factors: it is for this Court and this Court alone to determine the section 330 factors the same as it is to determine who is a critical vendor.

28. The experience of GLM proves the Kafkaesque nature of the process. The Debtors, with their advisor at Alvarez, conducted a telephone conference with GLM to discuss the receivable, the relationship, and the potential of critical vendor status. It was to these people that GLM was to make its pitch. There was no evidence, no ability to contest evidence, and nothing other than basically GLM pleading its case. Those persons then came back the next day and simply said "no." The only response was that, because GLM has an alleged executory contract, the Debtors can simply compel GLM's continuing performance, with no consideration of the other facts and no thought to the basic fact that GLM cannot print money. The process was humiliating, especially when GLM knows that even as it is being told "no," $170 million of

other prepetition claims are being paid in full. All the while there is the implicit stick, and perhaps the implicit carrot, that the Debtors will make their determination regarding this or other matters based on whether the creditor causes trouble for the Debtors. There is nothing wrong with a debtor using its economic position for business leverage. The problem here is that this Court has clothed the Debtors with its powers, which they are now using in addition to economic leverage. That should never be permitted.

V. PRAYER

WHEREFORE, PREMISES CONSIDERED, GLM respectfully requests that the Court enter an order: (i) denying the Motion; (ii) conditioning any relief to be granted under the Motion on the above concerns being addressed; (iii) granting any such relief only after an evidentiary hearing based on the facts; (iv) rescinding the interim order entered on the Motion and ordering a disgorgement of amounts heretofore paid thereunder; and (v) granting GLM such other and further relief to which it may be justly entitled.

Dated: March 28, 2019.

Respectfully submitted,

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By: /s/ Davor Rukavina

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 28th day of March, 2019, true and correct copies of this document were electronically served by the Court's ECF system on parties entitled to notice thereof and that, additionally, he caused true and correct copies of this document to be served by U.S. first class mail, postage prepaid, on the following:

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