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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

OBJECTION OF UNITI TO MOTION OF UMB BANK, NATIONAL ASSOCIATION AND U.S. BANK NATIONAL ASSOCIATION

[1] The last four digits of Debtor Windstream Holdings, Inc.'s tax identification number are 7717. A complete list of the debtor entities and the last four digits of their federal tax identification numbers 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: 400l North Rodney Parham Road, Little Rock, Arkansas 72212.

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STATUTES & RULES

CSL National, LP and certain of its affiliates that are collectively referred to as Landlord under the Master Lease (collectively, "Uniti"),[2] by and through their undersigned counsel, hereby submit this objection (the "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. 728) (the "Motion").[3] In support of the Objection to the Motion filed by UMB Bank, National Association ("UMB Bank") and U.S. Bank National Association ("U.S. Bank" and, together with UMB Bank, the "Movants"), Uniti submits the declaration of Eli J. Vonnegut (the "Vonnegut Decl.") and respectfully states as follows:

PRELIMINARY STATEMENT

1. The Movants' lack of standing to challenge the character of the Master Lease is clear and has been recognized by other parties.[4] The procedure by which the Movants seek to attack the Master Lease also makes a mockery of due process. With only four weeks' notice, no

[2] The *Memorandum of Law in Support of 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. 729) (the "MOL") incorrectly asserts that Uniti Group Inc. is the Landlord under the Master Lease. *See* MOL ¶ 1. Uniti Group Inc. is the indirect parent of CSL National, LP and its affiliates that are collectively referred to as Landlord under the Master Lease.

[3] Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Motion and the MOL.

[4] *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), at ¶ 2 (calling the Motion "an attempt to end-run well-established procedures meant to protect a chapter 11 debtor's right to control claims and causes of action of its estate."); *First Lien Ad Hoc Group's Statement in Support of 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. 761), at ¶ 1 ("The Indenture Trustees inappropriately seek through their Motion to wrest control from the Debtors of a critical piece of the chapter 11 cases – i.e., the characterization of Windstream Holdings' master lease with Uniti – attempting instead to litigate it on its own in a manufactured context to circumvent the derivative standing question.").

testing of evidence, no documentary discovery or witness testimony, and no other procedural safeguards of any kind, the Movants ask the Court to rewrite the terms of a multi-billion dollar lease and to take away from Uniti and give to Services and its subsidiaries (who are not even party to the Master Lease) billions of dollars of property. That is not how *any* meaningful litigation is done in bankruptcy, let alone a proceeding of the magnitude of an attack on the true character of the Master Lease. If and when a party with proper standing seeks to challenge the character of the Master Lease, it must undertake that complex and factually intensive litigation by adversary proceeding, offering new expert analysis and affording Uniti the due process and procedural protections to which it is entitled, including the opportunity to respond to specific allegations in a complaint, conduct necessary discovery, and employ experts to provide and rebut testimony. The Movants' incoherent approach would prejudice not only Uniti, but also the Debtors and all other parties having an interest in their estates.

2. When the Master Lease between Uniti and Holdings was put in place in 2015 in connection with Uniti's spinoff from Windstream,[5] a critical component of the transaction was the parties' expectation that Uniti Group Inc. ("Uniti Parent") would be taxed as a real estate investment trust, or REIT. Because of this, Windstream's and Uniti Parent's expert advisors undertook a rigorous analysis of the lease, including the value and useful life of the leased property and all other relevant factors, and comfortably concluded that it would be respected as a true lease, as intended and designed. Prior to the spinoff, Windstream sought a private letter ruling from the IRS that the spun off assets would qualify as real property for REIT purposes. As part of that process, Windstream made representations to the IRS, under penalty of perjury,

[5] "Windstream" means Holdings, Services, and its subsidiaries.

about factual matters reviewed by courts in determining whether a lease is a true lease, including with respect to the economic useful life of the leased property. Until its recent adoption of the tortured phrase "Uniti Arrangement," Windstream has consistently, including during this bankruptcy, described the relationship between Uniti and Holdings as that of landlord and tenant, and acknowledged that ongoing, uninterrupted access to the leased network is critical to the survival of its business.

3. Under binding Second Circuit precedent, an agreement that purports to be a lease is presumed to be one unless and until a court actually determines it is not. In the case at bar, this presumption is supported and strengthened by voluminous evidence of both the parties' intent that the Master Lease be a true lease and the care the parties took in structuring the Master Lease to ensure that it would be respected as such. The Movants offer *no* new evidence and *no* new expert analysis to counter this strong presumption, and instead baselessly suggest that *all* expert analyses of the Master Lease ever undertaken and the parties' consistent treatment of the relationship were somehow simply dead wrong. Tellingly, the Movants cite no objective or contemporaneous expert analysis but point to statements by Windstream management made *during this bankruptcy as part of efforts to demand concessions from Uniti* in arguing the network's useful life is shorter than it was determined to be in 2015. The evidence, in fact, shows that Uniti has a clear and substantial residual interest in the leased property, given the term of the lease, the value of the assets and the critical fact, ignored entirely by the Movants, that Windstream has no right to acquire the leased property at any time. The clear intent of the parties, supported by objective and rigorous expert analyses, cannot be supplanted by scattershot, post-hoc attorney criticism.

4. The Movants also ignore that they are creditors of Services and not of Holdings, and as such could not benefit from a recharacterization were it to occur. Recharacterization of a lease, at root, is premised on a finding that the tenant holds superior ownership rights to those of the landlord, but Services has *no* independent rights under the Master Lease—it is neither a party to the lease nor even a third party beneficiary. Services in fact could be evicted from the network by Holdings should Holdings choose to do so. Recharacterization of the Master Lease thus could only ever convey the network to Holdings, where Uniti would be the largest secured creditor and the continuing de facto owner. In addition to being a fatal flaw in the Movants' recharacterization arguments, the fact that Services and its subsidiaries lack their own enforceable right to use the network is a significant vulnerability for them in the current structure, as they are reliant for their survival on a continuing grant of permission from Holdings, which Holdings could withdraw. Uniti has offered to remedy this vulnerability for Services and rationalize the structure to make it more protective of Services as part of a comprehensive agreement, and remains willing to do so.

5. These serious defects in the Motion throw into sharp relief the Movants' gamble: By seeking to block Holdings' payment of rent, the Movants hope to harm Uniti in a way that they could not in a litigation on the merits, and thereby extract concessions from Uniti, even if their strategy risks Windstream's eviction from the leased property and the ensuing liquidation of the Windstream's businesses. But the Bankruptcy Code is clear that if Windstream wishes to continue to use the leased property that it needs to sustain a viable business, Holdings must pay rent as it comes due—the simple assertion of a dubious challenge to the Master Lease cannot change this. If Holdings fails to satisfy its obligations, Uniti will be entitled to evict Windstream from the leased property.

6. Litigation between Windstream and Uniti is not in the best interest of the Debtors or any other party at this time. It would delay or destroy any possibility of productive negotiations, while destabilizing and accelerating the erosion of the value of Windstream's businesses by putting Windstream at risk of eviction. Uniti has been from the beginning and remains committed to being a constructive partner in these chapter 11 cases. To that end, Uniti has pushed the Windstream constituents to engage in negotiations from the outset of the case, and has proposed multiple transaction structures to Windstream and its creditors that would enhance value and creditor recoveries for the entire Windstream enterprise—including the Movants. Engagement from Windstream and its stakeholders on the core questions of how best to optimize and restructure Windstream's business, instead of an unrealistic quest for a litigation windfall, can form the foundation of a productive mediation, a step that Uniti wholeheartedly supports to help the parties make progress in solving Windstream's challenges and moving toward a successful restructuring. Uniti is hopeful that the Court will reject the substantively and procedurally deficient Motion and allow the Debtors and their stakeholders to continue good faith negotiations in an attempt to reach a constructive global compromise.

BACKGROUND[6]

I. The Uniti Group

7. Uniti Parent is an independent, internally managed REIT. Uniti Parent and its subsidiaries (including CSL National, LP and its affiliates that are collectively referred to as Landlord under the Master Lease) (collectively, the "Uniti Group") are engaged in the

[6] The "Background" portion of the MOL includes numerous incorrect and misleading factual assertions. While this section corrects certain of such incorrect and misleading assertions, failure to directly address any particular factual assertion contained in the MOL should not be construed as an admission by Uniti that such factual assertion is correct.

acquisition and construction of mission critical infrastructure in the communications industry. As a REIT, Uniti Parent is generally not subject to U.S. federal income taxes on income generated by its REIT operations, which includes income derived from the Master Lease.

II. The Spinoff

8. On July 29, 2014, Holdings and Services announced plans to spin off their telecommunications network assets (the "Spinoff") in order to "enable Windstream to realize significant financial flexibility by lowering debt by approximately $3.2 billion and increasing free cash flow to accelerate broadband investments, transition faster to an IP network and pursue additional growth opportunities to better serve customers." *See* Vonnegut Decl., Ex. A, July 2014 8-K, at 3. In an investor presentation filed with the Securities and Exchange Commission on the same day, Holdings and Services touted that the Spinoff "is free cash flow accretive, significantly deleveraging to [Windstream] and provides the potential for substantial shareholder value creation." *Id*. at 4. Chief Executive Officer Tony Thomas reiterated the benefits of the Spinoff to the Debtors at the outset of their bankruptcy cases, declaring that:

> The transaction had many benefits for Windstream and created the opportunity to unlock value for shareholders through the creation of two independent public companies with distinct investment characteristics. The spin-off enhanced the credit profile of the Windstream business, providing Windstream with greater financial and strategic flexibility and reduced the actual or perceived competition for capital resources within Windstream. The spin-off transaction accelerated network investments to deliver faster internet speeds to consumers . . . . Windstream completed the Uniti spin-off, thereby creating significant value by reducing debt and increasing opportunities for investment in Windstream's network, which was then better positioned to better serve consumers, first responders, large enterprises, and small businesses.

Declaration of Tony Thomas, Chief Executive 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 "Thomas Decl."), at ¶ 26.

a. The Separation and Distribution Agreement

9. On March 26, 2015, Holdings, Services and Uniti entered into a Separation and Distribution Agreement pursuant to which, among other things, Services and certain of its subsidiaries (the "Transferor Subsidiaries") assigned to certain Uniti Group entities, among other things, approximately 66,000 route miles of fiber optic cable lines, 235,000 route miles of copper cable lines, central office land and buildings, easements, permits and pole agreements, and a consumer competitive local exchange carrier business, in exchange for (i) the issuance of Uniti Parent common stock to Services, (ii) the transfer of approximately $1.035 billion in cash from the Uniti Group to Services, and (iii) the transfer from the Uniti Group to Services of approximately $2.5 billion of Uniti Group debt. *See* Thomas Decl. at ¶ 24. Services used the consideration received from the Uniti Group to retire approximately $3.3 billion in principal amount of its outstanding debt, effecting a substantial deleveraging. *See* Vonnegut Decl., Ex. B, April 2015 8-K, at 7. The Spinoff was consummated on April 24, 2015.

b. The Master Lease

10. On April 24, 2015, Uniti and Holdings executed the Master Lease, pursuant to which Uniti provided Holdings with the "exclusive right to use, or cause to be used, the Leased Property," consisting of the network assets transferred to Uniti. *See* Vonnegut Decl., Ex. C, Master Lease, § 7.2. The Master Lease is, by its terms, a bilateral agreement between Uniti and Holdings only; no other Windstream entity is a party to the Master Lease, or a third party beneficiary of the Master Lease. *See id.* § 41.16; *see also* Vonnegut Decl., Ex. D, Fletcher

Deposition, at 121-23 (discussing the decision for Holdings, and not Services and its subsidiaries, to be the sole tenant under the Master Lease). Windstream has repeatedly, including in this bankruptcy, referred to the Master Lease as a "lease" and has described the relationship between Uniti and Holdings as that of landlord and tenant. *See, e.g.*, Thomas Decl. at ¶¶ 7 (representing that "Holdings entered into a master lease agreement with certain subsidiaries of Uniti, pursuant to which it leases the assets."), 25 ("Pursuant to the Master Lease, Windstream Holdings leased (and still leases) the assets contributed to Uniti."); Vonnegut Decl., Ex. E, December 2014 8-K, at 8, 17, 22 (referring to Holdings as Uniti's "anchor tenant").

11. The Master Lease is a "triple net" lease, pursuant to which Holdings is responsible for paying *ad valorem* taxes, insurance, and maintenance associated with the Leased Property (in addition to monthly rent payments, as discussed below) in exchange for its right to use, occupy, and operate the Leased Property. *See* Vonnegut Decl., Ex. C, Master Lease, §§ 4.1 (taxes), 9.1 (maintenance and repair), 13.1-13.10 (insurance); *see also id.* § 3.4 ("[Uniti] and [Holdings] acknowledge and agree that . . . this Master Lease is and is intended to be what is commonly referred to as a 'net, net, net' or 'triple net' lease").

i. Payment of Rent

12. Holdings is responsible for the payment of rent in advance on the fifth business day of each calendar month. *See id.* § 3.1. Rent was initially set at $650 million per year, plus 8.125 percent of funds provided by Uniti for capital improvements prior to the second anniversary of the effective date of the Master Lease, plus an annual 0.5 percent increase of the rent as of the end of the immediately prior year commencing with the fourth year of the agreement. *Id.* § 3.1. Rent for the Master Lease was fixed at the midpoint of an economic estimation by Ernst & Young LLP ("EY") of the fair market value rental range for the Leased

Property. *See* Vonnegut Decl., Ex. F, Board Presentation, at 34. The budget attached as Schedule 1 to the final order approving the Debtors' DIP financing contemplates the funding of full rent payments. *See Final Order (a) Authorizing the Debtors to Obtain Postpetition Financing, (b) Authorizing the Debtors to Use Cash Collateral, (c) Granting Liens and Providing Superpriority Administrative Expense Status, (d) Granting Adequate Protection to the Prepetition Secured Parties, (e) Modifying the Automatic Stay, and (f) Granting Related Relief* (Docket No. 376) (the "DIP Order"), Schedule 1.

ii. Lease Term and Termination

13. The Master Lease has a term of 15 years and provides that Holdings may exercise up to four five-year renewal options following expiration of the initial term in 2030. For each renewal, rent is re-set to then current fair market value. *See id.* § 1.3; *see also* Vonnegut Decl., Ex. G, Q1 2019 10-Q, at 27 ("Future lease payments due under the agreement reset to fair market rental rates upon Windstream Holdings' execution of the renewal options."). Although the Master Lease is not severable until 2030, if Holdings elects to renew, it may elect to renew with respect to only certain of the facilities covered by the Master Lease (each, a "Facility") and not others on the last day of the previous term. *See id.*, Ex. C, Master Lease, § 1.4. In other words, the Master Lease provides Holdings with the flexibility to choose which Facilities it wishes to continue to lease for any given renewal term. If Uniti and Holdings are unable to agree on a rental rate for any renewal term (for the specific Facilities included in the renewal), independent appraisers will determine the rate by looking to "[t]he rental price that a willing renter and a willing landlord, with neither being required to act, and both having reasonable knowledge of the relevant facts" would agree to. *Id*. at F-1.

14. Upon the expiration or termination of the term with respect to any Facility, Holdings is required to transfer to a successor tenant or operator all business operations conducted through such Facility, including certain licenses, equipment, and customer relationships relating to such Facility.[7] *Id.* §§ 2.1, 36.1. If the transfer to a successor tenant or operator cannot be completed by the expiration or earlier termination of the term with respect to any Facility, Holdings has agreed at Uniti's option to enter into a management agreement with Uniti and to continue to operate such Facility not for its own account but rather in exchange for a management fee. *Id.* § 36.3. In this scenario, Holdings would not pay rent, would not be responsible for costs and expenses related to the operation and maintenance of the Facility, and would not be entitled to any profits, rents, or revenues relating to the Facility; it would act solely as a contractor for Uniti. *Id.* Accordingly, the Movants are simply incorrect in their assertion that "Windstream must continue making rent payments in perpetuity unless it ceases operations because, at the lease-end, the Transferor Subsidiaries are obligated to continue operating the Leased Property and paying rent unless a replacement operator that passes regulatory muster is installed." MOL ¶ 63.

iii. Windstream's Reliance on the Leased Property

15. In each Annual Report filed by Holdings and Services since the Spinoff, Holdings and Services have stated that loss of access to the Leased Property under the Master Lease "could have a material adverse effect on our business, financial position, results of operations and liquidity." *See* Vonnegut Decl., Ex. H, 2018 10-K, at 21; *id.*, Ex. I, 2017 10-K, at 20; *id*, Ex.

[7] The Master Lease further requires that Holdings receive fair market value consideration from a successor tenant as consideration for such transfer, which entitles Holdings to a fair market value payment for its business operations and personal property upon the expiration or earlier termination of the term with respect to any Facility. *Id.* § 36.1(a).

J, 2016 10-K, at 19. Holdings has also described the Leased Property as "essential and the only means for [Services] to serve clients" and stated that the Leased Property is essential for Services "to have a business and to continue to generate cash flows." Vonnegut Decl., Ex. K, Lender Q&A, at 5.

16. As a network communications provider, Windstream is subject to "carrier of last resort" obligations in some markets, which "generally obligate [Windstream] to provide basic voice services to any person within our service area regardless of the profitability of the customer." *See* Vonnegut Decl., Ex. H, 2018 10-K, at 32. Windstream is also responsible for public safety and other public interest considerations by ensuring that, for instance, its customers are able to call 911 to obtain police and fire department assistance. *See* 47 C.F.R. § 64.3001. Windstream cannot fulfill those critical obligations without access to the Leased Property.

iv. True Lease Intent

17. The intention of the parties to enter into a true lease and the importance to the parties of the Master Lease being respected as a true lease is evidenced in numerous documents and statements from the time of entry into the Master Lease. First, the Uniti Group publicly recognized that "[i]f the Master Lease is not respected as a true lease for U.S. federal income tax purposes, [Uniti Parent] may fail to qualify as a REIT."[8] *See* Vonnegut Decl., Ex. N, Uniti

[8] The importance of Uniti Parent's REIT status is recognized in the Separation and Distribution Agreement, which provides that a benefit of the Spinoff was to "meaningfully enhance the ability of the extensive copper cable network and local and long-haul fiber optic cable network utilized in the provision of advanced network communications and technology solutions to businesses and consumers to raise capital by issuing equity on more favorable terms than would be possible, absent the [Spinoff], in the public markets to institutional investors that invest in real estate investment trusts." *See* Vonnegut Decl., Ex. L, Separation and Distribution Agreement, at 2. To that end, the Windstream board of directors approved the Spinoff only after receipt of a private letter ruling from the IRS with respect to the qualification of the spun off assets as "REIT-able" real property. *See id*., Ex. M, Q2 2014 10-Q, at 43. Further, Windstream's public statements leading up to the Spinoff reflect the importance of Uniti Parent being a REIT and a clear intent for Uniti Parent to be a REIT. *See, e.g.*, *id*., Ex. E, December 2014 8-K, at 8 (quoting Tony Thomas: "Given the importance of the REIT formation to Windstream's future

Information Statement, at 23. To that end, Uniti received an opinion (the "True Lease Opinion") from Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden"), in which Skadden determined that "[Uniti] should be treated as the owner of the Leased Properties and the Master Lease should be respected as a true lease for U.S. federal income tax purposes with respect to the Leased Properties." Vonnegut Decl., Ex. O, True Lease Opinion, at 25.

18. On July 16, 2014, Windstream received a private letter ruling from the Internal Revenue Service ("IRS") relating to the tax-free nature of the Spinoff and the qualification of the spun off assets as real property for REIT purposes (the "IRS Ruling"). *See* Vonnegut Decl., Ex. P, IRS Ruling. While the IRS Ruling did not expressly rule that the Master Lease is a true lease, it implicitly assumed that the Master Lease is a true lease. For example, the IRS could only rule that "[p]ayments received by [Uniti] under the [Master] Lease will be treated as 'rents from real property'" under 26 U.S.C. § 856(d), *see id*. at 35, if the IRS had concluded, or was assuming, that the Master Lease is a true lease, as only true leases can produce payments that qualify as "rents" for U.S. federal income tax purposes. In order to obtain the IRS Ruling, Windstream made numerous representations to the IRS under penalty of perjury about factors reviewed by courts in determining whether a lease is a true lease, including with respect to the economic useful life of the Leased Property. *See*, *e.g.*, Vonnegut Decl., Ex. P, IRS Ruling, at 11, 30.

19. Numerous provisions of the Master Lease also reflect an intent for the Master Lease to be a true lease. Section 6.1 of the Master Lease provides that:

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performance, the Board of Directors and I are intently focused on completing the spinoff, and it remains a strategic priority . . . . This refined structure allows Windstream to reach our leverage goals faster to strengthen our competitive position, which we believe is appropriate and prudent given the fast changing telecom industry and rapidly evolving customer needs.").

> [Uniti] and [Holdings] acknowledge and agree that they have executed and delivered this Master Lease with the understanding that (i) the Leased Property is the property of [Uniti], (ii) [Holdings] has only the right to the possession and use of the Leased Property upon the terms and conditions of this Master Lease, (iii) this Master Lease is a "true lease," is not a financing lease, capital lease, mortgage, equitable mortgage, deed of trust, trust agreement, security agreement or other financing or trust arrangement, and the economic realities of this Master Lease are those of a true lease, (iv) the business relationship created by this Master Lease and any related documents is and at all times shall remain that of landlord and tenant . . . .

Id. at § 6.1(a). Holdings also agreed to "waive[] any claim or defense based upon the characterization of this Master Lease as anything other than a true lease" and agreed "not to challenge the validity, enforceability or characterization of the lease of the Leased Property as a true lease." *Id.* § 6.1(e).

III. Voluntary Petitions and Motions

20. On February 25, 2019 (the "Petition Date"), each of the Debtors filed a voluntary petition under chapter 11 of the Bankruptcy Code. Tony Thomas declared in support of the first day relief sought that the Debtors "did not arrive in chapter 11 due to operational failures" and did "not anticipate the need to restructure material operational obligations." Thomas Decl. at ¶ 5. Instead, he recognized that the "primary aim of these chapter 11 cases is to serve as a foundation for a financial restructuring necessitated by an adverse ruling in the United States District Court for the Southern District of New York by Judge Jesse Furman, which found a default under an indenture governing certain of [Services'] unsecured notes." *Id.* Debtors' counsel reinforced this view at the first day hearing, declaring that Windstream "is a very successful business with very, very strong operations that received an adverse litigation judgment that resulted in a liquidity crunch." *See Transcript Regarding Hearing Held on February 26, 2019 at 2:08 p.m.*

(Docket No. 173), at 19:19-22; *see also id*. at 23:5-7 ("And make no mistake, this is a very successful company that it just at the moment is in a liquidity crunch.").

OBJECTION

I. The Movants Lack Standing to Challenge the Character of the Master Lease and Holdings' Schedule G

21. The Movants bear the burden of demonstrating they have standing to bring suit, and they have failed do so. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Vague statements about the character of the Master Lease being a "live issue" and reference to a "reservation of rights" included in the Cash Management Order, *see* MOL at ¶¶ 45, 54-55, have no legal significance and ignore both that the Movants (i) have not sought standing to assert an estate claim on behalf of Holdings and (ii) have no claim against Holdings and thus lack standing to challenge the nature of Holdings' obligations. Because the Movants have no right to seek the requested relief, the Court must deny the Motion in full.

a. The Movants Lack Standing to Challenge the Character of the Master Lease

i. The Movants Lack Independent Standing to Assert an Estate Claim Attacking the Master Lease

22. Claims to recharacterize a lease are claims to augment the scope of an estate and settle the interests and claims of the debtors and the lease counterparties. When the relief sought is to "vindicate the rights of the estate as a whole, that remedy, with limited exception, can only be brought by the debtor." *In re Blockbuster Inc.*, 2011 WL 1042767, at *1 (Bankr. S.D.N.Y. Mar. 17, 2011); *see also St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc.*, 884 F.2d 688, 701 (2d Cir. 1989) (characterizing claims as reserved for the trustee in part because "[t]he claims, if proved, would have the effect of bringing the property of the third party into the debtor's estate,

and thus would benefit all creditors"); *In re Tronox Inc.*, 855 F.3d 84, 106 (2d Cir. 2017); *cf. Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 8-9, (2000).

23. Individual creditor standing to initiate a cause of action without court approval requires an individual, particularized injury. *See Blockbuster*, 2011 WL 1042767, at *2 (citing *In re AppliedTheory Corp.*, 493 F.3d 82, 86 (2d Cir. 2007)).[9] "If a claim is a general one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, the trustee is the proper person to assert the claim . . . ." *St. Paul Fire*, 884 F.2d at 700-01 (citations omitted); *see also Solow*, 994 F. Supp. at 178. The Movants have not demonstrated any particularized injury supporting independent standing and, for this reason alone, the Motion should be denied.

ii. The Movants Have Not Sought Derivative Standing

24. The Second Circuit has made clear that an individual creditor must receive a grant of derivative standing from the bankruptcy court in order to pursue claims on behalf of a bankruptcy estate. *See AppliedTheory*, 493 F.3d at 85-86 (citing *In re STN Enterprises*, 779 F.2d 901, 904-05 (2d Cir. 1985)); *see also In re Sabine Oil & Gas Corp.*, 562 B.R. 211, 230 (S.D.N.Y. 2016) (applying *AppliedTheory* and *Blockbuster* to deny breach of fiduciary duty claims asserted by individual creditors because such claims were derivative to the company's claims, and the creditors neither had independent standing nor had received derivative standing). The Movants have not sought derivative standing to bring an estate claim.

[9] *See also Solow v. Stone*, 994 F. Supp. 173, 178 (S.D.N.Y.) ("[P]laintiff has standing only if the breach of fiduciary duty claims are not property of the estate. 'Property of the estate does not belong to any individual creditor.' Whether a claim is property of the estate or of an individual creditor depends on whether the claim is general or particular . . . ." (quoting *Kalb, Voorhis & Co. v. American Financial Corp.*, 8 F.3d 130, 132 (2d Cir. 1993))), *aff'd*, 163 F.3d 151 (2d Cir. 1998).

iii. The Movants' "Live Issue" Assertion Has No Legal Significance

25. The Movants assert that the character of the Master Lease was made a "live issue" by its inclusion on Holdings' Schedule G, but cite no support for the notion that this could somehow grant them standing. Instead, the Movants misleadingly cite to a passage from *PSINet*, and describe the court there as "finding recharacterization proceeding properly commenced before lessor had filed proof of claim because lessor had sought post-petition rent payments." MOL at ¶ 54 (quoting *In re PSINet, Inc.*, 271 B.R. 1, 23 (Bankr. S.D.N.Y. 2001)). In fact, the "live issue" being decided by the court in *PSINet* was whether an adversary proceeding brought by a debtor was a core proceeding for purposes of determining bankruptcy court jurisdiction. *See PSINet*, 271 B.R. at 11-12. The Movants have failed to demonstrate standing as a result of Holdings including the Master Lease on Schedule G and, as discussed below, as non-creditors of Holdings the Movants do not even have standing to challenge Holdings' Schedule G in the first place.

b. The Movants Lack Standing to Challenge Holdings' Schedule G

i. The Movants Are Not a "Party in Interest" in Holdings' Bankruptcy Case

26. In bankruptcy, a plaintiff must not only demonstrate its constitutional and prudential standing, but also that it is a party in interest pursuant to section 1109. *See In re Motors Liquidation Co.*, 580 B.R. 319, 342 (Bankr. S.D.N.Y. 2018). The Movants do not purport to be a party in interest in Holdings' bankruptcy case.[10] Nor could they, as the Movants are creditors of Services, not Holdings.

[10] The Movants cite to multiple cases affirming that a *debtor* has standing to challenge the nature and character of a claim, which are not helpful to their argument. *See* MOL at ¶ 54.

27. Section 1109 provides a non-exclusive list of qualifying parties in interest, all of which have interests in or claims *against the debtor in question*. *See* 11 U.S.C. § 1109(b). Courts in the Second Circuit have concluded that "[t]o establish party in interest standing under section 1109, a proposed participant must either be a party enumerated in the statute or: (1) have a 'direct' stake in the proceeding and (2) 'be a creditor of a debtor . . . or be able to assert an equitable claim against the estate.'" *Motors Liquidation*, 580 B.R. at 342-43 (quoting *In re Ionosphere Clubs, Inc.*, 101 B.R. 844, 849 (Bankr. S.D.N.Y. 1989)). As courts in this district have recognized, "a creditor of one of the debtor's creditors" is not a party in interest. *S. Blvd., Inc. v. Martin Paint Stores*, 207 B.R. 57, 61 (S.D.N.Y. 1997) (citing *In re Comcoach Corp.*, 698 F.2d 571, 573 (2d Cir. 1983)).

28. Here, the Movants are creditors of certain subsidiaries of Holdings, but *not* of Holdings itself. Accordingly, the Movants fall well short of the party in interest standard in Holdings' case and do not have standing to challenge Holdings' Schedule G. *See In re OptInRealBig.com, LLC*, 345 B.R. 277, 281 (Bankr. D. Colo. 2006) (finding that a creditor of one debtor lacked party in interest status in the bankruptcy of the debtor's principal).

II. The Movants Have Not Satisfied Rule 60(b)

29. The Movants have not satisfied the requirements for this Court to modify the Cash Management Order pursuant to Rule 60(b)(1) or Rule 60(b)(6) of the Federal Rules of Civil Procedure (made applicable in bankruptcy by Fed. R. Bankr. P. 9024) to prohibit transfers to Holdings to fund payments under the Master Lease. The Motion should be denied on that basis.

a. The Motion Was Not Timely Filed

30. Rule 60(b)(1) allows the Court to modify an order due to "mistake, inadvertence, surprise, or excusable neglect." The Movants do not allege that any of these circumstances are

present here; instead, they believe the Court was wrong when it entered the Cash Management Order. If the Movants were dissatisfied with an order of this Court, they should have timely appealed it. The time to appeal entry of the Cash Management Order expired two months ago, and the Movants may not use Rule 60(b)(1) as "a way to assert an otherwise time-barred appeal." *In re 310 Assocs.*, 346 F.3d 31, 35 (2d Cir. 2003); *see also Schildhaus v. Moe*, 335 F.2d 529, 531 (2d Cir. 1964) ("Rule 60(b) was not intended as a substitute for a direct appeal from an erroneous judgment." (internal citations omitted and citation omitted)). Moreover, Rule 60(c)(1) requires such motions to be made "within a reasonable time"—waiting two months to file the motion surely was not "reasonable" and the request is untimely for this additional reason. Fed. R. Civ. P. 60(c)(1).

b. There is No Basis for Relief Under Either Rule 60(b)(1) or Rule 60(b)(6)

31. The Movants' request also fails on the merits. "A motion for relief from judgment is generally not favored and is properly granted only upon a showing of exceptional circumstances . . . . [T]he burden of proof is on the party seeking relief from judgment . . . ." *United States v. Int'l Bhd. of Teamsters*, 247 F.3d 370, 391 (2d Cir. 2001) (internal citations omitted). The Movants have identified no controlling law or factual matters that the Court overlooked when entering the Cash Management Order. *See In re 8 W. 58th St. Hosp., LLC*, 2015 WL 9311525 (Bankr. S.D.N.Y. Dec. 21, 2015).

32. The Movants alternatively argue—in a short footnote—that Rule 60(b)(6) warrants modification of the Cash Collateral Order. Rule 60(b)(6) is rarely invoked, and then only "when there are extraordinary circumstances justifying relief, . . . when the judgment may work an extreme and undue hardship, . . . and when the asserted grounds for relief are not recognized in clauses (1)-(5)." *Nemaizer v. Baker*, 793 F.2d 58, 63 (2d Cir. 1986). Assertion of

legal error is not a proper basis for Rule 60(b)(6) relief. *In re Enron Corp.*, 352 B.R. 363, 369 (Bankr. S.D.N.Y. 2006) ("[A]n error in legal interpretation does not constitute 'extraordinary circumstances.'").

III. Any Challenge to the Character of the Master Lease Should Be Brought as an Adversary Proceeding

33. Even if the Movants had standing to challenge the character of the Master Lease, the Motion is procedurally defective. Any challenge to the character of the Master Lease would be factually complex and should be brought as an adversary proceeding, which would afford all parties the benefits of formally briefing the issues, undertaking discovery, submitting expert testimony, and having their rights adjudicated through a trial. The rights of both Uniti and Holdings would be severely prejudiced if a challenge to the character of the Master Lease could be compressed into a mere motion, brought on only four weeks' notice, with no contemplated introduction or testing of new evidence of any kind.[11] In this and any other litigation of this magnitude, the due process rights of all parties must be safeguarded.

34. In *PSINet*, Judge Gerber recognized that the proper manner for seeking to recharacterize a lease is by means of an adversary proceeding pursuant to Bankruptcy Rule 7001, stating:

> Fed. R. Bankr. P. 7001, which sets out those matters which require an adversary proceeding, includes among them, with exceptions not relevant here, proceedings to "determine the validity, priority, or extent of a lien or other interest in property," Rule 7001(2); "a proceedings to obtain an injunction or other equitable relief," Rule 7001(7); and proceedings "to obtain a declaratory judgment

[11] The critical importance of discovery and expert testimony is highlighted by the sheer number of incorrect, unsupported, and misleading factual assertions alleged in the MOL, as described further below, and by the voluminous document requests and the deposition notice served by the Movants on the Debtors after filing the Motion and the MOL. *See* Docket No. 775.

> relating to any of the foregoing." Rule 7001(9). *Thus it is appears that determining the recharacterization issue by adversary proceeding, under Fed. R. Bankr. P. 7001 et seq., and not just by contested matter, under Fed. R. Bankr. P. 9014, was at least appropriate, if not essential*.

PSINet, 271 B.R. at 12 n. 27 (emphasis added). If a party with proper standing seeks to challenge the character of the Master Lease, it should do so by means of an adversary proceeding, affording Uniti the procedural protections to which it is entitled, including the ability to respond to specific allegations in a complaint and conduct necessary discovery.

IV. The Movants' Recharacterization Arguments Fail

35. Because of the Movants' lack of standing and the Motion's procedural defects, it is neither necessary nor appropriate for Uniti to respond to their arguments in detail at this time. If the character of the Master Lease is ever challenged in a procedurally proper manner, Uniti reserves the right to address any arguments raised at that time. Because the MOL includes numerous incorrect and misleading factual assertions in support of an incoherent recharacterization analysis, however, Uniti will briefly address some of the most salient flaws in the MOL to correct the record and avoid confusion.

36. First, it is well-established that an agreement like the Master Lease, which plainly purports on its face to be a lease, is presumed to be a true lease until the Court determines otherwise, *see In re PCH Assocs.*, 804 F.2d 193, 200 (2d Cir. 1986), and that the burden of proof at trial rests with "the party seeking to characterize the Agreement as something 'other than what it purports to be.'" *In re WorldCom, Inc.*, 339 B.R. 56, 62 (Bankr. S.D.N.Y. 2006) (quoting *In re Owen*, 221 B.R. 56, 60 (Bankr. N.D.N.Y. 1998)). For a party to carry its burden of proof, it must introduce *evidence* sufficient to rebut the presumption that a purported lease is, in fact, a lease. *See, e.g.*, *In re Ajax Integrated, LLC*, 554 B.R. 568, 582 (Bankr. N.D.N.Y. 2016) (finding that a

purchase option was nominal "[f]rom the evidence adduced" by the debtor where the opposing party failed "to provide any countervailing evidence of its own" to "counter [the] [d]ebtor's proof"); *In re Barney's, Inc.*, 206 B.R. 328, 336 (Bankr. S.D.N.Y. 1997) (rejecting as "untenable" a recharacterization movant's argument that the court must "look to the bigger picture to determine the true economic substance of the transaction" while "limit[ing] the scope of that picture to the four corners of [the] documents"); *In re Integrated Health Servs., Inc.*, 260 B.R. 71, 77 (Bankr. D. Del. 2001) (noting that "[n]o evidence was presented" to suggest that monthly payments were calculated to ensure a return on investment and concluding that the agreements at issue were true leases). The Movants have failed to carry their burden to introduce any evidence to rebut the overwhelming weight of evidence making clear that the Master Lease is a true lease.

37. The Master Lease is not merely "styled as a lease," it was carefully and conservatively crafted by Holdings, Uniti, and their respective advisors at the time of its negotiation and implementation to be a true lease and to ensure it would withstand scrutiny and be respected as a true lease, given the importance of Uniti Parent's REIT status.[12] Uniti Parent obtained a True Lease Opinion from Skadden, supported by an appraisal performed by EY, which found that Uniti should be treated as the owner of the Leased Property and that the Master Lease should be respected as a true lease for U.S. federal income tax purposes, applying factors similar to those established by the Second Circuit in *PCH* and cited by the Movants. *See*

[12] *See* Master Lease § 6.1 ("[Uniti] and [Holdings] acknowledge and agree that they have executed and delivered this Master Lease with the understanding that the Master Lease is a 'true lease,' . . . and the economic realities of this Master Lease are those of a true lease."). Even prior to the Spinoff, Holdings expressed its intent for Uniti to be a REIT, and Uniti recognized that if the Master Lease failed to be respected as a true lease for federal income tax purposes, Uniti Parent may have failed to quality as a REIT; *see also supra* at ¶ 17.

Vonnegut Decl., Ex. O, True Lease Opinion, at 25. To Uniti's knowledge, this rigorous and careful analysis is the only expert analysis of the Master Lease that has been performed. The Movants offer no evidence to rebut this analysis, offering only post hoc lawyers' critiques, which cannot and should not supplant a comprehensive expert analysis undertaken at the time of the transaction.

38. Second, the Movants' recharacterization arguments rely on incorrect and misleading assertions and contain several glaring legal flaws.[13]

a. The Movants Strategically Ignore the "Purchase Option" Factor. Although the Movants ignore it entirely, among the most important factors considered by courts when assessing the character of a lease is whether the lease permits or requires the tenant to acquire the leased property for a nominal sum at the end of the lease term. *See, e.g.*, *In re Hotel Syracuse, Inc.*, 155 B.R. 824, 838-39 (Bankr. N.D.N.Y. 1993); *In re Wingspread Corp.*, 116 B.R. 915, 923 (Bankr. S.D.N.Y. 1990). Consistent with the parties' intent that it be a true lease, the Master Lease does not provide Holdings with any purchase option at any time.

b. The Useful Life of the Leased Property Substantially Exceeds the Lease Term. The Movants' unsupported assertion that the term of the Master Lease exceeds the useful life of the Leased Property does not withstand scrutiny. The expert appraisal of the Leased Property performed at the time of the Master Lease's negotiation and implementation concluded that the useful life of the Leased Property would far exceed the term. *See* Vonnegut Decl., Ex. O, True Lease Opinion, at 21.[14] Further, on

[13] This is true even beyond the core elements of the recharacterization analysis. The Movants at various points reference Windstream's accounting treatment of the Master Lease as though to imply it should influence this court's ruling on its motion. But courts have repeatedly recognized that GAAP accounting treatment does not govern their analysis when applying legal standards or evaluating economic realities. *See In re Sierra Steel, Inc.*, 96 B.R. 275, 278 (B.A.P. 9th Cir. 1989) ("Thus although GAAP are relevant, they are not controlling in insolvency determinations."). Windstream management of course acknowledged this in 2015. As Bob Gunderman, the CFO commented, "the GAAP accounting answer is a failed sale-leaseback, and . . . that's the accounting determination of the transaction, which is – I would say to you is not – not exactly in line with what I would call the legal substance of the transaction." Vonnegut Decl., Ex. U, Kentucky Public Service Commission Hearing Testimony, at 46:7-14.

[14] In a presentation to the board of directors of Holdings and Services dated May 17, 2015, Holdings and Services represented that the residual value at the conclusion of the 15 year lease term would be approximately 35% of the appraised fair market value of the Leased Property. *See* Vonnegut Decl., Ex. F, Board Presentation, at 35.

information and belief, Uniti understands that Windstream represented to the IRS under penalty of perjury that the various components of the Leased Property had economic useful lives at the time of the transaction vastly in excess of the lease term. *See* Vonnegut Decl., Ex. P, IRS Ruling, at 11, 30. Tellingly, to attempt to counter this record, the Movants cite statements made by Windstream executives *during these bankruptcy cases* while negotiations among Uniti and Windstream were ongoing, minimizing the value of the Leased Property in a notably unsubtle attempt to buttress their negotiating leverage.[15] Beyond these self-serving statements, the Movants offer only vague assertions about potential obsolescence and technological advancement and the general view that the copper component of the Leased Property is declining in value, supported not by expert analysis, but instead by a small collection of out-of-context statements by Windstream executives.[16] *See* MOL ¶ 66-67. The appraisal conducted by EY, by contrast, expressly considered various forms of depreciation and obsolescence, determined that there was functional

[15] The Movants cite a May 15, 2019 statement made by CEO Tony Thomas in Windstream's 2019 earnings presentation 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 the value of the copper facilities" as evidence that the lease term exceeds the useful life of the Leased Property. MOL at ¶ 67. The official committee of unsecured creditors relies entirely on this and other statements made by Thomas in the 2019 earnings presentation for the same purpose in their standing motion. *See 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* (Docket No. 786) (the "UCC Motion"), at ¶ 52. These self-serving overstatements by Thomas were immediately recognized by the market as a part of a public pressure campaign to obtain rent concessions from Uniti. *See, e.g.*, Vonnegut Decl., Ex. Q, Bloomberg Intelligence Article ("Windstream had hinted it would seek concessions on its master lease with Uniti, yet its new threat to reject or recharacterize it is an escalation, that we view as impractical, value-destructive and ultimately hollow. Windstream said in its 1Q earnings release that it's considering renegotiating, recharacterizing or rejecting the master lease."); *id*., Ex. R, Morningstar Analyst Note ("We see the firm's implication that it finds the lease unattractive as merely a negotiating tool to entice Uniti to bargain."); *id*., Ex. S, J.P. Morgan Research Report (observing that Thomas' statements at the 2019 Earnings Presentation "strike[] a far more aggressive tone than we have heard from WIN in the past" and suggesting that "WIN is setting the stage for negotiations with Uniti for a reduction in the lease payment").

[16] For example, the Movants' citation to Robert Gunderman's statement that it is "theoretically possible that, by 2050, the [Leased Property] could be considered obsolete and have no practical value" strategically hides that Gunderman went on to state that he did *not* believe that the Leased Property will be obsolete by 2050: "Of course, it is impossible to predict what technological and economic changes may have occurred by that time; it is at least theoretically possible that, by 2050, the [Leased Property] could be considered obsolete and have little practical value. *It is much more likely, however, that there will continue to be demand for some kind of telecommunications capabilities delivered to homes and businesses over fixed transmission facilities, as there has been since telephone technology was developed in the late 19th century, even though the nature of the facilities and the services they enable will probably continue to change*." *See* Vonnegut Decl., Ex. T, Gunderman Rebuttal Testimony to the Kentucky Public Service Commission, at 7-8 (emphasis added). In addition, the 15 year term of the Master Lease would expire in 2030—well before 2050. However, in 2014 Interim CEO and Treasurer Robert E. Gunderman suggested that there could be residual value in the Leased Property accruing to Uniti even after 35 years. *See* Vonnegut Decl., Ex. U, Kentucky Public Service Commission Hearing Testimony, at 25:14-17.

obsolescence associated with the copper cable network, and adjusted its appraisal accordingly, still comfortably concluding that the useful life of the Leased Property substantially exceeded the lease term. *See* Vonnegut Decl., Ex. F, Board Presentation, at 34. Self-serving conclusory soundbites by executives posturing for negotiation cannot rebut rigorous expert analysis. If anything, these statements undermine a recharacterization argument by illustrating the extent to which Uniti has retained the risks and rewards of ownership of the Leased Property: if the value of the Leased Property *does* actually decline substantially by 2030, Uniti would be harmed in the form of a lower rent rate, plus Windstream's ability to jettison unattractive Facilities per the terms of the Master lease. *See* Vonnegut Decl., Ex. C, Master Lease, at F-1 (resetting the rent to the price "that a willing renter and a willing landlord, with neither being required to act, and both having reasonable knowledge of the relevant facts" would agree to); *id*. § 1.4 (providing that Holdings may elect to renew with respect to only certain of the facilities covered by the Master Lease).

c. Uniti's Inability to Directly Operate the Leased Property is Meaningless. Landlords to regulated businesses need not *themselves be regulated businesses* in order to retain ownership of their property—they simply re-lease to another regulated tenant upon lease expiration. Illustrating the absurdity of the Movants' argument, if REITs were deemed not to own their property by virtue of their inability to operate it directly, no REIT would actually own its property, because one of the requirements for maintaining REIT status is *not operating one's assets directly*. *See* 26 U.S.C. § 856(d)(7)(A).

d. Triple Net Leases Are Not Indicative of a Disguised Financing. The Movants argue that the Master Lease's "triple net" character means it is not a true lease, ignoring that courts have roundly acknowledged that triple net leases are common in the market and have no material bearing on a recharacterization analysis. As the Second Circuit has stated:

> Although we conclude that the indicia of ownership in the lessee are a factor in our decision, we caution that this factor, too, should not be viewed in isolation. To do so would be misleading because of the increasingly common use of "triple net" leases. In a typical "triple net" lease, the rent stated is "net" to the landlord because the tenant takes responsibility for taxes, operating expenses, and the like . . . . It may appear in a typical triple net lease, then, that the lessee has assumed many of the responsibilities of ownership. This

> superficial shifting of costs in a triple net lease, taken alone, should not be interpreted to mean that an agreement is not a lease for purposes of § 365(d)(4).

Int'l Trade Admin. v. Rensselaer Polytechnic Inst., 936 F.2d 744, 751 (2d Cir. 1991); *see also Integrated Health*, 260 B.R. at 77 ("[A] triple net lease is not an unusual term in a true lease.").

39. In sum, the only parties to have undertaken a serious and objective analysis of the Master Lease concluded comfortably that it is a true lease. The Movants' unsupported views reveal only the rigor of the original analysis and the Movants' inability to offer a serious rebuttal. In every one of the seven cases cited by the Movants in which a court actually recharacterized a lease, the purported lessor clearly held no residual interest in the leased property: in four cases, the lessee had an option to purchase the property for nominal consideration,[17] in one case, the lessor never held a possessory right in the lease leased assets at all,[18] and in the remaining two cases 99 and 165 year lease terms, respectively, left the lessor without a residual interest.[19] The Master Lease could not be further from these facts. In sum, the only parties to have undertaken a serious and objective analysis of the Master Lease concluded comfortably that it is a true lease. The Movants' unsupported views reveal only the rigor of the original analysis and the Movants' inability to offer a serious rebuttal.

[17] *See Ajax*, 554 B.R. 568; *Hotel Syracuse*, 155 B.R. 824; *In re Clinton Nurseries, Inc.*, 2018 WL 2293554 (Bankr. D. Conn. May 17, 2018); *PSINet*, 271 B.R. 1.

[18] *See In re CNB lnt'l, Inc.*, 307 B.R. 363 (Bankr. W.D.N.Y. 2004).

[19] *See Rensselaer*, 936 F.2d 744; *PCH*, 804 F.2d 193.

V. The Movants Would Not Benefit From a Recharacterization

a. If Uniti Is Not Respected as the Owner of the Leased Property, Only Holdings Could Be the Owner

40. The Movants ignore a critical issue: If the Master Lease were somehow recharacterized as a financing, what would the remedy be and who would benefit? The Movants assert, without citing *any* authority, that Services and its subsidiaries would become the owners of the Leased Property, while Uniti would be left with a claim only against Holdings, but case law is clear that recharacterization hinges on whether the *tenant* bears "significant indicia of ownership." *PCH*, 804 F.2d at 201. The Movants concede that Services and its subsidiaries are not parties to the Master Lease, *see* MOL ¶ 39, and they are not even third party beneficiaries of the lease, and yet the Movants still fail to present the Court with any case in which a court recharacterized a lease by concluding that a third party with no independent rights under the purported lease was the true owner of the assets.[20] This of course is unsurprising, given that recharacterization is focused on the question of which party to the lease displays superior indicia of ownership pursuant to the terms of the lease. As one court has stated, "[t]he threshold issue is how *the agreement* allocates risk of ownership (if a lease) or credit (if a form of loan)." *In re Dena Corp.*, 312 B.R. 162, 169 (Bankr. N.D. Ill. 2004) (emphasis added); *see also In re*

[20] The UCC Motion asserts, citing no relevant case law, that the Court should take the extraordinary measure of "collaps[ing] the component parts of the [Spinoff] in determining whether to recharacterize the Master Lease as a disguised financing and the [Spinoff] as a pledge of the Transferred Assets to the [Uniti Group] to secure a borrowing from the [Uniti Group]." UCC Motion ¶ 35. In support, the UCC cites two cases that posit that collapsing is a fraudulent transfer doctrine, and neither of which so much as mentions recharacterization. *See In re Sunbeam Corp*., 284 B.R. 355, 370 (Bankr. S.D.N.Y. 2002) ("A series of transactions may, under certain circumstances, be 'collapsed' and treated as a single transaction *for the purpose of determining whether there has been a fraudulent conveyance*" (emphasis added)); *In re Adelphia Commc'ns Corp.*, 512 B.R. 447, 489 (Bankr. S.D.N.Y. 2014) ("It is not infrequently appropriate . . . to 'collapse' a series of transactions *for fraudulent transfer analysis*" (emphasis added)).

Montgomery Ward, LLC, 469 B.R. 522, 530 (Bankr. D. Del. 2012) ("A primary indicator of *the agreement's* nature is how ownership is allocated" (emphasis added)).

41. Even if Movants could demonstrate that Services and its subsidiaries, as non-parties to the Master Lease, could be the true owner of the Leased Property, they have also failed to put forward any evidence that Services and its subsidiaries possess anything resembling ownership rights under the Master Lease. The Movants fail to point to any basis on which Services or its subsidiaries could assert any enforceable right to use, occupy, or operate the Leased Property independent of Holdings' ongoing gratuitous grant of permission, let alone long-term rights that might be deemed tantamount to ownership. Instead, the Movants cite numerous obligations of *Holdings* under the Master Lease (many of which, as described above, are common of triple net leases and have been found by courts to have little bearing on a recharacterization analysis), allege that these obligations are indicia of ownership, and then take an extraordinary leap to conclude that *Services* effectively owns the Leased Property. MOL at ¶ 78. This position is untenable. The Master Lease is clear that Holdings has the "exclusive right to use, or cause to be used, the Leased Property" and that the Master Lease has no third party beneficiaries. Master Lease §§ 7.2, 41.16. Services and its subsidiaries therefore possess *no enforceable independent right to access the Leased Property*. *See* Master Lease §§ 7.2 ("Throughout the Term of this Master Lease, [Holdings] shall have the exclusive right to use, or cause to be used, the Leased Property . . . ."); 41.16 ("[Uniti] and [Holdings] hereby acknowledge that they do not intend for any other Person to constitute a third-party beneficiary hereof, except for any permitted successors and/or assigns."). If it so chose, Holdings could rescind its grant of permission to its subsidiaries to access the Leased Property tomorrow. Needless to say, true owners of property are not subject to the risk of eviction.

42. Holdings and Services are separate corporate entities with different stakeholders. Holdings is not a party to any of Services prepetition debt, and its directors and management have a fiduciary responsibility to maximize the value of Holdings' estate—not Services' estate or the Windstream enterprise as a whole—for the benefit of Holdings' stakeholders. There has been extensive public disclosure of the separateness of the two entities and extensive reliance by informed and sophisticated investors on their separateness. *See*, *e.g.*, Vonnegut Decl., Ex. H, 2018 10-K, at 2 ("Windstream Services and its guarantor subsidiaries are the sole obligors of all outstanding debt obligations . . . . Windstream Holdings is not a guarantor of nor subject to the restrictive covenants included in any of Windstream Services' debt agreements."); *id*. at 34 ("Windstream Holdings entered into a long-term triple-net master lease with Uniti.").

43. It is only Holdings that has the right to use, occupy, and operate the Leased Property, Holdings that is burdened by the obligations outlined in the Master Lease, and Holdings that could benefit from a recharacterization of the Master Lease. The Movants have not asserted that there is any basis for substantive consolidation here (nor could they show one), and yet that is effectively what they ask the Court to order. There is no basis for any such action and the Court should reject the request.

b. If the Master Lease Were Recharacterized, Uniti Would Have Senior Secured Claims Against Holdings

44. If Holdings were found to be the owner of the Leased Property, Uniti's claims against Holdings would be secured by a valid, properly perfected lien on the Leased Property, and Uniti would be the only significant prepetition secured creditor of Holdings. Pursuant to the Master Lease, Holdings granted to Uniti a first priority lien on the Leased Property to secure the

payment and performance of all obligations under the Master Lease if the Master Lease is recharacterized as a financing arrangement:

> Notwithstanding (a) the form and substance of this Master Lease and (b) the intent of the parties, and the language contained herein providing that this Master Lease shall at all times be construed, interpreted and applied to create an indivisible lease of all of the Leased Property, if any court of competent jurisdiction finds that this Master Lease is a financing arrangement, this Master Lease shall be considered a secured financing agreement and *[Uniti]'s title to the Leased Property shall constitute a perfected first priority lien in [Uniti]'s favor on the Leased Property to secure the payment and performance of all the obligations of [Holdings] hereunder (and to that end, [Holdings] hereby grants, assigns and transfers to [Uniti] a security interest in all right, title or interest in or to any and all of the Leased Property, as security for the prompt and complete payment and performance when due of [Holdings'] obligations hereunder*).

Master Lease § 11.1 (emphasis added). In March 2018, Uniti also made protective security filings as a cautionary measure to ensure that Uniti's claims would be secured by the Leased Property should the Master Lease ever be recharacterized. Accordingly, in a recharacterization Scenario, as the holder of a multi-billion dollar claim secured by a fully perfected first priority lien on the Leased Property,[21] Uniti would be Holdings' largest creditor by a large margin.

c. Even if the Leased Property Were Deemed Owned by the Transferor Subsidiaries, Uniti Would Hold Structurally Senior Claims

45. Ignoring the lack of any legal basis for their position, in arguing that the Transferor Subsidiaries should be deemed the true owners of the Leased Property, the Movants also do not address the fact that they hold claims against only some of those Transferor Subsidiaries. A substantial portion of Windstream's revenue generation capacity and enterprise value resides in Transferor Subsidiaries that do not guarantee Windstream's prepetition debt.

[21] Uniti's lien on the Leased Property would be senior to the liens of the DIP Lenders. *See* DIP Order, at ¶ 8(a)(iii).

See Vonnegut Decl., Ex. H, 2018 10-K, at F-115 (reporting "Total revenue and sales" of $1,221,400,000 for "Guarantor" subsidiaries of Services and $4,596,900,000 for "Non-Guarantor" subsidiaries for the year ending December 31, 2018, where "Non-Guarantor" subsidiaries are defined as those subsidiaries that "are not guarantors of [Services'] guaranteed notes."). If the Master Lease were recharacterized on the premise that the Transferor Subsidiaries are the owners of the portions of the Leased Property that they owned prior to the Spinoff, Uniti's resulting claim against these entities would be structurally senior to the Movants' claims and would absorb an enormous portion of Windstream's enterprise value.

46. Recharacterization of the Master Lease would do little to help the Movants under any conceivable scenario. If Holdings is viewed as the true economic owner of the Leased Property, as the principal secured creditor of Holdings, Uniti would regain ownership of the Leased Property. If the Transferor Subsidiaries are somehow deemed the owners, by virtue of its structurally senior claims, Uniti would still absorb a huge portion of Windstream's enterprise value. Any effort to recharacterize the Master Lease is a fool's errand.

VI. Disruption of Rent Payments Will Destroy Windstream's Businesses

47. Contrary to the Movants' blithe assertion that Windstream should simply stop paying rent, if Holdings is unable to meet its obligations under section 365(d)(3), Holdings, Services, and their subsidiaries will lose access to the Leased Property, which would destroy their businesses and jeopardize the safety and stability of their operations to the detriment of their customers and stakeholders.

a. Holdings Is Obligated to Pay Rent Under the Master Lease Unless and Until the Court Actually Determines That the Master Lease Is Not a True Lease

48. As discussed above, the Master Lease is presumed to be a true lease unless and until a challenger *actually proves* otherwise. Windstream cannot obtain free use of property owned by Uniti by simply *alleging* it believes the Master Lease should be recharacterized. Under section 365(d)(3), Holdings "*shall timely perform all the obligations of the debtor* . . . arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected . . . ." 11 U.S.C. § 365(d)(3) (emphasis added). Section 365(d)(3) is "*mandatory* in requiring performance . . . *until performance is excused by reason of a determination by the court that section 365 is not applicable*." *In re Mirant Corp.*, 2004 WL 5643668, at *3 (Bankr. N.D. Tex. Sept. 15, 2004) (emphasis added); *cf. In re Elder-Beerman Stores Corp.*, 201 B.R. 759, 761-62 (Bankr. S.D. Ohio 1996) ("[W]here the debtor is faced with agreements unambiguously titled as 'leases,' the debtor must fully perform all obligations arising under § 365(d)([5]) until such time as the court may find the agreements to be other than leases, or that other equitable relief is appropriate."); *see also In re Stone Barn Manhattan LLC*, 405 B.R. 68, 77-78 (Bankr. S.D.N.Y. 2009).

49. The presumption that the Master Lease is a true lease is not rebutted simply by the filing of the Motion nor any other pending attempt to recharacterize the Master Lease. *See Mirant*, 2004 WL 5643668, at *3 (holding that a party's burden to recharacterize a lease "is not met by mere allegations, even when the allegations are presented in the form of a complaint under Fed. R. Bankr. P. 7001"). Instead, the Court must *actually determine* that the Master Lease is not a true lease for Holdings to escape its obligations under section 365(d)(3). *See id.*; *Elder-Beerman*, 201 B.R. at 761-62. The Court has not made that determination (and likely

never will), thus Holdings must continue to make timely rent payments to maintain access to the Leased Property.

b. If Holdings Does Not Pay Rent on a Current Basis, Uniti Is Entitled to Relief From the Automatic Stay to Terminate the Master Lease

50. If a debtor wishes to continue to use leased property, it is required under section 365(d)(3) to "timely perform" its postpetition obligations under the lease, including its obligation to pay rent as it comes due. A debtor's failure to pay rent as it comes due is cause for relief from the automatic stay to terminate the lease and evict the tenant. *See In re Pudgie's Dev. of NY, Inc.*, 239 B.R. 688, 696 (S.D.N.Y. 1999) ("During the post-petition, pre-rejection period, the landlord may move for relief from the automatic stay and evict the debtor-tenant."); *In re J.T. Rapps, Inc.*, 225 B.R. 257, 263 (Bankr. D. Mass. 1998) ("If an estate representative does not comply with its obligations under § 365(d)(3), the lessor . . . may . . . file a motion for relief from stay to have the estate representative evicted from the premises . . . ."); *see also* 11 U.S.C. § 362(d)(1) (permitting a court, on the request of a party in interest, to grant relief from the automatic stay "for cause"). Accordingly, if Holdings fails to pay rent to Uniti when due, Uniti will be entitled to relief from the automatic stay in order to terminate the Master Lease and evict Holdings, Services, and their subsidiaries from the Leased Property.

CONCLUSION

51. For the foregoing reasons, Uniti respectfully requests that the Court deny the Motion.

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