

Hearing Date: August 20, 2019 at 10:00 a.m. (Eastern)
Objection Deadline: August 16, 2019 at 4:00 p.m. (Eastern)

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

)	
In re:)	Chapter 11
)	
WINDSTREAM HOLDINGS, INC., <i>et al.</i> , ¹)	Case No. 19-22312 (RDD)
)	
Debtors.)	(Jointly Administered)
)	

)	
WINDSTREAM HOLDINGS, INC. and)	
WINDSTREAM SERVICES, LLC,)	
)	
Plaintiffs,)	
)	
v.)	Adv. Pro. No. 19-08279
)	

UNITI GROUP, INC., CSL NATIONAL, LP, CSL)	
ALABAMA SYSTEM LLC, CSL ARKANSAS)	
SYSTEM, LLC, CSL FLORIDA SYSTEM, LLC,)	
CSL GEORGIA SYSTEM, LLC, CSL IOWA)	
SYSTEM, LLC, CSL KENTUCKY SYSTEM,)	
LLC, CSL MISSISSIPPI SYSTEM, LLC, CSL)	
MISSOURI SYSTEM, LLC, CSL NEW MEXICO)	
SYSTEM, LLC, CSL OHIO SYSTEM, LLC, CSL)	
OKLAHOMA SYSTEM, LLC, CSL TEXAS)	
SYSTEM, LLC, CSL REALTY, LLC, CSL)	
GEORGIA REALTY, LLC, CSL NORTH)	
CAROLINA SYSTEM, LP, CSL NORTH)	
CAROLINA REALTY, LP, CSL TENNESSEE)	
REALTY, LLC,)	
)	
Defendants.)	
)	

THE FIRST LIEN AD HOC GROUP'S MOTION TO INTERVENE

TO THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE:

¹ The last four digits of debtor Windstream Holdings, Inc.'s tax identification number are 7717. Due to the large number of debtors in the chapter 11 cases (the "Debtors"), a complete list of the Debtors, along with the last four digits of each Debtor's federal tax identification number, is not provided herein but is set forth in the *Debtors' Motion for Entry of an Order (I) Directing Joint Administration of Chapter 11 Cases and (II) Granting Related Relief* filed in the Debtors' chapter 11 cases [Case No. 19-22312 (RDD), Dkt. No. 17]. The location of the Debtors' service address is: 4001 North Rodney Parham Road, Little Rock, Arkansas 72212.



The ad hoc group of certain unaffiliated holders of the Debtors' first lien indebtedness (the "First Lien Ad Hoc Group")² hereby moves, pursuant to section 1109(b) of title 11 of the United States Code (as amended, the "Bankruptcy Code") and Fed. R. Civ. P. 24 (made applicable hereto by Fed. R. Bankr. P. 7024), for entry of an order authorizing the First Lien Ad Hoc Group to intervene in the above captioned adversary proceeding (the "Adversary Proceeding").³

INTRODUCTION

1. On July 25, 2019, the Debtors commenced the Adversary Proceeding, which takes aim at the "Uniti Arrangement," a contractual arrangement between Windstream and Uniti. The Complaint seeks, among other things, a declaration that (i) the Uniti Arrangement, including the Master Lease, does not create a "lease" under the Bankruptcy Code and should instead be recharacterized as a disguised financing; (ii) the Master Lease does not create a lease of "real property" under the Bankruptcy Code; and (iii) Uniti breached the Master Lease through its acquisition of several Windstream competitors.

2. In support of its recharacerization claim, the Complaint identifies a host of "deficiencies" in the Master Lease. In particular, the Complaint alleges that the Master Lease should be recharacterized because, among other things, (i) "no material residual value will

² The First Lien Ad Hoc Group is comprised of certain holders of loans or other indebtedness issued under: (i) that certain Sixth Amended and Restated Credit Agreement, originally dated as of July 17, 2006, amended and restated as of April 24, 2015 and subsequently amended, among Windstream Services, LLC, the other loan parties party thereto, the lenders from time to time party thereto, J.P. Morgan Chase Bank, N.A., as administrative agent and collateral agent and the other parties thereto; and (ii) that certain Indenture for certain 8.625% notes due 2025 dated as of November 6, 2017, by and among Windstream Services, LLC and Windstream Finance Corp., the guarantor party thereto, Delaware Trust Company, as trustee and notes collateral agent and the holders thereunder. *See Amended Verified Statement of the First Lien Ad Hoc Group Pursuant to Bankruptcy Rule 2019* [Case No. 19-22312 (RDD), Dkt. No. 790].

³ For the sake of efficiency, the First Lien Ad Hoc Group does not currently intend to file a separate complaint but instead joins in the allegations in the Debtors' Complaint. Should the Court grant this Motion, the First Lien Ad Hoc Group intends, to the greatest extent possible, to work cooperatively with the Debtors (and any parties that intervene on their side) to avoid burdening the Court with unnecessary duplication.

remain once Windstream exits the Master Lease” (Compl. ¶ 178); (ii) Uniti is not “acting as an owner with an economic interest in the telecommunications network,” in part because Uniti does not maintain or develop the leased networks (Compl. ¶ 179); and (iii) the Master Lease was not “priced at market to be a lease” since Windstream’s rent is scheduled to grow by over \$40 million while the leased networks “plummet in value” (Compl. ¶ 180).

3. The First Lien Ad Hoc Group has a strong interest in the Adversary Proceeding. Importantly, if the Court were to recharacterize the Master Lease as a financing arrangement, (i) Uniti would have a sizeable claim against the Debtors, and (ii) the assets allegedly “leased” to Uniti pursuant to the Master Lease would revert to being property of the Debtors, and might be subject to a lien held by the First Lien Ad Hoc Group.

4. Neither the Debtors nor the Defendants will be prejudiced by the intervention of the First Lien Ad Hoc Group, which filed this Motion just twelve days after the Debtors filed their Complaint. Defendants have not yet responded to the Complaint (and will not be doing so for several weeks) and the Debtors have been on notice since before the commencement of this action that the First Lien Ad Hoc Group may seek to intervene.

5. Accordingly, and as set forth in more detail below, the First Lien Ad Hoc Group should be permitted to intervene in the Adversary Proceeding.

JURISDICTION AND VENUE

6. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157(a) and 1334(b), and the Amended Standing Order of Referral of Cases to Bankruptcy Judges of the United States District Court for the Southern District of New York (M-431), dated January 31, 2012 (Preska, C.J.). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

RELIEF REQUESTED

7. By this Motion, the First Lien Ad Hoc Group seeks entry of an order, pursuant to section 1109(b) of the Bankruptcy Code and Fed. R. Civ. P. 24 (made applicable hereto by Fed. R. Bankr. P. 7024), authorizing it to intervene in the Adversary Proceeding.

ARGUMENT

A. The First Lien Ad Hoc Group Has an Unconditional Right to Intervene in the Adversary Proceeding

8. Federal Rule of Civil Procedure 24, as made applicable to adversary proceedings by Bankruptcy Rule 7024, provides for intervention as a matter of right to any party who, on a “timely motion,” is “given an unconditional right to intervene by a federal statute.” Fed. R. Civ. P. 24(a). The Bankruptcy Code provides creditors with exactly such an unconditional right. Specifically, it provides that “[a] party in interest, including the debtor, the trustee, a creditors’ committee, an equity security holders’ committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear to be heard on any issue in a case under this chapter.” 11 U.S.C. § 1109(b); *see also In re Riverside Nursing Home*, 43 B.R. 682, 684 (Bankr. S.D.N.Y. 1984) (“[A] creditor is viewed in 11 U.S.C. § 1109(b) as a ‘party in interest’ who may appear and be heard on any issue in a case.”).

9. Section 1109(b)'s grant of a right to be heard "on any issue in a case" includes the right to intervene in an adversary proceeding. The Second Circuit addressed this very issue in *In re Caldor Corp.*, holding that "the phrase 'any issue in a case' plainly grants a right to raise, appear and be heard on *any issue* regardless whether it arises in a contested matter or an adversary proceeding." 303 F.3d 161, 169 (2d Cir. 2002) (emphasis in original); *see also Iridium India Telecom Ltd. v. Motorola, Inc.*, 165 Fed. Appx. 878, 879 (2d Cir. 2005) ("Our decision in *Caldor* thus established that a party in interest under 11 U.S.C. § 1109(b) has an unconditional right to intervene in an adversary proceeding under 24(a)(1)"); *In re Calpine Corp.*, 354 B.R. 45, 48 (Bankr. S.D.N.Y. 2006) (granting a creditor's motion to intervene pursuant to *Caldor*). The Second Circuit's approach follows that of the Third Circuit, and has recently been embraced by the First Circuit. *See Assured Guar. Corp. v. Fin. Oversight & Mgmt. Bd. for Puerto Rico (In re Fin. Oversight & Mgmt. Bd. for Puerto Rico)*, 872 F.3d 57, 63 (1st Cir. 2017) (holding that § 1109(b) provides a creditors' committee "with an 'unconditional right to intervene' in [an] adversary proceeding" under Rule 24(a)(1); *Official Unsecured Creditors' Comm. v. Michaels (In re Marin Motor Oil, Inc.)*, 689 F.2d 445, 457 (3d Cir. 1982) (same).

10. This Motion also satisfies Rule 24(a)'s timeliness requirement. The Second Circuit and courts within it consider four factors in assessing whether a motion to intervene under Rule 24(a) is timely: "(1) how long the applicant had notice of the interest before it made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the application if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness." *U.S. v. Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994). Each factor weighs in favor of the First Lien Ad Hoc Group.

11. *First*, this Motion was filed just twelve days after the Debtors commenced the Adversary Proceeding. Courts in the Second Circuit routinely find such a short period between the commencement of an action and a motion to intervene to be “timely.” *See, e.g., Miller v. Silbermann*, 832 F. Supp. 663, 669 (S.D.N.Y. Sep. 13, 1993) (motion to intervene filed “only two weeks” after case reopened was timely); *Booker v. Frederick S. Todman & Co.*, 113 F.R.D. 138, 140 (S.D.N.Y. 1986) (motion to intervene filed “a few weeks” after a lawsuit was “made in timely fashion”).

12. *Second*, there will be no prejudice to either the Debtors or the Defendants because there has been no meaningful delay between the commencement of the Adversary Proceeding and this Motion. Defendants have not responded to the Complaint yet and are not required to do so for several weeks. And, the Debtors have been on notice since before the filing of the Complaint that the First Lien Ad Hoc Group may intervene if they sought to recharacterize the Master Lease in an adversary proceeding as the Debtors have had frequent communications with the First Lien Ad Hoc Group about this very issue.

13. *Third*, the First Lien Ad Hoc Group *will* be prejudiced if it is unable to intervene in the Adversary Proceeding. The First Lien Ad Hoc Group holds a significant amount of secured debt across the Debtors’ capital structure and members of the group possess, through their collateral agents, first liens on many of the Debtors’ assets. If the Master Lease were ultimately recharacterized as a disguised financing, (i) Uniti would have a sizeable claim against the Debtors, and (ii) the First Lien Ad Hoc Group could have a lien on the assets that were “leased” to Uniti as part of the Master Lease, which would be considered property of the Debtors upon recharacterization.

14. *Fourth*, there are no unusual circumstances militating against a finding of timeliness. As noted, this Motion was filed just twelve days after the commencement of the Adversary Proceeding, and stands to directly impact members of the First Lien Ad Hoc Group.

15. Accordingly, because the First Lien Ad Hoc Group has an unconditional right to intervene under 11 U.S.C. § 1109(b) and this Motion was “timely” filed, the Court should grant the First Lien Ad Hoc Group’s Motion to intervene in the Adversary Proceeding pursuant to Federal Rule 24(a)(1).

B. Alternatively, the First Lien Ad Hoc Group May Intervene As Of Right or Permissively

16. Even if the Court were to find that the First Lien Ad Hoc Group does not have an unconditional right to intervene under Rule 24(a)(1), the First Lien Ad Hoc Group may intervene as a matter of right under Rule 24(a)(2) or permissively under Rule 24(b).

17. Federal Rule 24(a)(2) provides that, on “timely motion,” a court must permit anyone to intervene who “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” Fed. R. Civ. P. 24(a)(2). Federal Rule 24(b)(1) provides for permissive intervention to anyone who “has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1)(B).

18. The Second Circuit has “expressly approved consideration of the same factors . . . under Rule 24(b) permissive intervention as in intervention as of right under Rule 24(a)(2).” *Kamdem-Ouaffo v. Pepsico, Inc.*, 314 F.R.D. 130, 134, n.4 (S.D.N.Y. Jan. 26, 2016). Under those factors, an applicant must “(1) timely file an application; (2) show an interest in the action; (3) demonstrate that the interest may be impaired by the disposition of the action; and

(4) show that the interest is not protected adequately by the parties to the action.” *R Best Produce v. Shulman-Rabin Marketing Corp.*, 467 F.3d 238, 240 (2d Cir. 2006).

19. As noted above, each of the first three factors is present here: (i) this Motion was filed just twelve days after the Complaint was filed; (ii) the First Lien Ad Hoc Group holds a significant amount of secured debt across the Debtors’ capital structure; and (iii) any recovery of the First Lien Ad Hoc Group could be impacted if the Master Lease were recharacterized as a disguised financing.

20. The fourth factor—that the First Lien Ad Hoc Group’s interest is not adequately protected—also weighs in favor of the First Lien Ad Hoc Group. As the Supreme Court has noted, the burden of this requirement is “minimal,” and it is satisfied so long as the applicant “shows that representation of his interest ‘may be’ inadequate.” *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972). That plainly is the case here. No party to the Adversary Proceeding adequately represents the First Lien Ad Hoc Group’s interest in maximizing recoveries for its members. Although the Debtors generally have a duty to maximize the value of their estates, only the First Lien Ad Hoc Group has the specific interests of its members as its sole focus.

NOTICE

21. Notice of this Motion has been given to counsel to the Debtors and the Defendants. In light of the nature of the relief requested herein, the First Lien Ad Hoc Group submits that no further notice is required and requests that such notice be deemed adequate and sufficient.

NO PRIOR REQUEST

22. No previous application for the relief requested herein has been made to this or any other court.

CONCLUSION

23. For the reasons set forth above, the First Lien Ad Hoc Group respectfully requests entry of an order, substantially in the form annexed hereto as Exhibit A, (i) authorizing the First Lien Ad Hoc Group to intervene in the Adversary Proceeding and (ii) granting the First Lien Ad Hoc Group such other and further relief as the Court may deem just and proper.

Dated: August 6, 2019
New York, New York

PAUL, WEISS, RIFKIND, WHARTON &
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Exhibit A

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:)	Chapter 11
)	
WINDSTREAM HOLDINGS, INC., <i>et al.</i> , ¹)	Case No. 19-22312 (RDD)
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Debtors.)	(Jointly Administered)
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WINDSTREAM HOLDINGS, INC. and)	
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CAROLINA REALTY, LP, CSL TENNESSEE)	
REALTY, LLC,)	
)	
Defendants.)	

**ORDER PURSUANT TO 11 U.S.C. §§ 1109(b), FEDERAL RULE OF CIVIL
PROCEDURE 24, AND FEDERAL RULE OF BANKRUPTCY PROCEDURE 7024
GRANTING THE FIRST LIEN AD HOC GROUP'S RIGHT TO INTERVENE IN THE
ADVERSARY PROCEEDING**

¹ The last four digits of debtor Windstream Holdings, Inc.'s tax identification number are 7717. Due to the large number of debtors in the chapter 11 cases (the "Debtors"), a complete list of the Debtors, along with the last four digits of each Debtor's federal tax identification number, is not provided herein but is set forth in the *Debtors' Motion for Entry of an Order (I) Directing Joint Administration of Chapter 11 Cases and (II) Granting Related Relief* filed in the Debtors' chapter 11 cases [Case No. 19-22312 (RDD), Dkt. No. 17]. The location of the Debtors' service address is: 4001 North Rodney Parham Road, Little Rock, Arkansas 72212.

Upon the motion (the “Motion”)² of the First Lien Ad Hoc Group for entry of an order, pursuant to section 1109(b) of the Bankruptcy Code and Fed. R. Civ. P. 24 (made applicable hereto by Fed. R. Bankr. P. 7024), authorizing the First Lien Ad Hoc Group to intervene in the Adversary Proceeding; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. § 1334; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided; and it appearing that no other or further notice need be provided; and the Court having determined that the relief sought in the Motion is in the best interest of the Debtors, their creditors, and all other parties in interest; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and upon all the proceedings had before the Court and after due deliberation, it is:

ORDERED that the Motion is granted; and it is further

ORDERED that the First Lien Ad Hoc Group is authorized to intervene in the Adversary Proceeding; and it is further

ORDERED that all pleadings and other papers required to be served on every party in this Adversary Proceeding pursuant to Fed. R. Civ. P. 5 and Fed R. Bankr. P. 7005 shall be served on the First Lien Ad Hoc Group; and it is further

ORDERED that the First Lien Ad Hoc Group is hereby authorized and empowered to take such steps and perform such acts as may be necessary to implement and effectuate the terms of this Order; and it is further

² Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

ORDERED that this Court shall retain jurisdiction to hear and determine all matters arising from the implementation and interpretation of this Order.

Dated: August __, 2019
White Plains, New York

THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE