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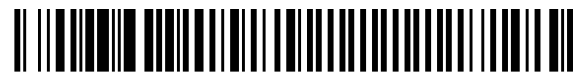
Counsel to the Debtors and Debtors in Possession

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)

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

[1] The last four digits of Debtor Windstream Holdings, Inc.'s tax identification number are 7717. Due to the large number of Debtors in these chapter 11 cases, for which joint administration has been granted, a complete list of the debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors' claims and noticing agent at http://www.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.



I, Richard U.S. Howell, P.C. hereby declare as follows:

1. I am an attorney with the law firm of Kirkland & Ellis LLP, counsel for the debtors and debtor in possession (collectively, the "Debtors") in the above-captioned matter. I submit this declaration in support of *the Debtors' (I) Brief In Support of Confirmation of the First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings Inc. et al., Pursuant to Chapter 11 of the Bankruptcy Code, and (II) Omnibus Reply to Confirmation Objections* (the "Motion").

2. Attached hereto as Exhibit 1 is a true and correct copy of the declaration of Nicholas Leone, dated June 21, 2020 and is filed Under Seal.

3. Attached hereto as Exhibit 2 is a true and correct copy of the 9019 hearing transcript, dated May 8, 2020.

4. Attached hereto as Exhibit 3 is a true and correct copy of the declaration of Anthony Thomas, dated June 21, 2020.

5. Attached hereto as Exhibit 4 is a true and correct copy of the transcript of Tony Thomas June 12, 2020 deposition in this proceeding and is filed Under Seal.

6. Attached hereto as Exhibit 5 is a true and correct copy of the transcript of Nicholas Leone June 17 2020 deposition in this proceeding and is filed Under Seal.

7. Attached hereto as Exhibit 6 is a true and correct copy of the transcript of Kevin Nystrom June 19, 2020 deposition in this proceeding and is filed Under Seal.

8. Attached hereto as Exhibit 7 is a true and correct copy of the Expert Report of Nicholas Grossi in support of the Debtors' first amended joint chapter 11 plan of reorganization dated June 11, 2020 and is filed Under Seal.

9. Attached hereto as Exhibit 8 is a true and correct copy of the declaration of Nicholas Grossi, dated June 21, 2020 and is filed Under Seal.

10. Attached hereto as Exhibit 9 is a true and correct copy of the amended rebuttal expert report of Kevin Nystrom in support of objection of the official Committee of Unsecured Creditors to confirmation of the first amended joint chapter 11 plan of reorganization of Windstream Holdings, Inc., *et al.*, pursuant to chapter 11 of the bankruptcy code, dated June 17, 2020.

11. Attached hereto as Exhibit 10 is a true and correct copy of the Perfection Certificate and is filed Under Seal.

12. Attached hereto as Exhibit 11 is a true and correct copy of the 9019 hearing transcript, dated May 7, 2020.

13. Attached hereto as Exhibit 12 is a true and correct copy of the amended and restated security agreement, dated July 17, 2006.

14. Attached hereto as Exhibit 13 is a true and correct copy of the expert report of Nicholas Leone in support of the Debtors' first amended joint chapter 11 plan of reorganization, dated June 11, 2020 and is filed Under Seal.

15. Attached hereto as Exhibit 14 is a true and correct copy of the hearing transcript in *In re Sears Holdings Corp., et al.*, dated July 31, 2019.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Dated: June 22, 2020
Chicago, Illinois

KIRKLAND & ELLIS LLP

/s/ *Richard U.S. Howell, P.C.*
Richard U.S. Howell, P.C.

Exhibit 1

FILED UNDER SEAL

EXHIBIT 2

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 Case No. 19-22312-rdd
4 - x
5 In the Matter of:
6
7 WINDSTREAM HOLDINGS, INC.,
8
9 Debtor.
10 - x
11
12 United States Bankruptcy Court
13 300 Quarropas Street, Room 248
14 White Plains, NY 10601
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16 May 8, 2020
17 1:58 PM
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19
20
21 B E F O R E :
22 HON ROBERT D. DRAIN
23 U.S. BANKRUPTCY JUDGE
24
25 ECRO: UNKNOWN

1 HEARING re Trial Continues from May 7, 2020
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25 Transcribed by: Sonya Ledanski Hyde

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18 New York, New York 1028
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20 BY: ALAN MAZA (TELEPHONICALLY)
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24
25

1 P R O C E E D I N G S

2 THE COURT: Good afternoon. This is Judge Drain
3 and we're here in Windstream Holdings, Inc., et al. This is
4 the second day of the hearing on the Debtors' motion for
5 approval of the Uniti settlement and the backstop commitment
6 agreement as well as the scheduled hearing on the Debtors'
7 request for approval of their disclosure statement. This is
8 a completely telephonic hearing, so first, you should
9 identify yourself and your client when you initially speak.
10 I may ask you to do so again if I think the Court reporter
11 doesn't understand or can't put together your voice with
12 your name, and I may do that more than once.

13 The Court Solutions recording bot is recording
14 this hearing as it did yesterday. The recording is then
15 provided to the clerk's office and can be available, then,
16 for requesting as a transcript. There should be no other
17 recording of this hearing.

18 So, with those preliminaries out of the way, we
19 were in the middle of closing arguments on the Uniti
20 settlement motion. I'd heard from all parties initially and
21 I posed some questions for the Debtors in response, or in
22 light of the presentations made by the objectors, and I was
23 going to give the Debtors just a brief period for rebuttal
24 also. So, I'm not sure which of the Debtors' counsel is
25 going to handle that, but you should do it now.

1 MR. WEILAND: Thank you. Good afternoon, Your
2 Honor. It's Brad Weiland of Kirkland and Ellis here for
3 Windstream Debtors. Thank you for your time today after the
4 long hearing yesterday, especially. We appreciate the time
5 and consideration.
6 I do want to address a few points raised by Your
7 Honor at the end of the day yesterday, but I did want to
8 start with some late breaking news on the backstop
9 commitment fee, which was one of the points, but of course,
10 we can table that until you want argument on that motion.
11 But we did hear you, loud and clear yesterday. Following
12 Your Honor's direction, we spoke with counsel for the
13 backstop parties. We think they heard you as well, and we
14 were able to agree to some meaningful concessions regarding
15 the fee in the event the backstop commitment is terminated
16 without the rights offering under the proposed plan going
17 through.
18 Those are three concessions, Your Honor. First,
19 instead of the fees being payable upon termination or within
20 three business days, the fee would be payable under a
21 promissory note with a one-year term and interest at the
22 prime rate. Second, if the Debtors do confirm and
23 consummate an alternative Chapter 11 plan, that note could
24 be paid at emergence as an administrative expense or could
25 be assumed and payable at any time up to one year after

1 emergence.

2 And third, if these cases are converted to cases

3 under Chapter 7, as unlikely as we think that that is, the

4 notes would be accelerated but could be redeemed and retired

5 for only $45 million plus accrued and unpaid interest, so

6 that is a meaningful discount from the $60 million payable

7 at termination or very shortly thereafter under the backstop

8 agreement as is on file today. So, I don't know if you want

9 to get into any of those issues now, Your Honor. I'm happy

10 to, or we can go back to the settlement, but I did want to

11 get those facts out there since they just developed before

12 we all joined the line.

13 THE COURT: Okay. I appreciate the update as well

14 as the focus by the backstop parties on this. Why don't we

15 leave it at that, at this point? We're going to get to the

16 backstop motion after the settlement motion, but therefore,

17 let's just go ahead with finishing up with the settlement

18 motion.

19 MR. WEILAND: Of course, Your Honor. Thank you.

20 Your Honor, you asked in addition to the backstop fee

21 question, a couple questions at the end of the hearing

22 yesterday. I just wanted to level set and correct a couple

23 things related to those points that Mr. Shore and Mr.

24 Marinuzzi said in their closings.

25 The Debtors have gotten these cases to the brink

1 of success through their leadership and stewardship of the
2 estates. Neither the Committee nor the Trustees have
3 spurred the Debtors to act when they concluded a thorough
4 investigation of all potential claims, even claims of
5 subsidiaries and even claims against directors and officers,
6 contrary to some of the assertions made yesterday. The
7 Debtors filed suit and prosecuted those claims for months.
8 On the point regarding creditor support for the
9 process and the plan that we have now, we have dozens of
10 creditors supporting, not just the handful of parties that
11 are participating in the Uniti stock purchase, and the
12 conspiracy theories don't match the facts on that front.
13 Without getting into any mediation order issues, the facts
14 are that we had no deal before the meeting in Little Rock
15 that Mr. Marinuzzi and Mr. Shore focused on, and we still
16 had no deal after that meeting.
17 Ultimately, we do believe that we all benefitted
18 from Elliott's efforts to push for a deal, and we're proud
19 of the ultimate deal we achieved. Others like it, too. One
20 hundred and seventy-five entities managed by over 40
21 investment firms have signed the PSA. That is much broader
22 than just the backstop parties, and while I don't think we
23 want or need to get into the plan or valuation issues today,
24 I know that's another one of your items, Your Honor, I do
25 think that the parties who have signed the PSA didn't sign

1 the PSA because they think their junior claims are entitled
2 to more that what the plan provides.
3 We've offered to discuss allocation and any other
4 issues that the parties have, with both the Committee and
5 the -- and counsel to the Indentured Trustee. Counsel to
6 the Trustees turned us down, over a month ago, when we tried
7 to have a session to discuss that. We're happy to do it
8 under the aegis of the mediation order or otherwise, but
9 we're willing to engage and we intend to engage on that
10 point, if there's someone to engage with, between now and
11 confirmation.
12 We expect that conversation to focus on the
13 allocation issues. I don't think we can be any clearer than
14 we've been and that Your Honor has been, going back to
15 discovery conferences we had last month, that all of the
16 issues regarding distribution and allocation of value under
17 the plan are not before the Court today and the release that
18 is before the Court is not intended to, nor should it,
19 prejudice anyone's rights or arguments regarding allocation.
20 The settlement agreement does provide that the
21 Debtors and the backstop parties can agree to the
22 distribution of cash payments from Uniti, but I think we
23 have consistently said, and we'll say it again, of course,
24 we all -- the Debtors and the backstop parties -- will be
25 bound by, and any agreement we make or want to make, will be

1 superseded by, the decisions of the Court at confirmation or
2 otherwise.
3 THE COURT: Can I interrupt you on --
4 MR. WEILAND: That --
5 THE COURT: -- that point?
6 MR. WEILAND: Yes, Your Honor.
7 THE COURT: Can I interrupt you on that point?
8 Section 8A of the definitive document, the settlement
9 agreement, states that "Uniti hereby commits to pay to the
10 Windstream entity or entities designated by the mutual
11 agreement of the Debtors, the required consenting First Lien
12 lenders and the required backstop parties three payments as
13 described therein, three separate types of payments, of
14 cash." And it's a material amount of money.
15 It's been argued by the objectors that this
16 actually does allocate settlement proceeds and a large
17 portion of the settlement proceeds because it's unlikely
18 that the consenting First Lien creditors and the requisite
19 backstop parties would agree to have those funds be sent to
20 a Debtor where there would be better arguments that some or
21 all of those proceeds would not be encumbered.
22 What is your response to that? Is this just a way
23 to get the money into the Debtors and it's subject,
24 thereafter, to reallocation, as per any plan that's
25 confirmed?

1 MR. WEILAND: Your Honor, on that front, I would
2 make a couple points. Number one, no determination or
3 agreement has been made about how the money will come in.
4 The settlement is not likely to be effective before our June
5 15th confirmation order, so it's not clear that that
6 determination will be made or will have to have been made
7 before then. If it were, again, I do not view that as
8 anything that should prejudice whatever arguments the other
9 side wants to make.
10 If they want to make an argument that the money
11 should come in to a particular Debtor, and have grounds to
12 argue that, I don't think that approval of the settlement,
13 including with this passage, is intended or should prejudice
14 them on that front. I don't know, I'm not aware of a Debtor
15 to which this money could be allocated to improve their
16 allocation arguments. I have not heard one from them.
17 I'm not aware of anything on that front in our
18 analysis, but to the extent that they want to make an
19 argument that the money should go to Debtor X and if it were
20 to go to that Debtor, their distributions under the plan
21 would or should be improved, I think they can make that
22 argument and we will address that at confirmation, with no
23 prejudice to that argument based on this part of the
24 agreement or anything else in the settlement.
25 THE COURT: Okay. So in sum, the Debtors view

1 this as simply a way for Uniti to know where the money
2 should go initially, but it's still subject to, as is
3 consistent with the 363(f) portions of the order, as far as
4 the purchase price is concerned, or the two purchase prices,
5 all valid, enforceable interests attaching to the proceeds?
6 MR. WEILAND: Yes, I think so, Your Honor. And, I
7 mean, this is a -- a lot has been made of it. I view it as
8 more a ministerial provision than anything else and, again,
9 any agreement among the Debtors and the backstop parties
10 would obviously be trumped by any decision of the Court
11 telling us that the value should have some in at another
12 point in the structure or should be distributed to other
13 parties. And this is not meant to take away from objectors
14 and it's not meant to take away from the Court's
15 prerogatives in making those decisions.
16 THE COURT: Okay. Anyway, I interrupted you.
17 feel free to go ahead.
18 MR. WEILAND: No, thank you, Your Honor, for the
19 questions. That was one point regarding allocation that I
20 wanted to cover. The other point that I wanted to cover
21 relates to the releases, which I know is an item unto itself
22 today, but to the extent that any allocation arguments the
23 Committee or the Trustees may want to bring are premised on
24 claims to be released under the settlement held by
25 subsidiaries or otherwise, first, again, it's unlikely those

1 releases or the settlement will even have gone into effect
2 by our confirmation hearing.
3 And second, notwithstanding approval of the
4 releases today, any arguments the objecting parties or
5 anyone else wants to bring, can be raised at confirmation.
6 The releases are not intended to prejudice the allocation
7 arguments, either, and I think we have been clear in
8 representations and stipulations to the Court to that
9 effect, but I'll just reiterate that, as well.
10 THE COURT: Okay.
11 MR. WEILAND: With respect to those releases, Your
12 Honor, they are broad. They were proposed by and insisted
13 on by Uniti in negotiations. We negotiated them and we
14 agree that they extend to a number of related parties on
15 both sides of the Windstream-Uniti fence. We also that
16 they're appropriate where, like here, we've thoroughly
17 invested all the claims, again, including subsidiary claims
18 and including claims against directors and officers.
19 They are limited in the sense that they say they
20 only release claims against the released parties in those
21 capacities. That's not a release of any claim that may be
22 held against one of the released parties that is captured
23 here. But this settlement is intended to bring finality and
24 certainty in resolving the Uniti situation. We think the
25 releases, as broad as they are, are a part of that.

1 THE COURT: Have you considered limiting language
2 in the releases to make it clear that, particularly as to
3 anyone that is on the Windstream side of getting a release,
4 that they only apply as to causative action that could
5 either directly or indirectly go against the Uniti parties,
6 in respect of the settlement and of the settlement itself
7 and the related agreement?
8 Put it differently, I understand that a major
9 reason Uniti is providing the consideration it is under this
10 settlement, is that it wants finality as to the claims
11 asserted or assertible against it by the Debtors, and that
12 could cover not just the Uniti companies, the defendants,
13 but also Uniti people, and those could be on the Debtors
14 side also, if claims against them would bleed back to Uniti.
15 To me, that's what is appropriate to be released here, as
16 well as because this has been subject to approval after
17 noticing a hearing, the actions taken in connection with
18 negotiating, entering into, drafting, and obtaining approval
19 of the Uniti documentation.
20 It seems to me that some form of proviso to make
21 sure you're not going beyond that, other than just saying,
22 in such capacity, might be advisable here in the order.
23 MR. WEILAND: Your Honor, I would -- to that, I
24 would say, we have not -- we don't have that language. We
25 would like to have the releases as drafted, if what Your

1 Honor means in asking the question is that you will only
2 approve the releases with that limiting language, I'm sure
3 we can talk about that language and propose something.
4 THE COURT: Well, look, I have rarely had this. I
5 think I've only had it once, in fact, a situation where
6 someone came back and said, I'm covered by an exculpation
7 provision in a confirmation order, and you -- there were two
8 different ways to read it. One was extremely broad and
9 wouldn't relate to just the matters that you would expect
10 would be covered by such an exculpation provision, i.e., the
11 conduct of the case and the agreements within the case that
12 were subject to notice and approval, but it went back and
13 said, anything related to the Debtor.
14 I don't want to have that type of litigation in
15 the future. I want to be able to point to the underlying
16 rationale for this, which is, Uniti is intended to be
17 protected, both directly and indirectly, from claims against
18 it, claims directly against it and claims that could go
19 against it, through other parties. So, I would think that
20 the parties could come up with some sort of proviso to that
21 effect, to put in the order.
22 MR. WEILAND: We can certainly do that, Your
23 Honor, and I'll have to discuss with other parties and my
24 client, but I'm sure we can come up with something, if that
25 is your decision.

1 THE COURT: Okay. You've already given --
2 MR. VONNEGUT: Your Honor, this is Eli Vonnegut --
3 THE COURT: You've already given quite a bit of
4 thought, obviously, in having reviewed the -- this comes
5 through and having reviewed the proposed order approving the
6 settlement to contribution bars and fallback allocation
7 language, so I think we'd be able to come up with similar
8 language along the lines I have just described.
9 MR. WEILAND: Yes, Your Honor. We can certainly
10 do that.
11 THE COURT: Okay. All right, so again, I
12 interrupted you, but you were covering one of the topics
13 that I had raised, so I wanted to focus on that.
14 MR. WEILAND: No, thank you, Your Honor. On the
15 releases, I think that sounds like the final word. I don't
16 have anything further to add. We will circle with others on
17 that and propose something. I think it may have been Mr.
18 Vonnegut who was trying to chime in just a moment ago.
19 MR. VONNEGUT: Yes, Your Honor, just chiming in to
20 say that your suggestion sounds fine from Uniti's
21 perspective. Thank you.
22 THE COURT: Okay. All right.
23 MR. WEILAND: Okay. Your Honor, those were two of
24 your three questions at the end of the day yesterday. I
25 think the third was the backstop fee, which we updated the

1 Court and others on just now. I think that is it from my
2 perspective on the settlement agreement, unless anyone else
3 has something to say, and then I'm happy to turn to the
4 backstop commitment agreement and approval of that today,
5 too.
6 THE COURT: Okay. Does anything -- does anyone
7 have anything more to say on the settlement agreement
8 motion?
9 MR. VONNEGUT: Your Honor, this is Eli Vonnegut of
10 Davis Polk. Two brief points I just wanted to address. I'm
11 not sure if there was any confusion about them but wanted to
12 clear up whatever confusion may exist. Mr. Shore made two
13 comments about the proposed 9019 order that I don't think
14 were entirely correct, so I just wanted to address those.
15 One, there was a suggestion that assets would be deemed
16 removed from the estate upon the approval of the settlement.
17 That's not right. I think what the language that
18 Mr. Shore was pointing to does, is just say that upon
19 confirmation of the asset purchase agreement, as a component
20 of the settlement, the assets that are sold will no longer
21 belong to Windstream and will transfer to Uniti. And then
22 the second point was that there may be some confusion as to
23 the manner in which Windstream operating subsidiaries that
24 currently are not party to the master lease are going to
25 become obligated under the new leases. That, I think, is

1 relatively straightforward.

2 They are -- they're not parties to the current

3 leases. They are going to be guarantors of Windstream's

4 obligations under the new leases. It's no more complex than

5 that.

6 THE COURT: Okay.

7 MR. VONNEGUT: Thank you.

8 THE COURT: All right, let -- Mr. Weiland, let's -

9 - I was going to give you all my ruling on the settlement

10 motion, but I'd like to turn, before I do that, to the

11 proposed order, and a couple of my questions, actually,

12 pertain to points that were made yesterday. I want to make

13 sure you've addressed them. Do you have the proposed order

14 there?

15 MR. WEILAND: I will momentarily, Your Honor. I'm

16 pulling it up on screen now.

17 THE COURT: Okay.

18 MR. WEILAND: I have the version, Your Honor, that

19 we filed, the amended version, at the Docket No. 1787.

20 THE COURT: Right, that's the one I have, too.

21 MR. WEILAND: That's the version you're looking

22 at?

23 THE COURT: yes.

24 MR. WEILAND: Yeah.

25 THE COURT: So, these are in no order, other than

1 just flipping the pages. If you turn to Page 5, the first
2 two findings in Heading C, I think are contrary in the
3 following respects to the record. C1 says, "Each Debtor's
4 board of directors, managing members, or other governing
5 body, as applicable, has authorized the execution and
6 delivery of the settlement document and the Debtors and
7 their affiliates have full corporate power and authority to
8 execute and deliver the settlement agreement."
9 And then, in little Roman ii(c), again, it says,
10 the settlement documents were negotiated, proposed, and
11 entered into by the Debtors, Uniti, and each of their
12 respective boards of directors, members, officers, et
13 cetera. Because as I took it down yesterday, at least as of
14 the date that the definitive documentation was entered into,
15 only the Holdings and Services board had approved the -- or
16 had authorized execution and delivery of the settlement
17 documents.
18 MR. WEILAND: I believe that's correct, Your
19 Honor, although, there may be corporate consents and the
20 like needed before we get to a closing at this time, and I
21 think when the documents were filed, the only board action
22 on the Debtors' side had been at the top.
23 THE COURT: Okay. So, I think you need to revise
24 these two findings to reflect the state of play. I mean, I
25 did, frankly, take away that it would be highly unlikely

1 that when you went to the other boards, given that there are
2 no separate shareholders than the ultimate shareholders,
3 there would be any dispute, or should be any dispute, but as
4 it stands now, these findings are -- I'm not able to make,
5 other than with respect to Holdings and Services. Although,
6 I am prepared to say that, I believe their interests are
7 aligned with the others. I'm not sure that's really a
8 finding akin to what you're asking for here.
9 MR. WEILAND: I think that's fine, Your Honor.
10 The one question I would have is, understandably -- or
11 understanding that the boards have not acted as those
12 entities today, should they be required to execute or
13 implement consents or other ancillary steps to the
14 settlement and the asset transfer, as long as the order
15 authorizes them to so act. I think that's fine.
16 THE COURT: Okay. And that is the case in the
17 decretal paragraph.
18 MR. WEILAND: In the order. I believe that's
19 right.
20 THE COURT: Right. Okay. If you go to nine,
21 you're just going to have to redefine the term releases in
22 Paragraph 4. I guess this is where you would add the
23 language, and then you would have the defined term releases
24 that we just discussed.
25 MR. WEILAND: Yes, Your Honor.

1 THE COURT: Apropos of the point Mr. Vonnegut
2 made, on Page 12, Paragraph 11, I think it should be made
3 clear that, with predicate language, that says upon the
4 effectiveness of the settlement or the closing of the
5 settlement, these things happen.
6 MR. VONNEGUT: Yes, Your Honor. That's the
7 intention, so we're happy to make --
8 THE COURT: All right.
9 MR. VONNEGUT: -- that clear.
10 THE COURT: And then secondly, it says, "Any
11 legal" -- "The term subject property is defined as any legal
12 title or beneficial interest that the Debtors or Windstream
13 successors may have in any of the MLA leased property, CLEC
14 leased property or ILEC leased property is defined as the
15 subject property." So, I think it's clear, but I just want
16 to get it on the record. The Debtors or the Windstream
17 successors' leasehold interest is not part of the subject
18 property, right? It's just, the underlying property is the
19 subject property.
20 MR. VONNEGUT: That's correct, Your Honor. The
21 point is just that they have a leasehold interest, but no
22 ownership interest.
23 THE COURT: Right. But the leasehold interest
24 itself, and of course the proceeds -- in any event, I think
25 it's clear with that one addition at the introductory

1 clause. On Page 14 and carrying over to 15, in Paragraph
2 16, it says, "The Debtors are authorized and directed to
3 assume the master lease and amend the master lease such that
4 the master lease will be divided into the ILEC lease and the
5 CLEC lease, pursuant to Sections 105(a), 363(b), and 365(a)
6 of the Bankruptcy Code."
7 And here's the language I'm asking you about, "in
8 all events consistent with the terms sheet." Should that
9 still be in there or should be -- were you referring the
10 settlement agreement at this point?
11 MR. VONNEGUT: That's a good point, Your Honor. I
12 think we should be referring to the settlement agreement.
13 That incorporates the terms sheet, but the settlement
14 agreement is the more comprehensive term.
15 THE COURT: Okay.
16 MR. WEILAND: Yeah, I agree with this -- with
17 that, and I think this one is just a product of having the
18 order on file before we had more than a terms sheet.
19 THE COURT: Right.
20 MR. SHORE: Your Honor, this is Chris Shore. In
21 light of Mr. Vonnegut's comment, shouldn't it also be that
22 Holdings is authorized and directed to assume the master
23 lease, to make clear that none of the other Debtors are
24 (sound drops) obligation under the master lease?
25 THE COURT: I'm going back to that paragraph.

1 Yes. I think it should be, whoever's going to be the
2 assuming party is authorized, and then you should say, and
3 the other Debtors are authorized to guarantee the
4 obligations thereunder.
5 MR. VONNEGUT: That's fine, Your Honor. Just the
6 -- it's the new leases where the other Debtors become
7 obligated.
8 THE COURT: So that would be in connection with
9 the CLEC and ILEC leases. So, you just need to break it out
10 --
11 MR. VONNEGUT: That's right.
12 THE COURT: -- in other words. Okay. All right.
13 On Page 18, this is the contract assumption and assignment
14 procedure section, kind of the middle of it. Paragraph G
15 says, "No IRU contract shall be deemed assumed and assigned
16 pursuant to Section 365 of the Bankruptcy Code until the
17 later of the settlement effective date and the date on which
18 all obligations to the cure amount and/or the proposed
19 assumption and assignment of the IRU contracts," plural,
20 "have been resolved and the cure amounts," plural, "have
21 been paid."
22 Is that right? Is that what you're intending,
23 that none is assumed until all of them are assumed? Or is
24 it -- or should it be the date on which all objections, the
25 cure amount, and/or the proposed assumption and assignment

1 of such IRU contract has been resolved and the cure amount,
2 singular, has been paid?
3 MR. WEILAND: I think it's probably the latter,
4 Your Honor.
5 MR. VONNEGUT: I agree with that.
6 THE COURT: Okay. Okay. All right, there's
7 another reference to releases with a lower-case R, contained
8 in this order and in the settlement document. I think you
9 should use the defined terms, unless I'm wrong, but it's in
10 Paragraph 37 on Page 26.
11 MR. WEILAND: We'll look at that, as well, Your
12 Honor.
13 THE COURT: Okay. And then 39, I think, is the
14 paragraph that implicates the allocation discussion that we
15 had about half an hour ago. It says, "The terms and
16 provisions of the settlement document," which would include
17 the Section 8A that we were just talking about, "and this
18 order shall be binding in all respects upon the Debtors," et
19 cetera, et cetera, et cetera, you know, everybody, including
20 the Chapter 7 Trustee under a plan.
21 And I think this is where it probably makes sense
22 to have a proviso that notwithstanding anything in the
23 foregoing, the allocation of the settlement proceeds is
24 fully reserved as among the non-Uniti parties and, if it
25 makes sense, it should say, including, without limitation,

1 notwithstanding Section 8A of the settlement agreement.
2 MR. WEILAND: Your Honor, I'm just writing that
3 down, but I think I've --
4 THE COURT: Well --
5 MR. WEILAND: I've got it.
6 THE COURT: That's the point. I know you're all
7 careful lawyers. I don't -- and I understand that what I
8 just said may, to Mr. Vonnegut or to you or to somebody,
9 open up a back door to Uniti that it shouldn't. The whole
10 purpose of this is to make it clear that, basically, no
11 matter where the money is paid, the allocation issues are
12 open.
13 MR. VONNEGUT: Your Honor, that's fine with us.
14 No objection.
15 THE COURT: Okay.
16 MAN 2: And, Your Honor, I think that same proviso
17 would have to go at the, what I have numbered, paragraph 48
18 which is that nothing contained in any plan of
19 reorganization or liquidation or any order of the Court
20 shall conflict or derogate from the terms of the settlement
21 document.
22 THE COURT: All right. Well, what I suggest is
23 what you -- when you put in the proviso in 39, just say, in
24 this paragraph or in paragraph 48.
25 MR. LOVETT: Your Honor, it's Sam Lovett, Paul,

1 Weiss, Wharton, Garrison on behalf of the first-lien ad hoc
2 group. Yeah, we can work with the parties on language. I
3 just want to make clear that obviously the language isn't
4 intended to give parties rights that they would not
5 otherwise have under applicable law.
6 THE COURT: Correct. When I say the allocation
7 issue, I mean all of those issues are open as they exist,
8 and it's consistent with the free and clear language where,
9 you know, all interests, claims, liens, rights,
10 incumbrances, attached to the proceeds. No more, no less
11 than they existed before.
12 I had one other comment which was on paragraph 44
13 which is the paragraph that permits modification. I would
14 add the committee -- counsel to the committee -- as well as
15 counsel to the consenting creditors to get notice of any
16 modification.
17 MR. VONNEGUT: We can do that, Your Honor.
18 THE COURT: I know I skipped ahead, but does
19 anyone else have any other comments on the proposed order
20 that we haven't addressed?
21 MR. MARINUZZI: Your Honor, it's Lorenzo Marinuzzi
22 of Morrison & Foerster on behalf of the committee. We don't
23 have any additional comments. We think Your Honor's
24 comments to the order capture our concerns. Thank you.
25 THE COURT: Okay. Very well. All right. Well,

1 let me give you my ruling. I have before me a motion by the
2 Debtors and Debtors in possession in this case for approval
3 under Bankruptcy Rule 9019 as well as related sections of
4 the bankruptcy code including sections 105, 363, and 364,
5 and 365 of the bankruptcy code of a settlement with what
6 I'll just refer to as the Uniti parties or Uniti.
7 The proposed settlement is complex and I believe
8 critical to the Debtor's ability to successfully reorganize.
9 In that sense, but I believe particularly with the
10 clarifications that have emerged as a result of the hearing
11 yesterday and discussion today, while it is intertwined as
12 the Debtor's witnesses have testified, with an eventual plan
13 of reorganization in these cases, it does not dictate the
14 terms of that plan other than -- and this is clearly
15 permitted under the bankruptcy code and case law --
16 resolving substantial and critical litigation with regard to
17 claims that the Debtor's estates have asserted or could have
18 asserted against Uniti.
19 The current Debtors and what became Uniti entered
20 into a complex set of transactions in 2015 whereby the
21 parent holding company and the services Debtor agreed to a
22 spinoff of a substantial portion of services assets to a new
23 entity, Uniti, for substantial consideration flowing back to
24 the remaining entities that are the Debtors today or at
25 least some of them.

1 Uniti then leased back substantially all of those
2 transferred assets, not the services which had originally
3 had them, but to a new top-tier holding company holdings.
4 The transactions are well summarized in the creditors
5 committee's objection to the motion before me in pages 5
6 through 7 -- just the actual steps in the transaction. It
7 was subsequently determined years later by the district
8 court in the southern district that the sale leaseback
9 violated the indenture at issue as asserted by an entity
10 that bought into the debt apparently thinking -- apparently
11 successfully -- that it would benefit from walking into a
12 default situation by alleging a default and a breach of the
13 indenture.
14 The resulting judgment was in the amount of $200
15 million plus, precipitated a financial crisis that led the
16 Debtors to file their bankruptcy cases. It was clearly
17 believed at the time that other than that large obligation,
18 the Debtors had substantial value and would be able to make
19 meaningful distributions through at least the debt part of
20 the capital structure including the unsecured notes and
21 general unsecured claims.
22 Nevertheless, as is to be expected in any large
23 Chapter 11 case, the Debtors and well as other parties and
24 interests including the unsecured creditors committee
25 investigated the 2015 transaction with Uniti and sought to

1 understand whether it would give rise to any claims against
2 Uniti that would belong to the Debtor's estates. The
3 Debtors and their creditors decided to pursue such claims.
4 The Debtor has filed a complaint asserting primarily the
5 characterization claims but also certain claims for breach
6 of contract and certain fraudulent transfer claims based on
7 the theory or theories, respectively, that Uniti had
8 breached noncompete types of provisions in their contracts
9 with the Debtors, and that the rent payments under the
10 master lease were, in the words of a former mayoral
11 candidate, too damn high and, consequently, the fraudulent
12 transfers. It's fair to say, though, that a primary focus
13 of the complaint was a cause of action to recharacterize the
14 master lease as a financing transaction under applicable
15 case law and to the extent relevant under applicable
16 statutes.
17 Uniti hotly disputed the claims and asserted
18 counterclaim. Recharacterization of a transaction as in
19 essence being a different type of transaction is well
20 recognized in the case law as a primary example of being
21 recharacterization of what is described a true lease that,
22 under various laws including the bankruptcy code, gives the
23 lessor certain rights, as instead being a financing
24 transaction which gives the party different rights. That
25 recharacterization does not evaporate the transaction as

1 transferred term says, recharacterizes it as a different
2 type of transaction.
3 The elements of recharacterization are generally
4 well understood but are quite facts driven and importantly,
5 the proponent of recharacterization has the burden of the
6 establishing recharacterization, and indeed, that burden has
7 been described as high by the second circuit which is also
8 referenced a strong presumption that a lease is a lease as
9 opposed to a financing transaction. See In re PCH
10 Associates, 804 F.2d 193, 200 (2d Cir. 1986).
11 The PCH Associates case was a, in some respects,
12 far more simple case than the present facts in that it
13 involved a sale leaseback of a hotel, one piece of real
14 property.
15 In that case, though -- or even in that case --
16 the second circuit noted, "as is evidenced in this case, the
17 decision by a court to recharacterize a formal transaction
18 can have a tremendous impact on the rights and obligations
19 of the parties to the transactions, as well as to the
20 interests of third parties. Given this fact, it is not
21 surprising that no clear formula for determining such
22 questions has emerged," Liona Corp PCH Associates, In re PCH
23 Associates, 949 F.2d 585, 597 (2d Cir. 1991).
24 The issues with respect to recharacterization are
25 somewhat clearer if one is dealing with personal property

1 covered by the uniform commercial code where the code lays
2 out one formula, specifically in UCC 120137, for determining
3 whether a transaction creates a lease or security interest,
4 and then other case law has applied, well recognized --
5 well, better recognized factors to a determination where the
6 specific elements of that section in 1 through 4, or one of
7 them, has not been established, see Duke Energy Royal, LLC.,
8 v. Pillowtex Corp, In re Pillowtex, Inc., 349 F.3d 711, 717-
9 718 (3d Cir. 2003).
10 If one of the elements of 120137, 1 through 4,
11 isn't established then one turns, even with personal
12 property, to a more nuanced analysis that focuses primarily
13 on issues of value and actual intent as opposed to objective
14 intent as expressed in the statute.
15 As far as real estate, frankly, it's not entirely
16 clear whether one looks at actual intent or expressed intent
17 but, in any event, the intent factor is not dispositive,
18 again, to the PCH cases that I've cited.
19 In addition, there is far less clarity as to the
20 nature of the remedy and the rights that would be had by the
21 party whose lease is recharacterized as financing
22 transaction. As to the real property at issue in the PCH
23 Associates case, second circuit in finding that the lease at
24 issue was in fact a sophisticated financing relationship,
25 thereafter held we conclude that the deed to the land

1 underlying the hotel while on its face conveying absolute
2 ownership to the owner was in reality nothing more than
3 security or the funds that Liona made available to PCH. In
4 short, Liona held an equitable mortgage. It then held that,
5 subject to proving up its claim even though it had missed a
6 bar date, it could assert such a claim in the bankruptcy
7 case.
8 There's a further issue in this particular case as
9 to the remedy because while the lease was with holdings, the
10 property that would in essence be the collateral for the
11 financing was transferred by services. That is important
12 because all parties recognize that if Uniti's resulting
13 claim upon a recharacterization resided at the services
14 level, it would much more dilute the recoveries of other
15 parties and interests in the bankruptcy case or cases.
16 The other causes of action have been much less
17 developed. The parties were prepared to go to trial on the
18 recharacterization cause of action on the day that the
19 settlement with Uniti was announced, thus the Court's
20 familiarity with the recharacterization issue is greater
21 than its familiarity with the other causes of action in the
22 complaint or other causes of action that are not asserted in
23 the complaint but objectors have said might exist against
24 Uniti.
25 Nevertheless, I am reasonably familiar with the

1 noncompete and fraudulent transfer causes of action in the
2 complaint and believe that each of them simply on the face
3 of the complaint and the underlying document, as far as the
4 contract cause of action in concerned, carry with them
5 significant problems on the merits. It's obviously the case
6 that the fraudulent transfer cause of action is subject to
7 defenses for good faith as well as the affirmative
8 obligation to show insolvency at the time of contracting
9 and/or an inability or projected inability to pay debts when
10 they come due and the like.
11 Given the date of the transaction -- 2015 -- and
12 the fact that at the time and thereafter after the
13 transaction was done, dividends were being made and it
14 appeared at least that the Debtors were solvent, a
15 fraudulent transfer cause of action would be an uphill
16 fight. In addition, the surplus -- the too-high portion of
17 the rent if one could show that -- would also be a key fact
18 in trying to establish recharacterization since one element
19 of showing recharacterization is that a portion of the so-
20 called rental obligation is really a disguised financing
21 return over and above the value implicit in limiting the
22 asset which leads to the issue of duplicate recovery.
23 I have spent this amount of time going through my
24 analysis at least of the legal merits of the causes of
25 action because that analysis is a fundamental element of a

1 bankruptcy court's review of a motion like this under
2 Bankruptcy Rule 9019 for approval of a settlement. As a
3 general matter, settlements and compromises are favored in
4 bankruptcy, and for an obvious reason, over and above the
5 fact why they are generally favored in all -- in connection
6 with all litigation.
7 It's especially important in bankruptcy where the
8 pie is already possibly too small to feed all the parties
9 and interests, that the estate minimize cost and generally
10 be cognizant of risk. In addition, it's important in
11 bankruptcy cases to get out of bankruptcy and end the
12 overhang and uncertainty that a bankruptcy case can create
13 or that can be exploited by competitors who are not in
14 bankruptcy, see generally, In re MF Global, 2012 Bankr.
15 LEXIS 3701. (Bankr. S.D.N.Y. Aug. 10, 2012) ., as well as In
16 re Iridium Operating, LLC, 478 F.3d 452 455 (2d Cir. 2007),
17 where the circuit stated that settlements are important in
18 bankruptcy cases because they, "help clear a path for the
19 efficient administration of the bankrupt estate."
20 As laid out by both the Iridium Court just cited
21 and the Supreme Court in Protective Committees for
22 Independent Stockholders at TMT Trailer Ferry, Inc, v
23 Anderson, 390 U.S. 414, 424-425, 1968, in considering a
24 motion for approval of a settlement, the court does not
25 decide the numerous issues of law in fact raised by the

1 issues that are being settled but must only canvass the
2 issues and see whether the settlement falls below the lowest
3 point in the range of reasonableness in deciding that it is
4 fair, equitable, and in the best interest of the estate.
5 See also, In re Residential Capital, LLC, 407 B.R. 720, 749
6 (Bankr. S.D.N.Y. 2013), and In re Adelphia Communications,
7 Corp, 327 B.R. 143, 159 (Bankr. S.D.N.Y. 2005).
8 That decision is within the discretion of the
9 Court which is informed not only by the motion but by the
10 fact that it is required to be served on notice to a wide
11 array of parties and interests and subject to a hearing and,
12 of course, objection. Particularly where important parties
13 and interests object, the Court needs to consider such
14 objections carefully although it should separately evaluate
15 the settlement even if there are no objections.
16 There's no specific statutory authority for
17 approval of a settlement, just Bankruptcy Rule 9019. The
18 closest is bankruptcy code Section 363(b) which requires
19 notice on a hearing and approval for actions out of the
20 ordinary course involving the Debtor's property. As I've
21 repeatedly held in evaluating such a decision, the Court
22 does not apply the ordinary corporate law business judgment
23 standard but analogous -- but importantly, in many ways
24 different -- review, ultimately coming down its own sense of
25 whether the settlement is fair, equitable, and in the best

1 interest of the Debtor's estates and creditors. See,
2 generally, In re Orion Pictures, Corp, 4 F.3d 1095 (2d Cir.
3 2004).
4 The Court obviously must make an informed and
5 independent judgment. It's not simply a rubber stamp, in
6 other words, notwithstanding, as I said before, the
7 importance of settlements of bankruptcy cases and the level
8 of canvassing that is required. See, for example, In re
9 Remsen Partners Limited, 294 B.R. 557, 565 (Bankr. S.D.N.Y.
10 2003). In the second circuit, the Iridium case that I
11 previously cited, focuses on seven interrelated factors in
12 determining whether a settlement is fair and equitable.
13 They are, first, the balance between litigation's
14 possibility of success and the settlement's future benefits;
15 second, the likelihood of complex and protracted litigation
16 with its attendant expense, inconvenience, delay, including
17 any difficulty in collecting on a judgment; three, the
18 paramount interest of creditors, including each affected
19 class as well as the benefits of a degree to which creditors
20 do not object or -- to -- or affirmatively support the
21 proposed settlement; whether other parties and interests
22 support the settlement; the competency and experience of
23 counsel supporting and the experience and the knowledge of
24 bankruptcy court judge reviewing the settlement; the nature
25 and breadth of releases to be obtained by officers and

1 directors; and the extent to which the settlement is the
2 product of ongoing bargaining.
3 In addition, the Iridium court noted that if the
4 settlement itself would cause a violation of the bankruptcy
5 code's priority scheme, one should look especially closely
6 at it and require assuring on a heightened standard for
7 approval of such a provision, although here, as has been
8 noted and as has been made clear today, that does not --
9 that concern is not implicated.
10 As with any settlement, one considers the merits
11 of continuing on with litigation instead of receiving the
12 actual assured recovery under the settlement. Here, I've
13 taken a fair amount of time to point out what I believe were
14 the substantial litigation risks that the Debtors faced in
15 continuing on with litigation. Instead of that, they are
16 receiving substantial value under this settlement. I accept
17 that the value estimate by the Debtor's financial advisor
18 Mr. Leone as to the dollar value or the hard dollar of the
19 settlement. I found his testimony to be credible and agree
20 based on my consideration that the settlement simply in
21 terms of its dollar value provides the roughly billion to
22 what he states in his declaration.
23 I also accept the testimony of Mr. Thomas and Mr.
24 Wells that in addition to that quantifiable dollar
25 contribution which is largely at present value as far as the

1 amount that is being paid over time, the settlement provides
2 important, not easily quantifiable, benefits but
3 nevertheless tangible ones. Those are primarily with
4 respect to additional flexibility by separating the master
5 lease into two separate leases, the realignment, and I would
6 say proper alignment now, of the tenant capital improvements
7 provisions and the favorable as against outside financing,
8 contribution by Uniti to updating Windstream's net worth.
9 When one looks at the range of recoveries based on what I
10 believe is the most likely result here, or at least in terms
11 of handicapping the litigation's outcome, which is some form
12 of recharacterization, although there is material risk even
13 as to that, but a senior claim at the services level, such a
14 result is favorable to Windstream and well above the lowest
15 range of reasonableness.
16 The objectors here have argued that the continued
17 cost of litigation would be minimal given that the parties
18 are ready for trial on the recharacterization issue at
19 least. However, I believe that there would be additional
20 costs beyond the costs of a trial which, frankly, would
21 probably -- would be probably not much more than the cost of
22 the litigation over the settlement itself. Those would be
23 the cost of litigation and inevitable appeals over
24 Windstream's claims and the ultimate remedy here.
25 In addition, there would be the additional cost

1 over litigating the contract and fraudulent transfer claims,
2 although, frankly, it's hard for me to believe that parties
3 seriously expected that after a result of the
4 recharacterization trial there wouldn't be a settlement of
5 those claims as well, i.e., that they were the tail and not
6 the dog.
7 The uncertainty that I just addressed and the
8 likely result as compared to the settlement itself is in
9 great contrast to a case of my own that was cited
10 extensively by one of the objectors, In re Remsen Partners,
11 Limited, which I've already cited. In that case, then
12 district judge Sotomayor had already ruled in parallel
13 litigation involving the same parties against the party with
14 whom the Chapter 7 Trustee was settling on two key issues.
15 Moreover, the objecting party was prepared to continue to
16 handle the matter on a contingency fee, and I believe that
17 that party would not be -- and the creditors that there was
18 -- where a win would give them a recovery. We're not
19 clearly out of the money because of the settlement itself
20 not being approved.
21 Here, to the contrary, continuing with litigation
22 not only would have a direct cost as I've described it, but
23 also prolong the bankruptcy case which is highly costly as
24 well, especially in respect of the key issue of where
25 Uniti's claim would lie in the Debtor's corporate and

1 capital structure if recharacterization were granted and
2 held up on appeal. That, unlike in the Remsen case, would
3 jeopardize the recovery, I believe, of parties who support
4 the settlement. While there was no valuation testimony with
5 respect to the Debtor's total enterprise value, I also have
6 on for approval today the Debtor's disclosure statement
7 which posits a far from full recovery by the first-lien
8 creditors, in essence, a projection of approximately a
9 billion-dollar shortfall.
10 Not proceeding with the settlement and running the
11 risk of either a loss and clearly substantial cost and risk
12 to the business would jeopardize those recoveries in a
13 meaningful way. That goes to the third factor in the
14 Iridium analysis, the paramount interests of creditors
15 including each affected class's relative benefits. As I
16 recognized in the Remsen case, there are times when the only
17 way a party and interest in a case can recover is upon a
18 homerun victory in litigation. They always oppose a
19 settlement, therefore.
20 I take away from Mr. Mendelsohn's testimony which
21 was candid and I think appropriate for an expert, that a
22 substantial recovery by the unsecured creditors here, unless
23 they win on the so-called allocation issue which I'll
24 address in a moment, would be that type of result, i.e., a
25 homerun. The overall standard for considering a settlement

1 does not favor that approach. Here, substantial creditors
2 are in support of the settlement both in terms of dollar
3 amount and number, including a group of creditors that has
4 been waiting to be paid in full. The (indiscernible)
5 creditors and -- who are unable to be paid in full at this
6 point, promptly, I believe, if the settlement is approved
7 and then a resulting plan is confirmed.
8 The indentured Trustee for the unsecured notes and
9 the unsecured committee opposes the settlement -- opposed
10 the settlement, excuse me. They're ably represented, and
11 particularly at the Trustee level, have succeeded in
12 throwing a fair amount of sand at the settlement, but except
13 as the parties to the settlement have been -- have agreed to
14 revise the settlement in light of their and my concerns, I
15 don't think that sand gums up the works.
16 Based on my own review and understanding of the
17 claims and causes of action and the range of recoveries, it
18 appears clear to me that while each class, i.e., those who
19 are in favor of the settlement and the more junior classes -
20 - representatives, at least -- that are against the
21 settlement are concerned, have taken legitimate positions in
22 the interests of their clients. The senior creditors here
23 do not fall into the category of, let's get it over with so
24 we can get paid right away. I believe that their interests
25 reflect an accurate weighing of the risks and rewards of

1 settlement versus litigation.

2 It's clear to me that the Debtors were represented

3 by capable counsel. In fact, they had two sets of capable

4 counsel advising them. Moreover, the settlement was

5 reached, I believe, in large part because of the

6 extraordinary mediation efforts of Bankruptcy Judge Shelley

7 Chapman. I say extraordinary because it is clear that the

8 mediation was lengthy. It took place over seven months with

9 mediation sessions, as evidenced by the testimony, at times

10 going all day and into the night and numbering at least 27,

11 if not more. Obviously, I do not know the nature of what

12 went on in those mediation sessions, but given the fact of

13 the mediation and the length of it as well as the undoubted

14 ability of the mediator -- frankly, if you applied an

15 imputed billing rate or on the lines of the billing rates

16 that top-tier professionals in those case are billing, her

17 services would be in hundreds of thousands of dollars for

18 those of you who measure things in dollars.

19 All of those factors lead me to believe that the

20 mediation was hard-fought and reached a reasonable result.

21 Having served as a mediator in a number of cases myself

22 where there are different positions depending on where one

23 stands in the capital structure, it is not unusual that at

24 some point the mediation focuses on those most directly

25 affected by a settlement. I do not believe this mediation

1 was anything other than that and given Judge Chapman's clear
2 diligence, I believe that if unsecured creditors wanted to
3 be more involved, they had ways to be more involved in the
4 mediation.
5 I also believe that the Debtors' own consideration
6 of the settlement was proper. As I've already said, I do
7 not employ the corporate law business judgment standard in
8 reviewing a motion like this, especially where there are
9 meaningful objections.
10 But even if I did, and recognizing that certain --
11 in fact, the majority of the Debtors' directors would be
12 getting a release under this settlement with respect to
13 their involvement in the Uniti transaction from 2015, but
14 the entire fairness standard where a director is interested
15 wouldn't be met here. I believe it would be met. There's
16 absolutely no evidence with the officers and directors who
17 would be deemed interested have acted in any way improperly
18 as a result of that interest.
19 I have looked carefully at the release provisions,
20 which would be the only provisions I think that are
21 implicated by that interest, and I have directed that they
22 be clarified to be what I think are appropriate provisions
23 here, which are, again, to give complete finality and peace
24 to the so-called Uniti issues, whether they involve direct
25 claims against Uniti or claims that would come in through

1 the back door or claims against third parties.

2 It has also been argued by the objectors that I

3 should defer ruling on the settlements until confirmation

4 and link the two or, alternatively, that the settlement is

5 disguised or a sub rosa plan. I believe I've already

6 addressed the sub rosa plan issue and is currently provided

7 in the contemplated proposed order. Nothing in this

8 settlement allocates recoveries to any specific class.

9 Consideration comes into the Debtor and then is subject to

10 allocation thereafter, not pursuant to this settlement or

11 this order.

12 That a transaction is large or sets the parameters

13 of the Debtors' estate does make it a sub rosa plan.

14 Rather, for a transaction or a settlement to be a sub rosa

15 plan, it has to dictate or allocate specific recoveries to

16 specific groups of creditors. This is the former, not the

17 latter. See, for example, Official Committee of Unsecured

18 Creditors of Cajun Electric Power Coop, Inc., In re Cajun

19 Electric Power Coop, Inc., 119 F.3d 349, 354-55 (5th Cir.

20 1997) and In re Dow Corning Corp. 192 B.R. 415 (Bankr. E.D.

21 Mich. 1996).

22 I also don't believe that entering into the

23 settlement and approval of it now is premature, as argued by

24 the notes' trustee. As I understood it, that argument was

25 twofold: first, the actual rent under the new ILEC and CLEC

1 leases based on a fair value appraisal. That is not an
2 indeterminant term; it's a term subject to a specific
3 mechanism, namely fair value appraisal. That mechanism
4 actually would result in a fair rent, as opposed to the
5 allegation in the Complaint, with regard to an unfair rent.
6 It should not hold up the implementation of the settlement.
7 It is also argued that the primary consideration
8 in the settlement will be coming in over time, a number of
9 years in fact, in the form of Uniti's financially enabling
10 the Debtors' investment in an improved network. It is
11 certainly conceivable, although I believe remote, that
12 notwithstanding this settlement, the Debtors would not
13 reorganize at all and, therefore, would not have the
14 benefits of that consideration, but it is just barely
15 conceivable.
16 A far more likely result in that the Debtors will
17 promptly confirm some form of reorganization plan whereby
18 these benefits would be locked in. If they were not
19 provided by Uniti, there is serious doubt, as made out by
20 Mr. Thomas, as to whether third-party financing would be
21 available for those necessary, or at least desired,
22 upgrades.
23 It appears clear to me that Uniti was pressed
24 about as far as one could go to get that number, and that
25 any further attempt to get anything other than a simple

1 recharacterization win, i.e., more money from Uniti, would
2 create potential risks regarding Uniti's performance.
3 There's also argued that the financial coverage ratios
4 might, in the new leases, might cause the Debtors and their
5 successors under a reorganization plan to default under
6 those leases.
7 It's not uncommon to have financial coverage
8 ratios in a document of this sort, which is a long-term
9 contract. I do not believe those ratios are manageable,
10 given the focus by quality professionals for the objectors
11 on making their objections as comprehensive as possible. I
12 believe it's telling that they have not argued that those
13 ratios are not achievable or not likely achievable or out of
14 whack. And, indeed, in rereading the objection this
15 morning, I actually didn't see a discussion of them.
16 I believe it is important to proceed with the
17 settlement now to give the Debtors the confidence to move
18 ahead with a reorganization plan. As with any plan, there
19 will be those who might be unhappy. That plan, however, is
20 not tied to this particular settlement. It leaves open the
21 allocation of the settlement value.
22 I also believe that the stock purchase by Elliott
23 Associates of Uniti stock at the then-current market price
24 is neither a thumb on the plan process, nor a case where an
25 important creditor in the capital structure used its

1 leverage to take value that would otherwise go to creditors
2 generally. First, Elliott's transaction with Uniti was a
3 separate transaction, and as stated by the Eighth Circuit of
4 Peabody Coal, that alone might insulate it from any attack
5 in this case. But I believe, more importantly, the evidence
6 has not shown that Elliott took an undue advantage, i.e.,
7 took consideration that would otherwise had gone to other
8 creditors.
9 Again, the trading price of the Uniti stock was
10 the market price on that day. One might assume the price
11 would go up based on, at least Elliott's view, that the
12 settlement might be good for Uniti. On the other hand,
13 Elliott gave Uniti other consideration as part of that deal,
14 including standing still for a year, which I believe I could
15 take judicial notice of this given Elliott's investor and
16 corporate profile, was a big win for Uniti.
17 Secondly, a buyer of stock isn't always right
18 about whether the stock goes up or down as predicted. And,
19 indeed, after the settlement was announced, the stock
20 actually went down in value.
21 In any event, it does not seem to me to be the
22 type of deal that Elliott can clearly be said to have
23 obtained value that would otherwise have gone to creditors
24 generally. The purchase price, while there's upside to it,
25 also has a downside, and appears to me to be fair.

1 Moreover, the funds paid by Elliott for the stock are being
2 used by Uniti to help fund the settlement. And it appears
3 to me that without those funds, Uniti would not have the
4 cash wherewithal to fund the entire settlement. Though I do
5 not see any faction to the objection based on the Elliott
6 investment in the Uniti stock and the subsequent agreement -
7 - again, separate and apart from the settlement agreement
8 with regard to a plan support agreement with the Plaintiff.
9 So weighing all those factors, I will approve the
10 settlement and related settlement documents, including the
11 two lease assignments, assignment of the RUI leases subject
12 to the assignment of -- I'm sorry, the assumption and
13 assignment procedures laid out in the proposed order, and
14 the other transactions contemplated by the Uniti settlement.
15 That still leaves open, of course, what sort of
16 plan the Court would confirm in this case. I have said this
17 before, I will say it again, but I really mean it this time.
18 And as the Charlie Parker song goes, "Now is the time." If
19 the committee and the indenture trustee want to try to
20 settle their allocation issues, now's the time.
21 I understand Judge Chapman remains ready to assist
22 you on that. But, frankly, I think you have the ability to
23 do that on your own by engaging with the lien creditors.
24 Otherwise, I will evaluate the arguments in the context of
25 the confirmation hearing with respect to the dry claim.

1 Again, I want to thank Judge Chapman for her work on this
2 matter.
3 Okay. So why don't we turn then to, hopefully
4 more briefly, to the oral argument on the backstop
5 commitment agreement motion.
6 MR. WEILAND: Thank you very much, Your Honor.
7 It's Brad Weiland from Kirkland. I'm happy to -- happy to
8 do that.
9 THE COURT: But actually, before we do that, I
10 apologize for going back to the settlement motion for a
11 moment. Just procedurally, what I'd like you to do is
12 revise the proposed order, circulate it to the parties who
13 filed pleadings in connection with the motion. You don't
14 have to formally settle it on them, just circulate it to
15 them to make sure that it's -- they can see it's consistent
16 with my ruling, and then send a blackline and a clean copy
17 to chambers.
18 If someone thinks the order is not consistent with
19 my ruling, you can send me a proposed different order
20 highlighting the changes in the order itself and an
21 explanatory email.
22 MR. WEILAND: That's exactly what we'll do, Your
23 Honor.
24 THE COURT: Okay. So then why don't we turn to
25 the backstop motion.

1 MR. WEILAND: Of course. May I proceed, Your
2 Honor?
3 THE COURT: Sure.
4 MR. WEILAND: So together with the settlement Your
5 Honor just graciously approved, the $750 million rights
6 offering are the two pillars of the Debtors' proposed
7 restructuring under the plan. Together, they represent the
8 fruit of the settlement and plan mediation that we've gone
9 through today.
10 The backstop commitment supporting the rights
11 offering was negotiated alongside and announced at the same
12 time as the Uniti settlement. Under the plan, cash
13 obligations, including repayment of the Debtors' $1 billion
14 DIP, and administrative claims in the hundreds of thousands
15 -- hundreds of millions of dollars and a cash paydown to the
16 holders of first lien claims will be paid with proceeds of
17 the rights offering and from up to $2.4 billion in new exit
18 financing.
19 The rights offering is backstopped by the equity
20 backstop parties, which consist of members of both the first
21 lien ad hoc group and Elliott Management. Under the
22 backstop commitment, the backstop parties have agreed to
23 purchase all of the shares under the rights offering at a
24 purchase price that reflects a discount of 37.5 percent to a
25 stipulated equity value equal to $1 and a 1/4 billion

1 dollars.
2 As we heard yesterday in Mr. Leone's testimony and
3 saw in his declaration, under the terms of the backstop
4 commitment agreement, the Debtors will pay the backstop
5 parties a fee of 8 percent in new common stock, calculated
6 to reflect the 37.5 discount applicable to the whole rights
7 offering on the plan effective date. As we've discussed,
8 Your Honor, that fee is payable in cash if the plan does not
9 become effective.
10 We believe that the concessions that we've gotten
11 from the backstop parties today should help to address the
12 concerns that you voiced yesterday. And with those
13 concessions, but even before, the unsecured creditors tried
14 to object to the fees. But the evidence here, including Mr.
15 Leone's testimony, but also the testimony from Mr.
16 Mendelsohn, is that these fees are consistent with market
17 practice and are reasonable in light of the commitment the
18 Debtors are obtaining.
19 The backstop commitment is necessary and critical
20 to the Debtors confirmation of a plan and ultimate
21 emergency. The Debtors' plan is premised on the rights
22 offering; it doesn't work without it. Likewise, the rights
23 offering is premised on the backstop and doesn't work
24 without it.
25 The Debtors negotiated hard for the backstop, and

1 we have made the business decision that moving forward with
2 the plan, including the rights offering and including the
3 backstop commitment and obligations it imposes on the
4 Debtors, is the best way to emerge from Chapter 11. It is
5 the product of extensive arm's length negotiations, through
6 months of mediation, during which we explored all options.
7 No other option was ultimately actionable, and no junior
8 stakeholder was willing to provide support for any
9 investment that would pay first lien claims.
10 Really, no one should quibble with the
11 accomplishment of having the $750 million equity financing
12 equipment in today's market, but the objectors still do.
13 Absent the commitment, it's entirely uncertain whether other
14 first lien creditors would participate in the rights
15 offering, and the security offered by the backstop is
16 crucial to the plan's ultimate confirmation and
17 consummation. The fees for that commitment were heavily
18 negotiated and designed to compensate the backstop parties
19 for the financial risk they're undertaking and the capital
20 they're reserving.
21 As we discussed, the backstop premium will be paid
22 in equity, unless it's payable in cash if a termination
23 event occurs. But in no event will a fee be paid twice, for
24 which I mean, Your Honor, that there is no upfront fee
25 followed by a fee when the transaction either closes or

1 fails to close. The creditors' committee and the trustees
2 argue that the backstop fees are too high, but even the
3 committee's witness testified that the fee was within the
4 range of comparable transactions.
5 In the papers, the objectors also allege that the
6 rights offering could be consummated without the backstop
7 commitment, or that the notional amount of the fee is
8 significantly higher because of other potential
9 participants. But the fact today, Your Honor, is that we
10 have no commitments to fund the rights offering, except
11 through the backstop. The equity backstop fees then
12 shouldn't be viewed in comparison just to the potentially
13 unfunded portion, but to the entire commitment that we're
14 obtaining from the backstop parties and from no one else to
15 fund the rights offering.
16 Arguments looking to MPM, I think in the
17 committee's and trustee's papers can be easily distinguished
18 because an MPM, there were certain non-backstop parties that
19 agreed to participate in the rights offering even without a
20 fee. Here, that's just not the case. Here, they had a
21 total commitment of 85 percent, including a number of
22 parties that were not backstop parties, and that's just not
23 what we have here. No other party beyond the backstop
24 parties has an obligation to participate in the rights
25 offering and the rights offering is not fully subscribed.

1 To touch quickly, Your Honor, on responses to a
2 few other arguments that the objectors raise. Creditors'
3 committee argues that the backstop fee essentially
4 forecloses our ability to exercise our fiduciary out in
5 light of the cross-default between the plan support
6 agreement and the backstop commitment agreement; that's not
7 -- that's just not the case. While we believe that the plan
8 under the plan support agreement and the backstop
9 commitment, under the rights offering offer us our best
10 available path forward today. The fiduciary out is the
11 fiduciary out, and if another alternative presents itself,
12 we can and will consider our ability to exercise that right.
13 The indenture trustees also assert that the
14 backstop fee could be used to engineer a plan support
15 agreement breach -- or the backstop parties, rather, could
16 engineer a plan support agreement breach by failing to close
17 on their commitment to purchase the Uniti stock and create a
18 chain of cross-defaults. We don't think that's a real risk,
19 and we aren't here today asking for these agreements to be
20 approved because we don't think that the parties to these
21 agreements are committed to getting to a closing. We
22 believe that this offers a value-maximizing path and a
23 favorable path forward for everyone and believe that we can
24 and will push to confirmation and ultimately a closing on
25 all of these transactions.

1 So, Your Honor, with that, I'm happy to cede the
2 floor, but I would just say that we do believe in the deal
3 that we've cut here. We think it represents a phenomenal
4 outcome so far and hope to take it through to an even more
5 consensual confirmation and ultimate deal.
6 THE COURT: Okay. Does anyone else want to -- I'm
7 not counting heads here, but does anyone have anything more
8 to say in support of the motion or should I hear from the
9 objectors?
10 MR. WOFFORD: Your Honor, Keith Wofford on behalf
11 of Elliott Investment Management from Ropes & Gray. I'd
12 just like to note one fact for the Court, which is in
13 considering the proprietary of the motion on the backstop,
14 we would call to Your Honor's attention the extraordinary
15 lengths that this backstop is outstanding prior to its
16 potential termination, which is the end of 2020 or,
17 depending upon regulatory approvals, potential the middle of
18 2021, which is another factor that we believe should be
19 considered in the overall context over the appropriateness
20 of the backstop.
21 THE COURT: Okay. All right, so I guess I should
22 hear from Mr. Marinuzzi or Mr. Shore.
23 MR. GOREN: Your Honor, Todd Goren, Morrison &
24 Foerster, on behalf of the Committee. I'm actually going to
25 take the backstop.

1 THE COURT: Okay.
2 MR. GOREN: Thank you, Your Honor. Todd Goren,
3 Morrison & Foerster, on behalf of the Official Committee.
4 Given your comments yesterday and today, I'm going to focus
5 my argument today solely on the termination fee. And while
6 we appreciate what the parties have done on the breakup fee,
7 we don't think it goes nearly far enough. As was
8 demonstrated in Mr. Mendelsohn's testimony, about a third of
9 the precedent comps have no breakup fee at all.
10 And if you look at the facts and circumstances of
11 each of the cases to determine what's appropriate, it's our
12 view, Your Honor, that this is one of those cases where no
13 breakup fee is appropriate. There's many reasons for that,
14 but the primary one is that the backstop, and in our view,
15 indeed, the entire rights offering, is simply unnecessary
16 here. I'll get into more detail on that shortly, but, in
17 short, it basically just recycles money among the first lien
18 lenders.
19 Before I get there, I'd just like to start briefly
20 with the standard. The Debtors argued in their reply that
21 they should get the deference of the traditional business
22 judgment standard. I think Your Honor's comments today and
23 in the MPM case make clear that that's really not the right
24 standard here; that the Court will make its own decision as
25 to whether the proposed transaction makes good business

1 sense and is in the best interest of the Debtors and fair
2 and equitable.
3 And, of course, we haven't heard much, but there
4 is another standard relevant to the termination fee, and
5 that's the standard for allowance of an administrative
6 claim. And for that, the Debtors need to demonstrate that
7 this is an actual and necessary cost of preserving the
8 estate. Not one of the Debtors' witnesses testified to that
9 fact. Instead, the primary testimony you got from the
10 Debtors from both Mr. Leone and Mr. Thomas is basically that
11 the rights offering is required to fund the payments
12 required by the PSA.
13 Mr. Leone testified that the rights offering is
14 required to make the cash distributions and emergence from
15 Chapter 11, consistent with the PSA, and Mr. Thomas
16 testified that the backstop commitment agreement is
17 necessary to fund the payments required by the plan support
18 agreement at emergence. So basically, you know, they were
19 testifying -- the testimony was that they have to make the
20 payments, that the 1L has to be made.
21 And I think the difference in language there is
22 telling. I don't think they can tell you this is an actual
23 and necessary cost because it's just not accurate. Unlike a
24 typical rights offering, which might be used to pay off a
25 senior creditor or provide critical cash to the balance

1 sheet, this rights offering does neither. Instead, the
2 rights offering simply recycles money from the PSA parties,
3 which again represent about 94 percent of the first lien
4 debt, back to those same exact parties.
5 Now Mr. Leone testified that he sees it as just
6 one big pile of cash coming in, but that's simply not what
7 the plan says. As Mr. Leone's cross demonstrated, under the
8 plan, the exit costs are being paid out of the exit facility
9 and other cash on the balance sheet. The rights offering
10 proceeds are not included in the definition of distributable
11 exit facility proceeds in Article 4(d)(1) of the plan.
12 In addition to that provision, Article 3(b)(3) --
13 THE COURT: I don't think that's right. I think
14 it's all cash.
15 MR. GOREN: Your Honor, if you'd look at it, it's
16 not. It's the required exit facility, term loans, and other
17 cash on hand held by the Debtors as of the effective date.
18 That doesn't include the rights offering because that's not
19 cash they hold as of the effective date. And if you look at
20 the treatment section of the plan, which is Article 3(b)(3),
21 I think that makes it even clearer, because that says that
22 they get one, cash -- they get cash in an amount equal to
23 the sum of the distributable exit facility proceeds, the
24 distributable flex proceeds, and the cash proceeds of the
25 rights offering. So it's treated separately; it's not in

1 that definition of distributable exit facility proceeds.
2 But even if you did look at it as one big group of
3 money, the fact is that the net result of the rights
4 offering is $750 million comes in and $750 million goes
5 right out the door to the same party. And the exit facility
6 is more than sufficient to cover all of the exit costs; they
7 don't need the rights offering to cover those costs.
8 So, you know, as Judge Wiles noted in Pacific
9 Drilling, backstop fees can be appropriate when real risks
10 are taken and when the fees are proportionate to those
11 risks. But like every other tool that has been invented,
12 they can be misused, and that's Page 5 of his decision.
13 Here, we think the backstop is being misused. The
14 rights offering participants are taking basically no risk.
15 The money is being put in and just coming right back out.
16 For every dollar that one of them puts in, they either get a
17 little less and, in some cases, maybe even a little more
18 than a dollar coming back to them. And if it's a little
19 less than a dollar, it's only because they made an
20 investment decision that they wanted more equity.
21 So what is the rights offering accomplishing here
22 and why is it part of the plan? Again, the only testimony
23 is that it was necessary to make the payments required under
24 the PSA. So as best as we can tell, it accomplishes
25 basically three things. First, it allows Elliott to get

1 their fees paid. I'm sure that's important to Elliott, but
2 it doesn't provide any money to the estate in isolation.
3 And second, it slightly reallocates the reorganized equity
4 among the 1Ls versus a straight equitization. And given the
5 high percentage of parties that are party to the PSA,
6 there's not likely to be much reallocation that ends up
7 actually even occurring here.
8 But even if that was the desired result, there's
9 plenty of ways that could be accomplished without a rights
10 offering, because under the plan, the 1Ls are supposed to
11 get a combination of cash from the proceeds of the exit
12 facility and rights offering and equity. And because of the
13 cash from the rights offering just goes directly back to the
14 1Ls, you could accomplish the same equity splits desired by
15 the PSA parties by eliminating the rights offering and just
16 letting the PSA parties elect how much cash from the exit
17 facility and equity they want to receive under the plan.
18 So if parties want more equity, which apparently
19 Elliott for one does, they could elect to receive less cash
20 from the exit facility and more equity, and parties that
21 want more cash elect to receive more cash and less equity.
22 Then result of how much cash and equity everybody is getting
23 wouldn't change at all under this construct; it would just
24 require a little bit of math by one of the bankers to figure
25 out those mechanics.

1 So it seems clear that the rights offering isn't
2 necessary for that purpose, which brings us to what we
3 believe is the real reason, is they want to hold the $60
4 million termination fee over the head of the objectors and
5 Your Honor as part of the plan confirmation process.
6 But there's no evidence in the record from which
7 the Court can conclude that such a claim is an actual and
8 necessary cost of preserving the estate. It's not serving
9 the purpose of a typical breakup fee to compensate the buyer
10 if a higher and better offer comes along. Instead, the fees
11 realistically only payable if the Court concludes that the
12 plan is not confirmable or even if just -- or even the Court
13 concludes that the plan needs to be delayed past the June
14 22nd milestone, which seems likely given the substantial
15 issues that may need to be resolved.
16 Another scenario in which it could be payable,
17 similar to the EFH case, Your Honor, is if for some reason
18 the required regulatory approvals don't come along; if that
19 happens, they can collect their termination fee. Again,
20 these don't strike me as reasons why the Debtors' estate
21 should have to pay a termination fee, particularly given the
22 recycling features.
23 The supporting parties' responses to all this
24 essentially comes down to two things. One, they argue it
25 was a necessary component of the plan. I think we've gone

1 through why, in our view, it's not. The rights offering
2 isn't ensuring that the Debtors have adequate money to
3 operate following insurance, and it's not junior creditors
4 paying off senior creditors, which as Mr. Mendelsohn
5 testified with the case in nearly every other account, if
6 not all of them.
7 But as an aside, that was what the rights offering
8 was right up until the very end when it was sponsored, and
9 Elliott noted this in their reply at Pages 8 and 9. At that
10 point, the rights offering was sponsored by the 2Ls, "To
11 purchase equity and reorganize Windstream from the first
12 lien holders." That's typically what you see a rights
13 offering for; it's not like this, and particularly a
14 backstop rights offering. But somehow the rights offering
15 remained part of the PSA when the 2Ls dropped out, and now
16 it's just the 1Ls buying equity from themselves and round
17 tripping the money without changing the Debtors' cash
18 position. So we don't think it's a necessary component of
19 the plan.
20 The other response is that the value is coming out
21 of the 1Ls anyway because all of the Debtors value is
22 encumbered, but that puts the cart before the horse. Mr.
23 Leone testified that the Debtors hadn't even performed the
24 analysis about whether all assets are encumbered. In
25 addition, all allocation issues as we've discussed at length

1 today are deferred until confirmation. But if the committee
2 is right and the settlement proceeds and certain other
3 assets are unencumbered and the plan ends up being not
4 confirmable as a result, then the $60 million breakup fee
5 will be borne by unsecured creditors who would have
6 otherwise been entitled to that.
7 Now obviously if the lenders were willing to agree
8 that the fee will only be paid out of their collateral, we
9 wouldn't have an issue to it, but the changes they agreed to
10 today didn't go to that point. So, otherwise, we would ask
11 the Court to deny approval of the break- -- of the
12 termination fee.
13 If the Court is inclined to approve some
14 termination fee, we believe that the fee proposed here is
15 simply too rich under the circumstances. The Debtors in the
16 first lien ad hoc group both assert that the fees are
17 market; however, you got zero analysis from the Debtors of
18 comparables to demonstrate that it's reasonable in market.
19 All you got was a bare statement and Mr. Leone's testimony
20 that he thinks it's reasonable with no numbers backing it
21 up.
22 THE COURT: Well, I have --
23 MR. GOREN: Mr. Leone --
24 THE COURT: I have a chart by your witness too
25 that lists a breakup fee for every single one of these

1 rights offerings on the chart.

2 MR. GOREN: Yeah, that's right, Your Honor. I was

3 just -- I was about to get there. Mr. Leone, for what it's

4 worth, Mr. Leone acknowledged in cross that he didn't even

5 analyze breakup fees; that that was not something they even

6 looked at here. We did the work, Mr. Mendelsohn did, and he

7 presented you with analyses as to the reasonableness of the

8 fees.

9 THE COURT: There are more. There are about five

10 that didn't have one, although they are -- anyway, most of

11 them have one.

12 MR. GOREN: Yeah. It's about a third of the total

13 don't have termination fees. And his testimony was that,

14 you know, that he pointed out that a large breakup fee

15 shouldn't be necessary here because the package as a whole

16 that the 1Ls are receiving, including the large discount to

17 plan value, the priority tranche, and because the proceeds

18 of the rights offering just got round tripped, indicated

19 that this is a very attractive and low risk proposition.

20 You have 72.8 percent of the 1Ls that are backstop

21 parties, and they've negotiated for themselves the right to

22 take 50 percent of the -- of up to 50 percent of the rights

23 offering in a priority tranche. And while the other PSA

24 parties aren't bound to participate, they did specifically

25 negotiate for the right to participate in this, in that

1 priority tranche. So similar to what we observed in --

2 THE COURT: I'm sorry to interrupt. But the

3 breakup fee takes place or is incurred when they don't get

4 those benefits. It's basically, I think, to compensate them

5 for putting the money aside, in essence, as a commitment and

6 them not using it.

7 MR. GOREN: So I think that's right, Your Honor,

8 which is where I was about to get to. It's that, you know,

9 that, in our view, the breakup fee here should be viewed

10 more in the context of a traditional breakup fee. It's not

11 ever payable in the event that they have to come out of

12 pocket and fund the break- -- actually fund the backstop,

13 which is why backstop fees tend to traditionally be so much

14 higher than breakup fees.

15 The breakup -- you know, the Debtors argue that

16 the breakup fee cases are in opposite because it's a

17 different kind of transaction. But realistically, it's

18 almost the same exact thing happening here: the 1Ls are

19 taking ownership of the company through the plan. And if

20 anything, there's even less need for a breakup fee because

21 the Debtors aren't soliciting higher and better offers and

22 their money is basically just getting round-tripped.

23 If anything, in our view, it's closer to paying a

24 breakup fee to a secured creditor who makes a credit bid.

25 In my view, Your Honor, that's to me --

1 THE COURT: Except this is cash. They're setting
2 aside a substantial amount of cash. They have to, right? I
3 mean, this is one of the reasons I asked Mr. Mendelsohn,
4 well, what is the right price, and it was clear to me it
5 wasn't zero.
6 MR. GOREN: Well, they are -- they are setting
7 aside cash. But, you know, like a traditional breakup, if a
8 seller -- you know, if a buyer is about to buy, they are
9 setting it aside, but, again, it's round tripping. They're
10 getting almost all of it back, not to mention, at the same
11 time, they're getting a significant amount of cash.
12 THE COURT: Not -- again, not if -- not if the
13 breakup fee event occurs, they're not getting it back.
14 MR. GOREN: Right, but then they don't need to
15 fund it if they're getting paid first.
16 THE COURT: But they set it aside and potentially,
17 they set it aside for a long time. They have to make sure
18 they have that amount of money for over a year potentially.
19 MR. GOREN: But that's really no different than a
20 buyer and a sale, and that's a traditional 1 to 3 percent.
21 So, you know, I think in our view, the breakup fee cases are
22 very illustrative here and really do -- should be the
23 guidepost of what an appropriate breakup fee is under these
24 circumstances.
25 You know, if they want -- if they're going to be

1 setting money aside, and I don't even know for sure that
2 that is happening because, you know, they are going to be --
3 if they ever had to fund, they would be getting more dollars
4 in on the day they were funding it than they are actually
5 paying out. So I don't know how any of them are accounting
6 for this on their balance sheet; it's not part of the
7 record. And there was no testimony, in fact, that they are
8 setting the money aside. So if anything --
9 THE COURT: No, but I'm not sure -- can I just --
10 I'm not sure that statement is right. The breakup -- the
11 backstop is for a subset of this group, so they're not
12 getting in the amount of the cash. They would not be
13 getting that amount of cash in, right?
14 MR. GOREN: Well, under the -- no. Under the
15 plan, if the plan were actually consummated, they would get
16 excess cash plus excess exit facility proceeds, which
17 exceeds the exit costs. So they're getting cash in, plus
18 the amounts they're funding under the rights offering, they
19 get their pro rata share of that back. So, yes, I mean --
20 THE COURT: But it's their pro rata share of it,
21 not the whole -- that was, I guess, my point. I thought you
22 were saying that they'd get the whole thing back. I think
23 they just get their pro rata share of it back.
24 MR. GOREN: Right, which is pretty close -- you
25 know, depending on how many people end up participating, is

1 likely pretty close to what they're put up and the amount of
2 --
3 THE COURT: But that was the problem with Mr.
4 Mendelsohn's scenarios two through four, is that you don't
5 know.
6 MR. GOREN: Well, you know at least 73 percent.
7 THE COURT: And, frankly, the rationale that you
8 stated for whether those are people participating or not
9 would argue that they -- a lot of them won't because they
10 don't want stock.
11 MR. GOREN: Well, although, I mean, there is at
12 least 73 percent already in the backup -- already in the
13 backstop. So, you know, they for a fact at least 73 percent
14 are participating. There's another 20 percent that are
15 questionable and may or may not participate, so, you know,
16 Mr. Mendelsohn's testimony with this was attractive enough
17 that they very likely would.
18 This all gets back to the fact that we think, at
19 most if you were going to allow some breakup fee, you should
20 look to the breakup fee cases as a guidepost. You know,
21 it's not different than, at best, they -- what a seller has
22 to do to set aside capital, so something in the 1 to 3
23 percent range, and we would argue less here is, under the
24 circumstances, would be better.
25 Look, the other alternative, which I think we

1 would be fine with, is if Your Honor required that any
2 breakup fee had to be paid solely out of the lenders'
3 collateral. If ultimately, they want to shuffle money
4 around themselves and pay themselves the breakup fee if
5 their plan, desired plan isn't confirmed, that's fine. But
6 what we are concerned with here, more than anything, is the
7 fact that if this plan isn't confirmed -- and as we sit here
8 today, we don't believe it's confirmable -- that they will
9 instead be entitled to the first $60 million of value, and
10 that's an allocation to them that we think is inappropriate
11 at this time.
12 THE COURT: Well, that's the point that I come
13 back to. I understand that point. It seems to me that even
14 a plan that ultimately will get confirmed, like -- well,
15 I'll take one where I was the mediator, Breitburn. Someone
16 came out of the woodwork, raised a legitimate issue, hadn't
17 been involved in the mediation. Judge Bernstein correctly
18 said, you know, you're not treating them under the Code
19 appropriately. I won't confirm this plan. If you make the
20 following changes, I'll confirm it, which is what happened.
21 It seems to me that I am not in a position today
22 to say that the plan that's on the table, which is, again,
23 the one that the backup is tied to, has a -- you know, it's
24 assured it's going to be confirmed. And that's a problem
25 for me with a $60 million charge, even if it is a note,

1 because of -- you know, because of that concern. I think if
2 you get beyond that, this breakup fee is fine because, at
3 that point, they're funding a plan. But I'm troubled by the
4 thumb on the scale of the $60 million note, which present
5 value is probably worth -- well, it depends. At the prime
6 rate, it's probably worth, you know, $50 million.
7 MR. GOREN: We certainly agree with that, Your
8 Honor, and I think there's probably two ways you could fix
9 that. Is, one, you could, like I just suggested, require
10 that the breakup fee only be paid out of the lenders'
11 collateral and not out of any unencumbered assets if it
12 becomes payable, so that, you know, you can sort of solve it
13 for that problem.
14 The other one would be to provide that the breakup
15 fee is only payable if the plan is terminated to pursue a
16 higher and better offer. And, you know, I think that was --
17 that was sort of where the dispute was in EFH; that was
18 Judge Sontchi's understanding -- yeah, the Judge's
19 understanding there.
20 THE COURT: Right, as opposed to their regulatory
21 delay.
22 MR. GOREN: Yeah. And so this puts the
23 confirmation is in the same category.
24 THE COURT: Yeah. I guess my concern is solely
25 with this plan. Frankly, if it was -- I mean, he just -- he

1 didn't think he had been told that it was that broad a
2 breakup. I'm fully aware that that would be included in the
3 breakup, but that doesn't particularly trouble me. If some,
4 you know, PUC decides to sit on this, I think they should be
5 compensated. But I have a hard time choking the
6 negotiations over the final iteration of this plan with a
7 $60 million fee tied to this particular plan, given the
8 briefing, or lack thereof, that I've gotten so far on what I
9 understand will be the committee's objection.
10 MR. GOREN: Understood, Your Honor, and we
11 (indiscernible).
12 THE COURT: So I guess my inclination would be not
13 just to reject it, but to say that I would approve, well,
14 basically, a two tier -- what we've been referring to as a
15 breakup fee. It's a fee if the financing doesn't happen,
16 the backstop doesn't happen, other than, obviously, if the
17 backstop parties breach, which is a smaller cash fee if it's
18 because the plan doesn't get confirmed, and the regular
19 breakup fee otherwise.
20 MR. WEILAND: Your Honor, this is Brad Weiland.
21 May I be heard on this point for just a moment?
22 THE COURT: Right.
23 MR. WEILAND: Your Honor, I understand --
24 THE COURT: What I wanted to say, what I'd say is
25 smaller, I would cut it in half with 4 percent.

1 MR. WEILAND: Your Honor, you know, on behalf of
2 the Debtors, I certainly can't argue with the notion that we
3 would have liked a smaller fee in those circumstances or
4 others, but I think what we're wrestling here is actually
5 not that unusual. In a lot of cases with rights offerings,
6 and backstop rights offerings at that, fees are approved.
7 Breakup fees are approved in connection with the
8 backstop in advance of solicitation and confirmation of a
9 plan, before objections are known and before objections are
10 briefed or any evidence is brought before the Court on those
11 objections or the issues that they raise.
12 In some of the cases that we have cited, 21st
13 Century Oncology, there was a backstop commitment with a
14 breakup fee approved, and later at the plan confirmation
15 stage, there were objections to that plan based on
16 feasibility and fairness grounds. None of those objections
17 were briefed or properly before Your Honor before that came
18 up.
19 THE COURT: Well, I know. I had that case too,
20 but there's a difference. I'm finding it very hard to
21 believe that there are no free assets. And remember, this
22 only happens if the plan's not confirmed. But I think the
23 reason it wouldn't be confirmed is probably because there is
24 some free assets somewhere. It may be worth less than $60
25 million, and then the money would have been spent. It just

1 -- it doesn't -- I don't think it, under these facts, it
2 doesn't make sense.
3 Again, it's the plan -- it's the weight on the
4 plan that, you know, is giving me pause here, not the
5 concept of a breakup fee or a break fee. And that's why I'm
6 suggesting -- and I appreciate the work that people did
7 overnight, which in some ways is attractive beyond what I'm
8 suggesting, which is a lower fee if the plan isn't confirmed
9 based on an objection by the committee or the noteholders
10 and, otherwise, it would stay the same.
11 MR. SHORE: Your Honor, this is Chris Shore. May
12 I be heard?
13 THE COURT: Okay. You guys are doing pretty well,
14 I think. I don't know where want to go.
15 MR. SHORE: Well, I just want to -- I would like
16 to have the 30 nothing. I mean, if $30 million is found as
17 unencumbered value, that's 30 times what we're getting under
18 the plan.
19 THE COURT: Well, I understand, but I think there
20 is a basis for some support here given that the willingness
21 to put the money up in the first place, and the fact that no
22 one else is prepared to do it.
23 MR. SHORE: Well, yeah. And let me address that
24 in particular, Mr. Wofford's statement that this is good to
25 the end of 2020. I'm in the backstop commitment agreement,

1 Section 9.2(a)(2), there's a termination event if the PSA is
2 terminated in accordance with its terms. The PSA can be
3 terminated if the plan confirmation order is not entered
4 into before 110 days after execution, which I peg at June
5 20th or so. So the backstop commitment parties, who are the
6 plan support parties, can terminate if the plan doesn't --
7 essentially, we don't have the confirmation hearing on June
8 15th. So it's not really open until the end of 2020; it's
9 only open until June.
10 THE COURT: But, again, this is tied to the plan
11 point, and I understand that point. I'm troubled by a $60
12 million price tag on a particular plan that I think may in
13 a, perhaps a very modest way, but still may need to be
14 amended for it to be confirmable.
15 MR. SHORE: Right. And we appreciate your
16 openness to hearing our arguments on that. But I would like
17 to say that it's not just enough to say that allocation
18 issues have been preserved. What the Debtors are committing
19 to now is to pay at least $30 million if this issue isn't
20 resolved in the next 30 days, because that would be
21 independent of the plan not being confirmed; it would be
22 because the PSA was terminated.
23 THE COURT: I understand your point.
24 MR. SHORE: And let me just address that for a bit
25 on -- because I think we're going to have to have a

1 discussion about plan confirmation scheduling. I don't know
2 whether Your Honor had a chance to review the blackline of
3 the disclosure statement.
4 THE COURT: Yes.
5 MR. SHORE: But we finally got the Debtors to get
6 pen to paper on what their view was of -- or the basis was
7 for their belief that everything was encumbered. And some
8 of the issues are just going to be around the Court's
9 interpretation of the DIP order, like the marshaling
10 provision and whether adequate protection can attach to the
11 settlement proceeds.
12 But they raise issues of adequate protection
13 liens, which are going to require -- if they want to go
14 forward with that theory are going to require valuations of
15 the collateral at the petition date and at exit, and we're
16 going to have to get into the extent of the lien releases.
17 We're going to have to get into what we didn't do in the
18 context of the settlement agreement is, what portion of this
19 is recharacterization, what portion is fraudulent
20 conveyance, what about other claims, which estates get them;
21 all that work's got to be done.
22 And then I don't know whether you noticed in the
23 liquidation analysis, there was a provision that was put in
24 the new paragraph in which the Debtors' liquidation
25 analysis, the way they're going to show, they say, that we -

1 - that the plan passes the best interest test as they are,
2 for purposes of that analysis, allowing $255 billion of
3 intercompany claims for which there's been no disclosure or
4 anything else.
5 All this is to say, I don't think -- if what's
6 going to happen is that the approval of the backstop
7 commitment isn't going to put a giant thumb on the scale of
8 the allocation fight. I mean, I think that the order's got
9 to provide that there be a reasonable period consistent with
10 due process for parties to litigate the allocation issue,
11 because otherwise we're going to get timed out before we
12 ever get there. We haven't had a chance to have a
13 discussion with the Debtors. We'll get up our discovery
14 requests and depo notices and all that. But practically
15 speaking, the allocation fight that they've laid out now in
16 their disclosure statement is going to take a lot of work.
17 THE COURT: Well, I would say due process and
18 common sense. I mean, it's one thing to represent an
19 indenture trustee aggressively; it's another to know when
20 it's time to end it. But I understand your point.
21 MR. SHORE: Thank you. That's what I have, unless
22 you have any questions.
23 THE COURT: Okay. I never thought that indenture
24 trustees are required to spend more money litigating
25 something than they could get out of -- their clients could

1 reasonably expect to get out of it, and that's why there are
2 exculpations and releases in the plan. But in any event, I
3 understand there has to be a reasonable time to have the
4 confirmation hearing.
5 MR. SHORE: Thank you.
6 THE COURT: So, Mr. Weiland, I know you're in an
7 awkward position here because you're the broker for trying
8 to get a deal done. But I am trying to say more than simply
9 no; I'm trying to tell you what I would approve.
10 MR. WEILAND: Understood, Your Honor, and
11 appreciate the guidance. There's not a lot that I can say
12 on my own right now, other than reiterate arguments that
13 I've made and haven't convinced you. What I might suggest,
14 if Your Honor is amenable to it, is taking just maybe a 15-
15 minute recess so we can confer with our client and with
16 other parties and then come back to you.
17 THE COURT: Okay. I think that's a good idea for
18 a couple of reasons. If we don't do that, we may come up on
19 the four-hour mark, and this way, we can call back in to
20 Court Solutions and avoid that automatic disconnect at four
21 hours.
22 MR. WOFFORD: Your Honor, Keith Wofford from Ropes
23 & Gray. Just one point of procedure just so that we can
24 deliberate in full knowledge. To be clear, what Your Honor
25 suggested would be potentially within the range of approval,

1 is a stepdown break fee of $30 million in the event that the
2 break fee is triggered by a failure to confirm the plan as
3 presented; but, otherwise, the break fee would remain intact
4 at the proposed amount.
5 THE COURT: Correct. And then the other caveat to
6 that is that the time in the PSA for confirmation needs to
7 be a reasonable time consistent with due process and common
8 sense.
9 MR. WOFFORD: Understood.
10 THE COURT: Which means we're not going to have a
11 discovery festival; but, at the same time, we have to build
12 in enough time to focus on the -- what we know now are going
13 to be the specific objections we're focusing on.
14 MR. WOFFORD: Understood. Thank you, Your Honor.
15 THE COURT: Okay. So I think why don't we resume
16 -- I did go through the disclosure statement and I don't
17 have a lot of comments. It would probably take about half
18 an hour. So depending on whether you've resolved the
19 objections or not, we can resume at 5:00 or we can resume at
20 10 of 5:00.
21 MR. LOVETT: It's Sam Lovett, Your Honor, from
22 Paul Weiss. I think we probably just need 15 minutes just
23 to speak with our clients.
24 THE COURT: All right.
25 MR. LOVETT: So I think let's do 10 to 5:00.

1 THE COURT: Let's get back at 10 of 5:00. Thank
2 you. Thanks a lot. Talk to you then.
3 MR. WEILAND: Okay. Thank you, Your Honor.
4 (Recess)
5 THE COURT: Hello, again. This is Judge Drain.
6 I'm calling in and we're going back on the record in In Re
7 Windstream Holdings, Inc., et al. I don't know if that
8 break was sufficient for the parties.
9 MR. WEILAND: Your Honor, it's Brad Weiland. That
10 was sufficient to reach a quick agreement to abide by Your
11 Honor's ruling.
12 THE COURT: Okay.
13 MR. WEILAND: That wasn't difficult. So I
14 believe, and I'll let counsel to Elliott and the first lien
15 group confirm, but I believe that the parties have agreed
16 that the breakup fee will stay as it is in the current
17 version of the backstop commitment agreement provided that
18 should the backstop commitment terminate because the plan is
19 not confirmed, the fee would be reduced to $30 million.
20 THE COURT: Okay. And again, that ties in to the
21 PSA and confirmed with in a reasonable and common sense time
22 for purposes of due process. Mr. Shore?
23 MR. SHORE: That's right, Your Honor.
24 THE COURT: Okay. All right. And that's
25 acceptable to the backstop parties?

1 MR. WOFFORD: Your Honor, Keith Wofford from Ropes
2 & Gray. That is acceptable to Elliott.
3 MR. LOVETT: Your Honor, Sam Lovett on behalf of
4 the first lien ad hoc group. That's acceptable to us as
5 well.
6 THE COURT: Okay, very well. All right. I'm not
7 going to give you a lengthy ruling on this one. I will
8 grant the backstop approval motion as modified. The use of
9 backstops in Chapter 11 cases is now I wouldn't say routine,
10 but there's a fair amount of experience with them. At the
11 same time, there's very little in the way of reported
12 decisions about them. Most of the time the issue comes up
13 where other parties are falling all over themselves to
14 participate in the backstop, and courts generally in those
15 instances review the proposal in light of their belief given
16 those facts, that it's not necessary to pay the types of
17 fees or other consideration to get the same benefit.
18 This is not that situation. No other parties have
19 shown up to say they want to participate in the backstop.
20 Rather it's alleged that the backstop isn't necessary at
21 all, or if it is necessary, it's only marginally necessary.
22 I'm not prepared to accept that on the evidence. The Debtor
23 I think has a valid use for committed funding for its
24 emergence. Parties also recognize, including Mr.
25 Mendelsohn, that at times backstops are used to get a deal

1 where parties otherwise disagree or where allocation of
2 stock versus cash or value. And I believe that the Peabody
3 case in some respects recognizes that, from the Eighth
4 Circuit.
5 The fees generally were not out of line based on
6 the testimony from the two experts. And other than my
7 concern about the undue weight that the breakup fee portion
8 of the backstop would have on the upcoming plan confirmation
9 process, I believe that they're warranted here.
10 So I have to say part of me also believes that the
11 committee's argument that the money is just being round-
12 tripped, or the fees are being round-tripped, generally also
13 argues for not treating this motion or the objection as
14 particularly telling, except again for the portion we've
15 focused on, which is the undue weight on the plan process.
16 And I've tried to balance the benefit of having a backstop
17 and committed funds as against that weight and coming out
18 with a reduced -- what I've been referring to colloquially
19 as a breakup fee.
20 So you can email that revised order to chambers,
21 Mr. Weiland, after circulating the changes to it, which are
22 really to reflect the change in the deal, which you can just
23 put in the order.
24 Again, as with the settlement order, you don't
25 need to formally settle that notice to the parties who have

1 taken an interest in this, but you should circulate it to
2 them. And, contrary to what I just ruled, they can send me
3 their version. Although I'm not encouraging them to do
4 that.
5 MR. WEILAND: Thank you, Your Honor. We will do
6 that.
7 THE COURT: Okay. So I think that leaves the
8 disclosure statement and the related solicitation notice
9 procedures matter. If you're ready to go ahead with that,
10 I'm ready to do that now.
11 MR. WEILAND: Your Honor, I think we are ready for
12 that. I will cede the phone line, clumsily, to my
13 colleague, Jack Luze
14 THE COURT: Okay.
15 MR. LUZE: Good afternoon, Your Honor. Jack Luze
16 with Kirkland and Ellis on behalf of the Debtors. I'll be
17 taking Your Honor through the disclosure statement, the last
18 item on the agenda.
19 Your Honor, I would note we received five
20 objections and one reservation of rights from the creditors'
21 committee. All objections have either been withdrawn or
22 resolved, and we've resolved the issues raised in connection
23 with the UCC's reservation of rights through inclusion of
24 additional disclosures, and in some instances, additional
25 language to the plan. Some of the disclosures and

1 additional plan provisions were as a result of informal
2 comments and objections we received as well.
3 Your Honor, I would note that the SEC's objection,
4 found at docket number 1724, has not been fully resolved.
5 Their objection focuses primarily on the third party release
6 provision. We have made some changes, Your Honor. We
7 included a carveout specific to the SEC in the plan that's
8 consistent with a similar carveout that's been included in a
9 number of other plans. And we also broadened somewhat the
10 opt-out procedures that were in the original disclosure
11 statement order and forms and procedures that were submitted
12 with the Court to ensure that all parties, even non-voting
13 classes, have an opportunity to opt out. We otherwise
14 believe that the releases are consensual through the opt-out
15 mechanism, consistent with procedures and decisions in this
16 jurisdiction. And even setting that aside, Your Honor, we
17 believe that that's an issue best left for confirmation if
18 not resolved between now and then.
19 The other objections have been resolved, as I
20 said, Your Honor. And we'd otherwise rest on our papers as
21 far as the case in chief in support of the disclosure
22 statement motion goes. Of course happy to discuss -- walk
23 through Your Honor's comments to any of the documents.
24 THE COURT: Okay. I would assume what you told me
25 is accurate and that I'll just be hearing from counsel for

1 the SEC. Although you may want to wait, sir, until you hear
2 my comments and decide whether anything more is necessary at
3 this point. Because I wanted to address the third party
4 release issue also.
5 MR. MAZA: Thank you.
6 THE COURT: And I'm sorry, that's Mr....
7 MR. MAZA: Maza.
8 THE COURT: Maza, right, for the SEC. So what I
9 have, just we're clear, is a first amended joint Chapter 11
10 plan, which is Docket 1781, and a first amended disclosure
11 statement, or a disclosure statement for the first amended
12 plan, which is docket 1782. So that's what people should be
13 looking at. And I'll be referring to the redline.
14 And most of you on the line know this. I am glad
15 when parties resolve their disclosure statement objections,
16 but I think it's important for the Court to go through the
17 plan and disclosure statement too, even in cases where, as
18 is here, there are sophisticated, very capable counsel
19 involved. And that's in part because counsel, having read
20 theses documents more than I'm sure they wish, may sometimes
21 miss something, or leave something a little uncertain. And
22 I think it's worthwhile for the Court to have that second
23 look. As I said, I don't have a lot of comments, but I want
24 to go through them with you.
25 And the first set is with the plan, and it deals

1 with the definition of releasing parties, which is on page
2 12 of the redline and paragraph 144 -- 1.44, excuse me.
3 I think this point that I'm about to make is not a
4 point that should be left to confirmation. I think you
5 really ought to deal with it now. In the definition,
6 releasing parties, it includes in G in the list, "All
7 holders of claims or interest that vote to accept or are
8 deemed to accept the plan."
9 One would think that someone who is unimpaired
10 under a plan wouldn't mind giving a release. But there's a
11 technical point here. Unless you're going to pay someone in
12 full in cash, then forcing a release on them I believe is --
13 or leaving it up to an opt-out approach renders them
14 impaired. And I think you should take it out, therefore.
15 I don't think the opt-out mechanism works for
16 someone who is unimpaired, because it raises the starting
17 issue that you in fact are impaired, and then you would have
18 to vote. And you don't want them to vote. So I think you
19 need to take that out of the plan, and similarly out of the
20 disclosure statement.
21 MR. LUZE: And, Your Honor, that's just with
22 respect to those deemed to accept, not those who vote to
23 accept?
24 THE COURT: Correct.
25 MR. LUZE: Understood, Your Honor.

1 THE COURT: Deemed to accept. Because by having
2 to opt out, they are, I believe, impaired. And you'd have
3 to send them balance as opposed to just an opt-out form.
4 Then secondly you have here -- and this is a
5 different issue. In clause -- or (I) in the list, the
6 release goes to those who are deemed to reject the plan and
7 who do not affirmatively opt out. I have recognized that,
8 and colleagues of mine have also recognized, that the opt-
9 out mechanism works with regard to plan releases, although
10 two of my colleagues disagree with that. But I think that
11 it's most problematic for those who are getting nothing
12 under the plan and therefore being deemed to reject.
13 So if you're going to include that with the opt-
14 out, I think there may be a confirmation issue. But beyond
15 that, the notice has to be clearer and the right to opt out
16 needs to be easier. And when we get to the solicitation
17 materials and the disclosure statement, that will explain my
18 comments.
19 You can take away from that completely the problem
20 by removing the deemed to reject language. Because again, I
21 think the best case to be made that the opt-out doesn't work
22 is for someone who knows they're getting nothing. The best
23 support for the opt-out as opposed to opt-in is the
24 analogous situation with opt-out class actions. But there
25 at least you have a choice. You're getting something. Even

1 if it's maybe just a couple dollars and most of the money is
2 going to the lawyers for the settling class, there's a
3 choice. Take something or take something else, i.e. the
4 right to keep litigating. Here there's no choice, because
5 you're deemed to reject if you're getting nothing. So it
6 puts you on shaky ground. And I have been recommending to
7 people that they take it out. I leave it up to them though,
8 because I think it is a configuration issue. It's based on
9 notice and where the plan ends up. But if you do leave it
10 in, you have to beef up the notice and the form from what
11 you have here.
12 I'm not expecting an answer on that. I think you
13 probably have to huddle with people. But I'm okay with
14 leaving it in the plan as long as the notice and this form
15 are beefed up a bit, and then leaving the issue for
16 confirmation.
17 I don't know if you want to stop there. I'm
18 happy to hear from the counsel for the SEC at this point.
19 But I'm probably signaling that I'm going to deny your
20 objection if you're still objecting at this point.
21 Obviously with full reservation of rights to object to the
22 plan.
23 MR. MAZA: Yes, Your Honor. This is Alan Maza
24 from the SEC. May I speak?
25 THE COURT: Sure.

1 MR. MAZA: So, first of all, I do want to amplify
2 what you just raised where we can't -- I don't think there's
3 any reported decision anywhere that says a shareholder who
4 is deemed -- or any party deemed to reject the plan would be
5 somehow bound by an opt-out. I mean, every reported
6 decision -- and in fact, even in Tops, which was a recent
7 decision which we are aware of that Your Honor granted the
8 opt-out, it was clear -- counsel made clear to you in the
9 transcript that, you know, under no circumstances were they
10 seeking to find those parties that were deemed to reject.
11 And particularly since there's no consideration.
12 We would also add to that, you know, there are
13 many reasons why a shareholder in particular would not
14 necessarily even possibly receive the ballot -- well, it's
15 not the ballot, it would be the form. You know, they're
16 depending on intermediaries to receive that. And just in
17 general the idea that there's no value for them. It's even
18 more of a degree if inattentiveness to the whole process.
19 So we definitely feel that at a minimum those public
20 investors should be outside of the scope of release.
21 We do raise these issues at the disclosure
22 statement juncture of the process since they're about to
23 solicit and they're also making a determination based on
24 what is represented that consent is -- that there is consent
25 or the opt-out process. And at least from the Emerge

1 decision -- I know it's Delaware, but it was a confirmation
2 -- basis to deny confirmation. So it's not necessarily that
3 it's, you know, when the argument is made, it's patently
4 unconfirmable. Well, yes, it could be patently
5 unconfirmable.
6 We also want to raise something else which we feel
7 is above the norm here. There is no carveout just in
8 general with regard to willfulness conduct, fraud, and gross
9 negligence in the release. We do acknowledge that the
10 Debtors did amend the plan to include an SEC carveout, but
11 we're talking about in general. And there are a bunch of
12 public investors here, not only on the shareholder level but
13 there's public noteholders. And we look at many, many,
14 many, many plans throughout the regions, and there's just
15 not that classic carveout, as I mentioned, for misconduct
16 and gross negligence. We don't see why even if ultimately
17 these releases are approved, that an officer and director
18 should somehow -- well, to quote Judge Wiles, get -- have
19 the anomaly of getting a better benefit in the court for
20 Chapter 11, which you're not involved -- you know, they're
21 just peripherally involved in as being officers of the
22 debtor than if they filed their own personal bankruptcy
23 under 523(a)(19). But I think that's something that at a
24 minimum should also be addressed.
25 We do mention, you know, what's in our papers,

1 that we do believe an affirmative act is necessary, and I
2 don't want to belabor the point, which I'm sure Your Honor
3 is aware based on other courts' determination that silence
4 could mean many things. Mostly, like we said, that there
5 was just not receipt.
6 I would just add, even in this COVID-19
7 environment, there are even mail issues. So here you have -
8 -
9 THE COURT: If someone cares enough to litigate
10 this issue and can establish they don't receive it, then
11 they didn't have a right to opt out. So that's a non-
12 argument.
13 MR. MAZA: Okay. Well, if they didn't receive it
14 but they weren't aware of the duty to opt out, then I'm not
15 sure how that would be --
16 THE COURT: Well, they are aware if they receive
17 it, because it will be made clear.
18 MR. MAZA: Right. But what I'm saying is the
19 Debtors are not aware that every party received it. That's
20 all I'm saying.
21 THE COURT: But if they don't receive it and they
22 care enough to bring litigation, then they won't be deemed
23 to have consented, because they didn't get the notice. It's
24 logic.
25 MR. MAZA: Right. But there could be post-

1 confirmation realization that there was a claim to litigate.
2 And then they're being forced to now --
3 THE COURT: That's a separate issue. That's the
4 fraud issue.
5 MR. MAZA: Okay.
6 THE COURT: But look, there's always a time to
7 make up your mind. And there's no more important time to
8 make up your mind than confirmation. That's why we have a
9 disclosure statement. So I don't buy those arguments. But
10 I do understand the issues with regard to people that are
11 getting nothing under a plan. And while the exculpation has
12 the fraud language in it, you're right -- and I admit this -
13 - the third party release does not. And that is a problem.
14 MR. MAZA: Okay. I appreciate Your Honor noting
15 that. Our arguments for jurisdiction were set forth in --
16 THE COURT: Well, those are denied, and they will
17 always be denied until the Second Circuit or the Supreme
18 Court rules otherwise based on the Third Circuit's
19 Millennium case and the Kirwan case.
20 MR. MAZA: Okay.
21 THE COURT: You're going to have to appeal that
22 one. And you're going to have to explain to the public why
23 there cannot be settlements in cases like Purdue because of
24 it.
25 MR. MAZA: Okay. Then the only other matters that

1 I would just say is regarding also we do think there's
2 potential overbroad exculpation in this scenario to the
3 extent that we're not clear that every party listed could be
4 deemed an estate fiduciary. To the extent that the Debtor
5 is able to make that showing, I guess that exculpation could
6 be resolved. And also, there is a list of pre-petition
7 transactions. I'm not sure that those are within the scope
8 of appropriate exculpation.
9 THE COURT: Well, if there's related pre-petition
10 transactions related to the plan's support agreement.
11 So this is an objection in two parts. I don't
12 believe the basis for exculpation is solely where someone is
13 specifically denominated as a fiduciary. Clearly there is
14 support to protect fiduciaries generally, but the underlying
15 basis for exculpation -- and this is where I do agree with
16 Judge Wiles, is that where there are transactions or simply
17 the conduct of a case because you do make a finding under
18 1123 -- I'm sorry, 1129(a)(3) when you confirm a plan, there
19 shouldn't be an opportunity to go afterwards against people
20 because they were part of that or were arguable a fiduciary
21 for part of that. It's to stop strike suits. And I think
22 with the carveout for fraud and gross negligence, I don't
23 have a problem with that.
24 And the one time when this has been raised before
25 me, I interpreted it narrowly to color those types of things

1 and not generally broadly to cover whatever was involved
2 with the debtor pre-petition.
3 MR. MAZA: Okay.
4 THE COURT: But I would like to turn to the
5 Debtor's counsel on the language of the third party release.
6 It does not just cover what happened in the case, but also
7 just anything relating to the debtors. And that means that
8 there should be something in here, as is generally in
9 confirmed Chapter 11 plans in this district, as an exception
10 for fraud, willful misconduct, and the like.
11 MR. BEHLMANN: Your Honor, may I be heard for one
12 moment?
13 THE COURT: Okay.
14 MR. BEHLMANN: This is Andrew Behlmann from
15 Lowenstein Sandler on behalf of Robert Murray, the lead
16 plaintiff in the Arkansas securities litigation pending
17 against Windstream in various (indiscernible).
18 THE COURT: Right.
19 MR. BEHLMANN: I certainly, especially at 5:19 on
20 a Friday, do not want to be duplicative of anything the SEC
21 has raised. I did want to raise one quick point though just
22 for the sake of having a clear record.
23 We did raise the opt-out issue at some length in
24 our objection to the disclosure statement and solicitation
25 procedures. While Mr. Luze is correct that the Debtors have

1 resolved our what I'll call pure disclosure issues through
2 the insertion of a couple of footnotes and a paragraph on
3 Page 32, we do not believe that out objection with respect
4 to the opt-out mechanism is resolved in any way. We
5 understand that's -- you know, further to Your Honor's
6 remarks, that's reserved for confirmation. We just wanted
7 to be clear that we don't view that objection as resolved,
8 and we intend to preserve that. And if the Debtors do
9 proceed with an opt-out release that purports to bind folks
10 that do not have an opportunity to vote on the plan because
11 they hold claims in impaired classes that are deemed to
12 reject, that we would be opposing that vehemently at
13 confirmation.
14 THE COURT: Okay.
15 MR. BEHLMANN: Thank you, Your Honor.
16 THE COURT: All right. Well, look, as far as the
17 Debtors are concerned, you do have this $30 million breakup
18 fee. The release language isn't the standard release
19 language that we have in our Chapter 11 plan. I think we
20 should change it to reflect that standard language. And you
21 should seriously consider dealing with the non-voting
22 because deemed to reject folks.
23 I'm not telling you that I would not confirm the
24 plan if I felt that there was a sufficient alerting them to
25 the consequences of not opting out. And the reason is that,

1 you know, the Debtors are entitled to have their sense of
2 peace at this point, but -- I mean, when a plan is
3 confirmed. But it is a serious issue, and we might end up
4 with an opinion that deals with it directly and might
5 trigger your $30 million fee that I just approved. I'm not
6 going to ask you to deal with that now, but I do believe
7 that the release language needs to be changed to conform
8 with the standard release language. And, let's see, who is
9 on from the U.S. Trustee? They could give it to you,
10 although I think you have it.
11 One related question. I know in the disclosure
12 statement you dropped the footnote about 510(b) claims. I
13 think you might want to do the same on Page 20 of the plan
14 when you identify the classes.
15 MR. LUZE: Certainly, Your Honor.
16 THE COURT: This is a tiny comment, but if you're
17 going to be making a couple other changes, you might as well
18 make it. On page 25, the heading says substantive
19 consolidation. I think you should change that to no
20 substantive consolidation, because that's what the text
21 says.
22 MR. LUZE: Understood, Your Honor.
23 THE COURT: And then on 31, the 1146 provision. I
24 know it says to the maximum extent permitted. But I think
25 given Piccadilly, I think you should say in the second line,

1 and in the second line to the bottom of the page, in both
2 places where it says, "Pursuant to in contemplation of or in
3 connection with," it should instead say, "Pursuant to or
4 under the plan," and then continue on pursuant to. This
5 other language really isn't consistent with the Supreme
6 Court opinion.
7 MR. LUZE: Understood, Your Honor.
8 THE COURT: Okay. And then on the disclosure
9 statement -- again, I'm working off the blackline. You need
10 to update the -- well, first point is you should -- I'm
11 sorry. On page 3, you make a reference to the Uniti 9019
12 motion. So you should have an update there, which could
13 just be a cross-reference to the lengthier discussion later
14 on if actually it's been granted.
15 MR. LUZE: Yes, Your Honor.
16 THE COURT: On page 12 at the top, you should add
17 in all caps, and underlined, and bold, if you don't do one
18 of these things, you will be deemed to have granted the
19 release.
20 MR. LUZE: Yes, understood.
21 THE COURT: And then you would have to change --
22 here's -- at the bottom of 12 I think you need to put in the
23 language that is in the -- the standard plan language for
24 releases.
25 MR. LUZE: On the third party release.

1 THE COURT: Yes.
2 MR. LUZE: Understood.
3 THE COURT: And then on Page 14, under (R), "How
4 do I go for or against the plan?" You should have a new
5 (S), which is, how do I opt out and not be bound by the
6 third party release. And then have a similar language
7 referring people to the instructions.
8 MR. LUZE: Understood.
9 THE COURT: On Page 17, it looks to me that you
10 got this language directly from the PBGC. That's fine, and
11 I'm glad you resolved it. I guess it was an informal
12 objection. But it's a little confusing. The top full
13 paragraph on Page 17 says, "During the bankruptcy
14 proceeding, the Windstream pension plan may terminate under
15 this trust termination provision. But then after you get
16 through that paragraph and four more, it becomes clear that
17 the Debtors are assuming it when they obtain the minimum
18 funding requirement.
19 MR. WEILAND: That's correct.
20 THE COURT: So I think maybe this top paragraph,
21 this top full paragraph should say that -- I would say
22 during the bankruptcy case, not proceeding, it was possible
23 or, you know, it could be the case that the plan would
24 terminate. But as discussed below, under this plan, that
25 won't happen. I guess you have to run that by the PBGC.

1 But otherwise, I would be very nervous until I got to the
2 bottom of the page if I were a creditor and worried about it
3 when, in fact, the plan has a very good resolution of the
4 pension plan issue.
5 MR. LUZE: Certainly. We'll add that language and
6 run it by the PBGC. That's fair as well.
7 THE COURT: Okay. And then on page 34, this is
8 where you'd have the main update of the Uniti motion, but
9 you'd have the cross-reference too from the earlier
10 reference on, I guess it's page 3.
11 MR. LUZE: Yes, Your Honor.
12 THE COURT: On page 36 where you talk about the
13 Uniti arrangement structure/terms. I think in that second
14 paragraph which talks about ILEC and CLEC leases, you should
15 add a sentence summarizing or stating that the rent under
16 those leases will be determined by an objective third party
17 to equal fair market rent. You know, summarizing it. But I
18 think you understand what I mean.
19 MR. LUZE: Yes, Your Honor.
20 THE COURT: Okay. I think it's worth your stating
21 on -- I guess it would be at the bottom of -- well, at the
22 top, sorry. At the top of page 37, at the bottom of little
23 8B there, and also at the bottom of 8C on 37, whether the
24 Debtors believe they will have any difficulty in meeting
25 those lease financial covenants.

1 MR. LUZE: Understood, Your Honor. We can add
2 that --
3 THE COURT: Obviously where they stand today,
4 knowing -- you know, with all the intro language that you
5 have at the beginning of the statement about forward-looking
6 projections.
7 So those were my comments on the disclosure
8 statement.
9 On the forms, the first one to focus on is Exhibit
10 3, the unimpaired non-voting status notice. I think --
11 well, not I think, you need to delete this from the package,
12 because I'm ruling now that they would be impaired if they
13 had to opt out to not be deemed to release.
14 And then the next notice, which is Exhibit 4.
15 This should be labeled more than just a notice of non-voting
16 status. If you're going to go with the opt-out mechanism
17 for these people, it should be notice of non-voting status,
18 and there should be a separate heading that says, "And
19 notice of need to opt out to preserved claims against
20 otherwise released parties."
21 MR. LUZE: Yes, Your Honor. I'll add that
22 language.
23 THE COURT: Okay. And then on the next page,
24 after the quote from Article 8B, you should say in all caps
25 and bold, "This release will be binding on you, i.e. you

1 will be deemed to have given it," and given should be
2 underlined, "unless you," and this should be underlined,
3 too, "opt out as instructed immediately below."
4 And then where it says how to opt out, you give
5 them two options. One is the e-ballot option, which is
6 fine. And then there's the mail option. And I think you
7 need to have postage prepaid for this. You need to give
8 them an envelope with postage prepaid.
9 And then I'm confused by what's on the next page.
10 In the box, it says e-balloting is fine. And then it says
11 "Notice of non-voting status and opt-out form submitted by a
12 facsimile or email will not be counted." I think most
13 people would think that the e-balloting is the same as
14 email. So maybe you should say email other than the e-
15 balloting.
16 MR. LUZE: Understood, Your Honor.
17 THE COURT: And then the heading below -- and this
18 is a consistent theme -- it should say, "How to opt out of
19 giving the releases." If you say opt out of the release,
20 well, someone might think that they're actually getting a
21 release and they don't care one way or the other. But this
22 would highlight that they're giving it. Same for the check
23 box below, opt out of giving the third party release. And
24 that plays out also in the beneficial holder opt-out form.
25 Each time you refer to opt out of a third party release, it

1 should be opt out of giving the third party release.
2 And I don't think it should be, "This notice of
3 non-voting status." It should be in this notice of opting
4 out of the release, in the box on page 3.
5 And is this to be mailed? How is this -- I wasn't
6 clear how this is to be done. Is this also e-ballots? It
7 doesn't say so.
8 MR. LUZE: So, your Honor, are you on the
9 beneficial holder form now?
10 THE COURT: Yes.
11 MR. LUZE: Yes. So, similar to how voting works
12 in public securities, there is a master ballot that goes out
13 to nominees, and then the nominees pass along a beneficial
14 holder ballot. It's the same concept here where they would
15 receive a beneficial holder form that they would return to
16 their respective nominees, and then the nominees have a
17 mater form that's returned to our balloting agent, in this
18 case KCC.
19 THE COURT: Okay. So they will be given the
20 instructions on where to mail it by their recordholder?
21 MR. LUZE: Yes, by their -- yes, by their
22 respective nominee. That's correct.
23 THE COURT: Okay. So again, since this is going
24 to be mailing, you need to provide them with a prepaid
25 postage envelope to mail it back. Given that they're

1 getting nothing under the plan, you have to make it easy for
2 them to opt out. And the same language should go in after
3 the quote from article 8B on page 4 that you put in for the
4 direct non-voting folks. You know, this release will be
5 binding on you, i.e. you will be deemed to have given it.
6 You know, that language.
7 MR. LUZE: Yes, I have that, Your Honor.
8 THE COURT: Okay. I think the rest are the people
9 who are getting something under the plan. And except to
10 make it clear that every time you refer to opting out of the
11 release, you had the word "giving the release". I don't
12 have any issues with those.
13 MR. LUZE: Understood, Your Honor.
14 THE COURT: So I would urge you to go with the --
15 just take out the non-voters. I guess you can try your
16 luck. But it really is problematic when you're getting
17 nothing.
18 The analogy to the class action settlement process
19 just doesn't -- it falls by the wayside at that point. So
20 you're just falling back on a general theory that a
21 bankruptcy plan can be final even if it has a release that's
22 improper. And that is true, but we know there are going to
23 be people who are objecting. So it's fairly problematic, or
24 more than fairly problematic.
25 MR. LUZE: Certainly, Your Honor. And thank you

1 for your guidance on these topics. We'll have to take that
2 particular point back to the PSA parties and of course the
3 company, but we will take that guidance and make sure it's
4 reflected appropriately in the solicitation version of the
5 documents that are submitted to chambers and filed on the
6 docket.
7 THE COURT: Okay. I don't think there's anyone
8 else that wants to be heard on the disclosure statement, but
9 you should feel free to speak up if you do.
10 MR. MAZA: Your Honor, this is Alan Maza. May I
11 make one more point?
12 THE COURT: Sure.
13 MR. MAZA: First of all, I just want to ensure
14 that there's no need for the SEC to file an additional
15 objection on these similar points for confirmation.
16 THE COURT: Well, I mean, look, it's just on
17 someone's computer. I think it's probably safer if you do
18 that.
19 MR. MAZA: Okay.
20 THE COURT: I mean, first of all, the facts will
21 be different. It's up to you, but I think the way a case
22 management order works, I would just pull up what you have
23 on your computer, make it an objection to confirmation, and
24 change the facts to reflect the actual facts.
25 MR. MAZA: Okay. And to the extent that items are

1 resolved, obviously those would not be included.
2 THE COURT: Right. Okay. So as far as these
3 changes are concerned and the order, my practice is to have,
4 after you've run it by your key constituents who you are
5 allied with and gotten their blessing on it to the extent
6 you need it, email a redline of the change plan and
7 disclosure statement to chambers. We'll review it quickly,
8 confirm that it's consistent with the comments you got, or
9 adequately addresses the comments that you got. And then
10 we'll contact you by return email and say yes, go ahead and
11 file the disclosure statement and plan, and email chambers
12 the order approving the disclosure statement. Or I guess
13 conceivably no, you didn't quite get the language right on
14 this point, if you make that change, then you can file.
15 And you should CC Mr. Maza at a minimum when you
16 email it to court. You may want to CC the U.S. Trustee,
17 too, as well as the other folks that you would normally CC.
18 Okay. Any questions?
19 MR. LUZE: No, Your Honor. That's clear. We will
20 follow those procedures. We've also received a few comments
21 since we filed the documents the day before yesterday, all
22 of which are fairly innocuous. Either cleanup changes
23 related to the contract procedures, and some points related
24 to the second lien indenture trustee being added to the
25 standard charging lien language. But that will be reflected

1 in the redline we submit to chambers as well.

2 THE COURT: Great. Okay, thank you. All right,

3 so I'll look for three orders. But the last one on the

4 disclosure statement, I guess you can send it when you send

5 the redline. But again, don't file the plan and disclosure

6 statement until we've had a chance to compare it against the

7 comments and let you know that it addresses them properly.

8 Okay. Thank you, everyone. I'm going to ring off

9 now, which will conclude the hearing.

10 (Whereupon these proceedings were concluded at

11 5:43 PM.)

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1 C E R T I F I C A T I O N

2

3 I, Sonya Ledanski Hyde, certified that the foregoing

4 transcript is a true and accurate record of the proceedings.

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8 Sonya Ledanski Hyde

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20 Veritext Legal Solutions

21 330 Old Country Road

22 Suite 300

23 Mineola, NY 11501

24

25 Date: May 12, 2020

EXHIBIT 3

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)

DECLARATION OF ANTHONY THOMAS

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

I, Anthony Thomas, hereby declare that the following is true to the best of my knowledge, information, and belief:

1. I am the President and Chief Executive Officer at Windstream and have held those positions since December 2014. I also have been a member of the Windstream Board of Directors since December 2014.

2. I have held a senior management position at Windstream since it was spun off from Alltel in 2006. I served as Windstream's Controller from 2006 to 2009 and as its Chief Financial Officer from 2009 to 2014. I also served as Windstream's Treasurer from 2012 to 2014. In August 2014, I was appointed President of the Real Estate Investment Trust Operations and oversaw the operations of the group that would go on to become Uniti until I was appointed Chief Executive Officer of Windstream. I am an accountant by training and obtained a MBA from Wake Forest University.

3. I support the *First Amended Joint Chapter 11 Plan of Reorganization of Windstream, Inc., et al., Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 1812] and all amendments and modifications (the "Plan"),[2] the related Disclosure Statement, and the chapter 11 cases.

4. I understand that this Declaration is intended to be submitted in lieu of direct testimony and that I will be subject to cross-examination.

I. The Proposed Restructuring.

5. I believe that the Plan is the exclusive option for Windstream to emerge from chapter 11 as a healthy and viable enterprise. Not only does it provide for a significant

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Plan or the *Disclosure Statement Relating to the First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc., et al., Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 1813] (the "Disclosure Statement"), as applicable.

deleveraging of Windstream's balance sheet, it also contemplates an infusion of capital through a combination of exit financing, a fully backstopped rights offering, and approximately $1.224 billion in net present value realized through settlement of the Uniti Adversary Proceeding.

6. The Plan and the significant consensus it represents is the product of many months of good-faith, arm's-length negotiations among Windstream, the Consenting Creditors, and other key constituents, who all worked towards a consensual, value-maximizing restructuring. I understand that the Plan enjoys robust support throughout Windstream's capital structure, with approximately $4.13 billion of Windstream's approximately $5.60 billion in prepetition funded debt party to the Plan Support Agreement. The Plan provides for a significant balance sheet restructuring that will significantly delever Windstream's capital structure, sending a strong message to the market and Windstream's employees, vendors, customers, and other business partners that they are well positioned for future success. Under the Plan:

a. Holders of Secured Claims will receive, at Windstream's option, in consultation with the Required Consenting Creditors and the Requisite Backstop Parties: (a) payment in full in cash; (b) collateral securing its Allowed Other Secured Claim; (c) reinstatement of its Allowed Other Secured Claim; or (d) such treatment rendering its Allowed other Secured Claim unimpaired.

b. Holders of Other Priority Claims will receive treatment in a manner consistent with section 1129(a)(9) of the Bankruptcy Code, rendering the claims unimpaired.

c. Holders of First Lien Claims will receive its pro rata share of: (a) 100% of the Reorganized Windstream Equity Interests, subject to dilution on account of the Rights Offering, the Backstop Premium, the Special Warrants, and the Management Incentive Plan; (b) cash in an amount equal to the sum of (i) the Distributable Exit Facility Proceeds, (ii) the Distributable Flex Proceeds, (iii) the cash proceeds of the Rights Offering, and (iv) all other cash held by Windstream as of the Effective Date in excess of the Minimum Cash Balance; (c) the Distributable Subscription Rights; and (d) as applicable, the First Lien Replacement Term Loans.

d. Holders of Midwest Notes Claims will receive its pro rata share of the Midwest Notes Exit Facility Term Loans, which shall be $100 million, plus any interests and fees due and owing under the Midwest Notes Indenture and/or the Final DIP Order to the extent unpaid as of the Effective Date, and any additional Midwest Notes OID Consideration.

e. Holders of Second Lien Claims will receive: (a) cash in an amount equal to $0.00125 for each $1.00 of Allowed Second Lien Claims, if holders vote as a class to accept the Plan; or (b) treatment consistent with section 1129(a)(7) of the Bankruptcy Code if holders vote as a class to reject the Plan.

f. Holders of Non-Obligor General Unsecured Claims will receive, at the election of the Requisite Backstop Parties, in consultation with Windstream: (b) reinstatement; or (b) payment in full, in cash.[3]

7. From the inception of this case, it has been Windstream's intent to reorganize as a going concern. On the petition date, and throughout this case, Windstream did not contemplate a foreclosure sale and never intended to surrender collateral to the secured creditors.

8. I believe that the terms of and transactions set forth in the Plan Support Agreement and the Plan set forth a clear path to emergence and will leave Reorganized Windstream better able to compete in the telecommunications industry. I believe the Plan is in the best interests of Windstream and all their stakeholders and, accordingly, that the Court should confirm the Plan.

II. The Plan Fully Complies with the Applicable Provisions of the Bankruptcy Code — § 1129(a)(1).

9. For the reasons detailed below, I believe the Plan satisfies the applicable Bankruptcy Code requirements for confirmation of a plan of reorganization. I have set forth the reasons for such belief below, except where such compliance is apparent on the face of the Plan,

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

the Plan Supplement, and the related documents or where it will be the subject of other evidence introduced at the Confirmation Hearing.

A. Proper Classification of Claims and Interests — § 1122.

10. I believe that each of the claims and interests in each particular class is substantially similar to the other claims and interests in such class. Article III.A of the Plan provides for the following Classes: Class 1 (Other Secured Claims); Class 2 (Other Priority Claims); Class 3 (First Lien Claims); Class 4 (Midwest Notes Claims); Class 5 (Second Lien Claims); Class 6A (Obligor General Unsecured Claims); Class 6B (Non-Obligor General Unsecured Claims); Class 7 (Intercompany Claims); Class 8 (Intercompany Interests); and Class 9 (Interests in Windstream).

11. In general, I believe that the Plan's classification scheme follows Windstream's capital structure. Valid business, legal, and factual reasons justify the separate classification of the particular claims or interests into the classes created under the Plan, and no unfair discrimination exists between or among holders of claims and interests. For example, debt and equity are classified separately. I believed that the differences in classification are in the best interest of creditors, foster Windstream's reorganization efforts, do not violate the absolute priority rule, and do not needlessly increase the number of classes. Accordingly, I believe that the Plan fully complies with and satisfies section 1122 of the Bankruptcy Code.

A. Designation of Classes of Claims and Equity Interests — § 1123(a)(1).

12. I can confirm that Article III of the Plan properly designates classes of Claims and Interests. Each class contains Claims or Interests that are substantially similar.

B. Specification of Unimpaired Classes — § 1123(a)(2).

13. I can confirm that the Plan identifies each class in Article III that is Unimpaired. The Plan identifies Classes 1, 2, and 6B as unimpaired.[4]

C. Treatment of Impaired Classes — § 1123(a)(3).

14. I can confirm that the Plan sets forth the treatment of each Class in Article III that is Impaired. The Plan identifies Classes 3, 4, 5, 6A, and 9 as impaired.[5]

D. Equal Treatment of Similarly Situated Claims and Interests — § 1123(a)(4).

15. It is my understanding that holders of Allowed Claims or Interests will receive the same rights and treatment as other holders of Allowed Claims or Interests within such holders' respective Class.

E. Means for Implementation — § 1123(a)(5).

16. I believe that the Plan provides adequate means for implementation. The Plan satisfies this requirement because Article IV of the Plan, as well as other provisions thereof, provides for the means by which the Plan will be implemented. Among other things, Article IV of the Plan provides for:

a. the execution and delivery of appropriate agreements or other documents of merger, amalgamation, consolidation, restructuring, reorganization, conversion, disposition, transfer, arrangement, continuance, dissolution, sale, purchase, or liquidation containing terms that are consistent with the terms of the Plan;

b. the execution and delivery of appropriate instruments of transfer, assignment, assumption, or delegation of any asset, property, right, liability, debt, or obligation on terms consistent with the terms of the Plan and having other terms to which the applicable parties agree;

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4 *See id.*

5 *See id.*

c. the filing of appropriate certificates or articles of incorporation, reincorporation, formation, merger, consolidation, conversion, amalgamation, arrangement, continuance, or dissolution or other certificates or documentation for other transactions as described in clause (i), pursuant to applicable state law;

d. the execution and delivery of the Reorganized Windstream Organizational Documents and any certificates or articles of incorporation, bylaws, or such other applicable formation, organizational, governance, or constitutive documents (if any) of Reorganized Windstream (including all actions to be taken, undertakings to be made, and obligations to be incurred and fees and expenses to be paid by Windstream and/or Reorganized Windstream, as applicable), and the issuance, distribution, reservation, or dilution, as applicable, of the New Common Stock, as set forth herein;

e. the execution and delivery of the Exit Facility Documents cases, including all actions to be taken, undertakings to be made, and obligations to be incurred and fees and expenses to be paid by Windstream and/or Reorganized Windstream, as applicable;

f. the execution and delivery of the Special Warrant Agreement, and the issuance and distribution of the Special Warrants;

g. the adoption of the Management Incentive Plan and the issuance and reservation of equity thereunder to the participants in the Management Incentive Plan on the terms and conditions set by the Reorganized Windstream Board after the Effective Date; and

h. all other actions that the applicable Entities determine to be necessary or appropriate, including making filings or recordings that may be required by applicable law in connection with the Restructuring Transactions.

17. The precise terms governing the execution of these transactions are set forth in the applicable definitive documents or forms of agreements included in the Plan Supplement.

F. Prohibition of Issuance of Non-Voting Stock — § 1123(a)(6).

18. I can confirm that Article IV.K of the Plan provides that the Reorganized Windstream Organizational Documents contain a provision prohibiting the issuance of non-voting equity securities to the extent required by section 1123(a)(6) of the Bankruptcy Code and

further, that the Reorganized Windstream Organizational Documents shall contain such a prohibition.

G. Selection of Officers and Directors — § 1123(a)(7).

19. I believe that the Plan is consistent with the interests of all stakeholders with respect to the manner of selection of directors to the Reorganized Windstream Board.

20. I can confirm that the Plan Supplement sets forth the structure of the Reorganized Windstream Board, members of which shall be appointed in accordance with the New Organizational Documents and other constituent documents of Reorganized Windstream. It is my understanding that the selection process and composition of the Reorganized Windstream Board accords with applicable state law, the Bankruptcy Code, the interests of creditors and equity security holders, and public policy. Accordingly, I believe the Plan satisfies the requirements of section 1123(a)(7) of the Bankruptcy Code.

H. Windstream Proposed the Plan in Good Faith — § 1129(a)(3).

21. I believe that the Plan was proposed in good faith with the legitimate and honest purpose of reorganizing Windstream's business and to enable Windstream to achieve a fresh start. The Plan is the product of extensive arm's-length negotiations among Windstream, lenders, and other key stakeholders. The Plan's widespread support across voting classes is strong evidence that the Plan is likely to succeed.

I. Payment of Professional Fees and Expenses Are Subject to Court Approval — § 1129(a)(4).

22. It is my understanding that section 1129(a)(4) of the Bankruptcy Code requires that certain fees and expenses paid by the plan proponent, by a debtor, or by a person receiving distributions of property under the plan, be approved by the Bankruptcy Court as reasonable or remain subject to approval by the Bankruptcy Court as reasonable. I can confirm that

Professional Fee Claims and corresponding payments are subject to prior Court approval and the reasonableness requirements under sections 328 or 330 of the Bankruptcy Code. Article II.C of the Plan, moreover, provides that Professionals shall file all final requests for payment of Professional Fee Claims no later than 45 days after the Effective Date, thereby providing an adequate period of time for interested parties' to review such Professional Fee Claims.

J. Compliance with Governance Disclosure Requirements — §1129(a)(5).

23. It is my understanding that Windstream will make all appropriate disclosures regarding the identities and affiliations of all persons proposed to serve on the Reorganized Windstream Board, as well as those persons that will serve as officers of Reorganized Windstream, in a Plan Supplement filed with the Bankruptcy Court.

K. Governmental Regulatory Approval of Rate Changes — § 1129(a)(6).

24. It is my understanding that section 1129(a)(6) of the Bankruptcy Code permits confirmation only if any regulatory commission that has or will have jurisdiction over a debtor after confirmation has approved any rate change provided for in the Plan. No such rate changes are provided for in the Plan.

L. Priority Cash Payments — § 1129(a)(9).

25. It is my understanding that the Bankruptcy Code generally requires that claims entitled to administrative priority must be repaid in full in cash or receive certain other specified treatment. I can confirm that the Plan provides that each holder of an Allowed Administrative Claim will receive Cash equal to the amount of such Allowed Administrative Claim on the Effective Date, or as soon as reasonably practicable thereafter, or at such other time defined in Article II.A of the Plan. In addition, no holders of the types of Claims specified by section 1129(a)(9)(B) of the Bankruptcy Code are impaired under the Plan. Finally, the Plan

specifically provides that each holder of Allowed Priority Tax Claims shall be paid in accordance with the terms set forth in section 1129(a)(9)(C) of the Bankruptcy Code.

M. Impaired Accepting Class of Claims — § 1129(a)(10).

26. It is my understanding that the Bankruptcy Code provides that, to the extent there is an impaired class of claims, at least one impaired class of claims must accept the plan "without including any acceptance of the plan by any insider," as an alternative to the requirement under section 1129(a)(8) of the Bankruptcy Code that each class of claims or interests must either accept the plan or be unimpaired under the plan. It is my understanding that holders of Claims and Interests in Classes 3, 4, and 5—which are impaired classes under the Plan—voted to accept the Plan independent of any insiders' votes.

N. The Plan Is Feasible — § 1129(a)(11).

27. In connection with proposing the Plan and presenting the Plan to the Bankruptcy Court for Confirmation, Windstream and its advisors have thoroughly analyzed their ability post-confirmation to meet their obligations under the Plan and continue as a going concern without the need for further financial restructuring. Windstream's executive management team, with assistance from its financial advisors at Alvarez & Marsal, LLP ("A&M"), prepared a set of financial projections for fiscal years 2020 through 2026 (the "Projected Period"), filed as Exhibit C to the Disclosure Statement (the "Financial Projections"). I am familiar with the methods used in the preparation of the Financial Projections and the conclusions reached. I have been involved in the formulation of the material assumptions included in the Financial Projections. Therefore, I can represent that they were prepared in good faith and are reasonable and appropriate to provide the foundation for the Financial Projections and the Plan. The Financial Projections demonstrate Windstream's ability to meet their obligations under the Plan, and Windstream has concluded

that it will be able to make all payments required under the Plan while conducting ongoing business operations.

28. Based on my review of the Financial Projections, Windstream anticipates that the Reorganized Windstream Board will review post-emergence financial projections and the Reorganized Windstream Board and Reorganized Windstream reserve the right to make public any post-emergence projections. To the extent that the Reorganized Windstream Board revisits the post-emergence financial projections, Windstream anticipates that main drivers of the financial projections that may change are the following: (a) customer add/disconnect assumptions, (b) pricing strategies, (c) possible capital investments, (d) known initiatives, and (e) historical trends. Any decisions to adopt or revise post emergence projections are subject to the Reorganized Windstream Board's consent.

29. Implementation of the Plan will enable Windstream to significantly delever their balance sheet by billions of dollars. During the Projected Period, Windstream's earnings before depreciation, amortization, and goodwill impairment are expected to grow from approximately $1.743 billion to approximately $1.809 billion. In addition, Windstream will make significant capital investments over the Projection Period, primarily in fiber investment to the premise for and fixed wireless infrastructure. Capital investments over the Projected Period accumulate to over $5.7 billion, equipping Windstream for continued growth and optimization.

30. In sum, the assets and Financial Projections of Reorganized Windstream demonstrate a reasonable assurance that Windstream will have and maintain sufficient liquidity and capital resources to pay amounts due under the Plan and fund operations during the Projected Period.

O. The Plan Provides for Payment of All Fees — § 1129(a)(12).

31. It is my testimony that Article II.E of the Plan provides that all such fees and charges, to the extent not previously paid, will be paid for each quarter until these chapter 11 cases are converted, dismissed, or closed, whichever occurs first.

III. The Principal Purpose of the Plan is not the Avoidance of Taxes as Required under Section 1129(D) of the Bankruptcy Code.

32. The Plan has not been filed for the purpose of avoidance of taxes or the application of section 5 of the Securities Act of 1933, as amended. Moreover, no party that is a governmental unit, or any other entity, has requested that the Court decline to confirm the Plan on the grounds that the principal purpose of the Plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. Rather, I believe Windstream filed the Plan to accomplish the objective of efficiently and responsibly reorganizing the capital structure, preserving the going concern value of the business, and providing recoveries to stakeholders.

IV. The Plan Complies With the Discretionary Provisions of 1123(b) of the Bankruptcy Code.

33. I understand that the Plan includes various discretionary provisions that are consistent with section 1123(b) of the Bankruptcy Code, but not necessary for confirmation under the Bankruptcy Code. For example, the Plan classifies certain Classes of Claims and Interests as Impaired and leaves others Unimpaired, provides a structure for Claim allowance and disallowance, and establishes a distribution process for the satisfaction of Allowed Claims entitled to distributions under the Plan. In addition, the Plan contains provisions implementing certain releases and exculpations discharging claims and interests, and permanently enjoining certain causes of action. These provisions are the product of arm's-length negotiations, have been critical to obtaining support for the Plan by its various constituencies, are given for valuable

consideration, and are fair and equitable and in the best interests of Windstream and its stakeholders.

A. The Debtor Release.

34. I believe that the Debtor release is appropriate, justified, in the best interests of the stakeholders, and an integral part of the Plan. The Debtor Release is a sound exercise of Windstream's business judgment, as it reflects the important contributions, concessions, and compromises made by the Released Parties in the process of formulating and supporting the Uniti Settlement and the Plan. Moreover, the Plan, including the Debtor Release, was heavily negotiated by sophisticated entities that were represented by able counsel and financial advisors. I believe that the result is a compromise that reflects the give-and-take of a true arm's-length negotiation process.

35. Further, I believe that the Debtor Release provides Windstream and the Released Parties with a substantial level of finality that is beneficial to Windstream and all parties in interest. Moreover, the Debtor Release is a central component of the balance sheet restructuring and is key to bringing the core parties to the deal. Finally, Windstream's directors, officers, and other agents, as well as the creditors' professionals and other agents, have been instrumental in negotiating, formulating, and implementing the restructuring transactions contemplated under the Plan Support Agreement and the Plan. These contributions enabled the successful administration of these chapter 11 cases, will facilitate Windstream's emergence from these chapter 11 cases, and avoid potentially costly and time-consuming litigation.

B. The Third Party Release.

36. In addition to the Debtor Release, the Plan provides for a consensual release by certain holders of Claims and Interests. Specifically, Article VIII.D of the Plan provides that

each Releasing Party[6] shall release any and all claims and Causes of Action such parties could assert against Windstream, Reorganized Windstream, and the Released Parties (the "<u>Third-Party Release</u>" and together with the Debtor Release, the "<u>Releases</u>"). Notably, I have been advised that each holder of a Claim or Interest was provided with the opportunity to opt out of the Third Party Release or was deemed not to be a Releasing Party.

37. In addition to being fully consensual, the Third Party Release is substantively warranted for the Released Parties. For months throughout these chapter 11 cases, the Released Parties worked constructively with Windstream and its advisors to negotiate and implement a value-maximizing settlement to resolve the Uniti Adversary Proceeding. The settlement of litigation with Uniti will bring over $1.224 billion in net present value to Windstream's estates and ultimately led to agreement on the terms embodied in the Plan Support Agreement. The support afforded to the Plan enables Windstream to emerge from these chapter 11 cases with a right-sized capital structure and the ability to continue to provide customers with the highest quality of communications services. I believe that the Third-Party Release allows Windstream to obtain the finality they need by minimizing the potential for distracting post-emergence litigation or other disputes.

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[6] The "Releasing Parties" means, collectively, (a) the Consenting Creditors; (b) the Backstop Parties; (c) the Uniti Parties; (d) the indenture trustees and administrative agents under the Debtors' prepetition Secured credit agreement and Secured notes indentures; (e) the DIP Lenders; (f) the DIP Agent; (g) all holders of Claims or Interests that vote to accept the Plan; (h) all holders of Claims or Interests that abstain from voting on the Plan <u>and</u> who do not affirmatively opt out of the releases provided by the Plan by checking the box on the applicable ballot indicating that they opt not to grant the releases provided in the Plan; (i) all holders of Claims or Interests that vote to reject the Plan <u>and</u> who do not affirmatively opt out of the releases provided by the Plan by checking the box on the applicable ballot indicating that they opt not to grant the releases provided in the Plan; and (j) with respect to each of the Debtors, the Reorganized Debtors, and each of the foregoing Entities in clauses (a) through (i), such Entity and its current and former Affiliates and subsidiaries, and such Entities' and their current and former Affiliates' and subsidiaries' current and former directors, managers, officers, equity holders (regardless of whether such interests are held directly or indirectly), predecessors, successors, and assigns, subsidiaries, and each of their respective current and former equity holders, officers, directors, managers, principals, members, employees, agents, advisory board members, financial advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, and other professionals, each in their capacity as such collectively.

38. Finally, throughout these chapter 11 cases and the related negotiations, Windstream's directors and officers steadfastly maintained their duties to maximize value for the benefit of all stakeholders, investing countless hours in and out of mediation, and reviewing numerous settlement and restructuring proposals, in addition to performing their ordinary course responsibilities. Litigation by Windstream against Windstream's officers and directors would be a distraction to Windstream's business and would decrease rather than increase the value of the estates. Accordingly, I believe that the Third-Party Release is appropriate.

C. The Exculpation Provision.

39. Article VIII.E of the Plan provides that each Exculpated Party shall be released and exculpated from any Cause of Action arising out of acts or omissions in connection with these chapter 11 cases and certain related transactions, except for acts or omissions that are found to have been the product of actual fraud, gross negligence, or willful misconduct (the "Exculpation"). The Exculpated Parties include Windstream and each current and former affiliate or related party of each of the aforementioned entities.

40. The Exculpation is intended to prevent collateral attacks against estate fiduciaries or parties that have acted in good faith to help facilitate Windstream's reorganization. The Exculpation was the product of extensive negotiations with third parties, many of whom played a critical role in formulating the Uniti Settlement, Plan Support Agreement, the Plan, and related documents in furtherance of the reorganization efforts. These negotiations were conducted with a high degree of transparency, at arm's-length, and in good faith. The Exculpation was important to the development of a feasible, confirmable Plan, and many of the Exculpated Parties are participating in the chapter 11 cases in reliance upon the protections afforded to the constituents involved by the Exculpation.

41. Here, Windstream proposes to exculpate the Exculpated Parties whose contributions and concessions have made the Uniti Settlement and Plan possible. In light of the record in these chapter 11 cases, I believe the protections afforded by the Exculpation are reasonable and appropriate. The Exculpation represents an integral piece of the Uniti Settlement and the Plan and is the product of good-faith, arm's-length negotiations, and significant sacrifice by non-Debtor Exculpated Parties. Based on conversations with my advisors and review of materials, I understand that the exculpation is narrowly tailored to exclude acts of actual fraud, gross negligence or willful misconduct, relates only to acts or omissions in connection with, or arising out of, Windstream's restructuring, and ultimately inures to the benefit of only those parties traditionally considered estate fiduciaries or those that have made similar contributions. The chapter 11 cases could not have progressed as productively absent the significant contributions of the Exculpated Parties, whose efforts were instrumental to the success of Windstream's efforts culminating in the Uniti Settlement and a value-maximizing plan supported by the vast majority of their stakeholders. As such, I believe the Exculpation is appropriate and should be approved.

D. The Injunction Provision.

42. It is my belief that the injunction set forth in Article VIII.F of the Plan (the "Injunction") is also essential and integral to the Plan. The Injunction is necessary to preserve and enforce the Debtor Release, the Third-Party Release, and the Exculpation each as set forth in Article VIII of the Plan. The Injunction permanently enjoins all Entities from commencing or continuing any action on account of, or in connection with, or with respect to any such Claims, Interests, Causes of Action, or liabilities discharged, released, settled, compromised, or exculpated under the Plan against Windstream, Reorganized Windstream, the Released Parties, or the Exculpated Parties. The Injunction is thus a key provision of the Plan

because it is necessary to preserve and enforce the discharge provisions in the Plan, the Debtor Release, the Third-Party Release, and the Exculpation that are central to the Plan, and I understand that it is narrowly tailored to achieve that purpose.

43. Based on my review of the Plan, my knowledge of the circumstances leading up to its development, and my discussions with Windstream's advisors, it is my understanding and belief that each of the discharge, injunction, release, and exculpation provisions set forth in Article VIII of the Plan are proper because, among other reasons, they: (a) are an integral part of the Plan; (b) were critical to obtaining the support of the various constituencies for the Plan; (c) are the product of arm's-length negotiations; and (d) are a condition to the Plan Support Agreement. Without these provisions, and the enforcement of such releases through the Injunction, the Released Parties indicated that they would not be willing to make their contributions under the Plan Support Agreement and Plan. Absent those contributions, Windstream would not be able to satisfy their obligations under the Plan Support Agreement and the Plan would not be feasible. The Injunction is necessary to preserve and enforce the Debtor Release, the Third-Party Release, and the Exculpation contained in the Plan. As such, these provisions are foundational to the success of the Plan and the chapter 11 cases.

V. The Uniti Settlement.

44. On May 12, 2020, the Court approved the Uniti Settlement that provided Windstream with $1.224 billion of net present value [Dkt. 1807].

45. As the Chief Executive Officer of Windstream, I am knowledgeable regarding Windstream's dealings with Uniti and the facts underlying the Uniti Adversary Proceeding. Based on my review of the complaint and market discussions, I believe that the value of the Uniti Settlement is almost entirely attributable to the recharacterization claim.

VI. The Degradation of Windstream's Business While Operating in Bankruptcy.

46. Windstream filed these chapter 11 cases nearly 16 months ago. Since the Petition Date, Windstream has faced challenges associated with operating their businesses in bankruptcy.

47. Prior to filing these chapter 11 cases, Windstream's board approved a business plan on February 6, 2019 (the "February 2019 Business Plan") that projected the company's EBITDA. I am familiar with these projections and believe that they were reasonable and reliable when made.

48. On February 15, 2019, Windstream received an adverse ruling from Judge Furman in the litigation with Aurelius. Ten days later, on February 25, 2019, Windstream filed these chapter 11 proceedings.

49. Although Windstream faced a liquidity shortfall, there was no material change to Windstream's business operations from when Windstream finalized the February 2019 Business Plan (February 6) and when Windstream filed these bankruptcy cases (February 25). Accordingly, on the Petition Date, Windstream's businesses continued to operate normally and as projected in the February 2019 Business Plan. Moreover, at the time of filing, Windstream believed that its first lien lenders were fully secured.

50. Additionally, shortly after Judge Furman's ruling, Windstream began negotiating with lenders to obtain debtor-in-possession ("DIP") financing and provided lenders nearly identical EBITDA projections as the February 2019 Business Plan, which ultimately led to Windstream obtaining DIP financing.

51. In March 2019, after filing these chapter 11 cases, Windstream revised the business plan in order to account for future harm to the company associated with operating in bankruptcy. As time has passed, Windstream has, in fact, experienced hardship associated with these proceedings. For example, Windstream began experiencing a higher rate of customer

churn and a lower rate of contract renewal, particularly in light of uncertainty regarding the date of emergence. At the end of 2019, the company adjusted its business plan to reflect the actual decline of its businesses that had occurred following the petition date, which was even greater than anticipated in March 2019.

52. Throughout 2020, the ongoing deleterious effects of operating in bankruptcy have continued to be a drag on Windstream's business operations. The Financial Projections attached as Exhibit C to the Disclosure Statement reflect the extent to which Windstream's business has suffered since the Petition Date, and I believe the Financial Projections accurately reflect Windstream's view of the business as it exists today.

Conclusion

53. In conclusion, it is my opinion as the Chief Executive Officer of Windstream, and having been involved in virtually every aspect of the chapter 11 cases and the negotiation of the Plan Support Agreement and Plan, that confirmation of the Plan is appropriate, is in the best interests of all parties-in-interest, and should be approved.

[*Remainder of page intentionally left blank*]

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: June 21, 2020

Little Rock, Arkansas

/s/ Anthony Thomas

Anthony Thomas

Exhibit 4

FILED UNDER SEAL

Exhibit 5

FILED UNDER SEAL

Exhibit 6

FILED UNDER SEAL

Exhibit 7

FILED UNDER SEAL

Exhibit 8

FILED UNDER SEAL

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

AMENDED REBUTTAL EXPERT REPORT OF KEVIN NYSTROM IN SUPPORT OF OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO CONFIRMATION OF THE FIRST AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION OF WINDSTREAM HOLDINGS, INC., *ET AL.*, PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

1. I am a Managing Director of AlixPartners, LLP ("AlixPartners"), a global consulting firm which has a principal place of business at 909 Third Avenue, Floor 30, New York, New York 10022. AlixPartners is serving as financial advisor to the Official Committee of Unsecured Creditors (the "Committee") of Windstream Holdings, Inc. and its debtor affiliates, as debtors and debtors-in-possession (collectively, the "Debtors").

2. I am duly authorized to submit this rebuttal expert report in support of the anticipated objection (the "Plan Objection") of the Committee to confirmation of the *First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al., Pursuant to Chapter 11 of the Bankruptcy Code* [Dkt. No. 1812] (as supplemented, the "Plan"), and in

[1] The last four digits of Debtor Windstream Holdings, Inc.'s tax identification number are 7717. Due to the large number of debtor entities in these chapter 11 cases, for which the Debtors have requested joint administration, 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.

rebuttal to the expert reports of Nicholas Leone (the "Leone Report") and Nicholas Grossi (the "Grossi Report"), each of which have been submitted by the Debtors in support of the Plan.[2]

3. The statements in this rebuttal expert report are, except where specifically noted, based on my personal knowledge or opinion, or information that I have received from the Debtors or the Committee's advisors, including other employees of AlixPartners, working directly with me or under my supervision or direction, as well as employees of Perella Weinberg Partners, the Committee's investment banker.

4. I am not being specifically compensated for this testimony other than through payments that may be received by AlixPartners as a professional retained by the Committee. If I were called upon to testify, I could and would competently testify to the facts set forth herein.

Background and Qualifications

5. AlixPartners is an internationally recognized restructuring and turnaround firm that has a wealth of experience in providing financial advisory services and enjoys an excellent reputation for services it has rendered in large and complex chapter 11 cases on behalf of debtors and creditors throughout the United States.

6. Commencing in March 2019, I have overseen and been directly involved with the AlixPartners team that has been one of the principal advisors for the Committee. In this capacity, I have become well-acquainted with the Debtors' capital structure, liquidity needs, and business operations.

7. I have more than 25 years of diversified business experience in restructuring, financial management, and accounting. In particular, I have held management roles and advised

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[2] Capitalized terms used but not defined herein have the meanings ascribed to them in the Plan, the Leone Report, or the Grossi Report, as applicable.

companies, boards of directors, investor groups, and lenders in a wide range of turnaround and reorganization situations. My operational experience covers numerous industries including telecommunications, mining, manufacturing, distribution, financial services, professional services, transportation, and real estate. I am a graduate of the University of South Dakota with a Bachelor of Arts degree in business administration.

8. I have extensive interim management experience, having served as: CEO of Boomerang Tube, an OTCG pipe manufacturer; chief restructuring officer ("CRO") of The Dolan Company, a publicly-held provider of business services; CRO of Blackhawk Mining; CRO of Mission Coal Company; CRO of Barnes Bay, owner of the Viceroy Anguilla Hotel and Resort; CRO of American Home Mortgage; COO of Hawaiian Telcom, the nation's tenth largest telecommunications utility; executive vice president and CFO of National Mortgage Corporation, a sub-prime mortgage wholesaler; and CFO of Asset Investors Corporation and Commercial Assets, Inc., publicly-held REITs.

9. I have significant experience in the development of reorganization plans, creditor negotiations, arbitrating with regulators and government agencies, business plan preparation and long-term forecasting, developing and implementing cost reduction programs, and the financial management of public and privately held companies.

10. My expertise includes proactive contingency planning for companies facing significant business transitions as well as leading due diligence of acquisition targets that are financially troubled. I have advised debtors, creditors, and other key stakeholders in numerous restructurings, including: Essar Minnesota; Mineral Park; Oxford Resources; Blitz USA; Samsonite; Marsh; ICG Communications; Rand McNally; and ANH Refractories. I have also

served as the financial advisor to the creditors of Murray Energy, EP Energy, Peabody, and Takata's North American operations.

11. I have testified nine times at trial, deposition, or by proffer, most recently in the chapter 11 case of Mission Coal. As a result of my experience and training, I am familiar with the standard methodologies and analyses necessary to assess a company's assets and claims, and to determine potential recoveries to the various creditor constituencies under different scenarios.

Summary of Opinions

12. According to the Grossi Report, the Debtors have taken the position that the Debtors have no unencumbered assets. Further, I understand that under the Plan Non-Obligor General Unsecured Claims are projected to recover in full, while the estimated range of recovery for Obligor General Unsecured Claims is 0.0–0.125%.

13. Based on my analysis and that of the Committee's professionals, it is my opinion that certain of the Debtors' material assets are unencumbered (collectively, the "Unencumbered Assets"). Both the Grossi Report and the Leone Report fail to properly account for the value of the Unencumbered Assets.

14. In addition, as set forth below, if the analysis of distributable value contained in the Leone Report is revised to account for and properly allocate the value of the Unencumbered Assets, then the Obligor General Unsecured Claims are entitled to recoveries of between 2.4% and 22.3%, before any adequate protection claims of the Prepetition Secured Parties are taken into account.[3]

[3] I understand that Mr. Leone has analyzed the value of adequate protection liens and claims and estimates that holders of First Lien Claims and Second Lien Claims are entitled to adequate protection liens and claims ranging from $654 million to $1,971 million. However, as set forth in the Committee's anticipated Plan Objection, I understand that these creditors have not sought allowance of any adequate protection claims and the Plan does not provide for the allowance of any such claims. In addition, I understand that the Committee contends that neither the Debtors nor the Prepetition Secured Parties have adequately demonstrated a diminution in value of the Prepetition Secured Parties' collateral and that allowance of such claims is not proper under the circumstances.

Unencumbered Assets

15. As set forth in greater detail in its Plan Objection, the Committee has determined as a result of its lien investigation that several categories of assets of value are not encumbered by prepetition liens. In conducting my analyses, I have focused specifically on the following: (a) certain unencumbered assets that hold liquidation value, including real property interests ("Unencumbered Operating Assets"), (b) recoveries in the Debtors' litigation against Charter Communications, Inc. and Charter Communications, LLC (collectively, "Charter"); (c) cash in certain deposit accounts; and (d) the value attributable to the Uniti Settlement (the "Settlement Value").

Unencumbered Operating Assets

16. Based on information provided in the Grossi Report, I understand that the Unencumbered Operating Assets have net book values totaling approximately $599 million, of which $159 million is attributable to Obligor Debtors. *See* Grossi Report, Appendix D. This is the same value the Debtors attributed to these assets in their schedules of assets and liabilities filed at the beginning of these cases. These assets, according to the Debtors' liquidation analysis, are set forth in **Appendix 1** attached hereto, and include: (a) land and buildings (including approximately 700 central offices, 25 point of presence facilities, and 400 remote switch facilities); (b) construction work-in-progress (consisting of in-progress fixed assets that have not yet been placed into service); (c) leased facilities deferral; (d) leasehold improvements; and (e) vehicles.

17. The Unencumbered Operating Assets are critical to the Debtors' ongoing business operations. Although Mr. Grossi relies on net book values to quantify the value of these assets as part of his liquidation analysis, I believe that the replacement values of certain of these assets, notably the Debtors' buildings and associated necessary refurbishing, are the more appropriate

valuation metric to use when valuing these assets as part of a reorganization and that the replacement value would be significantly greater than the net book values. Because, to the best of my knowledge, the Debtors have not conducted any formal valuation of the Unencumbered Operating Assets, I included the book value of construction work-in-progress, leased facilities deferral, and leasehold improvements in my analysis as a proxy for replacement value. These categories of Unencumbered Operating Assets were ignored by Mr. Grossi in the Debtors' liquidation analysis.

Charter Litigation Recoveries

18. Since early 2019, I understand that the Debtors have been prosecuting an action against Charter for violations of the Lanham Act, certain state statutes, and the automatic stay arising out of advertisements by Charter concerning the Debtors' bankruptcy that the Court has ruled were false and misleading. In recent post-trial briefing, the Debtors contended that the effect of Charter's inequitable conduct was to diminish the value of the Debtors' estates by approximately $18-19.9 million, thereby reducing the amount of value that would otherwise have been available for distribution to unsecured creditors of the Obligor Debtors. *See Debtors' Post-Trial Memorandum*, Adv. Pro. No. 19-08246, Docket No. 317, 38-39. The Debtors seek to recover at least $19.9 million in sanctions against Charter, as well as the equitable subordination of all of Charter Operating's claims against the Obligor Debtors.

19. As set forth in the Committee's Plan Objection, any recoveries in the Debtors' favor in their litigation against Charter constitute proceeds of commercial tort claims against which the Prepetition Secured Parties do not hold perfected liens. As a result, such proceeds should be deemed unencumbered and should be allocated to satisfy unsecured claims. The Grossi Report, however, fails to acknowledge the Charter litigation and the associated recoveries.

Cash in Certain Deposit Accounts

20. As of the Petition Date, the Debtors held cash totaling not less than $8,423,991 in deposit accounts believed to be held by Obligor Debtors. My understanding is that no deposit account control agreements have been provided for these accounts, and they are not otherwise in the control of the Prepetition Secured Parties. *See* **Appendix 2**. Notwithstanding the omission of these accounts in the Grossi Report, such cash should be deemed unencumbered and allocated to satisfy unsecured claims.

Settlement Value

21. The Leone Report ascribes a value of $1,245 million to the Uniti Settlement. For substantially the reasons set forth in the Committee's Plan Objection, I believe that the Settlement Value is unencumbered and should be allocated to satisfy unsecured claims.

Recoveries Accounting for Unencumbered Assets

22. To illustrate the impact on recoveries to Obligor General Unsecured Claims under the Plan once the value of the Unencumbered Assets described above is taken into account, I reran Mr. Leone's analysis of distributable value under three hypothetical scenarios, as set forth in **Appendix 3**, and described below.[4]

23. For all three scenarios, I relied on information provided by the Debtors' advisors. Other than the modifications outlined in this rebuttal report, I have used the same analyses and allocations set forth in the Leone Report and the Grossi Report, although I am not opining as to the appropriateness of the unmodified aspects of those analyses and allocations.

24. In preparing each scenario, I first applied the value of the Unencumbered Assets at each Obligor Debtor to satisfy the priority and administrative claims at each respective entity,

[4] The scenarios I have provided do not include pension termination claims or any potential adequate protection claims.

which the Grossi Report estimates total approximately $199 million in the aggregate. I then applied the value of any encumbered assets at each Obligor Debtor to the First Lien Claims, the Midwest Notes Claims, and, where appropriate, the Second Lien Claims. Finally, I allocated the excess value of any Unencumbered Assets remaining after payment of the priority and administrative claims at each Obligor Debtor on a *pro rata* basis among the deficiency claims of the Prepetition Secured Parties and the Obligor General Unsecured Claims. To the extent there was a shortfall of value to pay administrative and priority claims at any specific Debtor, such value was taken out of the value otherwise attributable to the Uniti Settlement to ensure that all administrative and priority claims are satisfied, as they are proposed to be under the Plan.

25. With respect to each scenario in Appendix 3, I take no position on whether the proposed allocation of Settlement Value is legally appropriate. Rather, the analysis is provided simply to aid the Court in understanding how value would flow under various scenarios.

26. Scenario A assumes that all of the Settlement Value is unencumbered and allocable solely to entities that are insolvent in the Debtors' capital structure.[5] Under Scenario A, over $528 million in value would flow to Second Lien Claims and Obligor General Unsecured Claims (creditors expected to receive nothing under the Plan), providing an estimated recovery of 22%.

27. Scenario B assumes that all of the Settlement Value is unencumbered and allocates that value among all Debtor entities in the same manner set forth in the Grossi Report. Under Scenario B, any excess Settlement Value at each Non-Obligor Debtor remaining after all claims at such entity have been paid in full is allocated to the Prepetition Secured Parties via the equity pledges at those entities, with a corresponding reduction to the First Lien Creditors' deficiency

[5] For ease of analysis, I have allocated the Settlement Value to Windstream Services in Scenario A, other than whatever portion of the Settlement Value was necessary to make the other Obligor Debtors administratively solvent.

claims. Scenario B results in over $110 million in value flowing to Second Lien Claims and Obligor General Unsecured Claims, providing an estimated recovery of nearly 5%.

28. Scenario C assumes, contrary to the Committee's contentions, that all of the Settlement Value is actually encumbered by the Prepetition Secured Parties' prepetition liens, with a corresponding reduction to the First Lien Creditors' deficiency claims. Even under this scenario, there is still nearly $60 million in value that should flow to Second Lien Claims and Obligor General Unsecured Claims under the Plan, providing an estimated recovery of approximately 2.4%.

29. I understand that the Grossi Report concludes that Obligor General Unsecured Claims are entitled to no recovery in a liquidation, and that the Plan similarly provides for little to no recovery for those claims. It is my opinion, however, that if the Unencumbered Assets are properly accounted for, holders of Obligor General Unsecured Claims would receive recoveries ranging between 2.4% and 22.3%. The actual amount of any such recovery will be determined by the allocation methods that are ultimately used.

Dated: June 17, 2020
New York, New York

Respectfully submitted,

/s/ Kevin Nystrom
Kevin Nystrom

APPENDIX 1

Unencumbered Operational Assets as Provided in Debtors' Liquidation Analysis

$ in thousands	Alleged Unencumb. Assets(A)	Included in Liquidation Analysis (Net Book Value as of the Effective Date): Buildings	Land	Vehicles	Subtotal(B)	Other Fixed Assets	Prepaid Assets	Total	Difference
Buildings	$ 145,189	$ 84,291	$ -	$ -	$ 84,291	$ 61,085	$ -	$ 145,376	$ 187
CWIP	380,171	-	-	-	-	362,680	-	362,680	(17,491)
Land	23,588	-	21,568	-	21,568	2,779	-	24,348	760
Leased Facilities Deferral	12,612	-	-	-	-	-	13,004	13,004	392
Leasehold Improvements	25,389	-	-	-	-	17,327	-	17,327	(8,062)
Vehicles	11,704	-	-	7,511	7,511	-	-	7,511	(4,193)
Total	**$ 598,653**	**$ 84,291**	**$ 21,568**	**$ 7,511**	**$ 113,370**	**$ 443,872**	**$ 13,004**	**$ 570,245**	**$ (28,408)**

Notes
(A) Values as of the chapter 11 filing date; used in Scenario B
(B) Used in Scenario A

APPENDIX 2

Deposit Accounts

Lien Grantor	Account No.	Account Name	Description[i]	Balance as of the Petition Date
[American Telephone Company LLC][2]		[American Telephone Company LLC]	BANK OF AMERICA MERRILL LYNCH (US)	-
[American Telephone Company LLC][2]		[American Telephone Company LLC]	BANK OF AMERICA MERRILL LYNCH (US)	-
[American Telephone Company LLC][2]		[American Telephone Company LLC]	BANK OF AMERICA MERRILL LYNCH (US)	-
[American Telephone Company LLC][2]		[American Telephone Company LLC]	BANK OF AMERICA MERRILL LYNCH (US)	-
BOB LLC	2140393	BOB LLC	CIBC / The Private Bank	7,697
Windstream Services, LLC[3]	[4]		CITIBANK	1,953
Windstream Services, LLC[3]	[4]		CITIBANK	571
Windstream Services, LLC[3]	[4]		CITIBANK	-
Windstream Services, LLC[3]	[4]		CITIBANK	193,331
Windstream Services, LLC[3]	[4]		CITIBANK	553,909
Windstream Services, LLC[3]	[4]		CITIBANK	-
Windstream Services, LLC[3]	[4]		CITIBANK	4,305
Windstream Services, LLC[3]	[4]		CITIBANK	-
Windstream Services, LLC[3]	[4]		CITIBANK	-
Windstream Services, LLC[3]	[4]		CITIBANK	-
Windstream Services, LLC[3]	[4]		CITIBANK	-
Windstream Services, LLC[3]	[4]		CITIBANK	-
Windstream Services, LLC[3]	[4]		CITIBANK	-
Windstream Services, LLC[3]	[4]		CITIBANK	7,717
Windstream Services, LLC[3]	[4]		CITIBANK	-
[Broadview Networks, Inc.][2]		[Broadview Networks, Inc.]	RBC	187,909
Buffalo Valley Management Services, Inc.	6728020220	Buffalo Valley Management Services, Inc.	U.S. BANK NATIONAL ASSOCIATION	5,108
Buffalo Valley Management Services, Inc.	2000038804234	Buffalo Valley Management Services, Inc.	WELLS FARGO BANK, N.A.	2,225
Cavalier Telephone, L.L.C.	004112807841	Cavalier Telephone, LLC	BANK OF AMERICA MERRILL LYNCH (US)	10,918
Conestoga Management Services, Inc.	3728020195	Conestoga Management Services, Inc.	U.S. BANK NATIONAL ASSOCIATION	2,722
Conestoga Management Services, Inc.	2000038804247	Conestoga Management Services, Inc.	WELLS FARGO BANK, N.A.	489
Core-Comm-ATX, Inc.	000796788396	CTC Communications Corp	BANK OF AMERICA MERRILL LYNCH (US)	35,486
D&E Management Services, Inc.	6728008333	D&E Management Services, Inc.	U.S. BANK NATIONAL ASSOCIATION	5,397
Core-Comm-ATX, Inc.	75136996	DeltaCom LLC	REGIONS BANK	1,528,623

Lien Grantor	Account No.	Account Name	Description[i]	Balance as of the Petition Date
Core-Comm-ATX, Inc.	004605286429	EarthLink Holdings/EarthLink Business LLC (One Com)	BANK OF AMERICA MERRILL LYNCH (US)	824,083
Core-Comm-ATX, Inc.	07460218741	EarthLink Holdings/EarthLink Business LLC (One Com)	FIFTH THIRD BANK, A MICHIGAN BANKING CORPORATION	648,944
Core-Comm-ATX, Inc.	75136708	EarthLink Carrier LLC (IFN)	REGIONS BANK	-
[MassComm, LLC][2]		[MassComm, LLC]	CHASE BANK, N.A.	-
[MassComm, LLC][2]		[MassComm, LLC]	CHASE BANK, N.A.	-
[MassComm, LLC][2]		[MassComm, LLC]	CHASE BANK, N.A.	-
[MassComm, LLC][2]		[MassComm, LLC]	CHASE BANK, N.A.	-
Eureka Networks, LLC	4427920882	PAETEC Communications, Inc.	BANK OF AMERICA MERRILL LYNCH (US)	-
Eureka Networks, LLC	571009204	PAETEC Communications, Inc.	HSBC	641,880
Eureka Networks, LLC	819612501	PAETEC Communications, Inc.	M&T BANK	720,508
PCS Licenses, Inc.	6728013880	PCS Licenses, Inc.	U.S. BANK NATIONAL ASSOCIATION	2,432
Teleview, LLC	33014351	Teleview, LLC	UNITED COMMUNITY BANK	11,953
[Windstream Communications Telecom, LLC][2]		[Windstream Communications Telecom, LLC]	BANK OF AMERICA MERRILL LYNCH (US)	-
Teleview, LLC	815010382	Windstream Communications, LLC	COMMERCE BANK	538,698
Teleview, LLC	2000032623712 / 4253420269 / 4127445518	Windstream Communications, LLC	WELLS FARGO BANK, N.A.	-
Teleview, LLC	2000032623712 / 4253420269 / 4127445518	Windstream Communications, LLC	WELLS FARGO BANK, N.A.	2,329,984
Teleview, LLC	2000032623712 / 4253420269 / 4127445518	Windstream Communications, LLC	WELLS FARGO BANK, N.A.	-
Teleview, LLC	1017709	Windstream Florida, Inc.	FIRST FEDERAL SAVINGS	11,495
Teleview, LLC	323349 / 0382	Windstream Georgia Comm. LLC	EXCHANGE BANK	11,019
Teleview, LLC	4122168115	Windstream Georgia Communications, LLC	WELLS FARGO BANK, N.A.	-
Teleview, LLC	7880052469	Windstream Georgia, LLC	REGIONS BANK	11,439
Teleview, LLC	818	Windstream Georgia, LLC	THE FARMERS BANK	1,795
Xeta Technologies, Inc.	4427812369	Windstream Holdings, Inc.	BANK OF AMERICA MERRILL LYNCH (US)	-
Teleview, LLC	1209736	Windstream Kentucky West, LLC	FORCHT BANK	20,324
Teleview, LLC	3700010464	Windstream Missouri, Inc.	UMB	2,315
Windstream Montezuma, LLC	962082	Windstream Montezuma, Inc.	MONTEZUMA STATE BANK	8,843

Lien Grantor	Account No.	Account Name	Description[i]	Balance as of the Petition Date
Windstream Montezuma, LLC	150872013936	Windstream Nebraska, Inc. - Windstream 15501	U.S. BANK NATIONAL ASSOCIATION	12,825
[Windstream Nebraska, Inc.][2]		[Windstream Nebraska, Inc.]	WELLS FARGO BANK, N.A.	-
Windstream Montezuma, LLC	251000206	Windstream North Carolina, LLC	FIRST BANK	1,207
Windstream Montezuma, LLC	12580	Windstream Ohio, Inc.	FIRST CENTRAL NATIONAL BANK	1,190
Windstream Montezuma, LLC	222092	Windstream Ohio, Inc.	PARK NATIONAL BANK	3,209
[Windstream Services, LLC][2]		[Windstream Services, LLC]	CHASE BANK, N.A.	-
Eureka Networks, LLC	0000795	Kerrville Telephone	SECURITY STATE BANK & TRUST	1,135
[Windstream Services, LLC][2]		[Windstream Services, LLC]	U.S. BANK NATIONAL ASSOCIATION	19,389
Windstream Services, LLC	4129085700	Windstream Services, LLC	WELLS FARGO BANK, N.A.	-
Windstream Services, LLC	7880052442	Windstream Standard, LLC	REGIONS BANK	43,753
Xeta Technologies, Inc.	814006094	Xeta Technologies, Inc.	COMMERCE BANK	7,211
Xeta Technologies, Inc.	9856092912	Xeta Technologies, Inc.	M&T BANK	-
Arc Networks Inc.	9977624678	ARC Networks Inc	Citibank	
BOB LLC	68015479	Bridgecom International Inc.	Citibank	
CoreComm-ATX, Inc.	9973402496	CoreComm ATX Inc	Citibank	
CoreComm-ATX, Inc.	4426456412	CT Communications, Inc.	Bank of America	
CoreComm-ATX, Inc.	4426456399	CT Communications, Inc.	Bank of America	
CoreComm-ATX, Inc.	003271085419	EarthLink Holdings/EarthLink LLC	Bank of America	
CoreComm-ATX, Inc.	003282507948	EarthLink Holdings/EarthLink LLC	Bank of America	
CoreComm-ATX, Inc.	111988926	EarthLink Holdings/EarthLink Shared Services LLC	Chase Bank	
Eureka Networks, LLC	9975348489	Eureka Networks LLC	Citibank	
Eureka Networks, LLC	3751905875	KCC - Kerville OPS	Bank of America	
Eureka Networks, LLC	38675978	Eureka Networks LLC	Citibank	
BridgeCom Solutions Group, Inc.	38674529	Bridgecom Solutions Group Inc	Citibank	
BridgeCom Solutions Group, Inc.	003299818296	EarthLink Holdings/EarthLink LLC	Bank of America	
Windstream BV Holdings, LLC (f/k/a Windsteam BV Holdings, Inc.)	4973846502	Broadview Networks Holdings Inc	Citibank	
Accounts hold at least $				**8,423,991**

[i] Although certain accounts are held at banks that are Prepetition Secured Parties, those accounts appear to be held by Debtors that are not grantors under the security documents related to such Prepetition Secured Parties' applicable Prepetition Loan Documents.

[2] The name of the entity holding the account cannot be verified based on information provided to date.

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[3] For one of these accounts, it appears the Lien Grantor may be BOB LLC.

[4] For eight of these accounts, the account nos. are: 49571189, 9937552139, 9937555321, 4975437016, 9946878237, 9937549378, 9977624678, 09963276, and 38674481.

APPENDIX 3

Recovery Scenarios Accounting for Unencumbered Assets

Windstream
Allocation of Unencumbered Assets to Unsecured Creditors of Obligors
Scenario A - Uniti Settlement Unencumbered and Allocated to Windstream Services LLC
$s in 000s

Preliminary Illustrative Draft
Subject to Material Revision
Prepared at the Direction of Counsel
Privileged & Confidential

	Unencumbered Assets					Admin & Priority Claims				1L & MWN Deficiency Claims		2L Deficency Claims		Uns Notes and Other GUC	
Entity	Unencumbered Operating Assets	Cash	Charter Litigation	Uniti Settlement	Total	Amount	Paid	Admin & Priority Claim Shortfall	Excess for GUCs	Amount	Paid	Amount	Paid	Amount	Paid
Windstream Shared Services, LLC	30,082				30,082	8,304	8,304	-	21,778	3,150,483	12,401	1,235,000	4,861	1,147,089	4,515
Valor Telecommunications of Texas, LLC	29,224				29,224	19,578	19,578	-	9,646	3,150,483	5,495	1,235,000	2,154	1,144,625	1,997
Teleview, LLC	26,181	2,939			29,120	1,803	1,803	-	27,317	3,150,483	15,563	1,235,000	6,101	1,144,434	5,653
Windstream Iowa Communications, LLC	22,310				22,310	10,347	10,347	-	11,963	3,150,483	6,815	1,235,000	2,672	1,144,776	2,476
Windstream Arkansas, LLC	7,992				7,992	7,546	7,546	-	446	3,150,483	254	1,235,000	100	1,144,129	92
Windstream Business Holdings, LLC	7,379				7,379	1,234	1,234	-	6,145	3,150,483	3,500	1,235,000	1,372	1,146,109	1,273
BOB, LLC	4,476	8			4,484	625	625	-	3,859	3,150,483	2,199	1,235,000	862	1,142,810	798
Windstream Sugar Land, LLC	3,885				3,885	2,962	2,962	-	923	3,150,483	526	1,235,000	206	1,143,085	191
Windstream South Carolina, LLC	3,689				3,689	38	38	-	3,651	3,150,483	2,081	1,235,000	816	1,142,864	755
Xeta Technologies, Inc.	3,041	7			3,048	11,477	3,048	8,429	-	3,150,483	-	1,235,000	-	1,146,411	-
Oklahoma Windstream, LLC	2,365				2,365	339	339	-	2,026	3,150,483	1,155	1,235,000	453	1,142,826	419
Windstream Lakedale, Inc.	2,354				2,354	24	24	-	2,330	3,150,483	1,328	1,235,000	520	1,142,973	482
Cavalier Telephone, L.L.C.	2,157	11			2,168	1,566	1,566	-	602	3,150,483	343	1,235,000	134	1,142,859	124
Texas Windstream, LLC	2,124				2,124	2,819	2,124	695	-	3,150,483	-	1,235,000	-	1,143,227	-
Windstream Cavalier, LLC	2,049				2,049	13,790	2,049	11,741	-	3,150,483	-	1,235,000	-	1,142,757	-
Windstream Alabama, LLC	1,623				1,623	466	466	-	1,157	3,150,483	659	1,235,000	258	1,142,974	239
PAETEC, LLC	1,063				1,063	1,487	1,063	424	-	3,150,483	-	1,235,000	-	1,147,854	-
Conversent Communications of Massachusetts, Inc.	874				874	615	615	-	259	3,150,483	148	1,235,000	58	1,142,757	54
Windstream Communications Kerrville, LLC	865	1			866	658	658	-	208	3,150,483	119	1,235,000	46	1,142,793	43
Windstream Lexcom Entertainment, LLC	694				694	753	694	59	-	3,150,483	-	1,235,000	-	1,142,964	-
Allworx Corp.	595				595	721	595	126	-	3,150,483	-	1,235,000	-	1,144,310	-
Windstream Montezuma, LLC	592	27			619	72	72	-	547	3,150,483	312	1,235,000	122	1,142,847	113
Windstream SHAL, LLC	552				552	112	112	-	440	3,150,483	251	1,235,000	98	1,142,759	91
Windstream Oklahoma, LLC	547				547	256	256	-	291	3,150,483	166	1,235,000	65	1,142,783	60
Windstream NorthStar, LLC	483				483	161	161	-	322	3,150,483	184	1,235,000	72	1,142,783	67
Windstream Services, LLC	267	825	18,000	1,245,000	1,264,092	5,917	5,917	(126,110)	1,132,065	3,150,483	643,926	1,235,000	252,421	1,153,273	235,717
RevChain Solutions, LLC	217				217	60	60	-	157	3,150,483	89	1,235,000	35	1,142,757	32
Windstream EN-TEL, LLC	217				217	139	139	-	78	3,150,483	44	1,235,000	17	1,142,771	16
Conversent Communications Long Distance, LLC	199				199	130	130	-	69	3,150,483	39	1,235,000	15	1,142,757	14
Windstream NuVox Oklahoma, LLC	88				88	355	88	267	-	3,150,483	-	1,235,000	-	1,142,812	-
Other	318	17	-		335	104,704	335	104,369	-	3,150,483	-	1,235,000	-	1,187,858	-
Total Obligors	158,502	3,835	18,000	1,245,000	1,425,337	199,058	72,948	-	1,226,279		697,597		273,460		255,222
Total Non-Obligors	440,173	4,587	-	-									22.1%		22.3%
	598,675	8,422	18,000	1,245,000											

The 1L and MWN deficiency claim from the Grossi report is reduced by the value of the 2L deficiency claim of $1,235,000

Windstream
Allocation of Unencumbered Assets to Unsecured Creditors of Obligors
Scenario B - Uniti Settlement Unencumbered and Value allocated to all Subs
$s in 000s

Preliminary Illustrative Draft
Subject to Material Revision
Prepared at the Direction of Counsel
Privileged & Confidential

	Unencumbered Assets					Admin & Priority Claims				1L & MWN Deficiency Claims		2L Deficency Claims		Uns Notes and Other GUC	
Entity	Unencumbered Operating Assets	Cash	Charter Litigation	Uniti Settlement	Total	Amount	Paid	Admin & Priority Claim Shortfall	Excess for GUCs	Amount	Paid	Amount	Paid	Amount	Paid
Windstream Shared Services, LLC	$ 30,082			$ -	$ 30,082	$ 8,304	$ 8,304	$ -	$ 21,778	$ 2,146,053	$ 10,321	$ 1,235,000	$ 5,940	$ 1,147,089	$ 5,517
Valor Telecommunications of Texas, LLC	$ 29,224			$ 1,414	$ 30,638	$ 19,578	$ 19,578	$ -	$ 11,060	$ 2,146,053	$ 5,245	$ 1,235,000	$ 3,018	$ 1,144,625	$ 2,797
Teleview, LLC	$ 26,181	$ 2,939		$ -	$ 29,120	$ 1,803	$ 1,803	$ -	$ 27,317	$ 2,146,053	$ 12,954	$ 1,235,000	$ 7,455	$ 1,144,434	$ 6,908
Windstream Iowa Communications, LLC	$ 22,310			$ 707	$ 23,017	$ 10,347	$ 10,347	$ -	$ 12,670	$ 2,146,053	$ 6,008	$ 1,235,000	$ 3,457	$ 1,144,776	$ 3,205
Windstream Arkansas, LLC	$ 7,992			$ -	$ 7,992	$ 7,546	$ 7,546	$ -	$ 446	$ 2,146,053	$ 212	$ 1,235,000	$ 122	$ 1,144,129	$ 113
Windstream Business Holdings, LLC	$ 7,379			$ -	$ 7,379	$ 1,234	$ 1,234	$ -	$ 6,145	$ 2,146,053	$ 2,913	$ 1,235,000	$ 1,676	$ 1,146,109	$ 1,556
BOB, LLC	$ 4,476	$ 8		$ -	$ 4,484	$ 625	$ 625	$ -	$ 3,859	$ 2,146,053	$ 1,831	$ 1,235,000	$ 1,053	$ 1,142,810	$ 975
Windstream Sugar Land, LLC	$ 3,885			$ -	$ 3,885	$ 2,962	$ 2,962	$ -	$ 923	$ 2,146,053	$ 438	$ 1,235,000	$ 252	$ 1,143,085	$ 233
Windstream South Carolina, LLC	$ 3,689			$ 41,712	$ 45,401	$ 38	$ 38	$ -	$ 45,363	$ 2,146,053	$ 21,519	$ 1,235,000	$ 12,384	$ 1,142,864	$ 11,460
Xeta Technologies, Inc.	$ 3,041	$ 7		$ 28,986	$ 32,034	$ 11,477	$ 11,477	$ -	$ 20,557	$ 2,146,053	$ 9,744	$ 1,235,000	$ 5,608	$ 1,146,411	$ 5,205
Oklahoma Windstream, LLC	$ 2,365			$ -	$ 2,365	$ 339	$ 339	$ -	$ 2,026	$ 2,146,053	$ 961	$ 1,235,000	$ 553	$ 1,142,826	$ 512
Windstream Lakedale, Inc.	$ 2,354			$ 33,228	$ 35,582	$ 24	$ 24	$ -	$ 35,558	$ 2,146,053	$ 16,868	$ 1,235,000	$ 9,707	$ 1,142,973	$ 8,984
Cavalier Telephone, L.L.C.	$ 2,157	$ 11		$ 4,949	$ 7,117	$ 1,566	$ 1,566	$ -	$ 5,551	$ 2,146,053	$ 2,633	$ 1,235,000	$ 1,515	$ 1,142,859	$ 1,402
Texas Windstream, LLC	$ 2,124			$ -	$ 2,124	$ 2,819	$ 2,124	$ 695	$ -	$ 2,146,053	$ -	$ 1,235,000	$ -	$ 1,143,227	$ -
Windstream Cavalier, LLC	$ 2,049			$ 2,121	$ 4,170	$ 13,790	$ 4,170	$ 9,620	$ -	$ 2,146,053	$ -	$ 1,235,000	$ -	$ 1,142,757	$ -
Windstream Alabama, LLC	$ 1,623			$ -	$ 1,623	$ 466	$ 466	$ -	$ 1,157	$ 2,146,053	$ 549	$ 1,235,000	$ 316	$ 1,142,974	$ 292
PAETEC, LLC	$ 1,063			$ -	$ 1,063	$ 1,487	$ 1,063	$ 424	$ -	$ 2,146,053	$ -	$ 1,235,000	$ -	$ 1,147,854	$ -
Conversent Communications of Massachusetts, Inc.	$ 874			$ -	$ 874	$ 615	$ 615	$ -	$ 259	$ 2,146,053	$ 123	$ 1,235,000	$ 71	$ 1,142,757	$ 65
Windstream Communications Kerrville, LLC	$ 865	$ 1		$ -	$ 866	$ 658	$ 658	$ -	$ 208	$ 2,146,053	$ 99	$ 1,235,000	$ 57	$ 1,142,793	$ 53
Windstream Lexcom Entertainment, LLC	$ 694			$ -	$ 694	$ 753	$ 694	$ 59	$ -	$ 2,146,053	$ -	$ 1,235,000	$ -	$ 1,142,964	$ -
Allworx Corp.	$ 595			$ 8,484	$ 9,079	$ 721	$ 721	$ -	$ 8,358	$ 2,146,053	$ 3,964	$ 1,235,000	$ 2,281	$ 1,144,310	$ 2,113
Windstream Montezuma, LLC	$ 592	$ 27		$ -	$ 619	$ 72	$ 72	$ -	$ 547	$ 2,146,053	$ 259	$ 1,235,000	$ 149	$ 1,142,847	$ 138
Windstream SHAL, LLC	$ 552			$ -	$ 552	$ 112	$ 112	$ -	$ 440	$ 2,146,053	$ 209	$ 1,235,000	$ 120	$ 1,142,759	$ 111
Windstream Oklahoma, LLC	$ 547			$ -	$ 547	$ 256	$ 256	$ -	$ 291	$ 2,146,053	$ 138	$ 1,235,000	$ 79	$ 1,142,783	$ 74
Windstream NorthStar, LLC	$ 483			$ -	$ 483	$ 161	$ 161	$ -	$ 322	$ 2,146,053	$ 153	$ 1,235,000	$ 88	$ 1,142,783	$ 81
Windstream Services, LLC	$ 267	$ 825	$ 18,000	$ -	$ 19,092	$ 5,917	$ 5,917	$ -	$ 13,175	$ 2,146,053	$ 6,236	$ 1,235,000	$ 3,588	$ 1,153,273	$ 3,351
RevChain Solutions, LLC	$ 217			$ -	$ 217	$ 60	$ 60	$ -	$ 157	$ 2,146,053	$ 74	$ 1,235,000	$ 43	$ 1,142,757	$ 40
Windstream EN-TEL, LLC	$ 217			$ -	$ 217	$ 139	$ 139	$ -	$ 78	$ 2,146,053	$ 37	$ 1,235,000	$ 21	$ 1,142,771	$ 20
Conversent Communications Long Distance, LLC	$ 199			$ 3,535	$ 3,734	$ 130	$ 130	$ -	$ 3,604	$ 2,146,053	$ 1,710	$ 1,235,000	$ 984	$ 1,142,757	$ 910
Windstream NuVox Oklahoma, LLC	$ 88			$ -	$ 88	$ 355	$ 88	$ 267	$ -	$ 2,146,053	$ -	$ 1,235,000	$ -	$ 1,142,812	$ -
Other	$ 318	$ 17	$ -	$ 31,107	$ 31,442	$ 104,704	$ 31,442	$ 73,262	$ -	$ 2,146,053	$ -	$ 1,235,000	$ -	$ 1,187,858	$ -
Total Obligors	$ 158,502	$ 3,835	$ 18,000	$ 156,244	$ 336,581	$ 199,058	$ 114,731	$ 84,327	$ 221,849		$ 105,196		$ 60,538		$ 56,115
Total Non-Obligors	$ 440,173	$ 4,587	$ -	$ 1,088,756									4.9%		4.9%
	$ 598,675	$ 8,422	$ 18,000	$ 1,245,000											

The allocation of the Uniti settlement is based upon the pro rata LTM Dec '19 OBITDAR of the subsidiaries as disclosed in para. 19 of the Grossi report
The 1L and MWN deficiency claim is reduced by the value of the 2L deficiency claim ($1,235,000) and the non gaurantors share of the Uniti settlement ($1,088,756) offset by the shortfall of Admin and Priority claims ($84,327) paid from the non gaurantors share of the Uniti settlement

Windstream
Allocation of Unencumbered Assets to Unsecured Creditors of Obligors
Scenario C - Uniti Settlement Collateral of 1L
$s in 000s

Preliminary Illustrative Draft
Subject to Material Revision
Prepared at the Direction of Counsel
Privileged & Confidential

	Unencumbered Assets					Admin & Priority Claims			1L & MWN Deficiency Claims		2L Deficency Claims		Uns Notes and Other GUC	
Entity	Unencumbered Operating Assets	Cash	Charter Litigation	Uniti Settlement	Total	Amount	Paid	Excess for GUCs	Amount	Paid	Amount	Paid	Amount	Paid
Windstream Shared Services, LLC	$ 30,082				$ 30,082	$ 8,304	$ 8,304	$ 21,778	$ 2,031,593	$ 10,024	$ 1,235,000	$ 6,094	$ 1,147,089	$ 5,660
Valor Telecommunications of Texas, LLC	$ 29,224				$ 29,224	$ 19,578	$ 19,578	$ 9,646	$ 2,031,593	$ 4,442	$ 1,235,000	$ 2,701	$ 1,144,625	$ 2,503
Teleview, LLC	$ 26,181	$ 2,939			$ 29,120	$ 1,803	$ 1,803	$ 27,317	$ 2,031,593	$ 12,581	$ 1,235,000	$ 7,648	$ 1,144,434	$ 7,087
Windstream Iowa Communications, LLC	$ 22,310				$ 22,310	$ 10,347	$ 10,347	$ 11,963	$ 2,031,593	$ 5,509	$ 1,235,000	$ 3,349	$ 1,144,776	$ 3,104
Windstream Arkansas, LLC	$ 7,992				$ 7,992	$ 7,546	$ 7,546	$ 446	$ 2,031,593	$ 205	$ 1,235,000	$ 125	$ 1,144,129	$ 116
Windstream Business Holdings, LLC	$ 7,379				$ 7,379	$ 1,234	$ 1,234	$ 6,145	$ 2,031,593	$ 2,829	$ 1,235,000	$ 1,720	$ 1,146,109	$ 1,596
BOB, LLC	$ 4,476	$ 8			$ 4,484	$ 625	$ 625	$ 3,859	$ 2,031,593	$ 1,778	$ 1,235,000	$ 1,081	$ 1,142,810	$ 1,000
Windstream Sugar Land, LLC	$ 3,885				$ 3,885	$ 2,962	$ 2,962	$ 923	$ 2,031,593	$ 425	$ 1,235,000	$ 259	$ 1,143,085	$ 239
Windstream South Carolina, LLC	$ 3,689				$ 3,689	$ 38	$ 38	$ 3,651	$ 2,031,593	$ 1,682	$ 1,235,000	$ 1,023	$ 1,142,864	$ 946
Xeta Technologies, Inc.	$ 3,041	$ 7			$ 3,048	$ 11,477	$ 3,048	$ -	$ 2,031,593	$ -	$ 1,235,000	$ -	$ 1,146,411	$ -
Oklahoma Windstream, LLC	$ 2,365				$ 2,365	$ 339	$ 339	$ 2,026	$ 2,031,593	$ 933	$ 1,235,000	$ 567	$ 1,142,826	$ 525
Windstream Lakedale, Inc.	$ 2,354				$ 2,354	$ 24	$ 24	$ 2,330	$ 2,031,593	$ 1,073	$ 1,235,000	$ 653	$ 1,142,973	$ 604
Cavalier Telephone, L.L.C.	$ 2,157	$ 11			$ 2,168	$ 1,566	$ 1,566	$ 602	$ 2,031,593	$ 277	$ 1,235,000	$ 169	$ 1,142,859	$ 156
Texas Windstream, LLC	$ 2,124				$ 2,124	$ 2,819	$ 2,124	$ -	$ 2,031,593	$ -	$ 1,235,000	$ -	$ 1,143,227	$ -
Windstream Cavalier, LLC	$ 2,049				$ 2,049	$ 13,790	$ 2,049	$ -	$ 2,031,593	$ -	$ 1,235,000	$ -	$ 1,142,757	$ -
Windstream Alabama, LLC	$ 1,623				$ 1,623	$ 466	$ 466	$ 1,157	$ 2,031,593	$ 533	$ 1,235,000	$ 324	$ 1,142,974	$ 300
PAETEC, LLC	$ 1,063				$ 1,063	$ 1,487	$ 1,063	$ -	$ 2,031,593	$ -	$ 1,235,000	$ -	$ 1,147,854	$ -
Conversent Communications of Massachusetts, Inc.	$ 874				$ 874	$ 615	$ 615	$ 259	$ 2,031,593	$ 119	$ 1,235,000	$ 73	$ 1,142,757	$ 67
Windstream Communications Kerrville, LLC	$ 865	$ 1			$ 866	$ 658	$ 658	$ 208	$ 2,031,593	$ 96	$ 1,235,000	$ 58	$ 1,142,793	$ 54
Windstream Lexcom Entertainment, LLC	$ 694				$ 694	$ 753	$ 694	$ -	$ 2,031,593	$ -	$ 1,235,000	$ -	$ 1,142,964	$ -
Allworx Corp.	$ 595				$ 595	$ 721	$ 595	$ -	$ 2,031,593	$ -	$ 1,235,000	$ -	$ 1,144,310	$ -
Windstream Montezuma, LLC	$ 592	$ 27			$ 619	$ 72	$ 72	$ 547	$ 2,031,593	$ 252	$ 1,235,000	$ 153	$ 1,142,847	$ 142
Windstream SHAL, LLC	$ 552				$ 552	$ 112	$ 112	$ 440	$ 2,031,593	$ 203	$ 1,235,000	$ 123	$ 1,142,759	$ 114
Windstream Oklahoma, LLC	$ 547				$ 547	$ 256	$ 256	$ 291	$ 2,031,593	$ 134	$ 1,235,000	$ 82	$ 1,142,783	$ 75
Windstream NorthStar, LLC	$ 483				$ 483	$ 161	$ 161	$ 322	$ 2,031,593	$ 148	$ 1,235,000	$ 90	$ 1,142,783	$ 83
Windstream Services, LLC	$ 267	$ 825	$ 18,000	$ -	$ 19,092	$ 5,917	$ 5,917	$ 13,175	$ 2,031,593	$ 6,056	$ 1,235,000	$ 3,681	$ 1,153,273	$ 3,438
RevChain Solutions, LLC	$ 217				$ 217	$ 60	$ 60	$ 157	$ 2,031,593	$ 72	$ 1,235,000	$ 44	$ 1,142,757	$ 41
Windstream EN-TEL, LLC	$ 217				$ 217	$ 139	$ 139	$ 78	$ 2,031,593	$ 36	$ 1,235,000	$ 22	$ 1,142,771	$ 20
Conversent Communications Long Distance, LLC	$ 199				$ 199	$ 130	$ 130	$ 69	$ 2,031,593	$ 32	$ 1,235,000	$ 19	$ 1,142,757	$ 18
Windstream NuVox Oklahoma, LLC	$ 88				$ 88	$ 355	$ 88	$ -	$ 2,031,593	$ -	$ 1,235,000	$ -	$ 1,142,812	$ -
Other	$ 318	$ 17	$ -		$ 335	$ 104,704	$ 335	$ -	$ 2,031,593	$ -	$ 1,235,000	$ -	$ 1,187,858	$ -
Total Obligors	$ 158,502	$ 3,835	$ 18,000	$ -	$ 180,337	$ 199,058	$ 72,948	$ 107,389		$ 49,445		$ 30,056		$ 27,889
Total Non-Obligors	$ 440,173	$ 4,587	$ -	$ -								2.4%		2.4%
	$ 598,675	$ 8,422	$ 18,000	$ -										

The 1L and MWN deficiency claim is reduced by the value of the 2L deficiency claim ($1,235,000) and the Uniti settlement ($1,245,000) offset by the shortfall of Admin and Priority claims ($126,110) paid from the Uniti settlement

Exhibit 10

FILED UNDER SEAL

EXHIBIT 11

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 Case No. 19-22312-rdd
4 - x
5 In the Matter of:
6
7 WINDSTREAM HOLDINGS, INC.,
8
9 Debtor.
10 - x
11
12 United States Bankruptcy Court
13 300 Quarropas Street, Room 248
14 White Plains, NY 10601
15
16 May 7, 2020
17 10:15 AM
18
19
20
21 B E F O R E :
22 HON ROBERT D. DRAIN
23 U.S. BANKRUPTCY JUDGE
24
25 ECRO: UNKNOWN

1 HEARING re Notice of Agenda / Agenda for Telephonic Hearing
2 on May 7, 2020
3
4 HEARING re Debtors' Motion for Entry of an Order Approving
5 the Settlement Between the Debtors and Uniti Group Inc.,
6 Including (I) the Sale of Certain of the Debtors Assets
7 Pursuant to Section 363(b) and (II) the Assumption of the
8 Leases Pursuant to Section 365(a)(ECF 1558)
9
10 HEARING re Objection of the Official Committee of Unsecured
11 Creditors to Debtors' Motion for Entry of an Order Approving
12 the Settlement Between the Debtors and Uniti Group Inc.,
13 Including (I) the Sale of Certain of the Debtors' Assets
14 Pursuant to Section 363(b) and (II) the Assumption of the
15 Leases Pursuant to Section 365(a) (related document(s)1558)
16 filed by Lorenzo Marinuzzi on behalf of Official Committee
17 of Unsecured Creditors (ECF #1740)
18
19 HEARING re Declaration of Lorenzo Marinuzzi in Support of
20 Objections of the Official Committee of Unsecured Creditors
21 to (A) Debtors' Motion for Entry of an Order Authorizing (I)
22 The Debtors' Entry Into the Backstop Commitment Agreement
23 and (II) Payment of Related Fees and Expenses, and (B)
24 Debtors Motion for Entry of an Order Approving the
25 Settlement Between the Debtors and Uniti Group, Inc.,

1 Including (I) The Sale of Certain of the Debtors' Assets
2 Pursuant to Section 363(b) and (II) The Assumption of the
3 Leases Pursuant to Section 365(a) filed by Lorenzo Marinuzzi
4 on behalf of Official Committee of Unsecured Creditor
5 (ECF #1742)
6
7 HEARING re Declaration of Bruce Mendelsohn in Support of
8 Objections of the Official Committee of Unsecured Creditors
9 to (A) Debtors' Motion for Entry of an Order Authorizing (I)
10 The Debtors' Entry Into the Backstop Commitment Agreement
11 and (II) Payment of Related Fees and Expenses, and (B)
12 Debtors' Motion for Entry of an Order Approving the
13 Settlement Between the Debtors and Uniti Group, Inc.,
14 Including (I) The Sale of Certain of the Debtors' Assets
15 Pursuant to Section 363(b) and (II) The Assumption of the
16 Leases Pursuant to Section 365(a) (related document(s) 1741,
17 1740) filed by Lorenzo Marinuzzi on behalf of Official
18 Committee of Unsecured Creditors (ECF #1743)
19
20 HEARING re Objection of UMB Bank, National Association and
21 U.S. Bank National Association, As Indenture Trustees to
22 Debtors' Motion for Entry of an Order Approving the
23 Settlement Between the Debtors and Uniti Group Inc.,
24 Including (I) the Sale of Certain of the Debtors' Assets
25 Pursuant to Section 363(b) and (II) the Assumption of the

1 Leases Pursuant to Section 365(a) (related document(s)1558)
2 filed by J. Christopher Shore on behalf of UMB Bank,
3 National Association, as successor indenture trustee, US
4 Bank National Association. (ECF #1744)
5
6 HEARING re Declaration Julia M. Winters in Support of of the
7 Objections of UMB Bank, National Association and U.S. Bank
8 National Association, As Indenture Trustees to the Debtors'
9 Motion for Entry of an Order Approving the Settlement
10 Between the Debtors and Uniti Group Inc., Including (I) the
11 Sale of Certain of the Debtors' Assets Pursuant to Section
12 363(b) and (II) the Assumption of the Leases Pursuant to
13 Section 365(a) (related document(s)l 744) filed by J.
14 Christopher Shore on behalf of UMB Bank, National
15 Association, as successor indenture trustee, US Bank
16 National Association. (ECF #1745)
17
18 HEARING re Declaration of Bruce Mendelsohn in Support of
19 Objections of the Official Committee Of Unsecured Creditors
20 to (A) Debtors Motion (related document(s) 1741, 1740)
21 (ECF #1749)
22
23 HEARING re Declaration / Amended Direct Examination
24 Declaration of Bruce Mendelsohn (related document(s)1749,
25 1741, 1740)(ECF #1764)

1 HEARING re Debtors Motion for Entry of an Order Authorizing
2 (I) the Debtors Entry into the Backstop Commitment Agreement
3 and (II) Payment of Related Fees and Expenses (ECF #1579)
4
5 HEARING re Objection of UMB Bank, National Association and
6 U.S. Bank National Association, As Indenture Trustees, to
7 the Debtors' Motion for Entry of an Order Authorizing (I)
8 The Debtors Entry Into the Backstop Commitment Agreement and
9 (II) Payment of Related Fees and Expenses (related
10 document(s) 1579) filed by J. Christopher Shore on behalf of
11 UMB Bank, National Association, as successor indenture
12 trustee, US Bank National Association. (ECF #1738)
13
14 HEARING re Objection to Motion/ Objection of the Official
15 Committee of Unsecured Creditors to Debtors Motion for Entry
16 of an Order Authorizing (I) the Debtors Entry into the
17 Backstop Commitment Agreement and (II) Payment of Related
18 Fees and Expenses (related document(s)1579)(ECF #1741)
19
20 HEARING re Declaration of Bruce Mendelsohn in Support of
21 Objections of the Official Committee of Unsecured Creditors
22 (ECF #1742)
23
24
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1 HEARING re Objection of UMB Bank, National Association and
2 U.S. Bank National Association, As Indenture Trustees
3 (ECF # 1744)
4
5 HEARING re Declaration of Bruce Mendelsohn in Support of
6 Objections of the Official Committee of Unsecured Creditors
7 (ECF #1749)
8
9 HEARING re Declaration/ Direct Examination Declaration of
10 Bruce Mendelsohn (ECF #1764)
11
12 HEARING re Debtors Motion to Approve the (I) Adequacy of
13 Information in the Disclosure Statement, (II) Solicitation
14 and Notice Procedures, (III) Forms of Ballots and Notices in
15 Connection therewith, and (IV) Certain Dates with Respect
16 Thereto (ECF # 1633)
17
18 HEARING re Response of Element Fleet Corporation to
19 Disclosure Statement and to Motion for Approval of Adequacy
20 of Disclosure Statement and Solicitation Procedures (related
21 document(s) 1632) (related document(s)1633) filed by John D.
22 Demmy on behalf of Element Fleet Corporation (ECF #51)
23
24
25

1 HEARING re Objection to Motion of Debtors to Approve
2 Adequacy of Disclosure Statement, Solicitation and Notice
3 Procedures, Forms of Ballot and Other Relief (related
4 document(s) 1633) filed by Alan S. Maza on behalf of
5 Securities And Exchange Commission. (ECF # 1724)
6
7 HEARING re Objection Securities Lead Plaintiff's Objection
8 To Approval Of The Disclosure Statement And Solicitation
9 Procedures Relating To The Joint Chapter 11 Plan Of
10 Reorganization Of Windstream Holdings, Inc. et al. (related
11 document(s)1632, 1633) filed by Michael S. Etkin on behalf
12 of Lead Plaintiff in the Securities Class Action Captioned
13 as Robert Murray v Earthlink Holdings Corp., et al. and the
14 Proposed Class. (ECF #1726)
15
16 HEARING re Objection of UMB Bank, National Association and
17 U.S. Bank National Association, as Indenture Trustees, to
18 the Disclosure Statement Relating to the Joint Chapter 11
19 Plan of Reorganization of Windstream Holdings, Inc. et al.,
20 Pursuant to Chapter 11 of the Bankruptcy Code (related
21 document(s)1632, 1633) filed by J. Christopher Shore on
22 behalf of UMB Bank, National Association, as successor
23 indenture trustee, US Bank National Association. (ECF #1734)
24
25

1 HEARING re Statement and Reservation of Rights of the
2 Official Committee of Unsecured Creditors with Respect to
3 Debtors Motion to Approve the (I) Adequacy of Information in
4 the Disclosure Statement, (II) Solicitation and Notice
5 Procedures, (III) Forms of Ballots and Notices in Connection
6 therewith, and (IV) Certain Dates with Respect Thereto
7 (ECF #1735)
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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

2

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4 Attorneys for the Debtor

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6 New York, NY 10022

7

8 BY: BRAD WEILAND (TELEPHONICALLY)

9

10 KIRKLAND & ELLIS LLP

11 Attorneys for the Debtor

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13 Chicago, IL 60654

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15 BY: RICHARD HOWELL (TELEPHONICALLY)

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17 KIRKLAND & ELLIS LLP

18 Attorneys for the Debtor

19 303 East Crescent

20 Elmhurst, IL 60126

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22 BY: YATES FRENCH (TELEPHONICALLY)

23

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25

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2 Attorneys for UMB Bank, US Bank
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6 BY: J. CHRISTOPHER SHORE (TELEPHONICALLY)
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8 MORRISON & FOERSTER LLP
9 Attorneys for the Official Committee of Unsecured
10 Creditors
11 250 West 55th Street
12 New York, NY 10019
13
14 BY: STEVEN RAPPAPORT (TELEPHONICALLY)
15 JOCELYN GREEN (TELEPHONICALLY)
16
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18
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1 ALSO PRESENT TELEPHONICALLY:
2
3 ALAN WELLS
4 BRIAN BRAGER
5 THOMAS KESSLER
6 BRETT BAKEMEYER
7 HARRISON DENMAN
8 JULIA WINTERS
9 KAT RICHARDSON
10 TODD GOREN
11 JENNIFER PARK
12 STEPHEN WOLPERT
13 ALLAN BRILLIANT
14 UZO DIKE
15 BRIAN HOCKETT
16 JOHN LUZE
17 GARY MENNITT
18 FRANCIS PETRIE
19 ANDREW BEHLMANN
20 ELI VONNEGUT
21 JEFFREY GLEIT
22 RICK ARCHER
23 BRIAN GUINEY
24 SHAYA ROCHESTER
25 PHILIP BRENDEL

1 PHIL BROWN
2 ESTHER CHUNG
3 JASON DIBATTISTA
4 BETH FRIEDMAN
5 ANDREW JACOBS
6 ANNA KORDAS
7 BRUCE MENDELSOHN
8 MICHELLE SHRIRO
9 JACOB ZAND
10 ROSA EVERGREEN
11 JASON ANGELO
12 EDWIN CALDIE
13 MICHAEL COLLINS
14 JEFFREY DAVIDSON
15 MICHAEL ETKIN
16 LEO GAGION
17 GABRIEL GLAZER
18 PATRICK HOLOHAN
19 RICHARD KRUMHOLZ
20 SAM LOVETT
21 ALAN MAZA
22 ELLIOT MOSKOWITZ
23 KATHERINE PROFUMO
24 MARC SCHWARTZ
25 JASON HUNT

1 CHANTELLE MCCLAMB
2 BRIAN HERMANN
3 GRACE HOTZ
4 EVAN MAASS
5 XU PANG
6 AISHA AL-MUSLIM
7 SANDY BEALL
8 LEV BREYDO
9 MARI BRYNE
10 HOLLACE COHEN
11 JAMES COPELAND
12 JOHN DEMMY
13 JEANNIE DIEFENDERFER
14 MATT ENGLEHARDT
15 JEREMY HILL
16 JEFFREY HINSON
17 WILLIAM HOLSTE
18 EMILY KATZ-TURNER
19 THOMAS KEMPNER
20 BILL LAPERCH
21 JOEL LEITIN
22 MATTHEW MASARO
23 TODD MEYERS
24 JOEL MOSS
25 RYAN ROBERGE

1 RICHARD ROBINSON
2 JULIE SHIMER
3 MICHAEL STOLTZ
4 LOUIS STRUBECK
5 TONY THOMAS
6 WALTER TUREK
7 SCOTT ZUBER
8 VLADIMIR JELISAVCIC
9 JASON ROSELL
10 RYAN YEH
11 STEPHANIE WICKOUSKI
12 JAMES BAILEY
13 DARRELL CLARK
14 PATRICK GEORGE
15 BRYAN GLOVER
16 MICHAEL LANGFORD
17 MATTHEW MCGINNIS
18 STEPHEN MOELLER-SALLY
19 TRACEY OHM
20 WILLIAM ROBERTS
21 WILLIAM SCHATZ
22 CLARK WHITMORE
23 KEITH WOFFORD
24 CHELSEY ROSENBLOOM
25 CELINE BUEHL

1 NICK LEONE
2 CASSANDRA FENTON
3 TYLER WILLIAMS
4 TONY THOMAS
5 AMANDA MICELI
6 MICHAEL L. SCHEIN
7 ERIK JERRARD
8 PAUL SCHWARTZBERG
9 LUCAS SCHNEIDER
10 JAMIE MEISEN
11 STEPHEN HESSLER
12 LORENZO MARINUZZI
13 KENNETH DENEAU
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1 P R O C E E D I N G S

2 THE COURT: Okay, good morning. This is Judge

3 Drain and we're here on In RE: Windstream Holdings, Inc. et

4 al. There are a number of matters on the calendar, but

5 before turning to them, let me just address the mechanical

6 or operational setting for today's hearing. Most of the

7 people involved in today's hearing are participating by

8 telephone through Court-Solutions as required by the SDNY

9 Bankruptcy Court's general order.

10 Because matters on today's calendar also involve

11 the consideration of a lot of testimony, witnesses who are

12 available for cross examination will be appearing by Skype

13 and the counsel involved in that examination, both cross and

14 redirect, are also available on Skype and they can see me as

15 well that way. The exhibits, as per my pretrial order, have

16 been provided to the Court and to the parties, and I believe

17 also to each of the witnesses in joint exhibit binders, the

18 admissibility of which, in each case, I believe, has been

19 agreed.

20 I also have the direct testimony of witnesses who

21 are slated to testify in the form of their declarations or

22 affidavits under -- in each case, under penalty of perjury,

23 as constituting their direct testimony. So that is the

24 procedural structure for these hearings.

25 For those of you speaking, in addition to

1 identifying yourself and your client the first time you
2 speak and if there's a long delay between the next time you
3 speak, you should do it also the second time. I may also
4 ask you to do it yet again if I think that the Court
5 reporter who will be transcribing the tape from Court-
6 Solutions might no be able to put your voice together with
7 your name. The only recording of this hearing is the Court-
8 Solutions recording. No one else should be recording it.
9 So with that being said, I have the amended agenda
10 for the hearing provided by the Debtors' counsel and I'm
11 happy to go in that order. The counsel for the Debtors, I
12 think, is on the phone as well as on Skype, so I can turn it
13 over to you.
14 MR. WEILAND: Thank you, Your Honor. This is Brad
15 Weiland of Kirkland and Ellis. Can you hear me?
16 THE COURT: Yes, I can.
17 MR. WEILAND: Okay. Thank you, Your Honor. It's
18 nice to see you, at least over a screen this morning. I
19 hope you're doing well. We do have a full calendar today.
20 There are three items on the agenda, as Your Honor
21 mentioned, the Uniti settlement approval motion, the
22 backstop commitment approval motion, and the motion to
23 approve the disclosure statement.
24 For the first two, we'd like to take them together
25 insofar as we have multiple witnesses who will be giving

1 testimony on both matters and will -- they will sit for
2 cross examination and redirect if necessary or both at once,
3 rather than getting up and getting down, if that is all
4 right with Your Honor.
5 THE COURT: Yes, that makes sense to me. The
6 witness declarations as is clear from the binders provided
7 to chambers cover both of those issues with the same
8 witnesses, by and large, in each case.
9 MR. WEILAND: That's correct, Your Honor, and with
10 respect to the third matter of approval of the disclosure
11 statement, if we can get to it today, I will just let Your
12 Honor know that we're happy to say that we've resolved
13 substantially all of the objections to that motion,
14 including the objections filed by the Creditors Committee
15 and the unsecured notes indentured Trustees, so we do
16 believe that that will be proceeding on a largely
17 uncontested basis if and when we are able to get to it.
18 THE COURT: Okay. On that request, I had prepared
19 for that hearing by reviewing, obviously, the plan and
20 disclosure statement as originally filed. I've not had the
21 chance to review the markup that was submitted yesterday.
22 It may be, therefore, notwithstanding everyone's work and
23 trying to agree on language that we might have to put that
24 off until tomorrow morning, just so I can review it.
25 MR. WEILAND: Of course, Your Honor. We're happy

1 to proceed however the Court would like.

2 THE COURT: Okay. So why don't we go ahead, then,

3 with the Debtors' presentation on the Uniti settlement

4 motion and the backstop commitment agreement motion, to the

5 extent that, as you said, the witnesses cover both of those.

6 I probably should have said this at the beginning. Where

7 there is an evidentiary hearing, particularly where it's

8 here, the parties have briefed the issues already. I didn't

9 anticipate any meaningful statements by counsel in advance

10 of the examination of the witnesses.

11 I obviously will hear oral argument after I hear

12 the witnesses and if there are any more exhibits to be

13 admitted, consider that -- those exhibits as well, so I

14 wasn't really contemplating opening statements.

15 MR. WEILAND: Nor were we, Your Honor. We agreed

16 with the objecting parties to dispense with opening

17 statements and get right to the case.

18 THE COURT: Okay. So why don't we do that, then?

19 MR. WEILAND: Okay. I will cede the podium, Your

20 Honor, to my partner, Mr. Howell, or cede the screen, as it

21 were, and he will take it from there.

22 THE COURT: Okay.

23 MR. HOWELL: Thank you. Appreciate ceding the

24 virtual screen, Mr. Weiland. This is Rush Howell from

25 Kirkland and Ellis on behalf of the Debtors. Your Honor, we

1 intend to call three witnesses today: Mr. Tony Thomas, Mr.
2 Nick Leone, and Mr. Alan Wells. And then I believe there
3 will be a fourth witness called by the Committee, Mr. Bruce
4 Mendelsohn.
5 Obviously, consistent with Your Honor's preferred
6 practice, we've submitted declarations in lieu of direct
7 examination and so we'll simply call each witness in turn
8 and have them affirm their declaration and then move to
9 cross, which will be the primary portion of today's hearing,
10 will be the cross examination. I'll note that there was a
11 emergency motion in limine filed by the objectors here.
12 We've responded to that yesterday. We're happy to stand on
13 our papers there and move forward, Your Honor, and turn to
14 our first witness, however you'd like to proceed.
15 THE COURT: Okay. Well, I have reviewed both that
16 motion in limine by the objectors, the Unsecured Creditors
17 Committee and UMB Bank as indentured Trustee and the
18 Debtors' objection to it. To me, it doesn't really require
19 a whole lot of argument. The parties have laid out their
20 positions and attached the deposition excerpts that they're
21 relying on. I've reviewed the declarations and the exhibits
22 that I think are relevant.
23 So my inclination was to give you a preliminary
24 ruling that's, I think, pretty close to an actual ruling,
25 but then, give the parties, if they want, a very brief

1 opportunity to try to persuade me otherwise.

2 MR. HOWELL: Of course, we're happy to proceed in

3 that way, Your Honor.

4 THE COURT: Okay. I'll do that, then. I have, as

5 I said, an emergency motion in limine that was filed, I

6 think, late in the day on May 5th to strike certain

7 testimony of the Debtors' three witnesses, Alan Wells, Tony

8 Thomas, and Nick Leone. Am I pronouncing that right, or is

9 it Leone?

10 MAN 1: It's Leone.

11 THE COURT: Leone. Okay. I apologize, Mr. Leone.

12 And the basis for the motion is the well-recognized

13 principle that a party cannot rely on evidence withheld

14 during discovery on the basis of attorney-client privilege.

15 It's laid out in a number of cases, but the leading case is

16 United States versus Bilzerian, 926 F.2d. 1285, 1292 (Second

17 Circuit, 1991) with the old saw, "A privilege cannot be at

18 once used as a shield and as a sword."

19 The motion goes, actually, to two different

20 assertions of privilege, not just the attorney-client

21 privilege; although, the first portion of the motion deals

22 with the alleged, either waiver of the attorney-client

23 privilege because of statements in the witness declarations

24 and/or the exhibits attached that refer to attorney advice,

25 and the second portion, however, deals with the invocation

1 of the Court's protective order as embodied in the order
2 directing mediation -- for wont of a better term, although
3 it's not entirely accurate -- the so-called mediation
4 privilege which is really an invocation of a protective
5 order.
6 I think the two issues do require somewhat
7 different analysis, although ultimately, the result, I
8 think, is the same, based on the same considerations, which
9 is what is the nature of the use by the Debtors in the
10 declarations of references to advice by counsel or the fact
11 of a mediation having taken place.
12 Before I get to that analysis, I should note that
13 the Debtors' objection takes the movants to task for filing
14 their motion as an emergency motion, essentially the day
15 before the hearing, given that there was a fairly
16 longstanding pretrial order here and it was clear that this
17 type of testimony was going to be used. I am not going to
18 deal with the motion on that basis. I don't think anyone
19 was particularly prejudiced by having to respond to it and
20 I'll just turn to the merits.
21 First, as to the mediation so-called privilege,
22 it's well recognized in the Second Circuit that
23 confidentiality is an important feature of mediation and
24 other alternative dispute resolution processes, that
25 promising participants confidentiality in these types of

1 proceedings promotes the free flow of information that may
2 results in the settlement of a dispute.
3 Therefore, the Second Circuit has held, "We
4 vigorously enforce the confidentiality provisions of our own
5 alternative dispute resolution, the civil appeals management
6 plan, because we believe that confidentiality is essential
7 to that plan's vitality and effectiveness." See Savage and
8 Associates, P.C. v. K&L -- that's ampersand L -- Gates, LLP,
9 In RE: Telligent, Inc., 640 F.3d. 53, 57 through 58 (Second
10 Circuit, 2011).
11 There, the Second Circuit held that "A party
12 seeking disclosure of confidential mediation communications
13 must demonstrate the special need for the confidential
14 material resulting unfairness from a lack of discovery, and
15 the need for the evidence outweighs the interest in
16 maintaining confidentiality. All three factors are
17 necessary to warrant disclosure of otherwise non-
18 discoverable documents." Id. at Page 58.
19 That is an overlay on the sword and shield
20 analysis here, so let me turn to that, which I think, with
21 that overlay, is applicable to both aspects of the emergency
22 motion. While it is clear that if a Court is presented with
23 a defense or claim premised upon reliance upon counsel, the
24 party asserting such reliance either waives the privilege or
25 cannot refer to the reliance on counsel.

1 On the other hand, where a party is simply noting
2 that it received the advice of counsel, not what that advice
3 was but is noting the process that it went through in
4 rebutting a due care challenge or similar challenge to their
5 action, the Courts have allowed testimony as to the input
6 from client without going into the nature of the input.
7 As Judge Glenn notes in In RE: Residential
8 Capital, LLC, 491 B.R. 63 at 72, (Bankruptcy SDNY, 2013),
9 the distinction between those points can be a fine line;
10 however, I believe it is distinction between substance and
11 process, and by and large, it appears to me that the
12 challenged portions of the declarations or challengeable
13 portions of the declarations fall on the side of process as
14 opposed to substance; i.e., the declarants note that they
15 had input from counsel, but do not describe the nature of
16 that input.
17 That is most clear with respect to the fact that
18 the board presentation referenced in Mr. Wells' declaration
19 is redacted and not provided to the Court and not asserted
20 as evidence with regard to the attorney presentation, the
21 same with Mr. Thomas. There are certain statements by
22 particularly the board members, not Mr. Leone, as to their
23 understanding of the nature and risks of the litigation with
24 Uniti. For example, Paragraph 18 of Mr. Wells' declaration
25 states, "I and the board considered the litigation risk

1 associated with each of our claims against Uniti. While I
2 am not a lawyer, I understood that there was a risk that the
3 Court may determine the master lease was a true lease," and
4 then he goes on, talks about other understandings he has
5 with respect to the risks of the Uniti litigation.
6 There's no statement in Paragraph 18 that that
7 analysis came from the Debtors' counsel. Moreover, one
8 could derive it from other sources, including Uniti's own
9 statements in this case and that's how I take it.
10 Paragraph 19 of Mr. Wells' declaration states,
11 "The Windstream board also received advice from its legal
12 and financial advisors and received 135-page presentation.
13 When evaluating the potential settlement, Windstream's
14 advisors supported approval of the settlement and advises
15 they estimated the total economic value of the settlement to
16 be approximately $1.224 billion."
17 The portion of the declaration that I think
18 crosses the line is the first clause of the second sentence
19 that I just read, "Windstream's advisors supported approval
20 of the settlement." To the extent that involved legal
21 advice, I believe it should not be part of the declaration.
22 It should be stricken and I won't consider it as legal
23 advice. My legal evaluation of the settlement, in other
24 words, won't take that statement into account.
25 Turning to Mr. Thomas' declaration, Paragraph 23

1 of that declaration takes -- discusses the significant risks
2 to both sides inherent in the litigation itself. The third
3 and fourth bullet points in that list headed "Factual
4 Disputes and Unresolved Questions of Law," again raised the
5 issue as to whether those items came from attorney advice or
6 other sources including, for example, financial advisors,
7 their own analysis, or -- I'm sorry, Mr. Thomas' or his
8 colleagues' own analysis or statements by Uniti.
9 To the extent that these two bullet points are
10 based on attorney advice, I will not consider them, again,
11 thinking that it crosses the line set by the caselaw while
12 discussed in the Residential Capital case, as far as my
13 analysis of the merits of the settlement.
14 This applies, also, to Paragraphs 24 and 26 of Mr.
15 Thomas' declaration, each of which would well be from a
16 source other than counsel and you're certainly free to ask -
17 - and now I'm addressing counsel for the Committee and UMB
18 Trustee -- whether these statements came from counsel or
19 from third parties other than counsel or internal analysis
20 by the Debtors. To the extent they did come from counsel, I
21 won't consider them.
22 Now, turning back to the mediation point, the
23 emergency motion is somewhat unclear as to the basis for the
24 requested relief. I actually don't see it as seeking
25 discover under the standard set forth in the Teligent case.

1 If that were the case, I believe that it is unwarranted
2 here, given the nature of the case that the Debtors are
3 presenting and the limitations on the Debtors' ability to
4 refer to the mediation, which they themselves recognize,
5 other than the fact that it occurred and the number of times
6 that parties met during that process and who those parties
7 were.
8 But to the extent that it is seeking that type of
9 discovery, I don't believe it is warranted under the
10 difficult standard laid out in that case. Moreover, it
11 appears to me that the questions where the mediation order
12 was invoked went to inquiries beyond how the Debtors are
13 using the mediation, which I think in each case, is simply
14 that it occurred, that it was lengthy, and that it involved
15 many meetings with the parties laid out.
16 So, I do not believe there is a basis to find that
17 the Debtors have gone beyond that and cherry picked or
18 raised aspects of the mediation that would open the door to
19 further questions about it. For example, they have not
20 stated, I believe, that any party objecting to the
21 settlement, for example, took a different position in the
22 mediation. So that's my ruling; although, as I said, I
23 would give the parties a brief opportunity to respond if
24 they think that I missed something in their arguments, as
25 opposed to just not accepting them.

1 MR. WEILAND: Your Honor --
2 MR. HOWELL: Nothing from the Debtors, Your Honor.
3 MR. WEILAND: I'm sorry, go ahead.
4 MR. HOWELL: Your Honor, Rush Howell from the
5 Debtors. Nothing further. I'll turn it to Mr. Shore.
6 THE COURT: Okay.
7 MR. SHORE: Thank you, Your Honor. Chris Shore
8 from White and Case on behalf of UM Bank and US Bank, as
9 indentured Trustee for the unsecured notes. With respect to
10 the privilege, I think I understand your ruling. We will
11 then inquire of the witnesses with respect to the specific
12 aspects of their testimony and whether it came from counsel
13 or whether it came from some other source.
14 With respect to the mediation, as you articulated
15 what the Debtors are trying to put in, we agree with that,
16 that a mediator was appointed, the mediation started in
17 August. The parties met over time. Certain people
18 attended. We don't have an objection to that.
19 Our objection was more towards how the
20 negotiations progress, who was involved in saying what, that
21 is, who raised what point in the mediation or issues with
22 respect to around anything that is in there, for example,
23 statements with respect to the Little Rock meeting. So, I
24 think the Debtors maybe have a different view, but as Your
25 Honor articulated what you view the Debtors' presentation

1 as, we aren't seeking to exclude that material.
2 THE COURT: Okay. I was just not aware that the
3 Debtors had said who said what in the mediation or were
4 relying on who said what in the mediation.
5 MR. SHORE: Well, I think there's some -- this is
6 less an evidentiary issue and it may come up in the context
7 of argument with respect to where the deal was reached, how
8 much of the deal was baked before the Little Rock meeting.
9 There are qualitative statements being made in the papers
10 regarding the progression of the mediation and that doesn't
11 come up in the declarations, per se, but it does come up in
12 the -- or it may come up in the arguments --
13 THE COURT: All right.
14 MR. SHORE: -- to the extend they --
15 THE COURT: But it -- okay. That -- fair enough.
16 But as far as the declarations are concerned, I just didn't
17 see anything that would open the door to inquiring as to who
18 said what at the mediation. Mr. Marinuzzi, do you have
19 anything on this or...
20 MR. RAPPOPORT: This is Steve Rappoport for the
21 Official Committee of Unsecured Creditors.
22 THE COURT: Okay.
23 MR. RAPPOPORT: We agree with Mr. Shore's
24 statements. We have nothing further to add.
25 THE COURT: All right, very well. So why don't we

1 proceed, then, to the cross examination. Who is going to be
2 your first witness, Mr. Howell?
3 MR. HOWELL: Thank you, Your Honor. Rush Howell
4 from Kirkland for the Debtors. Our first witness will be
5 Mr. Tony Thomas, so let's check and see if his video and
6 audio will work, here.
7 THE COURT: Okay. Let's get him on the screen.
8 MR. THOMAS: Good morning, Your Honor. I can see
9 myself on the screen. Can you see me?
10 THE COURT: Yes, and can -- Mr. Shore, can you see
11 him and Mr. Rappoport?
12 MR. SHORE: I cannot.
13 MR. RAPPOPORT: Actually, I can't, either. I can
14 see his name, but I don't see him.
15 THE COURT: Is there something they need to press,
16 Ryan?
17 CLERK: He'll have to keep speaking.
18 THE COURT: Just, if you speak a little bit more,
19 Mr. Thomas. I'm told that if you do that, you'll show up.
20 MR. THOMAS: Okay, Your Honor.
21 THE COURT: All right.
22 MR. THOMAS: Good morning, Mr. Shore. Good
23 morning, Mr. Rappoport.
24 MR. RAPPOPORT: Good morning.
25 THE COURT: You can see him now?

1 MR. SHORE: Cannot, Your Honor.
2 MR. THOMAS: Let me try it again. I unmuted the
3 microphone at the bottom of Skype. Perhaps that will help.
4 MR. RAPPOPORT: There we go.
5 THE COURT: Yeah, that did it.
6 MR. RAPPOPORT: There we go.
7 THE COURT: Thank you, Mr. Thomas.
8 MR. THOMAS: Okay.
9 THE COURT: Okay, so Mr. Thomas, would you raise
10 your right hand, please? Do you swear or affirm to tell the
11 truth, the whole truth, and nothing but the truth, so help
12 you God?
13 THE WITNESS: Yes, I do.
14 THE COURT: And it's Anthony, T-H-O-M-A-S,
15 correct?
16 THE WITNESS: Correct.
17 THE COURT: And, Mr. Thomas, you submitted a
18 declaration intended to be your direct testimony in these
19 hearings today. It's dated May 3rd. I have a copy here.
20 Sitting where you are today, it's only four days later, but
21 is there anything in this declaration that you would wish to
22 change as your direct testimony?
23 THE WITNESS: No, Your Honor.
24 THE COURT: Okay. Very well. So, I don't know
25 which of you agreed to go first, but the objectors can go

1 ahead with cross.

2 MR. RAPPOPORT: Okay. It's Steve Rappoport from

3 Morrison & Foerster on behalf of the Official Committee of

4 Unsecured Creditors.

5 CROSS EXAMINATION OF ANTHONY THOMAS

6 BY MR. RAPPOPORT:

7 Q Good morning, Mr. Thomas.

8 A Good morning.

9 Q You are currently the president/CEO of Windstream. Is

10 that correct?

11 A Yes, that's correct.

12 Q And you've held this position since December of 2014,

13 is that correct?

14 A Yes, that's correct.

15 Q And you've also been on the board of Windstream since

16 December 2014?

17 A Yes, that's correct.

18 Q You also sit on the board of Windstream's subsidiaries,

19 is that correct?

20 A Yes, that's correct.

21 Q And you hold a title similar, of president and CEO at

22 the subsidiaries, is that right?

23 A Yes, that's right.

24 Q I want to start by discussing the Restructuring

25 Committee, which we discussed at some length at your

1 deposition and which I know you also reference in your
2 direct. That Restructuring Committee which, just for the
3 record, in case it comes up at some point, during the
4 deposition I think we referred to that Restructuring
5 Committee as the Special Committee. Do you recall that?
6 A Yes, I recall that.
7 Q Okay. We might call it the Special Committee. We
8 might call it the Restructuring Committee, but we're talking
9 about the same thing. That Committee, the Restructuring
10 Committee, was supposed to be independent, correct?
11 A Yes.
12 Q And one of the purposes of the Restructuring Committee
13 was to consider potential claims against Uniti arising from
14 the Uniti arrangement, is that right?
15 A Yes, that's right.
16 Q And there were four members of the Restructuring
17 Committee, is that right?
18 A Yes, there were four independent board members.
19 Q And those board members were Alan Wells, Jeannie
20 Diefenderfer, Julie Shimer, and Michael Stoltz, is that
21 right?
22 A Yes, that's right.
23 Q Two of the board members who sat on the independent
24 Committee also sat on the board of Windstream when the sale
25 and leaseback and the spinoff took place, is that right?

1 A Yes.
2 Q And members of the board at the time of the spinoff
3 would've received Uniti stock, is that correct?
4 A Yes, that's correct.
5 Q And, in fact, you personally received shares of Uniti
6 in connection with the spinoff, is that correct?
7 A Yes, that's correct.
8 Q You received 71,823.6 shares of CS&L, is that right?
9 A Yes, and CS&L is predecessor company to Uniti.
10 Q Right. And you currently own 11,853 shares of Uniti
11 stock?
12 A Yes.
13 Q Isn't it true that some members of the Restructuring
14 Committee also own Uniti stock?
15 A Yes, that's my understanding.
16 Q And it's the case, is it not, that if Uniti had lost
17 the restructuring -- excuse me. Let me strike that and
18 start over. And it's the case, is it not, that if Unity had
19 lost the recharacterization claim, they would've had to file
20 for bankruptcy, right?
21 MR. HOWELL: Object. Calls for speculation.
22 MR. RAPPOPORT: Well, it is testimony that he has
23 given before, his view as to whether or not Uniti would have
24 to file for bankruptcy. I'm only asking for his opinion.
25 THE WITNESS: Yes, it's likely if Uniti had lost

1 the litigation that -- I'm sorry. It's likely if Uniti had
2 the litigation they would've had to file for bankruptcy or
3 some type of financial restructuring.
4 BY MR. RAPPOPORT:
5 Q Okay. And in that case, if Uniti had filed for
6 bankruptcy, Uniti stock would be worth far less than it is
7 right now. Do you agree with that?
8 A Yes.
9 Q Kirkland and Ellis had a role with the independent
10 committee, is that -- excuse me, with the Restructuring
11 Committee, is that correct?
12 A Yes.
13 Q And Kirkland and Ellis investigated claims against
14 Uniti relating to the Uniti spinoff transaction, is that
15 correct?
16 A It was a comprehensive review, including the Uniti
17 spinoff. They were reviewing for all potential claims,
18 including those associated with the Uniti spinoff.
19 Q Okay, but just to be clear, the Uniti spinoff was one
20 of the claims that Kirkland and Ellis investigated. Is that
21 correct?
22 A Yes, that's correct.
23 Q Okay. And Kirkland and Ellis also advise the company
24 on this bankruptcy, is that right?
25 A Yes, that's correct.

1 Q And, in fact, Kirkland and Ellis also represented the
2 company in litigation that was undertaken by Aurelius,
3 challenging the Unity arrangement, is that right?
4 A Yes, that's correct.
5 Q Okay. Norton Rose Fulbright also advises the board of
6 directors, in addition to the Restructuring Committee, is
7 that correct?
8 A Yes, that's correct.
9 Q Okay, and PJT was also an advisor to the Restructuring
10 Committee, is that right?
11 A Yes, the Restructuring Committee and the full board.
12 Q Right. PJT is advising the company in this bankruptcy,
13 in fact, correct?
14 A Yes, that's correct.
15 Q Okay. And you often attended Restructuring Committee
16 meetings, even though you're not a member of the Committee,
17 is that right?
18 A Yes.
19 Q And you remained in the room, often, when the
20 Restructuring Committee was voting on recommendations, isn't
21 that correct?
22 A Yes, that's correct.
23 Q Bob Gunderman, the Windstream CFO, he also attended
24 Restructuring Committee meetings, didn't he?
25 A Yes, he did.

1 Q And he was also an officer of Windstream when the
2 spinoff occurred, wasn't he?
3 A Yes, he was.
4 Q Okay. Isn't it the case that it was the full board of
5 holdings and services and not the Restructuring Committee
6 that authorized settlement discussions and voted to approve
7 the settlement?
8 A I'm sorry, the very beginning of that question, it was
9 a little bit muffled.
10 Q Sure. Isn't it the case that the it was the full board
11 of holdings and services and not the Restructuring Committee
12 that authorized settlement discussion and voted to approve
13 the settlement?
14 A Yes, the full board to approve the settle -- which is
15 inclusive of the Special Committee members.
16 Q Okay. You testified in your declaration that the Uniti
17 settlement provides Windstream Holdings' subsidiaries as
18 operators of the network, the ability to upgrade their
19 networks on more favorable terms on the master lease than
20 what Windstream could otherwise obtain through the capital
21 market. Do you remember that testimony?
22 A Yes, I do.
23 Q That's Paragraph 14 from your direct declaration, but
24 isn't it the case that the boards of the subsidiaries never
25 even met or had any discussion about what the settlement

1 means for their respective estates?
2 A Yes.
3 Q And you don't recall executing a consent on behalf of
4 the subsidiaries' determination to enter into the
5 settlement, is that correct?
6 A Yes, that's correct.
7 Q But you do understand that each of the subsidiary
8 Debtors has committed itself to go forward with the
9 settlement agreement, is that right?
10 A Yes, that is my understanding.
11 Q And each of the direct and indirect subsidiaries of
12 Holdings and Services is a party to the settlement
13 agreement, is that right?
14 A Yes, that is right.
15 Q But you do not recall taking any action as an officer
16 of any of the subsidiaries to approve the subsidiaries'
17 entry into the settlement agreement, right?
18 A No, not that I recall.
19 Q And the determination of the subsidiaries to enter into
20 the settlement was made based on the recommendation of
21 counsel and other advisors. Is that right?
22 A Yes.
23 Q And those advisors were Kirkland and Ellis and PJT, is
24 that right?
25 A Yes, and that would include Norton Rose, whose also

1 independent counsel to the board.
2 Q Okay. Fair to say that you never considered on a
3 Debtor-by-Debtor basis whether this settlement should have
4 been entered into?
5 A Correct. We were looking at the overall value to the
6 estate for the settlement.
7 Q In terms of the settlement consideration that is
8 supposed to be received, you're not aware of any analysis
9 that was undertaken as to whether any of the funds that are
10 being received from Uniti relate to encumbered versus
11 unencumbered assets, is that correct?
12 A Yes, that's correct.
13 Q And you don't know whether any --
14 THE COURT: I'm sorry, Mr. Rappoport, can I
15 interrupt you?
16 MR. RAPPOPORT: Yes.
17 THE COURT: When you say encumbered versus
18 unencumbered, you mean encumbered at -- subject to liens
19 granted by the Debtors?
20 MR. RAPPOPORT: That's correct.
21 BY MR. RAPPOPORT:
22 Q And actually my next question was, to make clear that
23 you're not aware, Mr. Thomas, of whether any of the assets
24 that are the subject of the recharacterization claims are
25 subject to liens of prepetition lenders, is that right?

1 A Yes, that's correct.
2 Q Okay. You understand that the reason
3 recharacterization is valuable to the Debtors is that the
4 assets -- if it succeeds, the assets will be deemed to have
5 never left the Debtors and Uniti will be given a claim back
6 against the estate. Is that right?
7 A Yes.
8 Q So if the effect of recharacterization would be that
9 the assets sold to Uniti go back to the subsidiary Debtor,
10 that would be of value to the Debtors, correct?
11 A Yes.
12 Q But you don't know whether or not the value of those
13 assets being placed back into the Debtors' capital structure
14 would be sufficient to pay all of your prepetition creditors
15 in full at every estate below Holdings, do you?
16 A I do not.
17 Q -- asked any of your advisors about...
18 MR. HOWELL: I apologize. This is Rush Howell. I
19 was unable to hear that question.
20 MR. RAPPOPORT: Sorry. The question was, as a
21 followup to the question concerning whether the value of the
22 assets being placed back into the Debtors' capital structure
23 would be sufficient to pay all prepetition creditors in full
24 with every estate below Holdings, and Mr. Thomas said that
25 he was not -- I don't think he -- he was not aware of that.

1 I then asked him whether he had asked about this.
2 BY MR. RAPPOPORT:
3 Q So the question was, you never asked about that, did
4 you?
5 A No, I did not ask advisors about that, specifically.
6 Q Okay. And you don't recall Kirkland and Ellis ever
7 providing the Restructuring Committee with a percentage
8 likelihood that the Debtors would prevail on the claims
9 against Uniti, do you?
10 A No.
11 Q I'm sorry, the answer is no, right?
12 A Yeah, no.
13 Q Thank you. And you don't recall Kirkland ever
14 providing the full board with a percentage likelihood that
15 the Debtors would prevail on their claims against Uniti, do
16 you?
17 A No.
18 Q Let's discuss the mediation for a moment, to the extent
19 that you can, obviously, given the mediation privilege. The
20 mediation started shortly after the Uniti adversary
21 proceeding was filed in July 2019, is that right?
22 A Yes.
23 Q And the board provided guidance to you concerning
24 engaging with Uniti in the mediation, is that right?
25 A Yes.

1 Q You testified in your direct that you were -- excuse
2 me. You testified in your direct that there were 30 days of
3 mediation, if not more, between August 2019 and February
4 2020. Do you recall that?
5 A Yes, I recall that.
6 Q Okay. But the Official Committee of Unsecured
7 Creditors was not invited to all of those sessions, was it?
8 A I don't believe so.
9 MR. HOWELL: -- foundation.
10 MR. RAPPOPORT: Sorry, was there an objection to
11 that?
12 MR. HOWELL: Yes, objection to foundation.
13 MR. RAPPOPORT: Okay, I'll wait for the judge on
14 that one.
15 THE COURT: Well, I mean, Mr. Thomas, are you
16 aware of who was invited to each of these sessions?
17 THE WITNESS: Most of the time, Your Honor, yes.
18 THE COURT: Okay, so I don't want you to
19 speculate, just answer as to your own knowledge as to any
20 instances where the representative of the Official Creditors
21 Committee wasn't included.
22 THE WITNESS: Yes, there were a few meetings where
23 there were not members of the Unsecured Creditors Committee
24 at the mediation.
25 THE COURT: And is that because they weren't

1 invited or because they didn't go?
2 THE WITNESS: I don't know the answer to that,
3 Your Honor.
4 THE COURT: Okay.
5 BY MR. RAPPOPORT:
6 Q The mediation was suspended in --
7 THE COURT: I don't know who -- If someone is on
8 Court-Solutions and typing or otherwise being heard, they
9 should put themselves on mute.
10 BY MR. RAPPOPORT:
11 Q So, I'm sorry, I didn't -- because of that, I didn't
12 hear what you said or maybe you didn't hear what I said.
13 Let's try that again. The mediation was suspended in
14 November, is that correct?
15 A Yeah, the mediation was suspended -- yeah,
16 approximately in November. I can't recall --
17 Q Okay.
18 A -- the exact time.
19 Q Sure. But the Debtors, Uniti, the First Lien Ad Hoc
20 Group, and the Second Lien Ad Hoc Group continued
21 negotiation amongst themselves, even after that date,
22 correct?
23 A Yes.
24 Q You don't recall having discussion with the Official
25 Committee of Unsecured Creditors or any of their members

1 regarding what an appropriate settlement might look like, do
2 you?
3 A Not myself specifically, but my advisors would have
4 those conversations.
5 Q You're aware, aren't you, the Elliott and the First
6 Lien set a meeting with Uniti in Little Rock early this
7 year, is that right?
8 A Yes, that's right.
9 Q And you learned following that meeting that Uniti had
10 agreed to sell Elliott and the First Lien Uniti stock for
11 $6.33 a share, is that right?
12 A Yes.
13 Q And that was 38,633,470 shares of Uniti stock, right?
14 A Approximately.
15 Q We'll just say 38 million, just for ease here. It had
16 previously been a goal of the Debtors to be given 19.9
17 percent of Uniti stock as part of the settlement with Uniti,
18 right?
19 A Yes. We've requested stock as part of the
20 consideration mix to achieve the overall settlement value.
21 Q And instead, Uniti sold that stock to Elliott and the
22 First Liens for $6.33 a share, is that right?
23 A Yes, to help fund the asset purchases and bring cash
24 into the Windstream estate.
25 Q Do you know where Uniti stock opened this morning?

1 A I do not.

2 Q Okay. So, I'll represent to you it opened at $6.60 a

3 share. Do you have an understanding as to how much of a

4 gain that would be over the price that Elliott and the 1Ls

5 are paying for that stock?

6 A Roughly 30 cents on 38 million shares?

7 Q Right. Do you know what that works out to in the

8 aggregate?

9 A That would -- double check my algebra this morning.

10 Maybe that's $1.2 million? Of course --

11 Q I think it's a little bit more than that, actually. I

12 have a calculator here, just for the benefit of everyone.

13 So, if we take -- we'll take 38 million and we'll multiply

14 it by 30 cents and I get $11.4 million. Does that sound

15 right to you?

16 A Yes, it does. And of course, the stock has traded

17 below that price for most of the period of time up until the

18 most recent open.

19 Q But it's trading above it right now and it was trading

20 as high as $10 at one point, isn't that correct?

21 A I don't recall specifically how high it got.

22 Q Okay. You testified that there is significant -- in

23 your direct declaration, you testified that there is

24 significant support amongst the creditors for the Uniti

25 settlement, right?

1 A Yes.
2 Q And, in fact, you say that more than 39 percent of the
3 unsecured noteholders support the settlement. Is that
4 right?
5 A Yes, that's correct.
6 Q Isn't it true, though, that the more than 93 percent of
7 unsecured creditors that support the settlement is basically
8 Elliott?
9 A I'm sorry, the 93 percent of?
10 Q It was 39 percent, but isn't it true that basically the
11 39 percent of unsecured creditors who support the settlement
12 is essentially Elliott?
13 A Yes, Elliott has a large unsecured position. I don't
14 know how much of the 39 percent they make up, but it is a
15 significant amount of it.
16 Q And of course, Elliott also holds a substantial portion
17 of the first and second lien debt as well, correct?
18 A Yes, that's correct.
19 Q So while your declaration trumpets creditor support for
20 the settlement, it's really just support from Elliott and a
21 few other parties, isn't it?
22 A All the --
23 MR. HOWELL: -- form.
24 THE WITNESS: --- first lien creditors support
25 settlement agreement.

1 BY MR. RAPPOPORT:
2 Q Okay. And you agree, don't you, that the settlement
3 and the plan are linked to one another?
4 A Yes, they are. They are highly rated.
5 Q Okay. In fact, it would be -- you'd agree that it
6 would be hard for the company to get a plan of
7 reorganization confirmed without first resolving the Uniti
8 litigation?
9 A Yes, we do believe we need to resolve the Unity
10 arrangement to go forward and plan a reorganization.
11 Q The Uniti settlement provides roughly $1.2 billion in
12 value to the Windstream estate, correct?
13 A I like to say it provides in excess of $1.2 billion.
14 Q Okay. You saw board presentations around the time of
15 the settlement that contained waterfall analyses reflecting
16 recovery to creditors when that $1.2 or in excess of $1.2
17 billion of value is factor into the value of the estate,
18 correct?
19 A Yes, I did see that waterfall analysis.
20 Q Those analyses show at most a million-dollar recovery
21 for the unsecured creditors, is that correct?
22 A Yes, that's my recollection.
23 Q it's your understanding, isn't it, that the First Lien
24 creditors were given the option to swap some of their debt
25 for equity, right?

1 A Yes.

2 Q You don't recall any consideration being given at the

3 board level to allowing the unsecured creditors to swap some

4 of their debt for equity, do you?

5 A I don't recall the specifics of that, but I'm certain

6 our advisors had lots of conversations with creditors about

7 their willingness to insert equity into a business.

8 Q Okay, but that wasn't quite my question. My question,

9 just to go back to it, was you don't recall any

10 consideration being given at the board level to allow any

11 unsecured creditors the swap some of their debt for equity,

12 is that right?

13 A Not to my recollection.

14 Q Okay. And the settlement provides certain releases, is

15 that right?

16 A Yes.

17 Q In fact, under the releases, each of the Debtors would

18 release their current and former directors, managers,

19 officers, and equity holders, is that right?

20 A Yes. There are broad releases that are part of the

21 settlement agreement.

22 Q Okay. And it would also be -- it was the intent,

23 excuse me, let's just start from the beginning there. It

24 was the intent of the Debtors to release anybody who ever

25 owned a share of the Uniti stock, including yourself, is

1 that right?
2 A Yes. They were broad releases.
3 Q Okay. Let's take a look at your declaration, if you
4 have it in front of you. If we could go to Paragraph 23,
5 and I want to talk about the two bullets that the Court
6 referenced earlier in its opinion concerning the motion in
7 limine, and so if you're looking on Page 8 of your
8 declaration, it's actually -- it's really Page 9, Paragraph
9 23, going over to the other page. On Page 9, there's a
10 bullet that says, "Factual dispute" and another one that
11 says, "Unresolved question of law." You see those?
12 A I do.
13 Q Okay. You relied on advice received from counsel in
14 preparing both of these bullets, is that correct?
15 A No.
16 MR. HOWELL: Object to form, compound question.
17 MR. RAPPOPORT: Well, okay. Why don't we talk
18 about --
19 THE COURT: Go by -- go by each of them
20 separately.
21 BY MR. RAPPOPORT:
22 Q Yeah, we'll start with factual disputes first. So,
23 what was your basis for making the statements under the
24 bullet, factual disputes?
25 A The factual disputes was based off internal company

1 analysis.
2 Q What kind of internal company analysis?
3 A Just associated with our work with appraisers and
4 various work we do to assess values...
5 Q Who prepared those analyses?
6 A It was the controller or perhaps the advisors, the
7 controller hires to help with such assessments.
8 Q What about the second bullet, unresolved questions of
9 law? What was the basis for that?
10 A That was from counsel.
11 Q Okay. If we look at Paragraph 24, and I can go
12 sentence by sentence or we can talk about the entire
13 paragraph. Why don't we start -- unless you're going to
14 tell me that the whole thing came from counsel, we'll go
15 sentence by sentence. So, did the entirety of Paragraph 24
16 come from counsel?
17 A No.
18 Q Okay. So, the first sentence says, "Even if Windstream
19 won, that did not guarantee a better outcome than the Uniti
20 settlement." What was the basis for that sentence?
21 A That was my assessment.
22 Q Okay. What was the basis for that assessment?
23 A Again, I would put in in terms of PJT and internal
24 analysis.
25 Q Okay. The next sentence begins, "While I am not a

1 bankruptcy attorney, I have a general understanding that the
2 value to Windstream of succeeding on its recharacterization
3 claim is a function of the location and size of Uniti's
4 resulting claim and where the transferred assets would be
5 located." What was the basis for making that statement?
6 A Again, that's just general knowledge of claims that I
7 have.
8 Q And where did you get that knowledge from?
9 A Years of experience working as a CEO and CFO.
10 Q Okay. When you -- I mean, for example, where you say
11 that "the value to Windstream of succeeding on its
12 recharacterization claim is a function of the location and
13 the size of Uniti's resulting claim," when did you learn
14 that?
15 A The specific dollar amounts, I learned through -- the
16 assessment framework came through PJT. The fundamental
17 concept that claims matter about their quantum and their
18 location in the capital structure, I kind of put in the rule
19 book of general knowledge.
20 Q Okay. The next sentence says, "I understood that there
21 was risk that even if Windstream prevailed on its
22 recharacterization claim, the resulting Uniti claim could
23 substantially dilute the actual benefit to the estate,
24 depending on the details of how the Court ruled." What was
25 the basis for that claim?

1 A Again, that's -- I read that as referring back to where
2 the claim would be located and depending if that's at
3 Holdings or below, as a steering level, that would impact
4 potential recoveries.
5 Q Well, there's reference to the details of now the Court
6 ruled. How did you learn about the possible scenarios on
7 how the Court might rule?
8 A Yeah, in regards to that express -- that one came from
9 counsel --
10 Q Okay.
11 A -- that specific phrase.
12 Q Okay. So, you learned -- part of the sentence, at
13 least, came from counsel to the extent it involved assessing
14 how the Court might rule?
15 A Yes. I was just looking at it from my perspective.
16 There's a quantum of claim and where that claim resides, the
17 capital structure is going to be significant to the impact
18 on Windstream and the estate.
19 Q Okay. The next sentence says, "In other words, we face
20 risk, not only on the merits of the claims but also on the
21 remedies, should we win." And then there's a parenthetical
22 that says, "In particular, on recharacterization which was
23 our largest and most important claim," close parenthetical.
24 What was the basis for this sentence?
25 A That was, again, my understanding, going from --

1 Q Well --

2 A -- experience.

3 Q Okay. There's a reference to facing risk, not only on

4 the merits of the claim but also on the remedies. How did

5 you learn about the risk relating to the merits of the

6 claim?

7 A Again, we went through that. I would probably make an

8 exception for the one we discussed before, the unresolved

9 questions of law that are in Paragraph 23.

10 Q So like that bullet, which you had said came from

11 counsel, you believe that the portion of the sentence

12 relating to the risk, not only on the merits of the claims

13 but also on remedies, that came from your discussions with

14 counsel?

15 A Only limited to, in one specific element here, the

16 unresolved questions of law.

17 Q If we flip over to Paragraph 26, I'll just ask the

18 question like I did before. Did the entirety of this

19 paragraph come from your discussions with counsel?

20 A No.

21 Q Okay. So then let's look at the first sentence. "and

22 there were potential tax consequences associated with

23 recharacterizing the Uniti arrangement as not a sale and not

24 a lease." What was the basis for that sentence?

25 A That was discussions with Windstream's vice president

1 of tax and our CFO.
2 Q So there were no discussions with legal counsel
3 relating to that sentence?
4 A There were also subsequent discussions with legal
5 counsel.
6 Q I'm sorry, subsequent to you writing that sentence or
7 subsequent to what?
8 A I'm sorry, subsequent to discussion I had with the VP
9 of tax, we had an internal meeting where we discussed this
10 matter, and then we also discussed it with counsel and our
11 various tax advisors.
12 Q So what you write in the first sentence, some of that
13 came from your discussions with counsel, is that correct?
14 A I would say the entirety of that statement could be
15 made based off my conversations with internal Windstream
16 team members.
17 Q The second sentence says, "While we believe that the
18 tax consequences should not occur upon a victory, it was
19 possible that Windstream should incur substantial tax
20 liabilities as a result of tax gains being triggered." And
21 what was the basis for that sentence?
22 A Same as before, internal discussions with the
23 Windstream tax team and their --
24 Q All right --
25 A I'm sorry, and their discussions with various tax

1 advisors.
2 Q Okay. So, you don't -- it's your testimony, then, that
3 nothing in this sentence came from discussion with your
4 lawyers, is that right?
5 A Yes, the material for this came from my discussion with
6 internal employees and potentially tax advisors such as
7 KPMG. That'd be the tax team utilized to do this analysis.
8 Q None of the advice you received from your internal
9 advisors was legal advice?
10 A There were subsequent discussion with attorneys as
11 well, but I can make all these statements in Paragraph 26
12 based off the discussions I had with internal employees and
13 their discussions with the various tax advisors.
14 MR. RAPPOPORT: Okay. I don't have any further
15 questions at this time. I pass the witness.
16 THE COURT: Okay.
17 CROSS EXAMINATION OF ANTHONY THOMAS
18 BY MR. SHORE:
19 Q All right, good morning, Mr. Thomas. It's Chris Shore
20 from White and Case. You should have a binder that is
21 labeled, "Indentured Trustee's Cross Examination Binder of
22 Tony Thomas." You have that?
23 A I have three binders and they're referred to as Joint
24 Hearing Exhibits.
25 Q Is that all you have, as far as binders?

1 A And then I have four individual documents sent to me.
2 MR. SHORE: Can I ask someone from Kirkland to
3 explain the transit of the cross binders?
4 THE COURT: You know, Mr. Shore, I don't have them
5 either, so it may be better just to work off the exhibit
6 binders, because I'll need to refer to those myself.
7 MR. SHORE: Okay. All right.
8 BY MR. SHORE:
9 Q All right, so let me -- well, we're going to need and
10 we'll just take a break when we get there, is the actual
11 settlement agreement and I'll give you the JX number. We'll
12 just take a pause while people pull it up. Okay, Mr.
13 Thomas, you got asked some questions by Mr. Rappoport about
14 the subsidiary Debtors. Let's talk about that for a minute.
15 You do know that there are more than 200 Debtors that are
16 subsidiaries either direct or indirect of the Debtor,
17 Windstream Services?
18 A Yes.
19 Q And you are an officer and director of each of those,
20 right?
21 A Yes.
22 Q And you understand that Ms. Moody, the general counsel
23 of Windstream Holdings is also an officer and director of
24 those subsidiaries, right?
25 A Yes.

1 Q And none of the boards of any of those Debtor
2 subsidiaries have held a post-petition board meeting, right?
3 A Yes, that's correct.
4 Q But you know that each of the subsidiary Debtors is a
5 party to the settlement agreement, right?
6 A Yes.
7 Q All right. Now, you are aware of resolution of the
8 Holdings and Services boards approving entry into the
9 settlement by those Debtors?
10 A Yes.
11 THE COURT: I'm sorry, Mr. Shore --
12 BY MR. SHORE:
13 Q But you are not --
14 THE COURT: I wasn't --
15 BY MR. SHORE:
16 Q -- any --
17 THE COURT: Can I interrupt you? I'm sorry. When
18 you say "those Debtors," which -- you mean the 200
19 subsidiary Debtors or the -- okay.
20 MR. SHORE: So, let me rephrase the question.
21 BY MR. SHORE:
22 Q The -- you are aware that the Holdings and Services
23 boards came up with specific resolution allowing the --
24 those two Debtors to enter into the settlement agreement,
25 right?

1 A Yes.

2 Q But you do not recall that any resolutions were passed

3 at any of the 200-plus subsidiary Debtors to approve entry

4 into the settlement, are you?

5 A No, I'm not.

6 Q And you don't recall taking in, independent of any

7 board meetings, you don't recall taking any action as an

8 officer of any of those Debtor subsidiaries to approve a

9 filing of the 9019 motion or the signing of the settlement

10 agreement, are you?

11 A No, I'm not.

12 Q And you cannot testify that you executed any consent in

13 lieu of a board meeting authorizing the subsidiary Debtors

14 to enter into the settlement agreement?

15 A No, I can't.

16 Q Okay. Now, if we can go to JX-77, which is the

17 settlement agreement. Give everybody a minute to pull that

18 up. Let me know when you have it.

19 A I have it.

20 MR. SHORE: Okay, and does Your Honor have a copy

21 of it?

22 THE COURT: Yes.

23 MR. SHORE: Okay.

24 BY MR. SHORE:

25 Q Now, this is, attached as Exhibit A is the settlement

1 agreement that all of the Debtors are seeking to have the
2 Court approve, right?
3 A Yes.
4 Q Can you turn back to Page 40 of 45, and you recognize
5 this page as being on of the pages of the terms sheet that
6 the Holdings and Services board approved entry into?
7 A Yes.
8 Q Okay. And the -- in the first bullet in general, it
9 says, "The parties agree to mutual releases from any and all
10 liability related to all claims and causes of action." You
11 see that?
12 A Yes, I do.
13 Q And that was the release language approved by the
14 boards of Holdings and Services, right?
15 A Yes.
16 Q And just so we can talk about process going forward,
17 you understood that after the board of Holdings and Services
18 approve entry into the terms sheet, it delegated to
19 authorize officers to come up with definitive documentation,
20 right?
21 A Yes, that's correct.
22 Q And you were one of the authorized officers, right?
23 A Yes, I was.
24 Q Okay. And as an authorized officer, you were
25 responsible, in part, along with other authorized officers,

1 with coming up with the actual release language included in
2 the settlement agreement attached as Exhibit A to JX-77?
3 A Yes, along with our legal counsel.
4 Q Okay. I'm going to come back to that in a bit. If you
5 turn to Page 12 of the settlement agreement, which is
6 Section 11, it's actually Page 8 of the settlement agreement
7 and 12 of 45 of the docket. You see that?
8 A Yes, I do.
9 Q And Pages 8, 9, 10, 11, and 12 lay out the terms of the
10 release approved by the authorized officers in conjunction
11 with counsel's recommendation, right?
12 A Yes.
13 Q And you would agree that the relief language included
14 in the settlement agreement is more detailed than what the
15 board approved?
16 A Yes, the settlement agreement is more detailed than the
17 terms sheet, yes.
18 Q Okay. And you did not play a large role in the
19 drafting of the release language, did you?
20 A No, simply under the concept in the terms sheet of very
21 broad releases consistent with the negotiated settlement
22 given the total amount of aggregate value going to the
23 estate.
24 Q Okay. But you do understand the general structure in
25 Section 11A is that a defined terms, Windstream release

1 parties are releasing the Uniti release parties of various
2 claims and causes of action, right?
3 A Yes, I see that.
4 Q Okay. And at the time of your deposition, you had not
5 conducted a detailed review of the definition of Windstream
6 release parties, right?
7 A No.
8 Q Or the definition of Uniti release parties?
9 A No.
10 Q Have you since done a detailed review of those
11 definitions?
12 A I believe, Mr. Shore, you took me through those
13 individually in the deposition process.
14 Q So if we look at the definition of Windstream release
15 parties in Footnote 4 on Page 9 of the settlement agreement,
16 that would -- or that language shows that each of the
17 Debtors estates including the subsidiary Debtors is a
18 releasing party, right?
19 MR. HOWELL: Objection. The document speaks for
20 itself.
21 BY MR. SHORE:
22 Q Sir, do you understand that each of the Debtors is
23 releasing claims against each of the Uniti parties?
24 THE COURT: Well, let me deal with the objection.
25 Is -- I mean, I could read this language as well as the

1 terms sheet. I don't know whether there's more to it than
2 that that you're looking for, Mr. Shore.
3 MR. SHORE: I just want to get the witness'
4 understanding as the authorized officer with respect to this
5 document, but let me be clear.
6 BY MR. SHORE:
7 Q `The board of directors of Holdings and Services has
8 not approved the settlement agreement, right, independently
9 from the authorization that was provided in connection with
10 the terms sheet?
11 A Yes, they approved the terms sheet and delegated to
12 myself and advisors to create the definitive documentation
13 consistent with that terms sheet.
14 Q Right. So just to be clear, the board of Services and
15 Holdings has not specifically approved any of the language
16 included in Section 11?
17 A No.
18 Q And that was left to you, among other authorized
19 officers, right?
20 A That's correct.
21 Q Okay. And I just want to get your understanding, both
22 as an officer of Holdings and Services, but also of the
23 subsidiary Debtors, you understood that each of the Debtors
24 was going to be providing a release, right?
25 A Yes, I understood that these were going to be broad

1 releases, was the understanding.
2 Q And you -- okay. And you understood that each of the
3 officers and directors and all the parties listed there were
4 also going to be providing releases?
5 A Yes, I did.
6 Q So for example, the shareholders are under this
7 agreement of Holdings are providing releases?
8 MR. HOWELL: Object. Again, document speaks for
9 itself.
10 MR. SHORE: I just want the witness'
11 understanding, Your Honor.
12 THE COURT: Okay, that's fair. Just based on your
13 understanding, recognize that the document, I think, is the
14 controlling thing here.
15 THE WITNESS: Yes, that's my understanding.
16 BY MR. SHORE:
17 Q Right. So, your understanding is each of the parties
18 listed in the -- in Section 4 are providing releases to the
19 Uniti release parties, right?
20 A Yes, that's my understanding.
21 Q Okay. And if you focus on the definition of Uniti
22 release parties, you understood that included in the
23 definition of Uniti release parties were affiliates of Uniti
24 -- former affiliates of Uniti entities, right?
25 A Yes.

1 Q And you do understand that the Debtors are former
2 affiliates of Uniti, right?
3 MR. HOWELL: Objection. Calls for a legal
4 conclusion.
5 THE COURT: Well, it's just based on your
6 understanding.
7 THE WITNESS: Yes, based on my understanding, they
8 would be considered affiliates.
9 BY MR. SHORE:
10 Q Right, because at the time of the spin or just
11 immediately before the spin, Uniti was a indirect or --
12 yeah, indirect subsidiary of Holdings, right?
13 A Not certain the specific type of subsidiary it was, but
14 it was affiliated in some sort of subsidiary mechanism.
15 Q Right. And you understood that the Windstream release
16 parties on the one hand were releasing the Uniti release
17 parties including other Debtors of all of the types of
18 claims that are listed in Paragraph A after the definition
19 of Windstream successors, all the way up to the definition
20 of the Windstream release claims, right?
21 A I believe that's accurate. Obviously, the language is
22 getting a little more legalistic here. Yes, the very broad
23 definition. I understood that.
24 Q And would you agree with me that the definition of
25 Windstream release claims relates to issues that were not

1 the subject of the Uniti adversary proceeding?
2 A They were subject to Kirkland's comprehensive review of
3 all claims, at which point we -- Kirkland recommended which
4 claims we should pursue in the adversary proceeding.
5 MR. SHORE: Motion to strike, Your Honor.
6 THE COURT: On what basis?
7 MR. SHORE: On the basis that he's now
8 affirmatively stating he relied on counsel to inform his
9 understanding of why the Windstream released claims relate
10 in any way to the Uniti settlement.
11 THE COURT: Okay. Well, that's fine. The
12 question -- I'll grant that. The question was just whether
13 the release goes beyond the claims asserted in the
14 complaint.
15 THE WITNESS: Yes, it does, to the best of my
16 knowledge.
17 BY MR. SHORE:
18 Q And then if you look at Paragraph 19 of your
19 declaration, the last sentence of Paragraph 19 is, "Based on
20 advice from my advisors, I believe that these releases are
21 appropriate." See that?
22 A Yes.
23 Q Other than -- and the advisors here is K&E?
24 A Perhaps PJT and Norton Rose in this context. I have to
25 reread the entire paragraph here, but...

1 Q Well, why don't you do that and let us know whether
2 anybody other than advice from K&E and Norton Rose informed
3 your belief that the releases are appropriate.
4 A I also understood it to be important to Uniti that they
5 -- in addition to K&E and Norton Rose, we also understood
6 broad releases was an important component to the overall
7 structure with Uniti.
8 Q That is another way of saying what you just testified
9 to, the releases were important to Uniti?
10 A Yes. I believe the releases were an important
11 component -- the broad releases were an important component
12 of the overall settlement.
13 Q Okay. So I want to focus on your testimony that the
14 releases are appropriate, which is at the end of Paragraph
15 19, and ask you, other than K&E or Norton Rose, did anybody
16 provide you advice with respect to whether or not the
17 releases contained in the settlement agreement were
18 appropriate?
19 A No, not to my knowledge. I believe that all came from
20 counsel's review of the releases.
21 MR. SHORE: Okay, and then, Your Honor --
22 THE COURT: No, I -- I will consider the sentence.
23 MR. SHORE: Okay, thank you, Your Honor.
24 BY MR. SHORE:
25 Q Can you turn to the -- while we're on the subject of

1 legal advice, can you turn to Paragraph 22?
2 A Yes, I'm there.
3 Q Again --
4 A In the declaration, correct?
5 Q Of your declaration. That's correct. Again, I'm going
6 to focus on the last sentence of that paragraph, and feel
7 free to review what you need to in that paragraph to be able
8 to answer questions about the last sentence.
9 A Okay.
10 Q Okay. This investigation report, a hundred-plus pages.
11 We received this in discovery, but all of the pages had been
12 redacted on the basis of attorney-client privilege. Are you
13 aware of any portion of that hundred-plus page presentation
14 containing non-legal advice?
15 A No, I'm not.
16 Q Right. So, all of the board's decisions with respect
17 to whether or not to bring a complaint was based on advice
18 of counsel in the hundred-plus page presentation, right?
19 A Yes.
20 MR. SHORE: Right. Your Honor, I would then renew
21 the motion to strike the last, I guess, two sentences of
22 Paragraph 22.
23 THE COURT: I agree with you on the last sentence.
24 Again, the next to last sentence is just a process point.
25 BY MR. SHORE:

1 Q Well, let's move past the filing of the complaint and
2 get to the authorization to enter into the settlement that
3 was done at the Holdings and Services level, okay? You
4 understand -- move forward to March 1.
5 A Yes.
6 Q And K&E presented to the board a skinnied down version
7 of the report, right?
8 A Again, at March 1st?
9 Q Yes.
10 A Yeah, the report was provided to the Restructuring
11 Committee in May and then before we filed the complaint in
12 July, K&E presented the complaint to the board, I believe
13 late June, early July. And then when it came to approving
14 the overall settlement with Unity, yes, that legal analysis,
15 K&E refreshed their analysis for the purposes of the board's
16 review of the settlement.
17 Q Okay. And in fact, the reason you personally approved
18 the settlement was based on the advice from K&E provided in
19 that March 1 report, right?
20 A Yes, that combined with PJT's economic quantification
21 of the total value that the estate would receive.
22 Q Right, but you recall me asking in your deposition
23 whether or not you would have approved the settlement in the
24 absence of legal advice from K&E regarding the risks and
25 rewards of litigation?

1 A I don't recall specifically, but I've -- I don't...
2 Q All right. Isn't it true that absent the advice from
3 K&E that was redacted for us from the March 1 report, you
4 would not have approved the Debtors' entry into the
5 settlement?
6 A That's correct. I relied on K&E's assessment of the
7 overall settlement, including the release claims, to make a
8 determination that it was right -- it was a good decision
9 for the estate.
10 Q Right, and just to understand the importance of that
11 legal advice to your decision making, you can't testify that
12 you would have approved the settlement, had K&E not provided
13 the advice it gave at the March 1 board meeting?
14 MR. HOWELL: Objection. Incomplete hypothetical
15 and calls for speculation.
16 THE COURT: If you can answer it, you can answer
17 it. If you're speculating, don't do it.
18 THE WITNESS: I guess I would be speculating, Your
19 Honor.
20 MR. SHORE: Here's the one problem we have.
21 Without the witness binders, we're not going to have the
22 deposition testimony of the witnesses. I believe that
23 binders were delivered to Court yesterday.
24 THE COURT: Can I --
25 MR. SHORE: -- afternoon.

1 THE COURT: I have the deposition testimony, but I
2 don't have the (indiscernible) witness binder. But can I --
3 I have a basic question. The Debtors are not saying that
4 they relied on K&E. You're asking for it. So, I don't know
5 where this is going. They are not -- that's not part of
6 their case, other than that they got advice as a process.
7 They're not relying on what that advice was, whether it was
8 to settle or not. You're the one asking that question.
9 So -- and the witness is under penalty of perjury,
10 so he's answering it, but you're opening the door to all of
11 this, so I'm really not sure where you're going here. If
12 it's to say that somehow you were sandbagged, I think it's
13 just the opposite.
14 MR. SHORE: All right. I'll move on, Your Honor.
15 BY MR. SHORE:
16 Q Let's turn to a new topic, which is the cost of
17 settlement versus litigation. All right. After the
18 complaint was filed and the mediation was established, the
19 full board of Holdings and Services gave instructions to
20 management and advisors with respect to a range of
21 acceptable outcomes in the negotiations, right?
22 A I'm sorry, get that -- Mr. Shore, can you repeat the
23 first part of that question?
24 Q Sure. So, I'm going to focus on the period of time
25 after the complaint was filed and as parties are heading

1 into mediation. It would've been in August of 2019, right?
2 A No, we began mediation at the end of July.
3 Q All right. And at that time, the full board of
4 Holdings and Services gave instructions to management or the
5 -- and the advisors, with respect to a range of acceptable
6 outcomes in the negotiations, right?
7 A Yes, we did talk about an aggregate value, as I recall.
8 Q And that range of Holdings and Services -- that the
9 Holdings and Services board suggested considered a
10 comparison of what you would get from settling the Uniti
11 claims versus the alternatives of litigating and then
12 winning or losing, right? The bookends were, what can we
13 get out of settlement and how does that compare to what we
14 would get if we won versus what we get if we lost, right?
15 A Yes, that's the comparative analysis.
16 Q Okay, and one of the bookends there was that if you
17 lost the litigation, you might have to assume the lease as
18 is or with minor modifications, right?
19 A Yes.
20 Q Now, I want to focus on the win, that is the other side
21 of the bracket, that the parties in the mediation were
22 trying to fall within. As a board member, you did get some
23 illustrative math from PJT regarding what the potential
24 outcome might be for an all-in win on the recharacterization
25 claim, right?

1 A Yes.

2 Q Okay. And -- but you never got any illustrative math

3 on what a win of the fraudulent conveyance claim that was

4 included in the complaint, did you?

5 A No, I do not recall seeing any illustrative math for

6 PJT on the fraudulent conveyance claim.

7 Q And you didn't get any illustrative math on the

8 contract claim that was asserted, right?

9 A The breach of contract -- no, not associated with the

10 breach of contract claim.

11 Q And you are aware that the UCC had filed a motion

12 seeking standing to assert claims among others that the

13 entire spin was a fraudulent conveyance because it rendered

14 the Debtors insolvent at the time?

15 A I don't recall that specifically.

16 Q Do you recall ever receiving any illustrative math from

17 PJT about any claims that the spin itself was a fraudulent

18 conveyance?

19 A Not that I recall.

20 Q Okay. Now, you testify in your declaration with

21 respect to potential cost savings, of settling versus

22 continuing to litigate?

23 A Yes, in the declaration, yes.

24 Q Now, you don't set forth the specific costs of what it

25 would take for K&E to continue the recharacterization count

1 through trial and appeal, do you?
2 A No, that is not in my declaration.
3 Q Okay. But what you do lay out are two forms of savings
4 that you say will be had if the Debtors settled versus going
5 forward and winning on the recharacterization claim, right?
6 A Yes.
7 Q Okay. First, you assume $400 million in annual cash
8 losses, right, while the Debtors are in bankruptcy?
9 A Associated with challenges of operating our enterprise
10 and wholesale business while in the restructuring.
11 Q But that's just an assumption on your part, right?
12 A No, it's based off recent historical performance we've
13 seen since we've been inside of the restructuring that
14 certain customers are unwilling to do business with
15 Windstream, given the impact and overhang associated with
16 restructuring and the pending litigation previously.
17 Q I just want to understand how that compares to your
18 testimony where you say, "I assumed the loss of at least
19 $100 million in revenue per quarter."
20 A I think --
21 MR. HOWELL: Object to form. Asked and answered.
22 THE COURT: Well, no, I think -- you can answer
23 that question. When you use the word "assume," what was
24 your assumption based on?
25 THE WITNESS: It was extrapolating from the

1 decline in fourth quarter 2019 performance.

2 MR. SHORE:

3 Q And in determining that loss, what was your assumption

4 about whether or not the Debtors would be paying rent after

5 they prevailed on the recharacterization claim?

6 A I don't think that was necessarily part of this

7 analysis, you know, we would continue to pay rent in the

8 recharacterization claim. This was more, as I believe,

9 associated with the expenses associated with Chapter 11,

10 because --

11 Q But --

12 A -- you could either win or lose.

13 Q -- iteration any potential savings that the Debtors

14 would have during this period between a win and a resolution

15 of appeals related to not having to pay $650 million-plus a

16 year in rent to Uniti?

17 A Yes, that's correct. That's not outlined in my

18 declaration.

19 MR. SHORE: Okay. I have no further questions.

20 THE COURT: Okay. Any redirect?

21 MR. HOWELL: Just briefly, Your Honor. And I

22 apologize. I should have said, Rush Howell from Kirkland

23 and Ellis for the Debtors. I'm not always sure when I'm

24 popping up on the screen and when I'm not.

25 THE COURT: You've been on the whole time.

1 MR. HOWELL: Okay. Well, I apologize to everyone
2 for having to look at me, but thank you. So I will be
3 brief, Your Honor.
4 REDIRECT EXAMINATION OF ANTHONY THOMAS
5 BY MR. HOWELL:
6 Q First, just a clarification point, really, for the
7 record. Mr. Thomas, you were asked a question about the
8 Little Rock meeting or the so-called Little Rock meeting.
9 Do you recall that?
10 A Yes, I do.
11 Q And there was, I believe, a suggestion in the question
12 that the -- Elliott was there along with other 1Ls, and my
13 question is, do you have an understanding as to whether
14 other 1L parties besides Elliott were at that meeting?
15 A No, it's my understanding it was just Elliott.
16 Q You were asked several questions about the releases
17 contained within the settlement agreement. Do you recall
18 that?
19 A Yes, I do.
20 Q What, to your understanding, did the Debtors get in
21 exchange for those releases?
22 A Total economic value in excess of $1.25 billion, plus a
23 lot of what we sometimes refer to as noneconomic value but
24 in fact is just probably more accurately paraphrased as
25 difficult to quantify benefits to the estate as well.

1 Q What would some of those benefits be?
2 A As an example, the ability to separate the ILEC and
3 CLEC lease, as an example, to create -- functionality. You
4 know, probably most importantly, the growth capital
5 investments, the real foundation of making Windstream
6 competitive. One of the biggest challenges Windstream's had
7 since I've been CEO is our ability to compete against the
8 cable companies and this $1.75 billion really is a necessity
9 for us to compete and be a going concern. Without that
10 capital investment, people are concerned about where the
11 business might be headed after this. And there were --
12 Q If you --
13 A -- benefits as well, as I outlined in my declaration.
14 Q You also -- you called the releases important to Uniti
15 during your cross examination. Were you aware as to or did
16 you believe as CEO of Windstream that you could arrive at
17 the settlement absent agreeing to releases?
18 A No. I felt releases was fundamental to the settlement.
19 Q Mr. Thomas, you were also asked several questions by
20 opposing counsel related to the subsidiaries of Windstream
21 services. You recall those questions?
22 A Yes, I do.
23 Q Do you believe that the proposed settlement is a good
24 deal for the subsidiaries of Windstream Services?
25 A Yes, I do. They will be the beneficiaries of

1 substantial amounts of capital investment along with the
2 infusion of half a billion dollars of cash from Uniti to
3 further strengthen the business.
4 MR. HOWELL: I don't have anything further, Your
5 Honor.
6 THE COURT: Okay. Any re-cross on that?
7 MR. SHORE: I have two areas, but I'll defer to
8 Mr. Rappoport first.
9 MR. RAPPOPORT: I don't have any re-cross. When
10 Mr. Shore is done, I just want to speak to the Court briefly
11 about Mr. Thomas' declaration in light of the testimony we
12 got earlier. So -- but I'll Mr. Shore (indiscernible).
13 THE COURT: Okay.
14 MR. SHORE: All right.
15 RE-CROSS EXAMINATION OF ANTHONY THOMAS
16 BY MR. SHORE:
17 Q Mr. Thomas, you just got asked some questions about the
18 economic and non-economic benefits coming for the releases.
19 That consideration is coming from Uniti and its corporate
20 subsidiaries, right?
21 A Yes, it's coming from Uniti.
22 Q As far as you know, none of that settlement
23 consideration is coming from the long list of Uniti release
24 parties other than the Uniti corporate entities, right?
25 A Yes, that's my understanding.

1 Q And then you got asked questions about the Windstream
2 subsidiaries and the benefits they're getting. You do
3 understand, don't you, that under the settlement agreement
4 both the payment of the APA purchase price and the payment -
5 - those installment payments that Uniti's going to be making
6 over time are not assured to go to any particular Windstream
7 subsidiary, right?
8 A Yes, the subsidiaries, I understand, I'm not certain
9 where the cash will go but they're obviously all
10 interrelated. It's a combination of all the subsidiaries is
11 what comprises Windstream and they rely upon each other in a
12 certain sense to be the company we are.
13 Q So maybe a foundational question. You do understand
14 that the Windstream subsidiaries own different assets,
15 right?
16 A Yes, I understand that.
17 Q Some may have lots of assets. Some have very few
18 assets, right?
19 A Yes, that's correct.
20 Q And the Windstream subsidiaries, you understand, have
21 differing creditor bodies, right?
22 A Yes, I understand that.
23 Q Okay, and just focusing on this issue of allocation,
24 you do understand that a feature of the settlement agreement
25 is that the -- where the cash is going to go is going to be

1 directed by the Debtors, the First Lien Creditors, and the
2 backstop -- requisite backstop parties, right?
3 MR. HOWELL: Objection to the question, Your
4 Honor. I think we've been clear that the allocation issues
5 are not up for today, and as we discussed --
6 THE COURT: Well --
7 MR. HOWELL: -- hearing on April 6th --
8 THE COURT: I think you need to lay a foundation
9 for the question, Mr. Shore. I think it assumes -- I think
10 the objection is that it assumes facts that are not in
11 evidence. So, I think if you lay a foundation, you can ask
12 the question.
13 MR. SHORE: Okay.
14 BY MR. SHORE:
15 Q Can you pull back out the settlement agreement?
16 A Yes, I can.
17 Q Okay.
18 A I have it in front of me.
19 Q And then if you look at Section 8 which is on Page 11
20 of 45 of the docket filed entry or Page 7 of the settlement
21 agreement, see that Section 8 refers to cash, right?
22 A Yes, I do.
23 Q And the -- that refers to the $245 million in APA
24 purchase price, right?
25 A Yes, it does.

1 Q And the IRU purchase and the cash consideration, right?
2 A Yes.
3 Q And when you provided a prior answer that the
4 subsidiaries are enjoined as cash, that's what you were
5 referring to, right?
6 A More specifically, I was referring to the $1.75 billion
7 in gross capital investments that creates the subsidiaries,
8 and obviously, the subsidiaries would benefit from the cash
9 coming in in terms of making the company a going concern and
10 making it a financeable entity going forward.
11 Q Right. So, I guess -- that's why I was just following
12 up with this specific question. You do understand that
13 whether or not any of the cash gets to any subsidiary to be
14 paid out to its diverse creditor body, is dependent upon a
15 future agreement of the Debtors required consenting First
16 Lien Creditors and the requisite backstop parties, right?
17 A Yes, I believe that you're just reading from the
18 settlement agreement there, yes.
19 Q Right, but you understood that, right?
20 A Yes, I understood that.
21 MR. SHORE: Right. No further questions, Your
22 Honor.
23 THE COURT: Okay. All right. Anything else with
24 Mr. Thomas? Okay, you can sign off, sir.
25 THE WITNESS: Thank you, Your Honor.

1 MR. RAPPOPORT: So, Your Honor, this is Steve
2 Rappoport for the Official Committee of Unsecured Creditors.
3 In light of Mr. Thomas' testimony concerning Paragraphs 23
4 and 24 of his declaration, and in light of Your Honor's
5 ruling on the motion in limine, we would ask that the Court
6 either strike or not consider for purposes of its ruling the
7 bullet in Paragraph 23 entitled, "Unresolved Questions of
8 Law."
9 THE COURT: I thought I already did that, but to
10 the extent that's not clear, I'm not considering it.
11 MR. RAPPOPORT: Sure. Okay. Then we would also
12 ask with respect to two sentences in Paragraph 24, where Mr.
13 Thomas references the details of how the Court ruled and
14 also the risk, not only on the merits of the claims but also
15 on the remedies, that those should be not considered or
16 stricken in light of the testimony.
17 THE COURT: And again, I've already marked these
18 sentences. I'm not striking the second one completely, but
19 I'm noting that I'm not considering anything where he
20 referred to unresolved questions of law, which is --
21 MR. RAPPOPORT: Thank you, Your Honor.
22 THE COURT: -- implicit in these two sentences.
23 MR. RAPPOPORT: Thank you, Your Honor.
24 THE COURT: And I think I was clear that the
25 sentences that Mr. Shore dealt with in Paragraph 22 and 18 -

1 -

2 MR. HOWELL: Your Honor, Rush Howell from

3 Kirkland. I had the last sentence of Paragraph 19 and the

4 last sentence of Paragraph --

5 THE COURT: Right.

6 MR. HOWELL: -- 22. I may have that incorrect.

7 THE COURT: I said 18. I meant 19. The last

8 sentences of both those paragraphs.

9 MR. HOWELL: Thank you, Your Honor.

10 THE COURT: Okay. All right. So, who do the

11 Debtors want to call next?

12 MR. HOWELL: Our next witness, Your Honor, is Nick

13 Leone.

14 THE COURT: Okay. Can you pull him up, Ryan?

15 MR. LEONE: Good morning, Your Honor.

16 THE COURT: Okay, good morning. We can see Mr.

17 Leone. Can the three of you on the phone -- on the Skype

18 also see him?

19 MR. RAPPOPORT: Yes, Your Honor.

20 MR. SHORE: Not yet, but --

21 THE COURT: Just speak a little bit, Mr. Leone. I

22 think that’s what picks you up.

23 MR. LEONE: That’s what triggers it.

24 THE COURT: Okay.

25 MR. LEONE: Am I up yet? Not yet?

1 THE COURT: Well, I can see you.
2 MR. LEONE: Okay. Mr. Shore, you can't see me
3 yet?
4 MR. SHORE: Not yet, but it's okay.
5 MR. LEONE: Okay. And the audio is fine?
6 THE COURT: All right. Okay. Mr. Rappoport, you
7 can see him?
8 MR. RAPPOPORT: I can, yes.
9 THE COURT: All right. Well, let me swear you in,
10 Mr. Leone. Would you raise your right hand, please? Do you
11 swear or affirm to tell the truth, the whole truth, and
12 nothing but the truth, so help you God?
13 THE WITNESS: I do.
14 THE COURT: Okay. And Mr. Leone, you submitted a
15 declaration dated May 3, 2020, intended to be your direct
16 testimony in these contested matters and that's stated in
17 Paragraph 3 of the declaration. Sitting here today, is
18 there anything you would like to change in it, as your
19 direct testimony?
20 THE WITNESS: No, Your Honor.
21 THE COURT: Okay. All right, so we can go ahead
22 with cross, then.
23 MR. RAPPOPORT: Okay. Thank you, Your Honor.
24 CROSS EXAMINATION OF NICHOLAS LEONE
25 BY MR. RAPPOPORT:

1 Q Good morning, Mr. Leone. It's Steve Rappoport. We
2 spoke last week for your deposition.
3 A Good morning.
4 Q So Mr. Leone, I want to start just with some
5 background. You're a partner in the Restructuring and
6 Special Situations Group at PJT Partners, is that correct?
7 A Yes, it is.
8 Q Okay. And PJT is the financial advisor engaged by
9 Windstream Holdings, Inc. and its affiliates as Debtors and
10 Debtors in Possession, is that right?
11 A Yes, that's correct.
12 Q You're familiar with the proposed settlement of claims
13 against Uniti Group that the Debtors are seeking approval of
14 here, is that right?
15 A Yes, I am.
16 Q Okay. You agree that the settlement of the Uniti
17 litigation and the plan of reorganization are linked, is
18 that right?
19 A Yes, that's my understanding.
20 Q And it's your testimony on your direct that the
21 settlement is a "core component" of Windstream's
22 restructuring?
23 A Yes, that's correct.
24 Q And you agree that it would be difficult for Windstream
25 to confirm a plan without resolution to the Uniti

1 litigation, is that right?
2 A Yes, I agree with that.
3 Q You testify in your declaration in Paragraph 5 that
4 there were 27 days of mediation that lasted over 100 hours
5 in total, is that right?
6 A Can I just pull that up very quickly?
7 Q Sure.
8 A I'm sorry, which paragraph?
9 Q Paragraph 5.
10 A Yes, I made that statement.
11 Q Okay. And you claim to have attended nearly every
12 session, is that right?
13 A That's correct.
14 Q And do you have a recollection of who attended those
15 sessions?
16 A Yes.
17 Q The unsecured creditors were not invited to attend
18 every one of those mediation sessions, were they?
19 A That's correct.
20 Q Okay. You're aware also that Elliott had a meeting
21 with Uniti in Little Rock earlier this year, is that
22 correct?
23 A Yes, I'm aware of that.
24 Q Windstream was not a part of that meeting, right?
25 A That's correct.

1 Q And following that meeting, you learned that Uniti had
2 agreed to sell Elliott and the First Lien an amount of stock
3 roughly equivalent to 19.9 percent of Uniti's outstanding
4 stock, is that right?
5 A Yes.
6 Q It has previously been the goal of the Debtors to be
7 given Uniti stock as part of the settlement with Uniti,
8 correct?
9 A I wouldn't use the term goal.
10 Q What term would you use?
11 A I would say it was part of the consideration or part of
12 the potential currencies that were being negotiated between
13 Uniti and the Debtors.
14 Q So part of the consideration that the Debtors were
15 seeking at one point was a portion of Uniti stock --
16 A Yes.
17 Q -- that fair? Okay. And instead, Uniti sold that
18 stock to Elliott and the First Lien for $6.33 a share,
19 correct?
20 A Yes.
21 Q And that works out to roughly $245 million in net
22 proceeds to Uniti, which Uniti is going to pass on to
23 Windstream, right?
24 A that's correct.
25 Q You agree that if the Court approves the settlement and

1 Uniti is able to put the litigation behind it, the market
2 will react favorably to that news?
3 A I know in my deposition -- I don't remember the exact
4 term I used -- I believe I said that the market review from
5 both Uniti standpoint and Windstream's standpoint, a
6 settlement to be good news.
7 Q All right. So, if you're looking at it from the
8 perspective of Uniti stock, the settlement would be good
9 new?
10 A Again, but if you're implying that the stock is going
11 to go up as a result of that, I can't say.
12 Q You understand it's part of the proposed settlement
13 that Windstream is releasing certain claims it has against
14 Uniti, correct?
15 A Yes.
16 Q You're not aware of any assessment of the value of the
17 claims being release in light of the probability of success
18 in Uniti litigation, correct?
19 A That's correct.
20 Q And you never did the math to value the fraudulent
21 conveyance claims that was asserted by the Debtors, did you?
22 A No.
23 Q And you never did the math to value the contract claim
24 that was asserted by the Debtors either, correct?
25 A That's correct.

1 Q Nor did you do the math on the breach of contract --
2 excuse me. Nor did you do the math on the breach of
3 fiduciary duty claims that were asserted by the Debtors
4 against Uniti.
5 A That's correct.
6 MR. HOWELL: Object to form. Mischaracterizes the
7 complaint.
8 THE COURT: I don't think counsel was referring to
9 the claim.
10 MR. RAPPOPORT: I think --
11 THE COURT: I think he was referring to release.
12 Am I right, Mr. Rappoport?
13 MR. RAPPOPORT: Well, I was referring to the
14 claims in the complaint and I think perhaps the issue is
15 that the breach of fiduciary duty claims were not against
16 the company. They were against the Debtors' prepetition
17 directors and officers, so I'm happy to restate that --
18 THE COURT: Okay.
19 MR. RAPPOPORT: -- that question.
20 BY MR. RAPPOPORT:
21 Q You never did any math on the breach of fiduciary duty
22 claims asserted against the Debtors' prepetition officers
23 and directors, correct?
24 A That's --
25 MR. RAPPOPORT: Objection.

1 THE COURT: I'm sorry, what's the basis for the
2 objection?
3 MR. HOWELL: It was the same objection as before.
4 The witness has answered, though.
5 THE COURT: Well --
6 MR. HOWELL: I don't think that that correctly
7 states the complaint.
8 THE COURT: Again, the fiduciary -- breach of
9 fiduciary duty claims, are they in the complaint, Mr.
10 Rappoport, that you were referring to or just general claims
11 that would be covered by the release?
12 MR. RAPPOPORT: Actually -- I think, actually,
13 you're making a good point, Your Honor. I think they are
14 claims that would be covered by the release. I beg your
15 pardon.
16 THE COURT: Okay.
17 MR. RAPPOPORT: That's correct. They would be
18 covered by the release.
19 BY MR. RAPPOPORT:
20 Q You've never done an analysis of any claim or cause of
21 action owned by any subsidiary of Services, correct?
22 A That's correct.
23 Q And as of your deposition, you had not made any
24 presentation to any of the Debtors' managers or board of
25 directors of any subsidiary with respect to the value of any

1 of those (indiscernible) claims, correct?
2 A That's correct.
3 Q You're not aware of anybody at the Debtors performing a
4 litigation risk analysis for the claims that the Debtors are
5 releasing against Uniti, correct?
6 A Correct.
7 Q And as of your deposition, you did not have an
8 understanding as to who Holdings creditors were,
9 specifically, correct?
10 A I'm sorry, can you repeat the question?
11 Q Sure. As of your deposition, you did not have an
12 understanding as to who Holdings creditors were,
13 specifically, correct?
14 A Not specifically.
15 Q Okay. And you did not have an understanding of the
16 amount of unsecured claims that Holdings has on its
17 schedule, is that correct?
18 A Correct.
19 Q And you did not have any working understanding as to
20 the collateral held by the First Lien and the Second Lien,
21 is that correct?
22 A I don't recall that specifically.
23 Q Okay. and you've never seen a scenario in which any
24 unsecured creditors of Services received a payout, is that
25 correct?

1 A Are you referring to some kind of recovery as part of a
2 plan? When you say --
3 Q Yes.
4 A -- payout, I'm not sure.
5 Q Correct. A recovery. Sure.
6 A Not that I recall.
7 Q Okay. And you've never seen a scenario in which any
8 unsecured creditors of Holdings received a recovery, is that
9 correct?
10 A Not that I recall.
11 Q And it's been your working assumption throughout the
12 case that the 1Ls and the 2Ls had liens on all the Debtors'
13 assets, is that correct?
14 A Yes.
15 Q You didn't perform any analysis as to what settlement
16 assets would be encumbered or unencumbered, did you?
17 A No, we did not.
18 Q You never provided a breakdown of encumbered versus
19 unencumbered assets relating to the settlement to the board,
20 did you?
21 A Not to my recollection.
22 Q You don't recall presenting the board with any math
23 showing the value of recovery to any particular creditor
24 body in connection with any particular claim, do you?
25 A No. Let me just expand. I mean, the analysis we did

1 was typically in connection with looking at the Debtor as a
2 whole and the creditors as one creditor body.
3 Q Okay, but you did not present either management or a
4 board of any Debtor, any views with respect to any recovery
5 that Services, as the individual estate, would receive as
6 part of the settlement, correct?
7 A That's correct.
8 Q And you didn't do any analysis as to whether or not
9 Services would be able to make distributions to its
10 unsecured creditors if it litigated the recharacterization
11 claims successfully, correct?
12 A Correct.
13 Q So if the Court were to rule that all the settlement
14 consideration is unencumbered, you have no understanding as
15 to what that would mean or what effect that would have on
16 the settlement?
17 A On the settlement? Sorry, could you repeat --
18 Q Sure, on the settlement -- well, sure, let me restate
19 it. If the Court were to rule that all the settlement
20 consideration is unencumbered, you have no understanding as
21 to what effect that would have in terms of where the
22 settlement consideration would go.
23 A No.
24 Q Okay. Are you familiar with the asset purchase
25 agreement that's part of the settlement in this case?

1 A Generally.
2 Q Okay. And generally, is it your understanding -- let
3 me start that over again. Generally, it's your
4 understanding that under the APA, Uniti is acquiring assets
5 and reversion strands, correct?
6 A Yes.
7 Q But you've not done a formal valuation of the assets
8 being sold pursuant to the APA, is that right?
9 A That's correct.
10 Q And you're not aware of any formal valuation of those
11 assets being done, correct?
12 A Correct.
13 Q One component of the settlement is the sale of dark
14 fiber assets and also contracts by Windstream to Uniti, is
15 that correct?
16 A Yes.
17 Q You testified that the fair value of those assets and
18 contracts being transferred is roughly $294 million, right?
19 A I don't remember if I used the term fair value or if I
20 used the term stipulated value, but I recognize the number
21 $294 million.
22 Q Okay. To the best of your knowledge, no independent
23 valuation of the dark fiber assets was performed by PJT or
24 anyone else, right?
25 A That's right.

1 Q And the Debtors were transferring those assets and
2 contracts for $285 million, is that right?
3 A I would rephrase that and say, consistent with my
4 testimony in deposition that we always viewed the
5 consideration coming from Uniti to Windstream as part of a
6 package and we never specifically thought this cash is going
7 toward this asset and this cash is going toward this
8 specific settlement.
9 Q Fair enough, but if you look at the -- if you look at
10 your declaration, it does show a value of assets being
11 transferred to Uniti and a value received, correct?
12 A Yes.
13 Q And the value being received is less, by about $9
14 million, from the value of the assets being transferred
15 (indiscernible).
16 A Again, I would repeat what I just said, which is that
17 we always viewed the consideration coming from Uniti to
18 Windstream as part of the entire package.
19 Q $245 million of the $285 million is coming from the
20 money that Uniti is obtaining in the Uniti stock sale, is
21 that right?
22 A Correct.
23 Q And it’s your understanding that the payment of that
24 $245 million by Uniti is conditioned on that stock sale
25 closing, right?

1 A Correct.

2 Q Let's talk about the backstop commitment agreement for

3 a moment. You're familiar with the backstop commitment

4 agreement?

5 A Yes.

6 Q Generally speaking, the backstop commitment agreement

7 provides that certain parties will backstop a $750 million

8 rights offering, is that right?

9 A That's correct.

10 Q Isn't it the case that the backstop parties represent

11 approximately 73 percent of the First Lien debt?

12 A I believe that's approximately right number, yes.

13 Q Okay. And the PSA has been amended to allow other First

14 Lien parties the ability to participate in the priority

15 tranche of the rights offering, is that right?

16 A That's correct.

17 Q If we include those other PSA parties, that brings the

18 total First Lien support for the plan up to about 92

19 percent, 93 percent, somewhere in there. Do you agree with

20 that?

21 A I believe direction of it, that's correct.

22 Q Okay. And is it fair to say that more than 92 percent

23 of the First Liens are either fully committed or likely to

24 participate in the rights offering?

25 A I'm sorry, can you repeat the question?

1 MR. HOWELL: Object. Calls --
2 MR. RAPPOPORT: Sure.
3 MR. HOWELL: Objection to the question. Calls for
4 speculation.
5 THE COURT: Well, when you --
6 MR. RAPPOPORT: I'm not --
7 THE COURT: But let me just -- Mr. Leone, do you
8 understand the term fully committed or likely committed? Do
9 you know what counsel means by that?
10 THE WITNESS: No, if he could explain.
11 THE COURT: So, I think you ought to lay a
12 foundation, Mr. Rapport, for what you mean by that.
13 MR. RAPPOPORT: Sure.
14 BY MR. RAPPOPORT:
15 Q So do you have an understanding, Mr. Leone, that some
16 parties are -- do you have an understanding that certain of
17 the First Lien parties are committed to purchasing the -- a
18 portion of the rights offering?
19 A They're committed to backstop it. They're not
20 necessarily committed to purchase.
21 Q Okay. But you also have an understanding that certain
22 parties have been given an option to purchase certain
23 portions of the rights offering?
24 A Correct.
25 Q Okay. So is it fair to say that 92 -- to go back to

1 the original question, I think, let's try it again. Is it
2 fair to say that more than 92 percent of the first Liens are
3 either fully committed or likely to participate in the
4 rights offering?
5 A They're not -- I mean, state this right. I can't
6 speculate as to whether or not they are likely to
7 participate, but to the extent that equity is not otherwise
8 purchased by 1L holders, they're committed to backstop the
9 rights offering.
10 Q Okay. Isn't it also the case that under the plan, 100
11 percent of the proceeds of the rights offering go to the
12 First Liens?
13 A Well, I would -- I'd describe it a little bit
14 differently, which is that when we get to the effectiveness
15 of a plan, we're going to have three sources of cash coming
16 into the company, the rights offering, exit facility, and
17 cash from Uniti. We have -- those are the sources of cash
18 and then we have multiple uses of cash, primarily repaying
19 our DIP and repaying our administrative expenses, and to the
20 extent of cash available after those repayments, then there
21 will be a repayment of certain first -- amounts of the First
22 Lien debt.
23 Q Well, let's talk about that for a second. Under
24 Article 4 of the plan, isn't it the case that the payment of
25 those emergence classes is being made from the exit

1 facility, not from the rights offering?
2 A I don't have -- I could pull that up, but frankly, the
3 way I -- I think the way that we've always thought about the
4 cash sources and uses, as I just described, we have cash
5 coming in from three different buckets and exit facility,
6 the rights offering, and from Uniti, and we have the uses
7 primarily, as I described, which is repayment of the debt,
8 the DIP, and administrative expenses.
9 Q Okay. Why don't we pull -- if you have the binders
10 with you, why don't we pull up what is Joint Exhibit 75?
11 Can you do that? Let me know when you're ready.
12 A I have it.
13 Q Okay. Can you flip to what is Page 27? It's actually
14 --
15 MR. HOWELL: I'm sorry, Steve, could --
16 MR. RAPPOPORT: Sorry. Go ahead, Rush.
17 MR. HOWELL: I'm sorry, which JX are we in?
18 THE COURT: Seventy-five.
19 MR. RAPPOPORT: We're in JX-75.
20 BY MR. RAPPOPORT:
21 Q And when I say 27, Mr. Leone, just to be clear, I'm
22 talking about the number at the very bottom of the page that
23 says JX-75.027. It would be Page 23 of the document. Let
24 me know when you're there.
25 A Sorry, can you repeat the page number?

1 THE COURT: Twenty-seven.
2 BY MR. RAPPOPORT:
3 Q So it's Page 27 of the exhibit. At the bottom of the
4 page, it should say JX-075.027.
5 A I have it.
6 Q Okay. So in the middle of that page, there's a
7 sentence that begins -- and tell me if you see this --
8 there's a sentence that begins, "On the effective date, the
9 net cash proceeds of the remaining required exit facility
10 term loans and other cash on hand held by the Debtors as of
11 the effective date will be." Do you see that sentence?
12 A Yes.
13 Q And it said, "first used to pay in full cash allowed
14 DIP claims, allowed administrative claims, allowed priority
15 tax claims, allowed other secured claims, allowed other
16 priority claims, and executory contracts and unexpired lien
17 secured claims as and to the extent that such claims are
18 required to be paid in cash under this plan." Do you see
19 that?
20 A Yes.
21 Q Doesn't that indicate that the costs, the emergence
22 costs you were talking about are being paid under the exit
23 facility, not the rights offering?
24 A Again, I can read the paragraph, but you have to view
25 it as (indiscernible).

1 Q Okay. So to go back to what we were talking about
2 before we discussed the sources, fair to say that under the
3 rights offering, you'd have somewhere between 73 percent to
4 possibly up to 100 percent of the First Liens funding a
5 rights offering which -- the proceeds of which go directly
6 back to the First Lien, is that right?
7 A Again, as I think we've been talking about for the last
8 couple minutes, I don't view -- no one's ear marking cash in
9 terms of rights offering versus going specifically towards
10 one use. It's a mix.
11 Q Okay.
12 A It's -- I'm sorry.
13 Q Sorry. I don't want to cut you off. Go ahead.
14 A No, I was just saying, I could read this paragraph if
15 you'd like me to, if that would be helpful.
16 Q I'm sorry, which paragraph?
17 A The one that you just referenced.
18 THE COURT: I read it. I understand --
19 MR. RAPPOPORT: Yes.
20 THE COURT: -- your answer. You don't need to go
21 over it again.
22 MR. RAPPOPORT: Thank you.
23 BY MR. RAPPOPORT:
24 Q Let's talk about plan equity value into the backstop
25 commitment agreement, if we can for a second. Plan equity

1 value under the backstop agreement is pegged at $1.25
2 billion. Is that right?
3 A That's correct.
4 Q It's your understanding that Elliott was involved in
5 determining plan equity value, correct?
6 A They were certainly part of the discussion.
7 Q They were involved in discussions with the Debtors
8 concerning what the plan equity value would be, correct?
9 A In terms of backstopping a rights offering, correct.
10 Q Okay. No market test was undertaken to determine
11 whether $1.25 billion was a reasonable number for plan
12 equity value, is that correct?
13 A That's correct.
14 Q Let's now move onto the backstop premium. You state in
15 your declaration that the backstop premium is equivalent to
16 $60 million of the $750 million rights offering, is that
17 right?
18 A Correct.
19 THE COURT: I'm sorry, did you say 50 or 60?
20 MR. RAPPOPORT: Sixty, six-zero.
21 THE COURT: Right. Okay.
22 MR. RAPPOPORT: Yeah.
23 THE WITNESS: I'm sorry, can I ask -- talk about
24 your last question again. When you say market test, can you
25 expand what you mean by market test?

1 BY MR. RAPPOPORT:
2 Q Well, did anyone go out into the market to see what
3 people thought the likely value of the -- the likely value
4 of the plan equity was at that point, I guess is the point.
5 A So let me try to clarify. So, did we go out to third
6 parties who were not already involved in these cases and try
7 to see if they were a buyer? We did not.
8 Q Okay --
9 A But there were discussions with others in the room that
10 were part of mediation, as to how they viewed the value of
11 the company.
12 Q Okay. That ties into something that I was going to ask
13 you about earlier -- or a little bit later, which is were
14 there any -- you're not aware of any discussions where
15 people went outside the capital structure to look for a
16 party to backstop its rights offering, are you?
17 A No.
18 Q Okay. Let's turn back, then, to the premium. So, the
19 premium works out to an 8 percent premium, right?
20 A Correct.
21 Q And the backstop parties are able to purchase equity in
22 the rights offering at a 37.5 percent discount, is that
23 correct?
24 A To the stipulated value, correct.
25 Q Okay. when you take that discount into account, the

1 real backstop premium, it was your testimony at deposition
2 it was somewhere around 12 percent, is that correct?
3 A When you say the real premium, if you took the $60
4 million which is in dollars and translated it into stock, it
5 would translate because of a 62.5 percent discount, it would
6 actually be getting 96 -- approximately $96 million in stock
7 which is approximately 12 percent of the $750.
8 Q Right. If the rights offering is fully subscribed, you
9 don't need a backstop party, do you?
10 A I'm sorry, could you repeat the question?
11 Q Sure. If the rights offering is fully subscribed, you
12 don't need a backstop party, do you?
13 A If the rights offering is fully subscribed, the people
14 who committed to purchase it under the backstop would not be
15 forced to purchase that equity.
16 Q Was any analysis or any thought given as to whether or
17 not this rights offering was going to be fully subscribed?
18 A The analysis -- I would say the evaluation was whether
19 or not the rights offering was going to be backstopped, so
20 that the Debtors knew that the capital would be there.
21 Q No consideration was ever given by PJT or anyone else,
22 to the best of your knowledge, as to whether -- actually, we
23 talked about that. this has to do with whether a party from
24 outside the capital structure was approached to backstop the
25 offering. Your testimony was no. The Debtors are required

1 to pay a $50 million termination fee if the backstop
2 commitment agreement was terminated. Is that correct?
3 A Yes.
4 Q Okay. You never did any analysis of whether the
5 Debtors could actually pay that termination fee, did you?
6 A Specifically, no.
7 Q It's your testimony the Windstream's liquidity is going
8 to start to tighten in early Q4, isn't it?
9 A Correct.
10 Q Paying a termination fee would make that liquidity
11 situation even tighter, sooner, correct?
12 A That is correct.
13 Q It's your understanding that the termination fee here
14 is supposed to be paid in cash within three days of
15 termination, correct?
16 A I know it has to be paid in cash. I don't remember the
17 exact time.
18 Q Okay. You never analyzed whether termination fees in
19 your list of comparables had to be paid in cash, did you?
20 A We did not.
21 Q Okay. You also didn't look into whether termination
22 fees in those cases were equivalent to the backstop premium
23 as is the case here, did you?
24 A I'm sorry, could you repeat the question?
25 Q You never looked into whether the termination fees in

1 those cases were equivalent to the backstop premium as is
2 the case here, did you?
3 A I don't recall.
4 Q Okay. And you consider the termination fee to
5 effectively be a breakup fee, correct?
6 A Yes.
7 MR. RAPPOPORT: Okay. I don't have any further
8 questions at the moment. Pass to Mr. Shore.
9 MR. SHORE: Okay. Your Honor, what is your
10 preference with respect to scheduling today? We've been
11 going a couple hours.
12 THE COURT: Well, I -- if someone wants to take a
13 restroom break, that's fine. How much longer do you -- how
14 long do you think you'll be, Mr. Shore, with this witness?
15 MR. SHORE: Half hour (indiscernible) minutes,
16 Your Honor.
17 THE COURT: All right. So, unless people want to
18 take, like, a five-minute break, why don't we go ahead and
19 finish the cross.
20 MR. SHORE: Okay.
21 CROSS EXAMINATION OF NICHOLAS LEONE
22 BY MR. SHORE:
23 Q All right. Good afternoon, Mr. Leone. Chris Shore
24 from White and Case on behalf of the Unsecured Notes
25 Trustee. Let me focus for a little bit on this question of

1 encumbrance. PJT has had a working recovery model during
2 these cases, right?
3 A Yes.
4 Q And that model shows various creditor recoveries under
5 various assumptions, right?
6 A That's correct.
7 Q And from time to time, you personally have reviewed
8 outputs from that model, right?
9 A Yes.
10 Q And that's part of your role and responsibilities as
11 the lead financial advisor at PJT, right, for the Debtor?
12 A Correct.
13 Q And all of the recovery waterfalls you've seen in these
14 cases show recovery running the 1Ls until they're paid in
15 full, then to the 2Ls until they're paid in full, and then
16 after that to the unsecured creditors, right?
17 A Yeah.
18 Q And in all the recovery waterfalls you've seen in these
19 cases, all of the Debtors' assets were treated as encumbered
20 by the liens of the First Liens and the Second Liens, right?
21 A Yes.
22 Q But you are aware that the various Debtors hold
23 different assets from the other Debtors, right?
24 A Not specifically.
25 Q Are you aware that every Debtor owns the same assets?

1 A Again, I don't know that.
2 Q So you've never seen any mapping of particular assets
3 to particular Debtors?
4 A At the start of our assignment, I probably was familiar
5 with a corporate org chart, but I'm not currently.
6 Q But you do know, for example that Holdings, the top
7 entity of the Debtors, has little to no assets, right?
8 A Yes, I'm aware of that.
9 Q Right. And you're aware that the individual Debtors
10 have different creditor bodies, right?
11 A Yeah.
12 Q Right, so for example, some of the subsidiary Debtors,
13 that is the Debtors below Services, have trade obligations
14 that other Debtors don't have, right?
15 A I would assume that, yes.
16 Q And some of the subsidiary Debtors are not obligors on
17 any of the funded debt, right?
18 A Yes.
19 Q And Holdings, for example, is not an obligor on the
20 funded debt, right?
21 A I don't know that one way or another.
22 Q Okay. And you don't have any working understanding as
23 to the collateral package of the First Liens and the Second
24 Liens, right?
25 A My understanding is that the First Liens and the Second

1 Liens have a lien on most of the assets of the company.
2 Q Most of the assets of the company, but not all of the
3 assets of the company?
4 A I can't tell you a breakdown.
5 Q Now despite the existence of different Debtors and
6 different assets and claims and creditors, your working
7 assumption throughout this case from the beginning is that
8 the 1Ls or 2Ls had liens on all of the Debtors' assets,
9 right?
10 A Certainly from -- yes, from a modeling perspective.
11 Q Okay. So, the model shows that everything is liened up
12 but you understand that maybe everything isn't liened up,
13 right?
14 A Again, I don't know if everything is liened up or not.
15 I'm saying from an analytical standpoint, whatever value was
16 inherent in the enterprise of Windstream, plus consideration
17 coming in from Uniti, we viewed as coming into Windstream.
18 Q But to be clear, you never did any analysis as to what
19 assets in the settlement were encumbered versus
20 unencumbered, did you?
21 A That's correct.
22 Q And you've never discussed the breakdown of encumbered
23 versus unencumbered assets with the Holdings or Services
24 board, right?
25 A That is correct.

1 Q Or with any other Debtor board, right?
2 A Correct.
3 Q Let's focus on the Debtors. I think you said before,
4 you're working assumption in these cases has been that
5 there's one "general Debtor," right?
6 A From a recovery standpoint, yes.
7 Q Right. That all of the assets are owned by one Debtor
8 and all of the claims are owed by one Debtor, right?
9 A Yes.
10 Q In all the analysis that you've presented to the board
11 of Holdings and Services and to the independent committee,
12 was based upon your assumption that there's one general
13 Debtor, right?
14 A Yeah.
15 Q And again, all of the analyses you presented to the
16 Holdings and Services board was based upon your assumption
17 that this one general Debtor's assets were all encumbered,
18 right?
19 A Yeah.
20 Q And you're not aware of anybody acting on behalf of the
21 individual Debtors who has thought about the allocation of
22 value to individual Debtor estates, right?
23 A No, I'm not.
24 Q Right. In other words, it's not just your assumption.
25 As far as you experienced in all your attendance at board

1 meetings and independent committee meetings, is that
2 everybody else shares your view that this is just one big
3 Debtor with one big pool of assets and claims?
4 MR. HOWELL: Object to the foundation.
5 THE COURT: Look, I think this is, at this point,
6 really cumulative. Mr. Rappoport elicited the same
7 testimony that they did not look at this on a Debtor-by-
8 Debtor basis.
9 MR. SHORE: Okay.
10 BY MR. SHORE:
11 Q All right. As the -- PJT provided advice to the
12 Debtors with respect to the plan and disclosure statement,
13 right?
14 A Yeah.
15 Q And did PJT recommend to the Debtors that they file the
16 plan on file?
17 A Can you maybe ask that -- I'm not sure if I followed.
18 Can you ask that again, please?
19 Q Sure. Was it PJT's advice in connection with other
20 advisors that the Debtors go ahead and file the plan, which
21 is currently on file?
22 A Our advice was certainly to move forward with the
23 settlement with Uniti.
24 Q And you understand that that plan provides that the
25 First Lien creditors will receive all of the value of the

1 estate being distributed to the pre-petition funded debt,
2 except where there's an acceptance of the certain creditor
3 classes, right?
4 A Well, I would say that the vast majority of the
5 recovery is going to people that participate in the
6 backstop, which happened to be First Lien creditors. That's
7 how I would say it.
8 Q Okay, but with respect to people who were receiving
9 distributions on account of their prepetition claims rather
10 than their backstop commitment, it's all going to the First
11 Lien and not to any of the unsecured creditors, other than
12 trade at non-guarantor subs, right?
13 A Well, under the plan, there's a de minimis amount of
14 recovery going to the Second Liens and to the unsecureds.
15 Q But that's in a death trap, right?
16 A Yes.
17 MR. HOWELL: Object to the form.
18 BY MR. SHORE:
19 Q So no unsecured creditor --
20 THE COURT: Well, let's -- I'll overrule the
21 objection. They have to vote in favor of the plan to get
22 the recovery.
23 MR. SHORE: Okay.
24 BY MR. SHORE:
25 Q Now, what is your understanding about whether the

1 Debtors have to pay the $60 million breakup fee if the plan
2 on file is not consummated, if you have one?
3 A I don't recall that specifically.
4 THE COURT: I'm sorry, Mr. Shore. Did you say the
5 plan not confirmed or consummated? I didn't quite hear
6 that.
7 MR. SHORE: Confirmed.
8 THE COURT: Confirmed. Okay.
9 BY MR. SHORE:
10 Q If the plan on file is not confirmed, do you understand
11 as to whether or not the Debtors have to pay the breakup
12 fee?
13 A I don't recall that specifically.
14 Q Okay, well let me tell you that one of the termination
15 events in the backstop that leads to the payment of the fee
16 is that the plan support agreement is terminated. You
17 understand that?
18 A Yes.
19 Q And you understand that the plan support agreement can
20 be terminated if the plan is not confirmed within a specific
21 period of time, right?
22 A Yes.
23 Q Okay. So is it fair to say, then, based upon what I've
24 represented to you, that the Debtors are going to be
25 committing to pay a $60 million breakup fee if the Court

1 determines that certain of the assets are unencumbered and
2 the First Liens don't agree to allow those to be distributed
3 to unsecured creditors?
4 MR. HOWELL: Objection. Incomplete hypothetical.
5 Calls for speculation.
6 THE COURT: Well, I mean, how so? Are you
7 objecting to the -- Mr. Shore's recitation of how the
8 backstop agreement terminates?
9 MR. HOWELL: I am not. I'm objecting to his
10 specific example as to a reason that the plan may not be
11 confirmed, which I think is incomplete in laying out one
12 factor. I think if the question is, if the plan is not
13 confirmed, then I would --
14 THE COURT: Well, all right --
15 MR. HOWELL: -- same objection.
16 THE COURT: But if it's not confirmed for any
17 reason, they -- the $60 million is triggered, I guess, is
18 the answer, right Mr. Leone?
19 THE WITNESS: I'm sorry, could you --
20 THE COURT: If the plan is not confirmed for any
21 reason, i.e., that the releases are too broad or the third-
22 party releases are too broad or the -- there's an unfair
23 classification ruling or there's -- it's not able to be
24 crammed down on -- in a particular class, then, whatever
25 reason, is the $60 million triggered?

1 THE WITNESS: I would say yes, absent some type of
2 modification to the plan that's acceptable to the backstop
3 parties.
4 BY MR. SHORE:
5 Q Right. So, I'm going to give you one specific example.
6 You've heard that the Debtors are reserving on the issue of
7 allocation of the settlement proceeds, right?
8 A Yeah.
9 Q You understand that if the Court were to rule that some
10 portion of the settlement proceeds is unencumbered, and
11 therefore have to be distributed to unsecured creditors,
12 that would give the plan supporter parties the right to
13 terminate their plan support, right?
14 A Yeah.
15 Q And to trigger the payment of a $60 million fee?
16 A Yeah.
17 Q And the assumption in the plan or the provision in the
18 plan that provides for the payment of all distributable
19 value to funded debt creditors to the First Lien is based on
20 an assumption only that every asset is liened, including the
21 settlement proceeds?
22 A Yeah.
23 Q In other words, in entering into the backstop
24 commitment, which commits the Debtors to pay in that
25 circumstance, there was no analysis done as far as you know

1 as to whether the Debtors are correct that the assets are
2 all unliened?
3 A That's correct.
4 Q Can you pull out JX-38?
5 A Okay.
6 Q Okay, and I'd ask you to turn to JX-38.0010. Okay, and
7 is this a presentation or a flow chart that you presented to
8 the board of Holding and Services over various points in
9 time?
10 A Yeah.
11 Q So when Mr. Rappoport was asking you questions about
12 math you've done, you don't -- this chart only applies to
13 the recharacterization count, right?
14 A Correct.
15 Q You never did a chart like this with respect to any
16 other claim that is being released pursuant to the
17 settlement agreement, right?
18 A Correct.
19 Q Okay, and to be clear about what this means here, if
20 you look in the red note down at the bottom, it's true that
21 this was, "a purely illustrative mathematical exercise,"
22 right?
23 A Correct.
24 Q And that the chart does not necessarily represent the
25 views of PJT partners or Kirkland and Ellis with respect to

1 the merits of Windstream's recharacterization claim, right?
2 A That is correct.
3 Q Okay. Now, the chart that you did present, this was
4 only ever presented to the board of Holdings and Services,
5 right, not any other board?
6 A I'm sure at some point, it was presented to the Special
7 Committee, if you're -- to make that distinction.
8 Q Okay, but you're not aware of any other Debtor board
9 other than Holdings and Services seeing this?
10 A Correct.
11 Q All right. And you're not aware of anybody at any
12 Debtor performing a litigation risk analysis for the claims
13 that the Debtors are releasing at Uniti, right?
14 A Can you clarify what you mean by litigation risk
15 analysis?
16 Q Sure. Where somebody expresses something other than
17 illustrative math and gives a view if we won, we would get X
18 dollars, the likelihood that we would win is Y, and
19 therefore the value of the claim is X times Y.
20 A I've not seen that analysis.
21 Q Now, the math exercise that you presented shows two --
22 It shows an NPV of the lease at the top, 5.771 -- that's
23 billion dollars, right?
24 A That's correct.
25 Q Okay. And then you ran two sensitivities against it,

1 right?
2 A Correct.
3 Q One is the likelihood that the Court would, after
4 recharacterization, restrict the claim to a claim at
5 Holdings, right?
6 A Yes.
7 Q And you ran sensitivities between 25 percent and 75
8 percent, right?
9 A Correct.
10 Q And as far as you know, nobody ever asked you to run it
11 to 100 percent?
12 A That's correct.
13 Q Okay. And then the -- you ran sensitivities with
14 respect to the likelihood that the Court would grant release
15 at all on the recharacterization claim, right?
16 A Said another way, sort of probability weighting to the
17 likelihood of success on recharacterization.
18 Q Right, and you ran those from 10 to 50 percent, right?
19 A Correct.
20 Q And that was -- Kirkland and Ellis provided you those
21 figures, 10 to 50 percent, purely as a mathematical exercise
22 and not based upon their views that that was the likelihood
23 of success, right?
24 A Yeah, I did not know what their views were. It was --
25 we were given the range.

1 Q Okay. And nobody ever asked you to run a range out to
2 100 percent on that, did they?
3 A No.
4 Q And that's -- just to be clear, no board member every
5 said to you, Mr. Leone, can PJT please present me a wider
6 range of sensitivities that shows what a total win would
7 look like?
8 A Not specifically, no.
9 Q Okay. Now, let's go back up to the $5.771 billion,
10 okay. That's represents the net present value of all the
11 expected future lease payments that the Debtors won't be
12 paying, discounted by 90 percent, right?
13 A That's correct.
14 Q Now, that number did not include any post-petition
15 rent, right? Sorry, let me ask that a different way. That
16 does not include any repayment by Uniti of post-petition
17 rent, does it?
18 A Specifically, I know it says it somewhere in a
19 footnote, this is looking at the rent payment beginning in
20 June of 2020 going forward into perpetuity, so to answer
21 your question specifically, it does not capture rents that
22 had been paid post-petition but prior to June 2020.
23 Q But you do understand that the recharacterization count
24 sought a declaration from the Bankruptcy Court that the
25 master lease was a financing, right?

1 A Yes.

2 Q And you are aware that the Debtor generally can't pay -

3 - make post-petition payments to a financing creditor on

4 account of a prepetition debt, right?

5 A Yes.

6 Q And you are aware that the Debtors have paid more than

7 $750 million in rent to "rent" Uniti, right?

8 A On a post-petition basis?

9 Q Yes.

10 A I don't know that number. It's approximately $65

11 million a month times however many months they've been in

12 bankruptcy.

13 Q Okay. And to be clear, then, your analysis that you

14 presented to the board doesn't reflect any of the money that

15 Unity might have to repay in the form of post-petition rent

16 made on account of a prepetition financing?

17 A This analysis does not reflect that; although, I don't

18 know that I would assign much value to that.

19 Q What do you mean, assign much value to that?

20 A Well, if Windstream were to win recharacterization and

21 would stop paying rent, and we had the ability to, on a

22 look-back basis, try to recover rent that we had paid, I

23 don't know that Uniti would have the wherewithal to make

24 good on those payments.

25 Q Well, let's be clear about a couple of things. First,

1 do you know where the money has been coming from for the
2 Debtors to pay -- for Holdings to pay rent?
3 A From their operation.
4 Q And do you know specifically which Debtor has been
5 making loans to Holdings?
6 A No.
7 Q Okay. And so, do you have any view as to whether any
8 of those Debtors, whoever's making the loans to Holdings,
9 will be able to obtain repayment of post-petition advances
10 made to Uniti?
11 A We may be mixing companies, here. I was referring to
12 Uniti's ability to make payments to Windstream on account of
13 post-petition rent.
14 Q Right. And I took a detour, there, and I'm focusing on
15 -- first, on the Debtor side of the equation. Is it fair to
16 say that you would not assign much value to the ability of
17 Holdings in that scenario to repay the post-petition
18 administrative loans it's received from its subsidiaries?
19 A I can't -- I don't know that.
20 Q Okay. And with respect to the Uniti payments, you
21 would have to -- you could perform an analysis as to the
22 collectability of post-petition rent disgorgements, right?
23 A I think the analysis I would do is if Windstream won on
24 recharacterization, and stopped paying rent, Windstream's
25 rent to Uniti represents approximately 80 percent of Uniti's

1 cash flow and if Windstream stop paying rent, I do not --
2 and Uniti then lost 80 percent of its cashflow, I think I
3 could say with a fair amount of confidence, they're not
4 going to be able to repay the post-petition rent.
5 Q Without filing for bankruptcy?
6 A With or without.
7 Q Are you -- did you do an analysis that in the event of
8 a recharacterization, Uniti would be incapable of making any
9 distribution to its unsecured creditors?
10 A I've not done that analysis.
11 Q Okay, so you have no basis from which to testify that
12 if -- sorry, if the Debtors had a $750 million disgorgement
13 claim against Uniti, they wouldn't be able to at least get
14 some of that back out of a Windstream -- sorry, a Uniti
15 bankruptcy?
16 A I have not done that analysis.
17 Q And to be clear, you never valued that claim, either on
18 an illustrative basis or an actual basis for any of the
19 Debtors?
20 A That is correct.
21 Q Okay, can we turn to the prior page of Exhibit 38 --
22 JX-38 at Page 9? And do you recognize this as a variation
23 on the buildup you provided to the Debtors -- sorry, the
24 buildup that appears also in your declaration?
25 A Yes, it looks similar.

1 Q So let's focus, for example, on the $402 million figure
2 in the left column -- also in the right column, under lease
3 breakage settlement over time.
4 A Yes.
5 Q That represent your view of the -- sorry, the net
6 present value of the payments from Uniti over time,
7 discounted at 9 percent, right?
8 A Yes, that's correct.
9 Q And the reason that it's discounted at 9 percent, in
10 part, is because the Debtors have a right to offset any
11 nonpayment of that against their lease obligations under the
12 new leases, right?
13 A I'd say that's part of it.
14 Q Right. Maybe expand it. Your work on this page and as
15 you submitted to the Court in your direct declaration is
16 based on the assumption that what we're going to have here
17 is a reorganized Debtor doing business with Uniti under the
18 new leases over time, right?
19 A That question, I would agree with, yes. Okay. So, on
20 this chart, can you identify what payments will come to the
21 Debtors if they don't reorganize with a plan and capital
22 structure that meets the net debt requirements? And maybe I
23 should break that down into pieces. You understand that
24 part of the settlement agreement is there's a net debt
25 covenant that's required to -- that the Debtors are required

1 to meet?
2 A Yes.
3 Q And it's three times, right?
4 A It's -- there a three-times incurrence covenant and at
5 three-and-a-half times maintenance covenant.
6 Q Okay. Now, there are various reasons why these Debtors
7 wouldn't be able to get to a -- the effective date of a
8 plan, right?
9 A yes.
10 Q For example, COVID-19 could really take hold and, like
11 many other Debtors, you just end up in a situation where you
12 can't reorganize, right?
13 A Yes.
14 Q In the event that the Debtors aren't able to
15 reorganize, what of the figures on the left column, the
16 buildup to 1.276, will the Debtors be receiving in exchange
17 for the releases?
18 A Well, my understanding is that the settlement -- put
19 the reorganization aside, but the settlement incorporates
20 all of these transactions, including the asset sale and the
21 cash transfers.
22 Q I'm just -- I'm asking a different question. In the
23 event that the Debtors enter into the settlement and the
24 settlement goes effective, you get to read opinion and the
25 release opinion and the settlement goes effective, right,

1 certain of these payments come in, right?
2 A Yeah, certain payments come in at the effectiveness of
3 the settlement, and certain of the payments come in over
4 time going forward.
5 Q Right, and so which of the payments come in if the
6 Debtors are unable to reorganize? For example, the GCI
7 Capital lease contributions, if the Debtors don't
8 reorganize, there is no new lease, right?
9 A Sorry, what do you mean by they're unable to
10 reorganize?
11 Q Well, that's why -- in the event that they are unable
12 to get a confirmed plan, you said that there are various
13 reasons in which they might not be able to get there. I'm
14 dealing with that scenario, okay?
15 A Okay.
16 Q All right. Now --
17 A So --
18 Q If the Debtors are unable to reorganize and go ahead
19 with a liquidating plan or any other form of structure,
20 right, there won't be new leases, right?
21 A So I'll answer your question this way. If the Debtors
22 are unable to reorganize and instead liquidate, I do not
23 believe the Uniti would have the obligation to make $1.75
24 billion in GCI commitments over the next 10 years.
25 Q Right. And do you know what happens to their

1 obligation to pay the $402 million over time?
2 A If the Debtors were to liquidate, I assume it would be
3 the same thing.
4 Q Okay. That, in fact, if the Debtors aren't able to
5 reorganize, substantially -- well, let me pull that apart.
6 The Debtors could still sell $285 -- I'm sorry, $294 million
7 of assets for $285 million, right?
8 A To the extent that the settlement took place before the
9 effectiveness of a plan, that would be correct.
10 Q Right. So the -- in the scenario I gave, Debtors
11 aren't able to reorganize, they could sell assets at a
12 presumed loss, right? Right?
13 THE COURT: You have to answer in words.
14 THE WITNESS: I thought there was more to that
15 questions. Can you repeat the question, Mr. Shore?
16 BY MR. SHORE:
17 Q Sure. In the event that the Debtors aren't able to
18 reorganize, they can -- I think your testimony was they
19 could still the assets on the effective date of the
20 settlement for a presumed loss of about $9 million, right?
21 A That's correc.t
22 Q But it's also your testimony that all of the other
23 consideration, here, wouldn't have to be paid by Uniti
24 because there is no new lease arrangement?
25 A I think I was taking the sort of extreme example, which

1 is if the Uniti settlement took place before the
2 effectiveness of a plan, which we don't know that it will or
3 it won't, and then somehow, after the effectiveness of the
4 settlement, Windstream ceased to exist, I would agree with
5 the statement that Uniti would not be on the hook for these
6 longer-term investment commitments.
7 Q So in some sense, the ability of the Debtors to harvest
8 the $1.2 billion is inextricably tied up in their ability to
9 reorganize, right?
10 A It is --
11 MR. HOWELL: Object to form.
12 THE WITNESS: It is linked to --
13 THE COURT: Overruled.
14 THE WITNESS: It is linked to Windstream's ability
15 to execute a long-term business plan.
16 BY MR. SHORE:
17 Q Right, and their ability to execute on a long-term
18 business plan is based upon their ability to reorganize an
19 exit, right?
20 A Yeah, I would agree with that.
21 Q All right, so let's focus for a moment on the new
22 leases. You do understand that the Debtors filed definitive
23 CLEC and ILEC lease agreements with the Court?
24 A Yeah.
25 Q And the first time you reviewed the CLEC lease was

1 during your deposition, right?
2 A Yes. I may have scanned it prior to, but I certainly
3 didn't read much of it.
4 Q Right, and prior to your deposition, you didn't notice
5 that the rent schedule in both the CLEC and ILEC leases are
6 left blank, right?
7 A Correct.
8 Q And you now understand that the rent, whatever
9 Windstream's obligations are going forward, is going to be
10 set according to an appraisal of the assets, right?
11 A That -- my understanding is that's how the mechanics
12 work, correct.
13 Q Okay. But you've not been -- PJT has not been involved
14 in any appraisal to set the rent, right?
15 A That's correct.
16 Q And PJT has not done a valuation of the leased assets,
17 right?
18 A That's --
19 Q -- the assets that Uniti is -- owns and it leasing
20 under the CLEC and ILEC leases.
21 A We have not.
22 Q And PJT has not been involved in determining how rent
23 is going to be allocated between the CLEC and ILEC leases,
24 right?
25 A That's correct.

1 Q And you don't have any personal knowledge of what the
2 results of the appraisal will be, right?
3 A I do not.
4 Q Or, ultimately, what rent Windstream will be required
5 to pay under the CLEC and ILEC leases that are being
6 assumed?
7 A As a split, that's correct.
8 Q Okay, well you don't know as an aggregate amount
9 either, right?
10 A As in a formal appraisal, correct.
11 Q Right. So, the rent could go up, rent go down, we
12 won't know until this appraisal is done, right?
13 MR. HOWELL: Objection to foundation.
14 THE COURT: Well, do you understand the question?
15 MR. SHORE: I can rephrase.
16 THE WITNESS: No, I mean, as part of the
17 settlement, the rent -- the $665 plus or minus was not
18 modified, and so there's going to be a split between the
19 CLEC and it is subject to a final appraisal.
20 BY MR. SHORE:
21 Q Right, and part of the appraisal could find out that
22 the assets -- that the rent has to be calibrated to fit
23 within a true lease opinion, right?
24 A That's my understanding.
25 MR. SHORE: Okay. I have no further questions,

1 Your Honor.
2 THE COURT: Okay. All right. We lose the Court-
3 Solutions feed after this hearing has gone for four hours,
4 which is 15 minutes from now. I normally like to finish a
5 witness before lunch, but maybe this is a good time to break
6 and then we can have redirect when we resume after lunch.
7 During that break, Mr. Leone, you should not be talking with
8 counsel, just have lunch --
9 THE WITNESS: Okay.
10 THE COURT: -- or walk the dog or whatever. So,
11 it's 1:07. Let's resume at 2, okay, and you all know how to
12 sign back in again? You need to sign back in for Court-
13 Solutions and for Skype, right? They should sign up for
14 both?
15 CLERK: Skype is up to them.
16 THE COURT: It's up to you. You can leave the
17 Skype on if you're worried that somehow you're not sure how
18 to leave it on -- turn it back on, but you should definitely
19 sign out from Court-Solutions.
20 THE WITNESS: Okay.
21 THE COURT: Okay, thank you.
22 (Recess)
23 THE COURT: Good afternoon, everyone. This is
24 Judge Drain. We're back on the record in In Re Windstream
25 Holdings, Inc, et al. I can see everyone on the screen, and

1 I believe where we left off, the Debtors were offered the
2 opportunity for redirect. Before you Mr. Howell, Mr. Leone,
3 you are still under oath. You understand that, right?
4 MR. LEONE: Yes, I do.
5 THE COURT: Okay, very well. Thank you.
6 MR. HOWELL: Thank you, Your Honor. Rush Howell
7 from Kirkland on behalf of the Debtors. A little strange to
8 start without an all rise, which would especially be helpful
9 to see who is wearing suit pants and who is not. But --
10 THE COURT: That's why we don't do it.
11 MR. HOWELL: You just have to guess. The Debtors
12 don't have any redirect of Mr. Leone. So the only thing I'd
13 like to do now is to move both Mr. Thomas' and Mr. Leone's
14 declaration into evidence, consistent of course with the
15 passages from Mr. Thomas' that were stricken earlier today.
16 I'm happy to do that later at the end, but I didn't want to
17 forget, Your Honor.
18 THE COURT: All right. I had assumed subject to
19 objections during the hearing, they were already in
20 evidence. But I have no problem admitting them as their
21 direct testimony as far as Mr. Thomas is concerned as we've
22 deleted certain portions.
23 MR. HOWELL: Thank you, Your Honor.
24 THE COURT: Okay. So I think that then leaves Mr.
25 Wells, right?

1 MR. HOWELL: That's correct. I will cede the
2 screen to my partner, Mr. French, who will call Mr. Wells.
3 THE COURT: Okay. Let's wait until we --
4 MR. FRENCH: Good afternoon, Your Honor.
5 THE COURT: Good afternoon. Let's wait until we
6 get Mr. Wells up on the screen in place of Mr. Leone.
7 MR. LEONE: And I should drop, correct?
8 THE COURT: Yes.
9 MR. LEONE: Okay. Thank you all. Thank you, Your
10 Honor.
11 THE COURT: He went off again. Mr. Wells. There
12 he is. Okay. All right.
13 Good afternoon, Mr. Wells.
14 MR. WELLS: Good afternoon, Your Honor.
15 THE COURT: Okay. Mr. French and Mr. Shore and
16 Mr. Rappaport, do you see Mr. Wells on your screen?
17 MR. SHORE: I do not, Your Honor.
18 THE COURT: You may need to say a couple of
19 things, Mr. Wells. That seems to pick you up.
20 MR. WELLS: Sure. Hello, Mr. Shore. Hello, Mr.
21 Rappaport. How are you today?
22 MR. RAPPAPORT: Very well, thanks.
23 MR. WELLS: Does that help any?
24 MR. SHORE: Not yet, but it takes about ten
25 seconds usually.

1 MR. RAPPAPORT: Your Honor, Joycelyn Greer from
2 Morrison and Foerster will be handling Mr. Wells, just so
3 you know. This is Mr. Rappaport.
4 THE COURT: Okay.
5 MS. GREER: Yes, Your Honor.
6 THE COURT: I'm going to pull you up on the
7 screen, too, Mr. Greer.
8 MS. GREER: It's Ms. Greer, Your Honor. Can you
9 hear me now?
10 THE COURT: Ms. Greer? Yes.
11 MS. GREER: Okay.
12 THE COURT: But we want to see you, too.
13 MS. GREER: Okay. I'll continue talking. Can you
14 see me now?
15 THE COURT: Almost. It will just take a second.
16 MS. GREER: Okay. I'll wait. How about now, Your
17 Honor?
18 THE COURT: We're trying to make room for you by
19 getting someone else off the screen. Yes, now I can see
20 you.
21 MS. GREER: Okay. Good afternoon, Your Honor.
22 THE COURT: Good afternoon. So let me swear you
23 in, Mr. Wells. Would you raise your right hand, please? Do
24 you swear or affirm to tell the truth, the whole truth, and
25 nothing but the truth, so help you God?

1 MR. WELLS: Yes, I do.

2 THE COURT: Okay. And it's A-L-A-N?

3 MR. WELLS: Yes, Your Honor.

4 THE COURT: W-E-L-L-S.

5 MR. WELLS: That's correct.

6 THE COURT: Okay. Now, Mr. Wells, you submitted a

7 declaration that was intended to be your direct testimony in

8 connection with these contested matters. It's dated May 3.

9 And sitting here today, let me ask you, is there anything in

10 this declaration that's intended to be your direct testimony

11 that you'd like to change?

12 MR. WELLS: No, there's not.

13 THE COURT: Okay. All right. So I'm not sure

14 which of you two is going to go ahead with cross, but you

15 can do that now.

16 MR. SHORE: I'm going to start, Your Honor. It's

17 Chris shore from White and Case on behalf of the trustee.

18 THE COURT: Okay.

19 CROSS-EXAMINATION OF ALAN WELLS

20 BY MR. SHORE:

21 Q Good afternoon, Mr. Wells.

22 A Hello, Mr. Shore. How are you?

23 Q I'm fine. You've never been involved in a bankruptcy

24 case before Windstream, right?

25 A Yes, sir, that's correct.

1 Q Right. So welcome to the party. But you have served
2 as a Windstream director since 2010, right?
3 A That's correct.
4 Q And when I say Windstream, that's just director of
5 holdings and services, right?
6 A Yes, that's correct.
7 Q Okay. Now, I'm going to move forward to 2019. Shortly
8 after Judge Furman's decision in the Aurelius litigation,
9 the Holdings and Services board retained separate counsel,
10 right?
11 A Yes, we did.
12 Q And that was Norton Rose, right?
13 A That's correct.
14 Q And Norton Rose has continued to advise the holding
15 services for post-petition, right?
16 A Yes, they have.
17 Q And in addition, the board has received advice from
18 Kirkland and Ellis too, right?
19 A Yes, we have.
20 Q All right. Now I'm going to ask you -- you should have
21 either an individual witness binder, which would be marked
22 as trustees or joint exhibits. I'm going to go to Joint
23 Exhibit 006.
24 A I believe I have it.
25 Q Okay. Does it say summary of action by written

1 consent?
2 A Yes, it does.
3 Q Okay. And this and on the next page are some written
4 consents of the board of directors of Windstream Holdings,
5 Windstream Services?
6 A Yes, that's correct.
7 Q And you recognize this as the joint action by which the
8 special committee or the independent committee was formed?
9 A Yes, I believe it is.
10 Q Okay. Now, when we talk about the independent
11 committee, that's just an independent committee of the
12 Windstream Holdings and Windstream Services board, right?
13 A That's correct.
14 Q And if you look at the first page of the consent, which
15 down at the bottom says JX006.002, do you agree with me that
16 the word companies is defined just as Holdings and Services?
17 A In the first paragraph, yes.
18 Q Right. And in the carryover, in the whereas on page
19 JX006.003, that first whereas establishes that the
20 independent committee is a committee of holdings and
21 services, right?
22 A I believe that's correct.
23 Q And this was formed shortly after Windstream's filing,
24 right, the independent committee?
25 A Yes.

1 Q A couple of months into the case, right?
2 A I've forgotten exactly when we filed. It was shortly
3 after the filing, I believe.
4 Q Well, if you look on page 006.002, it's dated April
5 5th, 2019.
6 A That's correct.
7 Q Does that refresh your recollection that it was done in
8 April?
9 A Yeah, it was. I just don't recall the date of our
10 filing.
11 Q Okay. Now, you were the chair of the special
12 committee, right?
13 A Yes, I was.
14 Q And the special committee never hired its own counsel,
15 did it?
16 A The special committee received legal advice from both
17 Kirkland and Ellis and Norton Rose, and also a third law
18 firm that I believe the company retained at the request of
19 the special committee.
20 Q Right. But the special committee never had its own
21 counsel.
22 A Not separate from Norton Rose and Kirkland Ellis and
23 the third law firm that we retained, no.
24 Q Okay. And the special committee never hired its own
25 financial advisor, did it?

1 A No. It relied upon the work of PJT.
2 Q And it didn't hire any other professionals at all,
3 right?
4 A No, we did not.
5 Q Okay. Now, the resolution forming the special
6 committee gave the special committee the power and authority
7 in consultation with the board to direct process regarding
8 the Chapter 11 cases, right?
9 A I believe that's correct. I haven't read this document
10 in full, but I believe that's generally the case, yes.
11 Q Well, we went over this document in your deposition,
12 right?
13 A Yes, we did. I just haven't read it today, that's all.
14 Q Okay. And one of the things that the special committee
15 was formed is to make recommendations to the board in
16 connection with a restructuring transaction, right?
17 A Yes.
18 Q And another task was to evaluate any proposed release
19 relating to claims or cause of action in connection with the
20 restructuring transaction, right?
21 A That's correct.
22 Q And just so the Court understands the limits of the
23 special committee's power, the special committee wasn't
24 authorized to grant any release to anybody, was it?
25 A No. The committee served to oversee the process for

1 the benefit of the whole board.
2 Q Right. And it couldn't settle any claims
3 independently.
4 A Correct. I'm sorry, Mr. Shore. I see your mouth
5 moving, but I can't hear you.
6 THE COURT: Yeah. You cut out, Mr. Shore. Still
7 can't hear you. He should redial into Skype? I mean -- Mr.
8 Shore, you should redial Court Solutions. He can't hear me.
9 MR. MENDELSOHN: It's Bruce Mendelsohn. I can
10 hear him, and he is in the process of dialing back in.
11 THE COURT: Okay, good.
12 MR. SHORE: I don't know what happened there. I
13 just got hung up on by Court Solutions. I apologize, Your
14 Honor, for the inconvenience.
15 THE COURT: No, that's fine. Unfortunately,
16 that's happened a couple of times over the last few days
17 that for some reason the Court Solutions line goes dead.
18 But you're back on now.
19 MR. SHORE: All right, very good.
20 BY MR. SHORE:
21 Q And I think I had a pending question, and I'm not sure
22 I heard the answer. The special committee had no authority
23 to settle any of the Debtor's claims, right?
24 A No, it did not.
25 Q Right. The Holding Services full board was required to

1 approve the settlements, right?
2 A That's correct.
3 Q And one of the things the special committee was given
4 the power to do was conduct, oversee, and investigation,
5 right?
6 A That's correct.
7 Q And the investigation was defined as the
8 (indiscernible) to review, consider, and evaluation of
9 potential claims or cause of action with respect to historic
10 transactions, right?
11 A Are you referring to a specific paragraph of the
12 resolution?
13 Q Sure. Let me just -- the resolution is in evidence.
14 Let me just move -- you understood that one of the
15 transactions which was going to be investigated was the
16 spinoff transaction by which the master lease arrangement
17 was set up, right?
18 A Yes, that's correct.
19 Q Okay. And at the time you were conducting this
20 investigation, you've owned stock in Uniti, right?
21 A Yes, I did.
22 Q And how many shares of stock of Uniti do you own?
23 A I know we filed a declaration of that. I don't have
24 that in front of me. I think it was roughly 26,000 shares.
25 But the declaration is correct.

1 Q Okay. And I don't know that we have an exhibit number
2 for that yet, but let's use approximately 25,000 shares.
3 Now, you have an understanding that one of the effects on
4 Uniti here with respect to this settlement is that its stock
5 will continue to trade, right?
6 A Yes. Uniti stock trades today and will continue to
7 trade following the settlement I assume.
8 Q Right. But you did understand that one of the
9 consequences of the Debtors prevailing on the
10 recharacterization claim was that Uniti might have to file
11 for bankruptcy, right?
12 A I understood that could be an outcome, yes.
13 Q In which case even if the Debtors were a hundred
14 percent successful in resolving a recharacterization claim,
15 that would cause you potentially to lose the entire value of
16 your 25,000 share in Uniti, right?
17 A Pending the outcome of the bankruptcy, it could.
18 Correct.
19 Q Right. And if for example PJT testified that their
20 believe that it was unclear that unsecured claims would be
21 paid, you would defer to their judgement about the
22 likelihood that equity claims would be paid, right?
23 A Yes, I would.
24 Q Okay. Now, aside from you, the other members of the
25 special committee are Ms. Diefenderfer and Michael Stoltz,

1 right? Oh, and Julie Shimer.
2 A Yes, and Dr. Shimer, yes.
3 Q Okay. And Mr. Stoltz was also on the Windstream board
4 at the time of the spinoff, right?
5 A I believe he was, yes.
6 Q So two of the four members of the independent committee
7 were involved in the spinoff transaction?
8 A Yes. Two of us were on the board at the time of the
9 spinoff. That's correct.
10 Q And you approved the transaction by which Windstream
11 spun off assets to Uniti, right?
12 A Yes, we did.
13 Q Okay. And you don't recall ever recusing yourself from
14 any meeting of the special committee, right?
15 A No, I don't.
16 Q Right. So let's talk a little bit about the
17 recharacterization claim. Prior to hearing about
18 recharacterization with regard to the master lease, you had
19 not been involved in any recharacterization litigation,
20 right?
21 A No, I had not.
22 Q In fact, you didn't even know what a recharacterization
23 claim was until you first heard about it in this case,
24 right?
25 A I believe that's correct.

1 Q Now, you understand that post-petition Windstream
2 Services has been distributing money to Windstream Holdings
3 so that Holdings can pay rent to Uniti, right?
4 A Yes.
5 Q And as an officer -- sorry, as a director of Services,
6 you approve the loans to be made from services to Holdings,
7 right?
8 A We approve the distributions from Services to Holdings.
9 I'm not sure that the form of a loan is a distribution.
10 Q And when you did that, you did not form a view as to
11 the ability of Services to get back the money that it
12 distributed to holdings if the lease were recharacterized,
13 did you?
14 A I'm sorry, could you repeat that?
15 Q Sure. When you authorized Services to make
16 distributions to Holdings, you didn't form a view as to the
17 likelihood that Services could ever get repaid that money if
18 in fact the lease was recharacterized.
19 A No, I did not.
20 Q And with respect to the money that was being paid from
21 Holdings to Uniti post-petition, you didn't form a view as
22 to the ability of Holdings to get back that money in the
23 event that the lease was recharacterized.
24 A No, I did not.
25 Q All right. Can you bring out JX22?

1 A I have it.
2 Q Okay. And if you could turn to Page 7. And it's an
3 illustrative recharacterization claim recovery that His
4 Honor has already seen. And I'm just bringing it up to ask
5 the first point. You've seen this chart on page 007 of
6 JX22, and a number of times, right?
7 A Yes.
8 Q It's been presented by PJT at a couple of board
9 meetings, right, of Holdings and Services?
10 A I believe that's right. I think the numbers may have
11 changed from time to time, but in general it's the same
12 format and chart.
13 Q And you never saw recovery (indiscernible) for the
14 fraudulent conveyance claim that was alleged in the
15 adversary proceeding, right?
16 A I don't believe so, no.
17 Q Or a recovery sensitivity for the breach of contract
18 claim, right?
19 A No.
20 Q And you never saw a decision tree that laid out the
21 fraudulent conveyance claim that the Debtors had brought
22 against Uniti and what it would be worth if the Debtors
23 prevailed, right?
24 A No.
25 Q And you never saw a decision tree that laid out the

1 breach of contract claim and what it would be worth if the
2 Debtors prevailed, right?
3 A I don't believe so.
4 Q Okay. Now, in this chart, you understood that what PJT
5 was expressing was that in the two scenarios on the two
6 branches, the value of the recharacterization claim was
7 somewhere between 1.5 billion and 1.3 billion, right?
8 A I'm sorry, the last number, I couldn't hear what you
9 said.
10 Q 1.3 billion.
11 A Yes.
12 Q Right. So if you look at the chart and there are some
13 bold numbers right above the probability sensitivity. You
14 understood that what PJT was expressing to you was the claim
15 was worth somewhere between 1.29 billion and 1.542 billion
16 based on this analysis.
17 A That's what I understood the chart said, yes.
18 Q Okay. And you understood that this was based on
19 probabilities that were laid out below, right?
20 A Yes.
21 Q And that's a 25 percent to 75 percent likelihood that
22 Holdings claims would be limited to a claim -- sorry, let me
23 withdraw that question. You understood that one of the
24 sensitivities was a 25 percent to 75 percent likelihood that
25 the claim of Uniti would be limited to a claim at Holdings,

1 right?

2 A That's correct.

3 Q And you understood that what that meant was if the

4 court determined that because Uniti had only signed a lease

5 with Holdings, its claim could only be at Holdings, that

6 claim would be worth (indiscernible), right?

7 A I'm sorry, you broke off again. I couldn't understand

8 the last part of your question.

9 Q All right. You understood that this Holdings claim

10 sensitivity was based on the view that if the court found

11 that Uniti's only claim was at the estate at which it

12 entered into the master lease with, Holdings, that claim

13 would be worth next to nothing, right?

14 A It would be worth far less, yes.

15 Q Right. Because Holdings doesn't really have any assets

16 as far as you know.

17 A That's correct.

18 Q And then the other probability was, running up on the

19 top of the sensitivity charts, was a likelihood of 10 to 50

20 percent that the recharacterization claim was viable.

21 A That's correct.

22 Q But you never saw a sensitivity analysis for any claim

23 or -- sorry, for anything above 50 percent, right?

24 A Not that I recall.

25 Q And you never asked for one, right?

1 A Correct.

2 Q In fact, you don't think anybody as far as you know

3 ever asked to have this chart expanded to run from zero to a

4 hundred percent, right?

5 A Not that I'm aware of.

6 Q And that's because you personally understood that PJT

7 and Kirkland's assessment that they were showing the board

8 was that Windstream had between a 10 and 50 percent chance

9 of winning on the recharacterization claim, right?

10 A That's in part. We also sook advice from Norton Rose

11 on that same question and got the same answer. So we relied

12 upon Kirkland Ellis, and Norton Rose, and PJT.

13 Q Okay. But that was your understanding, that what they

14 were putting out on the chart, PJT was putting out on the

15 chart, was the view of Kirkland and Ellis and Norton Rose

16 that the recharacterization claim was 10 to 50 percent.

17 A That's correct.

18 Q All right. Can you turn to the next page of the

19 document?

20 A Oh, I'm sorry. No, let's go back to that same page.

21 My bad. At the top of the sensitivity chart is a listing of

22 $5.771 billion, right?

23 A Yes.

24 Q And when you were presented this chart, you understood

25 that what PJT was trying to show you was that $5.771 billion

1 was the win on just the recharacterization claim.
2 A That's correct.
3 Q And you had plenty of opportunity to ask questions of
4 PJT about what they were intending to describe to the board,
5 right?
6 A Yeah. We had opportunities to question both K and E
7 and PJT at each of our restructuring committee meetings and
8 at each of the board meetings.
9 Q Okay. Now, at any time are you aware of anybody on the
10 board asking for an analysis of how that recovery might be
11 distributed to creditors?
12 A I know that PJT shared that information from time to
13 time with the board and the committee.
14 Q Right. But you don't have a view one way or the other
15 as to whether if the Debtors won the recharacterization
16 claim, they would have enough money to pay all of their
17 creditors at Services and below in full.
18 A No, because there was an open question about how
19 collectible a recovery from Uniti might be in the event that
20 we prevailed. And also there was a question of where that
21 collection would come to, to Holdings or Services.
22 Q Right. But the win scenario His Honor finds the claim
23 is limited to Holdings and all of the assets that are
24 subject to the lease, the leased assets, were actually
25 property of (indiscernible), right?

1 A I'm sorry, you broke off again.
2 Q Sure. You understood that the win, the $5.771 billion
3 victory, was in the event that the Court limited Uniti's
4 claim to Holdings. Right?
5 A Yes.
6 Q And that the win would mean that each of the Debtors
7 who -- sorry, all of the leased assets would be property of
8 the Debtor's estate, not property of Uniti, right?
9 A That's correct.
10 Q And so when you talk about collectability, it's not a
11 question of the Debtors -- let me withdraw that question.
12 You do understand that all of the Debtors have been running
13 the leased property as if they own the property, right?
14 A Yes.
15 Q And so the ruling would really be just a determination
16 that the owner of the property was the Debtors, not Uniti,
17 right?
18 A Yes. What I meant -- was referring to was Uniti would
19 then have a claim and where that claim would be. Would that
20 be at Holdings or would that be at Services.
21 Q Mm hmm, no, I understand. And that's just a question
22 of the likelihood as to where the claims would go, right,
23 when you discount the value of that claim.
24 A Yes.
25 Q And we focused on cost savings for a bit, and I

1 addressed this a little bit with other witnesses, so I can
2 be short on this. As far as you know, no one ever asked the
3 Debtor's professionals to provide a budget of the costs of
4 going forward with a litigation after March 1, did they?
5 A I don't believe a full budget. I know that our
6 restructuring committee questioned Kirkland and Ellis about
7 the ongoing costs of litigation and the proceeding. And we
8 just talked about how it would be fairly expensive and that
9 we were spending $20 to $30 million a month in Chapter 11.
10 Q Right.
11 A But beyond that, no.
12 Q But the mere fact that you're settling this litigation
13 doesn't get you out of bankruptcy, does it?
14 A Not yet. We hope it's a good first step.
15 Q Right. But that $30 million a month was going to be
16 spent for some months in the future regardless of whether
17 you settled with Uniti, right?
18 A Until we're out of Chapter 11, I assume we'll continue
19 to spend about that much per month, yes.
20 Q Right. And nobody ever broke out of that $30 million
21 figure what it would cost to complete the trial, to address
22 any appeals or collect against Uniti, right?
23 A No, that's correct. We just knew a settlement would
24 get to a quicker resolution than going through litigation.
25 Q Okay. Can you go to JX39, please?

1 A Yeah, I have it.
2 Q Okay. These are the board minutes of the March 1
3 meeting of Windstream Holdings and Windstream Services,
4 right?
5 A Yes.
6 Q And this is the meeting in which those two boards
7 authorized the filing or the approval of the settlement with
8 Uniti, right?
9 A Yes.
10 Q Okay. Now, on that first page you can see that there
11 are various board members and management present.
12 A Yes, I see that.
13 Q Okay. And just as the chair of the independent
14 committee, you were a director at the time of the spin,
15 right?
16 A Yes.
17 Q Mr. Thomas was a board member at the time of the spin,
18 right?
19 A That's correct.
20 Q Sandy Beall was a board member at the time of the spin,
21 right?
22 A Sandy Beall. But that's correct.
23 Q Sandy Beall, right. He was a board member at the time
24 of the spin, right?
25 A Yes, that's correct.

1 Q Mr. Hinson was a board member at the time of the spin,
2 right?
3 A Yes, he was.
4 Q Mr. LaPerch was a board member at the time of the spin.
5 A That's correct.
6 Q And Mike Stoltz was a board member at the time of the
7 spin, right?
8 A Yes, he was.
9 Q Okay. Now with respect to management who was present
10 at the meeting to approve the settlement, Bob Gunderman was
11 an officer at the time of the spin, right?
12 A Yes.
13 Q And Kristine Moody was employed at Windstream at the
14 time of the spin, right?
15 A Yes.
16 Q And she was involved in the spin transaction, right?
17 A I know she did some legal work on it, yes.
18 Q Yeah. And Drew Smith, he was employed at Windstream at
19 the time of the spin, right?
20 A I believe he was, yes.
21 Q And you believe Mr. Stopford was also employed by
22 Windstream at the time of the spin, right?
23 A I think so, but I don't know exactly when he started.
24 Q Yeah. And you believe Ms. Simpson was employed at
25 Windstream at the time of the spin, right?

1 A And the same thing, I believe so, but I'm not sure
2 exactly when she started working for the company.
3 Q Now, the special committee -- there's a discussion of
4 the Uniti proposal in the minutes. The special committee
5 did not review the Uniti proposal before the full board
6 meeting, did it?
7 A all the board members received material in advance of
8 the board (indiscernible). So the special committee members
9 received it just at the same time the other members of the
10 board received it.
11 Q Right. So the special committee didn't meet and review
12 the settlement proposal before the board meeting, right?
13 A No. At this point in time there were several proposals
14 happening in fairly quick fashion. And we determined it was
15 easier to just have the full board meet to talk about this
16 rather than have a special committee meeting. So the
17 committee members were all board members, so they all sort
18 of discussed at the same time.
19 Q Okay. And the special committee then did not make a
20 recommendation to the full board to enter into the Uniti
21 settlement as a committee, right?
22 A No. There was no formal recommendation by the special
23 committee, although each committee member was a board member
24 and they all voted unanimously to approve the settlement.
25 Q All right. Can you go to JX38, please?

1 A You said 38?
2 Q Thirty-eight, yes.
3 A Yes, I have it.
4 Q Okay. And this is the deck that was presented at the
5 board meeting, right?
6 A I believe so, yes.
7 Q Okay. Can you turn to Page 9, please, which is
8 JX038.009?
9 A Okay, I have it.
10 Q Okay. And you see the $285 million in cash up front?
11 A Yes, I see that.
12 Q Right. And you understood that to be the money that
13 Uniti was going to be paying for the Dark Fiber assets?
14 A Well, in general what I understood was this was all the
15 components of the transaction that occurred. And so that
16 285 was, as I describe, that component of the overall
17 settlement.
18 Q Right. You understood that the asset purchase
19 transaction which was part of the overall settlement was
20 that the Debtors were going to be getting $285 million for
21 assets valued at $294 million. Again, it's part of the
22 overall transaction.
23 A Yeah, but how I would describe this is an overall
24 package, that these were the components that were in place,
25 but what I was focused on, and I think the board was, is the

1 bottom line, not each individual component.
2 Q Okay. Well, you do understand that certain Debtors are
3 selling assets worth $294 million, right?
4 A Yes. Under this calculation, yes.
5 Q And you understand that -- do you have an understanding
6 of how many Debtors own the assets that are being sold?
7 A Not specifically, no.
8 Q Okay. Based on your answer about the overall deal,
9 what is any one of those debtors getting for agreeing to
10 sell its assets?
11 A Well, again, if I look at this transaction, it's a
12 global transaction for Holdings and Services, and all of
13 their subsidiaries benefit. So to the extent that Holdings
14 was stronger and Services was stronger and more money is
15 spent in the future of deployment of fiber in the network,
16 then each of the subsidiaries benefits.
17 Q Well, I get that it benefits, but I'm going to ask a
18 different question. Which debtors get any cash
19 consideration for the sale of their assets as part of this
20 deal?
21 A I don't think the deal describes exactly how the money
22 will flow down to each individual subsidiary, if that's what
23 your question is.
24 Q So the answer is that you don't know whether any
25 particular selling estate is going to get a dollar for the

1 assets it's selling?
2 A That's correct.
3 Q Okay. And these figures that are listed on page 9 of
4 JX38, you understand that these payments are all premised on
5 there being a reorganized debtor doing business with Uniti
6 into the future, right?
7 A Yes.
8 Q Okay. To answer a question -- can you turn to page 27
9 in the document?
10 A No, I may have -- no, that's not -- I lost my place.
11 Let me move on. I'm going to come back to the actual
12 resolutions with respect to the deal. Where is that?
13 Sorry.
14 MR. SHORE: I apologize, Your Honor. I've lost
15 my...
16 THE COURT: That's fine.
17 BY MR. SHORE:
18 Q Well, I'm going to have to come back to that. Maybe I
19 can pick it up after other questioning. You understood that
20 what the board was approving at the March 1 meeting was the
21 Debtor's entry into the terms sheet, right?
22 A Yes.
23 Q Okay. And that was what going to happen is that the
24 board was authorizing authorized officers to go out and
25 complete the negotiations over (indiscernible) the

1 documentation, right?
2 A Yeah, to work with counsel to complete those, yes.
3 Q Okay. And that would include Mr. Thomas, right?
4 A Yes.
5 Q And that would also include Mr. Gunderman and Ms.
6 Moody?
7 A Yes.
8 Q Okay. And you did not review the settlement agreement
9 before it was filed, right?
10 A I don't believe so, no.
11 Q And as far as you know, no special committee member
12 reviewed the settlement before it was filed, right?
13 A I don't believe so. I know that our special committee
14 asked the management team at Kirkland and Ellis and also
15 Norton Rose whether the settlement was consistent with the
16 terms of the term sheet. And we were told by all the
17 parties that it was. But I don't believe we reviewed it
18 (indiscernible).
19 Q All right. So the resolutions -- let's go to JX39 at
20 page 5.
21 A Okay, I have that.
22 Q Okay. In light of the resolutions that were done or
23 the consent that was done to set up the special committee,
24 this pertains to resolutions of the Services and Holdings
25 board, right?

1 A That's correct.

2 Q Which are referred to as the companies, right?

3 A Yes.

4 Q And the only thing that the resolutions apply to is the

5 companies, right?

6 A That's correct. It was the board of the companies

7 (indiscernible) approve these resolutions.

8 Q Right. So if you go to page JX39.006, the first

9 resolution is just a resolution that the settlement and the

10 plan support agreement are in the best interest of the

11 companies, that is Holdings and Services. Right?

12 A That's correct.

13 Q So the terms sheet, right, if you go to JX39 at page

14 78, or JX39.078, there is a reference in general -- are you

15 there?

16 A Yes, I'm here. Thank you.

17 Q There's a reference in general to the parties agree to

18 mutual releases from any and all liability related to all

19 legal claims and causes of action. Right?

20 A Yes.

21 Q And you formed an understanding as to what that meant

22 when you as a board member of Holdings and Services

23 authorized the debtors to enter into -- those to debtors to

24 enter into the transaction, right?

25 A Yes.

1 Q And your understanding was that the parties that were
2 going to be released were the defendants in the Uniti
3 litigation, right?
4 A Well, I think my understanding of this was just a broad
5 and general release that the parties would grant each other.
6 So I don't think I had a specific understanding of what it
7 was going to be. We just knew it was going to be a broad
8 and traditional release that would occur as part of the
9 settlement.
10 Q Right. But you understood that it would be the
11 defendants in the Uniti litigation that were being released.
12 Let's not talk about what claims are being released yet.
13 But it was the defendants that were going to be getting the
14 release. And maybe their officers, directors, and
15 employees. Right?
16 A Again, I understood it to be a broad release would be
17 negotiated with our management team and our counsel working
18 with the other side.
19 Q And as far as you recall, you don't know of a single
20 board discussion regarding any estate providing releases for
21 parties other than the parties to the Uniti litigation,
22 right?
23 A Again, I think our discussion was just there would be
24 broad releases that would be negotiated as the agreement was
25 put together.

1 Q Right. But do you recall anybody ever discussing at
2 the board level, that is the board members, that anybody
3 other than the defendants to the Uniti litigation would be
4 released?
5 A I don't think we got into that level of detail. I
6 think we just discussed the fact that there would be broad
7 releases that would be negotiated.
8 MR. SHORE: Okay. I don't think I have any other
9 questions, Your Honor.
10 THE COURT: Okay. Ms. Greer?
11 MS. GREER: Yes. Briefly, Your Honor. Just a few
12 follow up questions.
13 REDIRECT EXAMINATION OF ALAN WELLS
14 BY MS. GREER:
15 Q Good afternoon, Mr. Wells. My name is Jocelyn Greer
16 from Morrison and Foerster on behalf of the committee of
17 unsecured creditors. You testified in your declaration that
18 you personally attended mediation sessions. Is that
19 correct?
20 A Yes, I did.
21 Q And you personally also had discussions regarding
22 settlement at the mediation sessions with certain creditors
23 of Windstream. Is that correct?
24 A I believe in one of the sessions I was in discussions
25 with the mediator and some of the creditors and Uniti, yes.

1 Q And the creditors that you recall speaking with include
2 Elliott, is that correct?
3 A Yes, that's correct. At that time, yes.
4 Q And certain members of the first lien ad hoc group,
5 right?
6 A I don't recall if they were in the meeting I was in or
7 not.
8 Q You personally never had discussions with any members
9 of the committee of unsecured creditors, is that correct?
10 A No, I did not.
11 Q And you never had discussions with any of the committee
12 of unsecured creditors' attorneys, is that correct?
13 A I don't believe so, no.
14 MS. GREER: Okay. I have nothing further, Your
15 Honor.
16 THE COURT: Okay. Any redirect? Any redirect
17 from the debtors? Now your sound is off for some reason.
18 Are you on mute? Can't hear you. Mr. French, you have to
19 redial in to Court Solutions, if you can hear me.
20 MR. HOWELL: Your Honor, this is Rush Howell from
21 Kirkland. I will pass that message on to Mr. French. He is
22 dialing back in, but he has informed me that he doesn't have
23 any redirect questions. So we can proceed.
24 THE COURT: Okay. All right, very well. All
25 right. So, Mr. Wells, you are done for the day.

1 MR. WELLS: Okay. Thank you, Your Honor.
2 THE COURT: All right. I think that was all of
3 the Debtor's witnesses. I have the joint exhibits. Do the
4 Debtors have anything more on their direct case as far as
5 the evidence is concerned? Now you're off, Mr. Howell.
6 MR. HOWELL: Okay. I think that was user error.
7 THE COURT: Okay. All right. That's fine.
8 MR. HOWELL: I apologize. Nothing further. We
9 rest our case in chief.
10 THE COURT: Okay. Obviously subject to oral
11 argument.
12 MR. HOWELL: Yes.
13 THE COURT: And cross of any -- well, I guess Mr.
14 Mendelsohn for the committee.
15 MS. GREER: Yes, Your Honor. And pursuant to the
16 Court's instruction, similar to the debtors, we filed a
17 declaration in lieu of Mr. Mendelsohn's direct. The most
18 recent version of that declaration is at ECF1754. And I see
19 Mr. Mendelsohn on my screen now. I'm not sure if you can
20 see him.
21 MR. MENDELSOHN: I'm off mute if you can hear me.
22 THE COURT: Yes. I can not only hear you, but see
23 you, Mr. Mendelsohn. So let's see. I'm just turning to Mr.
24 Mendelsohn's declaration.
25 MR. FRENCH: Your Honor, this is Yates French on

1 behalf of Debtors. Just checking to confirm that my audio
2 was working again.
3 THE COURT: Yes. Okay. So I have the amended
4 direct examination declaration. That's the right one,
5 right, Ms. Greer?
6 MS. GREER: Yes, Your Honor.
7 THE COURT: All right. So let me swear you in,
8 Mr. Mendelsohn. Could you raise your right hand, please?
9 Do you swear or affirm to tell the truth, the whole truth,
10 and nothing but the truth, so help you God?
11 MR. MENDELSOHN: I do.
12 THE COURT: Okay. And it's Bruce, and then M-E-N-
13 D-E-L-S-O-H-N?
14 MR. MENDELSOHN: Yes.
15 THE COURT: Okay. So, Mr. Mendelsohn, you
16 submitted an amended direct examination in this set of
17 contested matters dated May 5, 2020. As stated in paragraph
18 3 of that declaration, it's intended to be your direct
19 testimony in support of the objection of the official
20 creditors committee to enter an order authorizing the
21 debtors' entry into the backstop commitment agreement and
22 payment of related fees and expenses and the objection of
23 the official unsecured creditors committee for entry of an
24 order approving -- of the debtor's motion for entry of order
25 approving the settlement between the debtors and Uniti

1 Group, Inc.
2 Sitting here today, is there anything you'd like
3 to change in that declaration as your direct testimony?
4 MR. MENDELSOHN: No, nothing to the amended
5 declaration.
6 THE COURT: Okay. So the Debtors can go ahead
7 with cross.
8 MR. FRENCH: Your Honor, this is Yates French on
9 behalf of the Debtors. Just briefly before I begin. I have
10 Mr. Mendelsohn on the short list of Skype video attendants.
11 I'm not getting video. Are others getting video?
12 THE COURT: Oh, okay. We are. Could you say a
13 little bit more, Mr. Mendelsohn? It appears to be voice-
14 activated, the Skype. So if you could just say a few words.
15 Four score and seven years ago, something like that.
16 MR. MENDELSOHN: Yes. Four score and seven years
17 ago. Yates, I can see you. I don't know if you can see me.
18 MR. FRENCH: As long as the Court's okay with it,
19 I'm fine proceeding.
20 THE COURT: Okay. All right. Why don't you go
21 ahead. I think it will come up as Mr. Mendelson keeps
22 talking.
23 MS. GREER: And I think Mr. Mendelson might be on
24 mute on Skype. So maybe if he unmutes, that would help the
25 problem.

1 THE COURT: Okay, very well. Thanks.
2 MR. FRENCH: Jocelyn, I'm on -- yes, I'm on mute
3 on Skype. Do you want me to unmute Skype?
4 THE COURT: Yes. Well, we just did that for you.
5 MR. FRENCH: Oh, okay. Got it. Thank you.
6 THE COURT: Thanks. Okay. Why don't you go
7 ahead, Mr. French?
8 CROSS-EXAMINATION BRUCE MENDELSOHN
9 BY MR. FRENCH:
10 Q Good afternoon, Mr. Mendelsohn. It's nice to hear from
11 you again. You'll recall I took your deposition a few days
12 ago?
13 A Yes.
14 Q You began work on this case over a year ago, shortly
15 after the Debtors filed for bankruptcy. Is that right?
16 A That is correct.
17 Q And after you began work on this case, before the
18 Debtors filed their adversary complaint, you attended a
19 meeting hosted by the Debtors where they presented a status
20 update on the claims investigation.
21 A Yes.
22 Q At that meeting, the Debtors walked you through the
23 claims investigation, gave you their thinking on what claims
24 they were considering bringing and what claims they were not
25 planning to bring. Is that right?

1 A Sort of. It was a very early meeting. It was one of
2 the very first meetings with the Debtor's professionals, and
3 it was really framing the initial issues around the case.
4 Q And you would agree they walked you through the
5 potential claims they were thinking of bringing?
6 A Yes.
7 Q Now, throughout your wok on this case, you've spent a
8 fair amount of time in communicating with the Debtor's
9 advisors, PJT, correct?
10 A Yes.
11 Q You are generally familiar with the Debtor's network?
12 A I'm not -- from a business operations standpoint are
13 you asking?
14 Q Just based on your work to date in the case. Do you
15 have an understanding of the state of the Debtor's network?
16 A Sorry, I couldn't hear the last word you said. Did you
17 say network, but business network?
18 Q Let me try restating this question. You would agree
19 with me the Debtor's telecommunications network needs to be
20 updated, right?
21 A Yes.
22 Q You understand that as part of the settlement with
23 Uniti, Uniti is agreeing to fund up to $1.7 billion in
24 growth capital improvements, right?
25 A Correct.

1 Q You agree that's an important benefit to the Debtors
2 under this (indiscernible)?
3 A I do.
4 Q And you're not aware of any other source of capital
5 other than settlement proceeds from Uniti that the Debtors
6 have accessed to make these capital improvements, right?
7 A Well, I think -- well, I would say I think that depends
8 on what happens with the case. While we're in bankruptcy,
9 the company has limited access to capital. It doesn't mean
10 that it won't have other access to capital under different
11 alternatives.
12 Q Sir, you should have received a package of materials
13 that includes your declaration as well as a copy of your
14 deposition transcript. Do you have those materials?
15 A Yes.
16 Q Could you please refer to the deposition transcript?
17 A I have it.
18 Q Now, you recall first I took your deposition on Monday,
19 right?
20 A Yes.
21 Q And that's a deposition that you understood that you
22 were under oath just as you are testifying in court today?
23 A Yes.
24 Q Could you please turn to page 31 of your deposition
25 transcript?

1 A All right.

2 Q And I will be referring to quotes on both page 31 and

3 32. I will direct your attention to page 31, line 24.

4 A Yes, I'm there.

5 Q And going through page 32, line 6, which reads,

6 question, "Are you aware of any source of capital other than

7 the settlement proceeds that the Debtors have access to to

8 make that amount of gross --" I believe it was supposed to

9 say growth, "-- capital improvements?" You responded, "Do

10 you mean aside from Uniti?" Question, "Yes." Answer, "No."

11 Do you recall me asking those questions, and did you give

12 those answers?

13 A Yes.

14 Q Now, since the settlement with Uniti has been proposed,

15 you've also spent time speaking with PJT specifically about

16 the settlement, right?

17 A Yes.

18 Q And you've modeled out for yourself how you value the

19 settlement. Is that right?

20 A That is correct.

21 Q PJT values the settlement as worth approximately $1.2

22 billion in net present value, correct?

23 A That is correct.

24 Q And that valuation, $1.2 billion in current value, is

25 roughly in line with your view of the valuation on the

1 consideration?
2 A Yes.
3 Q You have years of restructuring experience advising
4 both debtors and creditors, correct?
5 A Correct.
6 Q And in the course of your professional background,
7 you've specifically advised debtors to settle litigation to
8 avoid litigation lifts, right?
9 A That is correct.
10 Q Based on the work you've done in this case over the
11 last 12 months and based on your conversations with PJT and
12 your understanding of the value of the settlement, as you
13 sit here today, you can't say that Windstream electing to
14 settle these claims with Uniti in exchange for $1.25 billion
15 is a bad decision, right?
16 A I don't have enough information with respect to the
17 dynamics of the negotiation to determine whether they could
18 have gotten more and whether that would have been possible.
19 It is my impression that the outcome of this settlement is
20 very devastating for Uniti if it fails to occur. And so I
21 have the view that there is a possibility they could have
22 got more, but I can't -- it's impossible for me to answer
23 whether this is a fair or not fair settlement, because we
24 were not party to the negotiations.
25 Q Can you please turn to page 101 of your deposition

1 transcript?
2 A I'm there.
3 Q I'll refer to line 6 through 12. And again, this is
4 the transcript from your sworn deposition where you
5 understood you were under oath, correct?
6 A Yes.
7 Q Question, "So as you sit here today, you can't say one
8 way or the other whether Windstream electing to settle these
9 claims with Uniti in exchange for $1.25 billion is a good
10 decision or a bad decision?" Answer, "That is correct."
11 Were you asked that question?
12 MS. GREER: Your Honor, I -- I'm sorry. I object
13 that it's an improper impeachment. It doesn't contradict
14 what Mr. Mendelsohn just said.
15 THE COURT: I think that's right.
16 MR. FRENCH: I'll move on.
17 THE COURT: I think he explained a little more why
18 he said what he said. But his answer is he can't say one
19 way or the other, which I think is the same as saying he
20 can't say whether the Windstream settlement is a bad or good
21 decision.
22 MR. FRENCH: Thank you, Your Honor. I'll move on.
23 THE COURT: Okay.
24 BY MR. FRENCH:
25 Q I'd like to switch gears a little bit and talk about

1 your analysis of the backstop agreement. All right?
2 A Okay.
3 Q You have personally negotiated backstop agreements in
4 the past, correct?
5 A That is correct.
6 Q Would you agree with me that backstop parties, in the
7 backstop agreement, they are generally agreeing to buy
8 equity and the rights offering if there is insufficient
9 market demand from other parties to acquire the equity.
10 A I agree with that.
11 Q At eye level, backstop parties take on the risk that
12 there will be insufficient market demand to fulfill the
13 rights on.
14 A In part. There are a number of risks that backstop
15 parties take on. So it's a risk of whether it's a good
16 investment and the risk of whether they effectively get hit
17 with other parties not stepping up and the magnitude of that
18 potential, quote, unquote, hit.
19 Q And in exchange for taking on that risk, it's normal
20 for backstop parties to request fees.
21 A That is correct.
22 Q It's also a common term in backstop agreements that the
23 backstop parties are able to buy into the equity at a
24 discount to plan members, right?
25 A That is correct.

1 Q And it's not unusual for backstop agreements, if they
2 have a breakup fee, for that breakup fee to exactly equal
3 the backstop premium. Right?
4 A There are certainly many examples where the breakup fee
5 equals the backstop fee. There are different reasons for
6 both that needs to be understood. But the existence of a
7 breakup fee is a function of a lot of circumstances around
8 the case, such as topping bids, competitive offers, versus
9 some of the things that are going on in this case where the
10 breakup fee is tied to plan confirmation. So it is
11 different.
12 Q It's generally common for backstop parties to be pre-
13 existing creditors of the debtors. You would agree with
14 that, right?
15 A Absolutely.
16 Q So turning to the backstop agreement at issue in this
17 case, the backstop fee is eight percent, correct?
18 A The initial backstop fee is eight percent before being
19 (indiscernible) up for the discount, correct.
20 Q And you would agree that this fee, this eight percent
21 fee, falls within the range of market fees for a backstop
22 agreement?
23 A Well, so whenever you look at a concept for any
24 transaction, be it valuation, M and A, or otherwise for
25 backstop agreements, just because it hits a data point in

1 the range doesn't mean it's quote, unquote, in the range.
2 In this case, every single metric of the backstop fee is at
3 the very high end of the range. And the question that the
4 Court should evaluate is should we be at the high end of the
5 range, the middle of the range, or the low end of the range
6 based on the facts and risks associated with this backstop.
7 Q So just to draw you back to my question, sir, you would
8 agree with me that the backstop fee in this case is on the
9 high end within the range of market fees. Is that fair?
10 A It is above the median. It is above the average. But
11 there are certainly examples where they are higher.
12 Q I understand, sir. But as an expert witness, you're
13 testifying as to whether or not the fees fall within a range
14 of market fees. So I think I'm entitled to an answer to the
15 specific question, which is would you agree that the
16 backstop fee in this case falls within the high range, but
17 within the range of market fees?
18 A So I think I've answered your question. It's hard to
19 say it's in the range. It's above the average. It's above
20 the median. It is at the high end. So I can't answer is it
21 in the range. So there's not an evaluation where we had a
22 range. It is at the high end, higher than the median and
23 average.
24 Q Sir, could you please turn to page 69 of your
25 deposition?

1 A I'm there.
2 Q I'll refer you to lines 14 through 19 of the deposition
3 transcript from your sworn deposition. Question, "Do you
4 agree that a nominal backstop fee of eight percent is in
5 line with market?" Answer, "It's on the high end."
6 Question, "It's on the high end within the range of market.
7 Is that fair?" Answer, "Yes." Were you asked those
8 questions and did you give those answers?
9 A I did.
10 MS. GREER: Your Honor, I object again on it's
11 improper impeachment. I don't think it contradicts Mr.
12 Mendelsohn's testimony today.
13 THE COURT: Well, what it adds is just within the
14 range of market. The high end and then added -- so I'll
15 take it for what it's worth.
16 BY MR. FRENCH:
17 Q You have your declaration, sir?
18 A I do, yes.
19 Q I will refer you to Figure 1, which for the record
20 appears after paragraph 15 of the declaration.
21 A Yes.
22 Q Image 1 is a list of recent backstop transactions,
23 correct?
24 A Well, since 2016 with backstop agreements greater than
25 $50 million, and then sorted separately for backstop amounts

1 greater than $200 million.
2 Q You were personally involved in several of these
3 transactions, correct?
4 A Yes, I was.
5 Q You were personally involved in the (indiscernible)
6 Group transaction, and you represented the unsecured
7 creditors committee there, correct?
8 A That is correct.
9 Q Now, in that case you thought that the ten percent
10 backstop fee was high, correct?
11 A We did.
12 Q Now, ultimately even though you thought that that fee
13 was high, the ten percent backstop fee was agreed to by the
14 parties and approved by the court, right?
15 A That is correct.
16 Q You were also involved in Pacific Drilling, is that
17 correct?
18 A Yes, that is correct.
19 Q And there you represented the equity sponsor that
20 participated in the backstop agreement, right?
21 A Yes, that is correct.
22 Q Now, in that case, you found that a 46.9 percent
23 discount to plan equity was appropriate, right?
24 A Well, I'd like to shed some light on that. So at the
25 time of that backstop, which I think you're aware of Judge

1 Wiles' comments in the Southern District about that case, we
2 represented the equity. The company had virtually zero
3 revenues and there was an enormous amount of uncertainty as
4 to the valuation of the business. Thus the parties could
5 not agree on valuation-related issues, and the backstop
6 agreement was approved effectively as part -- I believe as
7 part of confirmation. The way the bridge was created by
8 creating a very large backstop discount relative to the
9 higher end price value, because the new money was only
10 willing to come in at a significant discount versus where
11 the debtor believe valuation was, which was substantially
12 higher.
13 Q Was there a global pandemic pending at the time of that
14 case?
15 A No, there was not.
16 Q And in that case were substantially all of the Debtor's
17 operating assets owned by a third party?
18 A No, no. Are you drawing a parallel -- I'm sorry. Are
19 you drawing a parallel with Uniti? I just want to make sure
20 I understand your question.
21 Q Just understanding the background. So your view that a
22 46.9 percent discount to (indiscernible) was appropriate in
23 that case. In that case, the backstop fee exactly equaled
24 the breakup fee, right?
25 A That is correct.

1 Q And in that case you felt it was appropriate for that
2 deal.
3 A That is correct.
4 Q I would like to turn to Peabody on Image 1. Now, that
5 is not a transaction that you personally worked on, but your
6 team at Perella was involved in the case, fair?
7 A Correct.
8 Q Peabody has the same backstop premium as Windstream,
9 correct?
10 A That is correct.
11 Q It has a higher discount --
12 A Yes, backstop, yes. That is correct.
13 Q It has a higher discount-to-plan equity than
14 Windstream, right?
15 A Correct.
16 Q And higher direct purchase than Windstream, right?
17 A Correct.
18 Q And in Peabody, the backstop premium converted 100
19 percent to a breakup fee, right?
20 A Correct.
21 Q All right. Can we move on to Image 2 in your
22 declaration?
23 A Okay, I'm there.
24 Q All right. I want to start by establishing some
25 terminology. I'm referring to the table in the upper left,

1 which says 1L claims. And just for the record, this is
2 Image 2 in his amended declaration. Do you see where you
3 break out the four, I'll call them buckets, of 1L claims?
4 A Yes, I do.
5 Q All right. Let's walk through them one by one.
6 Elliott, they are a party to the backstop agreement, right?
7 A Correct.
8 Q The second bucket, which you call 1L ad hoc groups,
9 these are effectively 1L lenders that are also parties to
10 the backstop agreement, fair?
11 A Yes.
12 Q Okay. The third group, priority non-backstop parties,
13 these are basically 1L lenders that have signed the plan
14 support agreement, correct?
15 A That is correct.
16 Q And the fourth group, non-RSA parties, these are 1L
17 lenders that have not signed the plan support agreement,
18 right?
19 A That is correct.
20 Q All right. Referring to Image 2, you have multiple
21 scenarios here where you calculate, I'll characterize it as
22 the effective backstop fee. Is that fair?
23 A Yes, the terminology is a little funny. The
24 calculation is exactly what it is, which is just simply a
25 percentage reflecting the backstop fee relative to the

1 various scenarios of the parties either participating or
2 committing to the backstop.
3 Q For example, in the top of the three columns on the
4 right-hand side, you have Scenario 1. And there you
5 calculate the backstop fee on remaining amounts as varying
6 between 264.4 percent and 423.1 percent. Right?
7 A That is correct.
8 Q Scenario 2, backstop fee on remaining amount as
9 calculated is between 132.2 percent and 211.5 percent. Is
10 that right?
11 A So that's correct. I just want to make sure we're
12 talking about the proper terminology. You know? Because
13 the terminology is important. We're not saying that is what
14 the backstop fee is, we're simply illustrating that the
15 backstop fee is calculated by that denominator so you can
16 look at it from the perspective of understanding the nature
17 of risk of the size of those parties that are backstopping
18 the agreement, compared to the size of the overall backstop,
19 and that goes to the question of how likely is it that the
20 backstop will be subscribed versus kind of what we -- what I
21 might call hung, and it gives you a lot of information about
22 that. So that's what we were trying to provide, data hung.
23 Q Well, I want to explore some of the bases that underly
24 in your opinions. In conducting the analysis that formed
25 the basis of your opinion testimony, you assumed that the

1 priority non-backstop parties were committed to
2 participating in the backstop agreement, right?
3 A Yes, that is correct.
4 Q Now, if that assumption turned out to be wrong, it's
5 possible that your conclusions would change, right?
6 A No, because you need to understand exactly what these
7 percentages mean. Backstop fee is $96 million; that is the
8 backstop fee. The fact that it's -- what we're trying to
9 get to here is is it appropriate for the backstop premia to
10 be at the end, the average, or the low end of the dataset.
11 That goes to the risk, two risks, and one of those risks is
12 the risk that the backstop is harmed. They have 73 percent
13 of the parties backstopping themselves that demonstrate --
14 and having a priority tranche saying they want that
15 backstop; in other words, they want to soak up more value.
16 That demonstrates that they like that investment and it's 73
17 percent already spoken for.
18 The fact that you have another 21 percent that has
19 signed the support agreement and negotiated to participate
20 in the priority tranche tells you that those parties are
21 interested in participating in the backstop. So one
22 component, not all components, but one component of the risk
23 is much significantly mitigated because you have a pretty
24 much subscribed backstop, which is the case here.
25 MR. FRENCH: Your Honor, I do object that that

1 answer was non-responsive to my question, which was simply
2 if one of his assumptions turned out to be wrong, it's
3 possible that his conclusions will change.
4 THE COURT: Well, I think he was just amplifying
5 on that -- on that assumption; that he was doing an analysis
6 of risk.
7 BY MR. FRENCH:
8 Q Well, as it turns out, your assumption that the
9 priority non-backstop parties who committed to participating
10 in the backstop agreement, that wasn't an accurate
11 assumption, correct?
12 A Initially, and we modified that, correct. But it
13 doesn't change my conclusion because it goes back to what
14 these numbers mean, does not change any conclusion
15 whatsoever.
16 Q So let's look at scenario one, okay? Are you there?
17 A Yes.
18 Q In scenario one, you assume that 100 percent of the
19 priority non-backstop parties have to participate in the
20 rights offering, right?
21 A That's 100 percent of this that they -- that the party,
22 non-backstop parties participate in the rights offering; is
23 that what you said?
24 Q Yes.
25 A Yes, that is 100 percent.

1 Q Same in scenario two. There, you assume that 100
2 percent of the non-priority backstop parties are
3 participating in the rights offering, right?
4 A No. Instead, you were assuming that the backstop
5 parties and the non-backstop parties do not participate in
6 the priority tranche of the backstop.
7 Q So your testimony is that the calculations set forth on
8 scenario two of your report do not include an assumption
9 that 100 percent of priority non-backstop parties
10 participate in the rights offering?
11 A Right. Please just restate exactly, so I can make sure
12 I understand exactly what your words are.
13 Q In scenario two where you calculate backstop fee on
14 remaining amount as ranging from 132.2 percent to 211.5
15 percent, you would agree with me that you assume that 100
16 percent of priority non-backstop parties would participate
17 in the rights offering.
18 A We'd assume that 100 percent of the priority non-
19 backstop parties do not participate in the priority tranche,
20 just to be clear.
21 Q But they do participate in the rights offering. Let me
22 restate my question. I think we're talking past each other.
23 Apologies, it's my fault. Here's my question to you: In
24 scenario two, you are again assuming that 100 percent of
25 priority non-backstop parties participate in the rights

1 offering, right?
2 A I'm sorry. It's just that the terminology is just
3 confusing me the way you're saying it, just a lot of
4 different defined terms. So I'm sorry, I'm not trying to be
5 difficult. If you wouldn't mind just rephrasing it.
6 THE COURT: I take it, Mr. French, are you
7 basically saying that scenario two assumes they participate
8 but not in the priority tranche?
9 MR. FRENCH: I'm just saying. Excuse me, Your
10 Honor. I'm saying that in both of these scenarios, scenario
11 one and scenario two, they're both based on the exact same
12 assumption, which is that 100 percent of the non-priority
13 backstop parties participate in the rights offering.
14 THE COURT: And maybe the only confusion, although
15 maybe it's only in my mind, is where they participate, as
16 priority or as just backstop -- just participating; is that
17 right, is that the difference?
18 MR. FRENCH: Well, my question is whether it
19 assumes that they'll participate in one way or the other.
20 THE COURT: One way or the other.
21 MR. FRENCH: They're not --
22 THE COURT: Right, in scenario two.
23 BY MR. FRENCH:
24 A So when you referred to the terminology non-priority
25 backstop parties, are you referring to -- on the upper left,

1 to what we call priority non-backstop parties; that row with
2 667 million? I just want to make sure we're talking about
3 the same thing.
4 Q Yes, sir.
5 A Right. So we are assuming that the priority -- I think
6 you had flipped the words; that's why maybe I was confused.
7 We are assuming that the priority non-backstop parties in
8 scenario two not participate in the priority tranche. They
9 do participate in the rights offering in that example.
10 Q Okay. I think we're on the same page.
11 A Okay, thank you.
12 Q Just to sum it up -- and let me know if I'm getting
13 this wrong -- scenario one and scenario two, they both
14 involve the same assumption that 100 percent of priority
15 non-backstop parties participate in the rights offering; is
16 that right?
17 THE COURT: One way or the other.
18 BY MR. FRENCH:
19 Q One way or the other.
20 A One way or the other, yes.
21 Q All right, let's explore that assumption. You would
22 agree with me that these priority non-backstop parties,
23 they're not obligated to participate in the rights offering;
24 they just have the option, right?
25 A I agree.

1 Q They're not only submitted to participate at this
2 point.
3 A I agree.
4 Q There's no guarantee that when the rights offering
5 actually occurs that anybody other than the backstop parties
6 show up to buy the Debtors' stock, right?
7 A That is correct.
8 Q In fact, given the unique circumstances we're all
9 dealing with today with the national pandemic, you would
10 agree it's completely possible that the priority non-
11 backstop choose not to participate in the rights offering.
12 MS. GREER: Objection, calls for speculation.
13 THE COURT: No. I think that's a fair -- a fair
14 question to ask a financial advisor.
15 BY MR. FRENCH:
16 A Look, I think -- I think it's definitely possible. I
17 actually believe it's more likely that they will participate
18 in the backstop rights offering for a variety of reasons.
19 And the capital markets, they are quite open, and most
20 investment firms are looking to make investments and
21 attractive investments. And for the various factors we've
22 discussed, I think this backstop rights offering is an
23 extremely attractive investment, demonstrated by the fact
24 that there's a priority tranche of people on its soak up
25 value.

1 It's demonstrated by the fact that there's a 52
2 1/2, 47 1/2 negotiated split where parties were fighting to
3 have as much of it as possible. It's demonstrated by the
4 fact that the priority non-backstop parties signed on to the
5 agreement in order to get the benefit of participating. I
6 think it's highly likely that they will participate.
7 Q I understand it's highly likely, sir. But focusing
8 back to my question, I just want to make sure there's a
9 clear answer to my question. You would agree that in the
10 middle of a national pandemic, it's completely possible that
11 the priority non-backstop parties choose not to participate,
12 right?
13 A That is correct.
14 Q It's entirely possible that the backstop parties will
15 end up having to purchase 100 percent of the Debtors'
16 equity, right?
17 A Correct.
18 Q I want to turn to scenario three. Are you there?
19 A Yes.
20 Q Now in this scenario, you are assuming that Elliott and
21 the 1L ad hoc group end up acquiring most of the Debtors'
22 equity; is that fair?
23 A No, they're not assuming anything in this scenario. Is
24 three you're --
25 Q Yes, sir.

1 A No, that's not accurate. Well, that's not what we're
2 reflecting here.
3 Q Well, it does assume that only Elliott and the 1Ls
4 participate in the priority tranche and remaining tranche,
5 right?
6 A No, that has nothing to do with what's reflected on
7 this page. This page just simply reflects -- it's a very
8 simplistic analysis, but it simply reflects the fact that
9 there's a significant amount of value associated with the
10 potential after litigation. And in the event of that
11 success, that value would more than cover the remaining
12 deficiency points. That's all this -- that's all this does.
13 It does not talk about direct --
14 THE COURT: I think you're talking about two
15 different charts. Are you still talking about scenario
16 three?
17 THE WITNESS: Oh, I'm sorry. I thought -- I was
18 on figure three.
19 THE COURT: Yeah, no. I think it's scenario three
20 on chart two.
21 THE WITNESS: Okay, I'm sorry. That's my error.
22 MR. FRENCH: Thank you, Your Honor.
23 THE WITNESS: Okay.
24 BY MR. FRENCH:
25 Q In scenario three, you're assuming that Elliott and the

1 1L ad hoc group acquire 100 percent of the Debtors' equity;
2 is that right?
3 A That is correct.
4 Q All right, let's take them one at a time, starting with
5 Elliott. Other than its obligations under the backstop
6 agreement, it doesn't have any other obligation to
7 participate in the rights offering, right?
8 A That's correct.
9 Q Okay, same question for the 1L ad hoc group. Other
10 than their obligation under the backstop agreement, they
11 haven't otherwise submitted or agreed to participate in the
12 rights offering, right?
13 A Only to the extent of their backstop components, not
14 with respect to the priority.
15 Q I'd like to turn to your second opinion. This is where
16 you opine that in the event of a litigation win, it's
17 possible that unsecured creditors may acquire full
18 recoveries or nearly full recoveries. Is that a fair
19 characterization?
20 A Yes.
21 Q In reaching this conclusion that a litigation win could
22 result in full recoveries for unsecured creditors, you
23 assumed that any resulting claims from Uniti would exist at
24 a structurally junior level to the unsecured claims, right?
25 A Not necessarily. Are you referring me to figure 3 now?

1 Q I'm referring to the basis of your second opinion and
2 the assumptions therefore.
3 A Okay. Well, I think that's reflected in figure 3. But
4 I'm not sure what you mean by my second opinion, but anyway,
5 I think we're talking about the same thing. That opinion
6 does not say that the unsecured creditors will receive a
7 full recovery. It says that there is a possibility that the
8 unsecured recoveries -- creditors could receive up to par or
9 up to a full recovery under the right set of circumstances.
10 It makes no commentary about the likelihood of that
11 happening. It simply points out that a successful
12 litigation has massive amounts of upside for the unsecured
13 creditors.
14 Q I understand, sir. I'm just trying to understand the
15 assumption that's underlying your opinion. And it's my
16 understanding that when reaching your conclusion that it's
17 at least possible that the unsecured creditors in this case
18 could receive full recoveries if there's a litigation win
19 that you assume that any resulting claim from Uniti would
20 exist at a structurally junior level to the preexisting
21 unsecured claims; is that accurate?
22 A It's partly accurate. I mean, under that scenario,
23 yes, that would translate into a full recovery under a
24 successful litigation. That is not the only scenario that
25 we would evaluate to determine if there was other treatment

1 of the Uniti claim that could also result in a full recovery
2 or a significantly better recovery.
3 Q Now in forming the bases of this opinion, you didn't
4 conduct any analysis as to what the size of a potential
5 Uniti claim could be post recharacterization, right?
6 A Sorry, there was some background noise. I apologize.
7 You got garbled on me.
8 Q In forming the bases of your opinion, you didn't
9 conduct any analyses into what the size of a potential Uniti
10 claim would be post-recharacterization, right?
11 A Again, my opinion was simply that there is the
12 potential upside, not that that upside will necessarily come
13 to fruition, so there's a lot of scenarios that could result
14 in that upside.
15 Q Can you please turn to Page 96 of your deposition
16 transcript?
17 A I'm there.
18 Q I'll refer you to Lines 17 through 22. Question:
19 Informing the bases of your opinion number two, you did not
20 conduct any analyses into what the size of a potential Uniti
21 claim would be after a recharacterization win. Did I get
22 that right? Answer: That's correct. Were you asked that
23 question and did you give that answer?
24 A Correct.
25 Q Likewise, you didn't consider any potential risk that

1 the Uniti claim would reside its services, not its holdings,
2 right?
3 A No, no, that's not correct. We just simply reflected
4 one scenario. We didn't say that it would result that way.
5 We just said under this scenario, recoveries could be as
6 much as par; not to say that that was the likely or
7 concluded scenario by any means.
8 Q Sir, can you please turn to Page 98 of your deposition?
9 A Yes.
10 Q I'll refer you to Lines 10 through 18. Question: In
11 conducting your analysis and forming your bases, what became
12 your conclusions in opinion number two, did you consider any
13 potential risk that the Uniti claims could reside of
14 services, not of holdings. Answer: That was not part of the
15 analysis that we were conducting. So the answer to your
16 question is no because that's not what we are conducting.
17 Were you asked that question and did you give that answer?
18 A Yes.
19 Q In addition -- and, I'm sorry, was the verbal answer
20 there was yes?
21 A Oh, I said yes, yes.
22 Q The audio cut out for a second. Now, in addition to
23 analysis for creditors under a litigation win, you've also
24 conducted analysis regarding creditor for other reasons, if
25 there's -- if Windstream lost the litigation, right?

1 A I'm actually not certain. Well, the answer would be
2 yes. We have looked at a range of recoveries based on the
3 range of values. I don't recall exactly whether or not we
4 looked at it as binary as successful outcome versus just
5 total unsuccessful outcome. We just looked at a range of
6 outcomes, so I don't believe we -- I just don't recall
7 exactly on that point.
8 Q Well, you would agree with me that if Windstream lost
9 the litigation, recoveries for its secured creditors would
10 be less than they are under the settlement agreement.
11 A I think so. I haven't done that analysis, but, I mean,
12 it intuitively makes sense.
13 Q And you'd also agree with me that in concept, unsecured
14 bondholders might get the exact same recoveries under a loss
15 that they get under the settlement. Do you agree with that?
16 A Well, not exactly. I mean, they would lose the money
17 if, in a sense, were voting, so not exactly.
18 Q Can I refer you to Page 102 of your deposition
19 transcripts?
20 A Yes.
21 Q I'll refer you to Lines 6 through 10. Question: It's
22 possible that if Windstream lost the litigation against
23 Uniti that the recoveries for unsecured bondholders would be
24 the exact same as they are under the settlement; is that
25 right? Answer: Correct. Were you asked that question and

1 did you give that answer?
2 A Yes.
3 MR. FRENCH: Your Honor, I have no further
4 questions at this time.
5 THE COURT: Okay. Before redirect, I had a
6 question for Mr. Mendelsohn. When you analyzed the backstop
7 commitment agreement, did you put any DAR amount on the
8 amount that you thought was excessive?
9 THE WITNESS: I didn't. We did not -- we did not
10 try to say, you know, 5 percent, you know, would be more the
11 norm versus 8. So we did not actually put a dollar amount
12 on it, Your Honor.
13 THE COURT: Okay. But if I wanted to look at
14 that, I would look at the percentages that you say are too
15 high and bring them down somewhat, right? It's not the
16 whole amount that's excessive.
17 THE WITNESS: Yeah, I think that's correct. There
18 are two different components, which is the amount and the
19 exigent relevance or relevant and structure of the breakup
20 fees.
21 THE COURT: Okay. Any redirect?
22 MS. GREER: Yes, Your Honor. Again, Jocelyn Greer
23 from Morrison & Foerster on behalf of the Committee of
24 Unsecured Creditors.
25 REDIRECT EXAMINATION OF BRUCE MENDELSOHN

1 BY MS. GREER:
2 Q Mr. Mendelsohn, I just want to take the last subject
3 that Mr. French covered with you first. Can you briefly
4 describe the analyses that form the basis of your opinion
5 two?
6 A I'm sorry, Jocelyn. My opinion is with respect to
7 which opinion exactly?
8 Q With respect to what is reflected in figure 3.
9 A Oh. Well that's, as I said, it's just a very, very
10 simplistic analysis. It is not financially terribly
11 insightful. It's just intended to show that there is a
12 significant amount potential upside for creditors resulting
13 from a better outcome from the litigation. And that
14 potential upside could be all the way up to par, but there
15 are a lot of different things that would have to happen in
16 order to -- you know, there's an infinite number of
17 computations that would affect what the actual recoveries
18 are depending on the facts and circumstances.
19 Q I'd like to take you know through some of the comps
20 that you went over with Mr. French and that are reflected in
21 figure 1, beginning with Pacific Drilling. You testified
22 that, in that case, you found the 46.9 percent ERO discount
23 to plan equity value to be appropriate. Do you remember
24 that testimony?
25 A Yes.

1 Q And why is it that the discounted plan equity value in
2 this case is inappropriate?
3 A Because all of these comps, just like I said earlier
4 about any -- using any comps in any analysis, you have to
5 figure out which are the appropriate comps and where in the
6 range you should be. And in the case of Pacific Drilling,
7 the company had virtually zero revenue. They had a large
8 fleet of ships, offshore ships that were not contracted, and
9 no one knew when those contracts would begin again. And so,
10 there is a massive amount of uncertainty and a big different
11 in opinion between the Debtor and the parties that were
12 willing to put in the new money. And that was compromised
13 with no objections, with all parties supported, based upon
14 achieving -- agreeing to a larger discount to plan equity
15 value.
16 I would also note, which is a really important
17 point, that in that case, as is the case in I'd say more
18 than 90 percent of these examples, if not 100. In every one
19 of these backstop examples, it is junior creditors providing
20 a backstop to repay senior creditors to defend their
21 position. In this case in Windstream, we do not have junior
22 creditors putting up the backstop to defend their position
23 to repay senior creditors. We have senior creditors putting
24 it back, basically round trip the dollars to repay
25 themselves. It's a very different set of facts.

1 Q And turning to Bristow Group, in that case, you -- the
2 parties ultimately agreed to a backstop fee of 10 percent.
3 And why is the backstop fee of 8 percent here unreasonable?
4 A So similarly to the point I just made, Bristow was a
5 fully consensual deal. We represented the committee. The
6 unsecured creditors were providing the backstop to pay off
7 the secured creditors. The secured creditors had put
8 forward a plan that basically left the unsecured creditors
9 with zero, so the unsecured creditors came forward with a
10 backstop in order to basically repay in full the secured
11 creditors. And so, for that reason, the benefit of that
12 backstop is flowing to all of the unsecured creditors;
13 again, very different from this case.
14 THE COURT: Can I interrupt you for a second? Did
15 all of the unsecured creditors put up the backstop or only
16 certain ones?
17 THE WITNESS: Only certain ones.
18 THE COURT: So they benefited, and the other
19 unsecured benefits simply by how?
20 THE WITNESS: So thank you. So in most of these
21 backstops, what you try to do -- I'm going to just confirm -
22 - what you try to do when you're representing a committee is
23 you try to make it as fair as possible to as many parties as
24 possible. And so, in the case of Bristow, we said, okay,
25 fine. And the direct allocation in that case was a

1 conversion of the DIP. The DIP converted to the equity;
2 that's why it was a direct allocation. So, again, each one
3 of these is specific. But as a committee, we insisted that
4 the rights offering be available to all parties who are
5 qualified investors, and we went to great lengths to make it
6 as available as possible.
7 In this case, you have the fact that the backstop
8 parties want as much of this backstop limit as they can get;
9 that's why they have a party tranche, that's why they fought
10 for 52 1/2 percent initially, and it's a very attractive
11 investment. It's a very attractive valuation if we can get
12 to that confirmation. That's the reason that this isn't as
13 risky, and as I said, there's a much lower likelihood that
14 this backstop gets hung because 73 percent's already spoken
15 for and 94 percent is, what I said earlier, I expect will be
16 spoken for. So there's very little risk on the hung -- on
17 the getting hung factor.
18 THE COURT: Has anyone in the junior class offered
19 to or sought to backstop a rights offering?
20 THE WITNESS: Not that I'm aware. Your Honor, the
21 nature -- but what's nature this mediation and negotiation
22 has been somewhat secretive. The committee has been kept in
23 the dark to a large extent. And so, this settlement --
24 settlement and the backstop are kind of announced and there
25 was never a market test that I'm aware of and there was

1 never an opportunity for parties to really negotiate.
2 THE COURT: Well, I'm assuming that people that
3 have this type of money can hire someone like you and do the
4 analysis and determine that it's attractive investment where
5 capital markets are open and doing business, right?
6 THE WITNESS: Yes, that's true, although the facts
7 and circumstances matter. In your case, you have both very
8 large creditors, Your Honor, who kind of have the capital
9 structure, quote/unquote, "locked up." And so, it would be
10 very difficult for a third party to come along and do a
11 backstop, because even if that backstop paid out all the
12 first liens, those large parties also own significant
13 amounts of second liens, and so, it would be very difficult.
14 So most investors would really not spend their time on it
15 because they would think the likelihood of success would be
16 low.
17 THE COURT: You mean of -- success of what, of the
18 ultimate investment or succeeding with the backstop?
19 THE WITNESS: Of being able to prevail with a
20 higher and better offer for a backstop that would be
21 confirmable. Or, otherwise, and what was reflected is the
22 fact that the first liens traded, and parties bought for the
23 sole intent to be able to participate in the backstop.
24 THE COURT: Okay.
25 BY MS. GREER:

1 Q Just a few more questions, Mr. Mendelsohn. Did you, in
2 forming your opinion about the unreasonableness of the
3 backstop, consider any aspect of the Debtors' plan of
4 reorganization?
5 A I'm sorry, Jocelyn. What was the last clause, did I
6 consider what?
7 Q Any aspects of the Debtors' plan of reorganization.
8 A Well, I think the question you might be asking me is
9 the nature of the backstop, as I said earlier, is different
10 from most, where all -- virtually all of these accounts are
11 junior creditors paying senior creditors. And in this case,
12 the money has just been -- basically being round tripped,
13 and the proceeds are basically just going from one pocket to
14 the next. It raises a question of, you know, why you need a
15 backstop. There are a lot of arguments we can get into as
16 to why or why not. But, again, it reduces, in my opinion,
17 it reduces the need to pay large backstop fees, and
18 certainly to pay large breakup fees.
19 MS. GREER: I have no further questions, Your
20 Honor.
21 THE COURT: Okay. All right. I'm assuming no re-
22 cross?
23 MR. FRENCH: That's correct, Your Honor.
24 THE COURT: Okay. So that concludes your
25 testimony, Mr. Mendelsohn. Thank you. You can sign out.

1 THE WITNESS: Thank you.
2 THE COURT: Okay. I don't think that the
3 objectors have any other witnesses, correct?
4 MS. GREER: We don't, Your Honor. Before we rest
5 our case, I just wanted to ensure that all of the joint
6 exhibits were now moved into evidence.
7 THE COURT: I think they are. I don't think there
8 are any in the exhibit books that are in dispute, right?
9 MS. GREER: I don't think so.
10 MR. FRENCH: There's one dispute which is in
11 dispute. Its reference is CX-1. It does not have a JX
12 designation, so if we move it on the JX exhibits, there will
13 be no issue.
14 THE COURT: Okay. Well, who wants the CX-1 in?
15 MS. GREER: So, Your Honor, that was originally a
16 DPC exhibit, and we agree with the Debtors that it was
17 subject to any -- their reservation of rights would be
18 hearsay objections and mediation privilege objections. I'm
19 not sure if they're now raising those.
20 MR. FRENCH: Your Honor, to the extent that the
21 documents being offered into evidence do assert mediation
22 privilege and with respect to hearsay, if the Court decides
23 it's necessary, would ask for a description of what purpose
24 they're using it for. I think that may inform the hearsay
25 objection. But the mediation privilege objection stands.

1 THE COURT: Let me take a look at it. Okay. All
2 right. It does sound like it's part of the negotiations
3 with the mediation. What's it being offered for?
4 MS. GREER: Yes, Your Honor. It's just being
5 offered to show the parties that were involved in the
6 negotiation of the equity splits and the, quote/unquote,
7 "equity opportunities." I would also note, to the extent
8 that Debtor's are raising a mediation objection, they
9 produced this to us without objection.
10 THE COURT: Well, I don't know if it was
11 inadvertent or not. But the -- look, I have testimony that
12 the mediation at times did not involve the creditors'
13 committee or the unsecured noteholders, and I believe that
14 includes the final version of the term sheet. So I don't --
15 I'd rather not have the details of that discussion, which is
16 really what CSX -- CX is for what it would include as part
17 of the record.
18 MS. GREER: Very well, Your Honor.
19 THE COURT: I think the mediation order is more
20 important than that, so I won't admit it on that basis. But
21 the other exhibits are all admitted, as if Mr. Mendelsohn's
22 declaration, the amended declaration.
23 MS. GREER: Thank you, Your Honor.
24 MR. HOWELL: Your Honor, Rush Howell from Kirkland
25 & Ellis. I'm not sure whether we had asked for Mr. Wells'

1 declaration to be admitted as well. I know we did with the
2 other two, but we should ask for that as well.
3 THE COURT: Okay. Is there any objection to that?
4 I don't think so.
5 MS. GREER: No, Your Honor.
6 THE COURT: Okay, so that's admitted as well. We
7 don't have a --
8 MS. GREER: Your Honor --
9 THE COURT: We don't have to have a separate
10 number for those declarations; they're just deemed admitted.
11 MS. GREER: Okay.
12 THE COURT: When they can be referred to, they can
13 be referred as the declaration.
14 MS. GREER: Your Honor, one other point I wanted
15 to raise. We previously agreed with the Debtors and the
16 other objector that any deposition cites in our papers would
17 be considered deposition designations and not part of the
18 record.
19 THE COURT: Okay. So you're not separately
20 introducing any deposition designations.
21 MS. GREER: Yes.
22 THE COURT: I'm looking at all three of you.
23 MS. GREER: Yes, Your Honor, with the exception of
24 one counter-designation that we raised this morning with the
25 Debtors and that they've agreed to consent to enter into the

1 record. I can -- we can provide the Court with that excerpt
2 of the transcript. It's an excerpt of the transcript of Mr.
3 Johannes Weber.
4 THE COURT: Okay. Well, why don't you email that?
5 Is that agreed, Mr. French?
6 MR. FRENCH: Yes, Your Honor.
7 THE COURT: Okay. So Ms. Greer, why don't you
8 email that to chambers, that excerpt. Or otherwise, it's
9 just what's been quoted in the declarations, as far as
10 deposition material, right?
11 MR. FRENCH: I know, Your Honor. Yeah. I think
12 technically, it was what was quoted in the Debtors' reply
13 and in the two objecting parties' objections.
14 THE COURT: Okay, not in the declarations, but in
15 your pleadings.
16 MS. GREER: Yes.
17 THE COURT: All right, that's fine.
18 MR. FRENCH: Yes, Your Honor.
19 THE COURT: That's fine. Okay, so I think the
20 factual record is closed, right? So it's 4:00. I'm happy
21 to hear oral argument. I think that makes more sense than
22 trying to do a disclosure statement because since I still
23 have to get through the changes. I'm happy to hear oral
24 argument on both motions. But we can't hear Mr. Weiland.
25 Are you on?

1 MR. WEILAND: Apologies, Your Honor. I unmuted
2 one, but not both of the systems. Can you hear me now?
3 THE COURT: Yes.
4 MR. WEILAND: Thank you, Your Honor. For the
5 record, this is Brad Weiland of Kirkland & Ellis, and anyone
6 on the phone. I think we're prepared to go forward on
7 closing arguments, Your Honor, if that would please the
8 Court. I think if you'd like, Your Honor, I'm prepared to
9 walk through arguments for both the settlement motion and
10 the backstop commitment motion back to back. We did take
11 those together, obviously through testimony today, and so
12 I'm happy to do that. Or if you'd prefer, we can take them
13 one at a time.
14 THE COURT: How did -- how did the objectors
15 prepare? Would you rather do them one at a time? I think
16 to me that makes more sense.
17 MR. WEILAND: One at a time.
18 THE COURT: Yeah.
19 MR. WEILAND: Okay. I'm happy to do it that way
20 too, Your Honor.
21 THE COURT: Okay.
22 MR. WEILAND: Okay. So first as to the Uniti
23 settlement, Your Honor, this has been a long process. Seven
24 months of litigation and negotiation and mediation and it's
25 already been a long day today, so I'll try to be brief in my

1 closing.

2 We've heard a lot of testimony, especially cross-

3 examination, but I'll start by quickly taking us back for

4 first principles. Under the Second Circuit decision in

5 Iridium in the Drexel Burnham Lambert cases, courts consider

6 seven factors in approving a settlement and consider whether

7 that settlement is above the lowest range of reasonableness

8 of potential outcomes.

9 These factors are all interrelated. The Court

10 knows them well. I won't take the time to walk through each

11 one. But I will say that all the factors here support

12 approval of the settlement.

13 In fact, as the evidence shows, in spite of the

14 objecting parties' attempts to distract from the core

15 factors, settlement before the Court today represents a

16 phenomenal return on our litigation investment, which Your

17 Honor knows can be a risky and speculative endeavor. The

18 Debtors and their professionals have worked tirelessly for

19 months to analyze and underlying the structure of the

20 prepetition Uniti arrangement and prosecute a bold case to

21 recharacterize that arrangement established years ago in

22 2015 with a meticulous complex design intended to withstand

23 attacks just like the litigation brought by the Debtors.

24 But we believed in our recharacterization claim

25 and our other claims. We believe they were compelling and

1 valuable, and so we went to work. We worked through months
2 of litigation, collaborating with our intervening creditors,
3 successfully defeating Uniti's motion to dismiss the
4 Complaint, and brining the adversary proceeding to the brink
5 of trial.
6 I just lost my Skype connection, but I think I --
7 THE COURT: No, we can still see you.
8 MR. WEILAND: -- I'm rejoined.
9 THE COURT: Okay.
10 MR. WEILAND: Okay, very good.
11 THE COURT: And hear you.
12 MR. WEILAND: We brought the adversary proceeding
13 to the brink of trial, Your Honor, through litigation. We
14 worked through months of mediation in parallel, led by Judge
15 Chapman and aided every step of the way by her generous
16 time, commitment and guidance, our efforts brought forth a
17 home run settlement for the estates here. To say this
18 settlement merely clears the bar of the lowest range of
19 reasonableness does it a disservice. It represents one of
20 the largest and most successful recharacterization outcomes
21 achieved in any bankruptcy court at any time.
22 Even though we've spent all day fighting over the
23 settlement, there really shouldn't be a controversy. We
24 have well over a billion dollars of benefits to ensure the
25 future competitiveness of the enterprise long after these

1 Chapter 11 cases have concluded. This is value these
2 Debtors had no ability to capture but for their and our
3 exhaustive work to investigate, develop and pursue these
4 claims.
5 For the objectors, though, the home run wasn't
6 enough. They wanted a grand slam, and that's, of course,
7 understandable. Even in this settlement, though enormously
8 beneficial to the Debtors and their businesses, is not
9 enough to put the objectors' constituents back in the money.
10 The only settlement that would do that is one that would
11 bankrupt Uniti and was unattainable, apart from an outright
12 victory in the litigation on both the recharacterization or
13 other claims and any follow-on disputes over the proper
14 remedies. But even a litigation win against Uniti at trial
15 could have brought the Debtors in ongoing litigation over
16 the future of the network and no clear path to emergence.
17 So no settlement would or could satisfy the
18 objectors' parochial interests. To them, it was and remains
19 trial or bust, or trial and bust if the Debtors were
20 unsuccessful; again, which could have left the Debtors'
21 prospects for a reorganization in doubt, but left some of
22 the objectors' constituents no worse off. That's their
23 prerogative; they don't have to be content with their lot in
24 these cases. But neither do we, the Debtors, have to be
25 compelled not to take a great deal when we have fought for

1 and succeeded in winning it.

2 Fortunate for the Debtors and their businesses,

3 the standard for approval of this settlement doesn't require

4 the equivalent of outright victory. It doesn't require us

5 to say, to the point Mr. Mendelsohn made in his testimony,

6 that it was not impossible to get any more. What we have

7 instead is a standard that requires a settlement to be above

8 the lowest rung in the range of reasonableness.

9 We have much better than that here. We have a

10 compelling settlement that offers over $1.2 billion in that

11 present value to the Debtors' estate. We have a settlement

12 that provides $1.75 billion in future investment paid for by

13 Uniti. We have a settlement that's supported by holders of

14 94 percent of first lien claims, holders of 39 percent of

15 unsecured notes claims, holders of 54 percent of second lien

16 claims, and holders of 72 percent of the Midwest secured

17 notes. This represents the vast majority of the Debtors'

18 prepetition funded debt. In total, that's approximately

19 $4.1 billion of approximately $5.5 billion in total

20 prepetition debt.

21 The objectors represent the remainder, or most of

22 it, but you can't argue with the fact that the overall

23 creditor consensus here is that this settlement is a good

24 deal for the estates and should be approved.

25 The objections don't disagree with the value that

1 the settlement provides; Mr. Mendelsohn confirmed that.
2 Rather, they seek to sow doubt regarding the process. They
3 attack the Debtors' deliberation process to argue that the
4 Debtors didn't adequately weigh the range of litigation
5 outcomes; not true. They mischaracterized negotiations
6 between the Debtors and Uniti regarding releases, and
7 between Elliott Management and Uniti regarding the stock
8 purchase, suggesting either or both weren't at arm's length;
9 again, not true.
10 They argue that the settlement shouldn't be
11 approved because the objectors don't support the settlement,
12 even though they're out of the money, and most other
13 creditors do.
14 I think the evidence has shown, Your Honor,
15 through the declarations and the testimony that you heard
16 live over the screen today that the Debtors' process in
17 evaluating and agreeing to the settlement was sound and took
18 into account the balancing of outcomes and the likelihood of
19 success in potential knockdown drag out litigation. This
20 goes back to the first two Iridium factors.
21 In addition to months of mediation regarding the
22 litigation and any potential settlement, Your Honor heard
23 from Mr. Thomas, Mr. Leone and Mr. Wells that the Debtors,
24 the Windstream Board of Directors, and the special committee
25 of the board actively analyzed and deliberated internally

1 over every aspect of the litigation and ultimate settlement,
2 meeting dozens of times.
3 The Debtors retained independent counsel. The
4 board retained separate independent counsel. The board
5 created a special committee to oversee the investigation and
6 prosecution and negotiation regarding the settlement of the
7 claims. After all of this analysis and evaluation, the
8 Windstream board ultimately approved the settlement
9 unanimously. The Debtors and PJT reviewed the settlement
10 terms, weighed the value it offered, specifically analyzing
11 the present value of the GCI program, the effect on renewal
12 rent, the cash consideration coming in against the
13 substantial risk posed by the adversary proceeding.
14 The creditors' committee, on the other hand,
15 engaged in a quote/unquote, "upside analysis" laid out in
16 Mr. Mendelsohn's testimony, which he admitted reflects just
17 one potential outcome without weighing the probabilities or
18 likelihood of success. It would require a moonshot victor
19 in the litigation, and that's not a risk weighting or
20 appropriate analysis to do in determining whether or not to
21 settle claims.
22 The objectors further argue that an independent
23 board should have been appointed for each of the Debtors'
24 200 plus subsidiaries. The indenture trustee's objection
25 says that the Debtors' advisors are conflicted because each

1 of the 200 plus subsidiaries were not independently
2 represented. That is ridiculous. It's not required by any
3 case law.
4 It ignores that there's no evidence, that there is
5 or should be a dispute among different debtors. It ignores
6 that holdings and services where the board and the special
7 committee sat, controlled and integrated Windstream
8 businesses comprised of all of the subsidiaries, and it
9 ignores that the settlement is specifically structured to
10 benefit the Debtors' overall business enterprise, including
11 all of the subsidiaries. A rising tide lifts all ships.
12 We just heard from Mr. Wells and Mr. Thomas today
13 that the subsidiaries are all receiving benefits under the
14 settlement because Windstream is an integrated enterprise
15 and all of the entities depend on one another.
16 Accordingly, Your Honor, we think it is absolutely
17 appropriate to say that the Debtors have weighed the balance
18 of the settlement against the litigation and the likelihood
19 of success and have gotten to a great result.
20 The objectors then focus on other process points.
21 They focus on the releases and the negotiation of those
22 releases between Windstream and Uniti. The releases here
23 are totally appropriate in connection with a comprehensive
24 settlement between the two parties. The Debtors are getting
25 over $1.2 billion for those releases. Uniti wouldn't have

1 done a deal otherwise, and it shouldn't be the case that the
2 Debtors can only settle claims if they retain the right to
3 sue Uniti or other related parties.
4 One thing to make clear that came up in witness
5 examination, Your Honor, lest there be any doubt given some
6 questions' attempts to I think confuse the point. If the
7 settlement does not close -- and that includes all of the
8 elements of the settlement, including Uniti's payments, then
9 there is no release of Uniti or of the related parties laid
10 out in the documents. If the Debtors are forced to
11 liquidate --
12 THE COURT: Can I interrupt you on that? I want
13 to make sure I understand that point because there are --
14 you used the word close, but then you also used the word all
15 payments. Under the settlement, many of those payments
16 don't happen for years. So which -- when do the releases
17 become effective; on the closing or when all of the
18 (crosstalk)?
19 MR. WEILAND: I spoke a little too loosely. They
20 become effective at closing. The closing requires Uniti's
21 upfront payments.
22 THE COURT: Okay.
23 MR. WEILAND: Including the approximately 250
24 million of asset purchase price.
25 THE COURT: So the remedy if Uniti doesn't perform

1 its other obligations is breach of contract remedy, as well
2 as an express right to set off rent payments.
3 MR. WEILAND: That's correct, Your Honor.
4 THE COURT: Okay.
5 MR. WEILAND: If we do get to a closing and then
6 run into any issues with performance on Uniti's side, we, of
7 course, have our remedies at law. We also have, under the
8 contract, an express offset provision.
9 THE COURT: Okay.
10 MR. WEILAND: Your Honor, Mr. Shore in his
11 questioning pointed out that if the Debtors were forced to
12 liquidate, Uniti would not be paying its, you know,
13 settlement payments in that scenario; that is true. As
14 unlikely as we think that is, we aren't seeking to approve a
15 settlement to proceed to confirmation because we don't think
16 we can close on those transactions. But if that were the
17 case, no, we wouldn't pull in the settlement value for
18 Uniti, but nor would we give a release. And in an actual
19 liquidation, again, as unlikely as we think that is, we also
20 wouldn't go on paying rent or any other obligations arising
21 from our operations. So we think that the value is real and
22 the product of true arm's length bargaining for those
23 releases.
24 The objectors, especially in their papers, Your
25 Honor, focused on the Little Rock meeting between Elliott

1 Management and Uniti involving the overall settlement, as
2 well as Elliott's purchase of Uniti's equity. But in
3 focusing on that, they ignore the seven months of mediation
4 that bookended that meeting. There's no evidence that the
5 Little Rock meeting was any less than an arm's length
6 negotiation between two parties with Direct, a divergent
7 interest in the settlement outcome.
8 But second, that's beyond the point and irrelevant
9 to the ultimate settlement obtained, which is different from
10 what Elliott and Uniti discussed in Little Rock at that
11 meeting. And the argument that the Debtors didn't have a
12 role in negotiating the settlement is false, totally
13 undercut by the mediation and the final settlement, which
14 was agreed not just by Elliott Management and Uniti, but
15 also by the Debtors and many other parties.
16 The right to acquire the Uniti stock never
17 belonged to the Debtors, and the Debtors need cash, not
18 Uniti equity, to satisfy the obligations they must satisfy
19 to get out of Chapter 11. The Court has Mr. Leone's and Mr.
20 Thomas' testimony on that point.
21 A couple of other points from today, Your Honor.
22 The objectors argue that certain Windstream board members
23 and officers could not be independent because they were in
24 those roles at the time of the spinoff and received Uniti
25 stock. But they have no evidence that the history or the

1 Uniti stock holdings left over from the original spin
2 colored the board's analysis or deliberation.
3 The efforts to sow doubt on that front with Mr.
4 Thomas and Mr. Wells asking about bankrupting Uniti really
5 went nowhere, ignore the fact that the board determined to
6 sue Uniti and ignore the fact that we pursued our adversary
7 complaint to the eve of trial when the settlement was
8 finally agreed.
9 The objectors raise a few other arguments not
10 directly tied to the Iridium factors, Your Honor, but I'll
11 touch on those briefly. The motion is ripe for adjudication
12 now, not at confirmation. The settlement is independent of
13 the plan, can be approved whether or not the plan is
14 confirmed. Of course, under the plan support agreement, we
15 are obligated to obtain approval or risk missing a milestone
16 that could give rise to a termination event no later than
17 May 8th, tomorrow, which was amended to accommodate this
18 hearing. But it's critical to the ongoing confirmation
19 efforts that we do get the settlement approved, but there's
20 no reason to hold up that approval pending confirmation.
21 The settlement is not an impermissible sub rosa
22 plan, as the creditors' committee argued. They say that
23 because of Uniti's sale of equity to the backstop parties
24 that dilutes value outside of the Debtors' estates. As we
25 have said and reiterated and as the evidence has shown,

1 that's not estate property. We don't and never had a right
2 to obtain or distribute that equity. It's not really our
3 concern how Uniti funds the consideration; just that Uniti
4 does, in fact, fund.
5 And that and other plan objections are reserved
6 pending the confirmation hearing, so I don't think that the
7 plan-related argument offer any obstacle that the Court
8 should consider in evaluating whether or not to approve the
9 settlement today.
10 So, Your Honor, that is my specific response to
11 certain objections. I'll say generally again, we are proud
12 of what we've accomplished in getting to this settlement.
13 We think it represents tremendous value for the estates and
14 a great outcome on what was inherently risky in pursuing
15 this litigation, and we respectfully would ask the Court to
16 approve this today.
17 THE COURT: I want to go back to the timing point
18 for a second. Are you aware of the projected timing for
19 fixing the reno amounts under the ILEC and CLEC leases?
20 MR. WEILAND: Your Honor, we hope and expect to
21 have that accomplished by July. There is an ongoing process
22 right now to complete the appraisals to allocate the $650
23 million of rent between the new -- the new leases, the two
24 leases instead of the one. We hope that that is no --
25 certainly no later than July. But that process is ongoing,

1 and we hope that it proceeds as quickly as possible.
2 THE COURT: Okay. Are there -- okay, that's fine.
3 All right. I'm happy to hear from the objectors. I'm not
4 sure which one of you want to go first.
5 MR. WEILAND: Thank you, Your Honor. I cede the
6 screen.
7 THE COURT: Okay.
8 MR. VONNEGUT: This is Eli Vonnegut at Davis Polk
9 on behalf of Uniti. May I be heard briefly?
10 THE COURT: Oh, that's right. I should -- I
11 forgot that there are people on the phone and not on Skype.
12 I'm happy to hear all of the parties who are on the phone
13 who are in support of the settlement first, and then we
14 should go to the objectors.
15 MR. VONNEGUT: Thank you, Your Honor. I am logged
16 in to Skype. Can you see me?
17 THE COURT: Now I can, yes.
18 MR. VONNEGUT: Okay, great. Thank you very much,
19 Your Honor. Thank you for accommodating us today with all
20 of our technological demands and challenges and for your
21 time generally in this proceeding. I'll be very brief in my
22 remarks, Your Honor, because I think Mr. Weiland ably
23 covered all of the core points that are at issue today.
24 Before I do that, I would like to thank Judge
25 Chapman once again, without whom I'm not sure we would have

1 made it here today. This was a process that was exhausting,
2 and her creativity and tireless energy, including both well
3 past midnight and some vacation, were really invaluable to
4 the process.
5 Your Honor, analysis of the settlement boils down
6 to a very simple question, as Your Honor is well aware: Does
7 the deal on the table provide good value to the Debtor when
8 compared to the risks and rewards of litigating? Like the
9 Debtor, Uniti believes that it's clear beyond question that
10 the benefits of this settlement in particular far outweigh
11 any expected value from continued litigation.
12 Uniti has committed to pay hundreds of millions of
13 dollars in guaranteed cash settlement payments to
14 Windstream. More importantly, Uniti is offering Windstream
15 the foundation of a plan to compete and to thrive in the
16 future.
17 The principal business challenge facing Windstream
18 right now is the need for substantial business -- for
19 substantial capital investment in the network, and that's a
20 point that you've heard clearly from many constituents in
21 this case. Under the current master lease, Windstream, if
22 it wanted to improve the network, would have to fund 100
23 percent of the cost and would likely have a very difficult
24 time raising that money, if it was able to do so at all.
25 Under the settlement, Uniti funds the entire $1.75

1 billion cost of a full upgrade of the network to fiber over
2 the next 10 years, and I think the importance of that to
3 Windstream's ongoing business really can't be overstated.
4 This is paired with a suite of value maximizing changes to
5 the master lease that will increase Windstream's strategic
6 and financial flexibility going forward and its ability to
7 generate value for its stakeholders. And as I've alluded to
8 in the past, what's unique about this settlement is that
9 value is value that only Uniti is in a position to unlock
10 for the Debtors.
11 The Debtors' investment banker pegs the aggregate
12 value of the settlement at roughly 1.25 billion. I think
13 it's worth noting that we actually think that substantially
14 understates the true value of the settlement, but for
15 today's purposes, we'll leave that alone.
16 So on the table, you have $1.25 billion at least
17 of guaranteed value and the foundation for a plan to get out
18 of bankruptcy quickly and get back to doing what this
19 company should be doing, which is serving its customers and
20 generating value for its stakeholders.
21 The principal argument that we've heard from the
22 objectors is very simple: If they won the litigation, they
23 might get more. But that, of course, leaves out the second
24 critical half of that statement, which is, if they lost the
25 litigation, they might get nothing.

1 I will touch on the merits only briefly because
2 they've been covered exhaustively to date. We start with
3 the simple premise that a purported lease is deemed -- is
4 presumed to be a true lease, unless and until it is shown to
5 be otherwise. There is a strong presumption of true lease
6 status that can only be overcome with substantial evidence
7 that the parties intended to impose obligations and infer
8 rights significantly different from those arising in an
9 ordinary landlord-tenant relationship.
10 This burden would have been incredibly challenging
11 for Windstream to overcome. This lease bears none of the
12 classic hallmarks of a disguised financing. There is no
13 bargain repurchase option, nothing like that. Against a
14 mountain of evidence, including every statement ever made by
15 Windstream prior to and even well into this bankruptcy,
16 Windstream would have had to rely almost exclusively on an
17 expert witness whose analysis has been questioned and
18 rejected as unreliable by multiple courts and regulatory
19 bodies in the past. It is very understandable that the
20 company would not want to take the gamble and bet the
21 survival of the enterprise on that litigation.
22 Also importantly, even if Windstream were to
23 prevail on the core question regarding the remaining useful
24 life of the network, that would really only be the first
25 inning of this particular litigation. To get value out of

1 the recharacterization claim, the Debtors would have to not
2 just win the core factual dispute, but also persuade the
3 Court to adopt a very novel remedy that had never been
4 imposed by a court before. Even after that, Windstream
5 would have to defeat Unit's counterclaims, prevail on
6 appeal, all while the value of the business is eaten away
7 and dragged down by the extensive hard and soft costs of
8 this very, very costly proceeding.
9 I won't go on and on. I think Your Honor gets the
10 point. As you have noted many times, this litigation
11 carries risks for both sides. The objectors' fantasies of
12 swift triumphant windfall profits are just that; they're
13 fantasies. The Debtors fought incredibly hard in this
14 litigation and in the settlement negotiations -- I've got
15 the scars to prove it -- and they ultimately made the very
16 responsible choice to take certainty of value over gambling
17 with the survival of the company. That is exactly what
18 debtors in bankruptcy are supposed to do.
19 The specific points raised by the objectors, Your
20 Honor, regarding the arm's length nature of the bargaining,
21 I was going to address, but I think I will not because I
22 think they were very capably addressed by Mr. Weiland.
23 What I will say in conclusion, Your Honor, is that
24 I've mentioned before that in this case, Uniti is much more
25 than a simple litigation adversary. Uniti is Windstream's

1 largest stakeholder and its long-term business partner, and
2 that is how we approached the settlement negotiations.
3 As you may have gleaned from the long history of
4 this particular adversary proceeding, we believe very, very
5 strongly in our position in the litigation and that we would
6 have prevailed at trial, but we do not want the relationship
7 between these two companies to devolve into endless
8 litigation. We want Windstream to emerge from this
9 bankruptcy and to thrive, and that is the goal that guided
10 the design of this settlement.
11 Beyond the substantial expected financial value of
12 the consideration under this settlement, what this deal does
13 is gives Windstream a way to get back to business, to
14 serving customers, to building value for their stakeholders,
15 not burning that value stuck in bankruptcy indefinitely.
16 Unless Your Honor has any questions, I have
17 nothing further.
18 THE COURT: Okay, that's fine. Thank you.
19 MR. VONNEGUT: Thank you, Your Honor.
20 THE COURT: Does anyone else want to say anything
21 in respect of the -- in support of the settlement? I have
22 pleadings of two parties-in-interest in the case, the 1L --
23 actually, three -- 1L lenders, Midwest lenders, and Elliott.
24 I'm happy to just rely on those pleadings if you don't want
25 to speak.

1 MR. LOVETT: Your Honor, it's Sam Lovett of Paul,
2 Weiss, Rifkind, Wharton & Garrison, on behalf of the first
3 lien ad hoc group. Can you hear me?
4 THE COURT: Yes.
5 MR. LOVETT: Thank you. Very, very short. I
6 also just want to thank Judge Chapman for putting up with us
7 for seven months to allow us to get to this spot. I just
8 want to reiterate what Mr. Vonnegut and Mr. Weiland said,
9 that a win in litigation, even assuming we could get there,
10 doesn't necessarily mean it's a win for even the first lien
11 creditors, much less then the unsecured creditors here.
12 As we said in our pleadings, we're recovering,
13 pursuant to the Debtors' PJT's analysis, 67 cents on the
14 dollar. Clearly, as the secured creditors here, if we
15 believe that we could receive more than that in through
16 litigation, we would not be on board with the settlement.
17 We are fully on board with the settlement. We went through
18 this with multiple months with Judge Chapman. We believe
19 this is the best outcome for the Debtors and their estates.
20 And it's undisputed that there's $1.2 billion of value
21 coming into the estate. There's no doubt in my mind that's
22 by far higher than the lowest range of reasonableness
23 required.
24 So we'd like to thank you and especially Judge
25 Chapman for the many months.

1 THE COURT: Okay, very well.
2 MR. SHORE: Your Honor, this is Chris Shore. I
3 did not want to interrupt the presentation there, but I
4 would object to the reference to what the first lien
5 creditors are getting; that is not made a part of this
6 record. That's -- I think the reference is to the
7 liquidation analysis and the valuation analysis in the
8 disclosure statement, which are a part of this record.
9 THE COURT: I don't think it's -- well, I agree
10 with you that it's not been introduced into evidence in this
11 record. I disagree with you that it's part of the
12 liquidation analysis. It's stated as part of the plan in
13 that plan recovery analysis. But as a statement of at least
14 what the first liens think they're getting from their
15 counsel, I will exclude it, but I understand that no one has
16 raised the valuation issue.
17 MR. SHORE: Thank you, Your Honor.
18 THE COURT: Or the overall TEB of this set of
19 debtors. So I don't know if there's anyone from Elliott or
20 the Midwest group who wants to say anything. Okay. Make
21 sure you're not -- I think you may be muted, sir.
22 MR. WOFFORD: Forgive me. Turned one mute on and
23 one mute off. Keith Wofford from Ropes & Gray on behalf of
24 Elliott Investment Management.
25 Your Honor, as you know, we've submitted papers

1 and we support the settlement. And we're going to primarily
2 rest upon those papers, but there are only two points that
3 we would like to emphasize. First, Elliott, more than any
4 other party in this virtual courtroom, would like the
5 settlement to be larger. But despite many months of effort,
6 this was the deal on the table at the eve of trial after
7 months of negotiation. The Debtors fiduciary has accepted
8 this deal and Elliott supports that decision.
9 As an aside, I have to note that the official
10 committee's notion of collusion between Uniti and Elliott is
11 as fanciful as it is, frankly, humorous. I think anybody's
12 who's familiar with the history here knows better than to
13 think that that's the case.
14 Second, you know, with respect to the letter of
15 intent, the relevant facts surrounding that letter are
16 undisputed; again, they've been covered in the papers and in
17 the testimony. And the settlement documents, which are the
18 definitive documents here, speak for themselves.
19 So for the reasons stated by supporting counsel,
20 from the Debtors, and from Paul Weiss on behalf of the first
21 lien ad hoc group, as well as in our own papers, Your Honor,
22 we do support the approval of the 9019 motion and the
23 settlement.
24 THE COURT: Okay. Anyone else before I hear from
25 the objectors? Okay, very well. So I don't know if Mr.

1 Shore, if you want to go first or Mr. Marinuzzi.
2 MR. SHORE: I thought Mr. Marinuzzi was going to
3 go first.
4 THE COURT: Okay. We have to get him back on the
5 screen. There he is, but you're on mute still. He's still
6 on mute. You have to unmute the Court Solutions too.
7 MR. MARINUZZI: Okay. Now I should be unmuted,
8 Your Honor.
9 THE COURT: Yeah, now I can hear you.
10 MR. MARINUZZI: Okay, great. All right, I'm sorry
11 for prolonging this with my technological incompetence.
12 THE COURT: You know, that's all right. Sometimes
13 it's hard to do two things at once.
14 MR. MARINUZZI: Sometimes it's hard to do one
15 thing. Your Honor, Lorenzo Marinuzzi from Morrison &
16 Foerster on behalf of the Official Committee of Unsecured
17 Creditors. I want to join the chorus of thank yous to the
18 Court and to Judge Chapman. This is not an easy hearing to
19 conduct, and the mediation certainly was very difficult and
20 time consuming for Judge Chapman and the participants.
21 I do want to start off by briefly reminding the
22 Court of the UCC's role in this case because I think it will
23 be helpful for the Court to understand the perspective that
24 the UCC has on this settlement.
25 When this case began, the UCC was of the view that

1 general unsecured creditors were in the money. And the
2 reason this case came to Your Honor's docket was because the
3 Debtors lost the litigation against Aurelius. But at first
4 day hearing, Debtors' counsel told the Court this is a very
5 successful business with a very, very strong operation that
6 received an adverse judgment and resulted in a liquidity
7 crunch. So the expectation was not that the committee would
8 be on the -- out of the money creditors, but, in fact, the
9 unsecureds (indiscernible).
10 Now, the UCC was also of the view from its
11 formation that the most important issue in the case is to
12 address the Debtors' claims under the Uniti arrangement.
13 And the UCC conducted from the beginning an investigation,
14 an expensive investigation into the possible claims that
15 could be asserted by the Debtors' estate against Uniti under
16 the master lease. And the UCC urged the Debtors to pursue
17 those claims and pursue them quickly because, as Your Honor
18 knows, every month that went by, there was another $54
19 million of rent and cash that left the Debtors' estate.
20 Now, the UCC was also very careful about
21 protecting the rights of the committee with respect to the
22 Uniti claims. And we negotiated in the final DIP order,
23 which is Docket #376 and Footnote 9, a provision that
24 reserves all rights and remedies under applicable law, if
25 any, with respect to the execution and performance of the

1 master lease and the transactions giving rise to it, which
2 is the binders and Uniti spinoff.
3 And that Footnote goes on to say that nothing in
4 this final order shall impact or prejudice the rights of any
5 such party, which includes the committee, to benefit from
6 any adjudication or settlement of any claims arising from,
7 asserted, or that could have been asserted on account of the
8 Uniti spinoff, and then it references the challenge
9 paragraph of the order. So we were very careful to make
10 sure that claims associated with the spinoff were preserved
11 and all rights were reserved on those claims.
12 It was not until the UCC had filed its own
13 standing motion on July 12th, 2019 -- and that's Docket #786
14 -- seeking standing to file a Complaint against Uniti that
15 the Debtors finally commenced their litigation after that.
16 Now, the UCC's motion sought standing to bring
17 recharacterization claims, as well as avoidance action and
18 claims for both actual and constructive form arising out of
19 the 2015 spinoff itself. The Debtors' Complaint did not go
20 as far back on avoidance actions.
21 The UCC, along with other intervening parties,
22 joined this intervening claim that's in that litigation. As
23 part of our standing motion in July, we also made a request
24 for the appointment of a mediator. We sought and supported
25 mediation because we viewed the claims that were being

1 settled in the mediation as unencumbered assets, and as the
2 fiduciary for unsecured creditors, we expected to play a
3 role in the ultimate settlement or prosecution of those
4 claims.
5 It turns out the UCC played no role in those
6 discussions, and the result was a plan support agreement and
7 plan that pays the general unsecured creditors with the
8 guarantor subsidiaries nothing. So $575 million of
9 unsecured notes, not held by the consenting creditors, and
10 somewhere between $40 and $60 million in trade claims are
11 getting nothing from those Debtor estates.
12 It's easy for the Debtors, the first liens,
13 Elliott, and anybody else that characterized the UCC as
14 representing creditors who were out of the money looking for
15 a cause to disrupt the settlement and fight for litigation.
16 It makes it easier for the Court to disregard our views.
17 We're annoying, we're standing in the way of what everybody
18 else wants the Court to approve, and we're wasting the
19 Court's time.
20 I want to count the disparaging comments in the
21 replies and measure that against the number of times I saw
22 hard core negotiations in the reply papers, but I ran out of
23 time. But the view that unsecured creditors do not get to
24 share in these proceeds of incremental value of the
25 settlement, this is something that's really wrong. We

1 fundamentally believe that unsecured creditors have a right
2 to share in the settlement proceeds.
3 We do not believe they are liened up by
4 prepetition liens, nor do we believe that the DIP lenders
5 can look for them to recover on their claims. And so, we
6 have every right to be heard about what we think about the
7 settlement and whether it's appropriate, and we will have
8 every right to be heard at confirmation about the allocation
9 of value and whether it's fairly being allocated to settle
10 unsecured claims.
11 And an allocation, I think we're in agreement, all
12 right to reserve. And Your Honor is not addressing anything
13 by -- if the Court were to approve this order, this motion
14 that addresses the allocation value. We'll have that fight
15 at confirmation if we have to.
16 Now, as for the settlement itself. It seems to be
17 that we're operating under this notion by the movants and
18 the parties supporting the settlement that Your Honor just
19 has to look to the dollar amount; that if the dollar amount
20 is within the range of reasonableness, then that's it and
21 nothing else matters, but that's not what Iridium says.
22 There's a number of factors in Iridium that the
23 Court has to apply. Now the Debtors bear the burden of
24 demonstrating that the settlement is fair and reasonable;
25 that's not in dispute. It's not up to us, as objecting

1 parties, to show that it was not a product of good faith
2 arm's length negotiations or that the settlement was bad;
3 it's the Debtors' burden. And it's up to the Debtors to
4 demonstrate that they've met the Iridium standards, and we
5 don't think they've met that standard.
6 I'm going to focus on primarily three aspects of
7 this settlement. Mr. Shore, I'm sure, will cover things
8 that I don't hit. And the three things are: the notion that
9 the settlement is widely supported by creditors; two, the
10 settlement mechanics and the problems with those mechanics;
11 and three, the process by which the settlement was achieved
12 and approved.
13 So support, Your Honor. We keep reading over and
14 over and we heard again that the settlement has widespread
15 support. But who's supporting it? Elliott? Okay. They
16 cut their deal; it makes sense. Seventy-two percent of the
17 holdings of Midwest notes; of course, they're getting paid
18 in full. The first liens; yes, they're getting 90 percent
19 of the value plus that's coming into the estate.
20 But then we keep hearing and reading about holders
21 of 54 percent second lien notes and 39 percent of the
22 unsecured notes being in support of the deal. It's been a
23 long time since I've seen pure economic investors support a
24 zero recovery. I understand sometimes vendors, sometimes
25 employees will say I'll take zero recovery, but I have an

1 ongoing relationship and I have ongoing employment, it makes
2 sense.
3 But the noteholders getting zero, there's more
4 there. And what we heard today during the testimony is that
5 the ad hoc -- and if you look at the 2019 disclosures that
6 are part of the record, Elliott earlier this year held $444
7 million of the $1.2 billion in unsecured notes. So my math,
8 that's 37 percent; they're pretty close to the 39 that are
9 supporting it. They also held a similar percentage of the
10 second lien notes.
11 And so, the reality, Your Honor, is the support
12 from the percentage of unsecured notes and second lien notes
13 that the Debtors keep touting, it is not because they think
14 the distributions that they're receiving in that capacity
15 are good or that the settlement's fair. They're responding
16 as holders of first lien notes and saying they'd like the
17 deal that they struck. And so, I don't view these as
18 economic investors telling you what they think in that
19 capacity; these are truly blocking positions, in my opinion.
20 So to say that there's overwhelming support from the
21 unsecured noteholders and the second liens to think, it's
22 just misleading.
23 The second thing I want to focus on is the
24 structure of the settlement. The settlement goes hand in
25 hand with the plan. The plan support agreement dictates the

1 terms of the plan that the Debtors are going to ask the
2 Court to approve. The Debtors acknowledge -- Mr. Leone
3 acknowledged, Mr. Thomas acknowledged -- they're linked.
4 They're linked, they're together.
5 And so, you have to think about what happens if
6 you approve the settlement, but you don't approve the plan.
7 I know Your Honor asked that question. So we hear there's a
8 $1.224 billion -- $1,224,000,000 in net value that the
9 Debtors are ascribing to this settlement; it's a big number.
10 But all they are likely to receive by confirmation
11 -- and Your Honor hit on this point -- is the $285 million
12 upfront cash payment, which goes to buy $294 million worth
13 of dark fiber. The balance of the consideration is paid out
14 over time to the reorganized company.
15 But what happens if Your Honor denies confirmation
16 of the plan? What happens if Your Honor agrees with the UCC
17 and the unsecured creditors that the value from this
18 settlement needs to be allocated to pay off general
19 unsecured creditors, and that the proposed recovery under
20 the plan makes the plan unconfirmable. What happens?
21 What happens is that the settlement is effective,
22 the releases are effective, and then you have a situation
23 where if the plan doesn't confirmed, the backstop parties
24 and the PSA parties could terminate the plan. And so, Uniti
25 is released, the companies maybe has to pay a $60 million

1 breakup fee for terminating the rights offering. Mr. Leone
2 testified today that if they have to pay that $60 million,
3 who knows where the liquidity comes from (crosstalk) --
4 THE COURT: That's not -- that's the next motion.
5 MR. MARINUZZI: Fair, Your Honor, fair. So, Your
6 Honor, we're standing up for a situation where if the Court
7 approves the 9019 settlement today and they close that
8 settlement, $285 million comes in, the plan gets
9 sidetracked, that somehow we'll have to put the pieces back
10 together.
11 Now maybe the consenting creditors and the Debtors
12 think that's great leverage to have over the Court at
13 confirmation, knowing what the ramifications of not
14 approving the plan as filed would be. We think that's just
15 the risk that's not worth taking.
16 THE COURT: But I don't --
17 MR. MARINUZZI: But --
18 THE COURT: I guess if the settlement on its
19 merits is worthwhile, aren't you both basically game playing
20 at that point? I don't understand. I really don't
21 understand this point. I understand your backstop point. I
22 don't understand this point at all. It just means that you
23 have more leverage to get more money if I conclude that
24 you're right, although I see no evidence from either side on
25 this issue as to whether the liens attach to the settlement

1 proceeds or not.
2 So you're asking me to assume an issue where I
3 have absolutely no briefing on it one way or the other as
4 far as the liens are concerned, and say that the outcome of
5 that issue somehow should prevent a settlement from being
6 approved because maybe someone might have more leverage in
7 negotiations over a plan that's to come. I don't follow it.
8 MR. MARINUZZI: Well, Your Honor, I think Your
9 Honor hit it. It's a question of the leverage that exists
10 at that point over the process. Because Your Honor has
11 approved the settlement and we're stuck with a plan where
12 our argument, and everybody knows what our arguments are
13 going to be, is that we are entitled to such (crosstalk).
14 THE COURT: I don't -- I don't have -- no one is
15 going to be any argument as to what your liens -- what the
16 liens attach to or don't attach to. So it would seem to me
17 if I rule in your favor, you would have tremendous leverage
18 because the people that actually have more money in the deal
19 then see more risk.
20 MR. MARINUZZI: That's fair, Your Honor. I
21 appreciate that position and that point of view. I think
22 most of this, I want to explain why it is the committee is
23 coming out against the settlement because we view that risk
24 and can see the leverage going both ways.
25 Now process, I think only the failure of process

1 here. We believe the process of how the settlement was
2 negotiated and how it was approved were both flawed. Now,
3 the company appointed a special committee consisting of four
4 board members, and we heard from one of them today. They
5 were responsible for investigating the Uniti claims. The
6 purpose of the special committee, and we had testimony about
7 the charter was, in fact, to investigate the Uniti claims,
8 so that's what the special committee was empowered and
9 tasked to do.
10 Now, we heard from Mr. Wells today that two of the
11 four members of the special committee held shares in Uniti.
12 So they were charged with investigating claims where they
13 held stock in the target entity. At least three of the
14 members of the full board hold entity in Uniti today, and
15 some of the current board members were members of the board
16 at the time of 2015 spinoff approve that transaction -- I
17 lost count as Mr. Shore was examining Mr. Wells about how
18 many -- and many of their senior management were part of the
19 2015 transaction approval process and part of the Uniti
20 approval process.
21 Now, the Debtors take the view that it's okay for
22 board members to have stock in Uniti because the records
23 show that some, but not all, Windstream board members held
24 relatively small amounts of Uniti stock, and the Debtors say
25 there's no evidence that any member of the board acted with

1 anything but the best interest of the estate.
2 Now, Your Honor, I don't have any evidence of
3 wrongdoing. I am not alleging wrongdoing, so I don't want
4 to be misquoted to saying that somehow people were operating
5 nefariously. My point is that the Debtors are the
6 fiduciaries; they're in the room. Your Honor's not in the
7 room, we're not in the room. And so, it's fair for
8 unsecured creditors who are being told the settlement
9 allocates nothing to you to know that unbiased --
10 THE COURT: They're not being told that. That's
11 not being decided today.
12 MR. MARINUZZI: Your Honor, that's fair. But the
13 plan they're proposing promises zero, unless we vote to
14 accept, in which case, it's an eighth of a cent. I'll move
15 on.
16 THE COURT: But as far as the process point and
17 the fact that I think it's six of nine of the board members
18 were on the board in 2015 when the Uniti transaction
19 occurred and at least some of them, perhaps all of them have
20 Uniti stock, this isn't governed by the, you know, the
21 Delaware law corporate governance standards because there's
22 notice and a hearing with opportunity to object. And when
23 there is an objection, the Court pays a great deal of
24 attention to the objection and ultimately makes its own
25 decision.

1 But even under the Delaware corporate law standard
2 where there is a potential interest, it doesn't mean that
3 you decide that the transaction is in bad faith; you just
4 apply a higher standard in reviewing it, and I think that's
5 where the lack of any evidence of an actual conflict is
6 important. And under the entire fairness approach, I don't
7 think I've seen any evidence that anyone was influenced by a
8 desire to feather their Uniti nest or guided by the
9 paramount importance to them of getting a release, which
10 compared to their current role, I think, and the testimony
11 shook out, was just not anywhere close to what was driving
12 their decision making.
13 MR. MARINUZZI: Your Honor, I appreciate Your
14 Honor's point. I wanted to note it. As I said and I
15 acknowledge, I do not have any evidence of wrongdoing.
16 THE COURT: Okay.
17 MR. MARINUZZI: The next process point is the
18 Elliott meeting. So mediation began last summer, and no
19 deal was reached before Elliott flew to Little Rock on
20 January 31st to have a meeting, the Little Rock meeting.
21 But the Debtors took no part in negotiating the Uniti equity
22 component, and those discussions took place between Elliott
23 and Uniti and Mr. Weber acknowledged that, Mr. Leone
24 acknowledge that; that's not a mystery.
25 Why did Elliott fly to Little Rock? According to

1 their 30(b)(6) witness, Elliott requested the meeting to
2 discuss the settlement issues between Uniti and Windstream,
3 and also to discuss some issues unique to Elliott and Uniti;
4 that's from Weber's examiner.
5 Now let's put this into context. At that time,
6 Uniti was operating under a forbearance agreement with its
7 existing lenders. Elliott acquired a blocking position in
8 Uniti's debt and threatened to block the continuation of
9 that forbearance period. They used that blocking position
10 to try to extract value from Uniti in the form of the
11 special equity purchase. And that purchase is ultimately
12 documented in the LOI, letter of intent; that's Joint
13 Exhibit 41 and there's a number of them in there.
14 Now Uniti's witness, Mark Wallace, testified about
15 the rationale for why Uniti entered into the LOI with
16 Elliott. Among other things, Mr. Wallace described the LOI
17 as a means to get a waiver of its loan default because, to
18 the extent Elliot, I'm quoting, has a blocking position on
19 the waiver, then they would be able to influence the outcome
20 of the waiver process and the costs, which would be a drain
21 on our financial resources, following along that that would
22 reduce the amount available to pay Windstream.
23 So Uniti agreed at that January 31st meeting to
24 sell Elliott 38 million shares of Uniti stock at $6.33. But
25 what was interesting, and I didn't see it anywhere in the

1 replies, is that Uniti refinanced their debt the Friday
2 after that January 31st meeting, and so they no longer
3 needed a waiver from Uniti. And that's from Mr. Weber's
4 testimony, the 30(b)(6) witness, where he was asked what
5 happened to the going concern waiver; was it ever executed?
6 He said, no, it was not. Well, why not? Uniti did a secure
7 bond yield that made the waiver unnecessary. And when did
8 that happen? And the testimony was, it happened a week --
9 the Friday after that meeting.
10 THE COURT: Is this part of what was agreed to get
11 into the record from the deposition?
12 MR. MARINUZZI: Yes, Your Honor. This was the
13 transcript that Miss Greer advised the Court the Debtors had
14 agreed to allow us to put in, and it's 131, 7 to 15 of Mr.
15 Weber's deposition.
16 So Uniti agreed at the Little Rock meeting to sell
17 38 million shares to Elliott at $6.33 per share. A week
18 later, Elliott said Uniti no longer needed to pay Elliott
19 for a waiver. Nonetheless, between January 31st and March
20 2nd, the day of these letters of intent, Elliott sold out 18
21 million of the shares in Uniti to the consenting creditor in
22 exchange for support of the Windstream settlement.
23 So Elliott itself in its reply explains all the
24 benefits it provided to Uniti through the LOI. Paragraph 9
25 of their reply said that in exchange for the LOI, Elliott

1 agreed to not take activist efforts against Uniti. So, with
2 that agreement to sell the stock to Elliott under Elliott's
3 terms, Uniti would not have had the protection with the
4 standstill against Elliott, a noted activist investor.
5 Elliott goes on, in its reply, to say that Elliott agreed to
6 enter into waiver of Uniti's impending default in exchange
7 for the agreement community stock. But Uniti no longer
8 needed the waiver a week after that meeting. So, Uniti was
9 lucky that Elliott made the effort to fly to Little Rock and
10 try to help Uniti. But our view is, the side deal was
11 intended to result in Elliott obtaining enhanced value
12 because it would lock in the upside for the equity. And
13 (indiscernible) testified there was an expectation that
14 Uniti shares could increase upon a settlement and Elliott's
15 view was, again from the testimony, more likely than not,
16 the Uniti stock price could go up and down on the day the
17 settlement was announced. So, we're supposed to believe
18 that Elliott and the other consenting Creditors agreed to
19 purchase the stock just to help Elliott get financing. Our
20 view is --
21 THE COURT: I'm sorry, you mean Uniti get
22 financing, not Elliott.
23 MR. MARINUZZI: Uniti -- I'm sorry, that Elliott
24 and the consenting Creditors bought the stock because Uniti
25 needed financing. Our position is that this is Uniti giving

1 the consenting Creditors substantial value for them to
2 approve a Settlement Agreement with Windstream, so it --
3 THE COURT: But, could I make sure I understand.
4 The -- you stated that -- and I don't know if this is in the
5 record or not, maybe it's in the deposition that is going to
6 be sent to me in the email -- that before the waiver, that I
7 gather they agreed they would provide, but before it was
8 provided in writing, Uniti refinanced a portion of its debt.
9 Is that step one?
10 MR. MARINUZZI: Correct. Uniti refinanced the
11 debt that Elliott bought a piece of and didn't need the
12 forbearance any longer.
13 THE COURT: Okay. But the financing that the
14 stock purchase price is for is not that financing, right?
15 It's to finance the settlement.
16 MR. MARINUZZI: That's correct.
17 THE COURT: Okay. Different financing.
18 MR. MARINUZZI: Correct. I'm sorry, Your Honor.
19 Sorry to confuse you.
20 THE COURT: And Uniti also, I think -- at least
21 this is in its filing in support of the settlement -- has
22 also agreed, in essence, to not be the typical Elliott
23 activist in the Uniti structure for a year? Is that right
24 Mr. Wofford? I think that's part of its agreement.
25 MR. WOFFORD: That is correct, Your Honor. There

1 were three agreements that we mentioned, along with the
2 waiver, to which Mr. Marinuzzi refers. The first was, a
3 lock up for a year which makes the discussion of the stock
4 price somewhat superfluous. The second was the standstill
5 with respect to activist activity, which is also a year from
6 the closing. The be clear, that’s not a year from now. And
7 then the third is obviously the commitment, regardless of
8 the stock price, to finance at a price of 633.
9 THE COURT: Okay. All right. I just wanted to
10 make sure we had the facts out on the record.
11 MR. MARINUZZI: Thank Your Honor and thank you Mr.
12 Wofford. So, let's put this into perspective, one year ago
13 today, Uniti stock closed at $11.10. And so, there's
14 tremendous upside in this equity and the reason they bought
15 the equity was for the upside. Uniti was happy to sell it.
16 Elliott was happy to buy it. And this was a means, we
17 believe, for the consenting creditors and Uniti to get the
18 settlement approved by Windstream. By my math, the upside
19 in the equity component using the trading price from one
20 year ago is $181 million. If the parties to the LOI had
21 instead demanded that Uniti pay them a $181 million
22 facilitation fee as part of the settlement that settles all
23 estate claims against Uniti but allows them to keep $181
24 million for themselves, would that be okay? I don't know,
25 Your Honor. That, to me, changed the process.

1 THE COURT: But that's not what happened. That's
2 not what happened. The company is getting the proceeds at
3 the stock purchase, which, as I understand it, was the
4 trading price on the day that the LOI was entered into.
5 MR. MARINUZZI: Correct.
6 THE COURT: So --
7 MR. MARINUZZI: I think they set the date in the
8 LOI>
9 THE COURT: So, yes, there are people who like to
10 make a specific investment in a specific company in its
11 equity. There are plenty of other people who would rather
12 have the cash so they could decide where to spend the money
13 in every company that's public and non-public. So, as long
14 as the money is not being privately spent on one party,
15 honestly, I don't see what's wrong with it. It's -- the
16 proceeds of the investment are coming into the company, in
17 cash. I'd rather have the cash. I mean, I'd rather have
18 the cash than stock in Uniti. No offense to Elliott's
19 judgment, but, you know, they have a different profile.
20 Certainly not a 345 U.S. Trustee approved investment, right,
21 for a debtor?
22 MR. MARINUZZI: I imagine not.
23 THE COURT: Okay.
24 MR. MARINUZZI: All right, Your Honor, I'll move
25 on. The other -- the only final point about the Elliott

1 side deal, the Debtors wanted to pretend the equity
2 component is separate and apart from the settlement, but
3 it's not, and so the Court has to consider that in
4 connection with the entire settlement because it's that
5 equity component that funds the settlement purchase price,
6 that gives rise to the PSA and gives rise to the Plan, so
7 it's all related. It's a fiction to assume it's not part of
8 the settlement discussions.
9 THE COURT: But how is it unfair? If it was
10 negotiated at the price that day, it's fluctuated up and
11 down since then, there's risk in any equity investment going
12 forward and the proceeds of it are going right back to the
13 company, how is it -- I don't -- I mean, look, if Elliott
14 said to Uniti -- and there's no evidence that this happened
15 -- if Elliott said, you know, "You pay us a 35 percent
16 premium, we'll buy the stock, not at 633 where it was
17 trading, but at 233 or whatever, and we'll swing our vote in
18 favor of the settlement, then that would probably, arguably
19 at least, be value that that premium should be valued that
20 should be coming to the company as opposed to Elliott. I
21 appreciate that there are arguments to be made that that's
22 just a separate deal and one can argue that the Circuit
23 Court in the Peabody case was persuaded in analogous
24 situations, as well as Judge Wismer and others when focusing
25 on unfair discrimination. But I don't think we have to get

1 there. I don't see the facts fitting into that fact
2 pattern.
3 MR. MARINUZZI: I'm not saying it's an unfair
4 discrimination issue. This is --
5 THE COURT: No, no. I'm saying it's not an issue
6 where Elliott took money that would otherwise go to other
7 creditors.
8 MR. MARINUZZI: No, I think the analysis is,
9 Elliott flew to Little Rock, came out with an agreement to
10 buy Uniti stock with upside, just based on last year's
11 trading price, came back to a mediation where the Board
12 approved the settlement under a PSA that says unsecured
13 creditors aren't entitled to recover anything. We just
14 think the process -- the process we think was flawed. Your
15 Honor, I appreciate the point. I'm not going to convince
16 Your Honor otherwise. If Your Honor has any other
17 questions, I'm happy to answer them. But otherwise, I will
18 cede the virtual podium.
19 THE COURT: Well, I did have one question because
20 I -- look, I appreciate that creditors who go into a case
21 feeling that they're going to get a substantial recovery and
22 then it turns out they're not, are going to be doing
23 everything they can to figure out why. But maybe I am wrong
24 about this, but it seemed to me that unsecured creditors, at
25 least trade creditors, felt they were, at least, somewhat in

1 the money at the start of this case separate and apart from
2 recovery on the Uniti settlement, right?
3 MR. MARINUZZI: I think that's fair.
4 THE COURT: So, they weren't -- I mean, they're
5 not evaluating this in the context of, "We believe we're in
6 the money because we're going to win on this mammoth
7 litigation."
8 MR. MARINUZZI: No, no. I think they're
9 evaluating -- and just so we're clear, the Plan has the
10 encumbered Debtors and the unencumbered Debtors and so, the
11 unencumbered Debtors are flagged (indiscernible).
12 THE COURT: Right.
13 MR. MARINUZZI: On the encumbered Debtors, I think
14 the issue is, the settlement proceeds, we believe, are
15 unsecured and need to be shared among the petition C claims
16 and the pure unsecured claims. I think that's where the
17 disagreement lies.
18 THE COURT: All right. But that's an issue for
19 another day. That's not the -- I mean, one looks at the
20 settlement separate and apart from that because that's not
21 part of the settlement.
22 MR. MARINUZZI: Your Honor, our objection to the
23 settlement was, and my focus was on the process.
24 THE COURT: Okay. All right. I guess, though, if
25 the process leads to the right result, does it even matter?

1 I'm not saying the process was wrong, but if it leads to the
2 right result, does it matter? If a judge finds that, after
3 a Notice of Hearing?
4 MR. MARINUZZI: Your Honor, if Your Honor finds
5 the process led to the right result and that's Your Honor's
6 findings, sometimes, I think that more should be expected
7 from fiduciaries.
8 THE COURT: Well, except there's no evidence that
9 they did anything improper.
10 MR. MARINUZZI: There is no evidence, Your Honor.
11 There is no evidence.
12 THE COURT: Okay. All right. Okay. Thank you.
13 MR. MARINUZZI: You're welcome. Thank you.
14 MR. SHORE: All right, Your Honor, Chris Shore from
15 White & Case, on behalf of the Trustees. I'd like to make
16 five points. One is to provide our perspective on what we
17 see happening here. Two, to address what the Court needs to
18 do about the claims that are swept into the release, other
19 than the recharacterization claim certified Holdings and
20 Services. Three, if we focus just on recharacterization,
21 why isn't immunity put on the table and is either recurrent
22 iteration enough? Four, does it make sense to address this
23 outside of Plan? And five, something no-one's touched on,
24 which is Debtor's request for relief, not just under 9019,
25 but also Section 363 and 365 of the Code.

1 Our perspective, and let me respond to Your
2 Honor's question, what people thought in this case. As Your
3 Honor may recall, the Trustee, through the first tab in the
4 recharacterization fight, we filed a Motion to strike the
5 Master Lease from the schedules and it was always our big
6 belief, from the beginning of the case, having looked at
7 this, that a primary source of recovery for unsecured
8 creditors was going to be by pursuing claims related to the
9 spinoff and claims related to whether or not the lease could
10 be recharacterized. From our perspective in the beginning
11 of the case, what the Court has had before it, is two
12 orbiting parties, prodding each other's gravity, tied
13 together with this thing called a Master Lease. One of
14 them, the Debtors, and the only party over which the Court
15 has responsibility and the only parties over which we have a
16 responsibility to collect from are the Debtors. They're the
17 ones with all the regulatory obligations, all the costs, all
18 the employees and the parties who are charged with operating
19 this whole business.
20 The other is a reap, which came out of the
21 investment bankers' brains when reap spinoffs were all the
22 rage. It's a special purpose investment vehicle with some
23 reap management and a whole lot of leverage. And this whole
24 case has been driven by this two orbiting party process that
25 was set up at the time of the spinoff and our view, which

1 was shared by Judge Berman, is that the whole thing breached
2 the indentures. There was nothing about this transaction
3 that was consistent with the rights of our noteholders when
4 this was done.
5 So, let me move to the record. I get it, it's
6 very easy to see why management supports the settlement.
7 They're going to get, if this thing moves along the way the
8 Debtors want, a reorganizable Debtor with new fixed leases
9 and they are going to be substantially de-levered. And they
10 get releases of all their activity in connection with the
11 spin. It's easy to see why the Board of Holdings and
12 Services supports it. They get the same releases.
13 Let me focus, for just one second, on this direct
14 pecuniary interest. It's not a question of showing that
15 they acted on it. And the Delaware corporate governance,
16 the issue is whether or not they have an interest and then
17 we switch to an entire fairness standard and that same
18 concept where you've got parties who are interested in the
19 transaction, carries over to the 9019 setting we cited for
20 Your Honor, the Geltzer case in re: Soup Kitchen in the
21 (indiscernible) case, one of Judge Conrad's old cases,
22 talking about a higher scrutiny that should be afforded to
23 9019 that involved investigations and releases and
24 compromises of claims in which the fiduciaries charged with
25 running that, have a role. So, it's really, from our

1 perspective, that the Court should be applying a higher
2 scrutiny to the process here, not a lesser one. And we do
3 believe process is important because at the end of the day,
4 it's what made the Bankruptcy Court allow the work. There
5 is an expectation that the parties will follow appropriate
6 processes, the parties are charged with following
7 appropriate processes, both under the Bankruptcy Code and
8 under the State Governance Rules and they're expected to
9 follow them and the Court should be able to rely on the
10 Debtors to do that. So, we do believe that process is
11 important.
12 Now, we went through the list of who is and who is
13 not supporting. Every Creditor supporting this deal is
14 getting consideration outside of the deal. The releases,
15 and I'll come back to it in a bit, are releasing all the 1L
16 Creditors who received Uniti stock in connection with the
17 spinoff. They are all getting -- everybody who's supporting
18 is getting the offer to purchase the 20 percent of the stock
19 at a discount to current trading prices. I'll come back to
20 that a little bit. And all of them are getting -- presuming
21 or depending on how the next Motion goes, back stop fees,
22 but at least the Debtors are willing to give it to them. No
23 -- well, Uniti is supporting. Now the fact that Uniti
24 believes that it would have won, I guess is to be expected.
25 It's certainly not an iridium factor as to whether or not

1 counsel for the party who is non-Debtor party is settling
2 really believes that they would have won. And it's, in my
3 experience, rare that the other side even weighs into that
4 graph. But to be clear, Uniti did agree to pay $1.2 billion
5 under certain circumstances. Again, I don't think it's
6 worth $1.2 billion, but did offer to pay a whole lot of the
7 cash to get rid of the claims.
8 Now, the Debtors, as Mr. Marinuzzi pointed out,
9 seek to brush aside the lack of support and objections and
10 complaints from out of the money stakeholders with nothing
11 to lose. I have to protest that. We have been clear --
12 leave aside the evidence for a second -- we've been clear
13 about our position with the Debtors, with the first lien, in
14 pleadings we've filed in this Court, that the settlement
15 consideration is liened as are other assets of the Debtor.
16 We've told everyone why and we still, notwithstanding Your
17 Honor's comment about the Debtors engaging on the issue of
18 encumbered, still have not had any engagement from anybody.
19 On this Motion, we sought the discovery to support
20 our views. We wanted to make a record for Your Honor on
21 this issue that they had to allocate certain of the claims
22 to fraudulent conveyance claims, which are not subject to
23 liens. Or they had to allocate it to particular guarantor
24 estates who had claims or transferor estates who had claims.
25 We wanted to show you with an evidentiary record, that it's

1 our money to win or lose on the recharacterization suit and
2 the claims that are being released. The Debtors refuse to
3 produce any discovery on that, and they sought a protective
4 order on the basis that they weren't going to allocate. And
5 in the ruling in their favor, you -- I think, if I remember
6 correctly, you said, "I would come to the hearing and remind
7 you that the Debtors said we're not going to allocate." I'm
8 reminding you the Debtors said they weren't going to
9 allocate. The reason Your Honor doesn't have a record on
10 the allocation point and what our views are is because the
11 Debtors didn't produce that evidence.
12 THE COURT: But -- I'm sorry. The context of what
13 I told you was, if the Debtors tried to allocate, then you
14 would remind me that they're not allowed to do that. So,
15 the allocation is going to happen in the future. So, the
16 only issue is whether the total amount is correct in light
17 of all of the claims that are being released.
18 MR. SHORE: Your Honor --
19 THE COURT: And you were certainly entitled to
20 create a record on that, i.e. what is the value of all the
21 claims that are being released. Not the allocation, but the
22 overall value.
23 MR. SHORE: Right, but saying that we are out of
24 the money and asking Your Honor to base your decision on the
25 iridium factor of weighing Creditor support based on the

1 fact that we're out of the money is an allocation. Our view
2 is, we are not out of the money. If we are right, and once
3 we get the record to establish it, and it will require
4 discovery from the Debtors, if we're right that the
5 unsecureds are entitled to more -- are entitled to the
6 proceeds, we are, depending on the size of the deficiency
7 claim of the first lien, the parties the Court should be
8 listening to with respect to whether or not this claim
9 should be settled. So, it's just focusing on that iridium
10 factor of who you should be listening to. There is a record
11 from which you can say that the UCC represents an out of the
12 money constituency or the Trustees represent an out of the
13 money constituency.
14 THE COURT: Well, the only thing I have heard as
15 far as whether, based on TEV, your clients are in the money
16 or the UCC's clients are in the money, is based on a theory
17 that the liens don't extend to certain assets, not based on
18 TEV (indiscernible). The best I've heard on that is a
19 statement by the Committee's Financial Advisor that he
20 thinks the presumed Plan value is small.
21 MR. SHORE: Well, again, the Plan value is a
22 function of the backstop rights and not a valuation of the
23 Debtors.
24 THE COURT: But, the point is that if someone is
25 fighting a settlement because they will only get value from

1 it if the settlement doesn't happen and there's a win, then,
2 in fact, they are asking the Court to gamble with the other
3 folks' recovery. And I'll be frank with you, I don't have a
4 lot of evidence as to whether your clients are out of the
5 money on that basis or not. But, again, as far as
6 allocation is concerned, the lien is concerned, to me,
7 that's neither here nor there if the settlement itself, as a
8 whole, makes sense, then that issue will be decided, just as
9 it would be decided ultimately, not at the trial of the
10 recharacterization action, but the trial of the other claims
11 or the settlement of the other claims and a Plan negotiation
12 or contest ultimately. So, to me, it's kind of a red
13 herring.
14 MR. SHORE: Well, it's only a red herring if the
15 Court is not going forward on weighing this iridium factor
16 as the parties in the money support the settlement, the
17 parties out of the money want to gamble. I think about it
18 this way, if the only claim up were a claim being brought by
19 a Debtor which only owed money to one creditor, the fact
20 that many creditors wanted the Debtors to settle that
21 doesn't mean that the Court should disregard the views of
22 the Creditor of the estate settling the claim. The Court
23 should be listening to the claim --
24 THE COURT: Well, I am listening to you, but --
25 well, maybe enough said on this because I actually am

1 listening to you quite seriously.
2 MR. SHORE: Okay. One other word on allocation,
3 though. There have been a lot of statements on the record
4 about what's happening here with allocation. It's been in
5 letters to the Court, it's been in reply briefs, it's been
6 in statements on the record. We believe that it's
7 appropriate for the Court, at this point, as the UCC
8 originally proposed, to include a specific provision in the
9 Settlement Order, which makes clear that nothing in the
10 Order prejudices allocation arguments. Because otherwise,
11 what we're going to be trying to do at a later date when we
12 come back, is piece together what the Debtor said versus
13 what the first lien said versus what the Debtor said prior
14 to the trial and that's going to be a muddled record. I'll
15 come back to it a bit later, but there's some provisions in
16 the Order that were filed last night that go to this issue
17 and I'll come back to that.
18 So, let me focus on claims being compromised other
19 than the recharacterization. I think Your Honor is seeing
20 that the releases included in the Settlement Agreement are
21 incredibly broad. Under the express words of that
22 Agreement, and that's the one that the Debtors are seeking
23 approval for, all Debtors are releasing all claims related
24 to Windstream against all other Debtors, the management,
25 the Board, anybody who ever owned a share of Uniti stock,

1 just relating to the Windstream Debtors. The explanation
2 you heard on the record today is because that's what Uniti
3 wanted, that's why the Debtors were willing to agree, but
4 that's not a justification.
5 As Mr. Thomas admitted, the only parties providing
6 consideration are Uniti. None of the other released
7 parties, the one Ls, the two Ls, the Board, the management,
8 the other Debtors, are providing consideration for the
9 settlement and as such, these releases are not approvable in
10 a Plan setting under metro-media in our view. The irony
11 here is that the federal government, in a couple of
12 capacities, has objected to the Plan, but if this settlement
13 is approved, the releases of all these parties will have
14 already occurred. There's no record from which the Court
15 can canvas to look at claims other than the claims the
16 Debtors brought against Uniti or could have been brought
17 against Uniti. And we think those releases can't be
18 approved as written.
19 But certainly should not -- the only justification
20 for this I saw in Uniti's pleading file where they cite to a
21 whole bunch of submitted Orders where Courts granted relief
22 with respect to releases, in some cases, broadly as to who
23 was releasing or broadly as to who would be releasing. None
24 of them are anywhere near the APA, and reliance upon
25 admitted Orders to a Court is not, in our view, probative

1 evidence of what a Court would do when an objection is
2 raised with respect to the scope of releases.
3 And what do we do about the record with the
4 subsidiary Debtors? The only record in front of the Court
5 is that Holdings and Services created a special committee
6 which oversaw an investigation which led to a settlement
7 which was approved by the Boards of Holdings and Services.
8 Those are the only documents in the record. They -- Mr.
9 Thomas was clear, nothing has happened at the subsidiary
10 Debtors, even though they have different assets and
11 different Creditor bodies. I'll come back to Augie/Restivo
12 in a bit. Debtors can't just -- one estate can't be
13 settling for the benefit of another estate. But looking to
14 the 9019 caselaw --
15 THE COURT: But they made the Motion on behalf of
16 all of them. And the evidence suggests that the Settlement
17 is favorable to all of them. There's no evidence to suggest
18 it's not favorable to all of them, leaving aside the fact
19 that, to the extent there is an allocation, that's an issue
20 for the future.
21 MR. SHORE: Well, for example, the subsidiary
22 Debtors are the ones who transferred the assets to Uniti in
23 connection with the spinoff. That is the claim that the UCC
24 was seeking the authority to bring. Those subsidiary
25 Debtors don't have a recharacterization claim, per se. What

1 they have is a fraudulent conveyance claim. We transferred
2 the assets to Uniti for no consideration to us. That
3 consideration went to Holdings and Holdings distributed it
4 out to the pre-petition shareholders and to the one L
5 Creditors. They are releasing those claims under the
6 releases, as drafted. Even under the narrow reading, each
7 Debtor is releasing. The fact that they moved doesn't
8 establish the record. There is nothing in the record that
9 any of the subsidiary Debtors ever considered those claims,
10 which, by the way, are contrary to the claims of Holdings
11 and Services. Holdings and Services would take the
12 consideration in at the top of the capital structure. The
13 subsidiary Debtors would take it down at the bottom of the
14 capital structure and, since the only estates which the
15 Debtors currently believe are insolvent are the guarantor
16 Debtors, that would come to -- into the subsidiary estate as
17 an unliened, fraudulent conveyance claim.
18 THE COURT: So, it's an allocation issue.
19 MR. SHORE: It's not an allocation issue, Your
20 Honor, because they're releasing those claims without any
21 investigation, without any independence --
22 THE COURT: I'm sorry. I'm just going to stop you
23 right there. It's an allocation issue because it's part of
24 the overall settlement consideration and since there are no
25 outside shareholders of those entities, the issue is how it

1 should be allocated to the creditors of those entities and
2 nothing more than that. So, it's the overall value for the
3 settlement that counts.
4 MR. SHORE: I'm not going to belabor the point,
5 though --
6 THE COURT: Well, I don't think you should because
7 it doesn't -- it's not a point.
8 MR. SHORE: Well, let me say this. At $30 million
9 a month in reorganization expense, I would think that the
10 Debtors would be able to set up corporate governance here.
11 The fact is, is that we have never proposed that the Debtors
12 put in (indiscernible) for everybody or anything else. The
13 structure that it used is, you hire independent directors
14 who have no ties to any of this, they do the investigation
15 on behalf of all of the Debtors and they --
16 THE COURT: We've already covered this subject.
17 We've already covered this subject. I've heard it and
18 you've already heard I've made up my mind on it. I am
19 applying the entire fairness standard as to process and
20 there's absolutely no evidence that it was unfair.
21 MR. SHORE: Okay. Then let's move on to the $1.2
22 billion for recharacterization.
23 THE COURT: But it's not for recharacterization
24 solely as you've just said. It's for releasing all the
25 claims.

1 MR. SHORE: Okay. Well, okay. But the issue --
2 look, Your Honor, in your canvasing of the record, you have
3 no fact with respect to any other claim. You don't have any
4 statements with respect to the solvency of the Debtors, you
5 don't have any --
6 THE COURT: Actually, that's not true. The
7 Complaint says that after 2017, they were rendered
8 insolvent, so I do have that. But I don't have it from the
9 objectors either. So, you know, it's a red herring.
10 MR. SHORE: Well, it's a question of burden of
11 proof from our perspective.
12 THE COURT: Okay.
13 MR. SHORE: But let's focus on the $1.2 billion
14 then for the released claim. It's certainly a lot of money,
15 but as the documents work out, if the Debtors go effective
16 on this settlement and don't reorganize, they don't get
17 anything. They actually lose money on this settlement.
18 They end up -- Uniti can purchase the assets for a presumed
19 loss of $9 million to the Debtors, be without a lease in
20 place, they don't get the capital improvements and they
21 don't get the money paid over time. That's what the parties
22 understood about this deal, so it's not --
23 THE COURT: That's assuming that there would a
24 liquidation and they would -- that the Debtors would reach
25 the deal, right?

1 MR. SHORE: It's assuming -- well, the Debtors
2 don't breach the deal if they don't reorganize. There's no
3 -- the Debtor is untethered in the documents any
4 responsibility to go effective with this particular Plan,
5 but if they are not an operating debtor, they don't get the
6 benefit.
7 THE COURT: Okay. All right. So, I should assume
8 they're not going to operate?
9 MR. SHORE: No. I think the proper way to avoid
10 having to assume anything about that is to have this done at
11 confirmation because then the Court can know that we are
12 approving the Plan and that Plan will provide for $1.2
13 billion of consideration to come in and instead, we all have
14 to assume what's the likelihood that the Debtors are going
15 to get to an exit and as Mr. Leone said, there are exogenous
16 events that can dictate whether or not the Debtors get to an
17 exit. There are internal events. It's not a question of
18 leverage.
19 If we show Your Honor that the Debtors have
20 unencumbered assets, which is a Plan issue, the first liens
21 don't have to fund at all. So, then the issue with that is
22 not anything other than this process about whether the
23 Debtors get to an exit is not up to the fiduciaries, the
24 Debtors, it's up to the non-fiduciaries, the first liens and
25 the backstop party. The Debtors are trading away their

1 ability to get a Plan done that allocates in value to us
2 without giving up all of the consideration that Uniti has
3 put on the table.
4 On the recharacterization claim, leave aside the
5 other things from which the Court has to canvas -- and look,
6 it is a burden of proof issue. The Debtors -- and I've done
7 it in cases, seen it done in cases, we come in with where
8 the claims were and everything else. All the Court has
9 right now, as you pointed out, is the Complaint and an
10 Answer with respect to those claims and no analysis as to
11 the likelihood of success of those claims. And to be clear,
12 they're additive. It's not just the recharacterization
13 claim or the fraudulent conveyance claim, they're
14 independent causes of action. In fact, one is premised on
15 it being a lease and the other is premised on it not being a
16 lease.
17 So, there are two ways Uniti can lose. And the
18 contract claim is independent. There's nothing in the
19 record from which you can do it. That's why I say, this is
20 what the record that was created was on the
21 recharacterization claim. And the party -- oddly, the party
22 that makes the record on that was Uniti. You did include,
23 in its objection, certain of the deposition transcripts and
24 their views to support it. But that was not moved into
25 evidence. The Debtors, for their part, don't cite PCH, much

1 less pick through the factors and how they were actually
2 playing out in the litigation. We included in the record
3 JX16, our Summary Judgment Reply. From our perspective, it
4 was all about useful life. The Debtors had a bottoms up
5 useful life opinion from Dr. Vanston that this was the
6 useful life never of the assets never lasted to the end of
7 the lease.
8 And while Mr. Vonnegut says his views had been
9 rejected by courts, they were objected in the 1990s because
10 regulatory fraud and courts were skeptical of his views that
11 cable would carry broadband and that cell phones would
12 replace landlines. We're perfectly comfortable to go ahead
13 on that record. Parties cite to the E&Y report and the scan
14 report, those were not coming into evidence. They were not,
15 first of all, scan legal opinion can't come in for the truth
16 of the matter asserted and E&Y was not qualified as an
17 expert in this case. The Uniti experts -- all the Uniti
18 experts did, as set out in our Motion in limine which is
19 JX32 as joined by the Debtors would say Uniti -- sorry, E&Y
20 did not do it wrong. That was their case on the key issue,
21 and all that was between the Debtors and their $5.6 billion
22 win was a ruling from the Court that the experts for the
23 Debtors were credible. That claim was trial-ready. We
24 could have concluded it in early March based on the Court's
25 prior statements. It would have ruled, hopefully by the end

1 of March. The Court has no record, as people do in 9019
2 motions, of any costs for actually litigating the case going
3 forward, the cost of the trial, the cost of appeals.
4 In any event, whatever those costs were, were
5 going to be a tiny fraction of the amount in controversy.
6 You heard cites to $30 million a month, but that's just the
7 cost of staying in Chapter 11. Again, there's no record of
8 how long they're going to have to stay in Chapter 11 anyway.
9 Or when they're going to be able to get out again. Those
10 are all reserved as confirmation issues.
11 You've got the assumptions from Mr. Thomas that
12 the Debtors are losing $100 million a quarter in being in
13 bankruptcy, but he did not take into account the fact that
14 post-winning the recharacterization claim, the Debtors would
15 not be paying rent, that the $3 million in a month in
16 expenses would be saved. There is no issue, as some courts
17 focus on, in value in the claim, issue of collectability.
18 The ruling sought from the Court was that the Debtors owned
19 the assets. They don't need to do anything to get those
20 assets. Those assets exist on the Debtor's premises right
21 now and it would just be a legal ruling that title to those
22 assets belongs to the Debtors. There are courses of risk of
23 the Uniti bankruptcy, but that doesn’t invalidate the Court
24 Order that it is a financing, that their claim in the
25 Debtor's bankruptcy case is one of a debt claim. There is

1 no evidence, and the Debtors haven't put forth anything, of
2 the range of value for the claims. Zero is not reasonable,
3 obviously, but lower than every settlement needs its own
4 reasonability. No one ever got to the upper limits or even
5 asked for it. What, if we pursued all of the released
6 claims, what could we get? The Court must have noticed the
7 disconnect between Mr. Leone, who said my chart, which is, I
8 think JX38, yeah, JX38, was just an illustrative and didn't
9 represent anybody's views and Mr. Wells' view that this
10 represented the actual advice of K&E and PJT and Norton Rose
11 with respect to what was the outer limit.
12 Let's work with what Mr. Wells thought. $5.6
13 billion is the win and Mr. Leone confirmed that's
14 independent of the Debtor's ability to seek disgorgement for
15 post-petition rent payment and as he points out, is
16 obviously asked to be discounted for collectability, but
17 that was not an analysis anybody did. And if you compare,
18 if you agree that the settlement consideration is worth $1.2
19 and you compare it against it, we're talking about a claim,
20 just the recharacterization claim, as a 25 percent chance of
21 success. If you look at JX38 at page 10 --
22 THE COURT: I'm sorry. You're ignoring when you
23 say that, the claim that Uniti would have back as debt.
24 MR. SHORE: Well that's actually -- coming to that
25 right now. If you look at JX38, right, and you look at the

1 sensitivity that was rung. If you say that
2 recharacterization was a jump off, 50/50, that's not a moon
3 shot, that is a realistic litigation position. 50/50 and a
4 75 percent likelihood that the Court would lead the claim in
5 Holdings. All right. Now, well, if you look at the chart,
6 the range on the two sides is between $2.164 billion and
7 $2.569 billion. That's factoring in a 50 percent risk of
8 loss and a 25 percent risk that the Court would allow a
9 claim below Holdings. And by the way, they're not
10 independent, right? A recharacterization finding by the
11 Court would imply that the whole transaction was an end run
12 around the unsecured notes. Awarding a claim below
13 services, right, letting Uniti access to the assets that it
14 stripped out from under the indentures would give a profit
15 to Uniti in that. So, we're not talking about a moon shot.
16 There are --
17 THE COURT: But -- I'm sorry, but you're assuming
18 that the asset would go away from the claim, right?
19 MR. SHORE: I'm assuming that -- what the Court --
20 a 25 percent risk that the Court would say the claim went to
21 below, down to all the assets, and a 75 percent likelihood
22 that the Court would find that Uniti contracted to pay --
23 contracted with Holdings -- that was the party that they
24 took the credit risk on in entering into this transaction.
25 And it was done for a strategic reason because had they

1 taken claims down at the other subs, it would have clearly
2 been a violation of the indentures.
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8 THE COURT: Which the Debtor has already paid for,
9 and which would ignore the result in PCH Associates too,
10 where the Court imposed an equitable lien and said that the
11 asset followed the debt.
12 MR. SHORE: Right. But as Your Honor --
13 THE COURT: Right, the Second Circuit -- you just
14 ignore that.
15 MR. SHORE: No.
16 THE COURT: No. I just give 25 percent weight to
17 them.
18 MR. SHORE: Okay. You can work your way around
19 the chart with respect to that, but it's the same discussion
20 that Your Honor had with Mr. Vonnegut at the hearing, which
21 is there are no cases that deal with this three-way
22 arrangement.
23 THE COURT: Well, oh, you're factoring in the
24 indenture, which has already been litigated.
25 MR. SHORE: Right. But if you gave it a 50

1 percent likelihood, looking at Page 10, and a 30 percent
2 characterization in the left chart, $1.3 billion, right? We
3 are in the context of this case certainly at the low, low
4 end of reasonable.
5 THE COURT: I disagree.
6 MR. SHORE: And --
7 THE COURT: I'm sorry. I've been through the
8 cases, I've prepared for the trial, and I think I probably
9 have a pretty good idea of how it would've turned out, since
10 I was going to try it.
11 MR. SHORE: Well, yes, except that the evidence
12 that the parties had with respect to whether the claims
13 would be in holdings was not the subject of the trial. It
14 was just on the first issue, which is whether or not it
15 would be recharacterized. You don't have a record on the
16 second issue, other than --
17 THE COURT: I have certainly researched that
18 issue.
19 MR. SHORE: Sorry. I just have to switch my phone
20 -- speaker phone. Okay. I get it. But where the Debtors
21 are on this, just on the analysis that they presented to the
22 Board, you have to do some mental gymnastics to get down to
23 $1.2 billion.
24 THE COURT: Well --
25 MR. SHORE: It's a lot of money. I get it. But

1 the numbers are huge because the transaction was huge. And
2 look, let me say the last thing on why $1.2 billion and up.
3 Here's my take on the Little Rock meeting. It's not just
4 about the side consideration. It's that Unity was willing
5 to pay more to get the settlement done. It was willing to -
6 - for whatever it was worth -- give a party the right to buy
7 20 percent of its stock, subject to the terms of the
8 agreement.
9 The import of that is that the Debtors -- well,
10 the record is silent on whether the Debtors ever asked that
11 that right be brought into the estate.
12 THE COURT: But they're getting the proceeds of
13 it. They're getting the money.
14 MR. SHORE: Okay. Well, Your Honor, they're
15 getting the proceeds of it --
16 THE COURT: Yeah.
17 MR. SHORE: -- but they have to give away $297
18 million of assets.
19 THE COURT: Which they don't want.
20 MR. SHORE: Your Honor, whether the Debtors what
21 the assets or not, what's happening here is they're getting
22 $285 million for something that the parties agreed was worth
23 $297 million.
24 THE COURT: I don't see how that affects the --
25 MR. SHORE: (indiscernible)

1 THE COURT: -- Elliott stock purchase. Those
2 proceeds are coming into the estate.
3 MR. SHORE: No, those proceeds are going to Unity.
4 THE COURT: Which will then put the money into the
5 estate. That's a source of --
6 MR. SHORE: So Unity --
7 THE COURT: -- Unity's funding settlement.
8 MR. SHORE: Unity is buying assets per the express
9 terms of the APA with money. That's what the APA says. The
10 APA which they brought to you for your approval, we will buy
11 these following assets for $284 million. So what the -- the
12 estate maybe benefitted in the sense that Unity has a
13 funding source, but there's no evidence that Unity couldn't
14 get that money from somebody else.
15 THE COURT: Well, there's no evidence the Martians
16 didn't participate in Thanksgiving either. I mean, I really
17 don't like History Channel pleading. Come on. Let's just
18 be a little more realistic.
19 MR. SHORE: Your Honor, I'm not... The terms, you
20 saw -- you heard the witnesses say today we kind of viewed
21 this as an all-in deal. The APA, which is up for approval,
22 has Unity paying $284 million without a financing
23 contingency, and the Debtors delivering assets which are
24 worth $294 million.
25 THE COURT: Well, they pay other cash too. That's

1 not the only cash Unity is paying.
2 MR. SHORE: I'm not. I'm just saying the Debtors
3 aren't getting the benefit of any uptick in the stock which
4 exists today.
5 THE COURT: That's fine. I would take cash over
6 stock --
7 MR. SHORE: (indiscernible)
8 THE COURT: -- in Unity any day. And we've
9 covered that ground.
10 MR. SHORE: Why this should await plan
11 confirmation. And look, people have either not address this
12 forgotten the strong, and it's pretty clear in the documents
13 what happened. When this settlement is done, this
14 settlement can be closed independent of plan confirmation.
15 It is not tied at all to it. And as soon the Debtors get a
16 read opinion and a true lease opinion, they can -- nobody's
17 blocked the transaction -- they can go ahead and close. In
18 that event, the releases go into effect, the bar order goes
19 into effect, even if the Debtors are unable to confirm the
20 plan that's on the table. Mr. Weiland got that wrong.
21 The settlement consideration that Mr. Leone laid
22 out for Your Honor in his declaration, as he said, does not
23 come in if the Debtors don't get to their plan. But the
24 releases and the bar order go into effect.
25 THE COURT: I'm sorry. I don't think that's

1 right. It's not the particular plan. I think his testimony
2 was that if the Debtors ceased conducting business, they
3 almost by definition won't get the long-term consideration
4 under the deal.
5 MR. SHORE: If they do a --
6 THE COURT: They can form a different plan and
7 continue on in business and get the consideration, which is
8 what you and Mr. Marinuzzi fervently hope, which is that
9 your clients will get something to have a consensual plan on
10 the allocation issue.
11 MR. SHORE: What Mr. Leone also said was that the
12 plan must meet the three times (indiscernible).
13 THE COURT: Yes.
14 MR. SHORE: So the Debtors are tying their hands
15 with respect to particular plans that they can do. In other
16 words, someone can't come in, raise finance, come in and
17 take everybody out in the capital structure, and go forward
18 with a value-maximizing plan. In fact, the proposed order
19 ties the Court's hands from even entering a confirmation
20 order which would conflict or derogate.
21 So the Debtors are tying their hands with respect
22 to particular plans, plans that would create value for other
23 constituents. Because if they do that, they are in breach
24 of the settlement agreement and Unity doesn't have to
25 provide any of the $1.2 billion in consideration.

1 THE COURT: And that's because of the three times,
2 or 3.5, depending on which test you're...
3 MR. SHORE: Yes, Your Honor.
4 THE COURT: Is there anything to suggest that
5 that's not going to happen?
6 MR. SHORE: If anything -- no, I don't know.
7 THE COURT: Okay.
8 MR. SHORE: But a plan structure in which parties
9 -- you know, the question came up with Mr. Mendelsohn on
10 junior creditors coming forward. An indenture trustee is
11 not in a position to do that, obviously. But there is no
12 ability to retain any benefit from this settlement if
13 someone comes forward, the two Ls, or the unsecureds, and
14 seeks to take out the firsts or take out the seconds with
15 leverage.
16 THE COURT: Well, the question was justice to the
17 backstop, nothing else.
18 MR. SHORE: No, it goes to the --
19 THE COURT: My question was just to the backstop,
20 and that's what he answered.
21 MR. SHORE: Right. But it goes to the same issue.
22 I was asking him about the section in the settlement
23 agreement which contained the financing restrictions. And
24 that's in the settlement agreement, not the backstop
25 agreement.

1 THE COURT: But -- I'm sorry. So you're saying I
2 shouldn't approve this because someone would want to put
3 more leverage on the reorganized Debtor than three times?
4 And even though no one has offered to do that or suggested
5 to do that, and Elliott has a blocking position over that,
6 that somehow, we should just stay in place?
7 MR. SHORE: No, I'm saying --
8 THE COURT: I'm going to ask you to think about
9 that because we're coming up to the four-hour point and
10 everyone has to hang up on Skype -- not Skype -- hang up on
11 Court Solutions, stay on Skype. Hang up on Court Solutions
12 and redial in, because we are going to lose the call in
13 about three minutes. So I'm going to ask you to think about
14 that and then dial --
15 MR. SHORE: Okay.
16 THE COURT: -- back on Court Solutions.
17 MR. SHORE: Okay.
18 THE COURT: And that's everyone who's on the call.
19 (Pause)
20 MR. SHORE: All right, Your Honor, this is Chris
21 Shore. I'm back. I don't whether the other people are.
22 THE COURT: I think -- let's give it another
23 couple of minutes. Is the Debtors' counsel back on the
24 phone?
25 MR. WEILAND: I am, Your Honor. This is Brad

1 Weiland.

2 THE COURT: Okay. Then why don't we go ahead, Mr.

3 Shore.

4 MAN: We have to wait (indiscernible) --

5 MR. SHORE: Okay.

6 THE COURT: Oh, I'm sorry.

7 MR. SHORE: So the issue of approving or not

8 approving, there are two ways to solve that. One is for the

9 Debtors to take out the provisions in the settlement order

10 which say that the Court can't approve a plan that conflicts

11 or derogate from the settlement. Or if it is going to be a

12 breach of the settlement agreement, if the Court were to do

13 that, to find that there is a value-maximizing transaction,

14 then we should go that way. But in our view, you should be

15 able to link them and then not hold them together. It's the

16 delinking which creates the problems moving forward.

17 THE COURT: Did you even make this argument in

18 your objection?

19 MR. SHORE: Yes.

20 THE COURT: About the three times leverage and 3.5

21 times?

22 MR. SHORE: Yeah, it's in the reasons why we

23 shouldn't be doing this deal right now. There are a whole

24 bunch of --

25 THE COURT: I understand you made general

1 argument. I just don't recall the leverage point or the --
2 MR. SHORE: I don't --
3 THE COURT: -- improved transaction point.
4 MR. SHORE: I don't either, Your Honor.
5 THE COURT: Okay.
6 MR. SHORE: I think we did say specifically that
7 the approval of the settlement would restrict the Debtors'
8 reorganization opportunities going forward --
9 THE COURT: Well --
10 MR. SHORE: -- or avenues of --
11 MR. SHORE: -- that's probably true, because they
12 won't be able to litigate anymore against Unity. But
13 anyway...
14 MR. SHORE: Okay. And again, our problem is that
15 this all works if the Debtors are right that we have no
16 unencumbered value. But if there is unencumbered value,
17 this whole decision as to whether these Debtors reorganize
18 or liquidate or do some other transaction, it's left in the
19 hands of non-fiduciaries --
20 THE COURT: I don't --
21 MR. SHORE: -- the first lien creditors.
22 THE COURT: I don't understand that. I mean, that
23 type of decision is always left in the hands of non-
24 fiduciaries, because they're the ones that are voting on a
25 plan and objecting to confirmation and fighting it. That

1 would be an issue that would come up even if these claims
2 went to litigation in two trials. Trial 1, a
3 recharacterization; trial 2, of their other claims, and
4 their counterclaims. It's an issue that's always there.
5 And one would think that unless the company's plan valuation
6 is dramatically -- and I'm talking like a billion dollars --
7 too low, the issue is one where it's just focusing on this
8 settlement.
9 MR. SHORE: Well --
10 THE COURT: And I don't see how that somehow sends
11 the Debtor into a tailspin, because the senior creditors
12 have just as much of an interest in resolving that issue, if
13 not more, than the junior creditors.
14 MR. SHORE: Right. But there are two aspects of
15 this deal that are not just the normal people get to vote on
16 a plan. One is the provision in the settlement agreement
17 and the APA in which the proceeds -- and I'll come to that
18 in just a second -- the proceeds of the settlement can be
19 allocated by the Debtors -- mutual agreement of the Debtors,
20 the first-lien consenting parties, and the backstop parties.
21 THE COURT: That's the cash proceeds, not the
22 overall proceeds.
23 MR. SHORE: That's right. The cash proceeds of
24 the deal and the provision, or the structure of this, which
25 I've went through, which is the settlement proceeds can only

1 be realized if the first accept the plan.

2 THE COURT: And that --

3 MR. SHORE: And that's what --

4 THE COURT: That I don't -- I don't follow that.

5 That part, I don't follow.

6 MR. SHORE: Okay. It is a question to some extent

7 of leverage, right? But it's not just leverage. We could

8 move towards a situation in which what we're weighing on the

9 allocation -- even though they say we are not allocating at

10 all -- is under this allocation, the Debtors get $1.2

11 billion of consideration, and that one's supported by the

12 voting first lien. And in this allocation, the Debtors get

13 zero.

14 I did not understand the Debtors, there is no

15 allocation going on here, to mean that, but to be clear, you

16 must find $1.2 billion of unencumbered value if you want to

17 go forward. So again, I think the order needs to contain

18 some specific language with respect to what it means that

19 nothing is being allocated here, because so much of what's

20 going on here is answered with, this is just a plan issue

21 and that's all being reserved.

22 THE COURT: Okay. Maybe it's late --

23 MR. SHORE: Now (indiscernible) --

24 THE COURT: -- but other than the point about

25 preserving allocation rights, I didn't follow any of what

1 you just said. But that's fine. Zero -- how would you ever
2 have zero allocation to the Debtors?
3 MR. SHORE: No, no. Did I say to the Debtors?
4 THE COURT: Yeah.
5 MR. SHORE: Look, we go forward with --
6 THE COURT: Did you mean the unsecured creditors?
7 Then I follow you. Okay.
8 MR. SHORE: I did.
9 THE COURT: All right.
10 MR. SHORE: I did mean the unsecured creditors.
11 I'm sorry, Your Honor.
12 THE COURT: All right. I mean, that is a
13 conceivable result. The 1Ls say that's the legal result,
14 but I don't know. That's an issue that I would hope you all
15 could work out after looking at the documents and the law.
16 But if not, I'll decide it.
17 MR. SHORE: Right. And two more issues on
18 allocation. We got the order from it last night, or the
19 revised order, and there are two changes in the order which,
20 again, will be clarified with an allocation -- no allocation
21 provision. We've laid out to the Court in, I think, two
22 pleadings now, our view that the easement pull attachment
23 and pulls are un-liened property of the Debtors' estate.
24 The first liens released their liens on it, but they never
25 actually transferred, because Unity didn't want to get the

1 licenses.

2 In new Paragraph 11 of the proposed order, those

3 assets, immediately upon entry of the order, are deemed no

4 longer to be property of the estate, and that they're held

5 in a -- the Court's being asked to make a specific finding

6 in a valid New York trust. It can't have been property of

7 the estate and suddenly not become property of the estate

8 because of a settlement it doesn't allocate.

9 And similarly, the current state of play is that

10 Unity has no claims at the subsidiaries. But the immediate

11 effect of the order would be that Unity is given claims

12 under the new leases at each of the Debtors' estates and is

13 given liens on all of the assets.

14 THE COURT: Well, look, I got the revised order

15 this morning. I have not had a chance to go through it. I

16 take --

17 MR. SHORE: Okay.

18 THE COURT: On a point like that, you should talk

19 about it with Mr. Weiland and, hopefully, that will get

20 resolved, points like that.

21 MR. SHORE: Okay. There's the last two issues,

22 363 and 365. Under Paragraph 16 of the new order, the

23 Debtors are asking for the Court to enter an order which

24 authorizes and directs them to assume the master lease

25 immediately. And each of the Debtors is being asked to

1 assume the master lease and become obligated on it.
2 But there's no -- we don't even know the rent
3 under the leases right now, and what any of the individual
4 Debtors' obligations are going to be. It's another reason
5 why I think we have to let this marinade a little bit more
6 to fully understand what it means for each of the Debtors
7 who's currently not obligated under anything to become
8 obligated under the master lease and the two new leases.
9 Because each of the Debtors is assuming not holdings.
10 And on 363, again, a last point. The APA is clear
11 that assets of the one Debtor are being sold for cash.
12 Actually, assets of multiple Debtors are being sold for
13 cash. I don't see anything under Section 363 that allows
14 one Debtor to sell its assets and the proceeds of that asset
15 sale to be going to another Debtor. In fact, I think
16 Augie/Restivo expressly prohibits that in the absence of
17 substantive consolidation, a debtor cannot sell its assets
18 for the benefit of another debtor estate.
19 So, you know, if the Debtors had chosen to say
20 they don't want to allocate anything, and they've sworn up
21 and down that they're not going to allocate anything, but I
22 don't know how Section 363 lets a debtor sell assets and not
23 retain the benefits --
24 THE COURT: Well, is there -- again, I've not read
25 the order, because I got it recently. Is there a provision

1 that says where the money is going, the sale proceeds?
2 MR. SHORE: There's a provision in the APA which
3 says that on the mutual agreement of the Debtors, the
4 requisite first lien creditors and the requisite backstop
5 parties, the Debtors will allocate the APA proceeds. So no
6 Debtor -- and both Mr. Leone and Mr. Thomas will claim no
7 particular Debtor is getting any recovery, guaranteed
8 recovery, on the 363 sale.
9 And if I was a betting person, I would say that
10 the first liens would want to allocate all those proceeds to
11 an estate which doesn't have a claim of the unsecured
12 creditors, and instead they have an equity pledge of it. So
13 I'm not sure how that structure that they put forward
14 comports with the Code. And certainly, we don't think it
15 does, and we are objecting on that basis.
16 And unless Your Honor has any questions, that's
17 what I have on the 9019, 363 and 365 motions.
18 THE COURT: Okay. Well, obviously, the hour is
19 fairly late, and I expect that the Debtors would like to
20 have some rebuttal. But I don't think this is a good time
21 to do it. I understand you all will be back at 2:00
22 tomorrow.
23 I have a calendar in the morning. I think it
24 probably only will go to about 11:00, so conceivably, we
25 could get on the phone before lunch as well.

1 MAN: You also have (indiscernible).
2 THE COURT: Oh, I'm sorry. I'm told I have
3 something else -- I have a conference at 11:30 in another
4 case. So we're going to be back at 2:00. I'd like to hear
5 brief rebuttal from the Debtors, and then we can turn
6 briefly to the backstop agreement and the disclosure
7 statement.
8 As far as the disclosure statement is concerned, I
9 think that will just be my giving you the Debtors' comments
10 on the revised disclosure statements, since I've been told
11 that the objections have now been resolved. So most of the
12 time can be taken up with the conclusion of the hearing on
13 these two motions.
14 But I would like to leave counsel to the Debtors
15 and the other parties to the PSA with two or three points to
16 address that have been raised by the objectors.
17 The first is whether anything in the order or the
18 agreement is contrary to the notion that allocation issues,
19 as between secured and unsecured, are for the plan. The
20 second is what is the basis for the Debtors releasing not
21 only the Unity parties, and I include within that not only
22 the Unity Defendants, but also the people that would sue
23 Unity for liability if the Debtors sued them, but also,
24 Windstream parties that would not be looking to Unity as a
25 flow-through if their claims survived.

1 It would also appear to be appropriate that those
2 parties would get released if I approved the settlement with
3 respect to their involvement in the settlements, since
4 that's obviously something I've just approved. And that
5 would just avoid a strike suit. But there does appear to be
6 at least a potential for a release of Windstream parties by
7 Windstream -- the Windstream Debtors, that is -- that would
8 go beyond something that would be for Unity's benefit.
9 The last point goes to the backstop. At this
10 point, I have no briefing -- and I'm not faulting the
11 parties for this -- but I have no briefing on the so-called
12 allocation issue of the proceeds of this settlement. And on
13 that, I basically mean whether any of the proceeds are
14 allocable to unsecured creditors, because they would not be
15 covered by the liens of the 1L and 2L creditors.
16 Given that fact, I am troubled by a $60 million
17 breakup fee that would be triggered by the confirmation of a
18 plan that in essence provides for no allocation, other than
19 under a death trap. And I think the parties to the backstop
20 should be thinking about whether it's appropriate to have
21 that amount be in cash, as opposed to stock, or
22 alternatively, whether it should be reduced.
23 So I would like those points addressed tomorrow,
24 and they indicate the areas of concern that I have with the
25 matter before me, and frankly, also the areas where I don't

1 have concern.

2 So I'll hear you all. I don't need to have the

3 Skype anymore. I'll hear you all at 2:00 tomorrow

4 afternoon. Thank you.

5 (Whereupon these proceedings were concluded at

6 6:07 PM)

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1 C E R T I F I C A T I O N

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3 I, Sonya Ledanski Hyde, certified that the foregoing

4 transcript is a true and accurate record of the proceedings.

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8 Sonya Ledanski Hyde

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20 Veritext Legal Solutions

21 330 Old Country Road

22 Suite 300

23 Mineola, NY 11501

24

25 Date: May 10, 2020

EXHIBIT 12

AMENDED AND RESTATED SECURITY AGREEMENT

originally dated as of

July 17, 2006
and amended and restated as of April 24, 2015

among

WINDSTREAM SERVICES, LLC
(formerly known as Windstream Corporation,
and successor to ALLTEL Holding Corp.),

THE GUARANTORS PARTY HERETO

and

JPMORGAN CHASE BANK, N.A.,
as Collateral Agent

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Exhibit C Patent Security Agreement

Exhibit D Trademark Security Agreement

Exhibit E Perfection Certificate

Exhibit F Issuer Control Agreement

AMENDED AND RESTATED SECURITY AGREEMENT

AMENDED AND RESTATED SECURITY AGREEMENT originally dated as of July 17, 2006 and amended as of September 17, 2010 and August 11, 2011, as amended and restated as of April 24, 2015 as amended, amended and restated, supplemented or otherwise modified from time to time, this "**Agreement**"), among Windstream Services, LLC (formerly known as Windstream Corporation, and successor to ALLTEL Holding Corp.), as Borrower, the GUARANTORS party hereto and JPMORGAN CHASE BANK, N.A., as Collateral Agent.

WHEREAS, substantially simultaneously with but sequentially after the Spinoff, the Borrower is entering into the Credit Agreement defined in Section 1 hereof on the date hereof, pursuant to which, subject to the terms set forth therein, the Lenders have agreed to make Loans to, and issue and participate in Letters of Credit for the account of, the Borrower for the purposes set forth therein;

WHEREAS, the Borrower and each of the Guarantors entered into that certain Security Agreement dated as of July 17, 2006 in favor of the Collateral Agent (as amended as of September 17, 2010 and August 11, 2011 and as further amended, amended and restated, supplemented or otherwise modified prior to the date hereof, the "**Original Security Agreement**") and the parties thereto have agreed to amend and restate, without novation, the Original Security Agreement in the form of this Agreement in connection with its entry into the Credit Agreement;

WHEREAS, the Borrower is willing to secure the Facility Obligations by granting Liens on the collateral owned by it to the Collateral Agent as provided in the Security Documents;

WHEREAS, the Borrower is willing to cause certain of its Subsidiaries to guarantee the Facility Obligations as provided in the Guarantee Agreement and to secure such guarantees by granting Liens on the Collateral owned by such Subsidiaries to the Collateral Agent as provided in the Security Documents;

WHEREAS, the obligations of the Lenders to make Loans and participate in Letters of Credit, and the obligations of the Issuing Bank to issue Letters of Credit, under the Credit Agreement are conditioned upon, among other things, the execution and delivery of this Agreement and the Guarantee Agreement;

WHEREAS, the AC Holdings Indenture requires the AC Holdings Bonds to be secured on an equal and ratable basis with the obligations of AC Holdings and its "Restricted Subsidiaries" (as defined in the AC Holdings Indenture) in respect of the Credit Agreement; and

WHEREAS, upon any foreclosure or other enforcement of the Security Documents, the net proceeds of the relevant Collateral are to be received by or paid over to the Collateral Agent and applied as provided herein;

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

Section 1. *Definitions.*

(a) *Terms Defined in Credit Agreement*. Terms defined in the Credit Agreement and not otherwise defined in subsection (b) or (c) of this Section have, as used herein, the respective meanings provided for therein.

(b) *Terms Defined in the UCC*. As used herein, each of the following terms has the meaning specified in the UCC (and if defined in more than one Article of the UCC, shall have the meaning given in Article 9 thereof): Account, Authenticate, Certificated Security, Chattel Paper, Commodity Account, Commodity Customer, Deposit Account, Document, Entitlement Holder, Entitlement Order, Equipment, Financial Asset, General Intangibles, Goods, Instrument, Inventory, Investment Property, Proceeds, Record, Securities Account, Securities Intermediary, Security, Security Entitlement, Supporting Obligations and Uncertificated Security.

(c) *Additional Definitions*. The following additional terms, as used herein, have the following meanings:

"**AC Holdings Trustee**" means U.S. Bank National Association, in its capacity as the trustee under the AC Holdings Bonds, and its successors in such capacity.

"**Borrower**" means Windstream Services, LLC, a Delaware limited liability company (formerly known as Windstream Corporation, and successor to ALLTEL Holding Corp.), together with its successors.

"**Cash Collateral Account**" has the meaning specified in Section 8.

"**Collateral**" means all property, whether now owned or hereafter acquired, on which a Lien is granted or purports to be granted to the Collateral Agent pursuant to the Security Documents. When used with respect to a specific Lien Grantor, the term "Collateral" means all its property on which such a Lien is granted or purports to be granted.

"**Collateral Accounts**" means the Cash Collateral Accounts, the Controlled Deposit Accounts and the Controlled Securities Accounts.

"**Collateral Agent**" means JPMorgan Chase Bank, N.A., in its capacity as collateral agent under the Loan Documents.

"**Contingent Secured Obligation**" means, at any time, any Secured Obligation (or portion thereof) that is contingent in nature at such time, including any Secured Obligation that is:

(i) an obligation to reimburse an Issuing Bank for drawings not yet made under a Letter of Credit issued by it;

(ii) an obligation under a Swap Agreement to make payments that cannot be quantified at such time;

(iii) any other obligation (including any guarantee) that is contingent in nature at such time; or

(iv) an obligation to provide collateral to secure any of the foregoing types of obligations.

"**Contributed Assets**" means the assets contributed or otherwise transferred on the Sixth ARCA Effective Date by certain of the Wireline Companies to one or more subsidiaries of Propco immediately prior to the effectiveness of this Agreement pursuant to certain assignment and assumption agreements dated the date hereof.

"**Control**" has the following meanings:

(a) when used with respect to any Security or Security Entitlement, the meaning specified in UCC Section 8-106; and

(b) when used with respect to any Deposit Account, the meaning specified in UCC Section 9-104.

"**Controlled Deposit Account**" means any Deposit Account that is subject to a Deposit Account Control Agreement.

"**Controlled Securities Account**" means any Securities Account that (i) is maintained in the name of a Lien Grantor at an office of a Securities Intermediary located in the United States and (ii) together with all Financial Assets credited thereto and all related Security Entitlements, is subject to a Securities Account Control Agreement among such Lien Grantor, the Collateral Agent and such Securities Intermediary.

"**Copyright License**" means any agreement now or hereafter in existence granting to any Lien Grantor, or pursuant to which any Lien Grantor grants to any

other Person, any right to use, copy, reproduce, distribute, prepare derivative works, display or publish any records or other materials on which a Copyright is in existence or may come into existence, including any agreement identified in Schedule 1 to any Copyright Security Agreement.

"**Copyrights**" means all of the following: (i) all copyrights under the laws of the United States or any other country (whether or not the underlying works of authorship have been published), all registrations and recordings thereof, all copyrightable works of authorship (whether or not published), and all applications for copyrights under the laws of the United States or any other country, including registrations, recordings and applications in the United States Copyright Office or in any similar office or agency of the United States, any State thereof or any other country or any political subdivision thereof, including those described in Schedule 1 to any Copyright Security Agreement, (ii) all renewals of any of the foregoing, (iii) all claims for, and rights to sue for, past or future infringements of any of the foregoing, and (iv) all income, royalties, damages and payments now or hereafter due or payable with respect to any of the foregoing, including damages and payments for past or future infringements thereof.

"**Copyright Security Agreement**" means a Copyright Security Agreement, substantially in the form of Exhibit B, executed and delivered by a Lien Grantor in favor of the Collateral Agent for the benefit of the Secured Parties.

"**Credit Agreement**" means the Sixth Amended and Restated Credit Agreement originally dated as of July 17, 2006, as amended and restated as of April 24, 2015, by and among the Borrower, the Lenders party thereto, JPMorgan Chase Bank, N.A., as Administrative Agent and Collateral Agent, and the other agents party thereto, as amended, supplemented or otherwise modified from time to time.

"**Deposit Account Control Agreement**" means, with respect to any Deposit Account of any Lien Grantor, a Deposit Account Control Agreement in form and substance reasonably acceptable to the Collateral Agent, among such Lien Grantor, the Collateral Agent and the relevant Depository Bank, (i) providing that, after receipt of a Notice of Exclusive Control by the Depository Bank, and so long as the Collateral Agent has not delivered an Exclusive Control Termination Notice to the Depository Bank, such Depository Bank will comply with instructions originated by the Collateral Agent directing disposition of the funds in such Deposit Account without further consent by the Borrower or other applicable Lien Grantor and (ii) subordinating to the relevant Transaction Lien all claims of the Depository Bank to such Deposit Account (except its right to deduct its normal operating charges and any uncollected funds previously credited thereto).

"**Depository Bank**" means a bank at which a Controlled Deposit Account is maintained.

"**Enforcement Notice**" means a notice delivered to the Collateral Agent (which the Collateral Agent agrees to promptly forward to the Borrower) (i) by the Required Lenders or the Administrative Agent at any time after the maturity of the Loans has been accelerated pursuant to Article 7 of the Credit Agreement and/or the principal of the Loans shall not have been paid at maturity or (ii) by the AC Holdings Trustee at any time after the maturity of the AC Holdings Bonds has been accelerated pursuant to Section 5.1 of the AC Holdings Indenture and/or the principal of the AC Holdings Bonds shall not have been paid at maturity, in each case directing the Collateral Agent to exercise one or more specific rights or remedies under the Security Documents.

"**Equity Interest**" means (i) in the case of a corporation, any shares of its capital stock, (ii) in the case of a limited liability company, any membership interest therein, (iii) in the case of a partnership, any partnership interest (whether general or limited) therein, (iv) in the case of any other business entity, any participation or other interest in the equity thereof, (v) any warrant, option or other right to acquire any Equity Interest described in this definition or (vi) any Security Entitlement in respect of any Equity Interest described in this definition.

"**Exclusive Control Termination Notic**e" means, with respect to any Notice of Exclusive Control delivered in respect of a Collateral Account or the securities subject to an Issuer Control Agreement, a written notice from the Collateral Agent to the Depository Bank, the Securities Intermediary or the Issuer, as the case may be, stating that the Event of Default described in such Notice of Exclusive Control shall have been cured or waived or otherwise ceased to exist.

"**Facility Guarantee**" means, with respect to each Guarantor, its guarantee of the Facility Obligations under the Guarantee Agreement or Section 1 of a Guarantee Agreement Supplement.

"**Guarantors**" means each Subsidiary party to the Guarantee Agreement and each Subsidiary that shall, at any time after the date hereof, become a "Guarantor" pursuant to Section 5.10 of the Credit Agreement or Section 7 of the Guarantee Agreement.

"**Intellectual Property Filing**" means (i) with respect to any Patent, Patent License, Trademark (excluding any "intent to use" trademark application to the extent that, and solely during the period in which, the grant of a security interest therein would impair the validity or enforceability of such "intent to use" trademark application, or is prohibited, under applicable law) or Trademark License, in each case constituting Recordable Intellectual Property, the filing of the applicable Patent Security Agreement or Trademark Security Agreement with

the United States Patent and Trademark Office, together with an appropriately completed recordation form, and (ii) with respect to any Copyright or Copyright License, in each case constituting Recordable Intellectual Property, the filing of the applicable Copyright Security Agreement with the United States Copyright Office, together with an appropriately completed recordation form, in each case sufficient to record the Transaction Lien granted to the Collateral Agent in such Recordable Intellectual Property.

"**Intellectual Property Security Agreement**" means a Copyright Security Agreement, a Patent Security Agreement or a Trademark Security Agreement.

"**International Registry**" means the registry established pursuant to the Convention on International Interests in Mobile Equipment and its Protocol on Matters Specific to Aircraft Equipment, concluded in Cape Town on November 16, 2001.

"**Issuer**" means any issuer of Uncertificated Securities party to an Issuer Control Agreement.

"**Issuer Control Agreement**" means an Issuer Control Agreement substantially in the form of Exhibit F (with any changes that the Collateral Agent shall have reasonably approved).

"**Lien Grantors**" means the Borrower and the Guarantors.

"**LLC Interest**" means a membership interest or similar interest in a limited liability company.

"**Margin Stock**" has the meaning specified in Regulation U of the Board of Governors of the Federal Reserve System.

"**Non-Contingent Secured Obligation**" means at any time any Secured Obligation (or portion thereof) that is not a Contingent Secured Obligation at such time.

"**Notice of Exclusive Control**" means, with respect to any Collateral Account or the securities subject to an Issuer Control Agreement of any Lien Grantor, a written notice from the Collateral Agent to the Depository Bank, the Securities Intermediary or the Issuer, as the case may be, stating that an Event of Default has occurred and is continuing, and instructing such Depository Bank, Securities Intermediary or Issuer, as the case may be, to comply with instructions originated by the Collateral Agent with respect to such Collateral Account or Issuer, as applicable, without further consent by such Lien Grantor.

"**Opinion of Counsel**" means a written opinion of legal counsel (who may be counsel to a Lien Grantor or other counsel) reasonably acceptable to the Collateral Agent) addressed and delivered to the Collateral Agent.

"**Original Lien Grantor**" means any Lien Grantor that has granted a Lien on any of its assets hereunder as of the Sixth ARCA Effective Date.

"**own**" refers to the possession of sufficient rights in property to grant a security interest therein as contemplated by UCC Section 9-203, and "**acquire**" refers to the acquisition of any such rights.

"**Partnership Interest**" means a partnership interest, whether general or limited.

"**Patent License**" means any agreement now or hereafter in existence granting to any Lien Grantor, or pursuant to which any Lien Grantor grants to any other Person, any right under any patent or patent application.

"**Patents**" means (i) all letters patent and design letters patent of the United States or any other country and all applications for letters patent or design letters patent of the United States or any other country, including applications in the United States Patent and Trademark Office or in any similar office or agency of the United States, any State thereof or any other country or any political subdivision thereof, including those described in Schedule 1 to any Patent Security Agreement, (ii) all reissues, divisions, continuations, continuations in part, revisions and extensions of any of the foregoing, (iii) all claims for, and rights to sue for, past or future infringements of any of the foregoing and (iv) all income, royalties, damages and payments now or hereafter due or payable with respect to any of the foregoing, including damages and payments for past or future infringements thereof.

"**Patent Security Agreement**" means a Patent Security Agreement, substantially in the form of Exhibit C, executed and delivered by a Lien Grantor in favor of the Collateral Agent for the benefit of the Secured Parties.

"**Perfection Certificate**" means, with respect to any Lien Grantor, a certificate substantially in the form of Exhibit E, completed and supplemented with the schedules contemplated thereby to the reasonable satisfaction of the Collateral Agent, and signed by an officer of such Lien Grantor.

"**Permitted Liens**" means (i) the Transaction Liens and (ii) any other Liens on the Collateral permitted to be created or assumed or to exist pursuant to Section 6.02 of the Credit Agreement.

"**Pledged**", when used in conjunction with any type of asset, means at any time an asset of such type that is included (or that creates rights that are included) in the Collateral at such time. For example, "Pledged Equity Interest" means an Equity Interest that is included in the Collateral at such time.

"**Post-Petition Interest**" means any interest that accrues after the commencement of any case, proceeding or other action relating to the bankruptcy, insolvency or reorganization of any one or more of the Lien Grantors (or would accrue but for the operation of applicable bankruptcy or insolvency laws), whether or not such interest is allowed or allowable as a claim in any such proceeding.

"**Recordable Intellectual Property**" means (i) any Patent filed with the United States Patent and Trademark Office, and any material Patent License with respect to a Patent so filed (but only in cases where such Patent License consists of a material exclusive license by a third party to a Lien Grantor of all or substantially all rights in such Patent so filed), (ii) any Trademark filed with the United States Patent and Trademark Office (excluding any "intent to use" trademark application to the extent that, and solely during the period in which, the grant of a security interest therein would impair the validity or enforceability of such "intent to use" trademark application, or is prohibited, under applicable law), and any material Trademark License with respect to a Trademark so filed (but only in cases where such Trademark License consists of a material exclusive license by a third party to a Lien Grantor of all or substantially all rights in such Trademark so filed), (iii) any Copyright filed with the United States Copyright Office and any material Copyright License with respect to a Copyright so filed (but only in cases where such Copyright License consists of a material exclusive license by a third party to a Lien Grantor of all or substantially all rights in such Copyright so filed), and (iv) all rights in or under any of the foregoing.

"**Regulated Subsidiary**" means a Subsidiary as to which the consent of a Governmental Authority is required for any acquisition of control or change of control thereof.

"**Release Conditions**" means the following conditions for terminating all the Transaction Liens:

(i) all Commitments under the Credit Agreement shall have expired or been terminated;

(ii) all Non-Contingent Secured Obligations under the Loan Documents shall have been paid in full; and

(iii) no Contingent Secured Obligation under the Loan Documents (other than contingent indemnification and expense reimbursement

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obligations as to which no claim shall have been asserted) shall remain outstanding; and

(iv) either (x) all Secured Bond Obligations have been paid or (y) the Collateral Agent has received an Opinion of Counsel to the Lien Grantors in form and substance reasonably satisfactory to the Collateral Agent that the Secured Bond Obligations are no longer required to be secured under the Security Documents by any of the Collateral.

"**Restricted Collateral**" means any Collateral consisting of any property or assets of AC Holdings or any of its "Restricted Subsidiaries" (as defined in the AC Holdings Indenture).

"**RUS Pledged Deposit Account**" means any deposit account of a RUS Grantee that is required to be pledged to the RUS under a RUS Grant and Security Agreement, but only if such deposit account holds only (i) RUS Grant Funds and (ii) additional funds required to be contributed by the Grantees under the RUS Grant and Security Agreement, such amount not to exceed 25% of the average aggregate amount of funds under clauses (i) and (ii) of this definition.

"**Secured Agreement**", when used with respect to any Secured Obligation, refers collectively to each instrument, agreement or other document that sets forth obligations of the Borrower, obligations of a guarantor and/or rights of the holder with respect to such Secured Obligation.

"**Secured Bond Obligations**" means the obligations described in clause (b)(ii) of the definition of "Secured Obligations".

"**Secured Obligations**" means (a) in the case of the Borrower, the Facility Obligations and (b) in the case of each other Lien Grantor, (i) its Facility Guarantee and (ii) only in the case of a Lien Grantor that is the issuer of the AC Holdings Bonds or one of its "Restricted Subsidiaries" (as defined in the AC Holdings Bonds), the obligations of AC Holdings with respect to the AC Holdings Bonds (including, in each case under the foregoing clauses (a) and (b), Post-Petition Interest).

"**Secured Parties**" means the holders from time to time of the Secured Obligations.

"**Secured Party Requesting Notice**" means, at any time, a Secured Party that has, at least five Business Days prior thereto, delivered to the Collateral Agent (with a copy to the Borrower) a written notice (i) stating that it holds one or more Secured Obligations and wishes to receive copies of the notices referred to in Section 17(e) and (ii) setting forth its address, facsimile number and e-mail address to which copies of such notices should be sent.

"**Securities Account Control Agreement**" means, when used with respect to a Securities Account required to subject to a Securities Account Control Agreement hereunder, a Securities Account Control Agreement in form and substance reasonably acceptable to the Collateral Agent, among the relevant Securities Intermediary, the relevant Lien Grantor and the Collateral Agent to the effect that, after receipt of a Notice of Exclusive Control by the Securities Intermediary and so long as no Exclusive Control Termination Notice has been delivered by the Collateral Agent to the Securities Intermediary, such Securities Intermediary will comply with Entitlement Orders originated by the Collateral Agent with respect to such Securities Account without further consent by the relevant Lien Grantor.

"**Security Agreement Supplement**" means a Security Agreement Supplement, substantially in the form of Exhibit A, signed and delivered to the Collateral Agent for the purpose of adding a Subsidiary as a party hereto pursuant to Section 19 and/or adding additional property to the Collateral.

"**Security Documents**" means this Agreement, the Security Agreement Supplements, the Deposit Account Control Agreements, the Issuer Control Agreements, the Securities Account Control Agreements, the Intellectual Property Security Agreements and all other agreements or instruments delivered pursuant this Agreement or Section 5.10 or 5.11 of the Credit Agreement.

"**Trademark License**" means any agreement now or hereafter in existence granting to any Lien Grantor, or pursuant to which any Lien Grantor grants to any other Person, any right to use any trademark, including any agreement identified in Schedule 1 to any Trademark Security Agreement.

"**Trademarks**" means: (i) all trademarks, trade names, corporate names, company names, business names, fictitious business names, trade styles, service marks, logos, brand names, trade dress, prints and labels on which any of the foregoing have appeared or appear, and all other source or business identifiers, and all general intangibles of like nature, and the rights in any of the foregoing which arise under applicable law, (ii) the goodwill of the business symbolized thereby or associated with each of them, (iii) all registrations and applications in connection therewith, including registrations and applications in the United States Patent and Trademark Office or in any similar office or agency of the United States, any State thereof or any other country or any political subdivision thereof, including those described in Schedule 1 to any Trademark Security Agreement, (iv) all renewals of any of the foregoing, (v) all claims for, and rights to sue for, past or future infringements of any of the foregoing and (vi) all income, royalties, damages and payments now or hereafter due or payable with respect to any of the foregoing, including damages and payments for past or future infringements thereof.

"**Trademark Security Agreement**" means a Trademark Security Agreement, substantially in the form of Exhibit D, executed and delivered by a Lien Grantor in favor of the Collateral Agent for the benefit of the Secured Parties.

"**UCC**" means the Uniform Commercial Code as in effect from time to time in the State of New York; *provided* that, if perfection or the effect of perfection or non-perfection or the priority of any Transaction Lien on any Collateral is governed by the Uniform Commercial Code as in effect in a jurisdiction other than New York, "UCC" means the Uniform Commercial Code as in effect from time to time in such other jurisdiction for purposes of the provisions hereof relating to such perfection, effect of perfection or non-perfection or priority.

"**Unrestricted Collateral**" means all Collateral other than Restricted Collateral.

(d) *Terms Generally.* The definitions of terms herein (including those incorporated by reference to the UCC or to another document) apply equally to the singular and plural forms of the terms defined. Whenever the context may require, any pronoun includes the corresponding masculine, feminine and neuter forms. The words "**include**", "**includes**" and "**including**" shall be deemed to be followed by the phrase "**without limitation**". The word "**will**" shall be construed to have the same meaning and effect as the word "**shall**". Unless the context requires otherwise, (i) any definition of or reference to any agreement, instrument or other document herein shall be construed as referring to such agreement, instrument or other document as from time to time amended, supplemented or otherwise modified (subject to any restrictions on such amendments, supplements or modifications set forth in the Loan Documents), (ii) any reference herein to any Person shall be construed to include such Person's successors and assigns, (iii) the words "**herein**", "**hereof**" and "**hereunder**", and words of similar import, shall be construed to refer to this Agreement in its entirety and not to any particular provision hereof, (iv) all references herein to Sections, Exhibits and Schedules shall be construed to refer to Sections of, and Exhibits and Schedules to, this Agreement and (v) the word "**property**" shall be construed to refer to any and all tangible and intangible assets and properties, including cash, securities, accounts and contract rights.

Section 2. *Grant of Transaction Liens.*

(a) The Borrower and each Guarantor listed on the signature pages hereof, in order to secure its Secured Obligations, (i) reaffirms the security interest granted pursuant to the Original Security Agreement (but, for the avoidance of doubt, excluding any security interest granted in the Contributed

Assets) and (ii) hereby grants to the Collateral Agent for the benefit of the Secured Parties a continuing security interest in all of its right, title and interest in the following property of the Borrower or such Guarantor, as the case may be, whether now owned or existing or hereafter acquired or arising and regardless of where located:

(i) all Accounts;

(ii) all Chattel Paper;

(iii) all Deposit Accounts;

(iv) all Documents;

(v) all Equipment;

(vi) all General Intangibles (including any Equity Interests in other Persons that do not constitute Investment Property);

(vii) all Instruments;

(viii) all Inventory;

(ix) all Investment Property;

(x) all books and records (including customer lists, credit files, computer programs, printouts and other computer materials and records) pertaining to any Collateral;

(xi) ownership interests in (1) Collateral Accounts, (2) all Financial Assets credited to Collateral Accounts from time to time and all Security Entitlements in respect thereof, (3) all cash held in Collateral Accounts from time to time and (4) all other money in the possession of the Collateral Agent; and

(xii) all Proceeds of the Collateral described in the foregoing clauses (i) through (xi);

provided that the following property is excluded from the Collateral (and no Lien Grantor shall be deemed to have granted a security interest in): (A) motor vehicles the perfection of a security interest in which is excluded from the Uniform Commercial Code in the relevant jurisdiction; (B) voting Equity Interests in any Foreign Subsidiary in excess of 66% of all voting Equity Interests in such Foreign Subsidiary; (C) Equipment or Goods leased by any Lien Grantor under a lease that prohibits the granting of a Lien on such Equipment or Goods and any general

intangibles or other rights arising under any contract, lease, health care insurance receivable, General Intangible, instrument, license or other document, in each such case if (but only to the extent that) the grant of a security interest therein would constitute or result in (x) the abandonment, invalidation or unenforceability of any right, title or interest of such Lien Grantor therein, (y) a violation of a valid and effective restriction in favor of a third party or under any law, regulation, permit, order or decree of any Governmental Authority, unless and until all required consents shall have been obtained or (z) the termination of (or any party thereto having a right to terminate) such contract, lease, health care insurance receivable, General Intangible, instrument, license or other document; (D) any "intent to use" trademark application to the extent that, and solely during the period in which, the grant of a security interest therein would impair the validity or enforceability of such "intent to use" trademark application, or is prohibited, under applicable law; (E) any assets encumbered by liens permitted by Section 6.02(e), 6.02(m), 6.02(p) or 6.02(q) of the Credit Agreement; (F) Margin Stock; (G) Contributed Assets; (H) RUS Pledged Deposit Accounts; and (I) Notes Escrow Accounts.

(b) With respect to each right to payment or performance included in the Collateral from time to time, the Transaction Lien granted therein includes a continuing security interest in (i) any Supporting Obligation that supports such payment or performance and (ii) any Lien that (x) secures such right to payment or performance or (y) secures any such Supporting Obligation.

(c) The Transaction Liens are granted as security only and shall not subject the Collateral Agent or any other Secured Party to, or transfer or in any way affect or modify, any obligation or liability of any Lien Grantor with respect to any of the Collateral or any transaction in connection therewith or constitute a "change of control" with respect to any Person for purposes of the Communications Act or any similar state law.

Section 3. *General Representations and Warranties.* Each Original Lien Grantor represents and warrants that:

(a) Such Lien Grantor is duly organized, validly existing and in good standing under the laws of the jurisdiction identified as its jurisdiction of organization in its Perfection Certificate (as supplemented by written notice to the Collateral Agent from time to time).

(b) Schedule 1 lists all Equity Interests in Subsidiaries and Affiliates owned by such Lien Grantor as of the Sixth ARCA Effective Date. Except as set forth on Schedule 1, such Lien Grantor holds all such Equity Interests directly (*i.e.*, not through a Subsidiary, a Securities Intermediary or any other Person).

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(c) Schedule 2 lists, as of the Sixth ARCA Effective Date, (i) all Securities owned by such Lien Grantor (except Securities evidencing Equity Interests in Subsidiaries and Affiliates) and (ii) all Securities Accounts to which Financial Assets are credited in respect of which such Lien Grantor owns Security Entitlements having an individual average daily balance in excess of $15,000,000. Such Lien Grantor owns no Commodity Account in respect of which such Lien Grantor is the Commodity Customer.

(d) All Pledged Equity Interests owned by such Lien Grantor are owned by it free and clear of any Lien other than (i) the Transaction Liens, (ii) Liens permitted pursuant to clauses (c) and (d) of Section 6.02 and (iii) any inchoate tax liens. All shares of capital stock included in such Pledged Equity Interests (including shares of capital stock in respect of which such Lien Grantor owns a Security Entitlement) have been duly authorized and validly issued and are fully paid and (if applicable) non-assessable. None of such Pledged Equity Interests is subject to any option to purchase or similar right of any Person.

(e) The Transaction Liens on all Collateral owned by such Lien Grantor (i) have been validly created, (ii) will have attached to each item of such Collateral as of the Sixth ARCA Effective Date (or, if such Lien Grantor first obtains rights thereto on a later date, will attach on such later date) and (iii) when so attached, will secure all such Lien Grantor's Secured Obligations.

(f) Such Lien Grantor has delivered a Perfection Certificate to the Collateral Agent. The information set forth therein is correct and complete as of the Original Closing Date (or on the effective date of such Lien Grantor's Security Agreement Supplement, if applicable).

(g) When UCC financing statements describing the Collateral as "all personal property" or "all assets" have been filed in the offices specified for such Lien Grantor in the applicable Perfection Certificate (as supplemented by written notice to the Collateral Agent from time to time), the Transaction Liens will constitute perfected security interests in the Collateral owned by such Lien Grantor to the extent that a security interest therein may be perfected by filing pursuant to the UCC, prior to all Liens and rights of others therein except Permitted Liens. When, in addition to the filing of such UCC financing statements and except for any filings required under the laws of a jurisdiction outside the United States with respect to intellectual property, the applicable Intellectual Property Filings have been made with respect to such Lien Grantor's Recordable Intellectual Property (including any future filings required pursuant to Section 4(a) and Section 5(a)), the Transaction Liens will constitute perfected security interests in all right, title and interest of such Lien Grantor in its Recordable Intellectual Property to the extent that security interests therein may be perfected by such filings, prior to all Liens and rights of others therein except

Permitted Liens. Except for (i) the filing of such UCC financing statements and (ii) such Intellectual Property Filings, no registration, recordation or filing with any governmental body, agency or official is required in connection with the execution or delivery of the Security Documents or is necessary for the validity or enforceability thereof or for the perfection or due recordation of the Transaction Liens or (except with respect to the capital stock of any Regulated Subsidiary) for the enforcement of the Transaction Liens.

Section 4. *Further Assurances; General Covenants.* Each Lien Grantor covenants as follows:

(a) Subject to the other terms and conditions hereof, such Lien Grantor will, from time to time, at the Borrower's expense, execute, deliver, file and record any statement, assignment, instrument, document, agreement or other paper and take any other action (including any Intellectual Property Filing and any filing of financing or continuation statements under the UCC) that from time to time may be necessary, or that the Collateral Agent may reasonably request, in order to:

(i) create, preserve, perfect, confirm or validate the Transaction Liens on such Lien Grantor's Collateral;

(ii) in the case of Pledged Deposit Accounts and Pledged Investment Property, cause the Collateral Agent to have Control thereof;

(iii) enable the Collateral Agent and the other Secured Parties to obtain the full benefits of the Security Documents; or

(iv) enable the Collateral Agent to exercise and enforce any of its rights, powers and remedies with respect to any of such Lien Grantor's Collateral.

To the extent permitted by applicable law, such Lien Grantor authorizes the Collateral Agent to file or record financing statements and other filing or recording documents or instruments with respect to the Collateral without the signature of such Lien Grantor in such form and in such offices as the Collateral Agent determines appropriate to perfect the security interests of the Collateral Agent under this Agreement. Such Lien Grantor authorizes the Collateral Agent to use collateral descriptions such as "all personal property" or "all assets", in each case "whether now owned or hereafter acquired", words of similar import or any other description the Collateral Agent, in its sole discretion, so chooses in any such financing statements. Such Lien Grantor agrees that a carbon, photographic, photostatic or other reproduction of this Agreement or of a financing statement is sufficient as a financing statement for filing or recording purposes. Such Lien Grantor appoints the Collateral Agent its attorney-in-fact to execute and file all

Intellectual Property Filings and other filings required or so requested for the foregoing purposes, all acts of such attorney being hereby ratified and confirmed; and such power, being coupled with an interest, shall be irrevocable until all the Transaction Liens granted by such Lien Grantor terminate pursuant to Section 18. The Borrower will pay the costs of, or incidental to, any Intellectual Property Filings and any recording or filing of any financing or continuation statements or other documents recorded or filed pursuant hereto.

(b) Such Lien Grantor will comply with Section 5.03 of the Credit Agreement with respect to any change in (i) its legal name, (ii) its jurisdiction of organization or other location (determined as provided in UCC Section 9-307) or the location of its chief executive office or principal place of business, (iii) its identity or form of organization or (iv) its federal Taxpayer Identification Number.

(c) Such Lien Grantor will, promptly upon request, provide to the Collateral Agent all information and evidence concerning such Lien Grantor's Collateral that the Collateral Agent may reasonably request from time to time to enable it to enforce the provisions of the Security Documents.

(d) From time to time upon any reasonable request by the Collateral Agent after the occurrence and during the continuance of an Event of Default or in connection with any event described in Section 4(b), such Lien Grantor will, at the Borrower's expense, cause to be delivered to the Secured Parties an Opinion of Counsel reasonably satisfactory to the Collateral Agent as to such matters relating to the transactions contemplated hereby as the Collateral Agent may reasonably request.

(e) As of the Sixth ARCA Effective Date, the Borrower will, at its expense, have caused aircraft mortgages in form and substance reasonably satisfactory to the Collateral Agent and otherwise in appropriate form for filing with the Federal Aviation Administration to be filed with the Federal Aviation Administration and cause the security interest created pursuant to such aircraft mortgages to be registered with the International Registry, and have taken all such other actions as may be necessary or reasonably requested by the Collateral Agent in order to create, perfect and record the Transaction Lien in the aircraft described on Schedule 4.

Section 5. *Recordable Intellectual Property.* Each Lien Grantor covenants as follows:

(a) As of the Sixth ARCA Effective Date (in the case of an Original Lien Grantor) or on the date on which it signs and delivers its first Security Agreement Supplement (in the case of any other Lien Grantor), such Lien Grantor will have signed and delivered (in the case of an Original Lien Grantor) or will

sign and deliver (in the case of any other Lien Grantor) to the Collateral Agent Intellectual Property Security Agreements with respect to all Recordable Intellectual Property then owned by it. Within 30 days after the end of each Fiscal Year thereafter, it will sign and deliver to the Collateral Agent an appropriate Intellectual Property Security Agreement covering any Recordable Intellectual Property owned by it on such date that is not covered by any previous Intellectual Property Security Agreement so signed and delivered by it. In each case, it will promptly make (or provide to the Collateral Agent all information required or reasonably requested by the Collateral Agent for it to make) all Intellectual Property Filings necessary to record the Transaction Liens on such Recordable Intellectual Property.

(b) Such Lien Grantor will notify the Collateral Agent promptly if it knows that any application or registration relating to any Recordable Intellectual Property owned or licensed by it may become abandoned or dedicated to the public, or of any adverse determination or development (including the institution of, or any adverse determination or development in, any proceeding in the United States Copyright Office, the United States Patent and Trademark Office or any court) regarding such Lien Grantor's ownership of such Recordable Intellectual Property, its right to register or patent the same, or its right to keep and maintain the same, in each case that would reasonably be expected to have a material impact on the overall value of all of the Collateral. If any of such Lien Grantor's rights to any Recordable Intellectual Property are infringed, misappropriated or diluted by a third party and such infringement, misappropriation or dilution would reasonably be expected to have a material impact on the overall value of all of the Collateral, such Lien Grantor will notify the Collateral Agent within 30 days after it learns thereof and will, unless such Lien Grantor shall elect not to do so in its reasonable business judgment (including because it reasonably determines that such action would not be of sufficient value, economic or otherwise), promptly sue for infringement, misappropriation or dilution and to recover any and all damages for such infringement, misappropriation or dilution, and/or take such other actions as such Lien Grantor shall reasonably deem appropriate under the circumstances to protect such Recordable Intellectual Property.

Section 6. *Investment Property.* Each Lien Grantor represents, warrants and covenants as follows:

(a) *Certificated Securities.* As of the Sixth ARCA Effective Date (in the case of an Original Lien Grantor) or on the date on which it signs and delivers its first Security Agreement Supplement (in the case of any other Lien Grantor), such Lien Grantor will have delivered (in the case of an Original Lien Grantor) or will deliver (in the case of any other Lien Grantor) to the Collateral Agent as Collateral hereunder all certificates representing Pledged Certificated Securities then owned by such Lien Grantor. Thereafter, whenever such Lien Grantor

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acquires any other certificate representing a Pledged Certificated Security, such Lien Grantor will immediately deliver such certificate to the Collateral Agent as Collateral hereunder. The provisions of this subsection are subject to the limitation in Section 6(j) in the case of voting Equity Interests in a Foreign Subsidiary.

(b) *Uncertificated Securities*. As of the Sixth ARCA Effective Date (in the case of an Original Lien Grantor) or on the date on which it signs and delivers its first Security Agreement Supplement (in the case of any other Lien Grantor), such Lien Grantor will have entered into (and will have caused the relevant issuer to enter into) (in the case of an Original Lien Grantor) or will enter into (and will cause the relevant issuer to enter into) (in the case of any other Lien Grantor) an Issuer Control Agreement in respect of each Pledged Uncertificated Security then owned by such Lien Grantor and deliver such Issuer Control Agreement to the Collateral Agent (which shall enter into the same). Thereafter, whenever such Lien Grantor acquires any other Pledged Uncertificated Security, such Lien Grantor will enter into (and cause the relevant issuer to enter into) an Issuer Control Agreement in respect of such Pledged Uncertificated Security and deliver such Issuer Control Agreement to the Collateral Agent (which shall enter into the same). The provisions of this subsection are subject to the limitation in Section 6(j) in the case of voting Equity Interests in a Foreign Subsidiary.

(c) *Security Entitlements*. As of the Sixth ARCA Effective Date, such Lien Grantor will, with respect to each Securities Account in respect of which it owns Securities Entitlements in excess of $15,000,000, have entered into (and will have caused the relevant Securities Intermediary to enter into) a Securities Account Control Agreement in respect of such Security Entitlement and the Securities Account to which the underlying Financial Asset is credited and will have delivered such Securities Account Control Agreement to the Collateral Agent (which shall have entered into the same); *provided* the aggregate amount of Securities Entitlements in respect of Securities Accounts that are not Controlled Securities Accounts shall not at any time exceed $25,000,000 for all Lien Grantors.

(d) *Perfection as to Certificated Securities.* When such Lien Grantor delivers the certificate representing any Pledged Certificated Security owned by it to the Collateral Agent, together with an effective endorsement (as defined in UCC Sections 8-102(a)(ii) and 8-107), including an appropriate stock power, (i) the Transaction Lien on such Pledged Certificated Security will be perfected, subject to no Liens, other than Permitted Liens, and (ii) the Collateral Agent will have Control of such Pledged Certificated Security.

(e) *Regulated Subsidiaries*. If the Collateral includes any capital stock of a Regulated Subsidiary (other than a Regulated Subsidiary set forth on

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Schedule 3) that is not represented by certificates, if and to the extent such capital stock is represented by certificates after the Sixth ARCA Effective Date, the relevant Lien Grantor shall promptly upon receipt thereof deliver such certificates to the Collateral Agent. No Lien Grantor shall hold any capital stock of a Regulated Subsidiary in a Securities Account.

(f) *Perfection as to Uncertificated Securities*. When such Lien Grantor, the Collateral Agent and the issuer of any Pledged Uncertificated Security owned by such Lien Grantor enter into an Issuer Control Agreement with respect thereto, (i) the Transaction Lien on such Pledged Uncertificated Security will be perfected, subject to no Liens, other than Permitted Liens, and (ii) the Collateral Agent will have Control of such Pledged Uncertificated Security.

(g) *Perfection as to Security Entitlements*. So long as the Financial Asset underlying any Security Entitlement owned by such Lien Grantor is credited to a Controlled Securities Account, (i) the Transaction Lien on such Security Entitlement will be perfected, subject to no Liens, other than Permitted Liens, and (ii) the Collateral Agent will have Control of such Security Entitlement.

(h) *Agreement as to Applicable Jurisdiction*. In respect of all Security Entitlements owned by such Lien Grantor, and all Securities Accounts to which the related Financial Assets are credited, the Securities Intermediary's jurisdiction (determined as provided in UCC Section 8-110(e)) will at all times be located in the United States.

(i) *Delivery of Pledged Certificates*. All Pledged Certificates, when delivered to the Collateral Agent, will be accompanied by duly executed instruments of transfer or assignment in blank, all in form and substance reasonably satisfactory to the Collateral Agent.

(j) *Foreign Subsidiaries.* A Lien Grantor will not be obligated to comply with the provisions of this Section at any time with respect to any voting Equity Interest in a Foreign Subsidiary if and to the extent (but only to the extent) that such voting Equity Interest is excluded from the Transaction Liens at such time pursuant to clause (B) of the proviso at the end of Section 2(a) and/or the comparable provisions of one or more Security Agreement Supplements.

Section 7. *Controlled Deposit Accounts.* Each Lien Grantor represents, warrants and covenants as follows:

(a) All cash owned by such Lien Grantor and held in such Lien Grantor's Deposit Accounts will be periodically transferred (in accordance with such Lien Grantor's past practice, or more frequently as such Lien Grantor may reasonably determine) to one or more Controlled Deposit Accounts, *provided* that

this Section 7(a) shall not apply to any cash held in a RUS Pledged Deposit Account that is required to be so held pursuant to the RUS Grant and Security Agreement or to any cash held in a Notes Escrow Account to the extent constituting Notes Escrowed Proceeds; *provided further* that the Deposit Account into which the "basis proceeds" in connection with the Spinoff are deposited shall not be required to be a Controlled Deposit Account until the date that is 60 days following the Sixth ARCA Effective Date (or such later date as agreed by the Collateral Agent in its discretion). Each Controlled Deposit Account will be operated as provided in Section 9.

(b) In respect of each Controlled Deposit Account, the Depository Bank's jurisdiction (determined as provided in UCC Section 9-304) will at all times be a jurisdiction in which Article 9 of the Uniform Commercial Code is in effect.

(c) So long as the Collateral Agent has Control of a Controlled Deposit Account, the Transaction Lien on such Controlled Deposit Account will be perfected, subject to no Liens, except for (i) the Depository Bank's right to deduct its normal operating charges and any uncollected funds previously credited thereto or as otherwise provided under applicable law and (ii) inchoate tax liens.

Section 8. *Cash Collateral Accounts.* (a) If and when required for purposes hereof, the Collateral Agent will establish with respect to each Lien Grantor an account (its "**Cash Collateral Account**"), in the name and under the exclusive control of the Collateral Agent, into which all amounts owned by such Lien Grantor that are to be deposited therein pursuant to the Loan Documents shall be deposited from time to time. Each Cash Collateral Account will be operated as provided in this Section and Section 9.

(b) The Collateral Agent shall deposit the following amounts, as and when received by it, in the Borrower's Cash Collateral Account:

(i) each amount required by Section 2.04(j) of the Credit Agreement to be deposited therein to cover outstanding LC Reimbursement Obligations and any amounts deposited under Section 2.04(c) of the Credit Agreement; and

(ii) each amount realized or otherwise received by the Collateral Agent with respect to assets of the Borrower upon any exercise of remedies pursuant to any Security Document.

(c) The Collateral Agent shall deposit in the Cash Collateral Account of each Lien Grantor (other than the Borrower) each amount realized or otherwise received by the Collateral Agent with respect to assets of such Lien Grantor upon any exercise of remedies pursuant to any Security Document.

(d) The Collateral Agent shall maintain such records and/or establish such sub-accounts as shall be required to enable it to identify the amounts held in each Cash Collateral Account from time to time pursuant to each clause of subsection (b) and subsection (c) above, as applicable.

(e) Unless (x) an Event of Default shall have occurred and be continuing and the Required Lenders shall have instructed the Collateral Agent to stop withdrawing amounts from the Cash Collateral Accounts pursuant to this subsection or (y) the maturity of the Loans shall have been accelerated pursuant to Article 7 of the Credit Agreement, any amount deposited pursuant to Section 2.04(j) of the Credit Agreement to cover outstanding LC Reimbursement Obligations shall be withdrawn and applied to pay such LC Reimbursement Obligations as they become due; *provided* that such amount (to the extent not theretofore so applied) shall be withdrawn and returned to the Borrower if and when permitted by said Section 2.04(j).

Section 9. *Operation of Collateral Accounts.* (a) [*Reserved*]

(b) Funds held in any Collateral Account may, until withdrawn, be invested and reinvested in such Cash Equivalents as the relevant Lien Grantor shall determine in its sole discretion; *provided* that, if (i) an Event of Default of the type described in paragraph (a), (b), (h) or (i) of Article 7 of the Credit Agreement shall have occurred and be continuing, or (ii) any other Event of Default shall have occurred and be continuing and an Enforcement Notice is in effect, the Collateral Agent may select such Cash Equivalents.

(c) With respect to each Collateral Account (except a Cash Collateral Account, as to which Section 8 applies), the Collateral Agent will instruct the relevant Securities Intermediary or Depository Bank that the relevant Lien Grantor may withdraw, or direct the disposition of, funds held therein unless and until the Collateral Agent delivers a Notice of Exclusive Control to such Depository Bank or Securities Intermediary, as the case may be; *provided* that the Collateral Agent will not deliver a Notice of Exclusive Control unless an Event of Default shall have occurred and be continuing; and *provided further* that, promptly following any request therefor from the applicable Lien Grantor after such Event of Default has been cured, waived, or otherwise ceases to exist, and so long as no other Event of Default shall have occurred and be continuing, the Collateral Agent shall deliver an Exclusive Control Termination Notice to the Depository Bank or Securities Intermediary, as the case may be.

(d) If an Event of Default shall have occurred and be continuing, the Collateral Agent may (i) retain, or instruct the relevant Securities Intermediary or Depository Bank to retain, all cash and investments then held in any Collateral Account, (ii) liquidate, or instruct the relevant Securities Intermediary or

Depository Bank to liquidate, any or all investments held therein and/or (iii) withdraw any amounts held therein and apply such amounts as provided in Section 13.

(e) If immediately available cash on deposit in any Collateral Account is not sufficient to make any distribution or withdrawal required or permitted to be made pursuant hereto, the Collateral Agent will cause to be liquidated, as promptly as practicable, such investments held in or credited to such Collateral Account as shall be required to obtain sufficient cash to make such distribution or withdrawal and, notwithstanding any other provision hereof, such distribution or withdrawal shall not be made until such liquidation has taken place.

Section 10. *Transfer of Record Ownership.* At any time when an Event of Default shall have occurred and be continuing, but subject to Section 12(e), the Collateral Agent may (and to the extent that action by it is required, the relevant Lien Grantor, if directed to do so by the Collateral Agent, will as promptly as practicable) cause each of the Pledged Securities (or any portion thereof specified in such direction) to be transferred of record into the name of the Collateral Agent or its nominee. Each Lien Grantor will take any and all actions reasonably requested by the Collateral Agent to facilitate compliance with this Section. If the provisions of this Section are implemented, Section 6(b) shall not thereafter apply to any Pledged Security that is registered in the name of the Collateral Agent or its nominee. The Collateral Agent will promptly give to the Borrower and the relevant Lien Grantor copies of any notices and other communications received by the Collateral Agent with respect to Pledged Securities registered in the name of the Collateral Agent or its nominee.

Section 11. *Right to Vote Securities.* (a) Unless an Event of Default shall have occurred and be continuing and the Collateral Agent shall have notified the Lien Grantors that their rights under this Section 11 are being suspended, each Lien Grantor will have the right to vote and to give consents, ratifications and waivers with respect to any Pledged Security owned by it and the Financial Asset underlying any Pledged Security Entitlement owned by it, and the Collateral Agent will, upon receiving a written request from such Lien Grantor, deliver to such Lien Grantor or as specified in such request such proxies, powers of attorney, consents, ratifications and waivers in respect of any such Pledged Security that is registered in the name of the Collateral Agent or its nominee or any such Pledged Security Entitlement as to which the Collateral Agent or its nominee is the Entitlement Holder, in each case as shall be specified in such request and be in form and substance reasonably satisfactory to the Collateral Agent. Unless an Event of Default shall have occurred and be continuing and the Collateral Agent shall have notified the Lien Grantors that their rights under this Section 11 are being suspended, the Collateral Agent will have no right to take any action which the owner of a Pledged Partnership Interest or Pledged LLC

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Interest is entitled to take with respect thereto, except the right to receive payments and other distributions to the extent provided herein.

(b) Subject to Section 12(e), if an Event of Default shall have occurred and be continuing and the Collateral Agent shall have notified the Lien Grantors that their rights under this Section 11 are being suspended, the Collateral Agent will have the right to the extent permitted by law (and, in the case of a Pledged Partnership Interest or Pledged LLC Interest, by the relevant partnership agreement, limited liability company agreement, operating agreement or other governing document) to vote, to give consents, ratifications and waivers and to take any other action with respect to the Pledged Investment Property, the other Pledged Equity Interests (if any) and the Financial Assets underlying the Pledged Security Entitlements, with the same force and effect as if the Collateral Agent were the absolute and sole owner thereof, and each Lien Grantor will take all such action as the Collateral Agent may reasonably request from time to time to give effect to such right; *provided* that the Collateral Agent shall have the right but not the obligation, from time to time, during the continuation of an Event of Default, to permit the Lien Grantors to exercise such rights.

(c) AFTER ANY AND ALL EVENTS OF DEFAULT HAVE BEEN CURED OR WAIVED, (I) EACH LIEN GRANTOR SHALL HAVE THE RIGHT TO EXERCISE THE VOTING, MANAGERIAL AND OTHER CONSENSUAL RIGHTS AND POWERS THAT IT WOULD OTHERWISE BE ENTITLED TO EXERCISE PURSUANT TO THE LOAN DOCUMENTS AND TO RECEIVE AND RETAIN THE PAYMENTS, PROCEEDS, DIVIDENDS, DISTRIBUTIONS, MONIES, COMPENSATION, PROPERTY, ASSETS, INSTRUMENTS OR RIGHTS THAT IT WOULD BE AUTHORIZED TO RECEIVE AND RETAIN PURSUANT TO THE LOAN DOCUMENTS; AND (II) PROMPTLY FOLLOWING ANY REQUEST THEREFOR FROM ANY LIEN GRANTOR AFTER SUCH CURE OR WAIVER, (A) THE COLLATERAL AGENT SHALL REPAY AND DELIVER TO EACH LIEN GRANTOR ALL CASH AND MONIES THAT SUCH LIEN GRANTOR IS ENTITLED TO RETAIN PURSUANT TO THE LOAN DOCUMENTS WHICH HAVE NOT BEEN APPLIED TO THE REPAYMENT OF THE SECURED OBLIGATIONS AND (B) AS APPLICABLE, THE COLLATERAL AGENT SHALL RESTORE THE RECORD OWNERSHIP OF ANY SUCH COLLATERAL TO EACH LIEN GRANTOR.

Section 12. *Remedies.* (a) If an Event of Default shall have occurred and be continuing and/or an Enforcement Notice is in effect, the Collateral Agent may exercise (or cause its sub-agents to exercise) any or all of the remedies available to it (or to such sub-agents) under the Security Documents.

(b) Without limiting the generality of the foregoing, if an Event of Default shall have occurred and be continuing and/or an Enforcement Notice is in effect, the Collateral Agent may exercise on behalf of the Secured Parties all the rights of a secured party under the UCC (whether or not in effect in the jurisdiction where such rights are exercised) with respect to any Collateral and, in addition, the Collateral Agent may, without being required to give any notice, except as herein provided or as may be required by mandatory provisions of law, withdraw all cash held in the Collateral Accounts and apply such cash as provided in Section 13 and, if there shall be no such cash or if such cash shall be insufficient to pay all the Secured Obligations in full, sell, lease, license or otherwise dispose of the Collateral or any part thereof. Notice of any such sale or other disposition shall be given to the relevant Lien Grantor(s) as required by Section 15.

(c) Without limiting the generality of the foregoing, if an Event of Default shall have occurred and be continuing and/or an Enforcement Notice is in effect:

(i) the Collateral Agent may license or sublicense, whether general, special or otherwise, and whether on an exclusive or non-exclusive basis, any Pledged intellectual property (including any Pledged Recordable Intellectual Property) for such term or terms, on such conditions and in such manner as the Collateral Agent shall in its reasonable discretion determine; *provided* that such licenses or sublicenses do not conflict with any existing license of which the Collateral Agent shall have received a copy;

(ii) the Collateral Agent may (without assuming any obligation or liability thereunder), at any time and from time to time, in its sole and reasonable discretion, enforce (and shall have the exclusive right to enforce) against any licensee or sublicensee all rights and remedies of any Lien Grantor in, to and under any of its Pledged intellectual property and take or refrain from taking any action under any thereof, and each Lien Grantor releases the Collateral Agent and each other Secured Party from liability for, and agrees to hold the Collateral Agent and each other Secured Party free and harmless from and against any claims and expenses arising out of, any lawful action so taken or omitted to be taken with respect thereto, except for claims and expenses arising from the Collateral Agent's or such Secured Party's gross negligence, bad faith or willful misconduct; and

(iii) upon request by the Collateral Agent (which shall not be construed as implying any limitation on its rights or powers), each Lien Grantor will execute and deliver to the Collateral Agent a power of

attorney, in form and substance reasonably satisfactory to the Collateral Agent, for the implementation of any sale, lease, license or other disposition of any of such Lien Grantor's Pledged intellectual property or any action related thereto. In connection with any such disposition, but subject to any confidentiality restrictions imposed on such Lien Grantor in any license or similar agreement, such Lien Grantor will supply to the Collateral Agent its know-how and expertise relating to the relevant intellectual property or the products or services made or rendered in connection with such intellectual property, and its customer lists and other records relating to such intellectual property and to the distribution of said products or services.

(d) Without limiting the generality of the foregoing, if an Event of Default shall have occurred and be continuing, each Lien Grantor will, if requested to do so by the Collateral Agent, promptly notify (and such Lien Grantor authorizes the Collateral Agent so to notify) each account debtor in respect of any of its Accounts that such Accounts have been assigned to the Collateral Agent hereunder, and that any payments due or to become due in respect of such Accounts are to be made directly to the Collateral Agent or its designee.

(e) Notwithstanding any other provision hereof or of any other Security Document, any enforcement of the Transaction Liens with respect to the shares of capital stock of any Regulated Subsidiary or with respect to any Regulatory Authorization shall be effected in accordance with the Communications Act, any applicable state law governing telecommunications, the terms of any Governmental Authorizations and any other applicable laws, rules and regulations. In particular, neither the Collateral Agent nor any other Secured Party shall enforce any of the Transaction Liens with respect to the shares of capital stock of any Regulated Subsidiary or with respect to any Regulatory Authorization if such enforcement would constitute or result in an assignment of such Regulatory Authorization or a change of control of such Regulated Subsidiary as to which the prior approval of such Governmental Authority is required (under then-current law), unless such approval has been obtained; *provided* that if any approval of any Governmental Authority is required for the enforcement of any Transaction Lien by the Collateral Agent, promptly upon the relevant Lien Grantor's receipt of notice thereof, such Lien Grantor shall use its best efforts to obtain all such approvals.

Section 13. *Application of Proceeds.* (a) If an Event of Default shall have occurred and be continuing and/or an Enforcement Notice is in effect, the Collateral Agent shall, in the discretion of the Collateral Agent, either hold as collateral for the Secured Obligations or at any time apply in whole or in part (i)

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any cash held in the Collateral Accounts and (ii) the proceeds of any sale or other disposition of all or any part of the Collateral, in the following order of priorities:

> *first*, to pay the expenses of such sale or other disposition, including reasonable compensation to agents of and counsel for the Collateral Agent, and all expenses, liabilities and advances incurred or made by the Collateral Agent in connection with the Security Documents, and any other amounts then due and payable to the Collateral Agent pursuant to Section 14 or pursuant to Section 9.03 of the Credit Agreement (other than contingent indemnification obligations as to which no claim shall have been asserted);
>
> *second*, to pay the unpaid principal of the Secured Obligations and any breakage, termination or other payments due under Swap Agreements and Cash Management Agreements (including without limitation, but only to the extent of, any cash constituting, or proceeds of, Restricted Collateral, the Secured Bond Obligations secured thereby), ratably (or provide for the payment thereof pursuant to Section 13(b), including without limitation in respect of the aggregate undrawn amount of all outstanding Letters of Credit or the obligations to make payments under Swap Agreements that cannot be quantified at such time), until payment in full of the principal of all such Secured Obligations shall have been made (or so provided for);
>
> *third*, to pay ratably all interest (including Post-Petition Interest) on the Secured Obligations (including without limitation, but only to the extent of, any cash constituting, or proceeds of, Restricted Collateral, the Secured Bond Obligations secured thereby), payable under the Credit Agreement and the AC Holdings Indenture, as applicable, until payment in full of all such interest and fees shall have been made;
>
> *fourth*, to pay all other Secured Obligations ratably (or provide for the payment thereof pursuant to Section 13(b)), until payment in full of all such other Secured Obligations shall have been made (or so provided for); and
>
> *finally*, to pay to the relevant Lien Grantor, or as a court of competent jurisdiction may direct, any surplus then remaining from the proceeds of the Collateral owned by it;

provided that Collateral owned by a Guarantor and any proceeds thereof shall be applied pursuant to the foregoing clauses *first*, *second*, *third* and *fourth* only to the extent permitted by the limitation in Section 2(h) of the Guarantee Agreement. The Collateral Agent may make such distributions hereunder in cash or in kind or, on a ratable basis, in any combination thereof.

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(b) If at any time any portion of any monies collected or received by the Collateral Agent would, but for the provisions of this Section 13(b), be payable pursuant to Section 13(a) in respect of a Contingent Secured Obligation, the Collateral Agent shall not apply any monies to pay such Contingent Secured Obligation but instead shall request the holder thereof, at least 10 days before each proposed distribution hereunder, to notify the Collateral Agent as to the maximum amount of such Contingent Secured Obligation if then ascertainable (*e.g.*, in the case of a letter of credit, the maximum amount available for subsequent drawings thereunder). If the holder of such Contingent Secured Obligation does not notify the Collateral Agent of the maximum ascertainable amount thereof at least two Business Days before such distribution, such holder will not be entitled to share in such distribution. If such holder does so notify the Collateral Agent as to the maximum ascertainable amount thereof, the Collateral Agent will allocate to such holder a portion of the monies to be distributed in such distribution, calculated as if such Contingent Secured Obligation were outstanding in such maximum ascertainable amount. However, the Collateral Agent will not apply such portion of such monies to pay such Contingent Secured Obligation, but instead will hold such monies or invest such monies in Cash Equivalents. All such monies and Cash Equivalents and all proceeds thereof will constitute Collateral hereunder, but will be subject to distribution in accordance with this Section 13(b) rather than Section 13(a). The Collateral Agent will hold all such monies and Cash Equivalents and the net proceeds thereof in trust until all or part of such Contingent Secured Obligation becomes a Non-Contingent Secured Obligation, whereupon the Collateral Agent at the request of the relevant Secured Party will apply the amount so held in trust to pay such Non-Contingent Secured Obligation; *provided* that, if the other Secured Obligations theretofore paid pursuant to the same clause of Section 13(a) (*i.e.*, clause *second* or *fourth*) were not paid in full, the Collateral Agent will apply the amount so held in trust to pay the same percentage of such Non-Contingent Secured Obligation as the percentage of such other Secured Obligations theretofore paid pursuant to the same clause of Section 13(a). If (i) the holder of such Contingent Secured Obligation shall advise the Collateral Agent that no portion thereof remains in the category of a Contingent Secured Obligation and (ii) the Collateral Agent still holds any amount held in trust pursuant to this Section 13(b) in respect of such Contingent Secured Obligation (after paying all amounts payable pursuant to the preceding sentence with respect to any portions thereof that became Non-Contingent Secured Obligations), such remaining amount will be applied by the Collateral Agent in the order of priorities set forth in Section 13(a).

(c) In making the payments and allocations required by this Section, the Collateral Agent may rely upon information supplied to it pursuant to Section 17(c). All distributions made by the Collateral Agent pursuant to this Section shall be final (except in the event of manifest error) and the Collateral Agent shall

have no duty to inquire as to the application by any Secured Party of any amount distributed to it.

Section 14. *Fees and Expenses; Indemnification.* Each of the Lien Grantors agrees that Sections 2.16 and 9.03 of the Credit Agreement will apply, *mutatis mutandis*, with respect to the execution, delivery and performance of this Agreement, the Original Security Agreement and the other Security Documents (including in connection with any payments hereunder or thereunder), including without limitation any and all reasonable out-of-pocket expenses, including transfer taxes and reasonable fees and expenses of counsel and other experts, that the Collateral Agent may incur in connection with (x) the administration or enforcement of the Security Documents, including such expenses as are incurred to preserve the value of the Collateral or the validity, perfection, rank or value of any Transaction Lien, (y) the collection, sale or other disposition of any Collateral or (z) the exercise by the Collateral Agent of any of its rights or powers under the Security Documents.

Section 15. *Authority to Administer Collateral.* Each Lien Grantor irrevocably appoints the Collateral Agent its true and lawful attorney, with full power of substitution, in the name of such Lien Grantor, any Secured Party or otherwise, for the sole use and benefit of the Secured Parties, but at the Borrower's expense, to the extent permitted by law to exercise, at any time and from time to time while an Event of Default shall have occurred and be continuing and/or an Enforcement Notice is in effect, all or any of the following powers with respect to all or any of such Lien Grantor's Collateral:

(a) to demand, sue for, collect, receive and give acquittance for any and all monies due or to become due upon or by virtue thereof,

(b) to settle, compromise, compound, prosecute or defend any action or proceeding with respect thereto,

(c) to sell, lease, license or otherwise dispose of the same or the proceeds or avails thereof, as fully and effectually as if the Collateral Agent were the absolute owner thereof, and

(d) to extend the time of payment of any or all thereof and to make any allowance or other adjustment with reference thereto;

provided that, except in the case of Collateral that is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, the Collateral Agent will give the relevant Lien Grantor at least ten days' prior written notice of the time and place of any public sale thereof or the time after which any private sale or other intended disposition thereof will be made. Any such notice shall (i) contain the information specified in UCC Section 9-613, (ii)

be Authenticated and (iii) be sent to the parties required to be notified pursuant to UCC Section 9-611(c); *provided* that, if the Collateral Agent fails to comply with this sentence in any respect, its liability for such failure shall be limited to the liability (if any) imposed on it as a matter of law under the UCC.

Section 16. *Limitation on Duty in Respect of Collateral.* Beyond the exercise of reasonable care in the custody and preservation thereof, the Collateral Agent will have no duty as to any Collateral in its possession or control or in the possession or control of any sub-agent or bailee or any income therefrom or as to the preservation of rights against prior parties or any other rights pertaining thereto. The Collateral Agent will be deemed to have exercised reasonable care in the custody and preservation of the Collateral in its possession or control if such Collateral is accorded treatment substantially equal to that which it accords its own property, and will not be liable or responsible for any loss or damage to any Collateral, or for any diminution in the value thereof, by reason of any act or omission of any sub-agent or bailee selected by the Collateral Agent in good faith, except to the extent that such liability arises from the Collateral Agent's gross negligence, bad faith or willful misconduct or from the Collateral Agent's breach of its obligations under this Agreement or the Original Security Agreement.

Section 17. *General Provisions Concerning the Collateral Agent.*

(a) The provisions of Article 8 of the Credit Agreement shall inure to the benefit of the Collateral Agent, and shall be binding upon all Lien Grantors and all Secured Parties, in connection with this Agreement and the other Security Documents. Without limiting the generality of the foregoing, (i) the Collateral Agent shall not be subject to any fiduciary or other implied duties, regardless of whether an Event of Default (or any default or event of default under the AC Holdings Bonds) has occurred and is continuing and/or an Enforcement Notice is in effect, (ii) the Collateral Agent shall not have any duty to take any discretionary action or exercise any discretionary powers, except discretionary rights and powers expressly contemplated by the Security Documents that the Collateral Agent is required in writing to exercise by the Required Lenders (or such other number or percentage of the Lenders as shall be necessary under the circumstances as provided in Section 9.02 of the Credit Agreement), and (iii) except as expressly set forth in the Loan Documents, the Collateral Agent shall not have any duty to disclose, and shall not be liable for any failure to disclose, any information relating to the Borrower that is communicated to or obtained by the bank serving as Collateral Agent or any of its Affiliates in any capacity. The Collateral Agent shall not be responsible for the existence, genuineness or value of any Collateral or for the validity, perfection, priority or enforceability of any Transaction Lien, whether impaired by operation of law or by reason of any action or omission to act on its part under the Security Documents. The Collateral Agent shall be deemed not to have knowledge of any Event of Default (or any

default or event of default under the AC Holdings Bonds) unless and until an Enforcement Notice is given to the Collateral Agent by the Borrower or a Secured Party with respect thereto. Except for the obligation of the Collateral Agent to make distributions in respect of the Secured Bond Obligations under Section 13, none of the Lender Parties shall be under any fiduciary, contractual or other duty to any holder of Secured Bond Obligations or any trustee on any of their behalf.

(b) *Sub-Agents and Related Parties*. The Collateral Agent may perform any of its duties and exercise any of its rights and powers through one or more sub-agents appointed by it. The Collateral Agent and any such sub-agent may perform any of its duties and exercise any of its rights and powers through its Related Parties. The exculpatory provisions of Section 16 and this Section shall apply to any such sub-agent and to the Related Parties of the Collateral Agent and any such sub-agent.

(c) *Information as to Secured Obligations and Actions by Secured Parties.* For all purposes of the Security Documents, including determining the amounts of the Secured Obligations and whether a Secured Obligation is a Contingent Secured Obligation or not, or whether any action has been taken under any Secured Agreement, the Collateral Agent will be entitled to rely on information from (i) its own records for information as to the Lender Parties, their Secured Obligations and actions taken by them, (ii) any Secured Party for information as to its Secured Obligations and actions taken by it, to the extent that the Collateral Agent has not obtained such information from its own records, and (iii) the Borrower, to the extent that the Collateral Agent has not obtained information from the foregoing sources.

(d) *Refusal to Act*. The Collateral Agent may refuse to act on any notice, consent, direction or instruction from any Secured Parties or any agent, trustee or similar representative thereof that, in the Collateral Agent's good faith opinion, (i) is contrary to law or the provisions of any Security Document, (ii) may expose the Collateral Agent to liability (unless the Collateral Agent shall have been indemnified, to its reasonable satisfaction, for such liability by the Secured Parties that gave such notice, consent, direction or instruction) or (iii) is unduly prejudicial to Secured Parties not joining in such notice, consent, direction or instruction.

(e) *Copies of Certain Notices*. Within two Business Days after it receives or sends any notice referred to in this subsection, the Collateral Agent shall send to the Lenders and each Secured Party Requesting Notice copies of any certificate designating additional obligations as Secured Obligations received by the Collateral Agent pursuant to Section 20 and any notice given by the Collateral Agent to any Lien Grantor, or received by it from any Lien Grantor, pursuant to Section 12, 13, 15 or 18.

Section 18. *Termination of Transaction Liens; Release of Collateral.* (a) The Transaction Liens granted by each Guarantor shall automatically terminate when its Facility Guarantee is released pursuant to the Guarantee Agreement, including upon a "Sale of such Guarantor" (as defined therein).

(b) The Transaction Liens granted by the Borrower shall automatically terminate when all the Release Conditions are satisfied.

(c) Upon any sale or other transfer by any Lien Grantor of any Collateral that is permitted under the Loan Documents, the Transaction Lien in such Collateral shall be automatically released.

(d) At any time before the Transaction Liens granted by the Borrower terminate, the Collateral Agent may, at the written request of the Borrower, (i) release any Collateral (but not all or substantially all the Collateral) with the prior written consent of the Required Lenders or (ii) release all or substantially all the Collateral with the prior written consent of all Lenders.

(e) Upon any termination of a Transaction Lien or release of Collateral pursuant to this Section 18, the Collateral Agent will promptly (without the vote or consent of any other Secured Party, in such capacity), at the expense of the relevant Lien Grantor, execute and deliver to such Lien Grantor such documents, and take such other actions, as such Lien Grantor shall reasonably request to evidence the termination of such Transaction Lien or the release of such Collateral, as the case may be. In connection with any such termination or release, the Collateral Agent shall be entitled to rely upon, and shall not incur any liability for relying upon, any certificate of the Borrower or the applicable Lien Grantor.

Section 19. *Additional Guarantors and Lien Grantors.* Any Subsidiary may become a party hereto by signing and delivering to the Collateral Agent a Security Agreement Supplement, whereupon such Subsidiary shall become a "Guarantor" and a "Lien Grantor" as defined herein.

Section 20. *Additional Secured Obligations.* The Borrower may from time to time designate its obligations under any Cash Management Agreement or Swap Agreement, in each case with a Lender or an Affiliate of a Lender, as additional Facility Obligations for purposes of the Loan Documents by delivering to the Collateral Agent a certificate signed by a Financial Officer that (i) identifies such Cash Management Agreement or Swap Agreement, specifying the name and address of the other party thereto, the notional principal amount thereof and the expiration date thereof, and (ii) states that the Borrower's obligations thereunder are designated as Facility Obligations for purposes of the Loan Documents.

Section 21. *Notices.* Each notice, request or other communication given to any party hereunder shall be given in accordance with Section 9.01 of the Credit Agreement, and in the case of any such notice, request or other communication to a Lien Grantor other than the Borrower, shall be given to it in care of the Borrower.

Section 22. *No Implied Waivers; Remedies Not Exclusive.* No failure by the Collateral Agent or any Secured Party to exercise, and no delay in exercising and no course of dealing with respect to, any right or remedy under any Security Document shall operate as a waiver thereof; nor shall any single or partial exercise by the Collateral Agent or any Secured Party of any right or remedy under any Loan Document preclude any other or further exercise thereof or the exercise of any other right or remedy. The rights and remedies specified in the Loan Documents are cumulative and are not exclusive of any other rights or remedies provided by law.

Section 23. *Successors and Assigns.* This Agreement is for the benefit of the Collateral Agent and the Secured Parties. If all or any part of any Secured Party's interest in any Secured Obligation is assigned or otherwise transferred to a permitted assignee, the transferor's rights hereunder, to the extent applicable to the obligation so transferred, shall be automatically transferred with such obligation. This Agreement shall be binding on the Lien Grantors and the Collateral Agent and their respective successors and permitted assigns.

Section 24. *Amendments and Waivers.* Neither this Agreement nor any provision hereof may be waived, amended, modified or terminated except pursuant to an agreement or agreements in writing entered into by the Collateral Agent, with the consent of such Lenders as are required to consent thereto under Section 9.02 of the Credit Agreement and the Borrower. No such waiver, amendment or modification shall be binding upon any Lien Grantor, except with its written consent.

Section 25. *Choice of Law.* This Agreement shall be construed in accordance with and governed by the laws of the State of New York, except as otherwise required by mandatory provisions of law and except to the extent that remedies provided by the laws of any jurisdiction other than the State of New York are governed by the laws of such jurisdiction.

Section 26. *Waiver of Jury Trial.* **EACH PARTY HERETO WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL PROCEEDING DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO ANY SECURITY DOCUMENT OR ANY TRANSACTION CONTEMPLATED THEREBY (WHETHER BASED ON CONTRACT,**

TORT OR ANY OTHER THEORY). EACH PARTY HERETO (A) CERTIFIES THAT NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER AND (B) ACKNOWLEDGES THAT IT AND THE OTHER PARTIES HERETO HAVE BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION.

Section 27. *Severability.* If any provision of any Security Document is invalid or unenforceable in any jurisdiction, then, to the fullest extent permitted by law, (i) the other provisions of the Security Documents shall remain in full force and effect in such jurisdiction and shall be liberally construed in favor of the Collateral Agent and the Secured Parties in order to carry out the intentions of the parties thereto as nearly as may be possible and (ii) the invalidity or unenforceability of such provision in such jurisdiction shall not affect the validity or enforceability thereof in any other jurisdiction.

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SCHEDULE 1

EQUITY INTERESTS IN SUBSIDIARIES AND AFFILIATES OWNED BY ORIGINAL LIEN GRANTORS (as of the Sixth ARCA Effective Date)

* Denotes Guarantor.

Direct Wholly-Owned Subsidiaries of Windstream Services, LLC (100% ownership)

Subsidiary	**Jurisdiction of Incorporation**
Windstream Holding of the Midwest, Inc. (f/k/a ALLTEL Communication Holdings of the Midwest, Inc.)*	Nebraska
Windstream Accucomm Telecommunications, LLC (f/k/a Windstream Accucomm Telecommunications, Inc., f/k/a Accucomm Telecommunications, Inc.)	Georgia
Windstream Accucomm Networks, LLC (f/k/a Windstream Accucomm Networks, Inc., f/k/a Accucomm Networks, Inc.)	Georgia
Windstream Kentucky East, LLC (f/k/a Windstream Kentucky East, Inc., f/k/a Kentucky ALLTEL, Inc.)	Delaware
Windstream Communications, LLC (f/k/a Windstream Communications, Inc., f/k/a Alltel Holding Corporate Services, Inc.)	Delaware
Windstream Supply, LLC (f/k/a Windstream Supply, Inc., f/k/a ALLTEL Communications Products, Inc.)*	Ohio
Teleview, LLC (f/k/a Teleview, Inc.)*	Georgia
TriNet, LLC (f/k/a TriNet, Inc.)	Georgia
Windstream Alabama, LLC (f/k/a Windstream Alabama, Inc., f/k/a ALLTEL Alabama, Inc.) *	Alabama
Windstream Arkansas, LLC (f/k/a Windstream Arkansas, Inc., f/k/a ALLTEL Arkansas, Inc.)*	Delaware
Windstream North Carolina, LLC (f/k/a Windstream North Carolina, Inc., f/k/a ALLTEL Carolina, Inc.)	North Carolina
Windstream Florida, LLC (f/k/a Windstream Florida, Inc., f/k/a ALLTEL Florida, Inc.)	Florida
Windstream Kentucky West, LLC (f/k/a Windstream Kentucky West, Inc., f/k/a ALLTEL Kentucky, Inc.)	Kentucky
Windstream Mississippi, LLC (f/k/a Windstream Mississippi, Inc., f/k/a ALLTEL Mississippi, Inc.)	Mississippi
Windstream Missouri, LLC	Delaware

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Subsidiary	**Jurisdiction of Incorporation**
Oklahoma Windstream, LLC (f/k/a Oklahoma Windstream, Inc., f/k/a Oklahoma ALLTEL, Inc.)*	Oklahoma
Windstream New York, Inc. (f/k/a ALLTEL New York, Inc.)	New York
Windstream Ohio, LLC (f/k/a Windstream Ohio, Inc., f/k/a ALLTEL Ohio, Inc.)	Ohio
Windstream Oklahoma, LLC (f/k/a Windstream Oklahoma, Inc., f/k/a ALLTEL Oklahoma, Inc.)*	Delaware
Windstream Pennsylvania, LLC (f/k/a Windstream Pennsylvania, Inc., f/k/a ALLTEL Pennsylvania, Inc.)	Pennsylvania
Windstream South Carolina, LLC (f/k/a Windstream South Carolina, Inc., f/k/a ALLTEL South Carolina, Inc.)*	South Carolina
Windstream Western Reserve, LLC (f/k/a Windstream Western Reserve, Inc., f/k/a The Western Reserve Telephone Company)	Ohio
Windstream Standard, LLC (f/k/a Windstream Standard, Inc., f/k/a Standard Telephone Company)	Georgia
Windstream Georgia Telephone, LLC (f/k/a Windstream Georgia Telephone Inc., f/k/a Georgia Telephone Corporation)	Georgia
Windstream Georgia Communications, LLC (f/k/a Windstream Georgia Communications Corp., f/k/a ALLTEL Georgia Communications Corp.)	Georgia
Georgia Windstream, LLC (f/k/a Georgia Windstream, Inc., f/k/a Georgia ALLTEL Telecom, Inc.)	Michigan
Windstream Georgia, LLC (f/k/a Windstream Georgia, Inc., f/k/a ALLTEL Georgia, Inc.)	Georgia
Texas Windstream, LLC (f/k/a Texas Windstream, Inc., f/k/a Texas ALLTEL, Inc.)*	Texas
Windstream Sugar Land, LLC (f/k/a Windstream Sugar Land, Inc., f/k/a Sugar Land Telephone Company)*	Texas
Windstream Iowa Communications, LLC*	Delaware
Valor Telecommunications of Texas, LLC*	Delaware
Windstream Southwest Long Distance, LLC*	Delaware
Southwest Enhanced Network Services, LLC*	Delaware
Windstream Lexcom Communications, LLC	North Carolina
Windstream Kerrville Long Distance, LLC*	Texas
Windstream Communications Kerrville, LLC*	Texas
Windstream Communications Telecom, LLC*	Texas
BOB, LLC	Illinois
D&E Communications, LLC*	Delaware

Subsidiary	**Jurisdiction of Incorporation**
Equity Leasing, Inc.*	Nevada
PAETEC Holding, LLC	Delaware
Progress Place Realty Holding Company, LLC*	North Carolina
WaveTel NC License Corporation	Delaware
Windstream CTC Internet Services, Inc.*	North Carolina
Windstream Intellectual Property Services, Inc.*	Delaware
Windstream KDL, LLC	Kentucky
Windstream Leasing, LLC*	Delaware
Windstream NuVox, LLC	Delaware
Windstream NuVox Arkansas, LLC*	Delaware
Windstream NuVox Illinois, LLC*	Delaware
Windstream NuVox Indiana, LLC*	Delaware
Windstream NuVox Kansas, LLC*	Delaware
Windstream Missouri, LLC	Delaware
Windstream NuVox Ohio, LLC	Delaware
Windstream NuVox Oklahoma, LLC*	Delaware
Windstream NTI, LLC	Wisconsin
Windstream Norlight, LLC	Kentucky
Windstream Hosted Solutions, LLC*	Delaware
Windstream Finance Corp.*	Delaware

Indirect Wholly-Owned Subsidiaries of Windstream Services, LLC		
Subsidiary	**Direct Parent Company (100% ownership)**	**Subsidiary Jurisdiction of Incorporation**
Windstream Systems of the Midwest, Inc. (f/k/a ALLTEL Systems of the Midwest, Inc.)	Windstream Holding of the Midwest, Inc.	Nebraska
Windstream of the Midwest, Inc. (f/k/a ALLTEL Communications of the Midwest, Inc.)	Windstream Holding of the Midwest, Inc.	Nebraska
Windstream Network Services of the Midwest, Inc. (f/k/a ALLTEL Network Services of the Midwest, Inc.)*	Windstream Holding of the Midwest, Inc.	Nebraska

Indirect Wholly-Owned Subsidiaries of Windstream Services, LLC		
Subsidiary	**Direct Parent Company (100% ownership)**	**Subsidiary Jurisdiction of Incorporation**
Windstream Nebraska, Inc. (f/k/a Alltel Nebraska, Inc.)	Windstream Holding of the Midwest, Inc.	Delaware
Windstream Lexcom Entertainment, LLC*	Windstream Lexcom Communications, LLC	North Carolina
Windstream Lexcom Long Distance, LLC*	Windstream Lexcom Communications, LLC	North Carolina
Windstream Lexcom Wireless, LLC*	Windstream Lexcom Communications, LLC	North Carolina
Norlight Telecommunications of Virginia, LLC*	Windstream NTI, LLC	Virginia
Cinergy Communications Company of Virginia, LLC*	Windstream Norlight, LLC	Virginia
Hosted Solutions Charlotte, LLC*	Windstream Hosted Solutions, LLC	Delaware
Hosted Solutions Raleigh, LLC*	Windstream Hosted Solutions, LLC	Delaware
Windstream D&E, Inc.	D&E Communications, LLC	Pennsylvania
D&E Wireless, Inc.	D&E Communications, LLC	Pennsylvania
D&E Networks, Inc.*	D&E Communications, LLC	Pennsylvania
Windstream D&E Systems, LLC	D&E Communications, LLC	Delaware
Conestoga Enterprises, Inc.*	D&E Communications, LLC	Pennsylvania
D&E Management Services, Inc.*	Windstream D&E, Inc.	Nevada
PCS Licenses, Inc.*	D&E Wireless, Inc.	Nevada
Infocore, Inc.	Conestoga Enterprises, Inc.	Pennsylvania
Windstream Conestoga, Inc.	Conestoga Enterprises, Inc.	Pennsylvania
Conestoga Wireless Company	Conestoga Enterprises, Inc.	Pennsylvania
Windstream Buffalo Valley, Inc.	Conestoga Enterprises, Inc.	Pennsylvania
Conestoga Management Services, Inc.*	Windstream Conestoga, Inc.	Delaware
Buffalo Valley Management Services, Inc.*	Windstream Buffalo Valley, Inc.	Delaware
Heart of the Lakes Cable Systems, Inc.*	Windstream Iowa Communications, LLC	Minnesota
IWA Services, LLC*	Windstream Iowa	Iowa

Indirect Wholly-Owned Subsidiaries of Windstream Services, LLC		
Subsidiary	**Direct Parent Company (100% ownership)**	**Subsidiary Jurisdiction of Incorporation**
	Communications, LLC	
Windstream Baker Solutions, Inc.*	Windstream Iowa Communications, LLC	Iowa
Iowa Telecom Technologies, LLC*	Windstream Iowa Communications, LLC	Iowa
Iowa Telecom Data Services, L.C.*	Windstream Iowa Communications, LLC	Iowa
Windstream Lakedale, Inc.*	Windstream Iowa Communications, LLC	Minnesota
Windstream Montezuma, LLC*	Windstream Iowa Communications, LLC	Iowa
WIN Sales & Leasing, Inc.*	Windstream Iowa Communications, LLC	Minnesota
Windstream Iowa-Comm, LLC*	Windstream Iowa Communications, LLC	Iowa
Windstream Lakedale Link, Inc.*	Windstream Iowa Communications, LLC	Minnesota
Windstream NorthStar, LLC*	Windstream Iowa Communications, LLC	Minnesota
Windstream EN-TEL, LLC*	Windstream Iowa Communications, LLC	Minnesota
Windstream SHAL Networks, Inc.*	Windstream Iowa Communications, LLC	Minnesota
Windstream SHAL, LLC*	Windstream Iowa Communications, LLC	Minnesota
Windstream Direct, LLC*	Windstream Iowa Communications, LLC	Minnesota
Windstream IT-Comm, LLC	Windstream Iowa-Comm, LLC	Iowa
Birmingham Data Link, LLC	Windstream KDL, LLC	Alabama
Windstream KDL-VA, LLC*	Windstream KDL, LLC	Virginia
KDL Holdings, LLC*	Windstream KDL, LLC	Delaware
Nashville Data Link, LLC	Windstream KDL, LLC	Tennessee
MPX, Inc.	PAETEC Holding, LLC	Delaware
PAETEC, LLC	PAETEC Holding, LLC	Delaware
Allworx Corp.	PAETEC Holding, LLC	Delaware
PaeTec Communications of	PAETEC, LLC	Virginia

Indirect Wholly-Owned Subsidiaries of Windstream Services, LLC		
Subsidiary	**Direct Parent Company (100% ownership)**	**Subsidiary Jurisdiction of Incorporation**
Virginia, LLC		
PaeTec Communications, LLC	PAETEC, LLC	Delaware
PAETEC Realty, LLC	PAETEC, LLC	New York
Windstream Cavalier, LLC	PAETEC, LLC	Delaware
XETA Technologies, Inc.	PAETEC, LLC	Oklahoma
RevChain Solutions, LLC (this entity has a foreign presence as RevChain Solutions, LLC Sucursal Columbia)	PAETEC, LLC	Delaware
US LEC Communications, LLC	PAETEC, LLC	North Carolina
McLeodUSA Telecommunications Services, L.L.C.	PAETEC, LLC	Iowa
McLeodUSA Information Services, LLC	PAETEC, LLC	Delaware
US LEC of Florida, LLC	PAETEC, LLC	North Carolina
US LEC of Georgia, LLC	PAETEC, LLC	Delaware
US LEC of South Carolina, LLC	PAETEC, LLC	Delaware
US LEC of Tennessee, LLC	PAETEC, LLC	Delaware
US LEC of Alabama, LLC	PAETEC, LLC	North Carolina
US LEC of Maryland, LLC	PAETEC, LLC	North Carolina
US LEC of North Carolina, LLC	PAETEC, LLC	North Carolina
US LEC of Pennsylvania, LLC	PAETEC, LLC	North Carolina
US LEC of Virginia, LLC	PAETEC, LLC	Delaware
PAETEC iTel, L.L.C.	US LEC Communications, LLC	North Carolina
McLeodUSA Purchasing, L.L.C.	McLeodUSA Telecommunications Services, L.L.C.	Iowa
Cavalier Telephone, L.L.C.	Windstream Cavalier, LLC	Virginia
Talk America of Virginia, LLC	Windstream Cavalier, LLC	Virginia
Talk America, LLC	Windstream Cavalier, LLC	Delaware
The Other Phone Company, LLC	Windstream Cavalier, LLC	Florida
Cavalier Services, LLC	Windstream Cavalier, LLC	Delaware
Cavalier IP TV, LLC	Windstream Cavalier, LLC	Delaware

Indirect Wholly-Owned Subsidiaries of Windstream Services, LLC		
Subsidiary	**Direct Parent Company** (100% ownership)	**Subsidiary Jurisdiction of Incorporation**
SM Holdings, LLC (this entity has a foreign presence as RPK (B.V.A.) Limited in the British Virgin Islands	Windstream Cavalier, LLC	Delaware
Intellifiber Networks, LLC	Windstream Cavalier, LLC	Virginia
Cavalier Telephone Mid-Atlantic, L.L.C.	Cavalier Telephone, L.L.C.	Delaware
LDMI Telecommunications, LLC	Talk America, LLC	Michigan
Network Telephone, LLC	Talk America, LLC	Florida

SCHEDULE 2

INVESTMENT PROPERTY
(other than Equity Interests in Subsidiaries and Affiliates)
OWNED BY ORIGINAL LIEN GRANTORS
(as of the Effective Date)

PART 1 — Securities

None.

PART 2 — Securities Accounts

The Original Lien Grantors own Security Entitlements with respect to Financial Assets credited to the following Securities Accounts:[1]

None.

[1] If any such Securities Account holds material long-term investments and is not a trading account, more detailed information as to such investments could appropriately be required to be disclosed in this Schedule.

SCHEDULE 3

REGULATED SUBSIDIARIES

Each subsidiary listed in Schedule 1 that is not denoted as a Guarantor is incorporated by reference into this Schedule 3.

SCHEDULE 4

DESCRIPTION OF AIRCRAFT

One (1) Cessna model 560XL airframe bearing manufacturer's serial number 560-5239 and U.S. Registration No. N626AT and two (2) Pratt & Whitney of Canada model PW545A aircraft engines bearing manufacturer's serial numbers PCE-DB0492 and PCE-DB0493 (each of which engines has 550 or more rated takeoff horsepower or the equivalent thereof).

One (1) 2004 Cessna model Citation XLS airframe bearing manufacturer's serial number 560-5531 and U.S. Registration No. N748W and two (2) Pratt & Whitney model PW545B aircraft engines bearing manufacturer's serial numbers DD0063 and DD0062.

EXHIBIT A
to Amended and Restated Security Agreement

SECURITY AGREEMENT SUPPLEMENT

SECURITY AGREEMENT SUPPLEMENT dated as of ____________, ____, between [*NAME OF LIEN GRANTOR*] (the "**Lien Grantor**") and JPMORGAN CHASE BANK, N.A., as Collateral Agent (the "**Collateral Agent**").

WHEREAS, Windstream Services, LLC (formerly known as Windstream Corporation, and successor to ALLTEL Holding Corp.) (the "**Borrower**"), the Guarantors party thereto and JPMorgan Chase Bank, N.A., as Collateral Agent, are parties to the Amended and Restated Security Agreement originally dated as of July 17, 2006 and amended and restated as of April 24, 2015 (as heretofore amended and/or supplemented, the "**Security Agreement**") under which the Borrower and the Guarantors secure certain of their respective obligations (the "**Secured Obligations**");

WHEREAS, [*Name of Lien Grantor*] [desires to become] [is] a party to the Security Agreement as a Lien Grantor thereunder;[1] and

WHEREAS, terms defined in the Security Agreement (or whose definitions are incorporated by reference in Section 1 of the Security Agreement) and not otherwise defined herein have, as used herein, the respective meanings provided for therein;

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. *Grant of Transaction Liens*. (a) In order to secure its Secured Obligations, the Lien Grantor grants to the Collateral Agent for the benefit of the Secured Parties a continuing security interest in all of its right, title and interest in the following property of the Lien Grantor, whether now owned or existing or hereafter acquired or arising and regardless of where located (the "**New Collateral**"):

[*describe property being added to the Collateral*][2]

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[1] If the Lien Grantor is the Borrower, delete this recital.

(b) With respect to each right to payment or performance included in the Collateral from time to time, the Transaction Lien granted therein includes a continuing security interest in (i) any Supporting Obligation that supports such payment or performance and (ii) any Lien that (x) secures such right to payment or performance or (y) secures any such Supporting Obligation.

(c) The foregoing Transaction Liens are granted as security only and shall not subject the Collateral Agent or any other Secured Party to, or transfer or in any way affect or modify, any obligation or liability of the Lien Grantor with respect to any of the New Collateral or any transaction in connection therewith or constitute a "change of control" with respect to any Person for purposes of the Communications Act of 1934, as amended, or any similar state law.

2. *Delivery of Collateral*. Concurrently with delivering this Security Agreement Supplement to the Collateral Agent, the Lien Grantor is complying with the provisions of Section 6 of the Security Agreement with respect to Investment Property, in each case if and to the extent included in the New Collateral at such time.

3. *Party to Security Agreement*. Upon executing and delivering this Security Agreement Supplement to the Collateral Agent, the Lien Grantor will become a party to the Security Agreement and will thereafter have all the rights and obligations of a Lien Grantor thereunder and be bound by all the provisions thereof as fully as if the Lien Grantor were one of the original parties thereto.[3] The Lien Grantor authorizes the Collateral Agent to file or record financing statements and other filing or recording documents or instruments with respect to the Collateral without the signature of the Lien Grantor in such form and in such offices as the Collateral Agent determines appropriate to perfect the security interests of the Collateral Agent under this Security Agreement Supplement. The Lien Grantor authorizes the Collateral Agent to use collateral descriptions such as "all personal property" or "all assets", in each case "whether now owned or hereafter acquired", words of similar import or any other description the Collateral Agent, in its sole discretion, so chooses in any such financing statements. The Lien Grantor agrees that a carbon, photographic, photostatic or

(continued…)

[2] If the Lien Grantor is not already a party to the Security Agreement, clauses (i) through (xii) of, and the proviso to, Section 2(a) of the Security Agreement (modified to replace references to "Original Lien Grantor" with the Lien Grantor) may be appropriate.

[3] Delete Section 3 if the Lien Grantor is already a party to the Security Agreement.

other reproduction of this Security Agreement Supplement or of a financing statement is sufficient as a financing statement for filing and recording purposes.

4. *Representations and Warranties*. (a) The Lien Grantor is duly organized, validly existing and in good standing under the laws of [jurisdiction of organization].

(a) The Lien Grantor has delivered a Perfection Certificate to the Collateral Agent. The information set forth therein is correct and complete as of the date hereof.

(b) The execution and delivery of this Security Agreement Supplement by the Lien Grantor and the performance by it of its obligations under the Security Agreement as supplemented hereby are within its corporate or other powers, have been duly authorized by all necessary corporate or other action, require no action by or in respect of, or filing with, any governmental body, agency or official and do not contravene, or constitute a default under, any provision of applicable law or regulation or of its Organizational Documents, or of any agreement, judgment, injunction, order, decree or other instrument binding upon it or result in the creation or imposition of any Lien (except a Transaction Lien) on any of its assets.

(c) The Security Agreement as supplemented hereby constitutes a valid and binding agreement of the Lien Grantor, enforceable in accordance with its terms, except as limited by (i) applicable bankruptcy, insolvency, fraudulent conveyance or other similar laws affecting creditors' rights generally and (ii) general principles of equity.

(d) Each of the representations and warranties set forth in Sections 3 through 10 of the Security Agreement is true as applied to the Lien Grantor and the New Collateral. For purposes of the foregoing sentence, references in said Sections to a "Lien Grantor" shall be deemed to refer to the Lien Grantor, references to Schedules to the Security Agreement shall be deemed to refer to the corresponding Schedules to this Security Agreement Supplement, references to "Collateral" shall be deemed to refer to the New Collateral, and references to the "Sixth ARCA Effective Date" shall be deemed to refer to the date on which the Lien Grantor signs and delivers this Security Agreement Supplement.

5. [*Compliance with Foreign Law*. The Lien Grantor represents that it has taken, and agrees that it will continue to take, all actions required under the laws (including the conflict of laws rules) of its jurisdiction of organization to

ensure that the Transaction Liens on the New Collateral rank prior to all Liens and rights of others therein.[4]]

6. *Governing Law*. This Security Agreement Supplement shall be construed in accordance with and governed by the laws of the State of New York.

IN WITNESS WHEREOF, the parties hereto have caused this Security Agreement Supplement to be duly executed by their respective authorized officers as of the day and year first above written.

[*NAME OF LIEN GRANTOR*]

By: ______________________________
Name:
Title:

JPMORGAN CHASE BANK, N.A.,
as Collateral Agent

By: ______________________________
Name:
Title:

---

[4] Include Section 5 if the Lien Grantor is organized under the laws of a jurisdiction outside the United States.

**Schedule 1
to Security Agreement
Supplement**

EQUITY INTERESTS IN SUBSIDIARIES AND AFFILIATES OWNED BY LIEN GRANTOR

Issuer	Jurisdiction of Organization	Percentage Owned	Number of Shares or Units

**Schedule 2
to Security Agreement
Supplement**

**INVESTMENT PROPERTY
(other than Equity Interests in Subsidiaries and Affiliates)
OWNED BY LIEN GRANTOR**

PART 1 — Securities

Issuer	Jurisdiction of Organization	Amount Owned	Type of Security

PART 2 — Securities Accounts

The Lien Grantor owns Security Entitlements with respect to Financial Assets credited to the following Securities Accounts:[1]

Securities Intermediary	Account Number

[1] If any such Securities Account holds material long-term investments and is not a trading account, more detailed information as to such investments could appropriately be required to be disclosed in this Schedule.

**Schedule 3
to Security Agreement
Supplement**

REGULATED SUBSIDIARIES

**Schedule 4
to Security Agreement
Supplement**

DESCRIPTION OF AIRCRAFT

EXHIBIT B
to Amended and Restated Security Agreement

COPYRIGHT SECURITY AGREEMENT

(Copyrights, Copyright Registrations, Copyright Applications and Copyright Licenses)

WHEREAS, [*NAME OF LIEN GRANTOR*], a _____________ corporation[1] (herein referred to as the "**Lien Grantor**") owns, or in the case of licenses is a party to, the Copyright Collateral (as defined below);

WHEREAS, Windstream Services, LLC (formerly known as Windstream Corporation, and successor to ALLTEL Holding Corp.) (the "**Borrower**"), the Lenders party thereto, and JPMorgan Chase Bank, N.A., as Administrative Agent and Collateral Agent, are parties to the Sixth Amended and Restated Credit Agreement originally dated as of July 17, 2006 and amended and restated as of April 24, 2015 (as amended from time to time, the "**Credit Agreement**"); and

WHEREAS, pursuant to the Amended and Restated Security Agreement originally dated as of July 17, 2006 and amended and restated as of April 24, 2015 (as amended and/or supplemented from time to time, the "**Security Agreement**") among the Borrower, the Guarantors party thereto and JPMorgan Chase Bank, N.A., as Collateral Agent for the Secured Parties referred to therein (in such capacity, together with its successors in such capacity, the "**Grantee**"), the Lien Grantor has secured certain of its obligations (its "**Secured Obligations**") by granting to the Grantee for the benefit of such Secured Parties a continuing security interest (the "**Transaction Liens**") in personal property of the Lien Grantor, including all right, title and interest of the Lien Grantor in, to and under the Copyright Collateral (as defined below);

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Lien Grantor grants to the Grantee, to secure its Secured Obligations, a continuing security interest in all of the Lien Grantor's right, title and interest in, to and under the following to the extent it constitutes Collateral (including giving effect to the proviso in Section 2(a) thereof) (all of the following items or types of Collateral being herein collectively referred to as the "**Copyright Collateral**"), whether now owned or existing or hereafter acquired or arising:

---

[1] Modify as needed if the Lien Grantor is not a corporation.

(i) each Copyright owned by the Lien Grantor, including, without limitation, each Copyright registration or application therefor referred to in Schedule 1 hereto;

(ii) each Copyright License to which the Lien Grantor is a party, including, without limitation, each Copyright License identified in Schedule 1 hereto; and

(iii) all Proceeds of the foregoing.

The Lien Grantor irrevocably appoints the Grantee its true and lawful attorney, with full power of substitution, in the name of the Lien Grantor, any Secured Party or otherwise, for the sole use and benefit of the Secured Parties, but at the Borrower's expense, to the extent permitted by law to exercise, at any time and from time to time while any Event of Default shall have occurred and be continuing and/or an Enforcement Notice is in effect, all or any of the powers provided for in Section 15 of the Security Agreement with respect to all or any of the Copyright Collateral.

The foregoing security interest has been granted under the Security Agreement. The Lien Grantor acknowledges and affirms that the rights and remedies of the Grantee with respect to the security interest in the Copyright Collateral granted hereby are more fully set forth in the Security Agreement, the terms and provisions of which are incorporated by reference herein as if fully set forth herein. In the event of a conflict between the Security Agreement and this Copyright Security Agreement, the terms of the Security Agreement shall control.

Upon termination of the Transaction Liens in the Copyright Collateral pursuant to the Security Agreement, the security interests granted hereby shall automatically terminate and be released, and the Grantee will, at the expense of the Lien Grantor, execute and deliver to the Lien Grantor such documents, and take such other actions, as the Lien Grantor shall reasonably request to evidence the termination of the security interests granted hereby.

Capitalized terms used but not defined herein but defined in the Security Agreement are used herein with the respective meanings provided for therein.

IN WITNESS WHEREOF, the Lien Grantor has caused this Copyright Security Agreement to be duly executed by its officer thereunto duly authorized as of the ___ day of __________, ____.

[*NAME OF LIEN GRANTOR*]

By: ________________________________
Name:
Title:

Acknowledged:

JPMORGAN CHASE BANK, N.A.,
as Collateral Agent

By: ________________________________
Name:
Title:

STATE OF ____________)
) ss.:
COUNTY OF __________)

I, ______________________, a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY, that _________________________, _______________ of [*NAME OF LIEN GRANTOR*] (the "**Company**"), personally known to me to be the same person whose name is subscribed to the foregoing instrument as such _________________, appeared before me this day in person and acknowledged that (s)he signed, executed and delivered the said instrument as her/his own free and voluntary act and as the free and voluntary act of said Company, for the uses and purposes therein set forth being duly authorized so to do.

GIVEN under my hand and Notarial Seal this ___ day of _______________, ____.

[Seal]

____
Signature of notary public
My Commission expires __________

Schedule 1
to Copyright
Security Agreement

[*NAME OF LIEN GRANTOR*]

COPYRIGHT REGISTRATIONS

Registration No.	Registration Date	Title	Expiration Date

COPYRIGHT APPLICATIONS

Case No.	Serial No.	Country	Date	Filing Title

COPYRIGHT LICENSES

Name of Agreement	Parties Licensor/Licensee	Date of Agreement	Subject Matter

EXHIBIT C
to Amended and Restated Security Agreement

PATENT SECURITY AGREEMENT

(Patents, Patent Applications and Patent Licenses)

WHEREAS, [*NAME OF LIEN GRANTOR*], a _____________ corporation[1] (herein referred to as the "**Lien Grantor**") owns, or in the case of licenses is a party to, the Patent Collateral (as defined below);

WHEREAS, Windstream Services, LLC (formerly known as Windstream Corporation, and successor to ALLTEL Holding Corp.) (the "**Borrower**"), the Lenders party thereto, and JPMorgan Chase Bank, N.A., as Administrative Agent and Collateral Agent, are parties to the Sixth Amended and Restated Credit Agreement originally dated as of July 17, 2006 and amended and restated as of April 24, 2015 (as amended from time to time, the "**Credit Agreement**"); and

WHEREAS, pursuant to the Amended and Restated Security Agreement originally dated as of July 17, 2006 and amended and restated as of April 24, 2015 (as amended and/or supplemented from time to time, the "**Security Agreement**") among the Borrower, the Guarantors party thereto and JPMorgan Chase Bank, N.A., as Collateral Agent for the Secured Parties referred to therein (in such capacity, together with its successors in such capacity, the "**Grantee**"), the Lien Grantor has secured certain of its obligations (its "**Secured Obligations**") by granting to the Grantee for the benefit of such Secured Parties a continuing security interest (the "**Transaction Liens**") in personal property of the Lien Grantor, including all right, title and interest of the Lien Grantor in, to and under the Patent Collateral (as defined below);

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Lien Grantor grants to the Grantee, to secure its Secured Obligations, a continuing security interest in all of the Lien Grantor's right, title and interest in, to and under the following to the extent it constitutes Collateral (including giving effect to the proviso in Section 2(a) thereof) (all of the following items or types of Collateral being herein collectively referred to as the "**Patent Collateral**"), whether now owned or existing or hereafter acquired or arising:

---

[1] Modify as needed if the Lien Grantor is not a corporation.

(i) each Patent owned by the Lien Grantor, including, without limitation, each Patent referred to in Schedule 1 hereto;

(ii) each Patent License to which the Lien Grantor is a party, including, without limitation, each Patent License identified in Schedule 1 hereto; and

(iii) all Proceeds of the foregoing.

The Lien Grantor irrevocably appoints the Grantee its true and lawful attorney, with full power of substitution, in the name of the Lien Grantor, any Secured Party or otherwise, for the sole use and benefit of the Secured Parties, but at the Borrower's expense, to the extent permitted by law to exercise, at any time and from time to time while any Event of Default shall have occurred and be continuing and/or an Enforcement Notice is in effect, all or any of the powers provided for in Section 15 of the Security Agreement with respect to all or any of the Patent Collateral.

The foregoing security interest has been granted under the Security Agreement. The Lien Grantor acknowledges and affirms that the rights and remedies of the Grantee with respect to the security interest in the Patent Collateral granted hereby are more fully set forth in the Security Agreement, the terms and provisions of which are incorporated by reference herein as if fully set forth herein. In the event of a conflict between the Security Agreement and this Patent Security Agreement, the terms of the Security Agreement shall control.

Upon termination of the Transaction Liens in the Patent Collateral pursuant to the Security Agreement, the security interests granted hereby shall automatically terminate and be released, and the Grantee will, at the expense of the Lien Grantor, execute and deliver to the Lien Grantor such documents, and take such other actions, as the Lien Grantor shall reasonably request to evidence the termination of the security interests granted hereby.

Capitalized terms used but not defined herein but defined in the Security Agreement are used herein with the respective meanings provided for therein.

IN WITNESS WHEREOF, the Lien Grantor has caused this Patent Security Agreement to be duly executed by its officer thereunto duly authorized as of the ____ day of ____________, ____.

[*NAME OF LIEN GRANTOR*]

By: ______________________________
Name:
Title:

Acknowledged:

JPMORGAN CHASE BANK, N.A.,
as Collateral Agent

By: ___________________________
Name:
Title:

STATE OF ____________)
) ss.:
COUNTY OF __________)

I, ______________________, a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY, that _________________________, _______________ of [*NAME OF LIEN GRANTOR*] (the "**Company**"), personally known to me to be the same person whose name is subscribed to the foregoing instrument as such _________________, appeared before me this day in person and acknowledged that (s)he signed, executed and delivered the said instrument as her/his own free and voluntary act and as the free and voluntary act of said Company, for the uses and purposes therein set forth being duly authorized so to do.

GIVEN under my hand and Notarial Seal this ___ day of _______________, ____.

[Seal]

____
Signature of notary public
My Commission expires __________

**Schedule 1
to Patent
Security Agreement**

[*NAME OF LIEN GRANTOR*]

PATENTS AND DESIGN PATENTS

Patent No.	Issued	Expiration	Country	Title

PATENT APPLICATIONS

Case No.	Serial No.	Country	Date	Filing Title

PATENT LICENSES

Name of Agreement	Parties Licensor/Licensee	Date of Agreement	Subject Matter

EXHIBIT D
to Amended and Restated Security Agreement

TRADEMARK SECURITY AGREEMENT

(Trademarks, Trademark Registrations, Trademark Applications and Trademark Licenses)

WHEREAS, [*NAME OF LIEN GRANTOR*], a ____________ corporation[1] (herein referred to as the "**Lien Grantor**") owns, or in the case of licenses is a party to, the Trademark Collateral (as defined below);

WHEREAS, Windstream Services, LLC (formerly known as Windstream Corporation, and successor to ALLTEL Holding Corp.) (the "**Borrower**"), the Lenders party thereto and JPMorgan Chase Bank, N.A., as Administrative Agent and Collateral Agent, are parties to the Sixth Amended and Restated Credit Agreement originally dated as of July 17, 2006 and amended and restated as of April 24, 2015 (as amended from time to time, the "**Credit Agreement**"); and

WHEREAS, pursuant to the Amended and Restated Security Agreement originally dated as of July 17, 2006 and amended and restated as of April 24, 2015 (as amended and/or supplemented from time to time, the "**Security Agreement**") among the Borrower, the Guarantors party thereto and JPMorgan Chase Bank, N.A., as Collateral Agent for the Secured Parties referred to therein (in such capacity, together with its successors in such capacity, the "**Grantee**"), the Lien Grantor has secured certain of its obligations (its "**Secured Obligations**") by granting to the Grantee for the benefit of such Secured Parties a continuing security interest (the "**Transaction Liens**") in personal property of the Lien Grantor, including all right, title and interest of the Lien Grantor in, to and under the Trademark Collateral (as defined below);

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Lien Grantor grants to the Grantee, to secure its Secured Obligations, a continuing security interest in all of the Lien Grantor's right, title and interest in, to and under the following to the extent it constitutes Collateral (including giving effect to the proviso in Section 2(a) thereof) (all of the following items or types of Collateral being herein collectively referred to as the "**Trademark Collateral**"), whether now owned or existing or hereafter acquired or arising:

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[1] Modify as needed if the Lien Grantor is not a corporation.

(i) each Trademark owned by the Lien Grantor, including, without limitation, each Trademark registration and application referred to in Schedule 1 hereto, and all of the goodwill of the business connected with the use of, or symbolized by, each Trademark;

(ii) each Trademark License to which the Lien Grantor is a party, including, without limitation, each Trademark License identified in Schedule 1 hereto, and all of the goodwill of the business connected with the use of, or symbolized by, each Trademark licensed pursuant thereto; and

(iii) all Proceeds of the foregoing.

The Lien Grantor irrevocably appoints the Grantee its true and lawful attorney, with full power of substitution, in the name of the Lien Grantor, any Secured Party or otherwise, for the sole use and benefit of the Secured Parties, but at the Borrower's expense, to the extent permitted by law to exercise, at any time and from time to time while any Event of Default shall have occurred and be continuing and/or an Enforcement Notice is in effect, all or any of the powers provided for in Section 15 of the Security Agreement with respect to all or any of the Trademark Collateral.

The foregoing security interest has been granted under the Security Agreement. The Lien Grantor acknowledges and affirms that the rights and remedies of the Grantee with respect to the security interest in the Trademark Collateral granted hereby are more fully set forth in the Security Agreement, the terms and provisions of which are incorporated by reference herein as if fully set forth herein. In the event of a conflict between the Security Agreement and this Trademark Security Agreement, the terms of the Security Agreement shall control.

Upon termination of the Transaction Liens in the Trademark Collateral pursuant to the Security Agreement, the security interests granted hereby shall automatically terminate and be released, and the Grantee will, at the expense of the Lien Grantor, execute and deliver to the Lien Grantor such documents, and take such other actions, as the Lien Grantor shall reasonably request to evidence the termination of the security interests granted hereby.

Capitalized terms used but not defined herein but defined in the Security Agreement are used herein with the respective meanings provided for therein.

IN WITNESS WHEREOF, the Lien Grantor has caused this Trademark Security Agreement to be duly executed by its officer thereunto duly authorized as of the ____ day of __________, ____.

[*NAME OF LIEN GRANTOR*]

By: ________________________________
Name:
Title:

Acknowledged:

JPMORGAN CHASE BANK, N.A.,
as Collateral Agent

By: ________________________________
Name:
Title:

STATE OF ____________)
) ss.:
COUNTY OF __________)

I, ______________________, a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY, that _________________________, _______________ of [*NAME OF LIEN GRANTOR*] (the "**Company**"), personally known to me to be the same person whose name is subscribed to the foregoing instrument as such _________________, appeared before me this day in person and acknowledged that (s)he signed, executed and delivered the said instrument as her/his own free and voluntary act and as the free and voluntary act of said Company, for the uses and purposes therein set forth being duly authorized so to do.

GIVEN under my hand and Notarial Seal this ___ day of _______________, ____.

[Seal]

____
Signature of notary public
My Commission expires __________

Schedule 1
to Trademark
Security Agreement

[*NAME OF LIEN GRANTOR*]

U.S. TRADEMARK REGISTRATIONS

TRADEMARK	REG. NO.	REG. DATE

U.S. TRADEMARK APPLICATIONS

TRADEMARK	REG. NO.	REG. DATE

TRADEMARK LICENSES

Name of Agreement	Parties Licensor/Licensee	Date of Agreement	Subject Matter

EXHIBIT E
to Amended and Restated Security Agreement

PERFECTION CERTIFICATE

The undersigned is a duly authorized officer of [*NAME OF LIEN GRANTOR*] (the "**Lien Grantor**"). With reference to the Amended and Restated Security Agreement originally dated as of July 17, 2006 and amended and restated as of April 24, 2015 among Windstream Services, LLC (formerly known as Windstream Corporation, and successor to ALLTEL Holding Corp.), the Guarantors party thereto and JPMorgan Chase Bank, N.A., as Collateral Agent (terms defined therein being used herein as therein defined), the undersigned certifies to the Collateral Agent and each other Secured Party as follows:

A. Information Required for Filings and Searches for Prior Filings.

1. *Jurisdiction of Organization*. The Lien Grantor is a corporation[2] organized under the laws of ___________.

2. *Name*. The exact legal name of the Lien Grantor as it appears in its [certificate of incorporation] is as follows:

3. *Prior Names*. (a) Set forth below is each other legal name that the Lien Grantor has had since its organization, together with the date of the relevant change:

(b) Except as set forth in Schedule 1 hereto, the Lien Grantor has not changed its structure[3] in any way within the past five years.

(c) None of the Lien Grantor's Collateral was acquired from another Person within the past five years, except

---

[2] Modify as needed if the Lien Grantor is not a corporation.

[3] Changes in structure would include mergers and consolidations, as well as any change in the Lien Grantor's form of organization. If any such change has occurred, include in Schedule __ the information required by Part A of this certificate as to each constituent party to a merger or consolidation and any other predecessor organization.

(i) property sold to the Lien Grantor by another Person in the ordinary course of such other Person's business;

(ii) property with respect to which the Transaction Liens are to be perfected by taking possession or control thereof;

(iii) property acquired in transactions described in Schedule 2 hereto; and

(iv) other property having an aggregate fair market value not exceeding $_________.

4. *Filing Office*. In order to perfect the Transaction Liens granted by the Lien Grantor, a duly completed financing statement on Form UCC-1, with the collateral described as set forth on Schedule 3 hereto, should be on file in the office of ____________ in _________[5]

B. Additional Information Required for Lien Searches.

1. *Current* Locations. (a) The chief executive office of the Lien Grantor is located at the following address:

Mailing Address	**County**	**State**

The Lien Grantor [does] [does not] have a place of business in another county of the State listed above.

(b) The following are all places of business of the Lien Grantor not identified above:

Mailing Address	**County**	**State**

(c) The following are all locations not identified above where the Lien Grantor maintains any Inventory:

Mailing Address	**County**	**State**

[5] Insert Lien Grantor's "location" determined as provided in UCC Section 9-307.

Mailing Address	**County**	**State**

(d) The following are the names and addresses of all Persons (other than the Lien Grantor) that have possession of any of the Lien Grantor's Inventory:

Mailing Address	**County**	**State**

2. *Prior Locations*. (a) Set forth below is the information required by paragraphs (a) and (b) of Part B–1 above with respect to each other location or place of business maintained by the Lien Grantor at any time during the past five years:

(b) Set forth below is the information required by paragraphs (c) and (d) of Part B–1 above with respect to each other location or bailee where or with whom any of the Lien Grantor's Inventory has been lodged at any time during the past four months:

C. Search Reports.

Attached hereto as Schedule 4A is a true copy of a file search report from the central UCC filing office in each jurisdiction identified in Part A–4 and Part B above with respect to each name set forth in Part A–2 and Part A–3 above (searches in local filing offices, if any, are not required). Attached hereto as Schedule __ is a true copy of each financing statement or other filing identified in such file search reports.

D. UCC Filings.

Attached hereto as Schedule 5A is a schedule setting forth filing information with respect to the filings referred to in Part A–4 and Part B above. Attached hereto as Schedule 5B is a true copy of each such filing. All filing fees and taxes payable in connection with such filings will be paid by the Lien Grantor.

E. Absence of Certain Property.

The Lien Grantor does not own any assets of material value which constitute commercial tort claims, farm products, electronic chattel paper, letter-of-credit rights which are not supporting obligations or as-extracted collateral, as each of the foregoing terms is defined in the UCC.

IN WITNESS WHEREOF, I have hereunto set my hand this __ day of __________, ____.

____
Name:
Title:

Schedule 3
to Perfection Certificate

DESCRIPTION OF COLLATERAL

All personal property.

Schedule 5A to
Perfection Certificate

SCHEDULE OF FILINGS

AGAINST ________________,
AS DEBTOR

Filing Office	File Number	Date of Filing[9]

[9] Also indicate lapse date, if other than fifth anniversary.

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EXHIBIT F
to Amended and Restated Security Agreement

ISSUER CONTROL AGREEMENT

ISSUER CONTROL AGREEMENT dated as of ____________, _____ among [*NAME OF LIEN GRANTOR*] (the "**Lien Grantor**"), JPMORGAN CHASE BANK, N.A., as Collateral Agent (the "**Secured Party**"), and [*NAME OF ISSUER*] (the "**Issuer**"). All references herein to the "**UCC**" refer to the Uniform Commercial Code as in effect from time to time in [*Issuer's jurisdiction of organization*]. Capitalized terms used but not defined herein shall have the meanings ascribed thereto in the Security Agreement referred to below.

W I T N E S S E T H :

WHEREAS, the Lien Grantor is the registered holder of [*specify Pledged Uncertificated Securities issued by the Issuer*] issued by the Issuer (the "**Securities**");

WHEREAS, pursuant to the Amended and Restated Security Agreement originally dated as of July 17, 2006 and amended and restated as of April 24, 2015 among Windstream Services, LLC (formerly known as Windstream Corporation, and successor to ALLTEL Holding Corp.), the Guarantors party thereto and JPMorgan Chase Bank, N.A., as Collateral Agent (as such agreement may be amended and/or supplemented from time to time, the "**Security Agreement**"), and subject to the terms and provisions set forth therein, the Lien Grantor has granted to the Secured Party a continuing security interest (the "**Transaction Lien**") in all right, title and interest of the Lien Grantor in, to and under the Securities, whether now existing or hereafter arising; and

WHEREAS, the parties hereto are entering into this Agreement in order to perfect the Transaction Lien on the Securities;

NOW, THEREFORE, the parties hereto agree as follows:

Section 1. *Nature of Securities.* The Issuer confirms that (i) the Securities are "uncertificated securities" (as defined in Section 8-102 of the UCC) and (ii) the Lien Grantor is registered on the books of the Issuer as the registered holder of the Securities.

Section 2. *Instructions.* The Issuer agrees to comply with any "instruction" (as defined in Section 8-102 of the UCC) originated by the Secured Party and relating to the Securities without further consent by the Lien Grantor or

any other person. The Lien Grantor consents to the foregoing agreement by the Issuer.

Section 3. *Waiver of Lien; Waiver of Set-off.* To the extent permitted by applicable law, the Issuer waives any security interest, lien or right of set-off that it may now have or hereafter acquire in or with respect to the Securities. The Issuer's obligations in respect of the Securities will not be subject to deduction, set-off or any other right in favor of any person other than the Secured Party.

Section 4. *Choice of Law.* This Agreement shall be governed by the laws of [*Issuer's jurisdiction of incorporation*].

Section 5. *Conflict with Other Agreements.* There is no agreement (except this Agreement) between the Issuer and the Lien Grantor with respect to the Securities [except for [*identify any existing other agreements*] (the "**Existing Other Agreements**")]. In the event of any conflict between this Agreement (or any portion hereof) and any other agreement [(including any Existing Other Agreement)] between the Issuer and the Lien Grantor with respect to the Securities, whether now existing or hereafter entered into, the terms of this Agreement shall prevail.

Section 6. *Amendments.* No amendment or modification of this Agreement or waiver of any right hereunder shall be binding on any party hereto unless it is in writing and is signed by all the parties hereto.

Section 7. *Notice of Adverse Claims.* Except for the claims and interests of the Secured Party and the Lien Grantor in the Securities, the Issuer does not know of any claim to, or interest in, the Securities. If any person asserts any lien, encumbrance or adverse claim (including any writ, garnishment, judgment, attachment, execution or similar process) against the Securities, the Issuer will promptly notify the Secured Party and the Lien Grantor thereof.

Section 8. *Maintenance of Securities.* In addition to, and not in lieu of, the obligation of the Issuer to honor instructions as agreed in Section 2 hereof, the Issuer agrees as follows:

(i) *Lien Grantor Instructions; Notice of Exclusive Control.* (A) So long as (x) the Issuer has not received a Notice of Exclusive Control (as defined below), or (y) if a Notice of Exclusive Control has been received, an Exclusive Control Termination Notice has thereafter been delivered and no subsequent Notice of Exclusive Control has been received, the Issuer may comply with instructions of the Lien Grantor or any agent of the Lien Grantor in respect of the Securities.

(B) After the Issuer receives a written notice from the Secured Party stating that an Event of Default has occurred and is continuing, and instructing the Issuer to comply with instructions originated by the Secured Party with respect to the Securities without further consent by the Lien Grantor (a "**Notice of Exclusive Control**"), and until the Issuer thereafter receives a written notice from the Secured Party, substantially in the form of Exhibit A hereto, stating that the Event of Default described in such Notice of Exclusive Control shall have been cured or waived or otherwise ceased to exist ("**Exclusive Control Termination Notice**"). the Issuer will cease complying with instructions of the Lien Grantor or any of its agents.

(ii) *Statements and Confirmations.* During any period described in subsection 8(i)(B) above, the Issuer will promptly send copies of all statements and other correspondence concerning the Securities simultaneously to each of the Lien Grantor and the Secured Party at their respective addresses specified in Section 11 hereof.

Section 9. *Representation and, Warranties of the Issuer.* The Issuer makes the following representations and warranties:

(i) This Agreement is a valid and binding agreement of the Issuer enforceable in accordance with its terms, enforceable in accordance with its terms, except as limited by (x) applicable bankruptcy, insolvency, fraudulent conveyance or other similar laws affecting creditors' rights generally and (y) general principles of equity.

(ii) The Issuer has not entered into any agreement with any other person relating to the Securities pursuant to which it has agreed to comply with instructions (as defined in Section 8-102 of the UCC) of such person. The Issuer has not entered into any other agreement with the Lien Grantor or the Secured Party purporting to limit or condition the obligation of the Issuer to comply with instructions as agreed in Section 2 hereof.

Section 10. *Successors.* This Agreement shall be binding upon, and shall inure to the benefit of, the parties hereto and their respective successors and permitted assigns.

Section 11. *Notices.* Each notice, request or other communication given to any party hereunder shall be in writing (which term includes facsimile or other electronic transmission) and shall be effective (i) when delivered to such party at its address specified below, (ii) when sent to such party by facsimile or other electronic transmission, addressed to it at its facsimile number or electronic

address specified below, or (iii) ten days after being sent to (or, if earlier, when received by) such party by certified or registered United States mail, addressed to it at its address specified below, with first class or airmail postage prepaid:

Lien Grantor:

Secured Party:

Issuer:

Any party may change its address, facsimile number and/or e-mail address for purposes of this Section by giving notice of such change to the other parties in the manner specified above.

Section 12. *Termination.* The rights and powers granted herein to the Secured Party (i) have been granted in order to perfect the Transaction Lien, (ii) are powers coupled with an interest and (iii) will not be affected by any bankruptcy of the Lien Grantor or any lapse of time. The obligations of the Issuer hereunder shall continue in effect until the Secured Party notifies the Issuer that the Transaction Lien on the Securities has been terminated or released pursuant to the Security Agreement, unless this Agreement is otherwise terminated by the Secured Party in its sole discretion.

Section 13. *Counterparts.* This Agreement may be executed in any number of counterparts, all of which shall constitute one and the same instrument, and any party hereto may execute this Agreement by signing and delivering one or more counterparts.

[*NAME OF LIEN GRANTOR*]

By: ______________________________
Name:
Title:

JPMORGAN CHASE BANK, N.A.,
as Collateral Agent

By: ______________________________
Name:
Title:

[*NAME OF ISSUER*]

By: ______________________________
Name:
Title:

Exhibit A

[Letterhead of Secured Party]

[Date]

[Name and Address of Issuer]

Attention: ________________________

Re: Notice of Exclusive Control

Ladies and Gentlemen:

As referenced in the Issuer Control Agreement dated as of ______, ____ among [*name of Lien Grantor*], us and you (a copy of which is attached), we notify you that that an Event of Default has occurred and is continuing, and we will hereafter exercise exclusive control over [*specify Pledged Uncertificated Securities*] registered in the name of [*name of Lien Grantor*] (the "**Securities**"). You are instructed to comply with instructions originated by the undersigned with respect to the Securities and not to accept any directions or instructions with respect to the Securities from any other person unless otherwise ordered by a court of competent jurisdiction.

You are instructed to deliver a copy of this notice by facsimile transmission to [*name of Lien Grantor*].

Very truly yours,

JPMORGAN CHASE BANK, N.A.,
as Collateral Agent

By: ______________________________
Name:
Title:

cc: [*name of Lien Grantor*]

Exhibit 13

FILED UNDER SEAL

EXHIBIT 14

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 Case No. 18-23538-rdd
4 ----------------------------------x
5 In re Chapter 11
6 SEARS HOLDINGS CORPORATION, et al., Case No. 1823538 (RDD)
7 Debtors. (Jointly Administered)
8 ----------------------------------x
9
10 United States Bankruptcy Court
11 300 Quarropas Street, Room 248
12 White Plains, NY 10601
13
14 July 31, 2019
15 10:12 AM
16
17
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19
20
21 B E F O R E :
22 HON ROBERT D. DRAIN
23 U.S. BANKRUPTCY JUDGE
24
25 ECRO: A. VARGAS

1 HEARING re Notice of Hearing / Notice of Continuation of
2 Hearing on Debtors Rule 3012 Motion (related document(s)
3 4034)
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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

2

3 WEIL, GOTSHAL & MANGES LLP

4 Attorneys for the Debtors

5 767 Fifth Avenue

6 New York, NY 10153

7

8 BY: SUNNY SINGH

9 ANDREW WEAVER as counsel with Cleary Gottlieb

10 RAY C. SCHROCK

11 PAUL R. GENENDER

12

13 CLEARY GOTTLIEB STEEN & HAMILTON LLP

14 Attorneys for Transform / ESL

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16 New York, NY 10006

17

18 BY: SEAN O'NEAL

19

20 MILBANK, TWEED, HADLEY & MCCLOY LLP

21 Attorneys for Cyrus Capital Management

22 28 Liberty Street

23 New York, NY 10005

24

25 BY: THOMAS R. KRELLER

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2 Attorneys for Wilmington Trust National Association
3 620 Eighth Avenue
4 New York, NY 10018
5
6 BY: EDWARD M. FOX
7 STEVEN PARADISE
8
9 AKIN GUMP STRAUSS HAUER & FELD LLP
10 Attorneys for Creditors Committee
11 One Bryant Park
12 New York, NY 10036
13
14 BY: JOSEPH SORKIN
15 PHILIP DUBLIN
16 SARA L. BRAUNER
17
18 ALSO PRESENT TELEPHONICALLY:
19
20 BRYANT OBERG
21 ZACHARY D. LANIER
22 SOMA BISWAS
23 DONNA LIEBERMAN
24 RITA MARIE RITROVATO
25 JOSEPH RUSSICK

1 KIMBERLY GIANIS
2 DAVID H. WANDER
3 ANDREW DIAZ
4 BRYAN CIMALA
5 JEFFREY H. SCHWARTZ
6 ANDREW THAU
7 ALIX BROZMAN
8 WILLIAM HOLSTE
9 MICHAEL WEINBERG
10 MATTHEW KOCH
11 JOSH SAUL
12 MARIA CHUTCHIAN
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1 P R O C E E D I N G S
2 THE COURT: Okay, good morning. In re Sears
3 Holdings Corporation, et al. We concluded the factual
4 elements of the 507(b)/506(c) contested matters last week.
5 And today is for oral argument by the parties.
6 MR. WEAVER: Your Honor, Andrew Weaver on behalf
7 of Transform. One housekeeping item, if it's okay with Your
8 Honor, relating to a lease dispute that we just needed to
9 present to Your Honor this morning before the main event, if
10 that's agreeable to Your Honor.
11 THE COURT: Is this the subject of the emails last
12 night?
13 MR. WEAVER: Last night, yes.
14 THE COURT: Yeah, that's fine.
15 MR. WEAVER: Fine.
16 THE COURT: There have been no changes to what was
17 said last night, right?
18 MR. WEAVER: Correct. And you have the Word
19 versions, Your Honor, and all parties consent.
20 THE COURT: So those orders will be entered.
21 MR. WEAVER: Thank you, Your Honor.
22 THE COURT: Okay.
23 MR. O'NEAL: Good morning, Your Honor.
24 THE COURT: Good morning.
25 MR. O'NEAL: Sean O'Neal, Cleary Gottlieb, on

1 behalf of ESL Investments. I think in terms of the order of
2 business, what we contemplate is that I will begin, then my
3 colleague Tom Kreller on behalf of Cyrus will proceed, and
4 then Ed Fox on behalf of Wilmington Trust will proceed, and
5 then Mr. Schrock on behalf of the debtors will proceed.
6 THE COURT: Okay, that's fine.
7 MR. O'NEAL: And I think what we'll do is we'll
8 first address 507(b) claims and liens, and then the 506(c)
9 surcharge. We do have deck that we hope will help Your
10 Honor as we go through the evidence. And with your
11 permission, I'd like to approach the bench to provide you
12 with a copy.
13 THE COURT: I think someone already did that.
14 MR. O'NEAL: Oh, good, very good to see.
15 THE COURT: Like radar.
16 MR. O'NEAL: Okay. But before we get to the deck,
17 I do want to make some preliminary comments. From the first
18 day of this case, the debtors' goal was to maximize value
19 for the non-insider creditors of this estate, and to do that
20 through a going concern sale. And to the extent that the
21 debtors were unable to accomplish that, to attract a going
22 concern bid, they would then pivot to a liquidation.
23 But until such time that they pivoted, the debtors
24 pursued this going concern sale, and they did it, you know,
25 vigorously. They went out and they solicited bids and they

1 tried to get the best and highest offer. And they did this
2 with their eyes wide open, knowing that pursuing this option
3 would have its cost, but they determined that the cost were
4 worth the potential benefit of maximizing recoveries to the
5 non-insider creditors.
6 The 2L creditors, in turn, agreed to allow the
7 debtors to continue operating the business and using the
8 collateral so they could pursue this strategy. But the
9 condition to that, as was set forth in the DIP order, was
10 that they received adequate protection, replacement liens
11 and super-priority claims and liens as well. And these
12 protections were granted early in the case pursuant to the
13 DIP order.
14 Now, as part of this auction process, ESL for its
15 part submitted a series of bids, each one adding more value
16 than the last. And the value actually came in different
17 forms: sometimes the value was, you know, additional
18 consideration; sometimes the value was assumption of
19 liabilities, or perhaps the agreement to reimburse costs;
20 and then also, limitations on the scope of releases that ESL
21 sought.
22 You will recall early on in the case, ESL was
23 attempting to obtain a full release as part of the sale
24 transaction. All the meanwhile that the debtors were
25 vigorously pursuing bids and an action process trying to get

1 a going concern sale, they had a data room and they had
2 investment bankers really trying to get in competing offers.
3 Throughout all of this time, the restructuring subcommittee-
4 -
5 THE COURT: Those competing offers also included
6 going concern or orderly liquidation offers, too, right?
7 MR. O'NEAL: Correct, Your Honor, yes. You know,
8 like if Amazon had come in and wanted to buy Sears' assets,
9 all or a part of it, that was certainly something they were
10 trying to do.
11 THE COURT: But they were also trying to obtain
12 bids from the liquidators.
13 MR. O'NEAL: The liquidators, yes. Correct, Your
14 Honor. Per your -- actually, per your request that they
15 made those efforts as well.
16 THE COURT: Okay.
17 MR. O'NEAL: And as I noted that throughout all
18 this time, it was the restructuring subcommittee that was
19 driving this process, right. The restructuring subcommittee
20 was set up almost immediately before the petition date, and
21 they were advised by counsel, separate counsel and advisors.
22 And, you know, throughout this time, none of these
23 decisions were made by -- or the restructuring subcommittee
24 for the benefit of ESL. The subcommittee was making these
25 decisions for the benefit of the estate; they were

1 fiduciaries.

2 And at the sale hearing, the debtors testified on

3 repeated occasions that the other creditors would benefit

4 substantially from this sale transaction, and that's why the

5 debtors asked Your Honor to approve this transaction. And

6 if you look at the testimony that was presented by the CRO,

7 by the independent board members, by the financial advisors,

8 they all attested to these facts, that this was the best way

9 to maximize recoveries for the non-insider creditors.

10 Now, the UCC, for its part, contested all of these

11 decisions and litigated, instead seeking an immediate

12 liquidation, but that request was denied.

13 And for its part, this Court determined that the

14 ESL bid was in the best interest of the estates and

15 maximized the value to other creditors. This bid that was

16 submitted and that was approved by this Court expressly

17 reserved ESL's rights to pursue adequate protection claims

18 and liens and to recover on those as part of the deal.

19 There were some limitations to the recovery, and we'll get

20 more into that later.

21 You know, looking back, that sale was really a

22 critical moment in the case. Effectively, it resulted in a

23 reorganization of the business. The business has continued,

24 the bulk of secured creditors have been paid, contracts and

25 leases have been assumed, hundreds of millions of dollars of

1 liabilities have left the estates, and 45,000 jobs were
2 saved from immediate termination.
3 In preserving the business and creating this
4 process, such that there was maximization of value for other
5 creditors, was exactly the choice that the debtors made.
6 Because, being well advised, they believed that it was best
7 and consistent with their fiduciary duties to attempt to do
8 that.
9 Now, unfortunately, during this case, the value of
10 the second lien collateral substantially diminished, going
11 from a $245 million cushion, over secured cushion on the
12 petition date to a loss of more than $700 million through
13 the projected effective date.
14 As Your Honor is aware, the second lien lenders
15 have presented evidence to back up this diminution in value,
16 and the purpose of the presentation I'm going to go through
17 is, hopefully, to set that up.
18 But before I do that, before I turn to the
19 evidence, I do want to also comment briefly on the 506(c)
20 surcharge. Obviously, the debtors carry the burden, and
21 they are really seeking what is an unprecedented amount of a
22 surcharge, a $1.4 billion surcharge. We've never seen that;
23 we've never seen a case that supports that; we've never even
24 seen an argument that seeks a $1.4 billion 506(c) claim. I
25 think it goes far beyond the reach of a 506(c) and we'll get

1 to that more.

2 Now, I think I want to end kind of the preliminary

3 comments with just noting that the stakes here are high.

4 It's bigger than just ESL. It's bigger than just the second

5 lien creditors. I think secured creditors around the nation

6 are looking at this case. These stakes are high.

7 When we think about adequate protection, we think

8 about what is the purpose of adequate protection. And when

9 you look at the legislative history, the purpose of adequate

10 protection, as I'm sure Your Honor is well aware, is, quote,

11 "To ensure that the secured creditor receives in value

12 essentially what he bargained for." That legislative

13 history goes on to state that adequate protection is derived

14 from the Fifth Amendment protection of property, unquote.

15 But, quote, "It's based as much on policy grounds as it is

16 on constitutional grounds," unquote.

17 Here, the policy underlying adequate protection is

18 that secured creditors should be encouraged to lend money to

19 distressed companies, and should be encouraged to allow the

20 debtors to use collateral so that they can attempt to

21 reorganize or attempt to achieve the highest possible value

22 for the estate as a whole.

23 And I think when you look at Judge Chapman's

24 opinion in Sabine, she stated that, you know, accepting, in

25 that case, the committee's arguments on adequate protection

1 would have been against the policy underlying adequate
2 protection. It resulted in secured lenders insisting on a
3 quick sale and lenders being less likely to permit the use
4 of cash collateral, and then also of lenders, quote,
5 "dramatically changing", unquote, the borrowing base in
6 asset-based lending.
7 So I just say that just to kind of remind everyone
8 just kind of the stakes and the basic principles of adequate
9 protection.
10 THE COURT: So you're saying the borrowing base is
11 the lender's expectation?
12 MR. O'NEAL: No. I'm saying that if we were to
13 actually not recognize adequate protection, I think folks
14 would take different actions and protect themselves on the
15 borrowing base.
16 THE COURT: But I guess my question is a little
17 different, which is asset-based loans are based largely on
18 borrowing base calculations.
19 MR. O'NEAL: Correct, yes. But I think we're, if
20 your point is to suggest that we should be using the
21 borrowing base as the starting point for calculation of the
22 value of the collateral, we'll get to that later.
23 THE COURT: Okay.
24 MR. O'NEAL: Okay. So I think with Your Honor's
25 permission, I'd like to start through the deck. I don't --

1 some of these matters are kind of preliminary and I'm not
2 going to spend a lot of time on them. But I think I just
3 would take us initially to slide 4, and that's really just
4 an excerpt of the DIP order and as a threshold matter,
5 there's no disagreement that the second lien creditors
6 received adequate protection liens and claims. Those liens
7 were granted early in the case pursuant to the DIP.
8 And, importantly, those replacement liens and
9 super-priority liens and claims were granted to protect the
10 second lien creditors for any diminution in the value of the
11 second lien collateral due, in part, to the new money
12 portion of the senior DIP, the carveout, and the debtors
13 continued use of collateral, and I think that's laid out in
14 the language. You see that also in slide 5, which talks
15 about the super-priority claims. Those are just quotes from
16 the documents.
17 Moving on to slide 6, we're just -- here, we're
18 just summarizing the basic framework, and it's a bit hard to
19 read, but I think you get the gist. The basic gist is that
20 the first step is determining the value of the second lien
21 collateral on the petition date. That's the first step and
22 that's what you see above the first blue line. The second
23 step is to subtract from that the relevant debt, the first
24 lien debt, and you see that's what going on below the second
25 blue line.

1 And you will see at the top of the page, we lay
2 out a few assumptions that kind of affect the analysis in
3 terms of what the collateral value is. And this chart
4 actually focuses mostly on Schulte and Henrich because I
5 think Murray has a different analysis. And under that
6 analysis, Murray is really going with a process that first
7 establishes the floor and then she builds up from there, but
8 we're kind of focused on the Henrich and Schulte for now.
9 Mr. Kreller will be available to talk about Murray.
10 And so, as I noted, the three -- the bottom line
11 is that all three experts of the second lien creditors
12 determined that the second liens were over-secured as of the
13 petition date. The ESL expert, David Schulte, has
14 determined that we were over-secured by over 245 million
15 with an adequate protection claim of 718 million.
16 Going now to kind of like -- there's a few
17 assumptions and a few things that kind of critically drive
18 the analysis and the value, and those are listed at the top.
19 And I think the point of this deck is to show that if you
20 kind of -- if you reach a conclusion on these four issues,
21 even under the debtors' analysis, there's a substantial
22 adequate protection claim.
23 Number one, if it's determined that there's no
24 basis to apply the 85-cent valuation of inventory that the
25 debtors have proposed. Number two, if you determine that

1 the second liens have a lien on the pharmacy assets, as we
2 say they do. Number three, if you determine, as I think you
3 agree, that the carveout doesn't actually reduce the amount
4 of the super-priority liens and claims; it just has a
5 seniority, but it was actually -- it doesn't reduce our
6 claims and liens. And then finally, that there's no basis
7 for the $1.4 billion surcharge.
8 That would mean that if you follow those
9 assumptions, we would pretty much -- we would have an
10 adequate protection claim of over $350 million; it's 368
11 million under this. Then, of course, if you agree with us
12 that the undrawn LCs should not be included when we're
13 deducting the amount of debt from our collateral, then that
14 368 number would increase substantially by the amount of the
15 LCs. And so, that's really the point of that slide.
16 I think slide 7 really just reminds us of the
17 relevant standard that the Supreme Court applies. To
18 determine the value of the collateral, you look to the
19 debtors' use and disposition of the collateral. I don't
20 think there's actually any disagreement that that's what
21 Rash says; I think there's some disagreement on what it
22 means. But, you know, I think Rash is clear that the proper
23 standard is not always the liquidation of value; it's not
24 the foreclosure value, but it's the replacement value.
25 And here where the debtors have determined to

1 continue to use the collateral so that they can generate
2 revenues that can be used by the estates, the proper
3 valuation is the replacement value. Basically, the
4 inventory was being sold for value and then new inventory
5 was bought for value, and that was repeating every day in
6 this case. And the debtors were using that collateral to
7 maximize the potential recoveries to the estates through,
8 hopefully, what they wanted to have, which was a going
9 concern sale.
10 And then, so what we do next is we just go through
11 the various buckets of collateral -- you know, you've got
12 inventory, you've got cash, you've got credit card
13 receivables, you've got pharmacy accounts receivable, you
14 have pharmacy scripts -- are kind of like the key collateral
15 pieces that we've looked at.
16 Slide 8 talks about Schulte's view and shows that
17 what we did with Schulte is he testified that book value is
18 roughly equivalent to replacement value. Book value is the
19 amount that Sears used in its SEC filings. And, you know, I
20 think what we found is that book value is roughly equivalent
21 to replacement value.
22 Now, the value -- and to calculate this, really
23 Schulte kind of separated out, and I think that's consistent
24 with ResCap and with Rash. You look to the use of the
25 property. So for inventory that was located in go-forward

1 stores, you use the go-forward book value; that book value
2 was the replacement value. And for -- and that's the going
3 concern value for that particular collateral, the inventory.
4 Then when you look to the inventory that was sold at the GOB
5 stores, you look to kind of the value that was sold in the
6 GOB stores, and that's what Mr. Schulte did.
7 Now, the starting point for Mr. Schulte for the
8 go-forward inventory was the book value, which was the
9 amount that was included on the borrowing base certificate,
10 the starting point. And that includes all the inventory,
11 whether eligible or not eligible for the borrowing base, and
12 we think that's the appropriate standard. The borrowing
13 base --
14 THE COURT: I'm sorry. Let me make sure I
15 understand that. Is he using book value for non-eligible
16 items?
17 MR. O'NEAL: Yes, he is. Yes, because that's
18 still value, right?
19 THE COURT: But he's using book value for it.
20 MR. O'NEAL: Yes. He's looking -- he's using book
21 value for the inventory, and he's not excluding ineligible
22 inventory.
23 THE COURT: Okay.
24 MR. O'NEAL: And that's because the inventory
25 still has value.

1 THE COURT: Right, but he's ascribing book value
2 to it.
3 MR. O'NEAL: Correct.
4 THE COURT: Does the book value reflect any
5 discount because it's not eligible?
6 MR. O'NEAL: No. The book value does not reflect
7 a discount. What the book value reflects is just the
8 replacement cost. The book value deducts already kind of
9 the direct cost of selling the inventory, so it's really
10 what we view as the replacement cost.
11 THE COURT: Why is that a proper measure here?
12 MR. O'NEAL: Because, I mean, I think --
13 THE COURT: When the lenders themselves don't use
14 it.
15 MR. O'NEAL: Right. Well, the lenders --
16 THE COURT: And when Tiger doesn't use it.
17 MR. O'NEAL: Sure, sure.
18 THE COURT: And when Miss Murray doesn't use it.
19 MR. O'NEAL: Sure. And I think that's, if you
20 think about it, when the lenders are doing a borrowing base
21 and when they're lending money, they're lending money on the
22 basis of, you know, their credit assessment. What Rash says
23 is you look to what a willing buyer and seller would pay and
24 accept.
25 THE COURT: How is that reflected in book value,

1 as opposed to actual market calculations?
2 MR. O'NEAL: Right, because that is the actual
3 replacement value. It does not include the cost of -- the
4 direct cost of selling the inventory.
5 THE COURT: Okay.
6 MR. O'NEAL: And so, the -- you know, so Rash
7 doesn't say that you look to what --
8 THE COURT: Are you aware of any case that
9 actually ascribes full book value to ineligible inventory?
10 MR. O'NEAL: I'm not aware of any case one way or
11 the other --
12 THE COURT: Oh, really.
13 MR. O'NEAL: -- that doesn't or that does.
14 THE COURT: Okay, all right. I'm going to cite
15 you a couple after this.
16 MR. O'NEAL: All right. All right, so I think one
17 of the things that Schulte did testify to, is that the
18 replacement value of the go-forward inventory based on book
19 value is actually a conservative approach. It's a lower
20 number than the retail net value that he could have used.
21 I think slide 9 is really just intended to make
22 one point, which is that the debtors also began with
23 inventory book value as their starting point. Now, you
24 know, obviously then what they did is they took an axe to it
25 and then they took a hatchet to it and then they kind of put

1 a stick of dynamite on it, but in the end -- in the
2 beginning --
3 THE COURT: Is that what borrowing bases are,
4 hatchets and dynamite?
5 MR. O'NEAL: No, no. I'm actually not referring
6 to the borrowing base.
7 THE COURT: Okay.
8 MR. O'NEAL: We'll get more to that later. I'm
9 referring to the 15 percent discount.
10 THE COURT: Right.
11 MR. O'NEAL: And then also the 506(c) surcharge.
12 THE COURT: Okay.
13 MR. O'NEAL: So slide 9 -- I'm sorry -- slides 10
14 and 11, you'll see that -- how Schulte valued the GOB
15 inventory. And the GOB inventory was based really on the
16 debtors' historic experience. You have an experience
17 between 2014 and 2018 when Sears was, you know, kind of
18 closing down the more than -- there were approximately 700
19 stores, and you see that's between 95 and 100 percent.
20 THE COURT: What is the source of this document?
21 MR. O'NEAL: This is the ledger is the source.
22 THE COURT: This is referenced in Footnote 84 of
23 Mr. Schulte's Declaration, but he doesn't really explain
24 where it comes from or what it is intended to show. So can
25 you do that for me?

1 MR. O'NEAL: Sure. I mean, it's really -- I mean,
2 this is -- I mean, this is -- I don't think there's any
3 contest that these are the recovery rates for the GOB
4 stores.
5 THE COURT: Well, when you say the recovery rates,
6 is this everything that was sold in the GOB stores?
7 MR. O'NEAL: Yes.
8 THE COURT: And did that include, for example,
9 pharmacy assets?
10 MR. O'NEAL: I don't -- I would have to confirm on
11 that one.
12 THE COURT: And did it include goods in transit?
13 I'm assuming not, right?
14 MR. O'NEAL: I will -- after I go through this,
15 I'll confirm, and I'll get back on the mic.
16 THE COURT: Okay. And do we know specifically
17 what was netted out?
18 MR. O'NEAL: Yes. What was netted out was --
19 THE COURT: The four wall costs, right?
20 MR. O'NEAL: That's correct.
21 THE COURT: Okay. And we don't know whether there
22 was ineligible inventory or just regular inventory; we don't
23 know the breakdown here, right?
24 MR. O'NEAL: That's correct. This would have
25 included conceivable ineligible.

1 THE COURT: But we don't know which was --
2 MR. O'NEAL: What portion of it.
3 THE COURT: -- what portion was.
4 MR. O'NEAL: Yeah. It's not --
5 THE COURT: -- included.
6 MR. O'NEAL: Correct.
7 THE COURT: Okay. Now, Mr. Henrich has a
8 different set of exhibits that has a different number at the
9 end of it and also a different number for total inventory at
10 cost sold. That is -- well, it appears he has two different
11 exhibits.
12 MR. O'NEAL: Right.
13 THE COURT: It's Exhibit G and Exhibit H to his
14 declaration. Can you explain why there's a difference?
15 MR. O'NEAL: Yeah. I mean, I think I'd have to
16 defer to Cyrus' counsel on explaining Henrich's methodology.
17 But I would say that I think at the hearing, I think you
18 asked the question of Mr. Griffith, who said that he
19 believed that Mr. Schulte's 95.6 number was the correct
20 number.
21 THE COURT: Well, he said it was the more reliable
22 one.
23 MR. O'NEAL: Yes.
24 THE COURT: But I'm just -- I'm curious as to how
25 there could be two exhibits as to the results of GOB sales

1 that could differ in these ways.

2 MR. O'NEAL: Right, and the difference is not

3 completely substantial; it's, like, 1 percent.

4 THE COURT: Right.

5 MR. O'NEAL: Yeah. But like I said, you know, I

6 think I would defer to Cyrus' counsel to explain that, but I

7 think the debtors are on record as saying that ours is the

8 more reliable.

9 And then I think what slide 11 does is it actually

10 shows what the GOB inventory was sold at during the

11 bankruptcy case, and that's the 95.6 percent. And what's

12 interesting is -- and you see this on slide 13, which is in

13 both cases Schulte picked the lower number and we're trying

14 to be conservative here.

15 I think I want to turn now to slide 12. There's

16 been some discussion about whether or not Schulte included

17 overhead in our valuations of the inventory collateral. And

18 so, I think what I would say is that this -- and his

19 analysis doesn't include indirect overhead, but it certainly

20 includes direct overhead. And I think that's clear on the

21 record that it includes the four-wall cost of selling the

22 inventory.

23 And there is still, even if you do that, there's

24 still a bit of a margin -- it's not huge, it's about $11

25 million -- in excess of that that could be available for

1 overhead. In addition, you know, there are other earnings
2 related to inventory that are not included in the debtors'
3 store letter -- store level financial statements,
4 particularly the vendor discounts and the rebates, which in
5 2018 was approximately 183 million. And I think what we're
6 just saying here is that that 183 million, which was
7 generated by inventory but is not deducted from the value of
8 the inventory, would actually be available for use for
9 overhead, so that's 183 million at least.
10 And then I think our next point is that there are
11 other assets, other businesses that should also contribute
12 to the corporate overhead. And I think Sabine is clear that
13 not all overhead should be allocated to a single piece of
14 collateral.
15 I think now I'd like to turn to slide 15, which
16 kind of adds -- or actually, I should say slide 14, which
17 kind of adds a little bit more detail to what I just talked
18 about. If you look at slide 14, that's that $11 million --
19 $11.5 million is kind of margin from the sales of inventory
20 that would be available for indirect overhead, on top of the
21 amounts, you know, that we've already deducted for indirect
22 -- I'm sorry -- for direct costs.
23 If you turn to slide 15, this is where we have, if
24 you look in the middle of the chart, that 183 number, the
25 2018 number for vendor discounts and other adjustments.

1 Again, those -- that amount would be available for overhead.
2 What we're doing here is we're just taking you through the
3 kind of -- the individual pieces that we talked about above.
4 Now, I'd like to talk about the 15 percent
5 discount, the 85 cents that the debtors have asserted. You
6 know, and I think that -- I start with I think what Your
7 Honor ruled on the 23rd, which is that, you know, the APA is
8 clear, there's no allocation. And so, we can't have parol
9 evidence on whether or not there was an allocation.
10 I think Your Honor was interested in whether these
11 disputed materials reflected any kind of view on value,
12 apart from the APA. Now we, as you know, Mr. Moloney
13 actively objected to the admission of those documents, which
14 we viewed as, you know, settlement documents and irrelevant
15 and the like. And I'm not going to repeat all of those
16 objections, but just to note that, you know, we are
17 maintaining all of our objections to the admissibility of
18 those documents.
19 But just setting that aside, we do believe that
20 those materials have no probative value. First, the debtors
21 never accepted the bid that was described in the disputed
22 materials; in fact, they vociferously objected. And they
23 wanted us to add more aggregate value and stated their
24 intention that they would liquidate rather than accept that
25 bid.

1 And to the extent that the buyer, that is that ESL
2 or Transform had made an offer, that offer was a package
3 deal. And if you go through that offer, one of the big
4 components of that offer, to the extent it was an offer, was
5 actually a global release, a global release of all claims
6 against ESL. As you know, that did not happen.
7 So in this instance, we had neither a willing
8 seller or a willing buyer; nobody took that deal. And from
9 a commercial standpoint, a bid is just a starting point;
10 it's an invitation to counter. And if there's no deal,
11 there's no deal, there's no valuation.
12 And I think if you look at the Supreme Court's
13 decision in Rash, particularly Footnote 2, the Supreme Court
14 says that, to have -- to determine value, you have to look
15 at the price that a willing buyer and a willing seller would
16 agree to buy and sell at. You didn't have that here.
17 Moreover, I think Judge Gropper's decision in
18 Tronox, a bit of a monster of a decision, but there's a note
19 and at note 86 where Judge Gropper says that, and it's
20 highlighted here on slide 16, "Courts give little weight to
21 unaccepted offers, especially where they lack finality." As
22 the Court said in United States versus Smith, "It's well
23 settled that a mere offer unaccepted to buy or sell is
24 inadmissible to establish market value." So we start with
25 the proposition there was no offer, there was no willing

1 buyer. Therefore, there is no -- and there was no willing
2 seller; therefore, there is no ability to determine value
3 based on that.
4 But there are additional issues that we have to
5 keep in mind, and those include that the deal substantially
6 changed from December and January, the early part of January
7 until the final acceptance of the bid in mid-January.
8 During that process, this auction process, Transform
9 ultimately agreed to add approximately 800 million in
10 additional assumed liabilities. And this additional
11 consideration formed part of the aggregate purchase price,
12 but there was never an allocation to specific assets. The
13 credit bid is only a piece of the consideration, and that
14 consideration was a package deal.
15 And third, we suggest that there's nothing in the
16 record to suggest that the 15 percent discount was a
17 valuation; in fact, the opposite is true. What the
18 documents say is that these were assumptions for purposes of
19 the bid. And it's kind of not surprising that that would
20 just be an assumption. It was a starting bid, a starting
21 offer. And I think we all know that at the time the GOB
22 store sales were at a substantially higher level than 85
23 cents.
24 Fourth, I think it's clear that there was no
25 testimony as to what was actually said during those

1 meetings, so it's -- I don't think it really is relevant.
2 So in the end, to the extent, you know, I think you've
3 already made the decision to admit those, but we submit that
4 they just have no probative value; they're not probative of
5 market.
6 Now I'd like to turn to cash. Schulte's analysis,
7 and I think everybody's analysis, assumed and determined
8 that we would have -- that the first lien lenders would
9 effectively use first the cash. We didn't have a lien on
10 the cash at the second lien level, but the first lien
11 lenders did. And there's also no dispute, however, that to
12 the extent that any of the cash was related to proceeds from
13 inventory that that would be part of our lien; that's the
14 proceeds language.
15 Now I think Your Honor asked whether there had
16 been a tracing exercise and the response was no, there had
17 been no tracing exercise. Instead, what we've done is we've
18 made the reasonable assumption that cash would be used first
19 by the first lien lenders.
20 THE COURT: There's no -- there's a waiver of
21 marshaling, right?
22 MR. O'NEAL: There is. But I think marshaling is
23 a bit of a red herring because the marshaling wouldn't even
24 come into play until the first lien lenders were paid in
25 full. So I don't think it really -- I just -- it's not

1 relevant. But I think we have to keep in mind that there's
2 actually a provision in the DIP agreement, and we've
3 highlighted it at the bottom of the page on Page 17, which
4 is that net proceeds from the sale of collateral, other than
5 the previously unencumbered assets which were to go over to
6 the winddown account, were to be used to pay down the ABL
7 lenders.
8 And I think you'll recall that at the hearing on
9 the APA issues, Mr. Friedman said that every time we got
10 money, we used it to pay down the ABL debt. So I think, you
11 know --
12 THE COURT: This is starting cash, right, that
13 you're referring to?
14 MR. O'NEAL: That's correct. This is the starting
15 cash on the books.
16 THE COURT: On the petition date.
17 MR. O'NEAL: That's correct, that's correct.
18 THE COURT: So it wouldn't be from post-petition
19 sales.
20 MR. O'NEAL: That's correct, but the next day, it
21 would be or, you know, immediately. Actually, the day of
22 the petition it would be, right, because --
23 THE COURT: Was there a cash sweep?
24 MR. O'NEAL: Well, I think -- well, what the DIP
25 loan says is that, you know, cash is to be used to pay the

1 ABL lenders, and I think that's consistent with what Mr.
2 Friedman --
3 THE COURT: So there wasn't a cash sweep.
4 MR. O'NEAL: Mr. Friedman called it a cash sweep.
5 THE COURT: But that's from proceeds of sales.
6 MR. O'NEAL: Correct.
7 THE COURT: Okay.
8 MR. O'NEAL: Let's look at credit card
9 receivables. I think the only point here is I think there's
10 no debate that credit card receivables form a part of the
11 second lien collateral. I think there's a bit of a debate
12 on what's the right number to use, I think. We used the
13 general ledger book value, and that was based on kind of
14 actual, you know, kind of the actual data. The debtors used
15 --
16 THE COURT: What actual data?
17 MR. O'NEAL: What's that?
18 THE COURT: What actual data?
19 MR. O'NEAL: The ledger.
20 THE COURT: The ledger.
21 MR. O'NEAL: Correct.
22 THE COURT: The book ledger.
23 MR. O'NEAL: Correct.
24 THE COURT: Okay. So no attempt to quantify
25 collectability on anything like that.

1 MR. O'NEAL: No, Your Honor. It was just what was
2 put on the ledger. And I think what the debtors used is
3 actually a forecast.
4 THE COURT: As did Tiger, as did Ms. Murray.
5 MR. O'NEAL: I think that's -- I think that's
6 correct.
7 THE COURT: So am I correct that every time he had
8 the opportunity to, Mr. Schulte used book value and didn't
9 do any other analysis as far as valuation is concerned?
10 MR. O'NEAL: I think we used book -- that's
11 correct, except -- yeah, I think that's right. I mean, the
12 starting -- we used, as the starting point, the book value.
13 THE COURT: Well, ending point too, right, except
14 for --
15 MR. O'NEAL: That's correct.
16 THE COURT: Right.
17 MR. O'NEAL: Okay. So I think that takes us to
18 pharmacy assets. There is a bit of a debate here between us
19 and the debtors on pharmacy assets.
20 THE COURT: As to whether they're included in the
21 collateral package.
22 MR. O'NEAL: That's correct, that's correct. The
23 -- initially, with respect to pharmacy receivables, I think
24 the debtors' witness include the pharmacy receivables as
25 second lien collateral. He then kind of changed his report.

1 But our view is that pharmacy receivables are a part of our
2 collateral package; they are proceeds from inventory. And
3 as you look at slide 19, we highlight the language in the
4 security agreements which talks about all inventory and
5 proceeds.
6 Now, you may ask the question, well, why did the
7 first lien security agreement refer to pharmacy receivables.
8 And I think the point is we're not a party to that
9 agreement, and I don't think that agreement controls what
10 our agreement is. And under the terms of the agreement, we
11 had a lien on the proceeds from inventory.
12 In terms of pharmacy scripts -- and we've
13 highlighted the language here in Clause F -- as part of our
14 second lien security package, we got a lien on all books and
15 records pertaining to the collateral. Pharmacy scrips are
16 really, it's the pharmacy's right to fill a prescription to
17 a given customer and so, we view that as a customer list.
18 And accordingly, it falls within books and records provision
19 of the security agreement.
20 THE COURT: Do you have any case law to support
21 that?
22 MR. O'NEAL: You know, we looked, and we didn't
23 see case law one way or the other on this particular point.
24 But, I mean, obviously, we consulted with our UCC experts,
25 and they all agree that, you know, books and records should

1 include things such as customer lists and pharmacy scripts.
2 THE COURT: But when you talk about scripts when
3 you're actually selling pharmacy assets, it's really just --
4 what would you actually sell?
5 MR. O'NEAL: Yeah. It's the right to sell to a
6 given customer.
7 THE COURT: To a customer, right?
8 MR. O'NEAL: Yeah, to a given customer.
9 THE COURT: Because there's a written
10 prescription.
11 MR. O'NEAL: That's correct.
12 THE COURT: So the customer can go elsewhere.
13 MR. O'NEAL: Yes. The customer could go
14 elsewhere, but that doesn't mean it's not our collateral if
15 they don't.
16 THE COURT: But it's different than a customer
17 list, right? A list is so you can identify customers.
18 MR. O'NEAL: Yeah, but that's exactly what the
19 pharmacy scripts is. It's a list of customers that could
20 fill their prescriptions at a Sears pharmacy.
21 THE COURT: Well, I'm just trying to conceive of
22 how this works from a buyer of a script. So let's say that
23 -- I don't know -- Rite-Aid wants to buy the script. What
24 is it buying?
25 MR. O'NEAL: It's buying the list of customers

1 that can fill their prescriptions at Sears.

2 THE COURT: Okay.

3 MR. O'NEAL: All right. And then so, I think we

4 turn to slide 21. I think aside from the, you know, kind of

5 the --

6 THE COURT: And he values that at book value,

7 right?

8 MR. O'NEAL: That's correct.

9 THE COURT: Full value.

10 MR. O'NEAL: At book value.

11 THE COURT: And he didn't read the Tiger report on

12 why that makes no sense.

13 MR. O'NEAL: Well, actually, I think that's not

14 entirely accurate.

15 THE COURT: Well, he testified he didn't read the

16 Tiger report.

17 MR. O'NEAL: Yeah, yeah. I think --

18 THE COURT: I got the other part.

19 MR. O'NEAL: Yeah. Let me -- I'm talking about

20 the second part of your statement.

21 THE COURT: Okay, all right.

22 MR. O'NEAL: What we did is we relied on the value

23 of the pharmacy scrips that was in the debtors' books and

24 records. We received from the debtors a document and

25 metadata, I think mid-September, that listed out the value

1 of the pharmacy scripts, and that list was at 72.8. Now,
2 there is a Tiger appraisal --
3 THE COURT: Book value or the value value?
4 MR. O'NEAL: This was the -- I mean, this was the
5 -- it is called the estimated script asset value is what the
6 -- that's what the --
7 THE COURT: So he didn't do any analysis of that
8 separately. He didn't determine how that number was
9 derived, anything like that?
10 MR. O'NEAL: That's correct because it was in the
11 debtors' books and records.
12 THE COURT: Right. And we all know debtors' books
13 and records are always accurate, and the case law has always
14 held that, right?
15 MR. O'NEAL: Well --
16 THE COURT: I'm being facetious. It hasn't ever.
17 MR. O'NEAL: I understand.
18 THE COURT: All right.
19 MR. O'NEAL: But I do think that it's -- this is
20 the best evidence of the debtors' view.
21 THE COURT: What sort of best -- all right, fine.
22 MR. O'NEAL: Yeah.
23 THE COURT: It also, obviously --
24 MR. O'NEAL: Because the Tiger, let's look at the
25 Tiger --

1 THE COURT: -- is clearly beneficial to your
2 client. And so, he didn't bother to dig into it and provide
3 any expert judgment as to it, right? He just took it as a
4 given.
5 MR. O'NEAL: I think that he took it as a given
6 that the debtors had valued it and had taken the time to
7 value it appropriately. I think when you look at -- let's
8 think about the Tiger.
9 THE COURT: But he didn't do any analysis of that.
10 MR. O'NEAL: He did not.
11 THE COURT: I don't really have any expert
12 testimony on that issue.
13 MR. O'NEAL: He accepted --
14 THE COURT: Except maybe Tiger's.
15 MR. O'NEAL: Right, but let's think about Tiger.
16 Tiger is interesting because obviously Tiger was working for
17 the lenders, so obviously had a different perspective,
18 right? They had a potential interest in reducing the value
19 of the scripts because, you know, it relates to the
20 borrowing base and the credit protection that they had
21 bargained for.
22 THE COURT: Well, that's not necessarily an
23 interest to reduce. It's just an interest to be accurate
24 because lenders don't want to set false guidelines because
25 then they'll be beaten out by other lenders --

1 MR. O'NEAL: I agree that --
2 THE COURT: -- that set up accurate guidelines.
3 And they're the ones that get the loans because lenders are
4 basically in the business of making loans, not managing
5 defaults.
6 MR. O'NEAL: I agree with that, but I do think
7 that the --
8 THE COURT: Well, that's not what you said.
9 MR. O'NEAL: I do think that the appraisal is done
10 for the lenders; it's not done for the debtors.
11 THE COURT: Right. And the debtors haven't given
12 me an appraisal and neither have you on this issue.
13 MR. O'NEAL: I've given you what's in the debtors'
14 books and records.
15 THE COURT: Right, okay.
16 MR. O'NEAL: And then I would say that --
17 THE COURT: So on this point, though, this is
18 really just sort of an ongoing part of the business. You
19 would have to value this if you're going to value it at all
20 on a liquidation basis, wouldn't you, because this is just
21 sort of people come to get their prescription. It doesn't -
22 - it isn't a receivable yet. It's just some sort of
23 inchoate right.
24 MR. O'NEAL: It's --
25 THE COURT: It only exists when you look to sell

1 it. And when you would sell it, would only be, I think, if
2 you're going out of business.
3 MR. O'NEAL: Right.
4 THE COURT: That's the only time I've seen
5 companies sell it.
6 MR. O'NEAL: I think it has -- I guess it has
7 value from a lending perspective. It has value from a sale
8 perspective.
9 THE COURT: Right. But it's --
10 MR. O'NEAL: But I think that that is -- that's
11 value, and it obviously has a greater value in a going
12 concern.
13 THE COURT: I don't understand that. It doesn't
14 have any value as a going concern because you don't realize
15 any money from it --
16 MR. O'NEAL: Well, you --
17 THE COURT: -- as collateral. You realize money as
18 a business because you have customers who show up. But you
19 don't -- it's not -- it's not -- there's no value to it
20 unless you're going to sell it somewhere.
21 MR. O'NEAL: And my point is that it has value
22 because customers are coming every day to fill their
23 prescriptions.
24 THE COURT: But --
25 MR. O'NEAL: It has intrinsic value.

1 THE COURT: -- not as a -- not as a book and
2 record. That's all I -- I mean, it has value when you sell
3 it, right? I mean, it's not --
4 MR. O'NEAL: Well, I think it has --
5 THE COURT: If you carry it on your books as
6 having a value of 72 million, that doesn't -- that's like
7 carrying goodwill on your books.
8 MR. O'NEAL: Right, but it does have value for --
9 THE COURT: Well, so does -- but how is it
10 different than goodwill at this point? I mean, it's just --
11 it's not realizable. I don't see how it has collateral
12 value unless you're going to sell it. And when you sell it,
13 you're in a situation where Rite-Aid, whatever, CVS knows
14 you're going out of business.
15 MR. O'NEAL: Right.
16 THE COURT: So they're going to put a big discount
17 on it.
18 MR. O'NEAL: I think, Your Honor, the value is
19 that every day, customers are coming in because they've got
20 a relationship with --
21 THE COURT: No, I get it, it's just like goodwill.
22 I mean, they're not -- they're obviously not going to be
23 coming into Sears because Sears is selling it.
24 MR. O'NEAL: But that has val- --
25 THE COURT: They're selling their prescription.

1 MR. O'NEAL: Understood.
2 THE COURT: Which basically means --
3 MR. O'NEAL: And that has value.
4 THE COURT: Okay.
5 MR. O'NEAL: And to your point, the Tiger
6 valuation, there's the subsequent Tiger valuation, right,
7 that was done in February that adjusted their prior estimate
8 and doubled it.
9 THE COURT: Right. And there's no explanation as
10 to why that was.
11 MR. O'NEAL: That's only what's in the Tiger
12 report, and that was $54 million.
13 THE COURT: Right.
14 MR. O'NEAL: So if you use that number --
15 THE COURT: It puts a number on it.
16 MR. O'NEAL: Right.
17 THE COURT: It doesn't say why it changed the
18 earlier analysis.
19 MR. O'NEAL: And so, if you're looking, that means
20 that the bid between the parties is, you know, roughly 72
21 versus 54.
22 THE COURT: Only if you assume Tiger was right in
23 February and not on the petition date.
24 MR. O'NEAL: Correct, correct.
25 THE COURT: Or what the amount of the receivables

1 was on the petition date, which wouldn't be in February.
2 MR. O'NEAL: Correct.
3 THE COURT: Right? So why should I accept
4 February for anything? Who knows what -- I mean, February
5 could basically say that the value went up --
6 MR. O'NEAL: I think it was just --
7 THE COURT: -- as opposed to down from the
8 petition date.
9 MR. O'NEAL: Yeah. For some reason, the Tiger
10 team revisited the valuation.
11 THE COURT: Maybe there were more -- maybe people
12 were writing more prescriptions between those months. They
13 are the months when people get colds.
14 MR. O'NEAL: I do not know the answer to that.
15 THE COURT: Okay.
16 MR. O'NEAL: I think the next question we have is
17 in, you turn to the next step, which is deducting the
18 relevant first lien debt from the amount of collateral.
19 Now, as Your Honor is aware, there's a few
20 differences between our respective positions on this. We
21 believe that unfunded or undrawn letters of credit should
22 not be deducted from the total amount of first lien debt
23 because they were not drawn; they were merely contingent
24 liabilities. And in a going concern process, it's
25 reasonable to conclude that those letters of credit would

1 not be drawn. And I think the facts substantially bore that
2 out because, in the end, only 9.3 million I think letters of
3 credit have been drawn.
4 THE COURT: Do you -- are you aware of any case
5 law that values debt in this context?
6 MR. O'NEAL: Not in this context.
7 THE COURT: I mean, there is -- Congress did, in
8 section 10 -- 132(a) arguably require a fair valuation of
9 debt, as well as assets as part of the defined term
10 insolvent.
11 MR. O'NEAL: Right. I don't know if that's
12 exactly on point, but I think there --
13 THE COURT: Right. I think -- I'm sorry to
14 interrupt you -- but I think it may indicate that,
15 otherwise, Congress intended people not to put a value on
16 debt.
17 MR. O'NEAL: But I think here in this instance,
18 right, if it is unfunded debt, there is no funded liability
19 for the debtors to pay. And I think it's very reasonable to
20 conclude that in a going concern process that those letters
21 of credit will never be drawn. And I think it's also
22 consistent with the debtors' first day petition when Mr.
23 Riecker did not include the undrawn letters of credit in the
24 borrowed money.
25 THE COURT: In an ongoing business, wouldn't it be

1 equally reasonable to assume that there would not be a full
2 payment of the first lien bank debt; it would just roll
3 over?
4 MR. O'NEAL: I'm not sure I follow your question.
5 THE COURT: Well, you made the assumption that
6 with a going concern the letters of credit wouldn't be drawn
7 on.
8 MR. O'NEAL: Correct.
9 THE COURT: Isn't it reasonable to make a similar
10 assumption that the first lien debt would not be required to
11 be paid in full in cash, but would roll over?
12 MR. O'NEAL: I guess you could make that
13 assumption. In the end --
14 THE COURT: I mean, isn't that kind of what
15 happened here?
16 MR. O'NEAL: Yeah.
17 THE COURT: There was no rollover of the first
18 lien debt?
19 MR. O'NEAL: I was just going to say, I mean,
20 ultimately, that's what happened. But I don't think that
21 affects the analysis that you don't have to deduct.
22 THE COURT: I mean, wouldn't -- I mean, why are
23 you making the distinction? The only distinction I can see
24 is the contingency, as opposed to the going concern point.
25 MR. O'NEAL: Yeah, that's correct. It was

1 contingent debt.
2 THE COURT: Because you -- I mean, in essence,
3 they rolled over the first lien debt too. They replaced one
4 first lien facility with another first lien facility.
5 MR. O'NEAL: Right. But that shouldn't -- I mean,
6 certainly, that shouldn't penalize our adequate protection
7 claims.
8 THE COURT: No, but that's not the point. You're
9 basically saying you count one, you count the first lien
10 debt, but you don't count the LCs.
11 MR. O'NEAL: Because they're --
12 THE COURT: Both of them were rolled over as part
13 of the sale.
14 MR. O'NEAL: Yes, but they're con- -- they were
15 contingent as of the petition date. You have to look to the
16 petition date. And on the petition date, they had not been
17 drawn and it was reasonable to conclude that they would not
18 be drawn. They were not drawn on the petition date.
19 THE COURT: Well, it's reasonable to conclude on
20 the petition date, given the values here, that the first
21 lien debt was fully covered and could be rolled over; same
22 thing.
23 MR. O'NEAL: But --
24 THE COURT: I mean, aren't you -- aren't you
25 really looking at what would, in this instance, the risk

1 that the second lien lenders are facing?
2 MR. O'NEAL: We are, but --
3 THE COURT: And that risk is materially one that
4 these LCs would be drawn? I mean, they are -- they do count
5 under the DIP order. They are subsumed in the definition of
6 prepetition obligations; they're not excluded.
7 MR. O'NEAL: Understood. But they were contin- --
8 they were -- just on the petition date, they were just --
9 they were contingent. They were not drawn. There was
10 nothing due under those facilities.
11 THE COURT: But they're definitely ahead, right?
12 It's a risk that your clients faced.
13 MR. O'NEAL: There was a risk that they could be
14 drawn, but they were not -- they were not drawn on the
15 petition date. And the facts have borne out that they, you
16 know, only an immaterial portion of the letters of credit
17 have been drawn since then.
18 THE COURT: And none of the first lien bank debt.
19 MR. O'NEAL: I'm sorry?
20 THE COURT: And none of the first lien bank debt
21 is outstanding either.
22 MR. O'NEAL: That's correct.
23 THE COURT: Because it was rolled over.
24 MR. O'NEAL: Again --
25 THE COURT: It's not like it was -- if it wasn't

1 rolled over, it would have been paid out in a liquidation,
2 right?
3 MR. O'NEAL: Well, there would have been --
4 THE COURT: And similarly --
5 MR. O'NEAL: -- they could have just, I mean, if
6 there was a liquidation. But we didn't have -- on the
7 petition date, we weren't liquidating.
8 THE COURT: I'm just going back to this point
9 about the LCs were taken care, they rolled over. Same thing
10 happens with the bank debt. It seems to me to prove too
11 much. It doesn't really -- to me, it doesn't matter that
12 much. I understand the point that the LCs, in essence,
13 collateralize debts that the company needs to collateralize
14 in order to do business, and not all of those debts will
15 necessarily come due. I understand that aspect of the
16 contingency.
17 But no one's really made an effort to show me
18 which of those -- you know, where there's an over- -- put it
19 different -- where there's an over-collateralization. I
20 mean, when companies go out of business, for example, they
21 look for any scraps of cash they can. And they fight with
22 the governmental units in the various states that are
23 responsible for managing workers' compensation, and they try
24 to persuade them that you're way over collateralized, you
25 should give us back some of the money. I understand that

1 argument.

2 MR. O'NEAL: Mm hmm.

3 THE COURT: But there's no evidence here as to

4 what that spread might be. But just to say that it

5 shouldn't be counted as debt, to me, really says too much.

6 That's based on the theory that in a going concern

7 reorganization or going concern sale, it's rolled over. But

8 that's what happens with the first lien debt that was

9 funded, same thing; it's still an obligation.

10 I don't see where Congress makes a distinction in

11 talking about this type of debt. It knew -- it knows how to

12 make the distinction in section 132(a), which kind of makes

13 sense in the -- when you're valuing insolvent for purposes

14 of preferences analysis and fraudulent transfer analysis,

15 but it's just debt that's ahead.

16 MR. O'NEAL: Yeah. I mean, well, I think --

17 THE COURT: It's also -- I'm sorry to interrupt

18 you.

19 MR. O'NEAL: Yes.

20 THE COURT: But it's also debt that Transform is

21 taking credit for, as far as the deal.

22 MR. O'NEAL: Well, Transform's taking credit for a

23 lot of different forms of contingent liability.

24 THE COURT: Right.

25 MR. O'NEAL: That doesn't mean --

1 THE COURT: Paying debt, satisfying debt.

2 MR. O'NEAL: But it doesn't mean that that's

3 funded debt.

4 THE COURT: Well, but funded just seems to beg the

5 question: it's debt.

6 MR. O'NEAL: But as of the, you know, under Rash,

7 you know, like, you know, obviously, 506(a) doesn't go into

8 great detail in terms of how you value the adequate

9 protection or how you value the collateral, but it does

10 instruct us to look at the petition date and at the proposed

11 use and disposition. And at the time of the petition date,

12 the debtors were pursuing a going concern process, and in a

13 going concern process, you know, the LCs would not be drawn,

14 would not be drawn.

15 THE COURT: So really Transform provided no value

16 when it arranged for the replacement of the first lien debt

17 or the replacement of the LC facilities?

18 MR. O'NEAL: Well --

19 THE COURT: That was just a -- it was a nothing?

20 MR. O'NEAL: It's a contingent liability.

21 THE COURT: Okay.

22 MR. O'NEAL: I mean, it's just like --

23 THE COURT: I think we probably --

24 MR. O'NEAL: It's just like some of the other

25 contingent liabilities, right? We agree that we would

1 assume up to a certain amount of 503(b)(9) expenses.
2 THE COURT: Right.
3 MR. O'NEAL: We would assume up to a certain
4 amount of severance expenses, all subject to a dollar-for-
5 dollar reduction in the event that assets weren't delivered.
6 THE COURT: Right.
7 MR. O'NEAL: Those were just contingent
8 obligations; we may never have to do this.
9 THE COURT: But they were clearly debts, though;
10 when they're actually assumed, they're debts.
11 MR. O'NEAL: That's -- this is -- and perhaps
12 that's the distinction between the contingent liability
13 nature of the LCs versus the claims that could exist.
14 THE COURT: Okay.
15 MR. O'NEAL: In terms of I think the next bucket
16 is post-petition interest. Debtors added post-petition
17 interest of approximately $34 million. I think that we're
18 not including that because that was not done on the petition
19 date. There was no post-petition interest due on the
20 petition date. And I think under Rash the key question is,
21 what's the value on the petition date. And I think we have
22 to look at the kind of, you know, assets we had, the
23 collateral that we were dealing with here.
24 THE COURT: Which actually, maybe the debtors were
25 too generous to you on, because they just assumed a

1 reasonable liquidation period?
2 MR. O'NEAL: Yeah, I would --
3 THE COURT: And actually, if you're actually
4 looking at what happened, it's twice as long as that.
5 MR. O'NEAL: Yeah, I would not --
6 THE COURT: So why wouldn't the interest be longer
7 than if you're applying Rash?
8 MR. O'NEAL: Respectfully, I would not call that
9 generous. It was -- post-petition interest was not due on
10 the petition date. And that debt --
11 THE COURT: No, but --
12 MR. O'NEAL: is not a cost of inventory. Right?
13 That supported other things besides just inventory.
14 THE COURT: But this isn't -- we're focusing on
15 the debt that's ahead of your clients that has to get paid.
16 MR. O'NEAL: Right. But on the petition date,
17 post-petition was not due.
18 THE COURT: But let's just stick with Rash, all
19 right? When did the Court determine the value of the car?
20 At the end in the hands of the debtor at the end of the
21 process.
22 MR. O'NEAL: But also it valued it at the
23 beginning and at the end.
24 THE COURT: In the hands of the debtor.
25 MR. O'NEAL: Correct.

1 THE COURT: And it's almost inconceivable to me to
2 believe that one would just shut one's eyes to the debt,
3 which would be owing under 507(b) to the senior creditors
4 when measuring the -- what's left over to pay the junior
5 creditors. And the debtors have chosen a hypothetical date,
6 which is when a liquidation would be done; that's where the
7 34 million comes in. But in actuality, if you're really
8 going to look at what actually happened, it would be -- I
9 don't know -- a month and a half, two months after that.
10 MR. O'NEAL: Yeah. I think one thing to keep in
11 mind is that the inventory was being sold every day. There
12 was a book value every day. There were proceeds being com-
13 -- were derived every day. We're not dealing with a car
14 that was sold at the end of the case. We're dealing with,
15 you know, going -- we're dealing with going concern and GOB
16 sales.
17 THE COURT: Right.
18 MR. O'NEAL: Those were happening every day and we
19 know the value of those.
20 THE COURT: So I guess -- but isn't the 34 million
21 calculated based on what was actually paid down? I don't
22 know. That's a question I have. I don't know if it is.
23 MR. O'NEAL: Yeah. I think the testimony was that
24 it was for an 11-week period.
25 THE COURT: But you're saying that the --

1 MR. O'NEAL: You looked at the value --
2 THE COURT: -- the base number on what interest
3 would be calculated on was reduced during that period
4 because of the application of sale proceeds.
5 MR. O'NEAL: That's correct. But I'm also saying
6 that the collat- -- you know, unlike the deal in Rash, the
7 inventory was sold on a daily basis. We have a value on
8 each day.
9 THE COURT: Right.
10 MR. O'NEAL: And on the petition date, we had a
11 book value.
12 THE COURT: I don't -- so? I don't understand the
13 significance of that. It wasn't all sold on the petition
14 date.
15 MR. O'NEAL: That's correct, but it was --
16 THE COURT: In fact, most of it was sold, in terms
17 of a lump sum, well after the petition date.
18 MR. O'NEAL: Well, I think, you know, at least
19 what is it, a billion, was bought and sold during the
20 bankruptcy?
21 THE COURT: Yeah. But not on the petition date
22 clearly, because then those sales would have been
23 unauthorized.
24 MR. O'NEAL: I think my point is only that we have
25 a market price on the petition date.

1 THE COURT: But it has to take into account
2 reality, which is that this -- again, Rash doesn't involve a
3 senior creditor; it just involves a car lender and a debtor.
4 You have to look at who's senior to you to see how you were
5 really diminished.
6 MR. O'NEAL: Right.
7 THE COURT: The senior creditors are entitled to
8 post-petition interest.
9 MR. O'NEAL: And I --
10 THE COURT: So to ignore that is just ignoring
11 something that shouldn't be ignored.
12 MR. O'NEAL: Again, I think you look to the
13 petition date and that was not due on the petition date, but
14 I --
15 THE COURT: Well, okay. But under Rash, that's
16 not when the sale happened either.
17 MR. O'NEAL: So I think at the hearing, Your Honor
18 had some questions about the carveout account. I don't know
19 if that's still a live issue.
20 THE COURT: No. I just wanted to make sure we
21 were all on the same page on that point.
22 MR. O'NEAL: Okay. And it wasn't entirely clear
23 the debtors' position on that particular point. But it's --
24 we believe that the carveout account doesn't actually reduce
25 our claim or our lien.

1 THE COURT: Right. It just -- it reduces the
2 money available to pay it.
3 MR. O'NEAL: Correct, Your Honor. I just wanted
4 to make sure we're on the same page there. And I think, you
5 know, I think another point, and we make this on slide 26.
6 And I think -- I'm not sure if Your Honor -- I gathered from
7 prior discussions that Your Honor is not going to be dealing
8 with Wilmington cash collateral motion at this stage. That
9 will be -- we will deal with that after Your Honor makes it.
10 THE COURT: Well, you have to see the results of
11 this determination.
12 MR. O'NEAL: That's --
13 THE COURT: But as I recall it, there's an
14 agreement in place that, depending on the outcome of this
15 determination, puts the winddown account at risk for
16 amounts.
17 MR. O'NEAL: That's correct, Your Honor.
18 THE COURT: That went in it after the beginning of
19 April, April 4th, I guess.
20 MR. O'NEAL: Okay. And slide 16 lays out our
21 views on what our replacement liens should be valued at.
22 And we can deal with that once we deal with the winddown
23 account, if that's your preference.
24 THE COURT: Okay.
25 MR. O'NEAL: 506(c) surcharge.

1 THE COURT: Well, before we get to that -- and
2 this is another issue that may or may not be relevant
3 depending on the outcome of the 507(b) calculation -- is the
4 dispute over the 50 million cap --
5 MR. O'NEAL: Yes.
6 THE COURT: -- on the 507(b).
7 MR. O'NEAL: I'm happy to talk about that.
8 THE COURT: Right. We should probably talk about
9 that.
10 MR. O'NEAL: We can do -- we can cover that right
11 now. We actually have a slide on this too; it's slide 37.
12 And there, we put in the language from the APA.
13 THE COURT: I'm sorry, slide what?
14 MR. O'NEAL: It's slide 37, Your Honor.
15 THE COURT: Okay.
16 MR. O'NEAL: I think the debtors' position is that
17 the -- that ESL has access only to 50 million from the
18 proceeds of certain litigation. And we think that's not how
19 the APA reads; it's not the deal that was bargained for.
20 What we've done on slide 16 is we've replicated the
21 language, and I think I'll just walk you through it and you
22 can ask me questions as you so choose.
23 We start with the language that ESL is entitled to
24 assert claims arising under 507(b) of the Bankruptcy Code
25 that it may have, so we have a broad statement that we get

1 to assert all of our claims. And then there are two
2 exceptions or limitations on that right. One limitation is
3 that ESL is not going to get the benefit of any proceeds
4 from specified litigation; that's, you know, Seritage and
5 Lands' End and other, those kinds of causes of action. The
6 second one is that, you know, any claims arising under
7 507(b) of the Bankruptcy Code shall be entitled to
8 distributions of no more than 50 million from the proceeds
9 of claims or causes of action with the debtors' estates,
10 other than the claims or causes of action described in
11 preceding clause C-1.
12 What that does is it says that our ability to
13 obtain recoveries from the proceeds of litigation, that's
14 other litigation, are limited to 50 million. That -- but
15 nothing in that language suggests that the proceeds -- or
16 that ESL's only recourse is to the proceeds of litigation.
17 What it's saying is that, to the extent there are proceeds
18 from litigation, there's going to be a 50 million cap on
19 recovery from those proceeds. And then there's nothing in
20 this agreement --
21 THE COURT: So you read the defined term claims as
22 litigation claims?
23 MR. O'NEAL: Yes.
24 THE COURT: The definition of claims in the APA is
25 much broader than that.

1 MR. O'NEAL: Yes, Your Honor. And I think this --
2 if you read this language, it's talking about from the
3 proceeds of any claims or causes of action where the
4 estates' other than claims or causes of action relating to
5 the preceding sentence. And I don't -- it's not referring
6 to -- it's referring to the proceeds from litigation.
7 THE COURT: It's referring to claims defined term,
8 which means, shall mean all rights to payment, whether or
9 not such right is reduced to judgment, liquidated or
10 unliquidated, fixed, mature or unmatured, disputed or
11 undisputed, et cetera. So that would include accounts
12 receivable, right? I mean, you've made that very point with
13 regard to the right to proceeds of inventory. It's a claim
14 under the UCC.
15 MR. O'NEAL: I think this language is not -- it
16 was not -- it's not broad enough to cover all kinds of
17 rights that the debtors may have and things that are, you
18 know, unrelated to litigation.
19 THE COURT: It uses the term claims, all claims,
20 other than the claims and causes of -- it says, the proceeds
21 of any claims or causes of action, any claims. Claims is
22 very broadly defined.
23 MR. O'NEAL: Right. But to the extent that the
24 debtors have assets, those are not actual claims; to the
25 extent that the debtor has in-hand assets, those -- there's

1 no limitation.

2 THE COURT: Proceeds of any claims. The proceeds

3 of any claims. Accounts receivable; when they come in,

4 they're proceeds. You made that point in your brief about

5 the pharmacy assets. It's the same thing.

6 MR. O'NEAL: Well, I don't think that was --

7 certainly not the -- I don't think that's the way the

8 language reads. And in any event, there's nothing in this

9 provision that limits our replacement liens.

10 THE COURT: No, you're entitled to only 50 million

11 though of the proceeds.

12 MR. O'NEAL: But not with respect to our

13 replacement liens, Your Honor, because this refers only to--

14 THE COURT: But we're talking about a 507(b).

15 MR. O'NEAL: That's correct.

16 THE COURT: Yes.

17 MR. O'NEAL: So to the extent we have replacement

18 liens on the assets, then we -- our replacement liens are

19 not covered by the cap.

20 THE COURT: Okay. We'll ask the debtor about

21 that. Okay. What assets would those be?

22 MR. O'NEAL: What's that?

23 THE COURT: I thought we were just talking about

24 507 at this point.

25 MR. O'NEAL: As part of the --

1 THE COURT: That's the whole point of why you are
2 all focused on 507.
3 MR. O'NEAL: Well, our pleadings in this whole
4 case is also about our replacement liens.
5 THE COURT: On what?
6 MR. O'NEAL: On the assets that the debtors
7 currently have.
8 THE COURT: But what are those?
9 MR. O'NEAL: We've laid them out: there's assets
10 in the winddown account; there's assets in the operating
11 account; there's assets that are to be -- to come later.
12 THE COURT: Well, the winddown account wouldn't be
13 covered, except under the stipulation --
14 MR. O'NEAL: Correct.
15 THE COURT: -- with respect to 507(b), so I don't
16 -- anyway. I'm just focusing on the 507(b) limitations.
17 MR. O'NEAL: Right. But we do have -- but the
18 507(b) cap by its terms doesn't apply to our replacement
19 liens.
20 THE COURT: I agree with that. I'm just not sure
21 what replacement lien collateral there is.
22 MR. O'NEAL: As part of the DIP order.
23 THE COURT: No, no, I understand the DIP order
24 gives you replacement lien. I just thought the parties
25 whole focus now on 507(b) is because there isn't any other

1 collateral.

2 MR. O'NEAL: We have -- I mean, our papers are

3 very much about exercising our rights for the -- on account

4 of our replacement liens as well.

5 THE COURT: Okay.

6 MR. O'NEAL: I don't know how much time Your Honor

7 wants to spend on the 506(c) surcharge. You know, I think--

8 THE COURT: Well, I'll tell you what. The debtors

9 have the burden of proof on this.

10 MR. O'NEAL: Yes.

11 THE COURT: So I think you should feel free to,

12 particularly given your open remarks, to stand up after

13 they've given their --

14 MR. O'NEAL: Okay. I'll do that, Your Honor.

15 THE COURT: -- say on it.

16 MR. O'NEAL: We have a lot to say on it.

17 THE COURT: Okay.

18 MR. O'NEAL: Thank you, Your Honor. I will now

19 yield to Mr. Kreller.

20 THE COURT: Okay.

21 MR. KRELLER: Good morning, Your Honor. Thomas

22 Kreller of Milbank, Tweed, Hadley & McCloy, on behalf of

23 Cyrus Capital Partners.

24 THE COURT: Right.

25 MR. KRELLER: With me on the phone, Your Honor, my

1 partners, Eric Reimer and Rob Liubicic. Your Honor, I'll
2 try to avoid redundancy with Mr. O'Neal's presentation to
3 the extent I can.
4 I'm actually going to start with something that we
5 noted in our reply brief, but I thought it was worth
6 reiterating here. Because I suspect one of the things you
7 may hear from the debtors, or at least will be suggested, is
8 that this issue needs to be resolved and it needs to be
9 resolved for zero claims in favor of the second lien lenders
10 because, otherwise, the debtors have a real problem
11 confirming their plan.
12 Your Honor, frankly, that should not be a
13 consideration in this hearing. We have indicated --
14 THE COURT: I agree with that. And I could tell
15 you further that my analysis of these issues, the
16 507(b)/506(c) issues, in large part because of the way they
17 break out their component parts, is not one where I actually
18 know the end number. I'm viewing them in the components.
19 And I may well in my ruling just give you my rulings on the
20 components and have the parties do the math because that's
21 how I've proposed it.
22 MR. KRELLER: Understood, Your Honor. And,
23 frankly, I don't know that there's another way to think
24 about it because of all of the moving parts --
25 THE COURT: Right.

1 MR. KRELLER: -- and the interplay.
2 THE COURT: Okay.
3 MR. KRELLER: Your Honor, the other point -- I
4 guess, following on that, Your Honor. We noted in our
5 reply, we're realists on this. We're well aware of the
6 circumstances that the debtors find themselves in.
7 To the extent there are material 507(b) claims
8 found here, we've indicated to the debtors all along the way
9 and we've indicated to the Court, we understand that a large
10 507(b) claim that simply craters the plan could potentially
11 be some sort of a Pyrrhic victory. And that the notion that
12 in that world, we might be better off looking to future
13 recoveries under the waterfall plan for our source of
14 recovery is something that's not lost on us.
15 And we've had discussions with the debtors on
16 this, we've had discussions with other second lien holders,
17 and we think folks are like-minded. So any attempt to kind
18 of leverage this as a function of a need to confirm a plan
19 doesn't really exist, Your Honor.
20 THE COURT: Okay.
21 MR. KRELLER: The other thing that I would note,
22 Your Honor, just at the outset just in terms of the overall
23 context. There's a lot of noise in the debtors' papers and,
24 to some degree, in the UCC's papers about somehow the notion
25 that the second lien lenders are now taking the position

1 that they would have fared better on their second lien
2 collateral in a company-wide going out of business sale, as
3 opposed to the going concern sale that happened, is somehow
4 a contradiction or a flip-flop on the part of the second
5 lien lenders.
6 Your Honor, I think that's a fallacy and it's
7 noise that ought to be disregarded. The truth of the matter
8 is there can be two things that appear to be inconsistent
9 here; and yet, they're both true. One is that the company
10 decided to pursue a going concern sale. It did so
11 successfully. It stood here in February and made a very
12 strong showing to you as to why that was in the best
13 interest of the estate.
14 But that doesn't mean that that going concern sale
15 was actually the best outcome that the second lien lenders,
16 as second lien lenders, could have realized on their
17 collateral had this case gone a different direction at the
18 outset. So I don't think -- I think those two different
19 scenarios can co-exist and both be true.
20 THE COURT: I think that's a fair statement. But
21 it does raise an interesting issue, which I think your
22 expert properly deals with, which is -- if I'm hearing the
23 statement correctly, the going concern sale actually has a
24 lower value for the collateral than a net orderly
25 liquidation.

1 And consistent with Rash and Sunnyslide -- or
2 Sunnyslope, that argues perhaps with a lower value being the
3 value that's the starting point. Now, she gets around that,
4 and perhaps properly so, by not just looking at book value
5 and saying that's what it is, but actually doing a net
6 orderly liquidation analysis.
7 MR. KRELLER: Well, Your Honor, I think what that
8 really highlights is I think that it's important from the
9 507(b) context and the cases and actually some commentary
10 from you earlier in these cases, that the petition date --
11 the petition date calculation really should serve as an
12 anchor, and it doesn't in a lot of the analysis and the
13 discussions that we see, particularly from Mr. Griffith.
14 But if you're going to determine, which I think
15 you have to, right, if you're looking to calculate the
16 decrease in value of the second lien collateral that was
17 available to the second lien collaterals at the outset of
18 the case to the present, I think you have to do a true
19 calculation as of the petition date.
20 THE COURT: Well, that's fair. But if that the
21 premise is that these assets are actually worth less, as a
22 result of a going concern sale, which was the equivalent to
23 Mr. Rash having his truck, then it's been argued to me at
24 least that I should use that valuation at the start also, as
25 opposed to a net orderly liquidation value. And, at least

1 in the Ninth Circuit, that's the law, even if that outcome
2 is not the optimal outcome, Sunnyslope Housing.
3 And it's not necessarily -- I don't think Rash
4 requires that. There's a very interesting opinion by Judge
5 Carey that came out in March that talks about doing a
6 valuation in a context where you have a going concern sale,
7 as opposed to a going concern reorganization, and giving the
8 Court some flexibility in deciding what's the appropriate
9 value, In Re. Arrow Group International, 2019 B.R. Lexus 904
10 (Bank. Delaware, March 26, 2019).
11 So in any event, but it strikes me that it's odd
12 to say you're bound by Rash; therefore, you're bound by the
13 actual course of the case, which is the sale process and
14 sale. But nevertheless, that outcome isn't a reasonable one
15 in connection with the initial valuation or one required by
16 Rash as part of the initial valuation.
17 Now, I appreciate you -- your client didn't do
18 this. Your client didn't do that; its expert did a net
19 orderly liquidation value analysis, and some aspect of that
20 may be appropriate here. But just to say we're doing a
21 going concern sale, we got hammered in it. Nothing about
22 the sale is complained about, right? It's not like the
23 debtors did it badly. And yet, say, well, on a going
24 concern basis, our starting valuation was three times the
25 actual value that resulted from the going concern sale.

1 Those two things just don't seem to fit.
2 Now, as far as adequate protection is concerned, I
3 can certainly see a right to adequate protection based on
4 the actual value on the petition date and that value
5 declined. But there, the actual value might well be, you
6 know, the actual value in a net orderly liquidation because,
7 you know, that's the only way it really declined.
8 MR. KRELLER: Well, Your Honor, I'm not -- again,
9 I think that if you stay true to the context of adequate
10 protection, what happened during the case is exactly what we
11 got adequate protection for.
12 THE COURT: Well, except if -- I think that's
13 right. I think that's how you should look at adequate
14 protection. But if people say that Rash means you have to
15 follow the actual result of the debtors' use, it's hard to
16 say that the actual result of the debtors' use here really
17 changed the value based on the actual result of the debtors'
18 use on the petition date, because it's not like the debtors
19 gave anyone any false information.
20 No one went into this believing that they were
21 going to realize on, you know, a hundred percent of the
22 inventory. No one could conceivably have thought of that on
23 the petition date. So if you apply Rash that way, it just
24 doesn't work, in other words. You've got to have something
25 more realistic as far as the reasonable expectations of the

1 lenders, which would be the comparison to the outcome here.
2 MR. KRELLER: Understood, Your Honor. What, I
3 guess, I think it's actually less tricky in this situation
4 because, although we keep using terminology like going
5 concern sale, what we're talking about here is inventory and
6 receivables.
7 THE COURT: Exactly. I agree with that.
8 MR. KRELLER: It's a --
9 THE COURT: People look, they don't look at the
10 going concern value of the whole thing. You look at
11 inventory and receivables in a specific context, which
12 asset-based lenders have been dealing with for decades.
13 MR. KRELLER: So, Your Honor, with that -- so I
14 think there's --
15 THE COURT: Which I think is -- I'm sorry to
16 interrupt you.
17 MR. KRELLER: That's fine.
18 THE COURT: Which I think is what your expert
19 does.
20 MR. KRELLER: I think she does too, Your Honor.
21 And I think it also goes back to your earlier remarks, which
22 is it's why I think that this -- you have to view this as
23 the components --
24 THE COURT: Right.
25 MR. KRELLER: -- breakout, because it's a much

1 more discreet exercise than it appears to be because there's
2 so much else going on in this case. And as we wrote in our
3 brief, this isn't about what happened around the inventory
4 and receivables.
5 THE COURT: Okay.
6 MR. KRELLER: And in fact, I think that we've
7 demonstrated, and I think Ms. Murray has demonstrated, and I
8 think the other second lien experts have some things that
9 are additive to that that demonstrate a pretty significant
10 diminution in value from when you start in the truest sense
11 of what did -- what collateral coverage did the second lien
12 lenders have as of the petition date. Because that's what
13 we bargained for adequate protection of. And to the extent
14 that decreased, that's what the 507(b) claim is.
15 THE COURT: Okay. But to me that is somewhat
16 inconsistent with Rash. That's all I'm saying. Not
17 inconsistent with Rash, it's inconsistent with people's
18 interpretation of Rash, like the Ninth Circuit
19 interpretation.
20 MR. KRELLER: Understood, Your Honor. I take your
21 point.
22 THE COURT: Okay.
23 MR. KRELLER: And I take your point, but I also
24 think that RASH is a little bit off to the side where you
25 have --

1 THE COURT: I agree with that. I interrupted you.
2 Why don't you go ahead with your argument.
3 MR. KRELLER: I will, Your Honor. So look, it
4 gets even easier because we don't really have an end date.
5 Typically when you're measuring the decrease in value, you
6 would have it start at the petition date, and you would look
7 at what happened over the collateral over time until some
8 other date, typically a plan effective date when the
9 adequate protection stopped. Here we don't -- we're
10 assuming that all of the collateral has been consumed either
11 through the sale or otherwise by the Debtors.
12 THE COURT: Right. Right.
13 MR. KRELLER: And so the end date is just zero
14 unless and until the Debtors show up with some additional
15 collateral. That would -- and that collateral our lien is
16 attached to, that would reduce the 507(b) claim. But for
17 purposes of today, right now that's a zero. So where you
18 really go is what's the petition date valuation that tells
19 you what's available to the second lien lenders.
20 Your Honor, the exercise really begins, and
21 frankly it almost ends at the petition date and what the
22 circumstances were at the petition date. What's the
23 collateral, what was it worth at the time, and what in the
24 way of senior obligations at that time, at that snapshot,
25 what were the senior obligations that actually sat in the

1 way of the second lien lenders getting to their collateral.
2 And as long as you hang in there with the petition date
3 being an anchor, and I think it has to be, that exercise
4 actually becomes pretty straightforward.
5 The second lien lender experts all take somewhat
6 different approaches to getting to a petition date
7 valuation, but they all at least follow a general road map
8 of you figure out what the collateral is, you value the
9 collateral, you figure out what the senior debt obligations
10 as of the petition date were sitting in front of the second
11 liens, you subtract that, and you arrive at the second lien
12 lenders' interest in the second lien collateral.
13 The Debtors pay lip service to that roadmap. They
14 repeat a lot that what they did was come up with a fair
15 market value of the collateral at the petition date. But
16 when you look at what they've done and you listen to Mr.
17 Griffith, you realize they very quickly veer off this path
18 and they start running in several different directions, most
19 notably running as far and as fast away from the petition
20 date as they can. They don't say they're doing that, they
21 don't try to justify it, they don't point to any law to back
22 it up, they just do it. And the reason they do it becomes
23 clear. They've adopted their 85 percent argument, and
24 they're clinging to it.
25 And, Your Honor, they then, hand-in-hand with

1 that, stick to the flawed theory that because they chose to
2 pursue a going concern sale, all of the costs associated,
3 virtually all of the costs associated with that process
4 should be surcharged against the second lien collateral
5 notwithstanding the fact that the second lien collateral was
6 just a subset, and frankly a somewhat small subset, of the
7 value of the overall transaction.
8 So the idea that the 85 percent number -- and I'll
9 talk about this in a minute. But the idea that the 85
10 percent number, because they can impute it in a tortured way
11 from the APA, is somehow a relevant metric, and the notion
12 that the only way to sell the 2L collateral was through the
13 going concern process. Neither of those hold water. And
14 it's what their position on this is basically founded in,
15 and it's flawed, and it fails.
16 A couple of other examples of the Debtors ignoring
17 the petition date. Mr. O'Neal talked about post-petition
18 interest. Again, Your Honor, I think that the beginning
19 part of this exercise is what exists as of the petition
20 date.
21 THE COURT: But you're talking about value. So
22 when you value the inventory and receivables, you do a
23 projection from the petition date, and then that's the
24 value. You project forward -- Tiger projects forward a
25 little under three months. Your expert largely does that,

1 too. But you can't get to value without projecting forward.
2 And similarly you can't, I think, get to the debt without
3 looking forward. I don't see how you could otherwise decide
4 what the debt is. I mean, it's -- if you're going to be
5 using a measure to determine the value of the assets that
6 looks forward 12 weeks, then I don't see how you can't also
7 -- why you can't -- why you must not also look forward on
8 the debt 12 weeks to the extent that it's payable. And that
9 includes the accruing interest.
10 MR. KRELLER: I have two responses to that, Your
11 Honor. One, the inventory exists as of the petition date.
12 THE COURT: But you value --
13 MR. KRELLER: The inventory is there.
14 THE COURT: But you value it looking forward.
15 MR. KRELLER: But it has -- that value is inherent
16 in that inventory. It's there. It exists. The interest
17 doesn't.
18 THE COURT: But it's --
19 MR. KRELLER: If -- I --
20 THE COURT: The only way to realize is over time.
21 And to me that's just --
22 MR. KRELLER: I take your point, Your Honor, but
23 that's not a valuation issue; then that becomes a surcharge
24 issue. That's a cost of selling the inventory.
25 THE COURT: But the cost is -- all right. To me

1 that's half a dozen of one, six of the other. I mean, it's
2 the same thing either way. And frankly there are costs in
3 the calculations. I mean, that's one of your best arguments
4 on 506(c) is there are already costs in the inventory
5 valuation.
6 MR. KRELLER: Right. That's right, Your Honor.
7 And I -- but I think that the difference is -- and you may
8 be right. If you agree that the $34 million is the right --
9 is a number that is a surchargeable amount, then yes, it
10 comes out on one side of the ledger or the other. But the
11 one piece that is relevant there is that the burden is very
12 different. The burden for them, including in a 507(b)
13 calculation where we have the burden versus their having to
14 satisfy their surcharge burden is different. This is a
15 component --
16 THE COURT: Well --
17 MR. KRELLER: This is a component, Your Honor --
18 THE COURT: I mean, you've got to -- I'm assuming
19 the four-wall aspect of the GOB sale includes paying the
20 rent. You know, in any event, it doesn't seem like this is
21 a particularly heavy burden for the Debtors to carry. But
22 to me it's really more calculating the senior debt than the
23 506(c).
24 MR. KRELLER: All right, Your Honor. The second
25 point on ignoring the petition date goes back to the LCs.

1 And here's what we know about the LCs. We know that nothing
2 was drawn as of the petition date and we know that over the
3 life of the case only $9 million were drawn. We know that
4 as the company went through what was essentially a
5 controlled liquidation in the years leading up to the
6 bankruptcy, they conducted something like 980 going out of
7 business sales. The LCs weren't drawn. This wasn't a run
8 on the bank, this wasn't going to be a run on the bank. Mr.
9 Griffith's speculation about what would happen in a fire
10 sale liquidation is a red herring. That was never a threat
11 to the company. That was never an option. This was always
12 going to go one of two ways; it was going to be a going
13 concern sale or it was going to company-wide GOB sales
14 carefully managed by professionals who do this.
15 THE COURT: Was the first lien debt accelerated
16 pre-bankruptcy?
17 MR. KRELLER: It -- I don't -- well, the revolver,
18 the ABL facility was being paid down on a daily basis.
19 THE COURT: So it wasn't accelerated. It wasn't
20 cancelled.
21 MR. KRELLER: It wasn't accelerated, no.
22 THE COURT: Right. So it was just the bankruptcy
23 that for purposes of filing a proof of claim accelerated it
24 all.
25 MR. KRELLER: I believe that's correct, Your

1 Honor. But you wouldn't -- for example, if there were
2 unfunded, undrawn amounts under a revolver, that's not
3 senior debt, that's not funded debt. That's not money that
4 the company owes anyone. And the LCs are the same thing.
5 The LCs are just a guarantee, and they're largely a
6 guarantee of performance on ordinary course obligations.
7 It's why Mr. Reicker doesn't include it in his first day
8 declaration and it's why the Debtors didn't include those
9 amounts in their publicly-filed financial statements except
10 as a footnoted item that says this is a -- these LCs exist
11 as contingent obligations. It's how contingent obligations
12 are accounted for, because they're contingent. And as of
13 the petition date they sat contingent. And nothing happened
14 during the course of the case, notwithstanding the very
15 public nature of the potential pivot to a liquidation.
16 Nothing changed the fact that those LCs sat there and
17 remained almost entirely undrawn.
18 So for the petition date snapshot as to what
19 collateral the 2Ls would have had access to on the petition
20 date if the music stopped -- and I don't mean that in terms
21 of there being a one-day liquidation, I just mean as a true,
22 intellectually honest calculation at the petition date, if
23 the music stopped, there were no obligations under those LCs
24 that would have sat ahead of the second liens' ability to
25 take its portion of the collateral after the senior debt was

1 paid in full, the amount that was owed under the senior debt
2 that was paid in full.
3 THE COURT: But if the music stopped, they would
4 either be drawn on or remain outstanding. They'd still be
5 ahead of the 2Ls. I mean, they'd be drawn on before they
6 expired, put it that way.
7 MR. KRELLER: Ahead in the amount of zero though,
8 Your Honor.
9 THE COURT: No, but if the music stopped, they
10 might not be drawn on until close to their expiry date, but
11 they would certainly be drawn on then. There's nothing else
12 to back them up.
13 MR. KRELLER: I don't know that that's -- there is
14 -- they were cash collateralized by ESL and Cyrus cash to -
15 - about 271 million of them were.
16 THE COURT: But --
17 MR. KRELLER: So the scenario of just all of the
18 sudden people hitting those LCs -- and they could --
19 THE COURT: But if you're a worker's comp board
20 and you know that that LC is going to expire on, you know,
21 whatever, August 20th or August -- you know, whenever the
22 expiry date is, and you know there's no more Sears, you're
23 going to draw on it.
24 MR. KRELLER: You're going to draw on it if it's
25 not extended. And guess who, Your Honor, stood behind those

1 LCs?

2 THE COURT: Right.

3 MR. KRELLER: It was ESL and Cyrus who would have

4 extended in all likelihood in that scenario. And this kind

5 of illustrates the problem that we have when we start

6 drifting away from the petition date and thinking about what

7 -- all the different scenarios that could happen. We know

8 what we know. They weren't drawn as of the petition date,

9 and only 9 million got drawn during the case. So to treat

10 them as obligations that stood between the second lien

11 lenders and their inventory and receivables collateral

12 ignores what we do know.

13 And Mr. Griffith can come up with a hypothetical

14 that they would all get drawn in a fire sale situation. And

15 he can't point to a case or minutes of experience that he

16 has in that realm.

17 THE COURT: Well, it clearly happens. I mean, I

18 can take judicial notice from that. It happened in the A&P

19 case. I'm handling that litigation right now, where they're

20 trying to get back some money.

21 MR. KRELLER: Well, Your Honor, and if they're

22 drawn and they're cash collateralized, that is what happens.

23 There's then a fight. And if the draws turn out to be

24 unnecessary or inappropriate, the money comes back to the

25 estate or that party who put up the cash collateral. So

1 it's not as if it goes away. That's kind of --
2 THE COURT: But no one has valued whether the --
3 no one has put a value on whether the LCs are in excess of
4 the liabilities that they -- for the beneficiary.
5 MR. KRELLER: That's true, Your Honor. I think
6 Ms. Murray actually comes closest to doing that when she --
7 and I do think that the $9 million of draws over the course
8 of the five month case, six month case, whatever it was by
9 the time the sale closed --
10 THE COURT: But almost 90 percent are for worker's
11 comp. Those people just draw off the whole thing and then
12 work it out over, you know, many, many years.
13 MR. KRELLER: Right, right. But they didn't.
14 They haven't.
15 THE COURT: They don't need to. But if the -- to
16 me that still doesn't mean that it's not an obligation,
17 because they have the right to do it. And in a net orderly
18 liquidation, you'd think they would. I mean, that's what
19 they would do.
20 MR. KRELLER: I don't think they typically do,
21 Your Honor. I think what -- only if they're expiring.
22 THE COURT: Well, yeah, but these aren't -- what
23 are the -- these are not 20-year LCs, right? They're -- you
24 roll them over every year, don't you?
25 MR. KRELLER: I don't know specifically what the

1 terms of these were.

2 THE COURT: Well --

3 MR. KRELLER: But they don't simply get drawn

4 because someone -- we know this, Your Honor. We know this

5 from -- this company has been liquidating for five years and

6 the LCs weren't being drawn.

7 THE COURT: That's a different scenario. I'm

8 talking about a scenario where you have a net orderly

9 liquidation of the collateral, which means you're selling

10 all of Sears in a liquidation. To me -- I mean, do we have

11 the LCs? Are they in the record? Are any of them in the

12 record? It would seem to me that it's likely that they're

13 not 20-year LCs, that they wouldn't just be sitting out

14 there, that they're probably one-year LCs with the rollover

15 feature. And it's also likely that they'd get drawn on if

16 there's a sale of the whole business. You know, in

17 liquidation.

18 MR. KRELLER: But, Your Honor, at the petition

19 date -- first of all, I'm not disputing at all that there

20 are obligations of the company that could turn into senior

21 debt ahead of the second liens.

22 THE COURT: Okay.

23 There are obligations, no question about it.

24 They're contingent. They're contingent, and those

25 contingencies were not triggered. They weren't triggered at

1 the beginning of the case. They were barely triggered
2 during the case, and those LCs are now gone because they got
3 replaced in the Transform sale.
4 THE COURT: Well --
5 MR. KRELLER: And frankly the notion that somehow
6 that amount, the rollover of the LCs gets built into the
7 aggregate purchase price, that's an argument that has no
8 place with respect to second lien lenders other than ESL.
9 And I don't even think it applies to ESL. The company's
10 calculation of the aggregate purchase price may include
11 that. I don't know that means that ESL is taking credit for
12 it. I think the company stood here and sold that to you
13 when they got approval of their sale.
14 THE COURT: Well, it takes care of an obligation.
15 I mean, look, there's a continuum here. You can value the
16 LCs at face if valuation is something that you're allowed to
17 do. But if you're doing a valuation, I don't know why you
18 wouldn't value the bank debt, too. I mean -- and again,
19 Congress seems to put a valuation of debt only in one place
20 in the bankruptcy code.
21 MR. KRELLER: Your honor --
22 THE COURT: If you don't value them, it's either
23 face or no value at all, nothing at all. Which is odd since
24 it's treated as a pre-petition obligation under the DIP
25 agreement.

1 MR. KRELLER: But it's also ignored by Mr. Reicker
2 when he talks about how much adequate protection is there
3 for people.
4 THE COURT: Well, but that's valuation as opposed
5 to just what's -- whether it's debt or not.
6 MR. KRELLER: Well, Your Honor, I think what you
7 do have from Ms. Murray's testimony, that they are ordinary
8 course LCs that sit there. They weren't withdrawn, they
9 didn't really get drawn, and they're not a material
10 obligation of the company. I think that's the testimony you
11 have. I don't think you have anything to rebut that from
12 the company side except Mr. Griffith's testimony which is
13 without any foundation.
14 THE COURT: Well, but it's not -- that's not
15 really valuation testimony. That just says what happened
16 here. And the bank debt -- I mean the first lien debt
17 didn't really get drawn, either. It rolled over.
18 MR. KRELLER: Well, Your Honor, I think the first
19 lien debt is different, right? It essentially got -- we
20 talked about it getting rolled over. It essentially was
21 refinanced.
22 THE COURT: Right.
23 MR. KRELLER: It essentially got paid off --
24 THE COURT: Right.
25 MR. KRELLER: -- with new financing.

1 THE COURT: Right.
2 MR. KRELLER: So it was in fact satisfied in
3 whatever amount was outstanding at that time.
4 THE COURT: So I think --
5 MR. KRELLER: It didn't get overpaid as a fixed
6 amount.
7 THE COURT: -- the legal issue is whether a
8 contingent debt should be countered or not. That's really
9 the issue.
10 MR. KRELLER: I think that's right, Your Honor. I
11 think that --
12 THE COURT: Because knowing that -- I'm sorry to
13 interrupt you. No one's put a value on it one way or the
14 other. There's no value on this debt. It's either all or
15 nothing as far as the testimony is concerned.
16 MR. KRELLER: You know, I think that yes and yes.
17 But I also would say that there is evidence around -- I do
18 think that there is weight to the fact that as of the
19 petition date, it wasn't debt; it was a contingent
20 obligation in the amount of zero. And over the life of the
21 case it only came up to about $9 million and then it all
22 went away in the sale.
23 THE COURT: All right. Again, that goes to the
24 Rash point where it's hard to -- if you're going to go with
25 Rash in one respect, you should go with Rash in all

1 respects. And you're not arguing that to me, and I don't
2 think that makes sense in the first place. And when I say
3 Rash, I mean the idea that the programmed outcome of the
4 case as projected on the petition date should govern
5 valuation. And unless -- you know, for diminution purposes,
6 that program somehow went awry. And I don't think it went
7 awry here. No one's contended that the Debtor screwed up in
8 the sale process.
9 MR. KRELLER: No, Your Honor. I think the issue
10 is that you're talking about a different -- in retail
11 inventory and receivables you're talking about a different
12 kind of an animal. This isn't a durable good, it's not
13 property, plant, and equipment.
14 THE COURT: No, I understand that. You're looking
15 at net orderly liquidation value.
16 MR. KRELLER: And those assets turn over --
17 THE COURT: But if you look at net orderly
18 liquidation value, you're assuming an orderly liquidation of
19 the whole business, which to me means there's reality to
20 those letters of credit. Because the reason for those
21 letters of credit being there is now really important, which
22 you need to protect the beneficiaries of them, because
23 there's nothing else to protect them with.
24 MR. KRELLER: Understood, Your Honor. And at the
25 risk of over-belaboring this, the -- I'll go back to this

1 company was effectively in orderly liquidation for five
2 years.
3 THE COURT: Well, there's still a lot left over
4 though.
5 MR. KRELLER: If people were --
6 THE COURT: I mean, I think they were probably
7 paying -- for example, I think they were probably -- the
8 worker's comp claims were probably being paid in the
9 ordinary course because they had the assets to do it.
10 MR. KRELLER: Right.
11 THE COURT: There's probably a budget line
12 somewhere on the company's books and records for payment of
13 worker's comp. And once there's no company, that doesn't
14 happen anymore. So then the worker's comp board says uh-oh,
15 we'd better draw those LCs.
16 MR. KRELLER: Once there's no company, then --
17 THE COURT: But that's the net orderly
18 liquidation.
19 MR. KRELLER: It's -- Your Honor, I think there's
20 a little bit of a mischaracterization of Ms. Murray's report
21 and how she approached this, and I think it's likely
22 something you'll hear from the debtors and say she used the
23 liquidation value, this wasn't a liquidation -- this case
24 didn't end up liquidating, therefore throw her out. Your
25 Honor --

1 THE COURT: I'm not going to accept that argument.
2 MR. KRELLER: I think though it's an important
3 distinction to realize Ms. Murray did not assume -- she
4 didn't assume that this was going to be a net orderly
5 liquidation value case across the board. What she said was
6 I am an expert in valuation, I have valuation principles,
7 and my valuation principles tell me that when I'm measuring
8 something as of a date like the petition date, I have to
9 apply what is known or knowable at that point in time. And
10 she looked at these assets and said here's retail inventory
11 and receivables and proceeds; what was known or knowable at
12 the time? There was not a going concern bid then in play.
13 There were plenty of statements from the debtors about how
14 they were ready at any given moment to pivot to company-wide
15 GOB sales. There was a UCC advocating very vigorously to
16 you often through the case that in fact that's the way the
17 case should go.
18 And so what Ms. Murray did was she said my proxy
19 for valuating this inventory is the one outcome that is kind
20 of the backstop here. It's kind of the contingency plan.
21 And if a going concern transaction doesn't materialize, this
22 is where it ends up. It's why she calls it a minimum case,
23 it's why we refer to it as setting a floor. And it was
24 basically her saying this is -- when I think about what
25 these specific asset were worth as of the petition date,

1 this is the most reliable thing that I can say about the
2 value. There's reasons that it could be higher. There's
3 ineligible inventory that's not in the borrowing base that
4 Tiger doesn't put in there. There are things that can be
5 added on, and there's reasons why it can increase because
6 the 88.7 percent used by Tiger as an NOLV is actually a much
7 -- a lower number than you see from a number of different
8 constituents in the case, including the debtors, including
9 the UCC, including Mr. Griffith's firm, including Abacus,
10 who -- you know, who has spent years liquidating these
11 stores.
12 So I think what she was doing was saying this is
13 the floor as of the petition date. It could be subject and
14 maybe should be subject to material upward adjustments like
15 the ones that Mr. Schulte and Mr. Henrich ultimately did.
16 Or even just like the people in the case, the constituents
17 in the case, and looked at this and said -- and stuck NOLV
18 percentages in the nineties on this.
19 So I don't think it's really fair to say that what
20 she did was this -- she assumed all the stores were going
21 out of business and the company was shutting down. I think
22 she said you asked me to value the inventory and the
23 receivables as of the petition date based on what was known
24 or could have been known at that time, and that's what I
25 did.

1 THE COURT: Okay.
2 MR. KRELLER: Your Honor, in contrast from the
3 debtor's side, we have Mr. Griffith. And while the Debtors
4 call this fair market value of the collateral as of the
5 petition date, Mr. Griffith didn't value the collateral. He
6 couldn't value the collateral; he's not an expert. He
7 didn't try to value the collateral, and he didn't want to
8 value the collateral. He wanted to put his arms around 85
9 percent and hang on for dear life. And in doing that, he
10 ignored the market. He ignored the market information that
11 he had, and he had a lot of it. And I shouldn't personalize
12 this; they had a lot of it, the debtors had a lot of this.
13 The market was not -- and certainly not as of the petition
14 date, the market was not, and the ESL transaction that
15 ultimately got negotiated in late January in finality and
16 closed in February. This -- the market for the -- again,
17 the second lien collateral, the inventory and the
18 receivables. Not the going -- not all the other stuff, the
19 second lien collateral. The market was maybe there's a
20 going concern sale in which the inventory will be embedded
21 and sold. But we've got all sorts of information about the
22 relevant market. We know that liquidators put bids in. We
23 knew that Tiger was looking at this. We know that Abacus
24 had a view on this. We know that the debtors had a view on
25 a winddown analysis, and we know that the UCC was looking at

1 it.
2 So the information that was in the market told you
3 that at a minimum, Tiger at 88.7 was saying this is what
4 this would yield. You had Mr. Meghji at M-III say -- using
5 a 90 percent NOLV. You had the UCC giving a presentation
6 that used a 90 percent NOLV. You had abacus saying --
7 giving a range of 90 to 93 percent. And in the course of
8 marketing the assets and soliciting liquidator bids, you had
9 four -- you had six different liquidating firms who formed
10 four bidding entities. And their bids were 89.4 to 91.7
11 percent. Mr. Griffith didn't look at those. The debtors
12 didn't think about that in this context. I don't know how
13 they can hang the words fair market value on something when
14 they affirmatively ignored the market.
15 And I think the other point, Your Honor, on this
16 that's important to keep in mind as it a bit -- has been a
17 bit lost in the shuffle, when you try to apply the APA and
18 impute a valuation to the inventory based upon the APA,
19 you're actually looking at an entirely different set of
20 assets than that that existed as of the petition date. As
21 of the October 15th petition date, the company is sitting
22 there with almost $3 billion, $2.6, $2.7 billion book value
23 of retail inventory sitting, ready to go on the brink of the
24 holiday selling season.
25 When ESL is negotiating with the company over its

1 going concern sale, you're sitting in January. The holiday
2 season is over. The inventory has been sold down by a
3 billion dollars. You've gone from 2.6 or 2.7 to the 1.5 or
4 1.6 that that included in the ESL bid. The notion that the
5 imputed price that they try to pull out of the APA is
6 somehow a metric of what $3 billion of inventory sitting at
7 the beginning of October was worth based upon a billion
8 dollars less in January after the biggest selling season in
9 the retail year, that just doesn't fly, Your Honor. That 85
10 percent metric doesn't make any sense, completely separate
11 and apart from the fact that the APA doesn't say that.
12 So I think it's -- I think that the metric is
13 wrong, the timing is wrong. That analysis and focusing and
14 putting all their eggs in the one basket of we know what
15 happened in the sale to ESL is completely misplaced and it
16 has nothing to do with a valuation determination as of the
17 petition date of the second lien collateral in the hands of
18 the company and available to the second lien lenders.
19 So, Your Honor, ultimately on the debtor's notion
20 of fair market value as of the petition date, which is the
21 necessary starting point for this exercise, they didn't do a
22 valuation, they couldn't do a valuation. They ignored the
23 market, they ignored the petition date.
24 THE COURT: Well, the market here that you're
25 referring to are various expressions of interest by

1 liquidators, right?

2 MR. KRELLER: Some of those were, a subset of that

3 was. The rest of it was views from the UCC and the debtors

4 themselves.

5 THE COURT: Okay. But that's not really a market,

6 that's just their --

7 MR. KRELLER: Well, presumably, Your Honor, their

8 views were informed -- and the other piece of this where

9 that information comes from is the company's historical

10 experience in running GOB sales. They ran 980 before the

11 case and they ran 260 during the case. They know how to do

12 this, and they probably have it screwed down pretty tight

13 about how much they make.

14 THE COURT: But the -- those proposals and those

15 sales didn't take into account all the costs, right?

16 MR. KRELLER: Your Honor, we believe the Tiger --

17 THE COURT: Tiger.

18 MR. KRELLER: -- The Tiger valuation did.

19 THE COURT: Except -- well --

20 MR. KRELLER: And I can't speak to the others.

21 THE COURT: But Tiger didn't take into account

22 legal, it took into account corporate overhead.

23 MR. KRELLER: Your Honor, there are --

24 THE COURT: Right?

25 MR. KRELLER: -- some things in the Tiger -- there

1 are some categories in the -- I don't know the direct answer
2 to that question, but there are categories in the Tiger
3 appraisal for things like closing costs and financing costs
4 and other costs.
5 THE COURT: It's not really laid out. You don't
6 really know what they take into account as far as their --
7 MR. KRELLER: I agree with that, Your Honor. I
8 think that's fair.
9 THE COURT: So that's an element of the --
10 MR. KRELLER: I think that's fair, Your Honor.
11 But I also think that it's a little hard to think that the
12 debtors, when they were making recommendations to their
13 board when they were in a hotly-contentious battle with the
14 UCC about what was the right alternative here in an auction
15 scenario and they used a 90 percent number, they just got it
16 wrong. They didn't think about the other costs. And the
17 UCC adopted the 90 percent, too. I'm not --
18 THE COURT: We'll -- I'll ask them about that.
19 But, look, I didn't have any testimony on it. I have a
20 document that clearly says what it says, but the context is
21 pretty opaque to me.
22 MR. KRELLER: It is, Your Honor. But I think if
23 they can explain to you that the less-than-complete
24 information was being given to their board, I would be
25 surprised if that's what you hear from them.

1 THE COURT: I mean, I know that part of their
2 argument against the transform sale is that they would have
3 very large 503(c) -- the estate would have very large 506(c)
4 claims. So I guess the -- but I'll ask them about the 90
5 percent.
6 MR. KRELLER: And, Your Honor, I'm not suggesting
7 that those numbers are definitive valuations. What I'm
8 telling you is there's a lot of data out there that Mr.
9 Griffith didn't bother to look to and the debtors ignore
10 when they say 85 percent is the fair market value because we
11 say it is.
12 THE COURT: That's fair.
13 MR. KRELLER: That's a gross oversimplification
14 and ignores facts in the record that you don't have to
15 accept as valuations --
16 THE COURT: Right.
17 MR. KRELLER: -- to know that the data is out
18 there.
19 Your Honor, you raised a question or made a
20 comment I guess at the outset of last week's hearing about
21 the expert's reliance on other outside sources like Tiger.
22 I don't -- I can certainly address that with you if that's
23 still an open question in your mind.
24 THE COURT: Well, I think -- I distinguish Tiger
25 from some of these other ones that are really not

1 appraisals. And there is testimony from multiple parties
2 that Tiger was relied on, et cetera. So I'm not sure how
3 much vetting -- it certainly -- put it this way; given other
4 parties' reliance on Tiger, including the lender group
5 through the debtor's borrowing base certificates, it
6 wouldn't be a basis for excluding Ms. Murray's testimony
7 that she heavily relied on Tiger, put it that way.
8 MR. KRELLER: Your Honor, then let me go a little
9 bit further with it, because I'm -- that's not entirely
10 satisfying.
11 THE COURT: Okay.
12 MR. KRELLER: Federal Rule of Evidence 703 says an
13 expert may base an opinion on facts or data in the case that
14 the expert has been made aware of and not just facts that
15 the expert has personally observed.
16 THE COURT: Right. That's fine. Facts are data.
17 But what she's relying -- if an expert is relying on another
18 expert's opinion, it may not be facts or data. So that's
19 the only point. But I'm saying this is enough. People
20 relied on this.
21 MR. KRELLER: That's fine, Your Honor. I'll move
22 on.
23 THE COURT: It's not clear to me why she relies on
24 one and not the other when she takes the February percentage
25 or something as opposed to the October percentage for

1 something, but that's another story.
2 MR. KRELLER: Well, I think the answer to that,
3 Your Honor, is -- without going into the report, I think
4 Tiger actually explains what they did in their report as to
5 how they recalibrated that calculation, if you will.
6 THE COURT: Can you also address -- and it's a
7 relatively small point. It's only about $8 million, which
8 is I guess fairly small. Ms. Murray has a discounted number
9 for credit card receivables of $54.8 million, Mr. Griffith
10 has $46.6. Can you explain the difference and why you think
11 Ms. Murray is correct?
12 MR. KRELLER: Your Honor, I think -- frankly I
13 think it's just kind of a matter of sourcing. The experts
14 were obviously working on an expedited timeline to try and
15 accommodate the debtor's confirmation desires. And I think
16 that those issues were just taken -- I think that the
17 numbers were just taken from different sources. And I can
18 see if I can -- I'm not sure I can pinpoint that one for you
19 as I stand here.
20 THE COURT: Okay.
21 MR. KRELLER: But I believe it may be the case --
22 that may be one where Ms. Murray was sourcing from the
23 debtor's schedules.
24 THE COURT: Okay.
25 MR. KRELLER: Your Honor, I think -- I guess the

1 one other point I'll make, and then I think in keeping with
2 the guidance you gave Mr. O'Neal is that I'll stop before I
3 flip the page into my 506(c) notes. But let me make one
4 other point, because I think it's relative to the discussion
5 that we've had about the notion that the company could be
6 very well justified in pursuing its going concern
7 transaction and its desire to find a comprehensive solution
8 here but have that not be the best thing for the second lien
9 lenders. Because a lot has been made about and there's a
10 lot in the papers about the support for the going concern
11 sale.
12 Clearly ESL was advocating for a going concern
13 sale. I don't think they were doing that as a second lien
14 lender, I think they were doing that as a buyer, as a
15 hopeful buyer and then ultimately a prevailing buyer. And I
16 think there's a meaningful distinction there.
17 With respect to Cyrus, Your Honor, because we drew
18 some fire on this, we're grouped as someone who was a
19 forceful advocate for the going concern sale and making
20 strong statements in support of the going concern sale.
21 Your Honor, there's nothing in the record to support those
22 statements. There's not a court filing, there's not a
23 hearing transcript, there are no letters from Cyrus to the
24 board as you've seen with ESL. You've got testimony from
25 Brendon Aebersold where he basically testifies I think I

1 remember -- and we've designated this testimony for you, but
2 I think I remember having calls with Cyrus at different
3 points in time during the case, I don't really know who they
4 were with and I'm not really clear on what they were about.
5 He was a skilled witness. There's not much to glean there.
6 But it falls well short of being a forceful advocate.
7 What you see from the debtors and what you see
8 from the UCC on this point, Your Honor, is a letter from
9 Cleary to the company on behalf of ESL. Cyrus was not a
10 party to that letter, Milbank was not a party to that
11 letter. Cyrus was not copied on that letter, Milbank was
12 not copied on that letter. And Cleary doesn't purport to
13 speak for Cyrus in that letter. That's what they have.
14 The other thing they have is that Cyrus came in
15 and did the junior DIP. And they say that Cyrus did the
16 junior DIP in order to bridge to a going concern sale. And
17 yet --
18 THE COURT: Right. And you say it was a
19 protective DIP.
20 MR. KRELLER: Well, Your Honor two -- three things
21 actually. It was a protective DIP. We didn't want to get
22 primed, but we didn't even want to get our adequate
23 protection liens primed, which would have been the case with
24 the Great American DIP that was -- they were trying to put
25 in ahead of us. That's point one.

1 Point two, Your Honor, the DIP wasn't solely for
2 the purpose of getting to a going concern sale. Mr. Reicker
3 testified in his declaration in support of the junior DIP --
4 and I believe it's Paragraph 14 of that declaration. He
5 says, "We will need the $250 million of liquidity even if we
6 end up pivoting to a liquidation because an orderly
7 liquidation will take time, and we need liquidity to do it."
8 So the debtors weren't even trying to sell this as a bridge
9 to a going concern.
10 And the third --
11 THE COURT: Well, that does take you beyond the
12 peak selling season.
13 MR. KRELLER: It does, Your Honor.
14 THE COURT: I mean, there are cases -- they're
15 early ones, but there are cases that actually apply
16 equitable considerations to 507(b) as opposed to 506(c).
17 MR. KRELLER: Well, Your Honor, I'd be interested
18 to know what equitable considerations there might be for
19 putting in a junior DIP. But my point is this, it wasn't
20 for the purpose of supporting an ESL transaction. In fact,
21 Mr. Aebersold's other -- in another portion of his
22 deposition, he acknowledged that when he negotiated and was
23 soliciting Cyrus's involvement in the junior DIP, he was
24 actually advocating to Cyrus that if they were going to step
25 in, he needed and wanted them to step in without being tied

1 to ESL because they didn't want ESL as a DIP lender.
2 THE COURT: Right.
3 MR. KRELLER: And so Cyrus made a credit decision
4 to make that DIP. It was protective, and it was agnostic as
5 to going concern sale versus orderly liquidation process.
6 That's what you have, Your Honor. That's what
7 they back up their allegations that Cyrus was somehow a
8 forceful advocate and somehow took positions. You won't
9 find anything in the docket, you won't find me standing at
10 hearings talking to you about how we want to see a going
11 concern sale happen. Those things didn't happen, they don't
12 have any proof, and their papers essentially demonstrate
13 that to you.
14 THE COURT: Okay. Am I right though that the
15 junior DIP contemplated taking the debtor's sale process,
16 whether it's going concern or orderly liquidation, beyond
17 the first 12 weeks of the case?
18 MR. KRELLER: It was -- well, I think the junior
19 DIP came in -- I think it got approved in late November. So
20 you're a month-and-a-half almost into the case.
21 THE COURT: Right.
22 MR. KRELLER: But yes, I think it was -- I think
23 the intention was to provide enough liquidity to see through
24 to a decision on whether there was going to be a going
25 concern sale or to pivot to the liquidation. But it wasn't

1 hard-wired into either of those alternatives, but it would
2 have provided the funding for the debtors to do that, and I
3 think that was their intention.
4 THE COURT: Okay.
5 MR. KRELLER: And, Your Honor, and then the last
6 part on that. Yes, the junior DIP rolled as part of the
7 ultimate transaction. That was a last-minute concession
8 that Cyrus made to the debtors at the auction and Cyrus's
9 decision was I can either roll this over and have my $350
10 million junior DIP become a piece of financing on Transform
11 Co. on essentially the same collateral, or this transaction
12 can fail and I can sit here with a $350 million junior DIP
13 in a messy bankruptcy in the wake of a failed ESL
14 transaction and wait it out and see what happens.
15 And so, Your Honor, that was just a standalone
16 decision. That wasn't advocacy for ESL or going concern or
17 anything else. Again, it was a credit decision that Cyrus
18 made because they were better with that loan being on the
19 outside of this bankruptcy case than they were leaving it
20 inside and whatever the aftermath would have been of the
21 failed auction.
22 THE COURT: Okay.
23 MR. KRELLER: Your Honor, the only other -- my
24 other points are on 506(c). So with that I'll sit down and
25 speak to you later.

1 THE COURT: Okay.
2 MR. FOX: Your Honor, Edward Fox with Seyfarth
3 Shaw on behalf of Wilmington Trust, indenture trustee and
4 collateral agent.
5 We have a binder, if we could hand it up, Your
6 Honor, that has some documents that are in evidence and
7 testimony that's been designated that I'll be referring to.
8 THE COURT: Okay. Thanks.
9 MR. FOX: Your Honor, at the outset I'd just like
10 to note -- and there's been I think some misconceptions
11 earlier in the case among certain parties. Wilmington Trust
12 is both the collateral agent for the entire second lien as
13 well as the indenture trustee for the 6-5/8th percent senior
14 secured notes due 2018, which are generally referred to as
15 the 2010 notes. Those are the cash pay notes. And they
16 were issued in 2010 and were secured at that time.
17 There's been some suggestion from time to time, I
18 think mostly earlier in the case, that ESL and Cyrus owned
19 those notes. And that's not the case. ESL does not own any
20 of those notes. I think that's clear from the exhibit to
21 the asset purchase agreement. And it's our understanding
22 that Cyrus does not own any of those, either. But there are
23 $90 million worth of outstanding notes on that 2010 position
24 which are owned by note holders who are not here today, but
25 who, some of them at least, do check in from time to time

1 with us. And we're here to speak for them in particular
2 since Cyrus and ESL are speaking largely for themselves.
3 THE COURT: And those notes are subordinated under
4 the -- in their creditor agreement as far as collateral?
5 MR. FOX: Under the security agreement, Your
6 Honor, the waterfall is that the collateral agents' fees and
7 expenses are paid first. The indenture trustees and loan
8 admin agents' fees and expenses are paid second. What are
9 called senior second lien obligations, which is everything
10 except the 2010 notes, are paid third. And then the 2010
11 notes are paid fourth with respect to collateral. If
12 there's no collateral and they're unsecured, then they're
13 all pari passu for whatever that's worth.
14 THE COURT: Okay. This is an issue no one has
15 addressed. But if it's meaningful here that ESL's -- if
16 ESL's $50 million cap is meaningful, does that cut off the
17 2010 notes' recovery?
18 MR. FOX: I think to the contrary, Your Honor,
19 that would help them. I think we've not gotten into it or
20 briefed it, as I think you recognize, in terms of the issue
21 of how a super-priority claim as opposed to a lien would be
22 treated under the -- if at all under the terms of the
23 security agreement --
24 THE COURT: Of the waterfall.
25 MR. FOX: Yes.

1 THE COURT: Okay. Anyway, it's an issue for
2 another day perhaps.
3 MR. FOX: Yes, yes.
4 THE COURT: All right.
5 MR. FOX: Your Honor, the primary issue here goes
6 to valuation at the petition date, and there's been a lot of
7 discussion about that. We have I think in some sense a
8 slightly different take, although not necessarily so, from
9 the other parties and the other experts. And that goes to -
10 - you know, the debtor argues that the issue is the fair
11 market value. The question is what's the market. And it's
12 also a question of when, but it's also what.
13 On October 15th -- and if you look at the first
14 point -- the first page of the binder, is an answer to a
15 question that I asked Mr. Griffith during his deposition.
16 And I asked him, between October 15th 2018 and the closing
17 of the sale on February 11th, 2019, what were the debtors
18 doing at their going concern stores? Were they open for
19 business to sell at retail? And he answered yes. And
20 there's no secret about that.
21 And I think it's important to remember, Your
22 Honor, that what we see within the courtroom and what goes
23 on in here is something very different than what was going
24 on two blocks away at the Sears store down the street where
25 they were selling inventory at retail starting on the

1 petition date and continuing until the sale occurred.
2 Selling Craftsman tools to Ms. Smith and washing machines to
3 Mr. Jones and whatever products, DieHard batteries, et
4 cetera, Kenmore appliances that Sears sells.
5 And on the first day of the case when Sears issued
6 a press release, it said, "As we look towards the holiday
7 season," and this is at Tab 1, "Sears and Kmart stores
8 remain open for business, and our dedicated associates look
9 forward to serving our members and customers." And that's
10 what was going on.
11 And so when it comes to valuing the collateral, we
12 believe, and Mr. Henrich valued the collateral as if it was
13 being sold at retail, which is exactly what the debtors were
14 doing with the collateral.
15 And if you look at Tab 2, it's a segment from Mr.
16 Reicker's declaration, the first day declaration, describing
17 the company's current operations, operating 687 retail
18 stores, being a market leader in appliances, tools, lawn and
19 garden, fitness equipment, automotive repair, and other
20 products, and talking about Kmart and the products that
21 Kmart sold. All of which was being sold at retail to retail
22 customers.
23 And so in our view -- and we look at Rash, too.
24 Our view. Our view is that the Debtors -- the use the
25 debtors are making of our collateral, which was inventory,

1 not durable goods or capital goods, but inventory -- was to
2 sell it at retail on a daily basis to customers who walked
3 in the door and paid retail.
4 And if you turn to Tab 3, Your Honor, which is
5 Joint Exhibit 10, you can see how the debtor in its stock
6 ledger detail listed both the cost of its outstanding
7 inventory as well as the selling value of the inventory.
8 And the cost was at $2.6 billion and the selling value by
9 the debtor's calculation was in excess of $5 billion.
10 So when one considers how to value the inventory
11 at the petition date given that the debtors were in a going
12 concern sale, what Mr. Henrich did and what we believe is
13 the appropriate methodology is to value that inventory as if
14 it's being sold at retail, which is exactly what was
15 happening here. That doesn't mean that there aren't other
16 methods that could have been applied, and others did. But
17 that's what Mr. Henrich did, and we believe that was
18 appropriate.
19 And in the context of a valuation, expert
20 testimony is appropriate. And I don't think, there's been
21 any question that Mr. Henrich is an expert and that his
22 testimony should be accepted here, although we are mindful
23 of the Court's concerns at the beginning of the hearing the
24 other day. But because the inventory was being sold at
25 retail at the petition date, Henrich valued the inventory at

1 retail value on the petition date. And we submit, Your
2 Honor, that that is the appropriate fair market value that
3 should be applied here. For that purpose, for that
4 valuation. And as I said, expert testimony is appropriate
5 to address that valuation issue.
6 Now, just to point out before I get to Mr.
7 Henrich's particular views and conclusions, at Tab 20 we
8 included -- or actually I think it's Tabs 19 and 20, we
9 included the weekly reporting that the debtors provided at
10 Tab 19 from January 30th that took us through January 26th.
11 And then at Tab 20 was the last two weeks that had been
12 omitted when the weekly reporting stopped with that January
13 30th report before the sale, and picked up those last couple
14 of weeks.
15 And what those show when you total the columns
16 across is that during that period of time from the petition
17 date through the sale date on February 11th to ESL as a
18 going concern, the debtors had revenues of $3,366,000,000.
19 They had net operating cashflow of $548 million, and they
20 had net cashflow before financing of $364 million. And
21 those are the results from largely the going concern store
22 sales as well as the going out of business sales which were
23 also going on, starting with the first wave of 142 stores at
24 or around the petition date, and then the additional two
25 waves after that.

1 So when Mr. Henrich looked at the inventory and
2 the other collateral to value it, he started with the
3 debtor's total inventory at cost of $2,576,000,000. He
4 deducted from that the going out of business inventory at
5 cost, which was available, and that's why he calculated it
6 this way, because that's the most readily available number,
7 leaving a going concern inventory at cost of $1,959,000,000.
8 Now, let me just stop for a minute, because I know
9 you asked the question about the going out of business
10 inventory and the various schedules that have floated
11 around. The going out of business inventory information was
12 provided by ESL in a spreadsheet. And as Mr. Henrich
13 explained, that spreadsheet contained a calculation error,
14 which is -- which one can see in the live spreadsheet but
15 not on paper. As a result of that, additional amounts of
16 either Kmart or Sears inventory were added in the columns
17 that should not have been added to those columns.
18 Despite that, the total percentage of GOB recovery
19 remained the same using the formula that Mr. Henrich applied
20 of 96.4 percent. He then corrected and attached to his
21 declaration the corrected schedule, taking out those
22 improperly added in amounts of Sears and Kmart to get to the
23 $617 million going out of business number.
24 Now, the effect of that actually was to increase
25 the overall value of the collateral. Because by reducing --

1 that reduced the amount of going out of business collateral,
2 thereby increasing the amount of going concern inventory at
3 the same time.
4 THE COURT: So where did this information come
5 from?
6 MR. FOX: It came from a spreadsheet that was
7 provided by ESL.
8 THE COURT: And how does -- how do they have
9 access to this?
10 ESL, as we understood it from ESL's counsel, had
11 all this information because they bought the -- through
12 Transform, bought the company.
13 THE COURT: Okay.
14 MR. FOX: It would have been nice to get it from
15 the debtors, but we got it from ESL. There's been no
16 dispute about the $617 million. There's been an issue of
17 the previous number which has been resolved.
18 There’s not been a dispute about the $617. And
19 then there’s been the difference between, as you raised with
20 Mr. O’Neal, between the 95.6 percent that Mr. Schulte
21 calculated, as the percentage, and the 96.4 percent that Mr.
22 Henrich calculated. That goes to how they did their
23 calculation of those numbers. They, I guess, differed in
24 their view of that. That percentage number has minimal
25 difference in terms of this.

1 THE COURT: And we don't know what that inventory
2 was comprised of, right? We don't know whether it included
3 eligible inventory only or all inventory.
4 MR. FOX: That was all the inventory, as we
5 understand it, that was sold at the going out of business
6 stores. Now, there --
7 THE COURT: But we don't know what that was,
8 though, right? What categories that fell into?
9 MR. FOX: You mean, eligible versus ineligible?
10 THE COURT: Right.
11 MR. FOX: No. I don't think there's a way to
12 know.
13 THE COURT: Or whether it included pharmacy assets
14 or anything like that?
15 MR. FOX: Well, as far as we know, to the extent
16 there was a pharmacy in a going out of business store.
17 THE COURT: But we don't know whether that was the
18 case?
19 MR. FOX: We do not.
20 THE COURT: Okay.
21 MR. FOX: I mean, I'm not sure that they would
22 have a going out of business sale for control substances.
23 I'm just speculating about that.
24 THE COURT: Well, sometimes you have GOBs where
25 you sell the pharmacy assets as part of the sale, although

1 separately. Not to just someone who walked in, obviously.
2 MR. FOX: Right.
3 THE COURT: Okay.
4 MR. FOX: But then getting back to the numbers.
5 So, taking the going concern inventory at cost, which is the
6 million-959--billion-959, Mr. Henrich then treated it as a
7 retailer does, and he applied a gross margin to that book
8 value of inventory to reach a selling cost of 2 billion, 759
9 million dollars. He then deducted from that store expenses
10 of 457 million, leaving a total inventory at going concern
11 value of $2.3 billion.
12 Now, he had added to that credit depart... I'm
13 sorry. Credit card deposits and transit, which are up above
14 in Exhibit 4. He also included the pharmacy accounts
15 receivable. And he included total cash, largely as a proxy,
16 on the theory that even if it was not considered proceeds of
17 our inventory, which would be our collateral, it would be
18 applied by the first lien lenders ahead of the application
19 of other collateral, since it's liquid and available to
20 them.
21 He then added to his 2.3 billion of total going
22 concern inventory the 617 million of GOB inventory, which
23 was reduced by unrecovered value at the liquidation sale of
24 22.4 million. So, that takes account, I think, the concern
25 that maybe not everything sells. Some of it gets disposed

1 of, thrown away, and sort of left in the stores as they
2 vacate, with the resulting total inventory for liquidation
3 value of 594 million.
4 THE COURT: So, that would -- I'm sorry. So, the
5 96 percent is before that reduction?
6 MR. FOX: The 96 percent... Well, no, the 617
7 million is the actual number. What that established,
8 though, was that when they sold that -- when they took
9 inventory at cost and sold it in the Debtor's going out of
10 business sales, the net result was that you got back 96.4
11 percent of the cost of that inventory.
12 THE COURT: All right. All of that inventory or
13 the inventory before you reduced it by 22.4 million?
14 MR. FOX: Well, of the inventory, and then you
15 reduce it by the 22.4 to take account of what didn't sell.
16 THE COURT: Well, let me phrase it differently.
17 It's been argued to me that the value of the inventory has a
18 market marker equal to the result of the GOP sales, which is
19 either 95 percent or 96 percent. But my question is, is
20 that really accurate or is the GOB sales percentage then
21 need to be further reduced because of the category that I'm
22 assuming wasn't sold or shrank, or whatever? That I guess
23 there's some number... I don't know if this is in a -- also
24 something ESL provided or just Mr. Henrich's own calculation
25 equals 22.4 million.

1 You know, I don't remember the answer to that
2 question. I think I did know it at the time. Well, you can
3 see why it might be meaningful.
4 MR. FOX: Yeah.
5 THE COURT: I mean, I go by what people pay for
6 something and if they actually pay 96 percent or 95 percent,
7 that's meaningful. But if really they're not paying
8 anything for a big chunk of it, then I would reduce it.
9 MR. FOX: Well, the 22 --
10 THE COURT: In other words, you wouldn't apply --
11 not for what they paid for, but I take into account what
12 disappeared or what they didn't pay for in coming up with an
13 overall percentage on everything else.
14 MR. FOX: Well, that 22.4 is a little bit -- it's
15 around 3 percent of the 617 million.
16 THE COURT: Right. Well, I understand. But it's
17 a zero, right? There's no value to that, so...
18 MR. FOX: Right. So, in other words, if that were
19 not included in the 617 and you were starting at 96.4
20 percent, you'd be talking around 93.4 percent.
21 THE COURT: Right. Before -- before the cost
22 component?
23 MR. FOX: Well, no --
24 THE COURT: Where does the 22.4 come from?
25 MR. FOX: I became it came from ESL, if I'm not

1 mistaken.

2 THE COURT: Is that in the record anywhere?

3 MR. FOX: If it's in that -- if it's in that

4 schedule, then it is. But I don't remember...

5 THE COURT: I mean, I guess -- in other words, you

6 can see -- I don't know the answer to this question but you

7 can certainly see a calculation of the GOB sales results as

8 being just of what was sold.

9 MR. FOX: Oh, I'm sorry, Your Honor. I've just

10 been told the 617 million times the 96.4 percent is 590...

11 That's the 594.8. The difference is the 22.4. So, it's

12 included already in the 96.4 percent. It's not an

13 additional deduction.

14 THE COURT: Okay.

15 MR. FOX: And the going out of business sale

16 numbers included the four-wall costs, selling costs for

17 those? So, those are also included in here. It's not --

18 those would not be an additional deduction.

19 Mr. Henrich then -- he had not included the home

20 services inventory of 114 million when he started with total

21 inventory of cost, unlike the other -- Mr. Schulte and Mr.

22 Griffith, who started with the 26.90, I think it was. He

23 was not comfortable initially about included that because he

24 wasn't sure where -- who it belonged to. When he got to

25 that point where he was comfortable that it belonged here,

1 he then included it but he did not include it in the
2 inventory that's grossed up by the gross margin of 29
3 percent.
4 So, he includes it at the book value of 114 with
5 no gross up because that was sold through Home Services
6 rather than directly in the stores. That resulted in total
7 inventory, by his calculation, of -- you know, cumulative
8 total inventory of $3.2 billion.
9 He then added to it the 72.8 million of pharmacy
10 scripts, and then deducted from the $3.279 billion total
11 collateral value; corporate expenses on a going concern
12 basis of 138 million, which is about 6 percent of cost;
13 corporate expenses on a liquidation of 19.1 million, which
14 is the 3.1 percent, which Tiger used. That's the only place
15 where Mr. Henrich relied on anything from an outside source
16 -- an outside expert like Tiger. And I think we can all
17 agree now that that -- the Tiger numbers were reliable.
18 And then he took a $51 million professional fee
19 charged for 506(c) costs with the expectation that that
20 would be the outside numbers. The Debtor put it -- it was
21 not clear at the time and we'll argue later that that's
22 excessive.
23 As a result of those adjustments, he leaves a
24 total collateral value of over $3 billion, which is more
25 than sufficient after paying down the first lien loan to

1 leave the second lien loans fully collateralized as to the
2 petition date. And, again, Your Honor, that's based on the
3 retail selling value, which is what the Debtor was doing on
4 a daily basis.
5 Now, the Debtors through Griffith make some
6 criticisms of Henrich. In the first instance, Griffith is a
7 fact witness so he's not really qualified to criticize
8 Henrich's valuation. He doesn't provide his own valuation
9 that the petition did. In the second supplemental
10 declaration, for instance, Page 9, Paragraph 13, he asserts
11 that Henrich applies too high of a margin to the going
12 concern inventory. That's the 29 percent.
13 But when he was asked about Henrich's use of the
14 29 percent gross margin in his deposition, the question was:
15 "Well, the question is do you believe Henrich was wrong to
16 use a 29 percent gross margin, which is the same gross
17 margin that M3 used?" Mr. Genender objected. Mr. Griffith
18 then answered: "I said I disagree with his methodology. I
19 don't have a problem with the 29 percent margin."
20 And when the Debtors prepared their weekly
21 reporting and they forecasted what their results were going
22 to be on a weekly basis for both the lenders, as required
23 under the final DIP order, of what they used the 29 percent
24 gross margin to forecast. And we've included that in here
25 for you to look at. That's at Tab 6. That's Joint Exhibit

1 015-4. And you can see in the gross margin numbers under
2 the forecast, the Debtors themselves use the 29 percent.
3 So, they really don't have a basis now to be
4 challenging that. And to the extent Griffith wants to talk
5 about methodology, he's not qualified to do that.
6 Griffith next in the supplement -- second
7 supplemental declaration on Page 9, Paragraph 13 -- claimed
8 that Henrich's calculation of GOB liquidation inventory cost
9 is overstated by 37.9 million. We've just discussed that
10 and Henrich's declaration in Paragraph 50, he not only
11 explained it but explained that this actually then increases
12 the go-forward inventory by that same amount, which
13 increases the total value of the inventory rather than
14 decreasing it.
15 Griffith next in his second supplemental
16 declaration at Pages 9 and 10 at Paragraph 13 complained
17 that Henrich does not consider additional expenses required
18 to sell the inventory. But Henrich did include the expenses
19 of 20 percent of sales for store expenses -- it was the 457
20 million of store expenses; the 5 percent corporate overhead,
21 which resulted in 138 million for going concern stores; the
22 19.1 million for GOB stores for overhead. And if you can --
23 and that totaled 157 million of overhead for just four
24 months, which on an annual basis would result in a $471
25 million corporate overhead.

1 Now, two things are interesting here: First, the
2 Debtors themselves, and actually M3 -- and this is at Tab 8
3 -- projected and told the committee in November of 2018,
4 that Sears Holdings could return to profitability and that
5 they anticipated their expectation was that the SG&A, which
6 Griffith thought Henrich wasn't using enough of, could be
7 reduced to 365 million as the estimate for 2019, and to 296
8 million for 2020.
9 So, that was their expectation, M3's expectation
10 and the Debtor's expectation of what the reasonable numbers
11 could and should be ultimately. And the number that Henrich
12 used on an annual basis is even higher than those numbers.
13 The other point that's particularly relevant is
14 that Griffith himself, although he criticizes Henrich and
15 says Henrich didn't use enough overhead, Griffith didn't
16 know how much overhead to use. When he was asked about it
17 in his deposition, he said -- and this is at...okay... He
18 was asked on Page 266 -- the question is "What was the
19 recovery as a percentage of book value on inventory in going
20 out of business stores?" Answer: "Without any allocations I
21 can't tell you." Question: "You have no idea?" Answer:
22 "There are certain allocations that are made that are
23 sometimes used in certain reports. Internally developed
24 ones by the Sears team, and Tiger takes a certain view as
25 well, but they're not based on actual total overhead."

1 Question: "I'm asking what the Debtor's actual
2 experience was. Not about Tiger's estimates. Do you know
3 what the Debtor's actual experience was?" Answer: "It would
4 depend on how much corporate allocations you were putting on
5 the stores." Question: "If you allocated no corporate
6 overhead, what would the result be?" Answer: "I can't
7 answer that. I don't know."
8 Question: "You don't know? How much overhead do
9 you believe should be allocated to the going out of business
10 store sales?" Mr. Genender objected. Answer: "It's hard to
11 say," said Mr. Griffith. Question: "So, you don't know how
12 much corporate overhead should be allocated to the going out
13 of business sale stores' results?" Answer: "It would depend
14 on the situation." Question: "Well, we're talking about the
15 Debtor's situation, the 242 going out of business stores."
16 Mr. Genender: "262." Mr. Fox: "262. Thank you." Answer:
17 "There should be more allocation than what they currently
18 have in the model." Question: "How much?" Answer: "I don't
19 have that quantified."
20 He criticizes Mr. Henrich but he has no idea what
21 he thinks the number should be other than it should be
22 higher. And that's just no basis for that kind of a
23 criticism.
24 With respect to -- or Griffith then says in his
25 declaration, Paragraph 13, that Henrich overstates the

1 inventory by using total inventory at cost of 2 billion, 576
2 million. That's the stock ledger inventory, except for the
3 114.6 million of Sears Home Services inventory. And
4 Griffith argues that Henrich should have started with net-
5 eligible inventory of 2 billion, 391 million.
6 But in the Griffith second supplemental
7 declaration at Page 7, Paragraph 11, Griffith himself uses
8 the stock ledger inventory of 2 billion, 690 million, which
9 includes the Sears Home Services, and he does not start with
10 net-eligible inventory. So, again, there's just no basis
11 for the criticism when he does the same thing.
12 He also, you know, argues about cash and what the
13 -- what the security agreement provides for, but he admitted
14 he can't -- he's not a lawyer, he can't make a legal
15 conclusion. And I think we've all agreed at this point that
16 that's a decision the Court will make.
17 With respect to the letters of credit, you've had
18 a significant amount of discussion about that. I'm not sure
19 that there's more than I can add to what Mr. Kreller
20 offered. I do believe the fact that there are contingent
21 applications and that there's, in fact, no obligation unless
22 the payment's not made in the ordinary course and there's
23 actually a claim back against the -- or to draw on ELC, does
24 matter and should have an impact here.
25 However -- and I'll -- and I'll come to this -- to

1 the extent that Griffith is asserting here that the Court
2 finds that the 271 million should come ahead of the second
3 lien claims in the collateral on the theory that that was
4 outstanding, it was a claim against the collateral -- then
5 the Griffith... And, again, we don't believe the 85 percent
6 is an appropriate valuation number. Certainly not as the
7 petition date and not as the sale date either. But if that
8 number is to be used, the 271 million has to be added to the
9 value, because that was an additional component of
10 consideration directly related to the sale cost of the
11 collateral and required under the asset purchase agreement.
12 And when that happens, that increases the amount
13 of the sale price from 85 percent to 101 percent. And I'll
14 come to it in a little bit, but that results in more than a
15 $300 million 507(b) claim when that's -- if that's properly
16 calculated that way.
17 Now, as we've discussed and as others have
18 discussed, Griffith claims --
19 THE COURT: Can you walk through that? I'm not
20 sure I follow that.
21 MR. FOX: Let me find the tab for you.
22 THE COURT: Yeah, okay.
23 MR. FOX: If you turn to Tab 16, and you're also
24 going to need to look at Tab 11 -- but if you turn to 16,
25 what Griffith says is he believed there were certain

1 components of the purchase price that, based on his view,
2 should be allocated, if you will, specifically to the
3 inventory and the second lien collateral. And that's a
4 billion-408, which he then divides by the 1.67 billion of
5 receivables and inventory that are required under I think
6 it's section 10.9 of the asset purchase agreement to be
7 delivered. And that's how he gets to his 85 percent number.
8 But what he leaves out of that is the obligation
9 of the purchaser under section 3.1F of the asset purchase
10 agreement to provide the letter of credit facility
11 consideration. And that letter of credit facility
12 consideration is defined to mean the obligation of the buyer
13 to basically cause those letters of credit to no longer be
14 outstanding as an obligation of the Debtor.
15 So, if the letters of credit are a charge against
16 the collateral ahead of the -- against the inventory, ahead
17 of the second lien, then by rights, if you follow or accept
18 Griffith's argument that he should apply the cost that he
19 chooses to allocate to the purchase of the remaining
20 inventory, what he leaves out of that is the additional cost
21 to have the buyer take care of that 271 million of
22 outstanding letters of credit and make those no longer be in
23 charge against the collateral.
24 THE COURT: But the buyer's replacing the first
25 lien debt too. I mean, there's a new first lien facility,

1 so that would be a charge too under that theory.

2 MR. FOX: Well, that's effectively what Griffith

3 argues.

4 THE COURT: No, but --

5 MR. FOX: No, no, no. Griffith argues -- he says

6 exactly that. He said -- first, he said it's the billion-

7 408 of cash under 3.1A. And if you divide a billion-408 by

8 the billion-676 and 10.9, you get 85 percent.

9 THE COURT: Oh, I see.

10 MR. FOX: Then he said -- when that wasn't working

11 as well, he said, well, the billion-408, we get to that by

12 the cost of paying off the 850 million of first lien debt --

13 THE COURT: I follow you now.

14 MR. FOX: -- the 433 and the 125 --

15 THE COURT: I understand now.

16 MR. FOX: But it's -- but what he never includes

17 in that calculation is the additional 271 million of LCs

18 that also have to be --

19 THE COURT: But you're criticizing his sort of

20 backing into the 85 percent. That's what you're doing.

21 MR. FOX: Well, if you're going to follow his

22 methodology to get to 85, he left out a part.

23 THE COURT: Okay.

24 MR. FOX: And the part he left out --

25 THE COURT: I follow you, I follow you.

1 MR. FOX: -- was the 271. And when you add that
2 back, now all of a sudden it's not paying 85 percent, it's
3 paying 101 percent.
4 THE COURT: Okay.
5 MR. FOX: So, they just can't have it both ways.
6 THE COURT: Well...
7 MR. FOX: They can't have it as a charge against
8 the collateral but not a cost of buying the collateral when
9 it's bought. That's just cherry-picking in an unfair way.
10 THE COURT: Well, you can certainly have something
11 as a charge ahead of the second line debt. That's... I
12 understand your point that the 85 percent, one of the
13 rationales for picking that is to walk through the million -
14 - billion-4 of first lien debt. I understand that point.
15 And you're basically saying that was -- that's contrived
16 because you're basically taking one aspect of the
17 consideration that Transform provided under the APA in tying
18 it to a value for the inventory. But I don't really see
19 that -- beyond that. But maybe that's all you're saying.
20 MR. FOX: Well, it's certainly contrived. And
21 when Mr. Griffith was here last week on the witness stand,
22 he was asked about that. His answer was, well, that's in a
23 different part of the agreement. Well, it's in 3.1F instead
24 of 3.1A or B but it's part of the consideration for the...
25 And so if you're going to equate particular parts of the

1 consideration to the collateral and you're doing that based
2 on what's the charge --
3 THE COURT: That's the part I understand. Okay.
4 MR. FOX: Now, to go back to it, you know, like we
5 said -- and I don't want to beat a dead horse, so just tell
6 me if you've heard enough on this point. But on the 85
7 percent, you know, the Debtors admitted on February 7th at
8 the sale hearing that they waived the allocation. And Your
9 Honor specifically questioned Mr. Schrock about it. The
10 testimony starts at Joint Exhibit 072-56.
11 THE COURT: Right. I don't need more on that.
12 MR. FOX: Right. And further, Your Honor, at that
13 hearing -- and I think this is important -- Your Honor asked
14 about the amount of consideration in addition to the credit
15 bid, and to do it briefly, Your Honor asked: "Just to cut
16 through it to do the math, you're saying basically that the
17 total value of the ESL deal is 5.2 billion, if you subtract
18 a billion-3 from that, which was the amount of the four
19 credit bids that are specifically allowed under 3.1B?" Mr.
20 Schrock said, "That's right." The Court: "There's 3.9
21 billion of value provided for the unencumbered assets." Mr.
22 Schrock: "That's right." The Court: "Has anyone placed a
23 value on unencumbered assets anywhere close to 3.9 billion?"
24 Mr. Schrock: "No, Your Honor."
25 So, at that point, the view was that of the 5.2

1 billion, only the credit bids of the various assets of the
2 various liens totaling 1.3 billion, which included the
3 various real estate loans as well as the loan on the
4 inventory and receivables -- the lien on the inventory and
5 receivables -- was -- everything else was going towards
6 unencumbered assets. So, it kind of undercuts the argument
7 today that we should look at 85 percent, based on Mr.
8 Griffith's view, because somehow he adds up to a billion-4,
9 when the statement by Debtor's counsel -- the concession by
10 Debtor's counsel on February 7th sale hearing was that that
11 additional 3.9 went to unencumbered assets, not to the
12 encumbered assets. You just -- they can't have it -- they
13 can't be saying one thing then and something else now.
14 The -- and just so it's clear, those were the
15 credit bids under 3.1B of the asset purchase agreement for
16 the IP Ground lease's term loan facility of 152 million, the
17 outstanding FILO facility obligations held by the buyer, 70
18 million, the obligations by the buyer and its affiliates
19 under the real estate loan 2020 of 544 million, and then the
20 $433 million credit bid for the inventory. And those
21 numbers added up to slightly more, by math, of a billion-2.
22 That's the billion-3 of credit bids that was being discussed
23 in Your Honor's questioning at that point.
24 And, as I said at the outset, even if Mr. Griffith
25 could allocate the purchase price, that does not determine

1 the value of the second lien collateral at the petition
2 date. And what Mr. Griffith says about this is instructive.
3 Because, according to him, this -- the 85 percent was just
4 an assumption. He says, starting at Page 262 of his
5 deposition -- I say, "When it says..." Question: "And it
6 says in Paragraph 14, as shown on the Debtor's valuation, M3
7 valued the collateral at 85 percent. Do you see that?" "I
8 do." Question: "Okay. When you say M3 valued, who at M3?"
9 Answer: "It's the assumption we were using so it would be
10 myself and the team that we -- that was working with me."
11 Question: "You say that's the assumption you were
12 using. IS that your opinion?" Answer: "It's the assumption
13 we were using was the 85 percent." Question: "So, it's not
14 your opinion?" Mr. Genender: "Objection to form. Asked and
15 answered. Answer: "It's one of the assumptions we made in
16 this document, yes. So, it's my declaration. So, if you
17 want to call it my opinion, but it's the 85 percent."
18 Question: "It's not what I want to call it; it's what you
19 are calling it." Answer: "I'm calling it an assumption."
20 Now, he can't offer value at the petition date
21 anyway, but he's admitting here that he just assumed that
22 that should be the same number. And there's no basis.
23 That's the only thing the Debtors have, and there's no basis
24 for it given that he's calling it, you know, an assumption.
25 Now, it goes further than that because he also

1 called it a proxy for value. But as I pointed out in the
2 very first slide that we used, that he admitted that the
3 Debtors were open for business to sell at retail at the
4 petition date. It was not the going concern sale to ESL.
5 And he admitted that there's a very large difference between
6 selling at retail and selling at business in bulk.
7 This is at 258 of his -- of his deposition, which
8 is designated. Question: "Do you know the difference
9 between selling in stores to retail customers and selling an
10 entire business in bulk to a buyer? Do you think there's a
11 difference between those two things?" Answer: "A very large
12 difference."
13 THE COURT: And what the Debtors were doing was
14 selling it in bulk to a buyer?
15 MR. FOX: At -- in February -- that's correct but
16 --
17 THE COURT: From the start. Or in bulk as part of
18 a liquidation sale?
19 MR. FOX: No, Your Honor. What they were doing
20 was selling their inventory to retail customers who walked
21 in the door --
22 THE COURT: No, but we know that that was not how
23 your clients were going to realize any value. They were
24 never going to get value that way. The Debtor's use of this
25 collateral was to get to -- a way to realize value, which is

1 either the sale as a going concern in the context of also
2 taking offers for overall liquidation. That's the only way
3 they were going to get any money.
4 MR. FOX: Well, two things: One, the Debtors had
5 given indications of the possibility of doing a standalone
6 without a sale. And that -- the presentation they made to
7 the Creditors Committee in, I believe it was November, which
8 was attached to the Transier declaration, and a portion of
9 which I showed you in one of the slides shows exactly how
10 they thought they could get there.
11 The other, though, is even if what they were
12 ultimately getting to was a sale, in the meantime, our
13 collateral, as it existed at the petition date, was being
14 sold at retail. And, in fact, the numbers would suggest
15 that it was virtually all sold. As I indicated, the total -
16 - the revenues were in excess of 3.3 billion. The Debtors -
17 -
18 THE COURT: Okay, I've heard enough on this.
19 MR. FOX: Okay.
20 THE COURT: Thank you.
21 MR. FOX: We talked about the standalone credit
22 facility, 271. I think Mr. Kreller covered the 34 million
23 of the interest on the post-petition obligations.
24 THE COURT: Right.
25 MR. FOX: I think, just to briefly --

1 THE COURT: A creditor truly expects to have a day
2 one going concern retail recovery here. I get it.
3 MR. FOX: No, Your Honor, I think the --
4 THE COURT: Yeah, the answer is no, that's not a
5 reasonable expectation. That's complete fantasy.
6 MR. FOX: I'm not suggesting otherwise, Your
7 Honor.
8 THE COURT: Well, then why give me a $3 billion
9 value? It's just -- it's just a fantasy. That's not a
10 potential recovery here under any scenario that's at all
11 realistic.
12 MR. FOX: No, Your Honor, the 3.3 billion was
13 revenue that was actually generated in the stores during
14 that period of time. That's -- you know, that's what
15 actually happened.
16 THE COURT: If that's what Congress wanted, then
17 the Code would be written completely differently.
18 MR. FOX: Your Honor, let me just -- I'll leave
19 aside the 506(c) points until later, as you suggested. Let
20 me just make sure -- I think there are... Your Honor, I
21 think you indicated on the professional fee carve-out
22 account that you don't believe there's an issue there now.
23 THE COURT: Right.
24 MR. FOX: Okay. If the Debtors have a different
25 view, we'll come and address it.

1 THE COURT: That's fine.
2 MR. FOX: We did include the solvency tracker at
3 Tab 23, which shows the funds that are put in the
4 professional fee carve-out account, the amounts that have
5 been paid. And I'll also not talk about post-closing
6 diminution.
7 Just one last point -- a couple last things. With
8 respect to Aebersold. You know, he was put in -- there was
9 no need to cross-examine him but we did take his deposition,
10 you know, about his indication that he had been hearing from
11 second lien parties pushing for a sale. It's clear from
12 what's been designated, he wasn't hearing from Wilmington
13 Trust about that. He didn't know who -- anybody who was
14 with Wilmington Trust. He couldn't identify them. He
15 clearly, you know, wasn't talking about that. So, I don't
16 think there's any indication that Wilmington Trust was the
17 party that was, you know, doing anything one way or another
18 to push for or to object to a sale.
19 I am a little bit surprised that the Committee
20 seems to be suggesting that, I guess, they would've been --
21 they were pushing for a liquidation because it would've bene
22 better for us, even though it wouldn't have been as good for
23 the estate otherwise. But that's a separate issue. So, I
24 think on that, point, Your Honor, I'll rest at this time.
25 Thank you.

1 THE COURT: Okay. All right.
2 MR. SCHROCK: Your Honor, would it be all right if
3 I take like five minutes before we get started?
4 THE COURT: Yeah, that's fine. I'll come back at
5 1:30.
6 MR. SCHROCK: Okay, thank you.
7 (Recess)
8 THE COURT: Okay, we're back on the record in In
9 re Sears Holding Corp.
10 MR. SCHROCK: Good afternoon, Your Honor. Ray
11 Schrock, Weil Gotshal, for the Debtors. Your Honor, I took
12 the liberty of approaching and setting a shorter handout for
13 you --
14 THE COURT: Okay.
15 MR. SCHROCK: -- as well as for your law clerk.
16 It'll guide some of the comments that I have here in closing
17 argument.
18 THE COURT: All right.
19 MR. SCHROCK: But I'll try and answer the
20 questions that you at least previewed during the course of
21 my presentation.
22 Your Honor is very well aware of the key issues
23 and the legal standards. And on Page 3 I would just note
24 that -- that we do think that the value of -- the correct
25 valuation to use, as of the petition date, is, you know, the

1 value in proposed -- in light of the proposed valuation and
2 the proposed disposition or use of such property as of the
3 moment they begin using the collateral.
4 Now, we came into these cases pursuing a going
5 concern sale but having the option for a liquidation. We
6 did believe that -- and we believe the record speaks for
7 itself as to the value that was actually paid for those
8 assets. But I think before we get into what we disagree
9 about I think it's helpful to look at what's really
10 undisputed. And I'll start with Page 4.
11 I don't think the parties dispute the book value
12 of the collateral. I don't think that the parties dispute
13 the second lien security agreement, terms of it, and that it
14 does not include any specific language regarding pharmacy
15 receivables, scripts, and cash. There's no tracing
16 analysis.
17 Then onto the second lien holders' experts --
18 performed independent valuations of the collateral. And I
19 do think that's meaningful. It is their burden. Every
20 single one of their experts simply assumes valuation. But
21 the whole purpose is for them to actually do a valuation
22 analysis if they're going to try and argue for a 507(b)
23 claim. None of the experts vetted or independently tested
24 the Tiger appraisal work. None of the experts performed
25 valuations of the collaterals of the sale closing.

1 The second lien holders are subject to an inter-
2 creditor agreement subordinate to all senior and first lien
3 debt. Now, Your Honor talked about and had questions around
4 how were letters of credit treated as debt for purposes of,
5 you know, the sale and otherwise in this 507(b) analysis?
6 And I think that it's instructive to look at the inter-
7 creditor agreement to which the parties are bound as of the
8 petition date that's incorporated into the DIP order. And
9 let's just look and see what the inter-creditor says.
10 It says that "The discharge of ABL obligations
11 means, among other things, one, amounts available to be
12 drawn under outstanding letters of credit issued thereunder
13 or indemnities or other undertakings issued pursuant thereto
14 in respective outstanding letters of credit..." and it goes
15 on.
16 Your Honor, there could be no doubt that when a
17 second lien creditor -- and under the terms of this very
18 inter-creditor agreement, those obligations have to be paid
19 in full or cash collateralized before the second lien
20 lenders can recover anything. I think it's also -- we can
21 take judicial notice of the fact that ESL and Cyrus had to
22 cash collateralize the one LC facility. Okay, other parties
23 are saying that you have to put up that cash as an
24 obligation. They obviously -- they counted it for purposes
25 of the APA. It is an obligation that had to be assumed.

1 The fact that it wasn't drawn, I don't believe
2 that really matters, Your Honor, because under the terms of
3 the inter-creditor that they've agreed to be bound by, it
4 had to be paid or taken out before they could recover
5 anything. That's the starting point and that's the ending
6 point when considering that 507(b) analysis.
7 Your Honor, the adequate protection on Page 5, the
8 package is also undisputed that, you know, they are provided
9 with a form of replacement lien super-priority claims,
10 Wilmington Trust fees, among other things to protect against
11 diminution in value. They consented to the use of cash
12 collateral. There is no 506(c) waiver for ESL in any
13 capacity or for the second lien lenders under the terms of
14 the DIP order.
15 The going concern sale, all of the assets were
16 sold. You know, two of the largest second lien lenders are
17 purchasers of the assets and participated in the sale. The
18 second lien lenders, the record is undisputed that they
19 advocated for the sale at all times. And, Your Honor, we do
20 think --
21 THE COURT: Well, what do you mean by advocated?
22 I mean, I don't recall either counsel for Cyrus or counsel
23 for the indentured trustee collateral agent affirmatively
24 advocating for the sale, as opposed to not advocating for
25 some other alternative.

1 MR. SCHROCK: So stipulated, Your Honor. Okay,
2 that's -- you're right. That's probably too far to say that
3 they were in court publicly advocating it. There's not
4 evidence in the record as to what the statements were,
5 certainly behind closed doors. I believe that's the truth
6 but that's, you know, what the record shows is not in
7 dispute.
8 THE COURT: Okay.
9 MR. SCHROCK: Your Honor, their -- they fought to
10 keep this out. But Your Honor did admit, for purposes of at
11 least for how people were thinking about the value of, you
12 know, the collateral, the value of the inventory and
13 receivables, that ESL repeatedly -- okay, they told the
14 Debtors, and Mr. Griffith said in his testimony, you know,
15 before the Court: "Do you recall references to the 85 cents
16 during the meetings?" "Yes." "By whom?" "Moelis and ESL."
17 Throughout the entire negotiations up through the
18 closing, Your Honor, it was -- 85 cents was the value that
19 they were assuming. That was the number that we were all
20 using and that all parties were using in terms of evaluating
21 the bid at the auction.
22 THE COURT: Why can't the results of the GOB sales
23 be as good a proxy for the collateral value?
24 MR. SCHROCK: Well, Your Honor, I think that some
25 of the GOBs -- there were some stores -- I think it's fair

1 to say that there were some stores that were actually set
2 for GOB at the beginning of the case. But what actually
3 happened here was we actually sold the inventory and
4 receivables, we would submit, for 85 cents. So, to look at
5 just the GOBs in some hypothetical that didn't occur with
6 respect to all of the inventory, I don't think that's as
7 good of evidence.
8 THE COURT: No, I understand the "all of the
9 inventory" point. But in the stores that went through GOB
10 sales, they sold inventory, right? I mean, they sold --
11 MR. SCHROCK: Yes.
12 THE COURT: So, I'm being told that the results of
13 those sales resulted in a -- after four-wall costs, you
14 know, 95 percent of the book value.
15 MR. SCHROCK: I think it was -- yeah. When
16 considering only eligible inventory, the NLV would be --
17 yeah, around 95 percent.
18 THE COURT: Well, it's unclear to me what is in
19 those sales. Whether it's eligible inventory, whether it's
20 all inventory and what percentage, etc. But --
21 MR. SCHROCK: And, Your Honor, we --
22 THE COURT: -- do you have something to show that
23 the 95 is just of eligible?
24 MR. SCHROCK: Your Honor, I think that the
25 relevant inquiry is whether or not the second liens have

1 submitted evidence that the 95 percent includes only
2 eligible inventory or what specifically is a component part
3 of that. They just have a gross number that includes the
4 results of the GOB sales. They had an opportunity to
5 present evidence to show what exactly those numbers were.
6 But all their -- their so-called experts did was assume that
7 number.
8 And so, Your Honor, I don't think that, you know,
9 I'm prepared to sit here and say one way or the other
10 around... I know the 95 percent did not include all of the
11 costs associated with the GOB sales. I know that when we
12 evaluated the Tiger bids in connection with comparing the
13 ESL sale to liquidation that we had to back out all of --
14 you know, Tiger was going to use the company's employees.
15 They were going to use -- these were going to be company-run
16 GOBs. These were not guaranteed results. These are just
17 something that they could forecast. And we had to back out
18 all of the costs associated with running the business and
19 operating it to arrive at a net-realizable amount.
20 Now, those amounts are not in the record and
21 they're not in the record, Your Honor, because, frankly, we
22 didn't believe that was the right method to go down to
23 actually value the inventory when we, in fact, had a going
24 concern sale. But, Your Honor, they certainly -- the second
25 liens never put that evidence into the record.

1 The second liens don't dispute that they received
2 100 percent recovery on 433,450,000 of the credit bid.
3 That's part of the record. That's what they received. And
4 they don't dispute that the first lien letter of credit
5 facilities were refinanced at the sale, and that was
6 certainly an assumed liability.
7 The -- we've talked a little bit about the -- what
8 ESL side during the course of the negotiations. I think
9 that that evidence is uncontroverted. It certainly is
10 instructive. We have the second lien lenders saying there
11 is no -- there's no allocation. Well, if there's no
12 allocation, they don't have any evidence of what was
13 actually paid for for the inventory. All they have is a
14 hypothetical that they point to about what NOLV was. That's
15 not the law, that's not what the purpose and the proposed
16 use of the inventory was as of the petition date. We'll let
17 those exhibits speak for themselves.
18 THE COURT: Well, are you saying that the going
19 concern sale was for a lesser amount than orderly
20 liquidation value?
21 MR. SCHROCK: Your Honor, it was -- the NOLV and
22 the book value and the 85 percent, it's a little bit apples
23 and oranges because the NOLV only counts eligible inventory.
24 So, for instance, when you do the math around Ms. Murray's
25 calculation -- you know, if you use our numbers on the book

1 value or, sorry, on the NOLV, we would be at 95.6 percent
2 under Mr. Griffith's calculations. That's the rough justice
3 on the equivalent math that we outlined on the record. We
4 would be at 95.6 percent. Ms. Murray would be at 88.7
5 percent.
6 I think that whether or not, you know, we would
7 actually -- we believe that by running the sale process, we
8 did increase the value of the assets. I think that nobody
9 really took into account the fact that this was going to be
10 an unprecedented liquidation. We didn't know -- the truth
11 is we didn't know what was going to happen if we put the
12 entire Sears chain up through liquidation through, you know,
13 over several months. And you put -- and you flooded the
14 market. And all of -- everybody we contacted about a
15 liquidation certainly said that. That we're not certain
16 what's going to be recovered on account of -- on account of
17 the inventory if you put it all out there at the same time
18 and run it on an expedited basis.
19 I think that, you know, by actually running the
20 sale process, if you'd have went through the NOLV, we do
21 think that the value actually -- you obtained a higher value
22 by going through the process and running the sale process,
23 but that's what was always contemplated from the moment that
24 we started.
25 At the first -- at the petition date, there was no

1 right to credit bid. There was only a process that we had
2 to go through that included the subcommittee investigation,
3 a lengthy process to get through the case. And only by
4 going through this process and incurring the actual cost
5 were we able to get to a point where the second lien lenders
6 could have the right to credit bid through an order that
7 Your Honor -- or a ruling that Your Honor made in January.
8 Without it, the second line lenders, we believe, would've,
9 in fact, covered substantially less. And they certainly
10 wouldn't have had the right to credit bid, you know, going
11 straight into a liquidation and we believe under those facts
12 and circumstances.
13 Now, Your Honor did -- you know, you approved the
14 bid procedures. You had a process to follow. That's what
15 really happened in this case. But what's strange is nobody
16 talks about what the real costs were involved in the case
17 other than the Debtors. There's a hypothetical cost
18 structure and an NOLV to try and arrive at, I think, at a
19 relatively inflated number for a 507(b) claim. But nobody
20 goes through and actually details what happened during the
21 case in terms of the costs that were incurred and what
22 should be broken out, other than the Debtors.
23 Mr. Griffith goes through that in detail. I
24 haven't seen or heard any testimony, you know, really
25 criticizing -- they criticize that he didn't do a careful

1 enough job but there's nothing that actually goes through
2 and outlines and details what they believe the right 506(c)
3 charge -- you know, should be, other than on a hypothetical
4 basis, not really on an actual cost basis as to what was
5 incurred in this case.
6 We think that if Your Honor looks at -- I believe
7 it's Slide 11, which is just our chart that we had come back
8 to time and time again. We really do believe it's this
9 simple. That if you looked at the petition date what they
10 would've recovered -- and, listen, this was, frankly, being
11 generous at the 85 cents that they could ever get there --
12 and then look at what they did recover, they recovered more.
13 There is no 507(b) claim in this case. And we certainly
14 don't think that the second lien lenders have carried their
15 burden to prove to this Court that there is a 507(b) claim.
16 The second lien lenders did obtain substantial
17 benefits during the course of this case, including, you
18 know, the credit bid, the allowance of their claims, they
19 got a credit bid release, they got a Cyrus release in
20 exchange for pursuing this sale. And, Your Honor, I don't
21 think that those items should really be discounted when
22 you're looking at the equities as to whether or not there
23 should be a 507(b) claim that's allowed by the Court in this
24 case.
25 Your Honor, none of the second lien experts valued

1 the collateral in accordance with the case law using a fair
2 market value approach, as was used -- and what was actually
3 paid for during the course of the sale. Instead, they go
4 through and assumed valuation without testing it, without
5 questioning it, without doing anything else other than just
6 taking it and plugging it into a model for what would've
7 happened if the company were to move into an NOLV, with
8 regard to two of the experts. Mr. Henrich's valuation
9 methodology -- you know, we're not going to spend a lot of
10 time on that. We don't believe that that's very credible.
11 Now, the second lien's experts, you know, do take
12 -- they do -- all of them do include the inventory and the
13 credit cards -- or, sorry, the pharmacy accounts receivable.
14 And I think it's noteworthy, Your Honor, that -- you know, I
15 didn't hear any explanation around why the second lien
16 security agreement wouldn't go through the trouble of
17 actually outlining what their collateral package would be
18 here. I don't understand how, you know, a script is
19 included within books and records. It's a right to -- you
20 know, for a customer list. And they are sold, as Your Honor
21 is very well-aware, you know, in this case and other cases -
22 - you sell scripts and you sell those script lists to other
23 authorized providers of prescriptions when you sell them to
24 a strategic buyer. So, CVS, you know, Walgreen's, other
25 parties that come in here.

1 But you don't have anything in the record that
2 says why would you have a security agreement that would fail
3 to enumerate cash, would fail to enumerate the pharmacy
4 scripts?
5 THE COURT: Well, I understand the cash point, but
6 as far as the -- except as far as proceeds go -- but as far
7 as scripts, why wouldn't it be included in books and
8 records? It's a record of your customers that have
9 prescriptions that have been written.
10 MR. SCHROCK: Your Honor, I don't think it's a
11 book and -- to me it's not a -- it's a right to issue a --
12 it's a right to issue a prescription to a customer. I don't
13 believe it's -- technically, it doesn't appear to be like a
14 book -- you know, a ledger or anything that I would consider
15 like a book and record.
16 The books and records also refers back to, I
17 believe, the underlying collateral package. So, it's the
18 books and records related to the other items that are
19 enumerated as part of the collateral package. And that
20 would be relatively circular if you just included books and
21 records that, you know, were allowed to, you know, pertain
22 to something that's not even enumerated.
23 THE COURT: This is a question for everyone. Are
24 there -- the parties (indiscernible) find any cases that
25 treat customer lists as being covered by books and records?

1 MR. SCHROCK: We're not aware of any, Your Honor.
2 THE COURT: No? No? Everyone's shaking their
3 head no.
4 MR. SCHROCK: And, Your Honor, I mean, the fact
5 that you have one security agreement that lists pharmacy
6 receivables, prescription lists, cash and cash equivalents,
7 and you have another that doesn't, you know, that's
8 certainly -- and it's -- you know, it's not like we're
9 talking about parties that are not... The same parties were
10 in both agreements.
11 THE COURT: But it doesn't --
12 MR. SCHROCK: In the case of ESL.
13 THE COURT: But to me, that just -- that doesn't
14 necessarily mean that it's not covered if it's within an
15 accepted definition. I mean, going to the pharmacy
16 receivables, for example...
17 MR. SCHROCK: Mm hmm?
18 THE COURT: It just has the word pharmacy in front
19 of it. I mean, it's still a receivable. So, to me that's--
20 MR. SCHROCK: Yes, but --
21 THE COURT: I don't see why that wouldn't be --
22 wouldn't be collateral, if you have a right to inventory and
23 the proceeds thereof. And that the pharmacy assets are just
24 like any other assets except they're connected with the
25 pharmacy and there are regulatory issues related to them.

1 But you sell them and then you collect on them.

2 MR. SCHROCK: Yeah, fair enough, Your Honor. I

3 mean, they do have a right -- and if you look at -- we put a

4 side-by-side for you on page -- on Slide 15.

5 THE COURT: Right.

6 MR. SCHROCK: Just to, you know -- they do have a

7 lien on inventory. You know, they have a lien on documents

8 related to inventory. I suppose if you were -- if you're

9 going to try and say that somehow it was a document related

10 to an inventory. But that books and records refers back to

11 the collateral package itself. And, again, I think it's

12 very circular to try and argue that well, it's included as

13 part of the collateral package.

14 THE COURT: No, I understand that argument on the

15 scripts. I'm more focused on pharmacy receivables because

16 that's a different -- it's anywhere from 10-1/2 to 14-1/2 in

17 the three 2L experts' reports, and it's given zero value by

18 the Debtors. But, I mean, a receivable is a receivable,

19 whether it has pharmacy in front of it or not, it seems to

20 me.

21 MR. SCHROCK: Yeah. And, Your Honor, they -- I

22 mean, when I'm looking -- I'm just looking at the collateral

23 package here. They have credit card accounts receivable,

24 inventory...

25 THE COURT: Yeah.

1 MR. SCHROCK: But they don't have --
2 THE COURT: But it extends to proceeds of the
3 foregoing.
4 MR. SCHROCK: It does.
5 THE COURT: Right.
6 MR. SCHROCK: It does. But it doesn't -- they
7 don't have a general lien on all -- on all accounts... The
8 accounts receivable is limited to credit cards.
9 THE COURT: No, I understand. But you would have
10 proceeds of inventory.
11 MR. SCHROCK: Yes. Yes, you would.
12 THE COURT: And once you collect on the AR, that's
13 proceeds.
14 MR. SCHROCK: Although I would say generally on
15 the AR, you know, that's -- you know, again, I mean, I
16 guess, to the extent it's from a credit card, that's right.
17 To the extent that I would agree with it -- to the extent
18 it's related --
19 THE COURT: Well, the thing is, the credit card
20 receivable isn't necessary a proceed of inventory.
21 MR. SCHROCK: Correct.
22 THE COURT: Because of the credit card
23 relationship. So, I could see why that would be separately
24 listed. Because you can't get there from just having a lien
25 on inventory and the proceeds thereof.

1 MR. SCHROCK: Right.
2 THE COURT: Because you go through the credit card
3 issuer.
4 MR. SCHROCK: Right.
5 THE COURT: Anyway...so...
6 MR. SCHROCK: But, Your Honor, I think --
7 THE COURT: So, maybe you win one out of two on
8 those.
9 MR. SCHROCK: But -- but, Your Honor, I mean,
10 again, I do think it's noteworthy that -- you certainly can
11 take judicial notice of the fact that there's -- the same
12 lenders are parties to each of these --
13 THE COURT: Maybe they have different lawyers, I
14 don't know. I mean, I don't --
15 MR. SCHROCK: They certainly did not.
16 THE COURT: But that doesn't really matter if you
17 can get a perfected lien on the description in the 2L
18 security agreement, right?
19 MR. SCHROCK: Mm hmm.
20 THE COURT: I mean, just because other people --
21 you know, other people draft it differently... I've not
22 been -- put it differently. I've not been given any law
23 that says that you've waived your right to certain proceeds
24 if you don't -- if you enter into another agreement that
25 specifies the right to those proceeds.

1 MR. SCHROCK: Yeah, I agree, Your Honor. I do
2 think that the DIP order did certainly note that there's a
3 category of collateral that the second liens don't have.
4 When they kind of go through the recitals, they talk about
5 it being specified, you know -- certain specified collateral
6 of the ABL lenders that's not party to -- or that the second
7 liens don't have.
8 THE COURT: Right.
9 MR. SCHROCK: I think that certainly every
10 analysis that the Debtors have ever done, we never thought
11 that they did -- and I certainly, you know, up until this
12 507(b) argument, I'd never really heard about the pharmacy
13 receivables, and script lists, and cash and cash equivalents
14 --
15 THE COURT: Well, they don't have a lien on cash
16 except for traceable proceeds, and they don't have a lien on
17 --
18 MR. SCHROCK: And they haven't done any tracing.
19 THE COURT: Right. And they don't have a lien on
20 scripts, I don't think.
21 MR. SCHROCK: They have credit card account -- I
22 mean, to the extent... I mean, when you think about it,
23 what are we really talking about? So, pharmacy receivables
24 versus prescription lists. I think that the scripts, those
25 are meaningful, right? You sell those in a GOB. A pharmacy

1 receivable, as opposed to a credit card accounts receivable
2 -- I would think that's a pretty narrow universe of items.
3 But we don't -- you know, unfortunately, we don't have
4 anything in the record kind of enumerating what that would
5 even be. But, you know, when we looked through this I said,
6 well, it's hard to -- when you look at what's a pharmacy
7 receivable, it seemed to be they were just drafting
8 carefully.
9 But a list -- there's not a prescription, there's
10 nothing in the grant of collateral that's around a
11 prescription list for -- and no one certainly argued it.
12 THE COURT: Right. Well, the experts have a value
13 between 10-1/2 and 14-1/2 million for pharmacy receivables.
14 They're getting it from somewhere, I'm assuming. Because
15 they haven't independently valued them -- they're getting it
16 from the Debtor's books and records.
17 MR. SCHROCK: Right.
18 THE COURT: Just the face value, right? Although
19 someone's discounted it.
20 MR. SCHROCK: Right. But, Your Honor, I'm not
21 aware of anybody ever, you know, speaking of that -- just
22 kind of prosecuting a 507(b) claim where they don't actually
23 do a valuation. There's no valuation that comes from the
24 parties that are asserting a 507(b) claim in this case. All
25 they do is rely on one -- a part of one for -- from Abacus.

1 There's nothing in the record that they even did.
2 They didn't vet it. They didn't test it. They didn't try
3 and get the rest of the -- they could've brought Abacus in
4 here. They could've asked a lot of questions around it. We
5 weren't going to do that because it wasn't our burden, but I
6 don't know how someone satisfies their burden to prove that
7 there's a 507(b) claim when you don't even do a valuation.
8 They didn't even perform one in any regard. They
9 did a math and there was a methodology, I think a flawed
10 one, about what would happen if there was a liquidation of
11 the business, but that wasn't our plan, that's not what
12 happened. And then you look at what's the end test result.
13 We don't know. We don't know what the end test result is.
14 There's no... you know, "Mr. Schrock said there's no --
15 there's nothing in the record about that so we can't tell
16 you." Those two things together don't add up of proof of
17 anything.
18 The -- every one of these experts understate the
19 first lien debt. To me, it would just turn everything on
20 its head if you say that you signed an inter-creditor
21 agreement and you can't get paid anything until the
22 discharge of the ABL obligations, in which you sign a
23 contract that include the LC obligations and including cash
24 collateralization up to 105 percent -- you then get -- those
25 agreements are then... But you can't get paid anything

1 until those things occur. Your liens are subordinated. But
2 somehow now, because we've refinanced them as part of the
3 sale in which the second lien lenders, the largest ones
4 participated in, that now there's -- they -- you know, you
5 don't even count that, count that amount.
6 And if you're going to use an NOLV, Your Honor,
7 and, honestly, I don't know where you were headed on this,
8 but how can you not include the LCs that would have to be
9 paid in a liquidation? A liquidation, by definition, you
10 have to pay off all of the ABL obligations including...
11 Now, that's what the inter-creditor really does. It talks
12 about what happens if the music stops. And if the music
13 stops, those amounts have to be paid. That's what the
14 record is in these cases.
15 Your Honor's already hit that the sale process --
16 nobody really questions what happened in the cases as far as
17 the Debtors running a fair sale process. They don't say
18 that that was, you know, an unfair way to conduct the cases.
19 They don't talk about that, you know -- there was no
20 criticism, and those statements are in the record
21 uncontroverted. And we think that's meaningful because,
22 again, when you look at the equities and you also, when you
23 look at what would actually occur to yield a fair market
24 value sale of the collateral in these cases.
25 I'm going to let the Unsecured Creditors Committee

1 hit a lot of the equities in determining whether or not
2 there should be a 507(b) claim here. But I'll just
3 emphasize, Your Honor, that when you really look at what
4 happened in these cases, and it was not -- as Your Honor is
5 well-aware, it wasn't for certain by any stretch that we
6 were going to be able to save the company, that we were
7 going to be able to sell these assets on a going concern
8 basis. And it was by far the largest second lien lender
9 that was the purchaser of that -- those assets.
10 The second lien lender that also, you know, helped
11 finance those assets and is, you know, an owner to some
12 degree, I presume, in Transform Co -- that those parties are
13 now able to come back after there was such a heavy fight
14 around liquidation to say we want a large 507(b) claim in
15 these cases in addition to this. Especially when you
16 consider the language that was agreed to as part of the APA
17 sale order.
18 THE COURT: Well, but doesn't that cut the other
19 way? I mean, ESL reserved the right, although capped, to
20 make or file a 507(b) claim. So, it's kind of hard to argue
21 that they waived it when they reserved it.
22 MR. SCHROCK: They didn't waive it, Judge. I
23 think that's, you know, one of the reasons that -- and, you
24 know, listen, the law we point to is 503(c)(3). That, you
25 know, Your Honor is certainly allowed to take into account

1 the facts and circumstances of the case to determine whether
2 or not that there should be, you know, a claim granted in
3 these cases.
4 THE COURT: Well, I'm sorry, 503(c)(3)?
5 MR. SCHROCK: Yes.
6 THE COURT: Why would that be applicable?
7 MR. SCHROCK: Because I think that other transfers
8 or obligations are outside the ordinary course of business
9 and not justified by the facts and circumstances of the
10 cases -- that's within the gambit of 503. And there's
11 nothing in the DIP order that says that that provision is
12 waived or that Your Honor would not be taking that into
13 account.
14 THE COURT: So, you're saying that the 507 claim,
15 as far as insiders, which would be ESL --
16 MR. SCHROCK: Yes.
17 THE COURT: -- is concerned, is actually governed
18 by 503(c)...?
19 MR. SCHROCK: I think it's relevant, Your Honor,
20 just according to the text. I admit, I have not seen any
21 cases to this effect but we will... I don't think that we
22 need to get there in order for the Debtors to prevail.
23 THE COURT: Because this really applies to
24 inducing the person to stay.
25 MR. SCHROCK: Well, that's certainly the

1 subsection, yes, Your Honor. But that's not to what -- by
2 its plain terms, that's what it would apply to. It applies
3 to insiders.
4 THE COURT: I mean, there are a few cases that
5 apply equitable principles to a 507(b) claim. They're
6 fairly old. They predate Flagstaff. And they actually stem
7 from a case that Flagstaff disagreed with, although that was
8 in a 506(c) context.
9 MR. SCHROCK: Your Honor, I do think that the
10 equities in this particular case, and especially when you
11 hear from the Unsecured Creditors Committee, that they
12 certainly -- they oppose the sale. That's not the way this
13 case worked out. But to say that those parties that
14 actually purchased the assets, who agreed to a cap, as in
15 large part, as part of their -- you know, the APA, are now
16 allowed to basically take everything from the unsecured
17 creditors in these cases.
18 That's not, I would submit, you know, as a
19 restructuring professional, as somebody who lived this, that
20 doesn't seem like the right outcome here in light of all the
21 facts and circumstances. But, Your Honor, I'll let them --
22 I'll let the Creditors Committee discuss more of the
23 equities.
24 THE COURT: Okay.
25 MR. SCHROCK: On 506(c), Your Honor, only the

1 Debtors put forth evidence of the actual cost in these
2 cases.
3 THE COURT: But the 2Ls put holes in that.
4 MR. SCHROCK: They talked about certain things
5 that they would do differently in the context of the
6 liquidation but, you know, Mr. Griffith's testimony -- and
7 we go through the categories on Page 26 -- his testimony
8 around the actual cost, it's uncontroverted. This is a
9 retailer. The stores exist so we can sell the inventory and
10 collect on the credit card receivables. The employee
11 payroll, the rent, the logistics, the professional fees, all
12 of these expenses, Your Honor, by line item -- and this is
13 somebody from M3. I mean, Mr. Griffith has been on the
14 ground with the Debtors for a couple of years. He's very
15 familiar with the business and he's the only person that
16 spoke to "here's what I believe and we think is fair to
17 allocate to the second lien collateral."
18 And when you think about it, for a retailer, if
19 you're not allocating it to this, you know, what else are
20 you -- you know, there may be some other costs. And he
21 didn't allocate everything, but anybody who --
22 THE COURT: I mean, the case law refers to there
23 needing to be a reasonable relation between the cost and the
24 collateral.
25 MR. SCHROCK: Mm hmm.

1 THE COURT: This seems to be way out of whack from
2 that.
3 MR. SCHROCK: Well, Your Honor --
4 THE COURT: And, secondly, I can certainly think
5 of other beneficiaries of the case -- landlords...
6 MR. SCHROCK: Yes.
7 THE COURT: ...503(b)(9) claimants whose
8 obligations were assumed...
9 MR. SCHROCK: Yes.
10 THE COURT: ...employees, PBGC. I mean, it may be
11 that these are legitimate quantifications of expenses.
12 MR. SCHROCK: Yes.
13 THE COURT: But I don't see how this shows that
14 they were primarily for the benefit of the 2L creditors.
15 MR. SCHROCK: Well, Your Honor --
16 THE COURT: Except, you know, in a much smaller
17 subset that may be included in -- already in valuations of
18 the inventory and receivables, or largely already included
19 in. I mean, legal is clearly not included in this.
20 MR. SCHROCK: Legal is not included. But if Your
21 Honor is going to use -- if you were to use NOVL to start,
22 which I will say again, that's not what happened here -- you
23 know, we had a fair market sale of the assets. When you
24 look at the employees, the company exists to run a retail
25 operation to sell the inventory. There may be some indirect

1 overhead that Your Honor can choose to exclude but certainly
2 all of the employees in the stores.
3 THE COURT: Well, that's if you assume the
4 inventory is the retail value. I understand -- I mean, I
5 think -- I understand that point if you go with the legal
6 analysis that would lead to Mr. Henrich's valuation.
7 MR. SCHROCK: Mm hmm.
8 THE COURT: But I think you can just as easily say
9 that the real value of the collateral is something much more
10 narrow than that, which is the value of the 2L lenders'
11 interest and the Debtors' interest in that collateral, which
12 I think is much more reduced to what they would be able
13 likely to achieve.
14 And then you may have equities that go into the
15 fact that they didn't insist on doing that at the beginning,
16 although they did consent to let the process go on.
17 MR. SCHROCK: They consented to (indiscernible) so
18 they're flat --
19 THE COURT: And one of them very actively
20 participated in that process. And one of them knew that by
21 lending to the process, it was going to go on two months
22 longer than --
23 MR. SCHROCK: Yeah.
24 THE COURT: -- in a net orderly liquidation value.
25 But leaving that aside, I mean, I think that counsel for

1 Cyrus made what I thought was a pretty good point, which was
2 that although she used net orderly liquidation value, that's
3 basically a way to value the collateral, even in the hands
4 of the Debtor because, again, it's their interest in the
5 collateral.
6 But that would assume that except for narrow
7 categories that specifically relate to that collateral, the
8 idea that the business operates for their benefit doesn't
9 really fly. The whole business.
10 MR. SCHROCK: Yeah, I thought it was interesting,
11 Your Honor, when you actually use the math -- NOLV again is
12 only eligible inventory. You know, I believe that would
13 bring Ms. Murray's value around 88.7 percent. We actually
14 used a higher value.
15 THE COURT: I understand. This --
16 MR. SCHROCK: Ours was 95.6.
17 THE COURT: Well, I understand. But she's -- it's
18 a different analysis because it looks at not the GOB sales
19 but the value in place.
20 MR. SCHROCK: But, again, Your Honor, I mean, we
21 ran a sale process and we sold the inventory. Your Honor,
22 we sold the inventory for 85 cents. We incurred all of
23 these costs to get there, to run the case. And it's not --
24 you don't -- you know, you have to allocate, you know --
25 I've seen, you know, ResCap -- certainly Judge Glenn on

1 ResCap, he actually -- because there was -- in part, I
2 think, because there was a 506(c) waiver there, he actually
3 includes the cost for the starting delta of the 507(b)
4 claim.
5 But where there is no 506(c) waiver, we incurred
6 1.4 -- you know, a billion and a half dollars' worth of cost
7 to get to the sale, okay? And then, you know, to say that
8 there's -- that they get to use a hypothetical NOVL, which
9 didn't occur, as a way to value --
10 THE COURT: Well, it's two different -- I think
11 we're talking about two different points.
12 MR. SCHROCK: Okay.
13 THE COURT: You don't really have a valuation to
14 support the 85 percent either. It was just --
15 MR. SCHROCK: No, we just have what happened in
16 the case.
17 THE COURT: Well, except as reflected in the
18 record, that's -- that consists of deal proposals...
19 MR. SCHROCK: Yes.
20 THE COURT: ...which were not the final proposal,
21 where parties were talking around 85 percent...
22 MR. SCHROCK: Mm hmm.
23 THE COURT: ...testimony that parties were talking
24 about 85 percent, which is consistent with those deal
25 proposals, and a final agreement that doesn't have an actual

1 allocation where it says 85 -- it doesn't really say 85
2 percent. You get there by doing math, including some of the
3 debt.
4 MR. SCHROCK: Right. But, Your Honor, what did
5 the second liens put up for the value, the sale value?
6 THE COURT: Well, I'm just --
7 MR. SCHROCK: I don't think they put up anything
8 but, you know...
9 THE COURT: Well, they -- there is, in essence,
10 two of the experts basically look at book value and do no
11 valuation on that other than valuing the Debtors -- a retail
12 -- Mr. Henrich valued the Debtors a retail enterprise and
13 basically said that's our value.
14 MR. SCHROCK: Mm hmm.
15 THE COURT: And then Ms. Murray, I think, applied
16 a fairly traditional approach to valuing inventory and
17 receivables.
18 MR. SCHROCK: Right, but not what actually
19 happened in the case. I don't know how someone can argue,
20 Your Honor, that we are submitting there is no proof of what
21 was actually paid for the assets but yet -- but they have to
22 make their case.
23 THE COURT: Well, their only proof is in the
24 actual GOB sales, and that doesn't reflect all the cost.
25 MR. SCHROCK: It does not reflect all the cost.

1 Abacus is, you know --
2 THE COURT: So, why doesn't Ms. Murray's analysis
3 actually kind of dovetail that when you actually factor in
4 the cost?
5 MR. SCHROCK: Your Honor, I believe that if you're
6 going to use anyone's, okay, you know, I would stipulate on
7 their side that Ms. Murray's would be -- holds together the
8 most --
9 THE COURT: I mean, I'm not asking you to agree
10 that she should include the cash, the scripts, or the full
11 value of the inventory in transit. But other than that, it
12 does seem to be a valuation. I appreciate she relies
13 heavily on Tiger, but she also doesn't say Tiger -- I mean,
14 she does say that she has experience valuing these types of
15 assets and she sees nothing to criticize at Tiger's number.
16 MR. SCHROCK: Yeah, but, Your Honor, I think what
17 Ms. Murray and all the experts do -- not one of them
18 actually performs a valuation of what occurred. All they do
19 is run, you know, some calculations based upon relying on
20 the work of another party, who's not in front of the Court,
21 and their complete analysis is not in front of the Court,
22 and run from what actually happened in these cases. That
23 they bought the collateral for 85 cents.
24 THE COURT: All right. Although I don't really
25 have that in the record either. I have indications that

1 people were talking around that number.

2 MR. SCHROCK: Your Honor, we don't have a final

3 agreement that denotes the 85 cents. What we do have is the

4 value of the first lien debt, we have the book value of the

5 inventory and a starting point, and we have a credit bid

6 where they actually received 100 cents on the dollar. And,

7 you know, other than the parties who were subordinated, you

8 know, it's by the two parties that purchased and were in

9 involved in the purchase of the assets of the company.

10 THE COURT: Right. So, what is your response to

11 the citations to Abacus and indicative proposals by other

12 liquidators, and the creditors' committees, and Debtor's

13 statements, all of which sort of revolve somewhere between

14 89 and 92 percent? Is it that we don't know what that's a

15 percent of?

16 MR. SCHROCK: We don't. You know, there -- these

17 are -- you know, these are -- first of all, the Abacus, you

18 know, bid, when you look at it, doesn't have all of the

19 costs, and the second liens never put in or even attempted

20 to try and put in a complete notion of what -- you know,

21 what all of those included. There's a number of costs that

22 would have to come off of the Abacus.

23 You know, Abacus, again, they're not buying the

24 inventory. They're using all of the company's employees.

25 THE COURT: To sell the inventory.

1 MR. SCHROCK: And to get a net realizable value,
2 which was substantially below, in our estimates, you know,
3 below the 85 cents that, you know, I guess, that we actually
4 compared it to when we, as a board, you know, agreed to sell
5 the assets of the company.
6 But my response to that, Your Honor, is just,
7 again, that is not -- that's not what happened in these
8 cases. It's a data point, just like the data point that ESL
9 was trying to talk the Debtors into taking their bid by
10 buying the collateral for 85 cents. They were pleading with
11 us, they were writing letters to everyone that would listen
12 -- we're paying you more than you're going to get on a
13 liquidation basis -- we're giving you 85 cents.
14 And when you actually subtract it out, you know,
15 those are -- coupled with the risk associated with actually
16 undertaking an unprecedented liquidation of an iconic
17 retailer, that what was going to happen by dumping all of
18 this inventory onto the street and trying to sell it over
19 the course of six months during the first six months of the
20 year, we believed you're going to get a higher value by
21 actually pursuing the sale. But if you look --
22 THE COURT: So you're saying, in essence, that's
23 inequitable -- it's inequitable for them at that point to
24 then say they actually lost value?
25 MR. SCHROCK: Yes. Yes. I mean, it is certainly

1 inequitable --

2 THE COURT: Although that's just ESL. That's no

3 one else.

4 MR. SCHROCK: I submit it's also Cyrus, Your

5 Honor, but -- and then there's the parties who are

6 subordinated and they're out of the money under all

7 circumstances. Your Honor, we do think the 506(c)

8 surcharges were necessary and reasonable and a direct

9 benefit to their... I think that Mr. Griffith's testimony,

10 again, he was the only one that talked about the actual

11 costs incurred in the case. That, you know, he's broken

12 them out, and we go through this on Slide 27, around, you

13 know, what actually was -- what was actually borne by the

14 estate. These are real costs that were actually incurred by

15 the company. And you can't controvert that by just pointing

16 to a hypothetical and submitting that that's a better record

17 on which the Court should rely.

18 And I know Your Honor's familiar with this, but

19 the purpose behind 506(c) is to prevent unjust enrichment, a

20 windfall to a secured creditor at the expense of the estate.

21 They didn't have a 506(c) waiver. We know this. If you

22 would buy their argument, Your Honor, they're saying that

23 we're not going to devaluate any of the actual cost in these

24 cases. We're going to use a net -- NOLV and we're going to

25 insist that none of the cost -- actually, there's a zero

1 506(c) surcharge.

2 Now, Ms. Murray does, you know, say that there is

3 some amount here, but this amount, the 506(c) surcharge, we

4 believe dwarfs any legitimate 507(b) claim that's in these

5 cases. And we go through the actual cost and, Mr. Griffith

6 does, what happens after, you know, post-sale as well.

7 That, listen, there was some inventory that

8 actually existed that, you know, has been -- that has been

9 spent. But when you look at the 506(c) surcharges that are

10 allocable to that inventory from the petition date through

11 these cases, there's certainly nothing that we believe that

12 would entitle them to any recovery on account of a 507(b)

13 claim.

14 So, Your Honor, I'm not sure if I answered all of

15 your questions but I'm -- I'll reserve the right to stand

16 back up if parties are going to retort on the 506(c) issues

17 and I'll let the Creditors Committee get up at this time.

18 THE COURT: Okay.

19 MR. SCHROCK: Thanks.

20 MR. SORKIN: Good afternoon, Your Honor. Joseph

21 Sorkin, Akin Gump, on behalf of the Official Committee of

22 Unsecured Creditors. Your Honor, I think we've covered most

23 of what there is to talk about and what I would cover. So,

24 I think I will be brief. I think it's important, though, to

25 bring it altogether -- excuse me -- and focus just for a

1 minute on the equities. But those equities also play into
2 the proposed theories of recoveries that each of the
3 Claimants have put forth here and why the equities, both
4 with respect to equitable arguments and why the fundamental
5 premise of those theories fails.
6 Your Honor, the Committee approaches this dispute
7 or comes to this dispute having lived the realities of this
8 case. The second lien parties are effectively in their
9 request for 507(b) claim attempting to ignore those
10 realities.
11 We heard this morning ESL talk about the policy
12 behind adequate protection legislation and what was meant.
13 What we didn't hear talked about and there is no case law
14 that says you look at a second lien lender or any secured
15 lender independent of every other action they take in the
16 case. In this case, you have to look at ESL as ESL not from
17 the petition date but as ESL throughout the entirety of the
18 process and the advocacy and the forcefulness with which
19 they pursued a going concern sale, which is exactly what
20 happened from the time of filing.
21 So, again, I don't think there's really any
22 dispute here. I think the level of aggressiveness
23 culminated with what is Joint Exhibit 25, excuse me, the
24 January 7th letter threatening litigation if the debtors did
25 not pursue the going concern sale. And in just a minute

1 we'll talk about each individually -- ESL, Cyrus, and
2 Wilmington Trust -- with respect to the experts they've put
3 forth.
4 Now, Cyrus has understandably attempted to
5 distance itself from ESL and look at each decision in a
6 vacuum. But the Committee argues that you can't do that.
7 You have to look at what Cyrus has done and how it's
8 approached its actions in the entire case because it was
9 those actions that allowed for financing first of the junior
10 DIP and then a rollover in connection with the sale of that
11 DIP.
12 In addition, none of the second-lien parties
13 advocated for anything other than going concern sale or the
14 sale to ESL. So, again, all of that taken together
15 establishes that the second-lien parties without their
16 actions, or inactions in some case, there would not have
17 been a going concern sale. Absent those second-lien
18 parties, no going concern sale would have happened. And,
19 again, the Court cannot, and there's no authority that's
20 been cited nor that we found that says the Court looks at
21 and ignores the actions taken by the second-lien parties
22 separate from their status as second-lien parties.
23 And that is why, and especially for the Committee
24 given the history of this case, the arguments in support of
25 the second-lien parties' 507(b) claim and against the

1 surcharge are so jarring and so -- such a difficult pill to
2 swallow. So if we look at them individually, first ESL,
3 Your Honor.
4 So ESL has put forth an expert that says the
5 appropriate value look at -- again, not a valuation. We
6 agree one hundred percent with the Debtors that the second-
7 lien parties have not met their burden. They have put forth
8 an expert who takes book value, and I think the discount
9 amounted to less than one percent that was applied to come
10 to the value. Now, if you were to ask ESL how ESL viewed
11 the value of that inventory, well, there's been a lot of
12 talk about the 85 cents. What the 85 cents shows, setting
13 aside whether or not it shows the value of the assets -- we
14 believe it does -- set that aside, what it clearly shows is
15 that ESL believed that the value of the inventory was far
16 less than a small one percent discount.
17 So, again, it is that argument, the fact that ESL
18 now comes to this Court --
19 THE COURT: I'm sorry. Why is that? Why should I
20 assume ESL thought that?
21 MR. SORKIN: Because ESL in its own documents in
22 connection with presenting its bids -- understandably, this
23 is not what was in the APA. What it clearly shows is that
24 ESL's assumptions and what it was assuming would be part of
25 the entire package it was putting together in its bid, value

1 the inventory as far less than a hundred cents.

2 THE COURT: Okay.

3 MR. SORKIN: That document is in evidence. It's

4 an exception to hearsay because it's an admission by a party

5 opponent. So I don't think there's any question that that

6 was -- again, whether or not it is the actual value, no

7 question that that was an indication of what they believe

8 value was.

9 So to now come and suggest that the Court should

10 ignore that and look at an expert that is decreasing the

11 value or diminishing the -- you know, has a small decrease

12 of one percent, we think is again just evidence of why it is

13 inequitable to come to this Court now. Again, all of this

14 is secondary to the primary argument that the 507(b)

15 claimants here have not carried their burden. They have not

16 put forth evidence of fair market value of the inventory for

17 its intended purpose. And that leads to Cyrus.

18 So, Cyrus has put forth a valuation for a net

19 orderly liquidation value, and Mr. Schrock talked about why

20 that is not appropriate here. But, again, to suggest that

21 you just ignore everything that happened and every action

22 that Cyrus took after the petition date where it funded and

23 without that funding, there would not have been a going

24 concern sale, it wasn't necessarily pre-ordained. We argued

25 against it. But Cyrus knew that what was actually going to

1 happen was just as likely to be a going concern sale.

2 And, again, as Mr. Schrock said, the idea that

3 you're now going to argue that the fair market value is not

4 what actually happened runs counter to everything that they

5 understood and the actions they took that allowed that going

6 concern sale to happen.

7 THE COURT: Well, all right. I understand your

8 point about ESL. I think it's basically you're saying that

9 at some point -- well, let me back up. The purpose of

10 507(b) is to protect a lender against the diminution of the

11 value of its collateral. There's a subsidiary purpose or a

12 purpose within that purpose which is to encourage lenders

13 and other parties in interest to give debtors more time to

14 see whether one course such as a going concern sale or a

15 reorganization will actually achieve more value and to

16 discourage prompt liquidations.

17 Your point in ESL is, well, ESL was pushing for

18 sale here no matter what. There was no choice here. ESL

19 didn't really have a choice ever, ever express a choice. It

20 was all for the going concern approach. Cyrus, I'm not sure

21 your argument really fits into the construct for 507(b)

22 because while they're funding it, one of the reasons they're

23 funding it is they know they have the 507(b) protections.

24 I mean I understand it's somewhat meaningful to me

25 that they were funding beyond 12 weeks, and the liquidation

1 scenario assumed 12 weeks. But maybe that just goes to
2 things like post-petition interest being part of the
3 calculation, not just for the 12 weeks but for the whole --
4 you know, through the sale. But, to me, it's a different --
5 I mean to say that a lender that has various options,
6 doesn't really know which is the best should have 507(b)
7 narrowed because they tried to keep options open is -- it
8 doesn't sound like it's the same analysis.
9 MR. SORKIN: Well, two points.
10 THE COURT: The application would be different on
11 the same analysis, in other words.
12 MR. SORKIN: Understood, Your Honor. And I guess
13 two points, and one is with respect to the equitable
14 arguments, we are certainly not arguing that they all stand
15 or fall together. Certainly, ESL is in its own category,
16 and any claim by ESL could be denied in and of itself.
17 With respect to Cyrus, I would go back to the
18 point I made earlier which is if you were looking only at
19 the junior DIP and at the decision with respect to whether
20 or not to fund the junior DIP, I think Your Honor's points
21 would be correct. But when looking at, as a whole, the
22 participation of Cyrus in the junior DIP and then the
23 decision to fund, again, if those are viewed as an act or
24 independently making separate decisions, then, you know, I
25 think it's a harder argument to make. But here, what you

1 have is the same actor agreeing to both fund the process
2 which went beyond what would be necessary for a liquidation
3 which was what was necessary for and contemplated a going
4 concern sale process and then participate and roll that
5 over. So I think it's the combination here of those two
6 actions that make this different.
7 THE COURT: Although you could say that they're
8 making the best of a bad deal, you know, at that point. I'm
9 not sure that's right, but I'm reluctant to adopt a
10 principle that would preclude people from making the best of
11 a bad deal. Anyway --
12 MR. SORKIN: Understood, Your Honor. And as Mr.
13 Schrock said, there isn't -- unlike ESL, and we have not put
14 before the Court evidence of counsel for Cyrus making
15 statements on the record, so we agree with Mr. Schrock on
16 that.
17 THE COURT: Okay.
18 MR. SORKIN: And, finally, Your Honor, I guess I
19 would move to Wilmington Trust, and I think that situation's
20 a little bit different because I think the idea that anyone
21 viewed or approached this process beginning as of the
22 petition date as an ongoing retail operation, it's just not
23 consistent with the facts. And I would point out that to
24 the extent there was ever a discussion of having lived it,
25 the possibility of certain retail operations continuing,

1 that was on a much smaller footprint and was never anything
2 that really materialized.
3 THE COURT: Okay.
4 MR. SORKIN: So, with that, Your Honor, unless the
5 Court has any further questions, I think that is all the
6 Committee had.
7 THE COURT: Okay. All right.
8 MR. O'NEAL: Just a brief rebuttal? Thank you,
9 Your Honor, for your patience. I know this has been a long
10 day.
11 So let me just start with the equities of the
12 case. I don't know where Your Honor is on this. But I do
13 feel compelled to say a few things because I'm happy to
14 embrace the equities of the case.
15 THE COURT: Well, you know, the equities of the
16 case is a loaded term. I would prefer to look at the --
17 although cases from the '80s use it. I would prefer to look
18 at this as how it ties into valuation. At some point, it
19 does seem strange to me that a company that not only is
20 trying to keep its options open but is actually threatening
21 the board for going with a liquidation alternative as
22 opposed to a going concern sale, can say that the value of
23 its collateral is actually higher in a liquidation.
24 MR. O'NEAL: Right. Your Honor, all our
25 liquidation analysis in Schulte's report is just a rebuttal

1 to the arguments that the Debtors had made with respect to
2 the equities in the case. So I'd like to address that.
3 THE COURT: Okay.
4 MR. O'NEAL: I mean let's -- it's kind of
5 astounding to hear us described as some kind of villains in
6 this process.
7 THE COURT: I'm just -- again, I'm trying to keep
8 this on the level of valuation.
9 MR. O'NEAL: Certainly, okay. So let's --
10 THE COURT: I mean I think ESL knew as much about
11 these companies as the people running the companies. And
12 they had a substantial investment in the debt. They knew
13 the equity was worthless. And they contend that
14 notwithstanding that, the going concern sale that they
15 pushed very hard for somehow reduced the overall value of
16 the company on the petition date by, you know, a factor too.
17 MR. O'NEAL: Well --
18 THE COURT: Some of that just doesn't concern me.
19 MR. O'NEAL: Certainly.
20 THE COURT: I mean why would -- that's like saying
21 you're just hitting yourself on the head.
22 MR. O'NEAL: I think this goes to the point that
23 you made when you were speaking with Mr. Schrock, which is
24 that when we did the big, we preserved our --
25 THE COURT: I'm not talking about the 85 percent.

1 MR. O'NEAL: No. And I'm not either.
2 THE COURT: Okay.
3 MR. O'NEAL: I'm talking about when we actually --
4 when we bought these assets --
5 THE COURT: Right.
6 MR. O'NEAL: -- we preserved our rights to pursue
7 507(b) claims. We preserved our rights at every turn in
8 this process.
9 THE COURT: So, I guess all that that means is
10 that -- to me, at least, is that when you're negotiating for
11 the sale, the sale itself isn't really fair market value for
12 these assets?
13 MR. O'NEAL: No. I don't -- we're not saying that
14 at all. I mean I think what we're saying is that when we
15 agreed to purchase the assets after a substantial
16 negotiation after a lot of give and take, ESL has a lot of
17 different capacities in this situation, not only as a
18 second-lien creditor, but also as a first-lien creditor,
19 also as an unsecured creditor, also we have Eddie Lampert
20 who was chairman of the board for some time. We have the
21 fact that ESL had invested billions of dollars in this
22 company and had not just an economic interest but other
23 interest as well and very much wanted to continue the
24 business and to continue the employment or at least to stop
25 the immediate termination of 45,000 employees.

1 There were a lot of things that were motivating
2 ESL beyond its second-lien position. And I don't think that
3 ESL should be penalized for buying the assets and actually
4 creating value for everybody in this room. There would be
5 no --
6 THE COURT: Well, I guess that's the point. If
7 it's creating value, how can it argue that it actually has
8 lost value on the collateral?
9 MR. O'NEAL: It is -- we created value through the
10 assumption of liabilities, for example, correct. And we
11 created value through the, as you mentioned, the assumption
12 of leases and the assumption of contracts.
13 THE COURT: But does that mean that --
14 MR. O'NEAL: It doesn't mean we waived our 507(b)
15 -- I mean --
16 THE COURT: No, I know you never waived -- there's
17 no waiver.
18 MR. O'NEAL: Yeah.
19 THE COURT: This is not a waiver argument. It's a
20 valuation argument. It's hard for me to see that there
21 would be such a disconnect between the sale proposal and the
22 value of the 2L collateral --
23 MR. O'NEAL: Well, there's --
24 THE COURT: -- since it was inventory and
25 receivables.

1 MR. O'NEAL: Yeah, I mean we're just looking to
2 the collateral, the second-lien collateral. We're applying
3 Rash. We believe that the replacement value is the book
4 value. And then we do the math from there, and then we
5 deduct the applicable first-lien debt. We're just following
6 what standard case law says in terms of --
7 THE COURT: You know, of course, the standard case
8 law that you cite doesn't say anything like that. In fact,
9 it says just the opposite. I'll turn to it.
10 MR. O'NEAL: Are you referring to Rash or --
11 THE COURT: No, I'm referring to Judge Glenn's
12 interpretation of Rash where he says --
13 (Pause)
14 THE COURT: -- "The Court remains favorable to the
15 dictates of section 506(a) by valuing the creditor's
16 interest in the collateral" -- it's the creditor's interest,
17 not the debtor's interest -- "the creditor's interest in the
18 collateral in light of the proposed post-bankruptcy
19 reality." And when he described the post-bankruptcy
20 reality, he says in criticizing Houlihan, who was the
21 creditor expert's valuation, "it assumes that the collateral
22 could have been sold on the petition date by the debtors.
23 This assumption ignores reality. You need to look at sales
24 conducted by other distressed entities on the brink of
25 insolvency."

1 I mean --

2 MR. O'NEAL: Your Honor, I think --

3 THE COURT: -- so to say that you used book value

4 is to me is divorced from reality is saying that you used

5 retail value.

6 MR. O'NEAL: Right. Allow --

7 THE COURT: It doesn't compute. That's not how

8 there's a realizable value here.

9 MR. O'NEAL: Allow me to explain our position.

10 THE COURT: Okay.

11 MR. O'NEAL: On this particular point, ResCap's

12 very different, right? ResCap dealt with hard-to-value

13 assets. It dealt with --

14 THE COURT: It deal with reality and realizing the

15 value of the collateral.

16 MR. O'NEAL: That's true, part of --

17 THE COURT: Not of the circulation of what, you

18 know, Mr. or Ms. Smith buy a washing machine for when you

19 know that there's a good chance you're going to have a

20 liquidation sale and at best, you're going to have a sale to

21 one party bidding on a going concern basis.

22 MR. O'NEAL: Right. Well, my point here is that -

23 -

24 THE COURT: And that party is your own client who

25 should know the difference --

1 MR. O'NEAL: Yeah, my --
2 THE COURT: -- because he's assessing the
3 competition.
4 MR. O'NEAL: Right. Well, actually, we didn't
5 assess the competition while we were bidding, right. We
6 very much hope that we wanted a robust option process,
7 right, just like with the --
8 THE COURT: He knows the liquidation alternative
9 --
10 MR. O'NEAL: We --
11 THE COURT: -- because he got the reports until he
12 got off the board. He knows the liquidation alternative,
13 and he knows what he's bidding against. And he's not
14 bidding against book value or retail value. It's that
15 simple, right? How is he bidding against something other
16 than that? If he knew he was bidding against retail value,
17 he would have had to have bid more and he just didn't
18 because that --
19 MR. O'NEAL: Well, we bid --
20 THE COURT: -- would have been a fantasy.
21 MR. O'NEAL: Your Honor, at the end what we did
22 was we bid against a hypothetical liquidation. But we were
23 hopeful that there would be other bidders, that there would
24 be other bidders.
25 THE COURT: Right. No, I agree. He bid against a

1 hypothetical liquidation. That's what he bid against. He
2 did not bid against book value or retail value --
3 MR. O'NEAL: But during the process --
4 THE COURT: -- what Mr. and Ms. Smith paid for a
5 washing machine.
6 MR. O'NEAL: But during the process, we're talking
7 now at the end of the process, right. What the Debtor's
8 restructuring subcommittee looked at, they looked at a
9 hypothetical versus ESL. We would have been more than happy
10 for a third party to come in and outbid us. That would have
11 been wonderful.
12 THE COURT: I don't think you're getting my point
13 which is that this ties into valuation. ESL knows this
14 company inside and out. It knows what it has to make to
15 acquire the company. And to say that what it would really
16 have to make is book value is just -- it's just -- it's
17 nonsense. So whether you call that equities or nonsense, I
18 prefer calling it nonsense. It just doesn't make any sense,
19 period.
20 And I guess to the extent nonsense is inequitable,
21 I agree it's inequitable. You know, and it's just --
22 MR. O'NEAL: Right. Well, then your argument is
23 about the valuation.
24 THE COURT: Yeah.
25 MR. O'NEAL: Then your argument is not about

1 whether or not we actually -- you know, whether the fact
2 that we wanted a sale to happen means that we don't have
3 507(b) claims.
4 THE COURT: Well, I think it is -- it's kind of --
5 I think in this sense, it's inequitable to argue now that
6 realizing value out of this company in respect of the
7 collateral is something other than what the parties went
8 through, which is a process on a very expedited time frame
9 to determine whether there would be a going concern sale or
10 a liquidation sale.
11 MR. O'NEAL: Understood, Your Honor. All I'm
12 saying is that you've got an issue with our valuation. You
13 don't have an issue with the fact that because we put forth
14 the bid -- I mean the --
15 THE COURT: Okay, that's fine.
16 MR. O'NEAL: -- the UCC, you know --
17 THE COURT: That's fine.
18 MR. O'NEAL: -- highlighted one again the letter
19 that you said should be put in a drawer and it had no impact
20 on the proceedings, right. I think you were very clear
21 about that in the sale hearing. If there's any equities
22 involved here, I think they should -- I mean the fact is is
23 that it is the restructuring subcommittee that approved this
24 transaction because it was better, because it maximized the
25 values to the estate. And we shouldn't be penalized because

1 of that.

2 THE COURT: Okay.

3 MR. O'NEAL: So if we could talk a little bit

4 about the 506(c) surcharge, though. I'm not sure if I need

5 to. I'm sensitive to your time and I think I've got your

6 views on it. But I do believe that just a few words could

7 be helpful.

8 You know, I think when I mentioned that they

9 applied a stick of dynamite to our 506(b) claims, I was

10 referring to their 506(c) surcharge. We've never before

11 seen anything remotely closely to 1.4 billion. I think on

12 Slide 27 of the presentation I gave you this morning, we

13 laid out the relevant factors, and it's Flagstaff.

14 THE COURT: Well, it's not necessarily all or

15 nothing, though. I mean it is true that the GOB sales as

16 well as the credit bid sale was premised on specific

17 corporate overhead that went to this collateral because that

18 is what they were selling, not everything. But it's hard to

19 believe that the 2L lenders would get a free ride.

20 MR. O'NEAL: Your Honor, I don't think we --

21 THE COURT: And in essence, that's what's being

22 suggested because your expert says that this is basically 99

23 percent of book --

24 MR. O'NEAL: Yeah, but I don't think we're --

25 THE COURT: -- with no 506(c).

1 MR. O'NEAL: We're not suggesting a free ride
2 because we've actually in our valuation, right, the book
3 value deducts from it the (indiscernible) cost, the direct
4 cost of the sale. So it's not -- we're not doing --
5 THE COURT: It doesn't deduct the legal cost of
6 actually getting approval for the sale, dealing with the
7 landlords, or paying the employees, right? It doesn't deal
8 with any of that.
9 MR. O'NEAL: It would cover the employees. It
10 would cover employees at the stores.
11 THE COURT: We covered the corporate overhead for
12 paying the employees?
13 MR. O'NEAL: The corporate overhead we've got --
14 THE COURT: HR?
15 MR. O'NEAL: Our materials, and I went through
16 this this morning, do provide that there's a lot of areas of
17 value. You can't assign all of the sale prices.
18 THE COURT: I'm not deciding all of it, but I'm
19 assuming that some of the HR function included dealing with
20 these employees.
21 MR. O'NEAL: That may be, but the -- to some
22 extent, there could be some overhead and I think it's clear
23 that it's not everything, as you've said. And there's
24 certainly other businesses that could not ever --
25 THE COURT: Should pay all of it?

1 MR. O'NEAL: -- take a surcharge.

2 THE COURT: But not pay all of it? But, again,

3 I'm talking about a reasonable relation --

4 MR. O'NEAL: Yeah. Understood. But --

5 THE COURT: -- as the case law says.

6 MR. O'NEAL: -- the Debtors have the burden on

7 this particular point, and they haven't created anything

8 along the lines of what you've said. When you look at the

9 case law and you, you know, you look at Slide 28 and I think

10 we go through the kinds of things that you normally see, you

11 know, storage fees and utilities and the like, we're not --

12 this is just $1.4 billion. And they basically just took all

13 of the costs and they deducted three minor buckets.

14 THE COURT: So does the four walls include

15 advertising expenses?

16 MR. O'NEAL: Yes, it does, Your Honor. And that

17 was in the testimony.

18 THE COURT: How do we know that?

19 MR. O'NEAL: That was in the testimony.

20 THE COURT: Okay.

21 MR. O'NEAL: Griffith.

22 THE COURT: Whose testimony?

23 MR. O'NEAL: Griffith, Mr. Moloney crossed

24 Griffith on this particular point.

25 THE COURT: Okay. I'll double check that.

1 MR. O'NEAL: And, you know, and I think also
2 Griffith admitted during his testimony that the 506(c)
3 charges that the Debtors had proposed covered a lot of other
4 businesses, Sears Auto Center, Shop Your Way.
5 THE COURT: No doubt. No doubt. A million -- a
6 billion-450, it's just not realistic.
7 MR. O'NEAL: Yes. We agree with that, Your Honor.
8 And I think, you know, just at bottom, you know, I
9 think we started out this morning saying that this was not
10 done for the benefit of us. If Brandon Aebersold had come
11 into this court and said -- and Allan Carr, the independent
12 director had said we're going to do this transaction because
13 it's good for ESL, that never would have been approved.
14 This is not -- this was a decision by the restructuring
15 subcommittee that that was the best deal.
16 I think, also, I would just note that -- I do want
17 to respond to just a few things that came up at other parts
18 of the debate today.
19 THE COURT: Okay.
20 MR. O'NEAL: I'll be quick. In terms of the
21 borrowing base, I think you were focusing that we should
22 perhaps suggesting that we should exclude ineligible
23 inventory. We don't think that's the right way to go.
24 There's some pretty important buckets of value in that. And
25 if you actually look at the --

1 THE COURT: Your expert ascribes 100 percent value
2 to it. That's just not credible.
3 MR. O'NEAL: If --
4 THE COURT: It's not credible. And he does no
5 valuation. He just blindly says it's all book value.
6 MR. O'NEAL: Well, I think that's because we view
7 that as replacement value.
8 THE COURT: And that's not credible. That's not a
9 valuation. That's just a wish.
10 MR. O'NEAL: Right. Well, let's focus
11 specifically on the issue, which is whether or not
12 ineligible receivables should be included.
13 THE COURT: There is some value to it. I
14 understand that.
15 MR. O'NEAL: Okay. And --
16 THE COURT: But no one except this Ms. Murray does
17 that.
18 MR. O'NEAL: Right.
19 THE COURT: Your expert doesn't do it.
20 MR. O'NEAL: And if you look at -- you know, for
21 example, if you look at I guess it was Slide 13 in Mr.
22 Schrock's presentation, you can get a sense, you know,
23 there's some pretty significant stuff in there, store
24 closing sale inventory that's GOB.
25 THE COURT: You have the burden of proof on this.

1 I'll cite you three cases where the courts denied a 507(b)
2 motion simply because the numbers were not articulated in
3 any way other than a gross estimation, which is what this
4 is.
5 MR. O'NEAL: Right. Well, we -- obviously we
6 disagree. We think book value is --
7 THE COURT: I should just pull it out. Where do I
8 get it? Where do I get it from? Where do I get the value
9 of the ineligible inventory from? What source other than
10 book value which doesn't apply?
11 MR. O'NEAL: I mean, well, actually, if you look
12 at the borrowing base certificate, there's value ascribed
13 there. It's just ineligible for borrowing. It's not value-
14 based.
15 THE COURT: But it's not a valuation. And you
16 have issue with the borrowing base.
17 MR. O'NEAL: Well, we used the beginning ledger
18 number for --
19 THE COURT: Oh, yeah, sure. The beginning number.
20 MR. O'NEAL: -- the book value.
21 THE COURT: Great. That was expert testimony, not
22 really.
23 MR. O'NEAL: Well, I would say that Mr. Schulte
24 did -- I mean he didn't just -- I mean he looked at book
25 value and he testified that he looked at other options and

1 he determined that book value was the best approximation.
2 THE COURT: Right.
3 MR. O'NEAL: And, actually, it ended up being
4 lower than the other inventory value.
5 THE COURT: Than retail value.
6 MR. O'NEAL: That's correct.
7 THE COURT: Yep.
8 MR. O'NEAL: And to net retail.
9 THE COURT: Right.
10 MR. O'NEAL: I think in terms of the LCs, I know
11 Your Honor has heard a lot on this today, and I think the
12 main focus is, you know, your concern that we didn't include
13 these contingent and liabilities. We continue to believe
14 that that is the correct way to look at it.
15 I guess conceivable you could, per your
16 questioning whether, you know, it -- conceivably, you could
17 value that at some amount, based on the draws that actually
18 occurred, which is the $9 million.
19 MR. O'NEAL: I think the other thing that --
20 THE COURT: No one has actually done that, right?
21 No expert has done that?
22 MR. O'NEAL: Well, I think, Your Honor, that would
23 be a relatively simple math exercise of --
24 THE COURT: No, but it's not a valuation exercise.
25 MR. O'NEAL: Valuing... That's correct, Your

1 Honor.

2 THE COURT: Put it differently, I doubt that the

3 beneficiaries of those LCs would say that they would walk

4 away from them for $9 million.

5 MR. O'NEAL: That may be, but there's nothing for

6 them to walk away from. There's no liabilities that have

7 actually come to roost as of the petition date.

8 THE COURT: Right.

9 MR. O'NEAL: In terms of the scripts, I think

10 there was some question about whether scripts actually have

11 a value. And I think they do have value. I mean, it is --

12 THE COURT: But they seem to be excluded, based on

13 the books and records being only in relation to the

14 collateral.

15 MR. O'NEAL: Well, the collateral here is the

16 inventory. So, in the same way that the pharmacy

17 receivables relate to inventory, the scripts relate to

18 inventory, which is the controlled substances and the

19 medication and the like. So, it's books and records related

20 to the inventory, which would include the pharmaceuticals.

21 So, we don't believe -- we believe that actually is actually

22 included.

23 And I would say that even stores that are

24 operating, they could sell the scripts. They could -- there

25 is intrinsic value to the scripts. You know, for example --

1 THE COURT: Am I right that all three of the
2 experts give them just face book value, they don't do any
3 valuation analysis of it?
4 MR. O'NEAL: That's my understanding, that we used
5 the Debtors' books and records on it.
6 THE COURT: Well, the book value.
7 MR. O'NEAL: I think I do -- another point I would
8 like to do is I would like to just turn your attention again
9 to the 507(b) cap. And I think if you were to -- and that's
10 on Slide 37 -- I think if you were to read it the way that
11 the people were suggesting earlier today, you're reading out
12 everything after $50 million. It's just basically you would
13 read out from the proceeds of claims, blah, blah, blah. It
14 would really -- it would not give any meaning to those words
15 if you were to read it as you described.
16 THE COURT: I'm sorry, this is...?
17 MR. O'NEAL: This is on Page -- if you look at our
18 deck Slide 37.
19 THE COURT: I don't understand your point.
20 MR. O'NEAL: Yeah, so if you were to say that it's
21 just a $50 million cap, that's all it -- it's just a $50
22 million cap, you would not need the words "from the
23 proceeds" and all of those words following in that
24 particular clause.
25 THE COURT: Well, remember this is Clause 2.

1 MR. O'NEAL: That's correct.
2 THE COURT: Clause 1 says there's no right out of
3 the specific litigation claims.
4 MR. O'NEAL: That's correct.
5 THE COURT: Clause 2 says $50 million and then it
6 says from where else?
7 MR. O'NEAL: Yeah, so --
8 THE COURT: So, I agree with you, you could say --
9 MR. O'NEAL: Yeah.
10 THE COURT: -- any ESL claims arising under 507(b)
11 of the Bankruptcy Code from any other source shall be
12 entitled to distributions of no more than --
13 MR. O'NEAL: Or you wouldn't even need "from any
14 other source" because the first rule is just that you're not
15 getting any recovery from these designated litigations,
16 right? That's just -- there's no recoveries from the Clause
17 1. And then Clause 2, if it were intended to apply to
18 everything, it would just stop right at $50 million.
19 THE COURT: I don't view that as required by this
20 language.
21 MR. O'NEAL: Well, I think we have to give meaning
22 to all of the words on the page and --
23 THE COURT: And I am.
24 MR. O'NEAL: -- if we're not giving meaning to the
25 words --

1 MR. O'NEAL It says from the proceeds of any
2 claims or causes of action.
3 MR. O'NEAL: It would just say, shall not be
4 entitled to distributions of --
5 THE COURT: But you already have Clause 1, so
6 you've got to say more than that, because Clause 1 --
7 MR. O'NEAL: No, because in Clause 1 we've said
8 there's no recoveries there.
9 THE COURT: And then Clause 2, you want to say
10 there is recovery? You've got to have more than that.
11 MR. O'NEAL: There's recovery -- yes, there is
12 recovery. That's correct. Except as provided in Clause 1.
13 THE COURT: It doesn't say that. Doesn't say
14 except as provided in Clause 1. I agree with you. You
15 could do it that way also, but to have written it a
16 different way serves that function.
17 MR. O'NEAL: Well, I don't even think you need the
18 "except as provided by Clause 1." I mean, and certainly, if
19 you look at the auction --
20 THE COURT: You're not going to win on this one.
21 MR. O'NEAL: And if you --
22 THE COURT: Defined term claims includes the -- I
23 mean it's the def -- it's as defined. It's how it's
24 written.
25 MR. O'NEAL: I think that we're kind of reading

1 out some language. And if you look at Slide --
2 THE COURT: You're the one reading out the
3 language. Let's move on from this. This is just not going
4 to work.
5 MR. O'NEAL: Okay. And I think -- I'm sensing
6 that I don't need to say anything more on the 85 cent issue,
7 but I'm happy to.
8 THE COURT: No, you don't.
9 MR. O'NEAL: Okay. And I think, Your Honor,
10 that's all I have. Thank you.
11 THE COURT: Okay. Thank you.
12 MR. KRELLER: Your Honor, Thomas Kreller again,
13 with Milbank, for Cyrus Capital. I'll try and limit this,
14 Your Honor, to a couple of points.
15 Beginning with 506(c), I think what we have here
16 is really best illustrated by what Mr. Schrock stood here
17 and told you, and it's really consistent with what Mr.
18 Griffiths told you in his supplemental declaration at Docket
19 4439, filed on July 3rd.
20 Mr. Schrock stood here and said, "You have to look
21 at what happened in these cases. We sold the inventory at
22 85 cents, and we incurred all of these costs, the $1.45
23 billion, and we incurred all of these costs to get to the
24 sale."
25 Mr. Griffith said something similar in his

1 declaration. He basically said that the number, the $1.4
2 billion that he put in his declaration, reflects the
3 rigorous sale process and efforts to sell the company as a
4 going concern.
5 There's a conflation here, Your Honor, and it's
6 exactly the issue that I pointed out when I first stood up
7 earlier today, which is there is a going concern sale that
8 happened in this case. There is a sale of receivables and
9 inventory that was a portion of that sale that became
10 embedded when ultimately the company chose that path. It
11 became embedded.
12 But the inventory and receivables, Your Honor,
13 were not the train. They were one car on the train. And
14 the Debtors' notion that they had to conduct the going
15 concern sale in order to dispose of the inventory and
16 receivables simply isn't the case.
17 THE COURT: Okay.
18 MR. KRELLER: And Your Honor, we know that isn't
19 the case. Mr. Aebersold testified as much, Mr. Griffith
20 testified as much --
21 THE COURT: No, you don't need to go on on this.
22 I mean, you're basically talking about Flagstaff.
23 MR. KRELLER: I am, Your Honor. And so, I think
24 the idea that -- I think this really goes to the component
25 in 506(c) where the costs have to be not just reasonable --

1 and I've heard your views on reasonable, and I agree with
2 them in terms of the magnitude of the costs they're seeking
3 to load on to the second lien collateral.
4 But there's also in 506(c) requires that the costs
5 be necessary. So, I'm going to focus on necessary.
6 THE COURT: No, you don't need -- your briefs have
7 covered all this. You don't need to do anymore on this
8 point.
9 MR. KRELLER: Okay, Your Honor. I will move on.
10 Your Honor, let me be very specific then in response to a
11 couple of the points that the Debtors made and that the UCC
12 made.
13 The notion that the second lien parties did not
14 object to the going concern process or the sale process,
15 Your Honor, that's really not evidence of anything other
16 than we bargained for adequate protection that we thought
17 would be there at the end of the day. And so, we were
18 pulled along in that process. And yes, ESL was active in
19 trying to put a bid forward.
20 But the fact that we didn't object was because at
21 the outset of the case, is we bargained for adequate
22 protection. And that's all we're seeking here. We're not
23 seeking to take things away from the unsecured creditors.
24 We're seeking the benefit of the bargain that we got in the
25 DIP order when we were given the adequate protection rights

1 that we had to protect our interest in the collateral.

2 THE COURT: Right.

3 MR. KRELLER: The other thing I would note, Your

4 Honor, on 506(c), I think the Debtors have done here exactly

5 what you're not supposed to do. They've taken it from the

6 top down rather than from bottom up. And what they've

7 basically said is they've laid a pile of costs in front of

8 you. And then in the supplemental iterations of Mr.

9 Griffith's declaration, he kind of starts to take some of

10 those things off the pile. And it's as if they're standing

11 here looking at you saying, okay, is that enough? Did we

12 take off enough now? And that's not what 506(c) is about,

13 Your Honor.

14 They're supposed to build that pile brick by

15 brick, and they're supposed to carry the burden that

16 substantiates to you how those costs related directly to the

17 preservation or disposition of the second lien collateral,

18 not all of the other stuff, not the real estate, not the IP,

19 not everything else going on in this business. Not all of

20 the assumed liabilities they were trying to put to ESL --

21 THE COURT: Well, it's primarily, as opposed to

22 exclusively. But other than that, I agree with you.

23 MR. KRELLER: I think that's right, Your Honor.

24 And to the primary point, let's cut to that, to the primary

25 point. You had a sale transaction that the Debtors proudly

1 stood here and said, we got $5.2 billion of value in this
2 transaction; this is a great result for the estate.
3 When you look at the second lien collateral as a
4 subset of the assets that were sold, the benefit that they
5 can point to as being realized by the second lien lenders is
6 the $433 million credit that we got for the credit bid.
7 Four hundred and thirty-three million dollars as a
8 percentage of a $5.2 billion transaction is 8.3 percent.
9 So, the benefit that inured to second liens through the
10 credit bid was 8.3 percent of the aggregate value that was
11 delivered in this transaction by the Debtors' own math.
12 The case that the Debtor cites on this point, Your
13 Honor, there’s a case -- and I apologize, I don’t have that
14 brief at my fingertips -- but there's a case that they cite
15 that cites to a case where there's a secured creditor who
16 received 59.5 percent of the benefit of the subject
17 transaction in that case. 8.3 percent is a far cry from
18 59.5 percent, Your Honor. And I don't know how you get --
19 how you could ever characterize 8.3 percent of the aggregate
20 purchase price as the primary benefit provided in the sale.
21 And that's all they have. That's what they point to.
22 Your Honor, a couple of very quick, discrete
23 points that I'll finish with. You asked about scripts.
24 There actually is a valuation in the Tiger appraisals.
25 There's two different valuations that Tiger did of the

1 scripts. They value it in I believe a September report at
2 $28 million. And then they later, in February I believe,
3 they reassessed their methodology for valuing scripts and
4 the moved that up to $54 million. So, you do at least have
5 in the record an attempt by at least one of the experts.
6 THE COURT: And there's been no analysis of that
7 by anybody, right?
8 MR. KRELLER: Your Honor, I believe that Ms.
9 Murray studied --
10 THE COURT: She just adopted the higher number.
11 She didn't say why. She doesn't even reference the earlier
12 number. I checked.
13 MR. KRELLER: That may be the case, Your Honor. I
14 know that she took into account those appraisals and I know
15 that she did in fact look at them.
16 THE COURT: But she --
17 MR. KRELLER: And --
18 THE COURT: It's one thing to say, I know a lot
19 about accounts receivable and inventory financing. She
20 doesn't really say she knows anything about pharmacy
21 receivables.
22 MR. KRELLER: True enough, Your Honor. I just
23 point it out because it sounded like you thought there was a
24 dearth of anything in the record, and I do point out --
25 THE COURT: There is.

1 MR. KRELLER: -- it is identified in the --
2 THE COURT: I mean, that's fact, or expert
3 testimony. I mean, I would think, given that they made two
4 valuations within three months apart, that someone would
5 need to cross-examine Tiger on that issue.
6 MR. KRELLER: Understood, Your Honor. So, Your
7 Honor, quickly, on the LCs, when you think about how this
8 actually works in the real world, one, on the petition date,
9 there was nothing drawn. But these were cash collateralized
10 at -- at least $271 million of the LCs were cash
11 collateralized by ESL and Cyrus.
12 If those were ultimately drawn -- and we know they
13 weren't drawn at the petition date and we know they weren't
14 drawn during the case -- but had they been drawn, the
15 issuing bank, I believe it was Citibank, would have honored
16 the draws and they would have hit the cash collateral. And
17 they would have taken the cash collateral that was the ESL
18 and Cyrus cash, and that amount -- that essentially would
19 become first lien debt. That would essentially become first
20 lien -- the senior obligations at that point in time would
21 no longer be contingent.
22 THE COURT: Right.
23 MR. KRELLER: And then what would happen -- and I
24 think this is what's happening and what you referred to in
25 terms of AM, PM -- it's happening in Linen 'n Things -- what

1 happens then is that after those draws get made and all for
2 the processing and time goes on, money comes back. Because
3 the LCs --
4 THE COURT: No one has given me any testimony on
5 that either.
6 MR. KRELLER: Well, Your Honor, the --
7 THE COURT: I realize that one could, but I don't
8 have that.
9 MR. SCHROCK: Your Honor, I think there is a
10 discussion in the Murray report, but I agree with you, it's
11 not about the cash collateral. But if we're --
12 THE COURT: No, but no --
13 MR. KRELLER: If we're talking about --
14 THE COURT: Leave aside the cash collateral,
15 because as you just said, there's a subrogation claim,
16 right?
17 MR. KRELLER: Right.
18 THE COURT: So --
19 MR. KRELLER: And that subrogation claim is
20 initially --
21 THE COURT: It's first, right? It's ahead of the
22 2Ls?
23 MR. KRELLER: It's ahead of the 2Ls --
24 THE COURT: Right.
25 MR. KRELLER: -- and it's initially in the amount

1 of the draw.
2 THE COURT: Right.
3 MR. KRELLER: And over time, if money comes back
4 because the draw was in essence an overdraw --
5 THE COURT: Right.
6 MR. KRELLER: -- that reduces that first lien
7 debt.
8 THE COURT: I understand that, but --
9 MR. KRELLER: So --
10 THE COURT: -- I have no testimony as to what is a
11 fair value of what that money would be. It assumes, without
12 evidence, that the 271 and I think it's 123 at the other LC
13 facility, are actually substantially in excess of the
14 obligations of the LC beneficiaries that they were issued
15 for. I don't have any evidence to say one way or another
16 about that.
17 MR. KRELLER: No, Your Honor --
18 THE COURT: But I do know from my own experience
19 that it's like pulling teeth to get money back. And you
20 know, it's nowhere close to the face value. I mean, it's
21 peanuts.
22 MR. KRELLER: I don't know that that's the case,
23 Your Honor, but --
24 THE COURT: Well --
25 MR. KRELLER: -- I'll move on.

1 THE COURT: I'm just basing it on a couple of
2 cases. But that's not expert testimony either. I don't
3 have any testimony on that issue.
4 MR. KRELLER: No, no, that's true. The evidence
5 you have on this point was that there were zero drawn under
6 the letters of credit at the petition date.
7 THE COURT: Right.
8 MR. KRELLER: And if you refuse to be unmoored
9 from the petition date, that has meaning.
10 THE COURT: Right.
11 MR. KRELLER: And there is evidence on that.
12 THE COURT: Right.
13 MR. KRELLER: Your Honor, you had asked me earlier
14 if the legal fees were taken out of the Tiger report. I
15 don't believe they were. But I do think it's worth noting
16 that the legal fees are paid through the carveout, so they
17 already effectively run out and get paid, and push us junior
18 in any event.
19 So, I think those costs -- you don't need to layer
20 on an additional amount of those costs through a 506(c)
21 surcharge. They're already effectively coming out of our
22 collateral via the carveout, or via the subordination that
23 the carveout effects.
24 THE COURT: But you’re saying that your claim is
25 still increased by that amount, right?

1 MR. KRELLER: We are entitled to adequate
2 protection for that, yes.
3 THE COURT: So...
4 MR. KRELLER: But it's not a -- it's not a
5 component of the valuation, the (indiscernible).
6 THE COURT: Well, but if you -- you're saying you
7 agreed to the carveout, but then aren't you taking it back
8 by saying that the 507(b) is increased by it?
9 MR. KRELLER: No. What I'm saying is we agreed to
10 the carveout in exchange for 507(b) rights, in exchange for
11 adequate protection --
12 THE COURT: Right.
13 MR. KRELLER: -- for the effect of the carveout.
14 THE COURT: Right. But it's --
15 MR. KRELLER: So, it's --
16 THE COURT: I still don't understand. If you're
17 valuing the collateral and comparing it to 507(b), it
18 proposes a 507(b) analysis. I don’t see why the carveout is
19 relevant, because you're still valuing the collateral in the
20 first place.
21 And Ms. Murray, I think is, as appropriate,
22 discounts the value for various costs related to it. And
23 direct legal fees -- not necessarily all the legal fees in
24 the case, by any means, I would think would be part of that
25 analysis. Tiger didn't do that. She didn't do it. But I

1 don't know why you wouldn't do it.

2 As far as the value of the collateral. I

3 understand there's a carveout. But as far as the value of

4 the collateral, since the carveout isn't a credit against

5 the 507(b) claim, it doesn't seem to affect the 507(b)

6 analysis.

7 MR. KRELLER: Your Honor, I agree with that. I

8 don't think it affects the 507(b) analysis --

9 THE COURT: Okay.

10 MR. KRELLER: -- which is the valuation analysis.

11 THE COURT: Okay. All right.

12 MR. KRELLER: Your Honor, I guess -- two more

13 points, just on this, on cash. I know you've looked --

14 you're thinking about tracing. I think Mr. Schrock has

15 tried to suggest that there might be other things in the

16 cash from other places.

17 I would submit at least this, Your Honor. There

18 was an ABL, essentially cash dominion mechanism in place at

19 the time -- at all relevant times we're talking about. I

20 think that it is highly unlikely that there would be

21 proceeds from other non-ABL collateral that would find its

22 way into that cash management system.

23 And so, I think the assumption that the experts

24 made in terms of the reasonableness -- the reasonable belief

25 that that cash represented proceeds, I think is consistent

1 with the common sense of how an ABL facility works, and the
2 facts that these Debtors, I don't imagine, would be all that
3 keen on dumping other unencumbered cash into a cash
4 management system encumbered to the benefit of their ABL
5 lenders.
6 THE COURT: Well, is this cash just in the -- is
7 there anything other than the cash management system?
8 MR. KRELLER: I don't know the answer to that,
9 Your Honor. We certainly -- in the cash collateral -- in
10 the cash collateral motion and the Riecker declaration,
11 first day declaration, are in the record and discuss the
12 scope and the magnitude of the cash management system. And
13 they talk about how the standard cash management system in a
14 retailer would work, and the volume of cash that runs
15 through that system.
16 And I believe the magnitude is something like $168
17 million runs through the account is the average balance
18 through those accounts. And we're looking at cash on the
19 petition date of about $123 million or $115 million. So,
20 the numbers are roughly consistent with what Mr. Riecker
21 testified to back when he was talking about the cash
22 management motion.
23 I acknowledge that's not a precise tracing
24 analysis. But I think it's persuasive evidence --
25 THE COURT: Well, my question was -- I mean, it

1 sounds like the Debtors only had the cash management system,
2 like they really didn't have a choice to put cash elsewhere.
3 MR. KRELLER: I don't know the answer to that,
4 Your Honor.
5 THE COURT: Okay.
6 MR. KRELLER: But having represented debtors, I
7 would be loath to put proceeds from non-collateral assets
8 into my controlled accounts with my other secured lenders.
9 THE COURT: Well, but this cash isn't... For
10 example, does this cash include cash in like payroll
11 accounts?
12 MR. KRELLER: Your Honor, my understanding from
13 the cash management motion is that there aren't payroll
14 account -- it's a zero balance -- the disbursement accounts
15 are zero a balance account where cash doesn't sit.
16 THE COURT: Well, this is all based on the cash
17 management motion?
18 MR. KRELLER: And the Riecker declaration in
19 support, Your Honor. That's in the record.
20 THE COURT: Okay.
21 MR. KRELLER: Your Honor, the last point I'll make
22 -- and I'll set aside Mr. Schrock's suggestion that he
23 somehow has some inside information about what Cyrus was
24 doing behind closed doors, because there's certainly nothing
25 in the record on that.

1 Beyond that, Your Honor --
2 THE COURT: Well, we've got something in the
3 record. We have a bid -- the rejected bids. And we have
4 some testimony about what Cyrus was talking about, although
5 nothing from Mr. Schrock.
6 MR. KRELLER: Yeah, I don't --
7 THE COURT: He was testifying, and I'm not
8 counting it as testimony.
9 MR. KRELLER: Thank you, Your Honor. And I think
10 there was testimony in there too about how they didn't
11 really know what -- and the liquidators told them in their
12 bids they didn't really know what costs were built into
13 those analyses. A lot of --
14 THE COURT: Well, I don't know. I mean, I don't
15 have that information. Ms. Murray doesn't discuss that.
16 MR. KRELLER: No, I understand that, Your Honor.
17 But for Mr. Schrock to stand here and tell you what the
18 liquidators told them when they submitted their bids --
19 THE COURT: No, I agree with that.
20 MR. KRELLER: That's not --
21 THE COURT: I'm not taking that as fact.
22 MR. KRELLER: And the more significant point on
23 that, Your Honor, is Mr. Schrock stood here and then you
24 asked him the direct question -- he answered a slightly
25 different question -- but your question was, you know, what

1 were all of the costs loaded into the 90 percent, or the 90
2 percentish numbers that people had out there, that the
3 Debtors had out there, that M-III had out there, that the
4 UCC had out there. And he sidestepped you a bit.
5 But what he said was, we don't really know what
6 was in there. We don't really know --
7 THE COURT: That's true.
8 MR. KRELLER: -- what was in there. Your Honor,
9 the materials that are in the record on this point with the
10 90 percent in there are the materials that were presented to
11 the board of directors to make the biggest decision in these
12 cases, the decision whether to pursue the ESL going concern
13 bid, or to proceed to an orderly winddown of the company
14 across the board.
15 And today you hear, we don't know what was in
16 there. I don't think that's credible, Your Honor.
17 THE COURT: Well, but I don't know.
18 MR. KRELLER: I --
19 THE COURT: I don't know what was in there. I
20 don't know whether there was a -- what they assumed would be
21 the cost to get to that 90 percent.
22 MR. KRELLER: I understand that, Your Honor. My
23 point is not what's in the 90 percent. My point is for the
24 Debtors to disavow that now in a litigation position that's
25 --

1 THE COURT: They're not disavowing the 90 percent.
2 They're just disavowing what it's 90 percent of.
3 MR. KRELLER: That may be the case, Your Honor.
4 But the notion that that's the advice that the board was
5 given in making this decision with the UCC breathing down
6 their necks, I think, Your Honor, that 90 percent had to be
7 pretty solid. And I think people had to be pretty
8 comfortable with it, because they were relying on it to make
9 a pretty big decision.
10 THE COURT: Well, again, 90 percent of what? They
11 might have been very comfortable with it and then factored
12 in the costs. I don't know.
13 MR. SCHROCK: Your Honor, I'm sorry. Just to
14 clarify. The board obviously made an informed decision.
15 What I should have said -- standing here now, I don't know
16 what the 90 percent was of. I know that the board was
17 provided with an analysis that took out -- that took off
18 costs. But that's not part of the record. And we didn't
19 put it in there because it wasn't our burden.
20 MR. KRELLER: Your Honor, I'll close with this.
21 Mr. Schrock will stand here and say you have to look at what
22 happened in this case. And I'll counter that with you have
23 to actually look -- and this is what I started with -- you
24 actually have to look at what happened to the 2L collateral
25 from the petition date over the life of the case.

1 You actually don't have to look at the rest of
2 what happened in the case. What you need to do is focus on
3 what was the collateral position at the petition date, and
4 it's zero now. Those are the things you have to look at.
5 The going concern sale, the bigger efforts to preserve
6 everything else, and the $5.2 billion less the 433 credit
7 bid, those actually don't have much of anything to do at all
8 here.
9 But until they can satisfy their burden under
10 506(c) to show you, with specificity and substantiation and
11 convince you that they're reasonable, I don't think they've
12 satisfied their burden to put all those costs on the 2L
13 collateral. And I don't think doing so would be consistent
14 with the case law in this circuit, certainly.
15 THE COURT: Okay.
16 MR. KRELLER: Thank you, Your Honor.
17 MR. FOX: Edward Fox, Your Honor, from Seyfarth
18 Shaw, on behalf of Wilmington Trust. I'll be brief, Your
19 Honor.
20 On the 506(c) points, the fundamental problem is
21 that what the Debtors put forth as the justification for the
22 506(c) surcharge basically consists of a single page with
23 categories (indiscernible).
24 And when we asked Mr. Griffith about that in his
25 deposition, what the supporting documentation was for it,

1 all he could point to, and the only thing he pointed to, was
2 the chart in Paragraph 20 of his May 25th declaration, and
3 nothing else. And when we asked for the output, we either
4 were told you can have the entire books and records of the
5 company, which was produced, some number of 145,000 pages-
6 plus, or the single page. There's nothing in between that
7 shows the subset of the costs which are allocated to 506(c).
8 And that's the fundamental problem, that there's
9 ability either for the creditors or for the Court to be able
10 to ascertain whether these numbers are appropriate or not,
11 because there's no backup documentation.
12 In addition, Your Honor, to the extent that this
13 one page or so constitutes the documentation that supports
14 it, you'll note that the categories in large part do not
15 even follow the same categories in the weekly reporting that
16 the Debtors were providing. And if they do, the numbers
17 don't match.
18 One example that we noticed quickly is there's
19 occupancy costs in the weekly reporting and GOB rent. Those
20 two numbers for the entire period from October 15 through
21 the sale date of February 9th constituted $149 million,
22 according to the Debtors' weekly reporting.
23 Mr. Griffith and the Debtors now for 506(c) have a
24 category that they call rent occupancy expense, property
25 taxes and property maintenance, and that total in Mr.

1 Griffith's May 26th declaration was $228 million, as opposed
2 to the $149 million of occupancy cost that they listed in
3 their weekly reporting. And even here in Mr. Schrock's
4 slide for that amount they total $152 million. You just
5 can't figure out --
6 THE COURT: When you say to me that the $149
7 million is for the total, not just for a week?
8 MR. FOX: Correct --
9 THE COURT: Right, okay.
10 MR. FOX: -- $149 million, according to the weekly
11 reporting for the two categories of occupancy, and then
12 separate category of GOB rent.
13 THE COURT: Okay.
14 MR. FOX: Now, Mr. Griffith tried to explain that
15 he thought, you know, some of this cost like property taxes
16 were included in SG&A. But there is no way to know that or
17 see that or to go hunting for it. And then there are
18 additional categories that, again, just don't fit or don't
19 match the categories of the reporting. So, it becomes
20 impossible to understand what, if anything, should be
21 included.
22 With respect to the professional fees, you'll
23 recall last week we raised the issue of Mr. Griffith's
24 ability to testify at all, and you declined to strike
25 Paragraph 33 and 32 of his declaration, even though he had

1 testified at his deposition that he had nothing to do with
2 selecting the professional fees, or the $51,000,000 and that
3 counsel did that. He comes back and sort of suggests that
4 he oversaw the process, I believe is what he said in his
5 declaration.
6 But if you look at what he's asking for in those
7 Paragraphs 32 and 33, the most that we could come up with,
8 based on what's in the record itself, including the fee
9 requests which were included in the exhibits, is about $33
10 million.
11 And when we went through them, if you include all
12 of Weil Gotshal's asset disposition costs through their
13 February fee application, that's about $13.4 million. If
14 you include all their hearing and court matters, that's
15 another $1.4 million. That gets you to the $14,927,627 that
16 Griffith uses.
17 After that -- and he had testified that they used
18 the M&A line item to pull out these costs from the various
19 professionals -- for FTI Consulting, the asset sale number
20 $248,197; for Paul Weiss, the for sale transactions, the
21 number was $2,027,029.
22 He testified that for professional fees that were
23 based -- where there was a fixed fee, they based it on hours
24 recorded. And he said that, therefore, $400,000 of a
25 million for Evercore should be included. But the Evercore

1 fee application, which is a Joint Exhibit 059-1, showed they
2 billed 245 of their 1,528 hours, or 16 percent of their
3 million, to assets sales, which is about $160,000, not
4 $400,000.
5 Houlihan has no asset sale category in their
6 application. And then Lazard has the sale transaction of
7 $453,000, and the total restructuring fee of $15,000,004.
8 And all that together totals to $33,288,143. So, to the
9 extent you can try to tease it out of what is available, at
10 least on that, it doesn't add to the amount that they're
11 asking for.
12 I think Mr. Kreller covered the carveout point, I
13 would just say this. The purpose of it is it allows the
14 professionals to be paid and not have the funds clawed back
15 from them, because it's taken off the top of the collateral.
16 But the creditors, the secured creditors, are
17 given the replacement lien and the replacement claim, the
18 superpriority claim, to then recover it back from the
19 estate. So, the professionals don't get hung out if there
20 is a shortfall, but the estate does cover it. And because
21 they're taken off the top, they're paid before the
22 collateral reaches us.
23 THE COURT: That works when there is a 506(c)
24 waiver, there's not a waiver here.
25 MR. FOX: Well, but --

1 THE COURT: I've dealt with this already.
2 MR. FOX: Okay, Your Honor. Two other things.
3 With respect to eligible inventory you asked about, the in-
4 transit inventory and the cash in advance inventory were the
5 two largest categories of ineligible inventory. But in
6 fact, all of that inventory actually showed up. So,
7 although it's not considered eligible, to the extent you're
8 looking at that number as a guidepost, it in fact does show
9 up out of those categories.
10 THE COURT: Where? When?
11 MR. FOX: It was delivered.
12 THE COURT: No, but on the petition date? No,
13 right?
14 MR. FOX: No, but it was ultimately delivered to
15 the --
16 THE COURT: But it's... People are including it
17 on the petition date as part of their valuation.
18 MR. FOX: Well, I think they include it because
19 there few that it does in fact show up and doesn't --
20 THE COURT: But they're not including post-
21 petition interest, which also, in fact, shows up?
22 MR. FOX: Because it's been paid for. But I
23 understand. That was the conclusion that reached with
24 respect to those categories.
25 THE COURT: By whom?

1 MR. FOX: By I think our expert and by the others.
2 THE COURT: Your expert didn't place any value on
3 inventory in transit.
4 MR. FOX: No, no, no. But he started with the
5 stock ledger inventory, not the eligible inventory. And
6 that's the difference. And that's why he felt comfortable
7 doing that because he concluded that it was out there, and
8 it would be paid for.
9 I mean, look, the thing about eligible inventory,
10 it's like if you go out and buy a house, the lender will
11 lend you 90 percent against the house, but that doesn't mean
12 the house isn't worth the 100 percent you for it or that you
13 can sell it for. And this is just a way for the -- you
14 know, the eligible inventory, it's a way for the lender to
15 protect itself. It doesn't mean that the additional
16 inventory or items don't have value.
17 Lastly, Your Honor, and I don't --
18 THE COURT: But they don't have 100 percent value.
19 That's the issue. Tiger values it at between 10 and 30
20 percent. Although for some reason, Ms. Murray valued it at
21 51 percent, without explaining why.
22 MR. FOX: Well, that was on a liquidation basis.
23 It was (indiscernible) an orderly liquidation sale.
24 THE COURT: Right. Well, we've been through that.
25 MR. FOX: Right. Lastly, Your Honor, I would just

1 point out that with respect to the extent the Court is going
2 to look to the sale price, notwithstanding what was said in
3 February, there was $5.2 billion of consideration paid for
4 the assets. And to the extent that $3.9 billion of that was
5 attributable to non-encumbered assets, I don't know what
6 assets this Debtor had that were not encumbered. They were
7 liened to the gills.
8 So, yet, it's not unheard of for a buyer to agree
9 that part of the consideration will be attributed to other
10 factors, which is maybe what went on here.
11 THE COURT: Well, there's no allocation.
12 MR. KRELLER: That's right. But at the end of the
13 day, there's $5.2 billion that's paid, and there are only
14 credit bids of $1.3 billion. So, there's additional value
15 there. How it gets allocated or divided towards particular
16 collateral becomes an open issue, that in the context of
17 this, I think needs to be considered.
18 Thank you, Your Honor.
19 THE COURT: Okay.
20
21 THE COURT: Okay. All right. I appreciate this
22 isn't a normal lunchtime, but I have to eat something
23 because I'm getting a little cranky. So, I'll be back at --
24 what is it, quarter to 4:00? I'll be back at 4:15.
25 MAN: Okay. Thanks, Judge.

1 (Recess)

2 THE COURT: Okay. We're back on the record in In

3 re Sears Holdings, et al. Does anyone else have anything

4 further to say before I give you my ruling? No. Okay.

5 No one should draw anything from the fact that

6 since I got off the bench a few minutes ago, it turned pitch

7 dark and we had a thunderstorm.

8 In any event, I'm going to give you an oral ruling

9 on what is a set of fairly complicated issues. I'm doing

10 that because I understand that the parties in this case

11 would benefit considerably from getting the result promptly.

12 And obviously giving it to you this afternoon is more prompt

13 than sitting down and writing a written opinion.

14 As is the case when I give an oral ruling, often I

15 may review the transcript and in addition to correcting any

16 typos or mis-citations, supplement it, correct my grammar,

17 et cetera. If I do that, I'll file it as an amended bench

18 ruling. It won't be a transcript. And obviously it won't

19 have the weight of a fully written opinion, but it will read

20 better. But my rulings won't change.

21 I have before me two motions, both involving the

22 so-called second lien, or 2L creditors, which comprise ESL,

23 Cyrus and those parties to the so-called 2010 Notes, whose

24 trustee, or indenture trustee, is Wilmington Trust.

25 Wilmington Trust also serves as the collateral agent for all

1 the 2L parties.
2 The two motions, two contested matters, before me
3 pertain to the following overall issues. First, whether the
4 2L creditors have a claim under Paragraphs 17 and 18, (d) in
5 each case, of the final Debtor in Possession Financing Order
6 in this case, and section 507(b) of the Bankruptcy Code,
7 which provides, "If the trustee" -- in this case the debtor
8 in possession -- "under section 362, 363 or 364 of this
9 title provides adequate protection of the interest of a
10 holder of a claim secured by a lien on property of the
11 debtor, and if, notwithstanding such protection, such
12 creditor has a claim allowable under subsection (a)(2) of
13 this section arising from the stay of action against such
14 property under section 362 of this title from the use, sale
15 or lease of such property under section 363 of this title,
16 or the granting of a lien under section 364(d) of this
17 title, then such creditor's claim under such subsection
18 shall have priority over every other claim allowable under
19 such subsection," that is, subsection 507(a)(2) of the
20 Bankruptcy Code. The parties refer to this as the "section
21 507(b) dispute."
22 In addition, I have a contested matter before me
23 pertaining to an assertion by the debtors in possession in
24 this case under section 506(c) of the Bankruptcy Code. That
25 provision states that the "trustee" -- in this case, the

1 debtor in possession – "may recover from property securing
2 an allowed secured claim the reasonable necessary costs and
3 expenses of preserving or disposing of such property to the
4 extent of any benefit to the holder of such claim, including
5 the payment of all ad valorem property taxes with respect to
6 the property."
7 It is often the case that in debtor in possession
8 financing/cash collateral orders on a final basis 506(c)
9 rights or claims against the secured creditor and/or its
10 collateral are waived. But that is not a case in this case
11 with respect to the second lien lenders' collateral.
12 Therefore, it's a live issue.
13 I will address the section 507(b) contested matter
14 first. That is a matter in which the second lien creditors
15 bear the burden of proof in showing their entitlement to the
16 superpriority claim set forth in section 507(b). See
17 Official Committee of Unsecured Creditors v. UMB Bank NA,
18 501 B.R. 549 -- oh, I'm sorry, it's the wrong -- no, I'm
19 sorry -- 501 B.R. 549 at 590 (Bankr. S.D.N.Y. 2013), and the
20 cases cited therein.
21 I should note that while section 507(b) gives, to
22 the extent the statute's requirements are satisfied, the 2L
23 creditors a superpriority administrative expense claim, that
24 claim has been limited in this case by two orders of the
25 Court, which set up certain reserves and then deal with the

1 reserves, the so-called "winddown reserves." But the claim
2 itself, except in one respect, has not otherwise been
3 limited by contract.
4 As is clear from the plain language of section
5 507(b), Congress set forth several criteria that have to be
6 satisfied for there to be such a claim. First, the creditor
7 has to have a claim allowable under subsection 507(a)(2) of
8 the Bankruptcy Code, which defines allowed administrative
9 expenses as the "actual necessary costs and expenses of
10 preserving the estate."
11 The vast majority of cases, as well as the leading
12 commentator, Collier on Bankruptcy, view this requirement as
13 relatively easy to meet, as long as the creditors'
14 collateral was used in a necessary way to preserve the
15 estate. And I conclude here that that element of the test
16 is satisfied, at least through the date of the sale to
17 Transform in this case.
18 Then the creditor must establish, first, that
19 adequate protection was provided and, later, proved to be
20 inadequate. And there's no question here that adequate
21 protection was in fact provided in the form of a replacement
22 lien.
23 Second, as I said, the creditor must have an
24 administrative expense claim under section 507(a)(2). And
25 finally, the claim must have arisen from either the

1 automatic stay of section 362, or the use, sale or lease of
2 property under section 363, or the granting of a lien under
3 section 364.
4 Here, the claim for diminution, if such a claim
5 exists, arose from the use, sale or lease of property under
6 section 363 of the Bankruptcy Code, given the alleged
7 diminution in the value of the collateral from the grant of
8 adequate protection through the sale to Transform.
9 It is clear, however, that the mere use of a
10 secured creditors' collateral is insufficient to establish a
11 507(b) claim. Instead, the use of the collateral here has
12 to be shown to have resulted in a diminution in the value of
13 the collateral, and it is the amount of that diminution,
14 i.e. comparing the value at time 1, and value at time 2,
15 that leads to an allowed 507(b) claim.
16 For all of the foregoing points, see In re
17 Construction Supervision Services, 2015 Bankr. LEXIS 2700 at
18 pages 17-19 (Bankr. E.D.N.C., August 13, 2015).
19 Consequently, 507(b) claims -- and the claims at
20 issue before me are no exception -- fundamentally raise
21 issues concerning value, the valuation of collateral, a
22 topic, for probably obvious reasons, that has led to much
23 case law and development of the law over the years, with
24 still an ultimate realization that valuation exercises are
25 exercises of judgment and not an exact science and are

1 driven heavily by the facts of a particular case.

2 Congress itself recognized this point in the

3 legislative history of the Bankruptcy Code, to section

4 506(a) of the Code. As stated in the Congressional

5 Reporter, "Value does not necessarily contemplate forced

6 sale or liquidation value of collateral, nor does it always

7 imply a going concern value. Courts will have to determine

8 the value on a case-by-case basis, taking into account the

9 facts of each case and the competing interests in the case."

10 H.R. Rep. No. 95-595, 95th Congress, 1st Sess., 365 (1977).

11 The legislative history of section 361 of the

12 Bankruptcy Code provides the same concept: "The section

13 does not specify how value is to be determined for purposes

14 of adequate protection," that is. "Nor does it specify when

15 it is to be determined. These matters are left to case-by-

16 case interpretation and development. This flexibility is

17 important to permit the courts to adapt to varying

18 circumstances and changing modes of financing. Neither is

19 it expected that the courts will construe the term 'value'

20 to mean in every case forced sale liquidation value or a

21 full going concern value. There is wide latitude between

22 those two extremes, although forced sale liquidation value

23 will be a minimum." And then Congress went on to say, "In

24 any particular case, especially of a reorganization case,

25 the determination of which entity should be entitled to the

1 difference between the going concern value and the
2 liquidation value must be based on equitable considerations
3 arising from the facts of the case." S.Rep. No. 95-989 95th
4 Congress 2d Sess., 54 (1978). See also H.R. Rep. No. 95-595
5 95th Congress, 1st Sess., 338 -- excuse me -- 340.
6 As noted by In re Craddock-Terry Shoe Corp., 98
7 B.R. 250 at 253-54 (Bankr. W.D.Va. 1988), the courts have
8 applied this flexibility in attempting to determine the most
9 commercially reasonable disposition practical under the
10 circumstances. The court there also noted that in order to
11 determine the most commercially reasonable disposition
12 practical, the court must follow the directive of section
13 506 and consider the purpose of the valuation. That is in
14 reference to section 506(a) of the Bankruptcy Code, which
15 states in (a)(1) that with respect to valuing the collateral
16 for determining the amount of an allowed secured claim,
17 "such value shall be determined in light of the purpose of
18 the valuation and of the proposed disposition or use of such
19 property and in conjunction with any hearing on such
20 disposition or use, or in a plan affecting such creditors'
21 interests."
22 Craddock-Terry Shoe Corp. went on to state, "The
23 purpose of adequate protection, as stated in the legislative
24 history of section 361 of the Bankruptcy Code, is to ensure
25 that the secured creditor receives in value essentially what

1 he bargained for." Of course, that concept leaves a lot up
2 to the discretion of the court. Many courts have held that
3 what a creditor bargains for is what it would get outside of
4 the bankruptcy case, since the statute measures the
5 creditor's interest in the debtor's interest in the
6 collateral, and normally the creditor would bargain for its
7 right outside of the bankruptcy case.
8 However, at least in terms of exit value, the
9 Supreme Court has made it clear in Associates Commercial
10 Corp. v. Rash, 520 U.S. 953 (1997), that the court should
11 look to the purpose of the proposed use of the asset, and if
12 it is to be for a reorganization, that use would be in the
13 hands of the debtor and would normally call for replacement
14 value.
15 I have not been asked for the Court to determine
16 valuation in the context of a sale allocation or a Chapter
17 11 plan of collateral, but, rather, under section 507(b).
18 The courts in this District have properly applied the Rash
19 case’s approach to 507(b) questions. Again See The Official
20 Committee of Unsecured Creditors v UMB Bank 501 B.R. 549,
21 593 - 97, and In re Sabine Oil and Gas Corp. 537 B.R. 503,
22 506 -- I’m sorry, 576 - 577 (Bankr. S.D.N.Y. 2016).
23 As is perhaps to be expected, as I said, that
24 general case law has not led to agreement among the parties
25 here as to the starting and ending -- well, at least the

1 starting values, and perhaps the ending values for the
2 507(b) analysis, or even how to, as a matter of law, go
3 about that analysis.
4 The 2L creditors have largely taken the view that
5 because their collateral, which is primarily inventory and
6 accounts receivable, is -- well, was used in the Debtors'
7 retail business, that I should apply a retail value to it in
8 the first instance, subject to discounts or a 506(c) claim,
9 the retail value being derived almost entirely, if not
10 entirely from how those assets were listed at cost on the
11 Debtor's books and records. That's the contention by the
12 experts for two of the three 2L movants here, Messrs.
13 Schulte and Henrich.
14 The third expert, Ms. Murray, contends that these
15 types of assets are reasonably and traditionally valued
16 based on customary borrowing base formula -- formulas, with
17 respect to eligible assets, at least, and at least to set a
18 floor value for those assets.
19 The Debtors, on the other hand, contend that the
20 ultimate -- they contend allocation of the sale value to
21 Transform under the ultimate section 363(b) sale in this
22 case should set the value of the collateral, both at the
23 beginning of the case, and, of course, at the end case --
24 end of the case.
25 They contend that that value is 85 percent of book

1 value for all of the collateral, both eligible for the
2 borrowing base and not eligible. All four parties use the
3 concept of going concern value but in different ways, even
4 though they all recognize that because of the nature of the
5 disposition of the collateral here, i.e. in a going concern
6 sale, some form of going concern value should be used under
7 the Rash case and the two SDNY cases that I've cited.
8 That, too, begs the question, however, as amply
9 stated, or as aptly stated, that is, by Bankruptcy Judge
10 Carey in In re Aero Group International, A-e-r-o G-r-o-u-p,
11 2019 Bankr. LEXIS 904 (Bankr. D Del., March 26, 2019), at
12 Page 38, the concept of going -- this is a quote, "The
13 concept of going concern versus liquidation is not a binary,
14 either/or situation. Instead, a company's status appears on
15 a spectrum between the sale of a true, financially healthy
16 going concern business, and a forced liquidation, with an
17 orderly liquidation somewhere in between."
18 Judge Carey noted that in that case there was a
19 going concern sale ultimately, but that that sale was in the
20 context of a failed standalone plan process and the distinct
21 possibility of veering or pivoting to a liquidation. Those
22 facts are also the case here. Thus, although the collateral
23 was used in the Debtors' retail business, the reality of
24 this case was quite clear: the Debtors would need a
25 financial reorganization that was premised upon, under all

1 realistic scenarios, either a going concern sale in the
2 context of competing liquidation bids, or no going concern
3 bid acceptable and pivoting to a liquidation. It is in that
4 context that I consider the valuation evidence put before
5 me.
6 I believe that that approach is also entirely
7 consistent with Judge Glenn's approach in Official Committee
8 of Unsecured Creditors v UMB Bank, 501 B.R. 549, starting at
9 page 594, and continuing through 597. As Judge Glenn there
10 states, "The Court remains faithful to the dictates of
11 506(a) by valuing the creditors' interest in the collateral
12 in light of the proposed post-bankruptcy reality." That's
13 at page 595. He goes on to criticize the valuation
14 assumption of the secured creditors in that case that was
15 ostensibly at fair market value, since there was a fair
16 market disposition ultimately in the case, as quote,
17 "assuming that the JSN Collateral could have been sold on
18 the petition date by the Debtors. This assumption ignores
19 reality." As Judge Glenn stated, that did not take into
20 account the costs associated with obtaining requisite
21 consents or other costs and timing concerns that pertain to
22 the real facts facing the secured creditors at the
23 commencement of the case.
24 Moreover, Judge Glenn faulted the secured
25 creditors' expert's assumption in not looking to sales

1 conducted by other distressed entities on the brink of
2 insolvency and, instead, considering only a solvent company
3 able to capture fair value for its assets.
4 To the contrary, Judge Glenn held that the debtor
5 was very substantially, and the collateral was -- and the
6 collateral was very substantially impaired by reason of
7 existing defaults that prevented the debtors from disposing
8 of most of their collateral at that time.
9 Any assessment, I believe, of the 2L creditors'
10 collateral at the commencement of the case in order to
11 determine its -- whether it has diminished in value,
12 therefore needs to take those concerns into account.
13 It may well be that some lesser form of value than
14 retail value, in a retail customer's hands, or full book
15 value, therefore, is appropriate, and that some form of
16 orderly liquidation value, instead, would be more
17 appropriate under these facts. See, for example, In re
18 T.H.B. Corp. 85 B.R. 192 (Bank. D. Mass. 1988).
19 In conducting such an analysis, one would expect
20 an expert to look at different types of collateral and to
21 make adjustments for their reasonably realizable value,
22 which is what the experts did in the Aero Group case, with
23 respect to accounts receivable and inventory, for example,
24 deducting off the face value or book value of accounts
25 receivable for old or potentially uncollectable receivables,

1 and making similar deductions based on the ability to
2 realize on inventory in the context of the case itself.
3 Accordingly, I have given next to no weight to Mr.
4 Schulte's purported expert report, where he simply took the
5 companies' book value inventory for "go-forward stores," and
6 discounted it by less than one percent. That includes not
7 only eligible receivables, which I believe are properly
8 discounted as the borrowing base does, but also ineligible
9 receivables and inventory and other assets that the record
10 reflects should be in fact steeply discounted.
11 Such discounting is normal and customary and
12 expected of a valuation of collateral, as was done in the
13 Aero Group case that I just cited, as well as the In re MD
14 Moody and Sons Inc. case, 2010 Bankr. LEXIS 5220 (Bankr.
15 M.D. Fla., March 5, 2010), where Judge Funk quite rightly
16 distinguished between the fair market value of eligible and
17 ineligible receivables, albeit in the context of an adequate
18 protection decision as opposed to a 507(b) decision.
19 It appears to me this really wasn't particularly
20 Mr. Schulte's fault, but was based on the direction he was
21 given, which I believe is based on a misguided
22 interpretation of the effect of the Rash case as applied to
23 determining initial adequate protection value and as was
24 properly construed in Official Committee of Unsecured v UMB
25 Bank, to the contrary to the legal approach applied by Mr.

1 Schulte apparently at the direction of counsel. That
2 valuation is simply not tied to reality, i.e. the normal
3 realizable value of this collateral in the context at the
4 start of this case.
5 That reasonable expectation of the 2L creditors
6 was not based on a pure book value analysis without taking
7 into account reasonable projections that would inform actual
8 valuation upon which a person would actually exercise some
9 judgment to determine the value of the collateral.
10 Rather, it assumed in essence an immediate sale of
11 the collateral to realize value on day one of the case at
12 retail value, as if anyone that would buy all the collateral
13 in that context where the Debtor was in severe financial
14 distress would in fact buy it for the same price that it was
15 marked on the Debtor's books, or, in the case of Mr.
16 Henrich's valuation, at retail value, i.e., as Mr. and Mrs.
17 Smith would buy an item of inventory, a washing machine, at
18 retail value.
19 It's clear to me that this is -- this should have
20 come as no surprise to any of the 2L creditors. Certainly
21 it should not have come as a surprise to ESL, the largest 2L
22 creditor, which had an intimate familiarity with the
23 Debtors' operations and analyses of the collateral for its
24 2L debt that were conducted over the years. But frankly, it
25 would -- should have come as no surprise to any

1 sophisticated lender.
2 I believe that Cyrus' expert, Ms. Murray, does
3 attempt to take realistic realizable value into account in
4 applying a borrowing base type of analysis to the
5 collateral. She does so, however, frankly based on another
6 entity's analysis who has not served as an expert in this
7 case, a company called Tiger Asset Intelligence, which --
8 Intelligent, excuse me, which provided a net orderly
9 liquidation value analysis of the collateral as of September
10 -- on September 28th, 2018, covering that value as of the
11 start of October, which is the closest valuation that one
12 has to the commencement of this case in mid-October of 2018.
13 Ms. Murray makes no effort to vet Tiger's
14 analysis, but assumes, based on her knowledge generally of
15 inventory and accounts receivable asset based facilities
16 that Tiger's conclusions as to a net orderly liquidation
17 value are reasonable.
18 She then applies that percentage to the "go-
19 forward store" inventory and then slightly different
20 percentages or somewhat different percentages to other types
21 of collateral, including inventory in transit and other
22 assets.
23 There are problems with this analysis that aren't
24 limited just to the fact that the Tiger analysis is almost
25 exclusively relied on without any real vetting. Ms.

1 Murray's analysis includes, for example, valuations for
2 inventory in transit, credit card receivables, pharmacy
3 scripts, and pharmacy receivables that differ considerably
4 from Tiger's own analyses as of the start of October of
5 2018.
6 For example, Tiger put a value on inventory in
7 transit of between 10 and 30 percent, which would lead to a
8 range between $19.8 million and $58 million. Ms. Murray put
9 a value on it of $74.6 million. Ms. Murray also appears to
10 have valued pharmacy scripts at face or near face, $72.8
11 million, when Tiger put a 38.1 percent value on such
12 scripts, and caveated its analysis by noting that the sale
13 of scripts on a liquidation basis is a delicate and
14 difficult task, given that other pharmacies know that the
15 debtor is going out of business.
16 Nevertheless, it appears to me that Ms. Murray's
17 general approach is at least somewhat, probably more than
18 somewhat, tethered to reality or the reality that faced
19 these second lien creditors at the start of this case with
20 respect to their interest in the Debtors' interest in their
21 collateral, as well as the reality of asset-based lending,
22 which is well established and reflected not only in the DIP
23 Order for the treatment of the ABL lenders and their rights
24 under the borrowing base calculations, but in numerous DIP
25 orders over the years. See, for example, In re RadioShack

1 Corp., 2015 Bankr. LEXIS, 4541 (Bankr. D Del., March 12,
2 2015), and in re Visteon Corp. 2010 Bankr. LEXIS 5516
3 (Bankr. D. Del. March 16, 2010).
4 Tiger, in adopting an 87.7 percent value against
5 face for eligible inventory and receivables stated that it
6 took certain costs into account, both direct and indirect.
7 It of course has not testified or been deposed, and we don't
8 know how it did that or what costs it considered. And Ms.
9 Murray does not evaluate that analysis in any way.
10 It's clear to me that certain costs were not
11 included, such as legal costs directly related to selling
12 the inventory, however. And as I noted, while there is some
13 value in the other inventory and assets, Tiger has heavily
14 discounted it.
15 The Debtors have a totally different approach. As
16 I stated, they contend that there is sufficient evidence to
17 show that the ultimate transaction here reflected both the
18 starting and ending value of the collateral, which should be
19 measured at 85 percent of book. There is a problem with
20 this evidence, however, as well, in that there's no binding
21 agreement to show that the parties intended that 85 percent
22 discounted number to be the allocable value for the
23 collateral.
24 To the contrary, the parties waived any allocation
25 of value among the forms of consideration in the Asset

1 Purchase Agreement with Transform, and the specific
2 references to 85 percent of book value, which are in
3 evidence, are in evidence in connection with prior and lower
4 bids made by Transform for the Debtors' assets or
5 substantially all the Debtors' assets as a going concern.
6 So, at best, that 85 percent discounted figure
7 serves as a "data point," for what it's worth. On the other
8 end of the scale, Ms. Murray refers to data points, as well,
9 that have similar evidentiary problems, namely, proposals,
10 that were not accepted, to use the Debtors' resources to
11 sell in going concern -- I'm sorry, in orderly liquidation
12 sales, going-out-of-business sales, the collateral by a
13 company called Abacus and bids by consortiums of
14 liquidators, which on their face show, in discount to book,
15 a net realizable value of between 89 and slightly under 94
16 percent of face value.
17 In addition, the 2L lenders point to analyses of
18 the collateral by the Debtors or the Creditor's Committee
19 that place a 90 percent discount to face value on it.
20 The problem with all of those data points is
21 similar to the problem with the 85 percent data point
22 related to the APA. There's no detail in the record as to
23 what collateral was covered and what costs were netted out
24 from the proposals. Moreover, they were just that,
25 proposals. They were not accepted, and, therefore, not

1 binding on anyone.

2 Finally, the Court has another data point, which

3 is the adjusted going-out-of-business-sale net recovery

4 which is in evidence in two different forms, one measuring

5 the actual going-out-of-business-sale net recoveries in this

6 case -- and that is with respect to many stores that were

7 sold and did not form the consideration sold to Transform --

8 where essentially some combination of inventory and other

9 assets were sold.

10 The two statements purporting to be accurate

11 statements of the results of those inventory sales state

12 that the discount on a net basis to face was either 95.6

13 percent or 96.4 percent. There is a similar problem with

14 these data points beyond the difference between the two

15 numbers. The first is that at least Mr. Henrich's

16 calculation came from ESL, and we don't know how ESL derived

17 its numbers, except that it is stated that ESL derived it

18 from succeeding to the Debtors' books and records.

19 Secondly, and more importantly, we don't know the makeup of

20 the inventory that was actually sold. Was it primarily

21 eligible inventory? Did it include ineligible inventory?

22 Did it include other assets referenced in the Tiger report

23 from September 28, 2018? It clearly did not include

24 inventory in transit. So although, again, it is a data

25 point, what makes up the figure that I'm being told to use

1 as an absolute marker is unknown. Finally, it is
2 acknowledged that the only adjustment off of the purchase
3 price for the net costs of the sales are the "four-wall
4 costs" related to the individual GOB sales, as opposed to
5 any on-top corporate costs, such as maintaining HR services
6 related to the employees who were selling the inventory and
7 the like.
8 I began this discussion of section 507(b) by
9 noting that the 2L creditors have the burden of proof here.
10 That's an important burden. Courts have denied 507(b)
11 requests in toto for a failure of proof of the amount of
12 diminution. See, for example, In re Bailey Tool Mfg. Co.,
13 2018 Bank. LEXIS 154 at 20 (Bankr. N.D. Tex. Jan. 23, 2018),
14 and In re Modern Warehouse Inc., 74 B.R. 773 (Bankr. W.D.
15 MO. 1987).
16 Simply based upon the information before me with
17 respect to the starting value of inventory, I conclude that
18 a proper measure of value for 507(b) purposes is with regard
19 to eligible inventory, exclusive of inventory in transit, of
20 86.5 percent of face.
21 There were certain other elements of the
22 collateral that have some value, which the 2L experts place
23 a value on, namely credit card receivables, pharmacy
24 scripts, and pharmacy receivables. The valuation of credit
25 card receivables by Messers. Schulte and Henrich are $64.2

1 and $64.3 million, apparently, also at face. Ms. Murray
2 values them at 64.3 percent -- I'm sorry, $64.3 million,
3 excuse me, while the Debtor -- I'm sorry -- Ms. Murray
4 values them at $54.8 million, while the Debtor puts a value
5 at $46.6 million. There seems to be no real analysis behind
6 Ms. Murray's value other than her desire, at least from what
7 I took away from statements made in oral argument, to
8 comport with what was on the Debtors' books of the
9 discounted value. I will go with the Debtors' book value,
10 $46.6, given that fact, $46.6 million.
11 As far as pharmacy scripts are concerned, all
12 three of the 2L experts value those scripts at $72.8
13 million, again apparently at face. However, as noted,
14 Tiger, the one whom Ms. Murray relied on for everything
15 else, puts a value of 38.1 percent as against face.
16 If I concluded that the scripts were in fact
17 collateral, I would discount them by that same 38.1 percent
18 number.
19 As far as pharmacy receivables are concerned, I
20 will take Ms. Murray's number of $10.5 million.
21 All three experts count cash as part of the 2L
22 lenders' collateral at the starting point of the case. They
23 do that notwithstanding the fact that they do not have a
24 lien specifically on all cash, but instead only have a lien
25 on the proceeds of their collateral.

1 They acknowledge that they have not done any sort
2 of tracing exercise to determine what cash was actually
3 proceeds of their collateral as existed on the books of the
4 company at the start of the case, although they urge me
5 simply to infer that most of the cash should be viewed as
6 their proceeds.
7 They also argue that the first lien debt that
8 comes ahead of them would apply the cash to reduce the first
9 lien debt, notwithstanding that there's no evidence if that
10 happened, specifically, or -- and, excuse me, the waiver of
11 marshaling in the Debtor in Possession Financing Order.
12 I agree with the Debtors that cash should not be
13 included here given the lack of tracing and the other
14 problems with the proof as established -- to establish this
15 is an element of collateral or this should be part of the
16 collateral determination.
17 There's also an underlying problem as to whether
18 the pharmacy scripts constitute the Debtors' -- I'm sorry --
19 constitute the 2L creditors' collateral. The 2L creditors
20 contend that the scripts, which are the right to fill a
21 prescription that has not yet been presented, are either
22 inventory or "books and records," and that if one sold the
23 books and records, i.e. the scripts, there would be value
24 attributable to it.
25 The right to fill a prescription, to my mind,

1 clearly is not inventory. The lien on "books and records"
2 as set forth in the 2L security agreement, has a qualifying
3 clause which states that they are books and records
4 pertaining to the collateral. I do not believe that a right
5 to sell un-presented prescriptions is in fact such an item
6 of collateral. In that sense, it's not like a creditor list
7 -- I'm sorry -- a customer list, which would be a separate
8 item of collateral and clearly has value just as scripts
9 have some value. So I believe it is also properly excluded
10 from the collateral calculation, even as to its heavily
11 discounted value as I previously found.
12 As I've noted, the diminution-in-collateral
13 analysis requires a starting point valuation, which I've
14 just conducted. One has to then determine what the
15 diminution was as of an end date. The parties agree that
16 the only end date value was the designated 2L credit bid
17 under the APA of $433.5 million.
18 So it would appear that the calculation of
19 diminution is relatively easy, i.e. subtract the collateral
20 value -- I'm sorry -- subtract from the starting collateral
21 value, which I've previously determined, the amount of
22 $433.5 million. It is complicated, however, by the fact
23 that this was second lien collateral. There is first lien
24 debt ahead of it.
25 Clearly, the 2L creditors' interest in the

1 collateral -- interest in the collateral as of the starting
2 date, has to take into account that senior debt, i.e., that
3 senior debt needs to be deducted from the collateral value
4 that I had previously found, in addition to subtracting the
5 $433.5 million credit bid.
6 The parties agree that the revolving credit
7 facility of $836 million and the first lien term loan of
8 $570.8 million and the FILO term loan of $125 million should
9 all be subtracted from the starting collateral value. They
10 disagree, however, about three other deductions that the
11 Debtors contend need to be made on account of the first lien
12 debt.
13 First, they disagree that postpetition interest
14 for the assumed 11 to 12 weeks of orderly liquidation sales
15 would have to be deducted. The Debtors calculate that
16 number at $34 million and no one has challenged that. The
17 2L creditors say that I must look at the petition date,
18 when, of course, that postpetition interest had not accrued,
19 and, therefore, I should not count it.
20 I conclude, to the contrary, that I must count it,
21 consistent with Judge Glenn's opinion in Official Committee
22 of Unsecured Creditors v UMB Bank, which I believe entirely
23 correctly says that one must apply projected "post-
24 bankruptcy reality," that's a quote, to the calculation.
25 It is completely unreal to assume a realizable

1 value on the collateral without a period to realize that
2 value in. The Debtors have assumed, I believe, the minimal
3 period for that realization in coming up with the $34
4 million of postpetition interest.
5 Clearly, the first lien creditors are -- would be,
6 entitled to that interest, given that they were oversecured,
7 and therefore have a right to it under section 506(b) of the
8 Bankruptcy Code. One might argue that postpetition interest
9 should continue to accrue through the sale, since that was
10 the real reality here. But the Debtors have not done so,
11 and I won't do so here.
12 In part I'm not doing so because of the pay downs
13 to the first lien creditors from the GOB sales, which would
14 have reduced the number against which postpetition interest
15 would be calculated. So the $34 million is a fair number.
16 That leaves what I believe to be the most
17 difficult issue with respect to the 507(b) determination.
18 Namely, the Debtors contend that two first lien letter of
19 credit facilities need to be counted in the first lien debt
20 and accordingly subtracted from the collateral value before
21 the 2L creditors would be entitled to any collateral value
22 on the petition date.
23 One facility is for $123.8 million of issued
24 letters of credit. Another one is for $271.1 million.
25 Neither of those facilities was drawn on the petition date.

1 Namely, they were therefore contingent obligations, although
2 they were collateralized.
3 Nevertheless, they were real obligations. They
4 were denominated in the Debtor in Possession Financing Order
5 as "senior debt." They clearly stood ahead of the 2L
6 creditors and had a claim, albeit contingent, to the 2L
7 collateral senior to the 2L creditors'.
8 Again, the realistic context of this case is not a
9 long-term going concern, but a short-term sale process, with
10 the very real backdrop of a potential liquidation in which
11 the Sears Debtors would go out of business.
12 Under that scenario, it appears clear to me that
13 the letters of credit would be drawn, either immediately or
14 upon their expiration date. The beneficiaries of the
15 letters of credit would not simply let their collateral in
16 the form of a letter of credit go away.
17 Ms. Murray calculates that almost 90 percent of
18 the letters of credit are in respect of worker's
19 compensation contingent obligations, obligations that, as a
20 going concern, the Debtors would be funding, but in a
21 liquidation scenario, would not fund.
22 One could conceivably do a valuation of those
23 letter of credit facilities and not simply take the value at
24 face. Congress does recognize in one context, namely
25 determining whether an entity is insolvent or not, that debt

1 as well as assets can be subject to a fair valuation and
2 section 101(32)(A) of the Bankruptcy Code. See for example
3 Traveler's International AG v TWA, 134 F.3d 183 (3d Cir.
4 1998). But it doesn't -- but Congress doesn't require a
5 valuation of debt in other contexts in the Code, and this
6 issue does not appear to have arisen in a 507(b) context.
7 One also could conceivably value the letters of
8 credit, not just on -- in terms of valuing the contingency
9 as to whether they would be drawn, but also as to whether
10 their face amounts exceed the underlying obligations that
11 they in essence secure, namely the worker's compensation
12 claims and other claims that they cover.
13 Neither of those valuation exercises was
14 undertaken here by the 2L creditors. They simply contend
15 that I should ignore the letters of credit because they were
16 not drawn on the petition date. As a backup, they say that
17 I should simply value them at roughly $9 million, the amount
18 that was drawn between the petition date and the sale.
19 Given the 2L creditors' burden of proof here, I
20 believe they were required to do more, and that I should
21 count the letters of credit in their face amount, rather
22 than do my own attempt to value such obligations, which,
23 again, according to the DIP Agreement, are senior
24 obligations.
25 I do so, again, in the context of this case, where

1 an orderly liquidation going out of business was clearly a
2 very available option against which ESL was bidding.
3 I believe that this resolves all of the open
4 disputes as far as determining the value of the collateral,
5 which subsumes in it what constitutes the collateral and the
6 diminution of the collateral between the petition date and
7 today.
8 I also have determined that the proper
9 interpretation of Paragraph 9.13 of the Asset Purchase
10 Agreement is that to the extent there is a 507(b) claim for
11 ESL, that claim is capped at -- recovery on that claim is
12 capped at $50 million, again based on the definition of
13 "Claim," uppercase Claim in the APA.
14 That definition, which is very broad and includes
15 a right to payment, I believe would mean that it would
16 include claims based on accounts receivable derived from
17 inventory. I'll note a similar argument, which I accepted,
18 was made by the 2L creditors for my including pharmacy
19 receivables in their collateral, even though it wasn't
20 specifically a defined term but can be viewed as based on a
21 right to inventory and the proceeds thereof.
22 So I don't know what that adds up to, but I think
23 the parties can do the math. And if there's a dispute, you
24 could explain the dispute to me as to what the diminution
25 claim will be.

1 Let me turn then to the second issue. And before
2 doing that, though, there is one issue that somewhat bleeds
3 over into the second issue.
4 The second issue, of course, is the 506(c) rights
5 of the debtor in possession. The Creditors Committee and
6 the Debtors have argued that I should take equitable
7 considerations into account in determining those 506(c)
8 rights. And I'll address that when I address the 506(c)
9 issues.
10 I will note, however, that at least a couple of
11 cases have taken equitable considerations into account when
12 doing a 507(b) calculation. They're relatively old cases. I
13 think the leading one is probably In re McFarland's Inc. 33
14 B.R. 788 (Bankr. W.D.N.Y. 1983). See also In re Cheatham,
15 C-h-e-a-t-h-a-m, 91 B.R. 982 (Bankr. E.D.N.C. 1988).
16 I recognize that in the 1980s bankruptcy courts,
17 (perhaps because it was an accepted fact of bankruptcy
18 jurisprudence then) that bankruptcy courts as "courts of
19 equity" -- and that seemed to mean what it said -- were more
20 willing to apply equitable principles to determinations. And
21 clearly Congress in drafting section 506(a) and section 361,
22 as reflected in the legislative history that I've just read,
23 also contemplated applying equitable principles in a
24 valuation.
25 The Supreme Court has severely narrowed the equity

1 jurisdiction of the bankruptcy courts over the years,
2 culminating in Law v Siegel, 134 S.Ct. 1188 (2014). And I
3 actually now view these cases through that lens.
4 I also view them as entirely consistent with my
5 holding on the valuation of the collateral for the 2L
6 creditors at the start of the case, in that I believe when
7 applying the equities in McFarland's and Cheatham and in
8 citing In re Callaster in doing so, those courts were
9 actually talking about what would be an appropriate
10 valuation in light of the facts of the case, namely, what
11 were the reasonable expectations as to the value of the
12 collateral given the nature of the case.
13 And again, as I've heavily relied on Judge's Glenn
14 and Carey's opinions, it seems to me the nature of this case
15 at the start was one where everyone knew -- none more than
16 ESL -- but everyone knew, that the Debtors were going to
17 dispose of substantially all of their assets in a very short
18 time, and that that was the only way that the secured
19 creditors would realize any value.
20 Applying mere book or retail value in those
21 circumstances, one could say would be inequitable, but it's
22 really just unrealistic. So I equate "equity" here as
23 really meaning what's realistic.
24 All right, turning to section 506(c), unlike the
25 507(b) issue, the Debtors here have the burden of proof.

1 See In re Flagstaff Food Service Corp., 739 F.2d 73, 77 (2d
2 Cir. 1984), and First Services Group Inc. v O'Connell (In re
3 Ceron), C-e-r-o-n, 412 B.R. 41, 48 (Bankr. E.D.N.Y. 2009).
4 Under the law of the Second Circuit, the statute's
5 plain language, which is requiring -- which requires, that
6 the expenses incurred by the debtor in possession were
7 necessary and the amounts expended were reasonable and
8 benefited the secured creditor -- require three different
9 things, including a gloss, namely that the benefit be
10 "direct" or "primary." See General Electric Credit Corp v
11 Peltz (In re Flagstaff Food Service Corp.), 762 F.2d 10, 12
12 (2d Cir. 1985). This does not mean that the creditor be the
13 only beneficiary of the expenses, but that the benefit be
14 not only direct, but primary.
15 The valuation of the collateral that I have given
16 already takes into account costs of realizing on the
17 collateral, not only the so-called "four-wall" costs and the
18 assumed, apparently, although, again, this has not been
19 vetted, 3.1 percent discount applied by Tiger, but also my
20 belief as to proper costs applied for corporate overhead
21 attributable to the collateral and legal fees and
22 professional fees directly attributable to the collateral.
23 Where do I come up with that extra discount? In
24 part from, largely from, Mr. Henrich's analysis of 506(c)
25 claims, as well as Judge Stong's analysis in the Ceron case,

1 in which she makes the clearly correct point that whether
2 expenses incurred were "reasonable," requires an assessment
3 that shows that there's some sensible proportion to the
4 value of the benefit to be received.
5 The relatively modest adjustment I've made to the
6 Tiger/Murray analysis takes that into account I believe
7 already. This is important because I think to do the
8 analysis again would be double counting in the 506(c)
9 context. Moreover, the 506(c) evidence provided to me by
10 the Debtors, which consists primarily of a one-page breakout
11 of alleged costs that would fit 506(c) itemized simply by
12 category adding up to over $1,400,000,000 does not break out
13 in sufficient detail any costs beyond what I've included in
14 the value of the collateral that I believe would properly be
15 charged under section 506(c).
16 I think without that level of detail, in other
17 words, I cannot make the "reasonable" and "necessary," let
18 alone "primary and direct benefit" analysis that the Second
19 Circuit case law requires. Consequently, I will deny the
20 Debtors' motion under section 506(c).
21 So I will ask counsel for Cyrus to prepare the
22 order denying the 506(c) motion, and counsel for the Debtors
23 to prepare the order on the 507(b) matter. You don't need
24 to formally settle those orders on the docket, but you
25 should clearly run them by the parties involved in this

1 litigation, including the Creditors Committee, before you
2 submit them to chambers.
3 And, again, if there's some dispute as to how my
4 rulings total up to a 507(b) claim, I would ask the parties
5 to give me their dueling orders with an explanation, emailed
6 obviously to each other as well as to chambers, of the basis
7 for their contention. Anything else?
8 MR. SCHROCK: Ray Schrock, for the Debtors. That
9 said, Your Honor, thank you very much for taking all this
10 time today.
11 THE COURT: Okay.
12 MR. SCHROCK: And we'll move to settle the orders
13 ASAP.
14 THE COURT: Okay.
15 MR. SCHROCK: Or not settle the orders, but
16 prepare them.
17 THE COURT: All right. I have to say also, I
18 greatly appreciate the efficient way that the parties set
19 this litigation up.
20 MR. SCHROCK: Thank you.
21 THE COURT: Thank you.
22 (Whereupon these proceedings were concluded at
23 5:49 PM)
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9 Debtor's Motion Denied Under section 506(c) 250 12

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1 C E R T I F I C A T I O N

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3 I, Sonya Ledanski Hyde, certified that the foregoing

4 transcript is a true and accurate record of the proceedings.

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8 Sonya Ledanski Hyde

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25 Date: August 12, 2019