Docket #0004 Date Filed: 5/29/2019

Hearing Date: June 17, 2019 at 10:00 AM (Eastern)
Objection Deadline: June 14, 2019 at 4:00 PM (Eastern)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: WINDSTREAM HOLDINGS, INC., *et al.*,[1] Debtors.	Chapter 11 Case No. 19-22312 (RDD) (Jointly Administered)
Windstream Holdings, Inc. and Earthlink Holdings Corp., Plaintiffs, v. Charlos Yadegarian, Robert Murray, Cindy Graham, and Larry Graham, Defendants.	Adversary Proceeding Adv. Pro. No. 19-08247 (RDD)

NOTICE OF HEARING ON MOTION OF SECURITIES CLASS ACTION LEAD PLAINTIFF TO DISMISS ADVERSARY COMPLAINT

PLEASE TAKE NOTICE that a hearing will be held before the Honorable Robert D. Drain, United States Bankruptcy Judge, in a courtroom to be determined, at the United States Bankruptcy Court for the Southern District of New York, 300 Quarropas Street, White Plains, New York 10601-4140 (the "Bankruptcy Court") on June 17, 2019 at 10:00 a.m. (Eastern Time), to consider the *Motion of Securities Class Action Lead Plaintiff to Dismiss Adversary Complaint* (the "Motion").

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

PLEASE TAKE FURTHER NOTICE that the Motion has been electronically filed with the Clerk of the Bankruptcy Court and may be examined and inspected by accessing the Court's website (http://www.nysb.uscourts.gov) or the website established by the Debtor's court-approved claims agent, Kurtzman Carson Consultants LLC, in connection with this chapter 11 case (http://www.kccllc.net/windstream).

PLEASE TAKE FURTHER NOTICE that any response or objection to the Motion must be filed with the Court by June 14, 2019 at 4:00 p.m. (prevailing Eastern Time) (the "Objection Deadline") and served so as to be actually received by such time by: Lowenstein Sandler LLP, One Lowenstein Drive, Roseland, New Jersey 07068, Attn: Michael S. Etkin, Esq. (metkin@lowenstein.com) and Andrew Behlmann, Esq.(abehlmann@lowenstein.com).

PLEASE TAKE FURTHER NOTICE that if no objections are timely filed and served with respect to the Motion, such Motion will be deemed unopposed, and the Bankruptcy Court may enter an order granting such Motion without a hearing.

Dated: May 29, 2019

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Bankruptcy Counsel to Lead Plaintiff

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MEMORANDUM OF LAW IN SUPPORT OF MOTION OF SECURITIES CLASS ACTION LEAD PLAINTIFF TO DISMISS ADVERSARY COMPLAINT

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Robert Murray ("Lead Plaintiff"), the court-appointed lead plaintiff in the securities class action captioned as *Robert Murray v. Earthlink Holdings Corp., et al.*, Case No. 4:18-cv-00202-jm (the "Securities Litigation"), pending in the United States District Court for the Eastern District of Arkansas (the "District Court"), and a defendant in the above-captioned adversary proceeding (the "Adversary Proceeding"), for himself and the Class he represents in the Securities Litigation (the "Class"), hereby submits this motion (the "Motion") pursuant to (a) Fed. R. Civ. P. 12(b)(6) ("Rule 12(b)(6)"), made applicable in the Adversary Proceeding by Fed. R. Bankr. P. 7012(b), and (b) Fed. R. Civ. P. 41(b) ("Rule 41(b)"), made applicable in the Adversary Proceeding by Fed. R. Bankr. P. 7041, to dismiss the Adversary Complaint. In support of the Motion, Lead Plaintiff respectfully states as follows:

PRELIMINARY STATEMENT [2]

1. In March 2018, shortly after commencing the Chapter 11 Cases but more than a month before filing the Adversary Proceeding, the Debtor Defendants sought Lead Plaintiff's consent to a supposedly brief continuance of oral argument on the Motions to Dismiss the Securities Litigation, which have been fully briefed since November 29, 2018. Counsel for the Debtor Defendants represented – both to Lead Plaintiff and to the Arkansas District Court – that the Debtor Defendants intended to "resolve those issues [related to the scope of the automatic stay] by filing a motion in the United States Bankruptcy Court for the Southern District of New York" and that the motion would cause a "slight delay[.]"

2. Notwithstanding these representations, after the Arkansas District Court granted the unopposed request for a continuance, it took more than a month for the Debtor Defendants to file the Adversary Proceeding, after which they have done absolutely nothing, relying instead on

[2] Capitalized terms used in this Preliminary Statement but not heretofore defined have the meanings given thereto throughout this Motion.

the open-ended continuance (which operates as a *de facto* stay) they obtained through representations that have proven to be false. On that basis alone, the Adversary Complaint should be dismissed for the Debtor Defendants' failure to prosecute.

3. In addition, the Adversary Complaint contains no more than bare recitations of legal standards, unfounded assumptions, conclusory assertions, and defective legal conclusions, none of which are entitled to the presumption of validity under Rule 12(b)(6) and all of which fail to state a plausible claim for the extraordinary relief the Debtor Defendants seek. On that basis, both counts of the Adversary Complaint should be dismissed.

BACKGROUND

A. The Merger and the Securities Litigation

4. The Securities Litigation is a putative class action arising from the 2017 merger (the "Merger") between EarthLink Holdings Corp. ("EarthLink") and Windstream Holdings, Inc. ("Windstream" and together with EarthLink, the "Debtor Defendants"), two of the debtors in possession in the above-captioned chapter 11 proceedings and the plaintiffs in the Adversary Proceeding (collectively with the Debtor Defendants, the "Debtors").

5. Through the Merger, which was completed on February 27, 2017, each share of EarthLink common stock was exchanged for 0.818 shares of Windstream common stock. Windstream issued approximately 93 million shares of common stock in a transaction valued at approximately $1.1 billion. Post-closing, Windstream's stockholders owned approximately 51% and former EarthLink stockholders owned 49% of the combined company. The Securities Complaint alleges that the Windstream shares issued in connection with the Merger, though purportedly worth $1.1 billion at the time, were in fact almost worthless.

6. The *Amended Class Action Complaint for Violations of Federal Securities Laws* (the "Securities Complaint")[3] filed in the Securities Litigation on July 27, 2018 asserts claims against each of the Debtor Defendants and certain of their respective current and former officers and directors (the "Non-Debtor Defendants" and together with the Debtor Defendants, the "Securities Defendants") (a) under sections 11, 12(a)(2), and 15 of the Securities Act of 1933 (the "1933 Act"), on behalf of Lead Plaintiff and all other persons or entities, except for the Securities Defendants, who purchased or otherwise acquired Windstream shares, pursuant and/or traceable to certain offering documents, and (b) under sections 14(a) and 20(a) of the Securities Exchange Act of 1934 (the "1934 Act"), on behalf of Lead Plaintiff and all other persons or entities, except for the Securities Defendants, who held EarthLink stock on the record date for the Merger.[4]

7. On September 13, 2018, the Securities Defendants filed motions to dismiss the Securities Complaint (the "Motions to Dismiss"). The Motions to Dismiss were fully briefed on November 29, 2018. Accordingly, on December 21, 2018, Lead Plaintiff filed a request for oral argument on the Motions to Dismiss, a copy of which is annexed hereto as **Exhibit A**, noting that counsel "estimates that no more than one hour would be necessary for combined argument by all parties." See Exhibit A at 1. Before filing the request, counsel for Lead Plaintiff conferred with counsel for the Securities Defendants, who jointly responded as follows and asked that their position be included in Lead Plaintiff's request when filed with the Arkansas District Court:

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[3] References to the Securities Complaint and the allegations therein are for informational purposes only, are qualified in their entirety by the Securities Complaint itself, and do not constitute an admission or stipulation with respect to any factual allegations in the Securities Litigation.

[4] The claims asserted in the Securities Complaint are based solely on strict liability and negligence, not on any reckless or intentionally fraudulent conduct by or on behalf of the Securities Defendants, and Lead Plaintiff has specifically disclaimed any allegation of fraud, scienter, or recklessness in connection with such claims. See Securities Complaint, ¶ 7.

> [Securities] Defendants do not believe oral argument is necessary given the parties' extensive briefing and the state of the law regarding the matters at issue, but defendants would be happy to participate in oral argument if the Court deems it beneficial.

See id. On January 24, 2019, the Arkansas District Court issued a notice of hearing scheduling oral argument on the Motions to Dismiss for March 6, 2019 at 1:30 PM Central.

B. The Chapter 11 Cases

8. The Debtors commenced the above-captioned voluntary chapter 11 bankruptcy cases (the "Chapter 11 Cases") on February 25, 2019.

9. On February 26, 2019, Windstream filed *Windstream Holdings, Inc.'s Notice of Bankruptcy and Automatic Stay* (the "Notice of Bankruptcy") in the Securities Litigation. The next day, Lead Plaintiff filed a response to the Notice of Bankruptcy, noting that the automatic stay only impacts the continued prosecution of the Securities Litigation against the Debtor Defendants, and that the Securities Litigation should proceed against the Non-Debtor Defendants absent an order of this Court extending the automatic stay.

C. The Securities Defendants' De Facto "Stay" of the Securities Litigation

10. On March 1, 2019, just five days before oral argument on the Motions to Dismiss was scheduled to take place, the Securities Defendants filed an unopposed motion seeking an open-ended, but supposedly brief, continuance of the oral argument (the "Continuance Motion"), a copy of which is annexed hereto as **Exhibit B**. The Continuance Motion indicated that Lead Plaintiff's response to the Notice of Bankruptcy "raises issues regarding the application of the automatic stay to defendants other than Windstream" and that "Windstream plans to resolve those issues by filing a motion in the United States Bankruptcy Court for the Southern District of New York." Id., ¶ 4. The Continuance Motion further asserted that "[a] *slight delay* to resolve the automatic stay issues presented by the Windstream bankruptcy will not prejudice any of the

parties." Id., ¶ 5 (emphasis added). Lead counsel to Lead Plaintiff, who had not yet retained bankruptcy counsel in connection with the Chapter 11 Cases, consented to the filing of the Continuance Motion as unopposed based upon the representations by counsel for the Debtor Defendants – which, as discussed below, turned out to be false – that they would file a motion in this Court in short order and that any delay would be brief.

11. The Arkansas District Court entered a memo docket entry in the Securities Litigation on March 4, 2019, continuing oral argument on the Motions to Dismiss "pending a determination by the United States Bankruptcy Court for the Southern District of New York of the scope of the stay against the non-Windstream defendants" and directing the parties to "advise the [Arkansas District] Court when this determination has been made."

12. The Debtor Defendants filed the Adversary Proceeding on April 5, 2019, more than a month after they filed the Continuance Motion. Since filing the Adversary Proceeding, and contrary to their representations to Lead Plaintiff and the Arkansas District Court that they intended to promptly "resolve those issues by filing a motion" in this Court, the Debtor Defendants have taken no action whatsoever to seek any immediate injunctive relief. The Debtor Defendants have not filed such a motion Instead, the Debtor Defendants have chosen to simply sit on their hands for nearly three months since availing themselves of the de facto "stay" they obtained through representations that have proven to be false.

13. Immediately after the Debtor Defendants filed the Adversary Proceeding, bankruptcy counsel to Lead Plaintiff and the Class contacted counsel for the Debtors to propose a consensual resolution of the Adversary Proceeding with respect to the Securities Litigation. Approximately three weeks later, the Debtors advised bankruptcy counsel to Lead Plaintiff that they were not interested in the suggested consensual resolution.

JURISDICTION AND VENUE

14. This Court has jurisdiction over the Adversary Proceeding pursuant to 28 U.S.C. §§ 157(a) and 1334(b). Venue is proper in this Court under 28 U.S.C. §§ 1408 and 1409. Lead Plaintiff consents to entry by this Court of a final order or judgment dismissing the Adversary Complaint. The predicates for the relief sought through this Motion are Federal Rules of Civil Procedure 12(b)(6) and 41(b), made applicable in this Adversary Proceeding by Federal Rules of Bankruptcy Procedure 7012(b) and 7041, respectively.

RELIEF REQUESTED

15. By this Motion, Lead Plaintiff requests that the Court enter an order dismissing the Adversary Complaint because the Debtor Defendants have failed to prosecute the Adversary Proceeding and because the Adversary Complaint fails to state a claim upon which relief can be granted.

BASIS FOR RELIEF REQUESTED

16. There are two independent bases for dismissal of the Adversary Complaint.

17. First, since filing the Adversary Complaint, the Debtor Defendants have done absolutely nothing to seek the supposedly urgent injunctive relief they purport to need. Instead, the Debtor Defendants misled Lead Plaintiff into consenting to, and the Arkansas District Court into granting on consent, a supposedly "slight delay" in the Securities Litigation. The Debtor Defendants are now using the mere pendency of this Adversary Proceeding to obtain an open-ended stay and needlessly prolong that continuance, essentially availing themselves of a *de facto* stay of the Securities Litigation for the sole benefit of the Non-Debtor Defendants without taking any action to affirmatively seek an order extending the automatic stay. The Debtor Defendants'

conduct and their failure to prosecute the Adversary Proceeding warrant dismissal of the Adversary Complaint.

18. Second, the Adversary Complaint fails to state a claim upon which relief can be granted. Rather than presenting factual allegations sufficient to support a plausible claim for the extraordinary injunctive relief the Debtor Defendants seek, the Adversary Complaint does nothing more than recite the relevant legal standard along with pure conjecture and faulty legal conclusions couched as factual allegations. The Debtor Defendants' failure to plead an adequate factual basis for the extraordinary relief they seek "'stops short of the line between possibility and plausibility'" and thus is insufficient to survive a motion to dismiss pursuant to Rule 12(b)(6). See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007).

I. THE COURT SHOULD DISMISS THE ADVERSARY COMPLAINT BECAUSE THE DEBTOR DEFENDANTS HAVE FAILED TO PROSECUTE.

19. Rule 41(b), made applicable in the Adversary Proceeding by Federal Rule of Bankruptcy Procedure 7041, provides in pertinent part that "[i]f the plaintiff fails to prosecute . . . a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) . . . operates as an adjudication on the merits." Dismissal under Rule 41(b) for failure to prosecute "is an appropriate remedy where a plaintiff has shown no due diligence in prosecuting the case." In re Crysen/Montenay Energy Co., 166 B.R. 546, 550 (S.D.N.Y. 1994).

20. Courts routinely dismiss cases where, as here, "the plaintiff has failed to take any steps, after filing a complaint, to prosecute the action, or where the plaintiff has failed to take any action over a length of time." Id. Though it is "a harsh remedy," see Romandette v. Weetabix Co., 807 F.2d 309, 312 (2d Cir. 1986), "this sanction may be necessary to allow courts 'to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the

parties seeking relief.'" Crysen/Montenay, 166 B.R. at 550 (quoting Link v. Wabash Railroad Co., 370 U.S. 626, 630 (1962)). The Adversary Proceeding is precisely that sort of case.

21. Here, despite representing to Lead Plaintiff and the Arkansas District Court in connection with the Continuance Motion that they intended to promptly file a motion to extend the automatic stay to the Non-Debtor Defendants, the Debtor Defendants have done *absolutely nothing* in the Adversary Proceeding since filing the Adversary Complaint nearly two months ago. In the Adversary Complaint, the Debtor Defendants purport to face various forms of supposedly imminent, irreparable harm (which, as discussed below, are either nonexistent or mere conjecture at this point) if the Court does not extend the automatic stay to the Non-Debtor Defendants or enjoin the continued prosecution of the Securities Litigation. Adversary Complaint, ¶ 17. Yet, the Debtor Defendants have done *absolutely nothing* to obtain such relief other than taking the purely perfunctory step of filing the Adversary Complaint to satisfy Bankruptcy Rule 7001. On that basis alone, the Adversary Complaint should be dismissed.

II. THE ADVERSARY COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND SHOULD BE DISMISSED.

A. Standard for Dismissal Under Rule 12(b)(6)

22. Federal Rule of Civil Procedure 12(b)(6), made applicable in the Adversary Proceeding by Federal Rule of Bankruptcy Procedure 7012(b), provides that a party may, by motion, seek dismissal of a complaint for failure to state a claim upon which relief can be granted. A complaint may be dismissed under Rule 12(b)(6) "if it appears beyond doubt that the plaintiff would not be entitled to any type of relief even if the complaint's factual allegations were proven." In re Torres, 367 B.R. 478, 482 (Bankr. S.D.N.Y. 2007). Dismissal of the Adversary Complaint is appropriate under Rule 12(b)(6) because it contains a bare and conclusory recitation of the legal standards for extension of the automatic stay and injunctive

relief supported only by pure conjecture and faulty legal conclusions couched as factual allegations, not factual allegations that, if proven, would support the relief the Debtor Defendants seek.

23. To survive a motion to dismiss pursuant to Rule 12(b)(6), a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). A complaint that sets forth merely a "conceivable" claim is not sufficient to survive a motion to dismiss. Iqbal, 556 U.S. at 680. Similarly, a complaint that "offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do. . . . Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Id. at 678 (quoting Twombly, 550 U.S. at 555, 557). A claim asserted in a compliant "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference" that the plaintiff is entitled to relief. See Iqbal, 556 U.S. at 678. A complaint that only "pleads facts that are 'merely consistent with'" entitlement to relief "'stops short of the line between possibility and plausibility'" and thus is insufficient. Id. (quoting Twombly, 550 U.S. at 557).

24. In assessing the sufficiency of a complaint, a court "must assume the truth of the complaint's factual allegations, drawing all reasonable inferences in the plaintiff's favor[.]" Torres, 367 B.R. at 482. However, the Court "is not bound to accept as true a legal conclusion couched as a factual allegation." Torres, 367 B.R. at 482. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." Iqbal, 556 U.S. at 679.

25. The Rule 12(b)(6) analysis is generally limited to "the facts as asserted within the four corners of the complaint, the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference[,]" McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 191 (2d Cir. 2007), as well as "matters of which judicial notice may be taken" and "documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." Brass v. Am. Film Tech., Inc., 987 F.2d 142, 150 (2d Cir. 1993); see also Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1088, 1092 (2d Cir. 1995) (noting that a court deciding a motion to dismiss may consider matters of which it can take judicial notice).

B. Count I of the Adversary Complaint should be dismissed because the Adversary Complaint fails to state a plausible claim for extension of the automatic stay to the Non-Debtor Defendants.

26. Upon the commencement of a chapter 11 bankruptcy case, the automatic stay immediately and automatically stays all "action[s] or proceeding[s] against the debtor" and all actions "to obtain possession . . . or to exercise control over property of the estate." 11 U.S.C. §§ 362(a)(1), (3). The automatic stay protects only a debtor and its property—not non-debtors or their property. See, e.g., Teachers Ins. and Annuity Assoc. of Am. v. Butler, 803 F.2d 61, 65 (2d Cir. 1986) ("It is well-established that stays pursuant to § 362(a) are limited to debtors and do not encompass non-bankrupt co-defendants.").

27. Courts occasionally, but rarely, extend the automatic stay to non-debtors upon motion under "unusual circumstances." See A.H. Robins Co. v. Piccinin, 788 F.2d 994, 999 (4th Cir. 1986), cert. denied, 479 U.S. 876 (1986). The unusual circumstances necessary to warrant extension of the automatic stay are narrowly defined by case law, and "[s]omething more than the mere fact that one of the parties to the lawsuits has filed a Chapter 11 bankruptcy must be shown in order that proceedings be stayed against non-bankrupt parties.'" Matter of Johns-

Manville (GAF Corp. v. Johns-Manville), 26 B.R. 405, 410 (Bankr. S.D.N.Y. 1983) (citing Royal Truck & Trailer v. Armadora Maritima Salvadoreana, 10 B.R. 488, 491 (N.D. Ill. 1981)). Courts may extend the automatic stay under section 362(a)(1) of the Bankruptcy Code to non-debtor parties where "the debtor and the non-bankrupt party can be considered . . . as having a unitary interest[,]" In re North Star Contracting Corp., 125 B.R. 368, 370 (S.D.N.Y. 1991), but will do so "only when a claim against the non-debtor will have an *immediate* adverse economic consequence for the debtor's estate." In re Queenie, Ltd., 321 F.3d 282, 287 (2d Cir. 2003) (emphasis in original).

28. The Adversary Complaint contains no factual allegations whatsoever that would demonstrate the "unusual circumstances" and "immediate adverse economic consequence to the [Debtor Defendants'] estate" necessary to support a claim for extension of the automatic stay to the Non-Debtor Defendants. Instead, in the general allegations applicable to both claims for relief, the Adversary Complaint merely:

- describes the Adversary Proceeding, the relief sought therein, the parties thereto, and a brief background of the Chapter 11 Cases (¶¶ 1-4, 6-11, 12-14, 16);[5]
- asserts in conclusory and speculative fashion that the Debtor Defendants "have an obligation to indemnify each of the Non-Debtor Defendants" and that, as a result of such obligations, any judgment against the Non-Debtor Defendants in the Securities Litigation "*could* affect property of the Debtors' estate" (emphasis added), legal conclusions that are not entitled to a presumption of validity in connection with this Motion and, in any event, (a) completely ignore the legal

[5] Nothing in this Motion or any other document or pleading filed in connection herewith is intended to be, is, or may be construed or interpreted as an admission or stipulation with respect to any fact or issue in the Securities Litigation. Lead Plaintiff, for himself and the Class and each member thereof, reserves all rights with respect to the Securities Litigation, including but not limited to all issues, claims, causes of action, arguments, counterarguments, and defenses.

reality, known to the Debtors when drafting the Adversary Complaint, that any such obligation could only result, at best, in a prepetition claim subordinated pursuant to section 510(b) of the Bankruptcy Code and subject to disallowance pursuant to section 502(e)(1)(B) of the Bankruptcy Code and (b) further ignore the fact, as a matter of public record of which this Court can take judicial notice in connection with this Motion, that the Debtor Defendants share defense counsel with the Windstream-affiliated Non-Debtor Defendants, whose fees presumably are directly paid by insurance, preventing any such indemnification obligation, even if adequately pleaded, from having any impact on the Debtor Defendants' estates (¶¶ 5, 15, 17(a));

- asserts, again in only a conclusory manner, that an adverse decision on the Motions to Dismiss "*could* prejudice the Debtors from defending themselves in the future" and "*risks* prejudicing the Debtor[Defendants]" (emphasis added), a purely conjectural statement that ignores that (a) the Motions to Dismiss have long been fully briefed, briefing that the Debtor Defendants' defense counsel has stated is sufficient for the Arkansas District Court to decide the Motions to Dismiss even without oral argument, and (b) the Debtor Defendants are represented by *the exact same counsel* as a number of the Non-Debtor Defendants (counsel that the Debtor Defendants acknowledge is being funded by insurance, see Adversary Complaint, ¶ 22) and thus will be adequately represented at the oral

argument on the Motions to Dismiss to the extent oral argument takes place (¶ 17(b), 24);[6] and

- asserts, again in only a conclusory manner, that the continued prosecution of the Securities Litigation against the Non-Debtor Defendants "will require the Debtors and their employees, particularly their legal department, to expend time and resources participating in the litigation to the detriment of the Debtors' reorganization[,]" ignoring the legal realities, known to the Debtor Defendants when they prepared the Adversary Complaint, that (a) the only activity on the horizon in the Securities Litigation is oral argument on the Motions to Dismiss, a purely lawyer-driven activity expected to take "no more than one hour" for both sides and which *counsel for the Securities Defendants has asserted is not even necessary "given the parties' extensive briefing and the state of the law regarding the matters at issue*," and (b) there will be absolutely nothing for the Debtors, their employees, or any of the Securities Defendants to do for the foreseeable future in the Securities Litigation because all discovery is currently stayed pursuant to the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), 15 U.S.C. § 78u-4(b)(3)(B), while the Motions to Dismiss remain pending (¶ 17(c)).[7]

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[6] Contemporaneously with this Motion, Lead Plaintiff is filing a motion in the Chapter 11 Cases seeking limited relief from the automatic stay to permit the Arkansas District Court to hear oral argument and rule on the Motions to Dismiss.

[7] In light of the stay of discovery pursuant to the PSLRA, Lead Plaintiff and the Securities Defendants filed a *Joint Federal Rule of Civil Procedure 26(f) Report* in the Securities Litigation on December 10, 2018, in which the parties proposed to reconvene their Fed. R. Civ. P. 26(f) conference within fourteen days after the Arkansas District Court denies the Motions to Dismiss in any respect.

These conclusory assertions are not entitled to the presumption of validity under Rule 12(b)(6). See Iqbal, 556 U.S. at 681 ("It is the conclusory nature of the respondent's allegations . . . that disentitles them to the presumption of truth.").

29. The allegations specific to Count I, in which the Debtor Defendants seek extension of the automatic stay to the Non-Debtor Defendants, fare no better under the rubric of Rule 12(b)(6). There, the Debtor Defendants repeat their conclusory and conjectural assertions (which, as discussed above, are no more than faulty legal conclusions that are not entitled to a presumption of validity in connection with this Motion) that they *might* owe indemnification obligations to the Non-Debtor Defendants (¶¶ 19, 21, 23, 25). The Debtor Defendants' conclusory speculation again disregards the fact that, as a matter of law, any indemnification claims the Non-Debtor Defendants might assert are prepetition claims that would, at best, be contingent, unliquidated, subordinated pursuant to section 510(b) of the Bankruptcy Code, subject to disallowance pursuant to section 502(e)(1)(B) of the Bankruptcy Code, and covered by insurance. Notwithstanding the Debtor Defendants' theoretical predictions of an identity of interest threatening harm to their estates, they have alleged no actual harm whatsoever, and certainly no imminent, irreparable harm or prejudice occurring now or facing them for the foreseeable future.

30. The Debtor Defendants further speculate in Count I that they "*could face* burdensome discovery" and "*could be forced* to respond to voluminous requests for documents[,]" and that the Non-Debtor Defendants "*could be distracted* by discovery" (¶ 24) (emphasis added). These hypothetical statements are not factual allegations sufficient to support a plausible claim for the extraordinary relief of extending the automatic stay; they are nothing more than conjecture that "stops short of the line between possibility and plausibility of

'entitlement to relief.'" See Twombly, 550 U.S. at 447 (citation omitted). The Debtor Defendants have not alleged (because, as a matter of law, they *cannot* legitimately allege) that they *do* face burdensome discovery or *will be* forced to respond to document requests, or that the Non-Debtor Defendants *are* or *will be* distracted by discovery because, as a matter of law, discovery in the Securities Litigation is stayed as a matter of law until the Motions to Dismiss have been adjudicated.

31. The Adversary Complaint presents nothing more in support of the Debtor Defendants' claim for extension of the automatic stay than a bare recitation of the applicable legal standard, pure conjecture, and a series of faulty legal conclusions. For that reason, Count I of the Adversary Complaint should be dismissed.

C. The Adversary Complaint fails to state a plausible claim for an injunction precluding the continued prosecution of the Securities Litigation against the Non-Debtor Defendants.

32. Count II of the Adversary Complaint seeks, in the alternative, an injunction under section 105(a) of the Bankruptcy Code staying the continued prosecution of the Securities Litigation against the Non-Debtor Defendants pending the effective date of a chapter 11 plan or further order of this Court. ¶ 27. As in Count I, the Debtor Defendants devote several paragraphs of Count II to a lengthy, albeit unnecessary, recitation of the applicable legal standard for obtaining injunctive relief under section 105(a). ¶¶ 28-30. Reciting the legal standard necessary to obtain relief, however, does not equal pleading "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Iqbal, 556 U.S. at 697 (quoting Twombly, 550 U.S. at 570). The Debtor Defendants fail in that respect as well.

33. To obtain injunctive relief under section 105(a) of the Bankruptcy Code, a chapter 11 debtor must demonstrate "(1) whether there is a likelihood of successful

reorganization; (2) whether there is an imminent irreparable harm to the estate in the absence of an injunction; (3) whether the balance of harms tips in favor of the moving party; and (4) whether the public interest weighs in favor of an injunction." Nevada Power Co. v. Calpine Corp. (In re Calpine Corp.), 365 B.R. 401, 409 (Bankr. S.D.N.Y. 2007). These requirements are "conjunctive and all of them must be established in order to obtain the relief sought." In re Provincetown Boston Airline, 52 B.R. 620, 625 (Bankr. M.D. Fla. 1985); see also Calpine, 365 B.R. at 409 (enumerating requirements with the conjunctive "and").

34. Injunctive relief under section 105(a) "'is an *extraordinary and drastic remedy*, not to be granted routinely, but only when the movant, by a clear showing carries the burden of persuasion.'" In re Continental Air Lines, Inc., 61 B.R. 758, 782 (S.D. Tex. 1986) (citation omitted; emphasis added). "The 'movant must make out a clear showing of hardship and adverse impact on the reorganization case if there is even a fair possibility that the stay will prejudice an adverse party.'" Id. at 781 (citation omitted). The movant must establish that the damage it will suffer if the injunction is denied "'plainly outweighs any foreseeable harm to the [non-movant].'" Johns-Manville, 26 B.R at 415 (citation omitted). The Adversary Complaint fails to plead facts sufficient to support any, much less all, of the elements necessary to obtain the extraordinary injunctive relief the Debtor Defendants seek.

2. Substantial Likelihood of Imminent Irreparable Harm

35. The Debtor Defendants' conclusory assertion that they face imminent, irreparable harm absent the requested injunction is unsupported in Count II for the same reasons as in Count I. As an initial matter, the Debtor Defendants' inaction in seeking *any* immediate injunctive relief unequivocally contravenes any allegation that any supposed harm is imminent. Moreover, in Count II, the Debtor Defendants essentially rehash the same litany of purely hypothetical risks

and incorrect legal conclusions set forth in Count I. None of these assertions are entitled to the presumption of validity under Rule 12(b)(6), see Iqbal, 556 U.S. at 681, nor, even if they were presumed to be valid, would they be sufficient to satisfy the pleading standard for injunctive relief. Dore & Assocs. Contracting, Inc. v. American Druggists' Ins. Co., 54 B.R. 353, 358 (Bankr. W.D. Wis. 1985) ("Speculative and conclusory allegations are clearly insufficient."); In re Phar-Mor, Inc. Sec. Litig., 166 B.R. 57, 62-63 (W.D. Pa. 1994) (finding, in denying a request for an injunction under section 105 of the Bankruptcy Code, that the allegation that pursuit of an action against debtors' auditor would delay the reorganization was "mere speculation [that did] not constitute the type of proof required to entitle the Debtors to an injunction").

36. First, the Debtor Defendants rely again on the faulty legal conclusion that continuation of the Securities Litigation against the Non-Debtor Defendants likely will "trigger[] the Debtors' continued indemnification obligations to all of the Non-Debtor Defendants" and "further harm the Debtors by depleting estate resources to enforce insurance coverage to fulfill those obligations" (¶ 32). Nowhere do the Debtors allege that they *have* expended any estate resources indemnifying the Non-Debtor Defendants (whose claims, if any, would not be paid, if at all, until after the effective date of a plan in any event) or pursuing insurance coverage, or that any coverage dispute even exists. Indeed, the Debtor Defendants' conclusory and conjectural assertion regarding insurance coverage conflicts with their earlier allegation that allowing the Securities Litigation to continue will "inevitably deplete the insurance proceeds" available to cover the Debtor Defendants (¶ 22).

37. Second, the Debtor Defendants again assert that allowing the Securities Litigation to continue against the Non-Debtor Defendants "opens up the Debtors to the possibility of

strategically disadvantageous applications of res judicata and collateral estoppel" (¶ 33). Just as in Count I, this statement is a defective legal conclusion entitled to no deference under Rule 12(b)(6). Concurrently with the filing of this Motion, Lead Plaintiff is filing a motion for limited relief from the automatic stay to permit the Arkansas District Court to hear oral argument and rule on the Motions to Dismiss with respect to the Debtor Defendants. If this Court grants Lead Plaintiff's stay relief motion, the Debtor Defendants' interests will be adequately represented at oral argument on the fully briefed Motions to Dismiss (an argument that the Debtor Defendants' own counsel has asserted is not even necessary in light of the fulsome briefing that was completed months ago).

38. Third, the Debtor Defendants again claim that the Securities Litigation will "distract[] their key personnel from their efforts to navigate the Debtors through Bankruptcy" and that "[f]orcing the Non-Debtor Defendants to split their attention between the chapter 11 proceedings and the [Securities] Litigation risks further injury to the Debtors" (¶ 34). This conclusory assertion fails here for the same reasons it failed in Count I. Discovery in the Securities Litigation is, as a matter of law, stayed during the pendency of the Motions to Dismiss. See ¶ 25 above. As a result, there is *absolutely nothing for the Non-Debtor Defendants to do* in the Securities Litigation. Oral argument on the Motions to Dismiss, which is expected to take less than an hour in total and which counsel for the Securities Defendants has asserted is not even needed in light of the parties' fulsome briefing, is a purely lawyer-driven exercise requiring no involvement from any of the Securities Defendants. The Arkansas District Court's ruling is not likely to issue at or immediately following oral argument. Only once the Motions to Dismiss have been adjudicated in favor of Lead Plaintiff (a process that could be further extended by any appeals) could discovery commence in the Securities Litigation.

3. Remaining Factors

39. The remainder of Count II is devoted to a perfunctory attempt to allege that the three remaining factors necessary to obtain injunctive relief are satisfied here (¶¶ 35-38). With respect to at least two of these factors, the allegations in the Adversary Complaint fall woefully short of stating a plausible claim for relief.

40. First, the Debtors assert in conclusory fashion that "[t]he likelihood of irreparable harm to the Debtors from the continuation of the [Securities] Litigation, as established above, far outweighs any risk of harm to the Plaintiffs in the [Securities] Litigation should the Bankruptcy Court enjoin the [Securities] Litigation until completion of the Debtors' chapter 11 process" and that Lead Plaintiff and the Class "will suffer no material harm, as they would be free to pursue their claims against the Non-Debtor Defendants at that time" (¶ 37). This statement relies by reference on all of the faulty legal conclusions and conjecture supporting the Debtor Defendants' earlier assertions of purely theoretical harm, and fails to meet the standards set forth in Twombly and Iqbal on that basis alone. The Debtor Defendants also assume, in conclusory fashion and without any factual support, that the ability to resume prosecuting the Securities Litigation against the Non-Debtor Defendants at some indeterminate future time means Lead Plaintiff and the Class face "no material harm." This assumption is not entitled to the presumption of validity under Rule 12(b)(6). See Iqbal, 556 U.S. at 681 ("It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth."). The Debtor Defendants have not provided, because they cannot provide, any factual support whatsoever for their assertion that the balance of harms weighs in favor of the extraordinary injunctive relief they seek.

41. Finally, the Debtor Defendants again assert, in a purely conclusory manner, that halting the Securities Litigation against the Non-Debtor Defendants "will serve the public interest by promoting the Debtors' speedy and successful conclusion of these bankruptcy proceedings – a benefit to all constituencies – and will advance the objective of the automatic stay" (¶ 38). Just as above, this assertion is meaningless for purposes of Rule 12(b)(6). The Debtor Defendants do not allege any facts indicating that an injunction barring litigation that currently will have no impact whatsoever on their estates will promote the "speedy and successful conclusion" of the Chapter 11 Cases or what benefit "all constituencies" would realize, nor do they allege any facts to plausibly show that the continued prosecution of the Securities Litigation against the Non-Debtor Defendants would hinder such a conclusion or what loss "all constituencies" would suffer absent a speedy and successful conclusion.

42. The Debtor Defendants have failed to assert "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" See Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 570). Count II of the Adversary Complaint should be dismissed because the conclusory assertions, conjecture, and incorrect and factually unsupported legal conclusions set forth therein fall woefully short of "the line between possibility and plausibility of 'entitlement to relief.'" See Twombly, 550 U.S. at 557 (citation omitted).

CONCLUSION

43. For all of the foregoing reasons, the Adversary Complaint should be dismissed.

RESERVATION OF RIGHTS

44. This Motion and any subsequent appearance, pleading, claim, or suit made or filed by Lead Plaintiff, either individually or for the Class or any member thereof, do not, shall not, and shall not be deemed to:

a. constitute a submission by Lead Plaintiff, either individually or for the Class or any member thereof, to the jurisdiction of the Bankruptcy Court;

b. constitute consent by Lead Plaintiff, either individually or for the Class or any member thereof, to entry by the Bankruptcy Court of any final order in any non-core proceeding, **which consent is hereby withheld unless, and solely to the extent, expressly granted in the future with respect to a specific proceeding**;

c. waive any substantive or procedural rights of Lead Plaintiff or the Class or any member thereof, including but not limited to (a) the right to challenge the constitutional authority of the Bankruptcy Court to enter a final order or judgment on any matter; (b) the right to have final orders in non-core matters entered only after de novo review by a United States District Court judge; (c) the right to trial by jury in any proceedings so triable herein, in the Chapter 11 Cases, including the Adversary Proceeding and all other adversary proceedings and related cases and proceedings (collectively, "Related Proceedings"), in the Securities Litigation, or in any other case, controversy, or proceeding related to or arising from the Debtors, the Chapter 11 Cases, any Related Proceedings, or the Securities Litigation; (d) the right to seek withdrawal of the bankruptcy reference by a United States District Court in any matter subject to mandatory or discretionary withdrawal; or (e) all other rights, claims, actions, arguments, counterarguments, defenses, setoffs, or recoupments to which Lead Plaintiff or the Class or any member thereof are or may be entitled under agreements, at law, in equity, or otherwise, all of which rights, claims, actions, arguments, counterarguments, defenses, setoffs, and recoupments are expressly reserved.

[*signature page follows*]

WHEREFORE, for all of the foregoing reasons, Lead Plaintiff respectfully requests that this Court enter an order dismissing the Adversary Complaint.

Dated: May 29, 2019

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EXHIBIT A – Request for Oral Argument

CARNEY BATES & PULLIAM PLLC

Honorable James M. Moody Jr.
United States District Judge
500 West Capitol Avenue, Room C446
Little Rock, AR 72201

December 21.2018

Re: *Murray v. EarthLink Holdings Corp., et al.*, 4:18-cv-00202-JM

Dear Judge Moody:

Lead Plaintiff hereby requests oral argument on the pending Motions to Dismiss and related Opposition. (ECF Nos. 21, 25, 37, and 40-41.) Counsel for Lead Plaintiff is optimistic that the parties can effectively distill the multitude of issues discussed in the combined 130-pages of briefing in order to help streamline and aid the Court's decision-making process. Lead Plaintiff invited Defendants to concur in this request. They jointly responded as follows: "Defendants do not believe oral argument is necessary given the parties' extensive briefing and the state of the law regarding the matters at issue, but defendants would be happy to participate in oral argument if the Court deems it beneficial. Please include defendants' stated position in your submission to the Court." If the Court is so inclined, Lead Plaintiff estimates that no more than one hour would be necessary for combined argument by all parties.

Respectfully submitted,

Randall K. Pulliam

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EXHIBIT B – Continuance Motion

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

ROBERT MURRAY, on behalf of himself and all others similarly situated *Plaintiff*, vs. EARTHLINK HOLDINGS CORP., SUSAN D. BOWICK, JOSEPH F. EASOR, KATHY S.LANE, GARRY K. MCGUIRE, R. GERARD SALEMME, JULIE A. SHIMER, MARC F. STOLL, WALTER L. TUREK, WINDSTREAM HOLDINGS, INC., CAROL B. ARMITAGE, SAMUEL E. BEALL III, JEANNIE H. DIEFENDERFER, ROBERT E. GUNDERMAN, JEFFREY T. HINSON, WILLIAM G. LAPERCH, LARRY LAQUE, KRISTI MOODY, MICHAEL G. STOLTZ, TONY THOMAS, and ALAN L. WELLS, *Defendants.*	)	Case No. 4:18-cv-202-JM

DEFENDANTS' UNOPPOSED JOINT MOTION
FOR CONTINUANCE OF HEARING

Pursuant to Local Rule 7.5, defendants jointly request a continuance of the scheduled March 6, 2019, hearing on defendants' motions to dismiss and for good cause state the following:

1. On January 24, 2019, the Court set a hearing for March 6 on defendants' pending motions to dismiss. Doc. 44.

2. A month later, on February 25, 2019, Windstream Holdings, Inc. ("Windstream") filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code. The following day, Windstream filed a notice of bankruptcy with

this Court stating that the filing of the bankruptcy proceeding triggered an automatic stay of this proceeding under the Bankruptcy Code. Doc. 45.

3. On February 27, plaintiffs responded to the notice of bankruptcy and argued that the automatic stay applies only to Windstream, that the Court should proceed with the case with regard to the other defendants, and that the March 6 hearing should proceed as scheduled. Doc. 46.

4. Plaintiffs' response raises issues regarding the application of the automatic stay to defendants other than Windstream. Windstream plans to resolve these issues by filing a motion in the United States Bankruptcy Court for the Southern District of New York.

5. The application of the automatic stay is an area that requires caution to avoid a violation of the stay. The motions to dismiss are not a pressing matter—they were pending for several weeks before plaintiff even requested a hearing. *See* Doc. 40, 41, & 43. A slight delay to resolve the automatic stay issues presented by the Windstream bankruptcy will not prejudice any of the parties.

6. Counsel for defendants has discussed this motion with counsel for plaintiff, who indicated that he did not oppose the motion.

WHEREFORE, defendants request that the Court continue the March 6, 2019, hearing until after the automatic stay issue has been resolved, along with all other proper relief.

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: WINDSTREAM HOLDINGS, INC., *et al.*,[1] Debtors.	Chapter 11 Case No. 19-22312 (RDD) (Jointly Administered)
Windstream Holdings, Inc. and Earthlink Holdings Corp., Plaintiffs, v. Charlos Yadegarian, Robert Murray, Cindy Graham, and Larry Graham, Defendants.	Adversary Proceeding Adv. Pro. No. 19-08247 (RDD)

ORDER GRANTING MOTION OF SECURITIES CLASS ACTION LEAD PLAINTIFF TO DISMISS ADVERSARY COMPLAINT

Upon consideration of the motion (the "Motion")[2] [Doc. No. ___] of Lead Plaintiff pursuant to (a) Fed. R. Civ. P. 12(b)(6) ("Rule 12(b)(6)"), made applicable in the Adversary Proceeding by Fed. R. Bankr. P. 7012(b), and (b) Fed. R. Civ. P. 41(b) ("Rule 41(b)"), made applicable in the Adversary Proceeding by Fed. R. Bankr. P. 7041, for entry of an order dismissing the Adversary Complaint; and it appearing that the Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* of

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

[2] Capitalized terms but not defined in this Order have the meanings given thereto in the Motion.

the United States District Court for the Southern District of New York dated January 31, 2012; and this Court having found that venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that adequate notice of the Motion has been given and no other notice need be given; and this Court having considered the Motion, any objections filed or otherwise raised thereto, and the arguments of counsel and having found that good cause exists for the relief requested in the Motion to the extent set forth herein; and after due deliberation and sufficient cause appearing therefor, it is **HEREBY ORDERED THAT**:

1. The Motion is GRANTED as set forth herein.

2. The Adversary Complaint is DISMISSED.

3. This Court retains jurisdiction to resolve any disputes with respect to the implementation and interpretation of this Order.

Date: _____, 2019
White Plains, New York

THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE