Docket #0786 Date Filed: 07/12/2019

Hearing Date: July 26, 2019 at 1:30 p.m. (Eastern)
Objection Deadline: July 23, 2019 at 4:00 p.m. (Eastern)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

NOTICE OF HEARING ON MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR (I) LEAVE, STANDING, AND AUTHORITY TO COMMENCE AND PROSECUTE CERTAIN CLAIMS AND CAUSES OF ACTION ON BEHALF OF DEBTORS' ESTATES AND (II) CONSENT RIGHTS TO SETTLEMENT

PLEASE TAKE NOTICE that on July 12, 2019, the Official Committee of Unsecured Creditors appointed in the above-captioned chapter 11 cases (the "Committee") filed the annexed *Motion of the Official Committee of Unsecured Creditors for (I) Leave, Standing, and Authority to Commence and Prosecute Certain Claims and Causes of Action on Behalf of Debtors' Estates and (II) Consent Rights to Settlement* (the "Motion"). A hearing on the Motion will be held before the Honorable Robert D. Drain, at the United States Bankruptcy Court for the

[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.

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Southern District of New York, 300 Quarropas St., White Plains, NY 10601 (the "Bankruptcy Court"), on **July 26, 2019 at 1:30 p.m.** (prevailing eastern time) (the "Hearing").

PLEASE TAKE FURTHER NOTICE that any responses or objections ("Objections") to the Motion shall be in writing, shall conform to the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules for the Southern District of New York, shall be filed with the Bankruptcy Court (a) by attorneys practicing in the Bankruptcy Court, including attorneys admitted pro hac vice, electronically in accordance with General Order M-399 (which can be found at www.nysb.uscourts.gov), and (b) by all other parties in interest, on a CD-ROM, in text-searchable portable document format (PDF) (with a hard copy delivered directly to Chambers), in accordance with the customary practices of the Bankruptcy Court and General Order M-399, to the extent applicable, and shall be served in accordance with the *Final Order Establishing Certain Notice, Case Management, and Administrative Procedures*, entered on April 22, 2019 [ECF No. 392], so as to be filed and received no later than **July 23, 2019 at 4:00 p.m. (prevailing eastern time)** (the "Objection Deadline").

PLEASE TAKE FURTHER NOTICE that if no Objections are timely filed and served with respect to the Motion, the Committee may, on or after the Objection Deadline, submit to the Bankruptcy Court an order substantially in the form annexed as Exhibit A to the Motion, which order may be entered without further notice or opportunity to be heard.

PLEASE TAKE FURTHER NOTICE that any objecting parties are required to attend the Hearing, and failure to appear may result in relief being granted upon default.

PLEASE TAKE FURTHER NOTICE that the Hearing may be continued or adjourned thereafter from time to time without further notice other than an announcement of the adjourned date or dates at the Hearing.

PLEASE TAKE FURTHER NOTICE that a copy of the Motion may be obtained free of charge by visiting the website of Kurtzman Carson Consultants LLC at http://www.kcllp.net/windstream. You may also obtain copies of any pleadings by visiting the Court's website at www.nysb.uscourts.gov in accordance with the procedures and fees set forth therein.

Dated: New York, New York
July 12, 2019

/s/ Lorenzo Marinuzzi

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

MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR (I) LEAVE, STANDING, AND AUTHORITY TO COMMENCE AND PROSECUTE CERTAIN CLAIMS AND CAUSES OF ACTION ON BEHALF OF DEBTORS' ESTATES AND (II) CONSENT RIGHTS TO SETTLEMENT

[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 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.

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Statutes

The Official Committee of Unsecured Creditors (the "Committee") of Windstream Holdings, Inc. ("Holdings") and its debtor affiliates, as debtors and debtors-in-possession (collectively, the "Debtors"), by and through its undersigned counsel, hereby moves the Court for the entry of an order, substantially in the form attached hereto as **Exhibit A**: (a) granting the Committee standing to commence and prosecute certain claims and causes of action on behalf of the Debtors' estates; and (b) granting the Committee the right to review and consent to any settlement of such claims and causes of action on behalf of the Debtors' estates (the "Motion"). In support of this Motion, the Committee incorporates by reference the *Declaration of Lorenzo Marinuzzi in Support of Motion of the Official Committee of Unsecured Creditors for (I) Leave, Standing, and Authority to Commence and Prosecute Certain Claims and Causes of Action on Behalf of Debtors' Estates and (II) Consent Rights to Settlement* (the "Marinuzzi Decl."), filed contemporaneously herewith, and respectfully states as follows:

PRELIMINARY STATEMENT

1. As all parties seem to recognize, resolution of potential claims against Uniti (defined below) and/or renegotiation of the purported Master Lease (defined below) with Uniti is one of the key gating items in these chapter 11 cases. Through its investigation into the 2015 sale and lease back transaction (the "Transaction") involving Uniti, and as detailed below, the Committee has identified various colorable claims (the "Proposed Claims") that must be resolved (either through litigation or negotiation) before the Debtors can emerge from bankruptcy.[2]

[2] The Debtors have also acknowledged that they hold a compelling recharacterization claim related to the Master Lease and that any commercial resolution with Uniti must reflect the strength of that claim. *See Debtors' Preliminary Objection to the Motion of UMB Bank, National Association and U.S. Bank National Association, as Indenture Trustees, (I) to Strike the Uniti Master Lease from the Debtors' Schedule G and (II) to Modify the Cash Management Order* [Docket No. 746], ¶ 1.

2. The Debtors and Uniti have been engaged in discussions and negotiations regarding the Master Lease. Although the Committee has made multiple requests, including in a letter to counsel for the Debtors dated June 26, 2019, to participate in those discussions and negotiations, it has not been invited to do so. The Committee's participation in these negotiations is imperative, as the value of any recovery to unsecured creditors in these cases will most certainly be impacted by any settlement with, or adjudication of any claims against, Uniti.

3. Unfortunately, the current September 23, 2019 deadline by which the Debtors must assume or reject unexpired non-residential real property leases (the "Assumption/Rejection Deadline") complicates the timing of any litigation. If the Master Lease constitutes a non-residential real property lease subject to section 365(d)(4) of the Bankruptcy Code, then it is deemed rejected by operation of law if the Debtors do not assume it by the Assumption/Rejection Deadline. Barring some negotiated agreement satisfactory to the Committee, the Committee (and presumably other estate constituents) would vigorously oppose the Debtors' rushed assumption of the Master Lease absent this Court's determination that the Master Lease is a true lease.

4. Absent a consensual extension by Uniti of the Assumption/Rejection Deadline, the estates must engage in a dual track process of litigation and negotiation. Otherwise, the Committee fears that the time pressures may exacerbate the risk that any settlement between the Debtors and Uniti may release estate claims against Uniti for a small fraction of their value, thereby harming the Debtors' unsecured creditors. The Committee believes that an estate fiduciary (either the Debtors or the Committee, if the Debtors are unwilling) must promptly assert these colorable claims against Uniti while negotiations continue.

5. On July 10, 2019, the Committee sent the Debtors a letter demanding that the Debtors advise the Committee whether, and by what date, they promptly intend to pursue the recharacterization and fraudulent transfer claims and causes of action regarding the Transaction and the Master Lease described therein by no later than 5:00 p.m. (Eastern) on July 17, 2019. The Committee is awaiting a response to the demand letter.

6. To be clear, the Committee remains open to continued discussions with Uniti and all stakeholders. But those negotiations can only be productive in a proper mediation with an extension of the Assumption/Rejection Deadline. The Committee filed this Motion out of an abundance of caution in the event that (a) the Debtors do not pursue those claims promptly in advance of the Assumption/Rejection Deadline, and (b) key parties are unwilling to participate in a global mediation. If the key stakeholders are willing to commit to mediation,[3] the Committee would defer prosecution of this Motion and welcome the opportunity to resolve the Uniti claims consensually.

7. For the reasons set forth herein, it is imperative that the Committee be granted standing to commence and prosecute estate claims and causes of action against Uniti as well as be granted consent rights over any proposed settlement of such claims and causes of action on behalf of the Debtors' estates.

JURISDICTION AND VENUE

8. The Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for this Motion are

[3] Without Uniti's agreement to voluntarily extend the September 23, 2019 Assumption/Rejection Deadline, the Committee is concerned that Uniti may use mediation to "run the clock" and limit the possibility for litigation should mediation fail.

sections 1103(c)(2) and (5) and 1109(b) of chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").

BACKGROUND

A. Procedural Background

9. On February 25, 2019, the Debtors each filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code with the Court. The Debtors are authorized to continue operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these chapter 11 cases.

10. These chapter 11 cases are being jointly administered pursuant to rule 1015(b) of the Federal Rules of Bankruptcy Procedure and the *Order Directing Joint Administration of Chapter 11 Cases* [Docket No. 56], entered on February 28, 2019.

11. On March 12, 2019, the United States Trustee for Region 2 appointed the Committee [Docket No. 136].[4]

12. On June 20, 2019, the Court entered an order extending the time within which the Debtors must assume or reject unexpired leases of non-residential real property under section 365(d)(4) of the Bankruptcy Code through and including September 23, 2019 [Docket No. 700].

B. The Transaction and Factual Background

1. The Spin-Off

13. The Debtors are a leading provider of advanced network communications, technology, broadband, entertainment, security, and related services to both consumer and business customers across the United States. *See Declaration of Tony Thomas, Chief Executive*

[4] The members of the Committee are: (a) Pension Benefit Guaranty Corporation; (b) Communication Workers of America, AFL-CIO, CLC; (c) AT&T Services, Inc.; (d) VeloCloud Networks, Inc.; (e) Crown Castle Fiber; (f) LEC Services, Inc.; and (g) UMB Bank.

Officer and President of Windstream Holdings, Inc., (I) in Support of Debtors' Chapter 11 Petitions and First Day Motions and (II) Pursuant to Local Bankruptcy Rule 1007-2 [Docket No. 27] (the "First Day Declaration"), ¶ 4. Prior to the Transaction, Windstream Services, LLC ("Services") and certain of its subsidiaries owned copper and fiber optic cable used in the operation of the Windstream business. *See* Windstream Holdings, Inc., Current Report (Form 8-K) dated July 29, 2014 ("July 2014 8-K"; *see* Marinuzzi Decl., Exh. A).

14. In or around 2013, Services' board of directors determined to structure a transaction whereby Services and its subsidiaries would transfer their fiber optic and copper cable and associated real estate assets to a newly formed corporate entity (Communications Sales & Leasing, Inc., now known as Uniti Group, Inc. ("Uniti")), and then spin that entity off to public shareholders. *See* July 2014 8-K. Uniti would then immediately lease back such property for use in Windstream's business. *See id.* Services' board approved the formation of a new parent holding company (Holdings), which would serve as the tenant in the transaction. *See* Docket No. 131-2 filed in *U.S. Bank Nat'l Ass'n v. Windstream Servs., LLC*, No. 1:17-cv-07857-JMF (S.D.N.Y. 2017) (the "Aurelius Litigation"), transcript of November 3, 2017 Deposition of Robert E. Gunderman. Services' board also determined that Uniti would exist as a real estate investment trust (a "REIT"), which would allow beneficiaries of the REIT to take advantage of higher trading multiples. *See* July 2014 8-K.

15. On July 29, 2014, the board of directors of Holdings announced its plan to separate the Windstream enterprise into two separate, independent publicly traded companies: (a) Services, a wholly-owned subsidiary of Holdings, which would provide network communications, technology, broadband, entertainment, security, and core transport solutions to customers; and (b) Uniti, which, through its subsidiaries, would acquire, own, and lease

distribution systems serving the communications infrastructure industry (and potentially other industries) and operate the consumer competitive local exchange carrier, or "CLEC," business.

16. Uniti was formed on September 4, 2014 as a wholly-owned subsidiary of Services. On March 26, 2015, Holdings, Services, and Uniti entered into a Separation and Distribution Agreement (the "Separation Agreement"; *see* Marinuzzi Decl., Exh. B). Pursuant to the Separation Agreement, Services and certain of its subsidiaries (the "Transferor Subsidiaries," and, together with Services, the "Transferors") purportedly transferred certain real estate, fixtures, and other assets (the "Transferred Assets") to Uniti and its subsidiaries (the "Transferees").[5] The purported asset transfer occurred on the same day that the Master Lease was signed and became effective. The Transferred Assets consisted of approximately 47% of Services' net book value of its telecommunications property, equipment, and plants.[6]

17. In exchange for the Transferred Assets, on April 24, 2015, Uniti transferred to Services: (a) 100% of Uniti's common stock; (b) $1.035 billion in cash; and (c) $2.5 billion of debt. On the same day, Services transferred 80.4% of the Uniti common stock to Holdings.

[5] The terms "Transferor Subsidiaries," "Transferors," "Transferred Assets," and "Transferees" are used herein for ease of reference. Per the below analysis, no actual transfer of assets took place and the Debtors have remained the owners of the assets at all times pursuant to the discussion herein.

[6] *See* Windstream Communications, Intercompany Memorandum, dated April 24, 2015 (the "Intercompany Memorandum"; *see* Marinuzzi Decl., Exh. C) at 1. As set forth in Section 2.2 of the Separation Agreement, the Transferred Assets consisted of the following:

1. real property assets at certain operational facilities referred to in the Separation Agreement (the "Facilities");
2. all buildings, structures, other improvements, and fixtures on the Facilities;
3. all fiber optic cable lines, copper cable lines, conduits, telephone poles, attachment hardware, and similar assets affixed to or incorporated into the Facilities;
4. rights (other than legal title) to (a) certain easements or rights-of-way real estate interests, (b) certain permits, franchises, licenses, and similar agreements granted by governmental authorities, and (c) all pole attachment agreements, railroad crossing agreements, leases of conduits, and similar agreements with third parties;
5. rights to the "Talk America" name and logo and related domains; and
6. all other assets used primarily in or that primarily relate to (x) the business of owning and operating the copper cable network and local and long-haul fiber optic cable network located on the Facilities and utilized in the provision of advanced network communications and technology solutions to businesses and consumers and (y) the CLEC Business.

Holdings then distributed that stock to Holdings' shareholders on the same day, at which time Uniti's common stock became publicly traded. Upon information and belief, the Transferor Subsidiaries did not receive any consideration in exchange for the Transferred Assets they transferred to the Transferees.

18. In a presentation made at the May 17, 2015 board of directors' meeting of Holdings and Services, Ernst & Young valued the real estate assets to be transferred to Uniti at between $7.45 billion and $8.24 billion.[7] According to the Board Presentation, Ernst & Young used cost (based on replacement cost less depreciation and obsolescence) and market (based on the return on asset and profitability metrics within the range of comparable companies) methodologies for valuation. *See* Board Presentation at 35.

2. The Leaseback

19. Pursuant to the Separation Agreement, on April 24, 2015, Holdings, as lessee, and a number of Uniti subsidiaries, as lessors (collectively, the "<u>Landlord</u>"), entered into a master lease (the "<u>Master Lease</u>"; *see* Marinuzzi Decl., Exh. E) by which the Landlord purported to lease certain of the Transferred Assets (the "<u>Leased Assets</u>") to Holdings. Pursuant to the Master Lease, Holdings has the exclusive right to use the network assets transferred to Uniti under the Separation Agreement for 15 years, with a tenant-only option to extend the term four times, for total of 35 years. Under Section 7.2 of the Master Lease, Holdings' subsidiaries have the right to "use, occupy and operate" the Leased Assets and discharge Holdings' obligations under the Master Lease.

20. As set forth in Section 3.4 of the Master Lease, the Master Lease is a "triple net" lease. Specifically, in addition to rent, Holdings is required to pay the following expenses with

[7] *See* Presentation to the boards of directors of Windstream Holdings, Inc. and Windstream Services, LLC, dated May 17, 2015 (the "<u>Board Presentation</u>"; *see* Marinuzzi Decl., Exh. D), at 34.

respect to the Leased Assets pursuant to the Master Lease: (a) all taxes, permit or license fees, and other governmental charges; (b) all insurance premiums; (c) all utilities; (d) all fees related to easements, licenses or other rights that benefit the Leased Assets; and (e) all maintenance and repair costs. The Master Lease also requires Holdings, among other things, to: (i) repair the Leased Assets if there is any casualty event (Section 14.2); (ii) comply with all obligations under pole attachment agreements that are part of the Leased Assets (Section 9.2); and (iii) comply with all the legal requirements applicable to the Leased Assets (Section 8.2).[8]

21. The initial rent Holdings agreed to pay under the Master Lease is $650 million per year. Starting with the fourth year of the initial 15-year term, the rent is subject to an increase of 0.5% per year. With respect to the rent after the fifteenth year of the term, Sections 1.4(b) and 41.14 of the Master Lease contemplate that Holdings and the Landlord will agree on a new rent amount, or if they fail to reach an agreement, the rent will be based on a fair market valuation performed by appraisers (based on the anticipated diminution in the value of the Leased Assets during the relevant renewal term and a "time value of money" component based on comparable rates of return for similar leases) as described in the Master Lease.

3. Regulatory and Accounting Treatment of the Transaction

22. The parties never intended for Uniti to use or operate the Leased Assets, and Uniti has never had the requisite regulatory authority to do so. *See* Intercompany Memorandum, at 2. Instead, the Transaction contemplated that the Transferor Subsidiaries (the approved owners and operators of the Leased Assets) would continue to use the Leased Assets just as they did before

[8] Additionally, under Section 15.1 of the Master Lease, if there is a partial condemnation of the Leased Assets, the Master Lease remains in effect and the Landlord must make available to Holdings a portion of any award paid by governmental authorities to restore the remaining Leased Assets, and Holdings must restore the remaining Leased Assets regardless of whether such portion of the award is sufficient to make such restoration. (The Master Lease does not specify how that "portion" would be determined.) Under Section 15.3 of the Master Lease, if there is a temporary condemnation of the Leased Assets (for less than 180 days), then the related award is paid to Holdings.

the Transaction. To that end, the Debtors took a number of steps to reassure regulators that the Transaction "was expected to be 'virtually invisible' and 'seamless' to customers." *U.S. Bank v. Windstream Servs.*, No. 17-CV-7857 (JMF), 2019 WL 948120, at *6 (S.D.N.Y. Feb. 15, 2019) (citations omitted) (the "SDNY Decision"). For example, "Windstream disclosed to the regulators that there would be a master lease signed by Holdings, but stressed that that was '*just for administrative ease* in terms of transacting—transacting the lease between the entities . . . for the benefit of the operating subsidiaries of Windstream.'" *Id.* (emphasis in original). The Debtors also represented that the Transferor Subsidiaries would retain exclusive, long-term usage rights, and have the same obligations with respect to the Transferred Assets after the Transaction. *See id.*

23. With respect to the accounting treatment of the Transaction, Holdings indicated that the Transaction would not qualify for sale-leaseback accounting, and, as a result, the Transaction was accounted for as a financing. *See* Intercompany Memorandum, at 2. The Intercompany Memorandum indicates that the Transaction involved several forms of "continuing involvement" by Services in the Transferred Assets after the completion of the Transaction, including (a) the Transferors' failure to transfer "title, and therefore, complete control of the easements, permits and pole attachment agreements" to the Transferees, and (b) Services' ability to, "through its retained 19.6% interest in [Uniti] common stock," participate "in future profits of [Uniti] and any appreciation in the value of the Transferred Assets." *Id.* at 9–10. Therefore, under applicable accounting rules, a full transfer of title of the Transferred Assets did not occur and the Transferred Assets remained on Services' balance sheet. *See id.* at 10.

4. The Aurelius Litigation

24. In September 2017, Aurelius Capital Management ("Aurelius") alleged that the Uniti spin-off constituted an impermissible "Sale and Leaseback Transaction" under the

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indenture governing the 6 3/8% Senior Notes due 2023 issued by Services (the "Indenture"). *See* First Day Declaration, ¶ 32. In reaction to the allegation, Services filed suit against U.S. Bank National Association ("U.S. Bank"), in its capacity as indenture trustee for the 6 3/8% Senior Notes due 2023, in Delaware Chancery Court seeking a declaration that it had not violated any provision of the Indenture. *See id.* at ¶ 33. On October 12, 2017, U.S. Bank, at the direction of then majority-holder Aurelius, filed suit in the District Court for the Southern District of New York seeking a declaration that defaults under the Indenture had, in fact, occurred. Services filed an answer and affirmative defenses in response to the complaint the following day, as well as counterclaims against the trustee and the noteholder. *See id.* The Delaware action was subsequently dismissed. *See* Windstream Holdings, Inc., Annual Report (Form 10-K) dated March 15, 2019.

25. On February 15, 2019, Judge Furman issued the SDNY Decision, holding that the Transaction was a "Sale and Leaseback Transaction" under the Indenture. The Court determined that although Holdings (not the Transferors) was the tenant under the Master Lease, the Transferors were also direct or indirect tenants. The court based its finding in part on the fact that the Transferors: (a) remained in possession of the Leased Assets; (b) contributed 100% of the lease payments; (c) expended over $339 million, as of mid-2017, to maintain and repair the Leased Assets; and (d) were subleasing or otherwise entering into agreements with third parties with respect to the Leased Assets. In addition, the court found that the Transferors transferred the Leased Assets to the Transferees in order to lease them back. The District Court awarded Aurelius a money judgment in an amount of $310,459,959.10.

5. The Committee's Demand to Prosecute the Claims

26. On July 10, 2019, the Committee sent a letter to the Debtors' counsel identifying and describing the following Proposed Claims arising in connection with the Transaction:

Recharacterization Claims[9]

- Claims to recharacterize the Transaction as a financing or secured loan rather than a true lease or a true sale. Specifically:
    - A claim that the Master Lease was not a true lease but a disguised financing transaction; and/or
    - A claim that the Transaction was not a true sale, but rather a pledge of the Transferred Assets to the Transferees to secure a borrowing from the Transferees.
- Claims to avoid improperly perfected or unperfected liens and security interests related to the recharacterization. Specifically:
    - Claims and related causes of action against Uniti to avoid improperly perfected or unperfected liens and security interests in the Transferred Assets or the Leased Assets under sections 544(a) and 550(a) of the Bankruptcy Code and applicable state law.

Fraudulent Transfer Claims

- Claims and related causes of action against Uniti to avoid and recover the Transferred Assets (or the value thereof) as actual and/or constructive fraudulent transfers under sections 544(b)(1) and 550(a) of the Bankruptcy Code and applicable state law.

The Committee also requested that the Debtors advise the Committee by no later than July 17, 2019 at 5:00 p.m. (Eastern) whether, and by what date, they intend to pursue those claims and causes of action. The Committee is awaiting a response to the demand letter.

27. If the Debtors do not indicate that they are prepared to prosecute the Proposed Claims, the Committee will file a proposed complaint before the hearing on this Motion.

BASIS FOR RELIEF

I. LEGAL STANDARD FOR DERIVATIVE STANDING

28. The Bankruptcy Code does not expressly authorize a creditors' committee to initiate an adversary proceeding to avoid transfers, obligations or liens, and/or pursue other causes of action typically brought by a trustee or debtor in possession. However, the Bankruptcy

[9] Titles of the claims used herein are descriptive only and not intended to limit the nature or type of claim.

Code provides for the establishment of a creditors' committee for the express purpose of protecting the rights of its constituents and similarly-situated creditors. In furtherance of this purpose, section 1103(c) of the Bankruptcy Code, which enumerates the statutory functions of a creditors' committee, authorizes creditors' committees to "perform such other services as are in the interests of those represented." 11 U.S.C. § 1103(c)(5).

29. The Second Circuit, in common with the majority of circuits to address the issue, has held that there is "an implied . . . right for creditors' committees to initiate adversary proceedings in the name of the debtor-in-possession." *Unsecured Creditors Comm. v. Noyes (In re STN Enters.)*, 779 F.2d 901, 904 (2d Cir. 1985). Indeed, derivative standing is frequently observed to be critical to the vindication of rights where debtors are either unable or unwilling to assert potentially valuable claims on behalf of the estates. *See Adelphia Commc'ns Corp. v. Rigas (In re Adelphia Commc'ns Corp.)*, 285 B.R. 848, 855 (Bankr S.D.N.Y. 2002) ("it is permissible, not uncommon, and often desirable for official committees to seek and obtain the right to assert [a] claim on behalf of the estate . . . when there is doubt as to the debtors' ability or inclination to prosecute the claim vigorously. . . ."); *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 562 (3d Cir. 2003) (observing that official committees play a "vibrant and central role in Chapter 11 adversarial proceedings").

30. Court approval of prosecution of claims by a creditors' committee is appropriate where the committee (a) presents colorable claims for relief that, on appropriate proof, would support a recovery, and (b) demonstrates that the "debtor unjustifiably failed to bring suit." *STN Enters.*, 779 F.2d at 905. In determining whether a debtor has unjustifiably failed to bring suit, the court does not evaluate the debtor's motive but instead considers whether "the action is likely

to benefit the reorganization estate." *See Adelphia Commc'ns Corp. v. Bank of Am., N.A. (In re Adelphia Commc'ns Corp.)*, 330 B.R. 364, 374 n. 19 (Bankr. S.D.N.Y. 2005) (citations omitted).

31. With respect to the first prong, this Court has held that it is "relatively easy" to satisfy the threshold for showing that claims are colorable. *Adelphia*, 330 B.R. at 376. Standing to assert claims "should be denied only if the claims are 'facially defective.'" *Id.*; *see also Official Comm. of Unsecured Creditors of Am.'s Hobby Ctr., Inc. v. Hudson United Bank (In re Am.'s Hobby Ctr., Inc.)*, 223 B.R. 275, 288 (Bankr. S.D.N.Y. 1998). The inquiry is "much the same as" evaluating a motion to dismiss a complaint for failure to state a claim. *Id.* at 282. There is no need for a court to conduct a mini-trial. *See id.*

32. In assessing the potential benefits to the estate, the court engages in a limited merits assessment to assure "that there is a sufficient likelihood of success to justify the anticipated delay and expense to the bankruptcy estate that the initiation and continuation of litigation will likely produce." *Adelphia*, 330 B.R. at 374 (quoting *STN Enters.*, 779 F.2d at 905–06). Although a "sufficient likelihood" of success is difficult to quantify, it is not necessary for the court to find that the claims are more likely to succeed than not. *Id.* at 386 ("It is plain that . . . the Committees do not have to show a likelihood of success on the merits."). A court need only assure itself that the proposed litigation is not a "hopeless fling" and that the "prospective rewards can reasonably be expected to be commensurate with the litigation's foreseeable cost." *See id.*; *see also Am.'s Hobby Ctr.*, 223 B.R. at 284 (approving derivative standing where there was a "fair chance that the benefits to be obtained from the litigation will outweigh its costs").

33. Here, if successful, the Proposed Claims could result in billions of dollars of recovered assets and avoided liens, significantly increasing the unencumbered value of the

Debtors' estates and greatly enhancing recoveries for unsecured creditors and other stakeholders. At the same time, costs incurred in connection with the prosecution of the Proposed Claims will likely be modest when compared to the recognizable value of the claims, even when discounting such value for the inherent uncertainty of litigation. The Committee accordingly submits that derivative standing is warranted.

II. THE PROPOSED CLAIMS ARE COLORABLE

A. The Recharacterization Claims are Colorable

34. There are colorable claims (a) to recharacterize the Master Lease as a disguised financing rather than a true lease, and/or (b) to recharacterize the Transaction as a pledge of the Transferred Assets to the Transferees to secure a borrowing from the Transferees rather than a true sale.

35. Here, the Transferors transferred the Transferred Assets to the Transferees, and Holdings (not the Transferors) is the lessee under the Master Lease. Therefore, the Court should collapse the component parts of the Transaction in determining whether to recharacterize the Master Lease as a disguised financing and the Transaction as a pledge of the Transferred Assets to the Transferees to secure a borrowing from the Transferees.

36. "Courts have 'collapsed' a series of transactions into one transaction when it appears that despite the formal structure erected and the labels attached, the segments, in reality, comprise a single integrated scheme when evaluated focusing on the knowledge and intent of the parties involved in the transaction." *Official Comm. of Unsecured Creditors of Sunbeam Corp. v. Morgan Stanley & Co. (In re Sunbeam Corp.)*, 284 B.R. 355, 370 (Bankr. S.D.N.Y. 2002) (citations omitted). In *Adelphia Recovery Trust v. FPL Grp., Inc. (In re Adelphia Commc'ns Corp.)*, the court looked to three factors in determining whether to treat a transfer as part of a larger, general scheme: (a) whether all of the parties involved had knowledge of the multiple

transactions; (b) whether each transaction would have occurred on its own; and (c) whether each transaction was dependent or conditioned on other transactions. 512 B.R. 447, 491 (Bankr. S.D.N.Y. 2014).

37. Here, the facts demonstrate that the Separation Agreement and the Master Lease should be collapsed for the purposes of any recharacterization analysis. First, all of the parties had knowledge of the component parts of the Transaction. To be sure, both Holdings and Uniti were created in order to facilitate the Transaction. Second, based on internal documents as well as public announcements detailing the structure of the Transaction, neither the Separation Agreement nor the Master Lease would have been consummated on their own. Lastly, the lease of the Transferred Assets back to Holdings under the Master Lease was dependent and conditioned on the transfer of the Transferred Assets to Uniti. Therefore, the Court should collapse the Separation Agreement and the Master Lease in connection with its analysis.

1. The Master Lease is Not a True Lease

38. There is a colorable claim that the Master Lease is not a true lease, and should thus be recharacterized as a disguised financing.

39. The Master Lease should be recharacterized as a disguised financing rather than a true lease. To determine whether an agreement constitutes a true lease, courts "look to the economic realities of the transaction to understand the underlying purpose and goal." *European Am. Bank v. Sackman Mortg. Corp. (In re Sackman Mortg. Corp.)*, 158 B.R. 926, 932 (Bankr. S.D.N.Y. 1993); *see also Int'l Trade Admin. v. Rensselaer Polytechnic Inst.*, 936 F.2d 744, 748 (2d. Cir. 1991) (courts must look to the "economic substance of the transaction . . . ."); *Liona Corp. v. PCH Assocs. (In re PCH Assocs.)*, 949 F.2d 585, 597 (2d Cir. 1991) ("It is well established that a bankruptcy court, as a court of equity, may look through form to substance when determining the true nature of a transaction as it relates to the rights of parties against a

bankrupt's estate.") (citations omitted); *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, 499 B.R. 416, 429 (S.D.N.Y. 2013) (looking to the substance of a transaction over its form in determining whether new value was created by money transfers).

40. In determining whether a purported lease is in fact a "true lease," factors courts consider include: (a) whether the lessee has an option to purchase the leased assets for nominal value at the end of the lease; (b) whether fair market rent is received by the lessor; (c) whether the lessee's obligation to pay rent is absolute; (d) whether the lessee assumes obligations associated with outright ownership of the property; (e) whether the property was purchased by the lessor specifically for the lessee's use; and (f) the useful economic life of the leased assets. *See, e.g.*, *Liona Corp. v. PCH Assocs. (In re PCH Assocs.)*, 804 F.2d 193, 200–01 (2d Cir. 1986); *see also United Airlines, Inc. v. HSBC Bank, N.A.*, 416 F.3d 609, 617 (7th Cir. 2009); *Duke Energy Royal, LLC v. Pillowtex Corp. (In re Pillowtex, Inc.)*, 349 F.3d 711, 716–23 (3d Cir. 2003).

41. None of these factors should be viewed in isolation, as "courts must be careful to look to 'the economic substance of the transaction and not its form,'' (*see Int'l Trade Admin.*, 936 F.2d at 751 (citation omitted)), and not lose sight of the central "inquiry" in a true lease analysis, which asks only "whether the parties intended to impose obligations and confer rights significantly different from those arising from the ordinary landlord/tenant relationship." *Barney's Inc., v. Isetan Co. Ltd. (In re Barney's, Inc.)*, 206 B.R. 328, 332 (Bankr. S.D.N.Y. 1997) (citations omitted).

a. Purchase Option

42. A provision giving the lessee an option to purchase the leased assets for nominal value at the end of the lease may indicate that a transaction is not a true lease. *See In re Pillowtex, Inc.*, 349 F.3d at 718; *see also Pactel Fin. v. D.C. Marine Serv. Corp.*, 136 Misc. 2d

194, 196 (N.Y. Dist. Nassau Cty. Ct. 1987). Here, Holdings does not have the option to repurchase the Leased Assets for nominal value at the end of the term of the Master Lease. However, as described below, the effective term of lease of the Leased Assets is for all or almost all of the useful economic life of the Leased Assets. Therefore, the absence of a purchase option is not an impediment to the Master Lease being recharacterized as a financing.

b. Rent

43. A lease in which fair market rent is received by the lessor is more likely to be viewed as a true lease than one in which the lessor does not receive such value. For example, in *In re PCH Associates*, the court held that a sale leaseback transaction did not constitute a true lease because of several facts, including the fact that the fixed rent bore no relationship to the market value of the land. 804 F.2d at 196. Similarly, in *In re United Air Lines*, the court's holding that a sale leaseback transaction did not constitute a true lease was partially based on the fact that the rent was not based on the market value of the property, but rather upon the amount United borrowed to develop its airport facilities. *United Airlines v. U.S. Bank, N.A. (In re United Air Lines, Inc.)*, 447 F.3d 504, 508 (7th Cir. 2006).

44. The facts demonstrate that the Master Lease is not a true lease because the rent is not structured to compensate Uniti for Holdings' use of the Leased Assets, but rather is based on the rate of return Holdings thought appropriate for Uniti's stakeholders:

- In its letter to the SEC dated September 5, 2014, Holdings wrote that it determined, "applying a reasonable market rate of return" to the Leased Assets, "a fair market annual lease payment would fall within a range of $600.0 million to $700.0 million." *See* Windstream Holdings, Inc. Request for Concurrence with Proposed Accounting Treatment, October 2, 2014 (the "<u>October 2 Letter</u>"; *see* Marinuzzi Decl., Exh. F). The October 2 Letter indicates that the $650 million initial lease rate would produce "financial stability for both Windstream and [Uniti] through the initial term of the lease." *Id.* The October 2 Letter further provides, "[w]hen balancing the cash flow benefits for both companies over the entire 15-year term, management settled on the proposed pricing structure." *Id.*

- According to the Board Presentation, Holdings' management believed that the $650 million initial rent was the "optimal initial lease rate" because it would "provide[] significant deleveraging to" Services, "allow [Uniti] to pay substantial dividend post transaction" and "ensur[e] feasibility and health of both" Services and Uniti through the term of the Master Lease. *See* Board Presentation at 34. The Committee believes that this valuation was based on factors such as debt rate and a return on assets, internal rates of return, and cost of capital approach, as opposed to what amount third parties would be willing to pay to rent the Leased Assets (*i.e.*, fair market value). *See id.*

- Under Section 10.2(b) of the Master Lease, if the Landlord, at its option, funds any of the capital improvements to the Leased Assets, the rent is subject to an increase (*i.e.*, the rent is designed to be a return on the Landlord's investment rather than a fair market rent).[10]

- After the fifteenth year of the term, Sections 1.4(b) and 41.14 of the Master Lease contemplate that Holdings and the Landlord will agree on a rent amount, or, if they fail to reach an agreement, the rent will be based on the fair market valuation of appraisers as described in the Master Lease. However, such fair market determination would be made based on the anticipated diminution in the value of the Leased Assets during the relevant renewal term and a "time value of money" component based on comparable rates of return for similar leases. This determination is not a true fair market rent determination (and, in any event, only applies after 15 years of non-market rent payments).

c. The Obligation to Pay Rent is Absolute

45. A lease in which the lessee is required to pay rent even if the lease is terminated is more likely to be viewed as a financing rather than a true lease. For example, in *In re United Air Lines*, in finding that the transaction was a secured loan and not a lease, the court identified several factors in support of its conclusion. One of the factors considered was the fact that there was a "hell or high water" clause in the lease agreement, meaning that United had to pay the full rental amount even if the property became unusable. *See In re United Air Lines*, 447 F.3d at 507–8.

[10] In particular, if the Landlord funds any capital improvements between April 24, 2017 and April 23, 2024, then for the balance of the initial 15-year term of the Master Lease, the rent is increased by the product of (a) the amount of funds advanced by the Landlord and (b) the capitalization rate not to exceed 200 basis points above the average of the Landlord's highest cost of debt average implied yield over the preceding 60 trading days and the Landlord's average implied dividend yield over the preceding 60 trading days. Note that for capital improvements funded by the Landlord during the above period, the increase in the rent is based on the cost of capital to the Landlord.

46. Here, the fact that Holdings is still required to pay the whole rent amount if there is partial condemnation of the Leased Assets supports the argument that the Master Lease was not a true lease, but rather was a disguised financing transaction. Under Section 15.1 of the Master Lease, if there is a partial condemnation of the Leased Assets, the Master Lease remains in effect and the Landlord must make available to Holdings a portion of the award paid by the governmental authorities to restore the remaining Leased Assets, and Holdings must restore the remaining Leased Assets regardless of whether such portion of the award is sufficient to make such restorations. Partial condemnation does not reduce the rent or terminate the Master Lease in part. Therefore, Holdings' absolute obligation to pay rent supports a finding that the Master Lease is not a true lease.

d. Obligations Typically Associated With Outright Ownership

47. With respect to tangible property, some courts have followed a broad approach and assessed whether the involved parties "impose [ ] obligations and confer [ ] rights [significantly different from] those arising [from the] ordinary landlord-tenant relationship." *In re Dena Corp.*, 312 B.R. 162, 170 (Bankr. N.D. Ill. 2004). For example, in *In re PCH Associates*, the court held that a sale leaseback transaction did not constitute a true lease because of several facts, including that the lessee "assumed many of the obligations associated with outright ownership of the property, including responsibility for paying property taxes and insurance." 804 F.2d at 201.

48. The fact that Holdings assumed obligations normally associated with ownership of property supports a finding that the Master Lease was not a true lease, but rather was a disguised financing transaction. *See infra* ¶¶ 62–64. Moreover, the Transferor Subsidiaries have in fact *retained legal title* to certain of the Leased Assets, including all easements, permits, and

pole agreements in effect at the time of the Transaction. One of the Transferor Subsidiaries asserted that, although Services was retaining legal title to these assets, it was transferring "beneficial ownership rights and interests"—in other words, "the right to all future income, gains or benefits from the easements and rights of way, as well as exposure to all risk of loss associated with those assets." Windstream Kentucky East, LLC and Windstream Kentucky West, LLC's Responses to the Kentucky Public Service Commission Staff's Second Request for Information, dated October 31, 2014, Marinuzzi Decl., Exh. G, at 1. However, those rights and interests were "immediately and contemporaneously" leased back to Holdings for the Transferor Subsidiaries' exclusive use. *See id.* Thus, Holdings is obligated to pay rent to Uniti to continue using the easements, permits, and pole attachments that Services continues to own. Holdings' obligations are typically associated with outright ownership, and thus support a finding that the Master Lease is not a true lease.

e. Property Purchased for Transferor's Use

49. In determining whether to recharacterize a purported lease, courts also consider whether the lessor purchased the property specifically for the lessee's use. For example, in *In re PCH Associates*, the court held that a sale leaseback transaction did not constitute a true lease because of several facts, including that the property was purchased by the lessor specifically for the lessee's use. 804 F.2d at 200–01.

50. Here, the fact that the Transferors transferred the Leased Assets with the express intention of leasing them back supports a finding that the Master Lease is not a true lease, but rather is a disguised financing transaction. Indeed, as noted above, both Holdings and Uniti were created by Services specifically to engage in the Transaction. Moreover, as explained below, the Transferors represented to state regulators that the Transferor Subsidiaries would retain exclusive, long-term usage rights and have the same obligations with respect to the Transferred

Assets after the Transaction, and that the Transaction was for administrative ease. The fact that Uniti purchased the Transferred Assets for the purpose of leasing them back to Holdings supports a finding that the Master Lease is not a true lease.

f. Useful Economic Life

51. A true lease results in the lessor obtaining something of value once the term of the lease is over and the lessee transfers possession of the leased property back to the lessor. *See In re APB Online, Inc.*, 259 B.R. 812, 817 (Bankr. S.D.N.Y. 2001) ("An essential characteristic of a true lease is that there be something of value to return to the lessor after the term."); *see also PSINet, Inc. v. Cisco Sys. Capital Corp. (In re PSINet, Inc.)*, 271 B.R. 1, 45–46 (Bankr. S.D.N.Y. 2001) (holding that agreements were not true leases because the leased "equipment would have no remaining economic value at the end of each lease term"); *In re CNB Int'l, Inc.*, 307 B.R. 363, 369 (Bankr. W.D.N.Y. 2004) (one "traditional indicator[] of a disguised" financing is a lease term that "equal[s] or exceed[s] the [the leased property's] economic life.").

52. Tony Thomas, the Debtors' CEO, has recently admitted that the current rent under the Master Lease is "significantly above market." Debtors' Script for the Earnings Presentation for the First Quarter of Fiscal Year 2019, dated May 15, 2019 (the "May 2019 Earnings Presentation"), Tony Thomas, Marinuzzi Decl., Exh. H. Additionally, the Debtors have stated that the copper wire, which makes up a substantial portion of the Leased Assets, has "very real and significant technological constraints" and has lost value "precipitously and will likely continue to do so." *See id.* Accordingly, the Debtors have suggested that "the lease payment could be reduced by 80% or more if the lease were to be renewed in 2030, because of the significant decline in value of copper facilities." *See id.* Therefore, it is likely that a majority of the Leased Assets by value will not have any useful economic life after the initial 15-year term

of the Master Lease. The fact that Uniti will not likely retain significant value after the term of the Master Lease supports a finding that the Master Lease is not a true lease.

2. The Transaction Was Not a True Sale.

53. There is an alternative colorable claim that the Transaction was not a true sale and should thus be recharacterized as a disguised financing.

54. Similar to the true lease analysis, in determining whether to treat a transfer of property as a sale or a secured loan, courts employ a case-by-case approach based upon the facts of a specific transaction. *See Bear v. Coben (In re Golden Plan of Cal., Inc.)*, 829 F.2d 705, 709 (9th Cir. 1986) ("Whether the parties intended outright sales or loans for security is determined from all the facts and circumstances surrounding the transactions at issue."); *Rollins v. Neilson (In re Cedar Funding, Inc.)*, 398 B.R. 346, 352 (Bankr. N.D. Cal. 2008) (explaining that "courts must look to the intent of the parties and the totality of the circumstances surrounding the transaction to determine whether § 541(d) will prevent equitable interests from becoming property of the estate") (citations omitted). As set forth below, in considering whether a transaction was a true sale, courts consider the following factors: (a) the intention and treatment of the transaction by the parties; (b) allocation of the risk of loss; (c) the economic benefits of the transaction; (d) whether the transferor continues to exercise control of the assets after the purported sale; (e) the adequacy of consideration; and (f) notification to customers of the asset transfer.

a. The Intention and Treatment by the Parties

55. The facts demonstrate that the Transaction was not a true sale based on the intent and treatment of the Transaction by the parties, including the following:

- The Transferors did not purport to transfer legal title to certain of the Transferred Assets. Instead, the Transferors transferred to the Transferees only beneficial ownership to the following: (a) certain easements or rights-of-way real estate interests; (b) certain permits, franchises, licenses, and similar agreements granted by governmental authorities; and (c) all pole attachment agreements, railroad crossing agreements, leases of conduits, and similar agreements with third parties.[11]

- The Transferors accounted for the Transaction as a financing for accounting purposes until after the Petition Date.
- The Separation Agreement, the Master Lease, and public filings make clear that the Transferors transferred the Leased Assets specifically so Uniti could lease them back to Holdings.

56. Therefore, the Transferors did not intend to and did not in fact part with control of the Leased Assets.

b. Risk of Loss

57. In determining whether a transaction was a true sale, courts consider allocation of risk of loss as between transferor and transferee. *In re Sackman Mortgage Corp.*, 158 B.R. at 934 (finding ambiguity in the agreement, the court examined several factors in determining the transaction was a disguised loan). Where the transferor retains risk of loss with respect to assets transferred, courts are more likely to conclude that a given transaction is a loan secured by the property transferred and not a true sale. *See Major's Furniture Mart, Inc. v. Castle Credit Corp.*, 602 F.2d 538, 545 (3d Cir. 1979) (seller retained full risk of account uncollectibility); *see also Aalfs v. Wirum (In re Straightline Invs., Inc.)*, 525 F.3d 870, 880 (9th Cir. 2008) (affirming finding that sale of accounts receivable was actually a disguised loan transaction because of seller's guarantee of full repayment); *Ryan v. Zinker (In re Sprint Mortg. Bankers Corp.)*, 164 B.R. 224, 228 (Bankr. E.D.N.Y. 1994), *aff'd*, 177 B.R. 4 (E.D.N.Y. 1995) (finding "guarantee of repayment by the lead lender to the participant . . . crucial in determining classification . . ."); *Fireman's Fund Ins. Cos. v. Grover (In re The Woodson Co.)*, 813 F.2d 266,

[11] The Transferors indicated that they retained "legal title to all easements and rights of way [and] no assignments of easements will be recorded in any real property records, and no agreements will be amended or assigned to reflect [Uniti's subsidiaries] as a party" in a filing with the Kentucky state authorities.

271 (9th Cir. 1987) (indicating that the presence of a guarantee "seems to result in a finding of a debtor-creditor relationship in most cases"). Further, if the transferee does not bear the same risk of loss as the transferor bore prior to the transaction, or if the transferor has made a guarantee of payment to the transferee, the transaction may be considered to be a loan and not a sale. *See Sackman Mortg. Corp.*, 158 B.R. at 934–35 (finding a "lending relationship and not a participation" where the purported "participant" ran no risk of loss on the underlying loan against the lender, but only ran the risk that the underlying obligor was not creditworthy); *see also Woodson*, 813 F.2d at 270–72 (noting that in "participation transactions . . . participants share in [the] risk and must rely on the creditworthiness of the borrower and the collateral"); *Corporate Fin., Inc. v. Fidelity Nat'l Title Ins. Co. of N.Y. (In re Corporate Fin., Inc.)*, 221 B.R. 671, 679 (Bankr. E.D.N.Y. 1998) (finding that in typical participation agreements "the participant shares the same risk as the lead lender regarding the receipt of payment, as both rely on the creditworthiness of the underlying borrower") (citing *Sprint*, 164 B.R. at 229).

58. The facts demonstrate that the Transaction was not a true sale based on the allocation of the risk of loss:

- The risk of loss with respect to the Leased Assets remained with the Transferors after the Transaction. The Master Lease is a "triple net" lease; therefore, the risk of loss did not pass to the Transferees and the Transferees were guaranteed a set rate of return (*i.e.*, the rent payment) for the initial term of the Master Lease.[12]

- The burden of an unexpected increase in these obligations would, based on the relevant provisions in the Master Lease, fall entirely on Holdings (and indirectly on the Transferors). In fact, in the Aurelius Litigation, the Court found that the Transferors

[12] Specifically, under the Master Lease, Holdings agreed to pay the following expenses with respect to the Leased Assets in addition to rent:

1. all taxes, permit or license fees, and other governmental charges;
2. all insurance premiums;
3. all utilities;
4. all fees related to easements, licenses or other rights that benefit the Leased Assets; and
5. all maintenance and repair costs.

expended over $339 million, as of mid-2017, to maintain and repair the Leased Assets. *See* SDNY Decision at 6.

- Under Section 15.1 of the Master Lease, if there is a partial condemnation of the Leased Assets, the Master Lease remains in effect and there is no partial termination of the Master Lease.

- The Transferors had additional obligations with respect to the Leased Assets typically associated with outright ownership of the Leased Assets. Among other things, the Master Lease imposed on Holdings the obligations to: (a) repair the Leased Assets if there is any casualty event (Section 14.2); (b) comply with all obligations under pole agreements that are part of the Leased Assets (Section 9.2); and (c) comply with all the legal requirements that apply to the Leased Assets (Section 8.2).

59. Therefore, the Transferors bore risks of loss typical of a financing transaction and not a true sale.

c. Economic Benefits

60. The extent to which a seller retains the economic benefits of ownership of the property purportedly transferred is also considered in determining whether a transaction is a true sale. If the transferor is entitled to any surplus from use of the transferred assets in excess of a fixed amount or has an unlimited right to repurchase transferred assets, a purported sale may be recharacterized as a financing. *See Levin v. City Tr. Co. (In re Joseph Kanner Hat Co.)*, 482 F.2d 937 (2d Cir. 1973); *Mapco Inc. v. United States*, 556 F.2d 1107, 1111 (Fed. Cir. 1977); *Fox v. Peck Iron & Metal Co.*, 25 B.R. 674, 690 (Bankr. S.D. Cal. 1982) (option to repurchase provided seller with the ability "to deprive . . . [buyer] of any increase in value").

61. The facts demonstrate that the Transaction was not a true sale based on the economic benefits of the Transaction. Specifically, the fact that the Transferors retained the economic benefits of the Leased Assets for the term of the Master Lease (subject to the payment of rent under the Master Lease) supports a finding that the Transaction was not a true sale, but rather was a disguised financing transaction. Under Section 7.2(f) of the Master Lease, Holdings

receives all rent, profits, and charges arising from the use of the Leased Assets or any sublease of the Leased Assets. For example, if the Leased Assets unexpectedly increase in value because of an unexpected change in market conditions or development of new technology, any resulting benefit would accrue to the Transferors during the term of the Master Lease. Furthermore, under Section 22.3(c) of the Master Lease, Holdings may enter into any sublease agreement without the prior written consent of the Landlord. In addition, under Section 15.3 of the Master Lease, if there is a temporary condemnation of the Leased Assets (for less than 180 days), then the related award is paid to Holdings. Therefore, the economic benefits support recharacterizing the Transaction as a financing.

d. Transferor's Continued Control

62. Continued control of assets by the transferor following a purported sale is customarily associated with a financing transaction. *See, e.g., Mapco, Inc.*, 556 F.2d at 1111 (buyer "had no dominion or control over the revenue payments"); *Commercial Sec. Co. v. Holcombe (In re E.E. Forbes Piano Co.)*, 262 F. 657, 661 (5th Cir. 1920) (collections and payment of collection expenses by the company).

63. The facts demonstrate that the Transaction was not a true sale based on the Transferor's continued control over the Transferred Assets:

- The Transferors maintained exclusive and uninterrupted control and possession of the Leased Assets after the Transaction. Under Section 1.3 of the Master Lease, Holdings has the exclusive right to use the Leased Assets for the term of the Master Lease.

- Services admitted that it continued to control the Leased Assets. Services did not obtain FCC approval for the Transaction, indicating that the Transaction qualified for "*pro forma* treatment under the FCC's rules and long-standing precedent," relying on an FCC rule that provides that "[t]ransfers of control or assignments that do not result in a change in the actual controlling party are considered non-substantial or *pro forma*."[13]

[13] Windstream Kentucky East, LLC and Windstream Kentucky West, LLC's Responses to the Kentucky Public Service Commission Staff's First Request for Information, dated November 3, 2014, Marinuzzi Decl., Exh. I, at 16.

- The Transferees did not control certain aspects of the Leased Assets after the closing of the Transaction. Section 4.2 of the Master Lease provides that the Landlord may not enter into agreements that relate to easements, licenses or other rights that benefit the Leased Assets without Holdings' consent. In addition, under Section 10.1 of the Master Lease, Holdings may make capital improvements without the Landlord's consent in accordance with "Engineering Standards," which Holdings may modify without the Landlord's consent if such modification is consistent with prevailing industry practice and complies with applicable law.

64. Therefore, the Transferors continued to control the Transferred Assets in a manner typical of a financing and not a true sale.

e. Adequacy of Consideration

65. The facts demonstrate that the purchase price paid by the Transferees for the Transferred Assets was inadequate, which supports a finding that the Transaction was not a true sale (but rather was a disguised financing transaction). *See, e.g.*, *Fox*, 25 B.R. at 689 (noting that assets transferred by debtor were worth at least twice what the debtor received for them, suggesting "a disguised financing scheme").

66. As discussed above, Ernst & Young valued a significant part of the Transferred Assets at $7.45 billion. Taking into account the immediate transfer of 80.4% of the Uniti stock (received from Uniti) by Services to Holdings, and then to Holdings' shareholders, Services only received approximately $4.37 billion of value in exchange for the Transferred Assets. The inadequacy of consideration supports recharacterizing the purported sale as a financing.

f. Notice to Customers

67. Courts have found the failure to notify the underlying obligors on receivables of a transfer of such receivables to a transferee is indicative of a secured loan rather than a true sale of the receivables. *E.E. Forbes Piano*, 262 F. at 661; *N.Y. v. Serv. Inst., Inc.*, 421 N.Y.S.2d 325 (Sup. Ct. 1979). The fact that the Transferors did not notify their customers regarding the transfer supports the argument that the Transaction was not a true sale, but rather was a disguised

financing transaction. Upon information and belief, Services did not notify its customers of the transfer of the Transferred Assets to the Transferees, except notice regarding the change of the name of the provider of the CLEC Business. An application submitted to an Alabama governmental agency indicates that the Transaction "is expected to be seamless to the vast majority of WIN Companies' customers; only the Windstream-CLEC residential customers who will be transferred to TAS will notice any initial change, and that is only in the name of the carrier that provides them service."[14]

68. Based on the facts set forth above, there is a colorable claim that the Transaction was not a true sale, but rather was a disguised financing and should be recharacterized as such.

3. The Claims Seeking Avoidance of Improperly Perfected or Unperfected Liens and Security Interests are Colorable

69. Improperly perfected or unperfected liens and security interests in the Transferred Assets or Leased Assets should be avoided. It is well-established that unperfected or improperly perfected security interests are subject to avoidance under section 544(a) of the Bankruptcy Code. That section allows a trustee or other estate representative to stand in the shoes of a hypothetical lien creditor and avoid an improperly perfected or unperfected security interest. *See In re 11 E. 36th, LLC*, No. 13-11506 (RG), 2015 WL 397799, at *3 (Bankr. S.D.N.Y. Jan. 29, 2015) (unperfected security interest in membership interest in limited liability company was subject to avoidance under section 544(a)); *D.C.I. Danaco Contractors, Inc. v. European Am. Bank (In re D.C.I. Danaco Contractors, Inc.)*, 141 B.R. 7, 13 (Bankr. E.D.N.Y. 1992) ("[A] debtor in possession[ ] holds the same rights as a hypothetical lien creditor and can set aside a security interest which is not perfected as of the date of filing the petition for relief."). Indeed, as

[14] Letter dated July 31, 2014 regarding Application of Windstream Subsidiaries for Approval, to the Extent Required by Law, of Certain Corporate Transactions and Grant of Certificate of Public Convenience and Necessity to Talk America Services, LLC, Marinuzzi Decl., Exh. J.

this Court has explained, even if no party in interest vested with proper standing has sought to exercise avoidance powers, "an unperfected lien is subject to avoidance *sua sponte* by the Court in the interest of justice." *See 11 E. 36th*, 2015 WL 397799, at *3 (citation omitted). Section 550(a) of the Bankruptcy Code enables recovery of the property transferred or the value of such property for the benefit of the estate, and section 551 of the Bankruptcy Code preserves that property for the estate. 11 U.S.C. §§ 550(a), 551.

70. Uniti has not filed deeds for the vast majority of the Transferred Assets. To the extent deeds have not been recorded, Uniti's interest in the Transferred Assets that are real property is not perfected.

71. Uniti has not filed UCC-1 financing statements or fixture filings against entities that owned fixtures that were part of the Transferred Assets. Therefore, Uniti's interest in the Transferred Assets that are fixtures is not properly perfected as against Services or the Transferor Subsidiaries.

72. Uniti has not filed UCC-1 financing statements against the Transferor Subsidiaries. Therefore, Uniti's interest in the Transferred Assets that are personal property is not perfected.

73. Uniti's security interest in any Leased Assets held at Holdings is insufficient.[15] Although CSL National, LP, one of the Landlords under the Master Lease, filed a UCC-1 financing statement against Holdings in Delaware, the financing statement references the property leased under the Master Lease and does not attach the Master Lease to the financing statement. Based on applicable law, the description is insufficient and, consequently, Uniti's

[15] As discussed herein, none of the Transferred Assets were the property of Holdings prior to the Transaction. As a result, the Committee does not believe that Holdings would be deemed to be the owner of any of the Transferred Assets if the Transaction is recharacterized. Rather, in a successful recharacterization action, the original owners of the Transferred Assets (*i.e.*, the Transferor Subsidiaries) would be deemed to still own the assets.

security interest in the personal property or fixtures is not perfected. *See, e.g.*, *First Midwest Bank v. Reinbold (In re 180 Equip., LLC)*, 591 B.R. 353, 355–56 (Bankr. C.D. Ill. 2018) (determining that collateral description was insufficient where it referred to a "First Amended and Restated Security Agreement" that was not attached to the filing and the collateral description).

74. Courts frequently apply section 544 of the Bankruptcy Code to avoid unperfected liens on real property in these circumstances. *See, e.g.*, *Dobin v. Sheehan (In re Eight Bulls, LP)*, 439 B.R. 370, 376 (Bankr. D.N.J. 2010), *aff'd sub nom.*, *Sheehan v. Dobin*, No. 10-6288 (FLW), 2011 WL 3625586 (D.N.J. Aug. 15, 2011) (avoiding property interest for failure to properly record); *Wasserman v. Capazzi (In re Day)*, 443 B.R. 338, 354-55 (Bankr. D.N.J. 2011) (same).

B. The Fraudulent Transfer Claims are Colorable

75. There are colorable fraudulent transfer claims arising out of the Transaction as to both the Transferor Subsidiaries and Services.

1. The Constructive Fraudulent Transfer Claims are Colorable

76. Section 548 of the Bankruptcy Code provides that a trustee or debtor may avoid any transfer or obligation incurred by the debtor if the debtor did not receive reasonably equivalent value in exchange for such transfer or obligation, and the debtor (a) was insolvent on the date of the transfer or incurrence of the obligation (or became insolvent as a result), (b) was left with unreasonably small capital, or (c) intended to incur, or believed that it would incur, debts that it could not pay as they matured. 11 U.S.C. § 548(a)(1)(B).

77. Section 544(b) of the Bankruptcy Code operates similarly and gives the trustee or debtor the rights and powers of any unsecured creditor to avoid transfers or obligations pursuant

to state fraudulent transfer law. *See* 11 U.S.C. § 544(b). In turn, applicable state law imposes similar or identical requirements as section 548 of the Bankruptcy Code.[16]

78. Generally, although there does not need to be a dollar-for-dollar exchange, "a party receives reasonably equivalent value for what it gives up if it gets roughly the value it gave." *Official Comm. of Unsecured Creditors of Fedders North America, Inc. v. Goldman Sachs Credit Partners L.P. (In re Fedders North America, Inc.)*, 405 B.R. 527, 546 (Bankr. D. Del. 2009 (quotations and citation omitted). In making this determination, courts look to, among other things, "(1) whether the value of what was transferred is equal to the value of what was received; (2) the market value of what was transferred and received; (3) whether the transaction took place at arm's length; and (4) the good faith of the transferee." *Grochocinski v. Zeigler (In re Zeigler)*, 320 B.R. 362, 375 (Bankr. N.D. Ill. 2005); *see Barber v. Golden Seed Co., Inc.*, 129 F.3d 382, 387 (7th Cir. 1997); *see also Picard v. Cohmad Secs. Corp., et al. (In re Bernard L. Madoff Inv. Secs. LLC),* 454 B.R. 317, 334 (Bankr. S.D.N.Y. 2011). Whether value given was reasonably equivalent is normally a question of fact, as valuation factors turn on the case-specific circumstances surrounding the debtor's decision to enter in the challenged transaction. *See Am. Tissue, Inc. v. Donaldson Lufkin & Jenrette Sec. Corp.*, 351 F. Supp. 2d 79, 105-06 (S.D.N.Y. 2004) (quotation omitted).

79. A debtor is left with unreasonably small capital if immediately after the challenged transaction it is left "technically solvent but doomed to fail." *MFS/Sun Life Tr.-High Yield Series v. Van Dusen Airport Servs. Co.*, 910 F. Supp. 913, 944 (S.D.N.Y. 1995) (citing *Moody v. Sec. Pac. Bus. Credit, Inc.*, 971 F.2d 1056, 1070 (3d Cir. 1992)). The test for

[16] Here, two of the relevant states (Delaware and Arkansas) operate under the Uniform Fraudulent Transfer Act and the Uniform Voidable Transactions Act, which are substantially identical to section 548 of the Bankruptcy Code. New York, the third relevant state, operates under the Uniform Fraudulent Conveyance Act, which provides for avoidance of obligations when "fair consideration" was not given in exchange for the transfer at issue. Fair consideration is akin to "reasonably equivalent value," but also imposes an additional requirement of good faith.

determining "whether assets are 'unreasonably small' focuses on reasonable foreseeability . . . and [it] is satisfied if at the time of the transaction the debtor had such minimal assets that insolvency was inevitable in the reasonably foreseeable future." *See Adelphia Recovery Tr. v. FPL Grp., Inc. (In re Adelphia Commc'ns Corp.)*, 652 F. App'x 19, 21 (2d Cir. 2016) (citing *Fid. Bond and Mortg. Co. v. Brand*, 371 B.R. 708, 723 (Bankr. E.D. Pa. 2007)) (internal citation omitted). Courts look to a number of factors in determining whether a debtor is left with unreasonably small capital, including the debtor's "debt to equity ratio, its historical capital cushion, and the need for working capital in the specific industry at issue." *MFS/Sun Life Tr.*, 910 F. Supp. at 944 (citations omitted). Courts also consider "all reasonably anticipated sources of operating funds, which may include new equity infusions, cash from operations, or cash from secured or unsecured loans over the relevant time period." *Moody*, 971 F.2d at 1072 n.24 (citation omitted). Courts will "consider the reasonableness of the company's projections, not with hindsight, but with respect to whether they were prudent when made." *MFS/Sun Life*, 910 F. Supp. at 944 (citation omitted); *see also Weisfelner v. Blavatnik (In re Lyondell Chem. Co.)*, 567 B.R. 55, 110 (Bankr. S.D.N.Y. 2017).

The Transaction Was Constructively Fraudulent as to the Transferor Subsidiaries

80. There is a colorable claim that the Transaction was constructively fraudulent as to the Transferor Subsidiaries. As part of the Transaction, the Transferor Subsidiaries transferred the Transferred Assets to the Transferees (*i.e.*, Uniti and its subsidiaries). Upon information and belief, the Transferor Subsidiaries did not receive *any* consideration in exchange for the Transferred Assets that they transferred to the Transferees. Therefore, the Transferor Subsidiaries did not receive any value, let alone reasonably equivalent value.

81. The inquiry then turns to whether the Transferor Subsidiaries were left with unreasonably small assets or were insolvent or rendered insolvent as a result of the transfer. Although diligence is ongoing with respect to which assets were owned by which Transferor Subsidiaries just before the Transaction, the facts set forth herein are more than sufficient for purposes of establishing that the fraudulent transfer claims are colorable.

The Transaction Was Constructively Fraudulent as to Services

82. There is a colorable claim that the Transaction was constructively fraudulent as to Services. Although the Transferor Subsidiaries received nothing in exchange for their assets, as part of the Transaction (and in exchange for the transfer of the Transferred Assets by the Transferor Subsidiaries to the Transferees), Uniti transferred 100% of its common stock, $1.035 billion in cash, and $2.5 billion of debt to Services. *See* Separation Agreement, § 2.1(a)(ii); *see also* Separation Agreement, Schedule 2.1(a). Services immediately transferred 80.4% of the Uniti common stock to Holdings. On that same day, Holdings distributed that stock to Holdings' shareholders. Given the multiple steps of the Transaction and flow of funds, the Court should collapse the components of the Transaction in order to determine whether it was a constructive fraudulent transfer.

83. As a general proposition, "an allegedly fraudulent conveyance must be evaluated in context; where a transfer is only a step in a general plan, the plan must be viewed as a whole with all its composite implications." *Orr v. Kinderhill Corp.*, 991 F.2d 31, 35 (2d Cir. 1993) (internal citations and quotation omitted). Courts generally focus on the knowledge of the parties involved. For example "[c]ourts have 'collapsed' a series of transactions into one transaction when it appears that despite the formal structure erected and the labels attached, the segments, in reality, comprise a single integrated scheme when evaluated focusing on the

knowledge and intent of the parties involved in the transaction." *In re Sunbeam Corp.*, 284 B.R. at 370. As set forth above, in *In re Adelphia Commc'ns Corp.*, the court looked to three factors in determining whether to treat a transfer as part of a larger, general scheme: (a) whether all of the parties involved had knowledge of the multiple transactions; (b) whether each transaction would have occurred on its own; and (c) whether each transaction was dependent or conditioned on other transactions. *See* 512 B.R. at 491.

84. Here, private and public documents, including press releases, contemplate the multiple steps taken to effectuate the Transaction. For example, the Separation Agreement required Services to cause the Transferor Subsidiaries to execute assignment agreements pursuant to which, in the aggregate, Services and the Transferor Subsidiaries transferred, conveyed, and delivered the Transferred Assets to Uniti. Separation Agreement § 2.2(a)(i). Furthermore, the Separation Agreement expressly contemplates that the equity in Uniti that Services received as consideration would be distributed to Holdings' shareholders. *See* Separation Agreement, 1. Additionally, on March 26, 2015, Holdings published a release titled "Windstream Board of Directors Gives Final Approval for REIT Spinoff and Declares Prorated Cash Dividend" (the "March 26, 2015 Press Release"; *see* Marinuzzi Decl., Exh. K), in which it announced that "Windstream expects to distribute approximately 80.1 percent of Uniti shares on April 24, 2015, to Windstream shareholders." Holdings also announced that "[i]n addition, conditioned on the closing of the spinoff, Windstream will make a cash distribution . . . to Windstream shareholders [which] the company would expect to make . . . on April 24, 2015." *See* March 26, 2015 Press Release.

85. The Debtors' own statements and the fact that Uniti was a subsidiary of Services at the time the Transaction was contemplated demonstrate that all of the parties involved had

knowledge of the components of the overall Transaction. The Separation Agreement—which was made public in Windstream Holdings, Inc., Current Report (Form 8-K), dated March 26, 2015 (*see* Marinuzzi Decl., Exh. L)—required Services to cause the Transferor Subsidiaries to transfer the Transferred Assets to Uniti. All of the parties had knowledge of the transaction structure, and none of the transfers would have occurred absent the overall Transaction.

86. The transfer of Uniti common stock from Services to Holdings would not have happened independent of the Transaction. Put another way, absent the Transaction, Uniti would not exist and no Uniti common stock would have been transferred to Services or transferred up to Holdings and then out to Holdings' shareholders. The distributions of stock from Services to Holdings, and from Holdings to its shareholders, were explicitly conditioned on transfer of the Transferred Assets. *See* Separation Agreement §§ 3.1(e); 3.2(a). As such, the transfer of Uniti common stock to Services and then to Holdings, as well as the distribution out to Holdings' shareholders, were conditioned on the overall Transaction.

87. Viewing the transactions as a whole, Services did not receive reasonably equivalent value in exchange for the Transferred Assets. As noted above, Ernst & Young valued a significant part of the Transferred Assets at $7.45 billion. Taking into account the immediate transfer of 80.4% of the Uniti stock from Services to Holdings, then to Holdings' shareholders, Services only received approximately $4.37 billion of value in exchange for the Transferred Assets. Accordingly, when viewed as a single, integrated transaction, Services did not receive reasonably equivalent value.[17]

[17] Any benefit of the Transaction structure, including in the form of certain tax advantages, flowed to Holdings' shareholders—not to Services—by virtue of the dividend. Although there does not need to be a dollar-for-dollar exchange to demonstrate reasonably equivalent value, assuming a low end valuation of $7.45 billion for the assets transferred to Uniti, Services did not receive reasonably equivalent value.

88. In sum, the facts set forth herein more than sufficiently demonstrate insolvency and lack of reasonably equivalent value, and thus the proposed constructive fraudulent transfer claims relating to the Transaction are colorable.

2. The Actual Fraudulent Transfer Claim Is Colorable

89. A transfer or obligation may be avoided as an actual fraudulent transfer if it was made or incurred with actual intent to hinder, delay, or defraud a creditor. 11 U.S.C. § 548(a)(1)(A). The Bankruptcy Code allows a debtor or estate representative to assert an actual fraudulent transfer claim either directly pursuant to section 548(a)(1)(A) or through state law made applicable by section 544(b).

90. To find the requisite intent, the hindering or delaying must have been the "clear and intended consequence of the act, substantially certain to result from it." *Tronox Inc. v. Kerr McGee Corp. (In re Tronox Inc.)*, 503 B.R. 239, 280 (Bankr. S.D.N.Y. 2013). The intent to hinder, delay, or defraud creditors can be proven not only by direct evidence but also by inference from a debtor's conduct and the circumstances surrounding a transaction. *See In re Lehman Bros. Holdings v. JPMorgan Chase Bank, N.A. (In re Lehman Bros. Holdings, Inc.)*, 541 B.R. 551, 575 (S.D.N.Y. 2015) ("Since '[f]raudulent intent is rarely susceptible to direct proof,' courts have recognized the existence of certain 'badges of fraud' that may be used to circumstantially establish the requisite actual intent to defraud." (quoting *In re Kaiser*, 722 F.2d 1574, 1582 (2d Cir. 1983))). In determining whether a debtor acted with actual fraudulent intent in making transfers or incurring obligations, courts have recognized various "badges of fraud" to determine intent. For example, under both Delaware and Arkansas law, factors to consider in determining actual intent include:

> (a) the transfer or obligation was to an insider; (b) the debtor retained possession or control of the property transferred after the transfer; (c) the transfer or obligation was disclosed or concealed; (d) before the transfer was made or

> obligation was incurred, the debtor had been sued or threatened with suit; (e) the transfer was of substantially all the debtor's assets; (f) the debtor absconded; (g) the debtor removed or concealed assets; (h) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; (i) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; (j) the transfer occurred shortly before or shortly after a substantial debt was incurred; and (k) the debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor.

6 Del. C. § 1304(b); ACA § 4-59-204(b). No exact number or combination of "badges of fraud" must be shown to establish the presumption of actual intent to hinder, delay, or defraud creditors, *see In re Stanton*, 457 B.R. 80, 94 (Bankr. D. Nev. 2011), and the presence or absence of any one "badge" of fraud is not dispositive, *see In re Fedders N. Am., Inc.*, 405 B.R. at 545.

91. The requirement of the intent to hinder, delay, or defraud creditors is disjunctive such that the "intent to hinder or delay creditors is sufficient, and intent to defraud need not be proven." *Nisselson v. Empyrean Inv. Fund, L.P. (In re MarketXT Holdings Corp.)*, 376 B.R. 390, 403 (Bankr. S.D.N.Y. 2007) (citations omitted). Thus, a scheme to defraud creditors may involve a scheme to avoid paying them, but a "scheme to hinder or delay does not require an intent not to pay creditors at all." *In re Duncan & Forbes Dev., Inc.*, 368 B.R. 27, 36 (Bankr. C.D. Cal. 2006). Instead, a debtor acts with an intent to hinder "if he or she acts with an intent to impede or obstruct creditors" and an intent to delay "if he or she acts with an intent to slow or postpone creditors." *Wiggains v. Reed* (*In re Wiggains)*, No. 14-03064-SGJ, 2015 WL 1954438, at *17 (Bankr. N.D. Tex. Apr. 28, 2015) (internal citations and quotation marks omitted).

The Transaction Is Subject to Avoidance as an Actual Fraudulent Transfer

92. The facts demonstrate that Services actually intended to hinder, delay, or defraud creditors through the Transaction and thus a colorable claim for an actual fraudulent transfer under the Bankruptcy Code and applicable state law.

93. Indeed, the Debtors structured the Transaction to avoid triggering the covenants set forth in section 4.19 of the Indenture restricting "Sale and Leaseback Transactions." To that end, none of the Transferor Subsidiaries signed the Master Lease. *See* Master Lease; *see also* SDNY Decision at 11 ("Windstream decided that Holdings would be the sole Windstream signatory on the Master Lease and that none of the Transferor Subsidiaries would sign the agreement."). Moreover, "Services' former General Counsel, John Fletcher, admitted that one reason that Holdings was the only Windstream entity to sign the Master Lease was to avoid 'a clear violation' of the Indenture." SDNY Decision at 5.[18] This statement is direct evidence that Services actually intended to hinder or delay creditors (*i.e.*, noteholders) in connection with the Transaction.

94. Aside from Services' admission that the Transaction was structured to avoid violating the covenant in the Indenture, other facts support an inference of actual intent to defraud, hinder, or delay creditors. For example, the Master Lease was not negotiated at arm's length. "Indeed, the parties to the Master Lease could not have negotiated the Master Lease at arm's length because [Uniti] did not even exist until the 2015 Transaction was implemented. Thus, the Master Lease—like the rest of the 2015 Transaction—was designed and drafted within and by Windstream." SDNY Decision at 5.[19] These facts, coupled with Services' actual intent to structure the Transaction in a way to avoid violating a covenant under the indenture, demonstrate that Services and Holdings actually intended to hinder, delay, or defraud creditors.

[18] In the SDNY Decision, Judge Furman noted that "Services understood and believed at the time that if the Transferor Subsidiaries signed the Master Lease and thus leased back the property they had transferred to Uniti, the 2015 Transaction would have indisputably constituted a Sale and Leaseback Transaction prohibited by Section 4.19 of the Indenture." SDNY Decision at 5.

[19] Moreover, upon information and belief, at the time of the Transaction, the chief financial officer of Holdings, was Robert Gunderman, whose brother, Kenneth Gunderman, was the chief executive officer of Uniti.

3. As to Both the Constructive and Actual Fraudulent Transfer Claims, the Value of the Transferred Assets Can Be Recovered From Uniti

95. Section 550(a) of the Bankruptcy Code enables recovery of the property transferred or the value of such property for the benefit of the estate, and section 551 of the Bankruptcy Code preserves that property for the estate. 11 U.S.C. §§ 550(a), 551.

96. There is a colorable claim that the value of the Transferred Assets is recoverable from Uniti as an initial transferee under section 550 of the Bankruptcy Code.

III. ANY REFUSAL TO PURSUE THE PROPOSED CLAIMS IS UNJUSTIFIABLE

97. As set forth above, derivative standing is generally granted where a debtor unjustifiably or unreasonably refuses to pursue claims that the bankruptcy court finds would benefit the estate. Here, as noted above, the Committee is still awaiting the Debtors' response as to its intent to prosecute the Proposed Claims and to confirm whether they support a global mediation. Given the potential applicability of the September 23 Assumption/Rejection Deadline, the Committee is left compelled to file this Motion pending a response from the Debtors. If the Debtors refuse to prosecute the Proposed Claims, such refusal would be unjustified under the facts of the case.

98. In determining whether a debtor's failure to assert estate claims is unjustifiable, the Court does not evaluate the debtor's motives but rather considers whether "the action is likely to benefit the reorganization estate." *See Adelphia*, 330 B.R. at 374, n. 19 (*citing STN Enters.*, 779 F.2d at 905; *In re Sunbeam Corp.*, 284 B.R. at 374). Here, the potential benefit to the Debtors' estates is enormous. If successful, the Proposed Claims will avoid transfers, liens, and other obligations relating to the multibillion dollar Transaction. Any recovered assets and

avoided liens and other obligations will inure to the benefit of the Debtors' unsecured creditors and other stakeholders.

99. Costs incurred in connection with the prosecution of the Proposed Claims will pale in comparison to the recognizable value of the claims, even when discounting such value for the inherent uncertainty of litigation. This is especially so given that the Committee (as well as several other interested parties in these cases, including the Debtors) has already conducted a substantial portion of the factual diligence and legal research underlying the Proposed Claims and is finalizing a detailed complaint asserting the Proposed Claims. *See Am.'s Hobby Ctr.*, 223 B.R. at 284 (in assessing cost, the court "discount[s] the cost of the Committee's investigation" and "the cost of drafting the complaint" because these are costs that the Committee "would have incurred in any event").

IV. THE COMMITTEE'S RIGHT TO REVIEW AND CONSENT TO ANY SETTLEMENT IS APPROPRIATE

100. The Committee is entitled not only to prosecute the Proposed Claims, but must also be entitled to review and consent to any settlement of the legal and commercial issues concerning Uniti. Of course, any such settlements would be subject to approval of this Court. It is indisputable that any decision to settle any of the Proposed Claims, and at what level, will have a significant economic impact on the Debtors' unsecured creditors whose interests the Committee represents in these cases.

CONCLUSION

101. For the foregoing reasons, the Committee respectfully requests that the Court enter an order substantially in the form of **Exhibit A** hereto: (a) granting the Committee derivative standing to commence and prosecute the Proposed Claims on behalf of the Debtors'

estates, and (b) granting the Committee the right to review and consent to any settlement of the commercial and legal issues concerning Uniti.

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Dated: July 12, 2019
New York, New York

Respectfully submitted,

/s/ Lorenzo Marinuzzi

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Exhibit A

Proposed Order

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

ORDER GRANTING MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR (I) LEAVE, STANDING, AND AUTHORITY TO COMMENCE AND PROSECUTE CERTAIN CLAIMS AND CAUSES OF ACTION ON BEHALF OF DEBTORS' ESTATES AND (II) CONSENT RIGHTS TO SETTLEMENT

Upon consideration of the Committee's motion (the "Motion")[1] for entry of an order (a) granting the Committee derivative standing to commence and prosecute the Proposed Claims on behalf of the Debtors' estates, and (b) granting the Committee the right to review and consent to any settlement of the commercial and legal issues concerning Uniti; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1134; and it appearing that venue of these chapter 11 cases and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b); and adequate and sufficient notice of the Motion having been provided to all parties in interest; and this Court having determined that the relief requested in the Motion is in the best interests of the Debtors, their estates, their creditors, and other parties in interest; and sufficient cause appearing for the relief requested in the Motion; and after due deliberation thereon, it is HEREBY ORDERED THAT:

1. The Motion is granted.

[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

1. The Committee is granted standing and authority pursuant to sections 105, 1103, and 1109 of the Bankruptcy Code to commence and prosecute the Proposed Claims, as stated more particularly in the Motion, with the full rights and privileges of, and in the stead of, the Debtors.

2. The Committee shall have the right to review and consent to any proposed settlement of the Proposed Claims and other commercial disputes involving Uniti; *provided, however*, that nothing herein shall obligate the Committee to negotiate or settle, or to discuss the negotiation or settlement of, any Proposed Claims or other commercial disputes involving Uniti.

3. The Committee is authorized and empowered to take all actions necessary to implement the relief granted in this Order.

4. Nothing herein shall affect in any way the Committee's right to seek standing to bring any other or additional claims or causes of action.

5. This Order shall be effective and enforceable immediately upon entry.

6. This Court retains jurisdiction to resolve any disputes arising under or related to this Order, including any discovery disputes that may arise between or among the parties, and to interpret, implement, and enforce the provisions of this Order.

White Plains, New York
Dated: _____________, 2019

____
THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE