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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

DEBTORS' REPLY IN SUPPORT OF THE DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS PURSUANT TO 11 U.S.C. §§ 105, 361, 362, 363, 364, 503, AND 507 (I) AUTHORIZING THE DEBTORS TO OBTAIN SENIOR SECURED PRIMING SUPERPRIORITY POSTPETITION FINANCING, (II) GRANTING LIENS AND SUPERPRIORITY ADMINISTRATIVE EXPENSE CLAIMS, (III) AUTHORIZING USE OF CASH COLLATERAL, (IV) GRANTING ADEQUATE PROTECTION, (V) MODIFYING THE AUTOMATIC STAY, (VI) SCHEDULING A FINAL HEARING, AND (VII) GRANTING RELATED RELIEF

Windstream Holdings, Inc. ("Holdings") and the other above-captioned debtors and debtors-in-possession (collectively, the "Debtors") file this reply to the objection[2] of U.S. Bank

[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' proposed 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.

[2] *See Limited Objection of U.S. Bank National Association Solely in Its Capacity as Unsecured Notes Indenture Trustee, to Debtors' Amended Motion for Entry of Interim and Final Orders Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364, 503, and 507 (I) Authorizing the Debtors to Obtain Senior Secured Superpriority Postpetition Financing, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Authorizing Use of Cash*

National Association ("U.S. Bank") and in further support of the Debtors' motion to authorize the Debtors' proposed postpetition financing [Docket No. 42] (the "DIP Motion").[3] The Debtors respectfully state the following in support of this reply:

Introduction

1. The proposed DIP Facilities provide the Debtors with up to $1 billion in necessary financing on extremely favorable market terms. The DIP Facilities resolve the liquidity crisis brought about by the Debtors' prepetition defaults, offer funding that (with the interim approval of the Court) has allowed the Debtors to transition smoothly into chapter 11 with minimal business disruption, and provide the solid bedrock for the Debtors' restructuring efforts as these chapter 11 cases move forward. As important, the DIP Facilities sends an unmistakable message to the market and all stakeholders that the Debtors' businesses remain strong and they have the financing necessary to complete their chapter 11 restructuring.

2. Further, since the first day hearing in these cases (and the appointment of the creditors' committee), the Debtors have engaged in extensive good-faith negotiations with all key creditor stakeholders regarding the terms of the proposed Final Order and have successfully reached agreement on the terms of that Final Order with the creditors' committee as well as the DIP lenders and their secured creditors. That agreement embodies a number of good-faith compromises that further protect junior stakeholders' interests and improve the potential effect of

Collateral, (IV) Granting Adequate Protection, (V) Modifying the Automatic Stay, (VI) Scheduling A Final Hearing, and (VII) Granting Related Relief [Docket No. 242].

[3] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the DIP Motion or the *Interim Order Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364, and 507 (I) Authorizing the Debtors to Obtain Senior Secured Priming Superpriority Postpetition Financing, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Authorizing Use of Cash Collateral, (IV) Granting Adequate Protection, (V) Modifying the Automatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief* [Docket No. 64] (the "Interim DIP Order"), as applicable.

the DIP Facilities on the Debtors' unsecured creditors. Notably, to resolve the creditors' committee's informal objections, the proposed Final Order now includes:

- an effective marshaling provision requiring that the DIP Secured Parties and the Prepetition Secured Parties first use commercially reasonable efforts to satisfy DIP Obligations, DIP Superpriority Claims, and Adequate Protection Claims from available DIP Collateral before looking to proceeds of Avoidance Actions, any claims against directors or officers of the Debtors, any claims against the Prepetition Secured Parties other than the Prepetition Revolving Lenders, and commercial tort claims;

- an express preservation of rights regarding the Debtors' master lease with affiliates of Uniti Group Inc. and the transactions putting in place the master lease;

- express acknowledgment that the payment of the consent fee to the prepetition lenders that consented to being primed by the DIP Facilities will not constitute diminution in value for any future adequate protection claim;

- a negotiated challenge period through 90 days after the entry of the Final Order (which period shall be extended if the creditors' committee files a motion seeking standing to challenge the liens supporting prepetition first lien debt during such Challenge Period);

- an increased budget of up to $250,000 for the creditors' committee to investigate claims against prepetition secured parties; and

- additional notice and access to information rights in favor of the creditors' committee.

3. Of the eleven formal objections and numerous informal objections and comments to the Final Order, only the U.S. Bank objection remains.[4] Notably, the U.S. Bank objection does ***not*** challenge the Debtors' need for financing or the core terms of the DIP Facilities and the benefits they confer on the estates. Instead, U.S. Bank raises only narrow legal points in its objection.

4. Entry into the DIP Facilities is a sound exercise of the Debtors' business judgment because the DIP Facilities provide substantial benefits that are essential to the continued going

[4] With the changes above and other modifications, the Debtors have resolved eight formal objections, and several informal objections (including those of the Creditors' Committee), as reflected in the chart set forth on **Exhibit A** attached hereto.

concern operations of the Debtors' businesses. The Debtors and other parties in interest have agreed to modifications of the Final Order in response to U.S. Bank's concerns. U.S. Bank's remaining objections should be overruled because, among other reasons, (a) granting liens and superpriority claims on unencumbered assets is permissible under the Bankruptcy Code, (b) a waiver of the "equities of the case" exception under section 552(b) is appropriate, (c) U.S. Bank has no standing to object to a marshaling waiver, (d) the consent fee was an important part of obtaining the Prepetition Secured Parties' consent to continued use of collateral and entry into the DIP Documents, (e) certain rights U.S. Bank is requesting are duplicative of rights granted to the creditors' committee, and (f) the events of default in the DIP Documents are customary and appropriate. For these reasons, and as described in greater detail below, the U.S. Bank objection should be overruled.

Argument

I. The DIP Facilities Provide Substantial Benefits and Reflect the Sound Exercise of the Debtors' Business Judgment.

5. The Debtors strongly believe that approval of the DIP Financing will maximize value for their stakeholders and that entry into the DIP Facilities is a sound exercise of the Debtors' business judgment. In determining whether to authorize a debtor to obtain financing under section 364 of the Bankruptcy Code, courts in this district have articulated an eight-factor test to determine whether to approve the proposed debtor-in-possession financing.[5] As described in

[5] Under this test, the debtor must show that: (a) the proposed financing is an exercise of sound and reasonable business judgment; (b) no alternative financing is available on any other basis; (c) the financing is in the best interests of the estate and its creditors; (d) as a corollary to the first three points, no better offers, bids, or timely proposals are before the court; (e) the credit transaction is necessary to preserve assets of the estate; (f) the terms of the transaction are fair, reasonable, and adequate, given the circumstances of the debtor and the proposed lender; (g) the financing is necessary, essential, and appropriate for the continued operation of the debtor's business and the preservation of its estate; and (h) the financing agreement was negotiated in good faith and at arm's length between the debtor and the lender. *See, e.g.*, *In re WorldCom, Inc.*, No. 02-13533, 2002 WL 1732646, at *2-3 (S.D.N.Y. July 22, 2002); *In re Ames Dep't Stores*, 115 B.R. 34, 37-39 (Bankr. S.D.N.Y. 1990).

greater detail in the DIP Motion and the Leone Declaration, the Debtors have satisfied this test and have shown that the circumstances of these cases require them to obtain financing under sections 364(c)(1)–(3) and 364(d) of the Bankruptcy Code. Having determined that DIP financing was available only under sections 364(c) and (d) of the Bankruptcy Code, the Debtors sought postpetition financing from both the Prepetition Secured Parties and third-party financiers. To avoid a protracted and expensive priming fight, the Debtors would either need to (a) obtain the consent of the Prepetition Secured Parties to the priming of their liens by a third-party lender or (b) locate a third-party lender willing to provide postpetition financing on an unsecured basis. None of the parties contacted were willing to provide debtor-in-possession financing junior to the Prepetition Secured Parties.

6. The Debtors, importantly, negotiated the DIP Facilities with the DIP Lenders in good faith, at arm's length, and with the assistance of their advisors. The Debtors believe that they have obtained the best financing available, all without burdensome case controls or milestones. Finally, the consensual nature of the DIP Facilities avoided a costly priming and adequate protection fight at the outset of these chapter 11 cases that would have caused significant uncertainty among the Debtors' vendors, employees, customers, and other stakeholders.

7. While U.S. Bank seeks to rewrite or eliminate certain provisions of the proposed Final Order, which embodies the negotiated deal between the Debtors, the DIP Secured Parties, and the Prepetition Secured Parties, the DIP Facilities and Final Order must be viewed as they were negotiated—as a whole. Without those certain provisions to which U.S. Bank objects, certain other provisions—or possibly the DIP Financing itself—would not have been available. Without the DIP Facilities, the Debtors lack the liquidity necessary to continue operating, to the detriment of all creditors.

II. The U.S. Bank Objection Should Be Overruled.

8. Notwithstanding the creditors' committee's role as fiduciary on behalf of all unsecured creditors (including the holders of unsecured notes for whom U.S. Bank serves as indenture trustee),[6] and its support for the Final Order, U.S. Bank seeks to usurp the creditors' committee's role in arguing that certain provisions of the DIP Credit Agreement and the Final Order are detrimental to all unsecured creditors. The DIP Credit Agreement and the Final Order are carefully-negotiated components of a comprehensive deal with the DIP Secured Parties and the Prepetition Secured Parties whose individual parts cannot be excised without severely jeopardizing the Debtors' consensual use of Collateral and continued access to DIP Financing, and the consequent viability of their restructuring and go-forward business. Nonetheless, the Debtors, the DIP Secured Parties, and the Prepetition Secured Parties have agreed to certain concessions in response to U.S. Bank's concerns in a good faith attempt to resolve certain of issues. To the extent that the U.S. Bank objection remains unresolved, it should be overruled.

A. The Debtors, the DIP Agent, DIP Lenders, and Prepetition Secured Parties Have Agreed to Certain Changes that Address U.S. Bank's Concerns.

9. U.S. Bank raises several concerns that the Debtors believe are resolved through revisions to the Final Order. Each of these requests and the proposed resolution are detailed below:

- ***First***, the Final Order should include language specifying that the DIP Agent is deemed a "Permitted Leasehold Mortgagee" under the Master Lease (as defined herein) and that all rights with respect to the Master Lease

[6] U.S. Bank is also one of the Debtors' adversaries in the prepetition litigation that resulted in an adverse ruling that directly led to the commencement of these Chapter 11 Cases. As described more fully in the First Day Declaration, on February 15, 2019, the District Court found that the Uniti spin-off transaction constituted a prohibited sale and leaseback transaction under the 6 3/8% Notes Indenture, that the applicable Debtor did not cure the default, and that the notice of acceleration was valid. The ruling found that an event of default occurred that has not been cured or waived. The ruling triggered a prepetition cross-default under the Prepetition Credit Agreement and a cross-acceleration event of default under the Debtors' secured and unsecured notes.

are reserved.[7] The Debtors have added language to the Final Order, which the Debtors believe resolves this concern.[8]

- ***Second***, Prepetition Adequate Protection Claims should be calculated based on the relative diminution in value of the collateral held by each of the respective Prepetition Secured Parties.[9] The Debtors have revised paragraph 15 of the Final Order to clarify that each Prepetition Secured Party is entitled to adequate protection on account its own interest in the Prepetition Collateral.[10]

The Debtors believe that the foregoing revisions to the Final Order resolve U.S. Bank's concerns with respect to the objections raised above. Moreover, the creditors' committee has notified the Debtors that these these revisions satisfy similar concerns of its own and represent an appropriate compromise.

B. Granting Liens on and Superpriority Claims on Unencumbered Assets Is Appropriate and Permitted.

10. U.S. Bank argues that unencumbered assets, including the assets of Holdings, proceeds of Avoidance Actions, commercial tort claims, and claims against directors and officers, should remain unencumbered, and that granting joint and several superpriority claims against

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7 U.S. Bank objection ¶ 7.

8 The DIP Agent and Prepetition Agent are each deemed a "Permitted Leasehold Mortgagee" under that certain Master Lease dated April 24, 2015, by and among CSL National, LP, the landlords party thereto and Holdings, as tenant (the "Master Lease"). Notwithstanding the foregoing and any rights granted by Holdings to and accepted by the DIP Lenders under the DIP Credit Agreement or otherwise provided in this Final Order with respect to Holdings (including releases), the DIP Lenders, the Prepetition Secured Parties, the Creditors' Committee, the Debtors' creditors and equity holders, and the Debtors each reserve all rights and remedies under applicable law, if any, with respect to the execution and performance of the Master Lease and the transactions giving rise to it (the "Uniti Spin-off"), and nothing in this Final Order shall impact or prejudice the rights of any such party to benefit from any adjudication or settlement of any claims arising from, asserted or that could have been asserted on account of the Uniti Spin-Off (but without limiting the effects and requirements of paragraph 21). Final Order, ¶ 8, n.10.

9 U.S. Bank objection ¶ 7.

10 The Prepetition Secured Parties are entitled, pursuant to sections 361, 362, 363(e), 364(d)(1) and 507 of the Bankruptcy Code, to adequate protection of their *respective* interests in all Prepetition Collateral, including the Cash Collateral, in an amount equal to the aggregate diminution in the value of ~~the~~ *each* Prepetition Secured ~~Parties'~~ *Party's respective* interests in the *applicable* Prepetition Collateral . . . . Final Order, ¶ 15 (emphasis added).

Holdings, which was not obligated under any of the Prepetition Debt, should not be permitted.[11] As set forth below, U.S. Bank not only ignores the plain language of the Bankruptcy Code and applicable case law, but also overlooks the numerous justifiable reasons why granting such liens and claims is appropriate in these Chapter 11 cases.

11. The Bankruptcy Code explicitly permits the granting of liens and superpriority claims on previously unencumbered assets, including the assets of Holdings, to secure postpetition financing or provide adequate protection.[12] In its objection, U.S. Bank ignores the plain language of section 364(c)(2) of the Bankruptcy Code, which explicitly contemplates the incurrence of debt secured by a lien on property of the estate that is not otherwise subject to a lien in exchange for providing much-needed postpetition financing. It is unsurprising, then, that the granting of liens on unencumbered assets (including avoidance actions) is routinely approved on a final basis as a means of providing security to a debtor-in-possession lender.[13]

12. Indeed, granting new liens on unencumbered assets is appropriate and routine in cases where, as here, such provision is a reasonable exchange for the manifest benefits provided under the DIP Facilities.[14] The DIP Facilities provide a direct benefit to the entire enterprise by allowing it to operate as a going concern, and the granting of liens on previously unencumbered assets is particularly appropriate in these Chapter 11 cases where the DIP Lenders were willing to provide $1 billion in DIP Financing to the estates. Similarly, extending a secured creditor's

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11 *See, e.g.*, U.S. Bank objection ¶¶ 17–19, 25–27.

12 *See* 11 U.S.C. §§ 361(2), 364(c)(2).

13 *See, e.g., In re Pacific Drilling S.A.*, No. 17-13193 (MEW) (Bankr. S.D.N.Y. Sep. 25, 2018) (final order approving the inclusion of previously unencumbered assets as part of DIP collateral, including avoidance proceeds); *In re HHH Choices Health Plan, LLC*, No. 15-11158 (MEW) (Bankr. S.D.N.Y. Jun. 8, 2016) (same); *In re Fairway Group Holdings Corp.*, No. 16-11241 (MEW) (Bankr. S.D.N.Y. May. 31, 2016) (same)*; In re Avaya Inc.*, No. 17-10089 (SMB) (Bankr. S.D.N.Y. Mar. 10, 2017) (same); *In re Uno Rest. Holdings Corp.*, No. 10-10209 (MG) (Bankr. S.D.N.Y. Feb. 18, 2010) (Docket No. 156).

14 *See, e.g., In re Metaldyne Corp.*, No. 09-134122009 WL 2883045 (Bankr. S.D.N.Y. June 23, 2009), at *4.

adequate protection liens and claims to previously unencumbered collateral is an accepted and customary mechanic to compensate prepetition lenders for the increased risk against their collateral that they bear in a chapter 11 case.[15]

13. Here, the Debtors negotiated an entirely appropriate adequate protection package with the Prepetition Secured Parties reasonably and at arm's length as a condition to the use of their Prepetition Collateral, including Cash Collateral. Notably, U.S. Bank cites no case law to support its argument that previously unencumbered collateral may not be subject to an adequate protection lien or claim or that the adequate protection package here is otherwise outside the range of reasonableness.

14. In addition, the Debtors, with the consent of the DIP Secured Parties and Prepetition Secured Parties and in negotiation with the creditors' committee, have added effective marshaling language to the Final Order that should, based on the U.S. Bank objection,[16] resolve U.S. Bank's concerns:

> [P]rior to seeking payment of any DIP Obligations, DIP Superpriority Claims, or Adequate Protection Claims, including 507(b) Claims, from the proceeds of (a) Avoidance Actions, (b) claims and causes of action against any current or former officers and directors of the Debtors, (c) claims and causes of action against the Prepetition Secured Parties other than the Prepetition Revolving Lenders, and/or (d) any commercial tort claim on which the Prepetition Secured Parties did not hold validly perfected liens as of the Petition Date, the DIP Secured Parties and the Prepetition Secured Parties, as applicable, shall use commercially reasonable efforts to first satisfy such claims from all other DIP Collateral.[17]

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15 *See generally In re AppliedTheory Corp.*, No. 02-11868, 2008 WL 1869770, at *1 (Bankr. S.D.N.Y. Apr. 24, 2008) ("[The unencumbered] assets can thereafter be encumbered (or made available to satisfy superpriority claims), if necessary to provide adequate protection. That's expressly authorized under section 361(2).").

16 *See* U.S. Bank objection ¶ 6 ("To the extent that the DIP Lenders are granted liens against the property of Holdings (including in the Master Lease) and other Unencumbered Property such as Avoidance Proceeds, unperfected commercial tort claims and claims against directors and officers, the Indenture Trustee respectfully requests that the Final Order require the DIP Lenders to marshal their other DIP Collateral to satisfy their claims.").

17 Final Order, ¶ 10(d).

C. A Waiver of the "Equities of the Case" Exception Under Section 552(b) of the Bankruptcy Code Is Appropriate.

15. Secured creditors' interests in collateral generally extend to postpetition proceeds of that collateral to the same extent that they would to prepetition proceeds of such collateral.[18] The equities of the case exception prevents "secured creditors from reaping unjust benefits from an increase in the value of collateral during a bankruptcy case resulting from the (usual) reorganizing chapter 11 debtor's use of other assets of the estate."[19] In other words, it is designed to prevent a "'windfall' at the expense of unsecured creditors."[20] Accordingly, numerous courts approve waivers of the equities of the case exception for secured creditors that make funds available to debtors for maintaining the value of the estate through those secured creditors' consent to (a) use their collateral,[21] or (b) new lenders providing postpetition financing to prime those secured creditors' liens.[22]

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18 11 U.S.C. § 552(b); *see also In re Photo Promotion Assocs., Inc.*, 53 B.R. 759, 763 (Bankr. S.D.N.Y. 1985). However, the court has the discretion to alter that general rule based on the "equities of the case." 11 U.S.C. § 552(b); *see also In re Vienna Park Properties*, 976 F.2d 106, 113 (2d Cir. 1992).

19 *Arnot v. Endreson (In re Endresen)*, No. 15-1141, 2016 Bankr. LEXIS 1154, at *38 (B.A.P. 9th Cir. Apr. 8, 2016) (citations omitted).

20 *Id.; see also Stanziale v. Finova Capital Corp. (In re Tower Air, Inc.)*, 397 F.3d 191, 205 (3d Cir. 2005) (holding equity of the case exception did not apply when the secured creditor would not receive "a windfall" and instead "simply recover what it is due").

21 *See* 11 U.S.C. § 363(c)(2)(A).

22 *See* 11 U.S.C. § 364(d); *see, e.g., In re Arch Coal, Inc.*, No. 16-40120 (CER), at ¶ 9(b) (Bankr. E.D. Mo. Feb. 25, 2016) [Docket No. 415] (granting waiver of equities of the case); *In re Walter Energy, Inc.*, No. 15-23007 (TOM), at ¶ 23 (Bankr. N.D. Ala. Jan. 28, 2016) [Docket No. 1772] (same); *In re Alpha Natural Resources, Inc.*, No. 15-33896 (KRH), at ¶ 11(b) (Bankr. E.D. Va. Sept. 17, 2015) [Docket No. 465] (same); *In re Blue Sun St. Joe Refining, LLC*, No. 15-42231 (ABF), at ¶ 7 (Bankr. W.D. Mo. Aug. 31, 2015) [Docket No. 91] (same); *In re Milagro Holdings, LLC*, No. 15-11520 (KG), at ¶ 21 (Bankr. D. Del. Aug. 19, 2015) [Docket No. 150] (same); *In re Magnetation LLC et al*, No. 15-50307 (GFK), at ¶ 14 (Bankr. D. Minn. June 10, 2015) [Docket No. 169] (same); *In re Blockbuster Inc.*, No. 10-14997 (BRL), 2010 WL 4873646, at *18 (Bankr. S.D.N.Y. Sept. 24, 2010) (finding that, because the DIP lender and prepetition lenders had agreed that their claims were subordinate to a carve-out, they were "entitled to all benefits of section 552(b) of the Bankruptcy Code and the 'equities of the case' exception under sections 552(b)(i) and (ii) of the Bankruptcy Code [would] not apply"); *In re General Growth Props., Inc.*, 412 B.R. 122, 127 (Bankr. S.D.N.Y. 2009) (holding that "[i]n light of the Lenders' agreement to subordinate their liens and superpriority claims to the Carve-Out, the Lenders are entitled to a waiver of . . . any 'equities of the case' claims under section 552(b) of the Bankruptcy Code . . . .").

16. U.S. Bank argues that the equities of the case waiver in the Final Order should not be authorized.[23] But the section 552(b) "equities of the case" waiver is reasonable and appropriate. ***First***, as set forth above, the Prepetition Secured Parties have consented to the Debtors' use of their Cash Collateral and priming of their Prepetition Liens. ***Second***, as the Debtors track the intercompany movement of cash, any transactions between assets that may be found to be unencumbered and those found to be encumbered can be reconciled at the end of these Chapter 11 cases. Thus, there would be no supposed "windfall" at the expense of unsecured creditors because the proceeds of encumbered collateral will be used to sustain the operating costs of such collateral. ***Finally***, the DIP Financing is necessary to preserve the going concern value of the Debtors' estates over the duration of these Chapter 11 cases for the benefit of all stakeholders. In light of these facts, the Debtors' decision to grant a waiver of section 552(b) to obtain the Prepetition Secured Parties' permission to consensually use cash collateral and be primed by the DIP Facilities to preserve the going-concern value of the Debtors is entitled to deference under the business judgment standard, is appropriate, and should be approved.

D. U.S. Bank's Objection to the Marshaling Waiver is Resolved and U.S. Bank Has No Standing to Object to the Marshaling Waiver.

17. U.S. Bank also objects to the marshaling waiver in the Final Order. The Debtors believe that this objection is resolved by the language in paragraph 10(d) of the Final Order.[24] To the extent U.S. Bank's objection is not resolved by this language, it should be overruled because

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23 *See* U.S. Bank objection ¶¶ 30–34.

24 [P]rior to seeking payment of any DIP Obligations, DIP Superpriority Claims, or Adequate Protection Claims, including 507(b) Claims, from the proceeds of (a) Avoidance Actions, (b) claims and causes of action against any current or former officers and directors of the Debtors, (c) claims and causes of action against the Prepetition Secured Parties other than the Prepetition Revolving Lenders, and/or (d) any commercial tort claim on which the Prepetition Secured Parties did not hold validly perfected liens as of the Petition Date, the DIP Secured Parties and the Prepetition Secured Parties, as applicable, shall use commercially reasonable efforts to first satisfy such claims from all other DIP Collateral. Final Order, ¶ 10(d).

as a representative of unsecured creditors, U.S. Bank has no standing to object to this provision. Only a secured creditor can invoke the doctrine of marshaling.[25] Here, none of the Prepetition Secured Parties or the DIP Secured Parties have objected to the marshaling waiver. Indeed, the marshaling waiver was negotiated in obtaining the consensual use of Cash Collateral and is an indispensable component in securing the DIP Financing. In addition, marshaling waivers are routinely granted pursuant to financing orders approved in this district and others.[26]

E. The Consent Fee Was Heavily Negotiated and Assisted in Obtaining the Prepetition Secured Parties' Consent to Continued Use of Collateral and Entry into the DIP Documents.

18. U.S. Bank argues that the consent fee payable to those prepetition lenders that affirmatively provide consent to the use of Cash Collateral and the priming of the Prepetition Collateral and entry into the DIP Documents is inappropriate and should be deducted from future Adequate Protection payments that may be made to the Prepetition Secured Parties.[27] Importantly, the consent fee has already been solicited and paid in accordance with the Interim Order. Although U.S. Bank is eager to pick and choose provisions of the DIP Facilities that it finds objectionable in isolation, the DIP Facilities must be viewed comprehensively with respect to the particular circumstances of these Chapter 11 cases.[28] Indeed, courts have held that even debtor-in-possession

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25 *See Galey & Lord, Inc. v. Arley Corp. (In re Arlco, Inc.)*, 239 B.R. 261, 274 (Bankr. S.D.N.Y. 1999) (holding that unsecured creditors have no right to invoke the doctrine of marshaling) (citing *Herkimer Cnty. Trust Co. v. Swimelar (In re Prichard)*, 170 B.R. 41, 45 (Bankr. N.D.N.Y. 1994).

26 *See, e.g., In re Aegean Marine Petroleum Network Inc.*, No. 18-13374 (MW), at ¶ 6.13 (Bankr. S.D.N.Y. Jan. 15, 2019) [Docket No. 290]; *In re Nine West Holdings*, No. 18-10947 (SCC), at ¶ 10(f) (Bankr. S.D.N.Y. June 28, 2018) [Docket No. 450]; *In re 21st Century Oncology Holdings, Inc.*, No. 17-22770 (RDD), at ¶ 19 (Bankr. S.D.N.Y. June 20, 2017) [Docket No. 134]; *In re BCBG Max Azria Global Holdings, LLC*, No. 17-100466 (SCC), at ¶ 46 (Bankr. S.D.N.Y. Mar. 28, 2017) [Docket. No. 228]; *In re Avaya Inc.*, No. 17-10089 (SMB), at ¶ 20(j) (Bankr. S.D.N.Y. March. 10, 2017) [Docket No. 230].

27 U.S. Bank objection ¶ 37.

28 *See, e.g., Farmland Indus., Inc.*, 294 B.R. 855, 879-880 (Bankr. W.D. Mo. 2003); *see also In re Ellingsen MacLean Oil Co.*, 65 B.R. 358, 365 (W.D. Mich. 1986), *aff'd*, 834 F.2d 599 (6th Cir. 1987).

financing that contains unfavorable terms can satisfy the fair and reasonable standard.[29] Further, "[i]t is not impermissible for a [lender] to use its superior bargaining power to obtain creditor-favorable terms in a financing agreement."[30]

19. Each of the provisions of the DIP Facilities that U.S. Bank finds objectionable was required as a condition to lend (or to be primed), notwithstanding vigorous negotiation between the Debtors, the DIP Secured Parties, and the Prepetition Secured Parties. The consent fee, in particular, assisted in obtaining the prepetition lenders' consent to the use of Cash Collateral and the other Prepetition Collateral, and the DIP Loan Parties' entry into the DIP Documents. The fee, in addition to already being paid, is in exchange for consent that has already been given. Simply put, the use of Collateral and entry into the DIP Facilities on an uncontested basis by the Prepetition Secured Parties would have been impossible without the concessions in favor of the Prepetition Secured Parties. Accordingly, the Debtors respectfully submit that the consent fee—which is not $32 million, but rather $19 million—is appropriate in light of the value of the Prepetition Secured Parties' consent obtained thereby, and deducting the consent fee from future Adequate Protection Payments would effectively reduce the overall consideration provided to the prepetition lenders in contravention of the terms on which such consent was vigorously negotiated and obtained.[31]

F. U.S. Bank's Remaining Objections Should Be Overruled.

20. U.S. Bank raises certain additional objections that attempt to substitute its judgment for that of the Debtors. U.S. Bank should not be permitted to usurp the Debtors' business

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29 *See In re Ellingsen*, 65 B.R. at 365 (finding that "the bankruptcy court would rightfully be more interested by the requirements and provisions of section 364 of the Code, than it would be by a picayune examination of every legal argument that could be brought against separate provisions of the proposed agreement.").

30 *In re Farmland*, 294 B.R. at 886 (internal citation omitted).

31 Furthermore, and as discussed at the First Day Hearing, the consent fee was not paid to the Prepetition First Lien Notes Secured Parties because their consent was not required under the First Lien Pari Passu Intercreditor Agreement.

judgment, and the Debtors believe that the concessions discussed herein and reflected in the Final Order are more than adequate to balance the rights of unsecured creditors against those of the DIP Lenders and Prepetition Secured Parties.

21. ***First***, U.S. Bank argues that it should be added to the list of parties entitled to receive notices and financial reporting.[32] This is overreaching by U.S. Bank whose interests, along with those of other unsecured creditors, are best served through the creditors' committee, which will receive such notices and financial reporting.[33]

22. ***Second***, U.S. Bank argues that the Challenge Period should be tolled if it files a motion seeking standing to commence a challenge within the Challenge Period.[34] The Debtors have revised the Final Order to provide that, if prior to the termination of the Challenge Period, the creditors' committee files a motion seeking standing to pursue a Challenge which attaches a complaint that specifies the allegations of the Challenge, then the Challenge Period for the creditors' committee shall be extended until the date that is two (2) business days after the Court rules on such request.[35] As the creditors' committee protects all unsecured creditors, such a right should only be extended to the creditors' committee.

23. ***Finally***, U.S. Bank argues that neither obtaining alternative financing nor termination of exclusivity should be events of default under the DIP Credit Agreement.[36] It is unreasonable to expect the DIP Secured Parties to permit the Debtors to obtain alternative financing by utilizing the DIP Financing to fund transactional costs and fees incurred pursuant to

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32 U.S. Bank objection ¶¶ 35–36.

33 Final Order, ¶ 15(j).

34 U.S. Bank objection ¶ 38.

35 Final Order, ¶ 21.

36 U.S. Bank objection ¶¶ 39–40.

such alternative financing. Similarly, an event of default triggered by the termination of the exclusivity period is a necessary protection for the DIP Secured Parties. Because the DIP Credit Agreement contain no milestones or burdensome case controls, it is indisputably reasonable to permit the DIP Secured Parties this minimally invasive means to encourage the Debtors to timely proceed towards confirmation. Moreover, the Debtors are obligated to propose a plan that provides for the indefeasible payment in cash of the obligations under the DIP Facilities.[37] In the event a competing chapter 11 plan were filed that did not provide for such treatment, the DIP Secured Parties would potentially be funding these Chapter 11 cases to their own detriment in the absence of the exclusivity event of default. These types of event of default are customary in DIP credit agreements routinely approved by courts in this district.[38] Accordingly, the U.S. Bank objection should be overruled.

Conclusion

24. For the reasons set forth herein, the Debtors respectfully request that the Court (a) overrule the U.S. Bank objection to the extent not resolved by the modifications discussed herein or pursuant to the Debtors' proposed Final Order; and (b) grant the relief requested in the DIP Motion on a final basis.

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[37] DIP Credit Agreement, Art. 7(xviii).

[38] *See, e.g.*, *In re Aegean Marine Petroleum Network Inc.*, No. 18-13374 (MW), at ¶ 6.13 (Bankr. S.D.N.Y. Jan. 15, 2019) [Docket No. 290] (the "Aegean Order") (approving a DIP facility where events of default included termination of the exclusive period to file a plan of reorganization and obtaining alternative DIP financing); Aegean Order Exhibit A, § 7.01(l), (o); *In re Nine West Holdings*, No. 18-10947 (SCC), at ¶ 10(f) (Bankr. S.D.N.Y. June 28, 2018) [Docket No. 450] (same); *see also In re Nine West Holdings*, No. 18-10947 (SCC), at ¶ 10(f) (Bankr. S.D.N.Y. Apr. 8, 2018) [Docket No. 33], Exhibit B, § 10.1(q)(ii)(C), (iv)(A), Exhibit C, § 8.01(o)(xii), (xiii); *In re 21st Century Oncology Holdings, Inc.*, No. 17-22770 (RDD), at ¶ 19 (Bankr. S.D.N.Y. June 20, 2017) [Docket No. 134] (the "21st Century Order") (same); 21st Century Order, Exhibit A, § 8.1(n)(ii), (iv); *In re BCBG Max Azria Global Holdings, LLC*, No. 17-100466 (SCC), at ¶ 46 (Bankr. S.D.N.Y. Mar. 28, 2017) [Docket No. 288] (the "BCBG Order") (same); BCBG Order, Exhibit C, § 11.1(t)(ii)(A), (iv), Exhibit D, § 8.1(g), (v).

Dated: April 12, 2019
New York, New York

/s/ Stephen E. Hessler

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Proposed Counsel to the Debtors and Debtors in Possession

Exhibit A

Objection Chart

In re Windstream Holdings, Inc.

Summary Chart Addressing Certain Objections[1]

No.	Party	Summary of Objection	Response
		Filed Objections	
1.	Certain Texas Taxing Jurisdictions (collectively, "Texas") [Docket No. 111]	Texas' ad valorem tax liens should not be subject to priming DIP Liens.	**Resolved**. The proposed Final Order provides that the DIP Liens do not prime Texas' ad valorem tax liens. (Proposed Final Order at ¶ 44).
2.	NW 230 Congress Street Property Owner LLC (the "NW Landlord") [Docket No. 199]	DIP Collateral should not include the NW Landlord lease or the Debtors' rights thereunder, the leased premises or building, any other property of NW Landlord.	**Resolved**. The proposed Final Order provides that the liens proposed to be granted to the DIP Agent do not extend to the NW Landlord's leasehold premises or any other property. (Proposed Final Order at ¶ 40).
3.	Element Fleet Management ("Element Fleet") [Docket No. 205]	The DIP Liens should not attach to vehicles leased by Element to the Debtors, the Debtors' rights under the vehicle lease and master services agreement, or proceeds therefrom.	**Resolved.** The proposed Final Order states the DIP Collateral does not include, nor shall the DIP Liens or Adequate Protection Liens attach to, the leased vehicles or Element Fleet's rights to the proceeds therefrom. (Proposed Final Order at ¶ 38).
4.	Ad Hoc Group of Midwest Noteholders (the "Midwest Noteholders") [Docket No. 208]	The Midwest Noteholders filed their reservation of rights to preserve their right to object to entry of the Final Order to the extent should contradict the adequate protection and other protections granted to the Midwest Noteholders in the Interim Order.	**Resolved.** The Debtors have added certain clarifying language to the proposed Final Order as requested by the Midwest Noteholders.
5.	POTA JV, LLC ("POTA") [Docket No. 209]	DIP Collateral should not include the POTA lease or the Debtors' rights thereunder, the leased premises or building, any other property of NW Landlord.	**Resolved**. The proposed Final Order provides that the liens proposed to be granted to the DIP Agent do not extend to the NW Landlord's leasehold premises or any other property. (Proposed Final Order at ¶ 41).

[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the DIP Motion (as amended), the DIP Orders, or the relevant objection, as applicable.

No.	Party	Summary of Objection	Response
6.	Santander Bank, N.A. ("Santander") [Docket No. 211]	The DIP Liens should not attach to equipment Santander leases to the Debtors and Santander's rights under the leases should not be impaired.	**Resolved**. The proposed Final Order states that the DIP Liens do not prime Santander's liens or interests under any lease agreements between Santander and the DIP Loan Parties or lease agreements assigned to Santander as of the date of entry of the Final Order. (Proposed Final Order at ¶ 42.)
7.	SunTrust Equipment Finance & Leasing Corp. ("STEFL") [Docket No. 220]	The DIP Liens should not prime STEFL's liens or interests arising under any agreements between STEFL and the Debtors.	**Resolved**. The proposed Final Order states that the DIP Liens do not prime STEFL's liens or interests under any agreements between STEFL and the DIP Loan Parties. (Proposed Final Order at ¶ 43.)
8.	Altec Capital Services, LLC and Altec Capital Trust ("Altec") [Docket No. 227]	The DIP Liens should not prime Altec's liens or security interests under any agreements between Altec and the Debtors.	**Resolved**. The proposed Final Order states that the DIP Liens do not prime Altec's liens or interests under any agreements between Altec and the DIP Loan Parties. (Proposed Final Order at ¶ 34.)
9.	U.S. Bank, N.A., Indenture Trustee[2] [Docket No. 242]	• To the extent that the DIP Lenders are granted liens against the property of Debtor Windstream Holdings, Inc. ("Holdings") and other unencumbered property, the DIP Lenders should be required to marshal their other DIP Collateral to satisfy their claims. • In the alternative, any provisions in the Final Order waiving marshaling be removed.	• Granting new liens on unencumbered assets is a reasonable exchange for the manifest benefits provided under the DIP Facilities. • U.S. Bank has no standing to request marshaling. Nonetheless, the proposed Final Order requires the DIP Secured Parties and the Prepetition Secured Parties to use commercially reasonable efforts to first satisfy their claims from other DIP Collateral. (Proposed Final Order ¶ 10(d)).
		The Final Order should include the following language: *Reservation of Rights Regarding Master Lease Transaction*. The DIP Agent shall be deemed a "Permitted Leasehold Mortgagee" under that certain Master Lease dated April 24, 2015, by and among CSL National, LP, the landlords party	**Resolved**. The proposed Final Order contains this language. (Proposed Final Order at ¶ 8(a), n.10.)

[2] U.S. Bank, N.A. is the indenture trustee under the (a) 7.750% 2020 Unsecured Notes; (b) 7.750% 2021 Unsecured Notes; (c) 7.50% 2022 Unsecured Notes; (d) 7.50% 2023 Unsecured Notes; and (e) 6.375% 2023 Unsecured Notes.

No.	Party	Summary of Objection	Response
		thereto and Holdings, as tenant. Notwithstanding the foregoing and any rights granted by Holdings to and accepted by the DIP Agent under the DIP Credit Agreement or otherwise provided in this Final Order with respect to Holdings (including releases and any adequate protection), the DIP Lenders, the Prepetition Secured Parties, the Creditors' Committee, each unsecured creditor and the Debtors each reserve all rights and remedies under applicable law, if any, with respect to the execution and performance of the Master Lease and the transactions giving rise to it, and nothing in this Final Order shall impact or prejudice the rights of any such party to benefit from any recoveries resulting from any adjudication or settlement of any claims arising from, asserted, or that could have been asserted, on account thereof.	
		The Adequate Protection Liens should not extend to all DIP Collateral, including Avoidance Actions and other unencumbered assets, and the 507(b) Claims should not extend to Holdings.	The Adequate Protection package was heavily-negotiated with the Prepetition Secured Parties as a condition to the use of their Prepetition Collateral.
		Prepetition Adequate Protection Claims should be calculated based on the relative diminution in value of the collateral held by each of the respective Prepetition Secured Parties.	The proposed Final Order provides that each Prepetition Secured Party is entitled to adequate protection on account its own interest in the Prepetition Collateral. (Proposed Final Order at ¶ 15).
		"Equities of the case" exception under section 552 of the Bankruptcy Code should be preserved.	A waiver of the "equities of the case" exception is appropriate because (a) it is necessary to obtain the Prepetition Secured Parties' consent to use Cash Collateral and prime their Prepetition Liens, (b) the proceeds of encumbered collateral will fund the operating costs of such collateral, and (c) the DIP Financing is necessary to preserve the going concern value of the Debtors' estates.
		U.S. Bank should be added as a notice party for financial reporting and similar purposes.	The creditors' committee is a sufficient notice party.
		The consent fee is inappropriate.	The consent fee was paid in accordance with the Interim Order and was appropriate and necessary under the circumstances to obtain consensual use of cash collateral and avoid a priming fight.

No.	Party	Summary of Objection	Response
		The Challenge Period should be tolled upon filing of a standing motion.	The proposed Final Order provides for an extension of the Challenge Period upon filing a motion for standing for a Challenge, which attaches a complaint that specifies the allegations of the Challenge. (Proposed Final Order at ¶ 21).
		Termination of exclusivity and obtaining alternative financing should not be Events of Default under the DIP Credit Agreement.	These Events of Default are appropriate under the circumstances and customary in DIP credit agreements.
10.	Mitsubishi UFJ Lease & Finance (U.S.A.) Inc. ("Mitsubishi") [Docket No. 255]	The DIP Liens should not prime Mitsubishi's interest in the equipment it leases to the Debtors.	**Resolved**. The proposed Final Order states that the DIP Liens do not prime Mitsubishi's liens or interests under any equipment lease agreements between Mitsubishi and the DIP Loan Parties. (Proposed Final Order at ¶ 39).
Informal Objections			
11.	ACE American Insurance Company or any of its affiliates ("Chubb")	• The DIP Secured Parties should not have a security interest or lien on any collateral or security provided by or on behalf of the Debtors to Chubb. • The Debtors may not grant liens or security interests in such collateral or security to any other party. • The proposed Final Order should not grant the Debtors any right to use any property (or the proceeds thereof) held by Chubb as collateral or security to secure obligations under insurance policies and related agreements. • Nothing, including the DIP Credit Agreement or the proposed Final Order Order, should alter or modify the terms and conditions of any insurance policies or related agreements issued by Chubb.	**Resolved**. The proposed Final Order provides that DIP Liens do not attach to the Chubb interests at issue, the DIP Liens do not prime any Chubb Liens, and insurance policies or related agreements issued by Chubb are not altered or modified. (Proposed Final Order at ¶ 36).
12.	CIT Finance LLC and CIT Communications Finance Corp (collectively "CIT")	Funds temporarily held in trust by the Debtors for CIT's benefit should not be encumbered by DIP Liens.	**Resolved**. The proposed Final Order does not attach DIP Liens to the funds at issue. (Proposed Final Order at ¶ 37).

No.	Party	Summary of Objection	Response
13.	Additional Texas Taxing Jurisdictions	Texas' ad valorem tax liens should not be subject to priming DIP Liens.	**Resolved**. The proposed Final Order provides that the DIP Liens do not prime Texas' ad valorem tax liens. (Proposed Final Order at ¶ 44).