

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

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

In re:

WINDSTREAM HOLDINGS, INC., *et al.*,¹

Debtors.

WINDSTREAM HOLDINGS, INC., and
WINDSTREAM SERVICES, LLC,

Plaintiffs,

vs.

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.

)
) Chapter 11
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) Case No. 19-22312 (RDD)
)

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) (Jointly Administered)
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) Adv. Pro. No. 19-08279 (RDD)
)

**MOTION OF UMB BANK, NATIONAL ASSOCIATION AND
U.S. BANK NATIONAL ASSOCIATION, AS INDENTURE TRUSTEES, TO
INTERVENE IN 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 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.kcellc.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.



UMB Bank, National Association, solely in its capacity as indenture trustee (“UMB Bank”) under that certain indenture dated as of December 13, 2017 between it and Windstream Services, LLC (“Services”) (as successor to Windstream Corporation) and Windstream Finance Corp. as co-issuers of 8.75% Senior Notes due 2024, and U.S. Bank National Association, solely in its capacities as indenture trustee (“U.S. Bank,” and together with UMB Bank, the “Trustees”) under (i) that certain indenture dated as of October 6, 2010 between it and Services as issuer of 7.75% Senior Notes due 2020, (ii) that certain indenture dated as of March 28, 2011 between it and Services as issuer of 7.75% Senior Notes due 2021, (iii) that certain indenture dated as of November 22, 2011 between it and Services as issuer of 7.50% Senior Notes due 2022, (iv) that certain indenture dated as of March 16, 2011 between it and Services as issuer of 7.50% Senior Notes due 2023, and (v) that certain indenture dated as of January 23, 2013 between it and Services as issuer of 6.375% Senior Notes due 2023, hereby file this motion (the “Motion to Intervene”), pursuant to section 1109(b) of title 11 of the United States Code (the “Bankruptcy Code”) and Rule 24 of the Federal Rules of Civil Procedure (the “Federal Rules”), as made applicable to this proceeding by Rule 7024 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), for entry of an order authorizing the Trustees to intervene in the above-captioned adversary proceeding (the “Adversary Proceeding”). In support of the Motion to Intervene, the Trustees respectfully state as follows:

PRELIMINARY STATEMENT

1. Approximately one month before Holdings and Services commenced the Adversary Proceeding, the Trustees filed their motion to strike the Uniti Arrangement from the Debtors’ schedules and to end the \$54 million per month in intercompany loans from the subsidiary Debtors to Holdings to fund Holdings’ “rent” obligations to Uniti, on the ground that the Uniti Arrangement is not a “true lease” under the Bankruptcy Code. The Debtors and most of their key

creditors have since come to echo the argument, asserting that the Uniti Arrangement is in fact a disguised financing. To resolve the dispute precipitated by the Trustees, the Debtors have committed to a mediation process, to be undertaken on a parallel path with litigation against Uniti. The Debtors subsequently agreed that all key constituents, including the Trustees, should be involved in the mediation process. The Debtors have also indicated that they will consent to the Trustees' intervention in the Adversary Proceeding. However, the Debtors have yet to circulate a proposed stipulation authorizing the Trustees to intervene, and thus, in an abundance of caution, the Trustees file this Motion to Intervene so that it can be heard with the other requests for intervention at the August 20 omnibus hearing, if necessary.

JURISDICTION

2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(a) and 1334(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and Bankruptcy Rule 7001. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

3. The Trustees represent holders of aggregate prepetition claims of more than \$1.131 billion in principal amount due as of February 25, 2019 under the Debtors' unsecured senior notes (the "Senior Notes"). As such, those claims account for approximately 77 percent of the Debtors' scheduled unsecured debt, and 100 percent of the Debtors' total unsecured bond debt. Services is the primary obligor on all of the Senior Notes and the direct or indirect owner of all other Debtors except Windstream Holdings, Inc. ("Holdings"), the majority of which have guaranteed repayment of the Senior Notes.

4. On May 10, 2019, each of the Debtors filed schedules of assets and liabilities and a statement of financial affairs. Holdings identified the arrangement styled as a Master Lease, dated as of April 24, 2015, among CSL National LP (predecessor to Uniti Group, Inc. ("Uniti")) and

certain subsidiaries, as landlord, and Holdings, as tenant (the “Uniti Arrangement”) in its schedules as a lease of non-residential real property. (*Schedules of Assets and Liabilities for Windstream Holdings, Inc.* [Docket No. 506], Schedule G)

5. The Debtors also requested authority, and received Court approval pursuant to the *Final Order Authorizing the Debtors to Continue (I) to Operate Their Cash Management System, Honor Certain Prepetition Obligations Related Thereto, and Maintain Existing Business Forms and (II) Their Intercompany Transactions* [Docket No. 382] (the “Cash Management Order”), to, among other things, continue making post-petition transfers of \$54 million in cash each month to Holdings to fund Holdings’ “rent” obligations to Uniti pursuant to the Uniti Arrangement.

6. On June 28, 2019, the Trustees filed 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] and memorandum of law in support thereof [Docket No. 729] (together, the “Trustees’ Motion”). The Trustees’ Motion seeks to strike the Uniti Arrangement from the Debtors’ schedules and to modify the Cash Management Order to prevent intercompany transfers to Holdings to fund post-petition payments pursuant to the Uniti Arrangement on the basis that it is not a true lease of non-residential real property governed by section 365 of the Bankruptcy Code.

7. After the filing of the Trustees’ Motion, the Debtors stated for the first time that they “believe the Uniti Arrangement is not a true lease, and instead should be recharacterized as a financing transaction.” (*Debtors’ Motion for Entry of an Order Appointing a Mediator* [Docket No. 803] (the “Mediation Motion”), ¶ 1) The Debtors indicated that they would file a complaint in the near term, but, because “a negotiated resolution to issues regarding the Uniti Arrangement could potentially be more cost-effective and beneficial to these chapter 11 estates than protracted

litigation[,]” they also requested the appointment of a mediator to oversee negotiations regarding the Uniti Arrangement, to proceed in parallel with litigation. (*Id.* ¶¶ 1-3) On July 23, 2019, the Trustees joined in the Mediation Motion, as well as the 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.² (*See Omnibus Joinder of UMB Bank, National Association and U.S. Bank National Association, as Indenture Trustees, to (I) the Debtors’ Motion to Appoint Mediator and (II) the UCC’s Motion for Standing* [Docket No. 834])

8. On July 25, 2019, Holdings and Services filed a complaint (the “Complaint”) against Uniti and its affiliates that are party to the Uniti Arrangement, thereby initiating the Adversary Proceeding (Adversary Case No. 19-08279) [Docket No. 847; Adv. Pro. Docket No. 1]. The Complaint seeks, among other things, a declaration that the Uniti Arrangement is not a “lease” under the Bankruptcy Code, including section 365, and instead should be recharacterized as a financing arrangement.

RELIEF REQUESTED

9. Pursuant to section 1109(b) of the Bankruptcy Code and Federal Rule 24 (made applicable hereto by Bankruptcy Rule 7024), the Trustees seek entry of an order authorizing them to intervene in the Adversary Proceeding.

² On July 30, 2019, the Court appointed the Honorable Shelley C. Chapman to serve as the mediator. (*Order Appointing a Mediator* [Docket No. 874]) The Trustees have been participating, and will continue to participate, in the mediation process in good faith.

BASIS FOR RELIEF

I. THE TRUSTEES MAY INTERVENE IN THE ADVERSARY PROCEEDING AS OF RIGHT

10. Federal Rule 24(a), made applicable hereto by Bankruptcy Rule 7024, provides that “[o]n timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) 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)(1)-(2). Federal Rule 24 “is to be liberally construed.” Degrafinreid v. Ricks, 417 F. Supp. 2d 403, 407 (S.D.N.Y. Feb. 23, 2006) (citations omitted).

11. In light of the fact that Holdings and Services filed the Complaint less than two weeks ago, the parties have yet to agree on a litigation schedule, and the defendants have yet to file a response to the Complaint, the Motion to Intervene is timely. In short, the Adversary Proceeding is in its infancy. See Padilla v. Maersk Line, Ltd., No. 07 Civ. 3638, 2009 U.S. Dist. LEXIS 100954, at *7 (S.D.N.Y. Oct. 29, 2009) (“When a case is in its early stages, a motion to intervene is timely.”). Moreover, the Trustees did not delay in making the request to intervene, and the existing parties will not be prejudiced by the Trustees’ intervention at this early stage, particularly given the preview of the Trustees’ position with respect to the Uniti Arrangement in the Trustees’ Motion and their active involvement in the mediation process.

A. Section 1109(b) of the Bankruptcy Code Gives the Trustees an Unconditional Right to Intervene Under Federal Rule 24(a)(1)

12. Section 1109(b) of the Bankruptcy Code 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 and be heard

on any issue in a case under this chapter.” 11 U.S.C. § 1109(b) (emphasis added). As the Second Circuit has determined, section 1109(b) of the Bankruptcy Code provides an express grant of authority for parties in interest to intervene in contested matters and adversary proceedings alike. Term Loan Holder Comm. v. Ozer Grp., LLC (In re The Caldor Corp.), 303 F.3d 161, 168 (2d Cir. 2002) (“We hold, therefore, 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.”); see also Adelphia Commc’ns Corp. v. Rigas (In re Adelphia Commc’ns Corp.), 285 B.R. 848, 853-54 (Bankr. S.D.N.Y. 2002) (“[T]he Second Circuit [in Caldor] determined that section 1109(b) [of the Bankruptcy Code] is applicable in adversary proceedings as it is in cases under the Bankruptcy Code, and hence that ‘a statute of the United States confers an unconditional right to intervene,’ within the meaning of Fed. R. Civ. P. 24(a)(1).”). The Trustees, whose constituents will be directly and significantly impacted by the outcome of the Adversary Proceeding, are plainly parties in interest. See In re Johns-Manville Corp., 36 B.R. 743, 754 (Bankr. S.D.N.Y. 1984), aff’d, 52 B.R. 940 (S.D.N.Y. 1985) (“[T]he concept of ‘party in interest’ is an elastic and broad one designed to give a Court great latitude to insure fair representation of all constituencies impacted in any significant way by a Chapter 11 case.”).

B. The Trustees are Entitled to Intervene Under Federal Rule 24(a)(2)

13. In addition to their right to intervene pursuant to Bankruptcy Code section 1109(b), the Trustees meet the criteria to intervene as a matter of right under Federal Rule 24(a)(2), pursuant to which, “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.” Floyd v. City of New York, 770 F.3d 1051, 1057 (2d Cir. 2014) (citations omitted).

14. The Trustees satisfy all four requirements. First, as set forth above, the Motion to Intervene is timely. (See supra ¶11) Second, the Trustees' interest in the Adversary Proceeding is clear from the overlapping issues addressed in the Trustees' Motion as well as the Trustees' involvement in the mediation process. Third, the Trustees would suffer significant prejudice if denied the right to participate as their constituents have a substantial economic interest in the outcome of the Adversary Proceeding. See Del. Tr. Co. v. Wilmington Tr., N.A., 534 B.R. 500, 510 (S.D.N.Y. 2015) (requirements for intervention "easily satisf[ied]" where creditors "stand to be harmed" by plaintiff's proposed method to allocate cash collateral); Casino Caribbean, LLC v. Money Ctrs. of Am., Inc. (In re Money Ctr. of Am., Inc.), 544 B.R. 107, 116 (Bankr. D. Del. 2016) (permitting intervention by party in interest whose recoveries could be diminished by successful prosecution of plaintiff's claims). Moreover, the Trustees have thus far agreed to hold the Trustees' Motion in abeyance, and intend to continue to do so if permitted to intervene, subject to reaching an agreement on an appropriately accelerated schedule for the Adversary Proceeding. Fourth, in light of the importance of adjudication of the Uniti Arrangement to the potential recoveries of holders of the Senior Notes, the Trustees' interests cannot be adequately represented by Holdings or Services.

II. THE TRUSTEES MAY INTERVENE PERMISSIVELY

15. Alternatively, the Trustees request that the Court allow them to intervene permissively. Federal Rule 24(b), made applicable by Bankruptcy Rule 7024, provides that "[o]n timely motion, the court may permit anyone to intervene 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). In exercising such discretion, courts consider whether intervention would "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

16. The Court should permit the Trustees to intervene under Federal Rule 24(b) here. For the reasons set forth above, the Motion to Intervene is timely, the questions of law and fact raised in the Trustees' Motion and the Complaint are common, and the Trustees' intervention would not cause delay or prejudice to the existing parties.

NOTICE

17. Notice of this Motion to Intervene has been given to the Debtors, the Defendants, the Office of the United States Trustee, and the other parties who have sought to intervene in the Adversary Proceeding. The Trustees submit that no other or further notice is necessary.

NO PRIOR REQUEST

18. No previous application for the relief sought herein has been made by the Trustees to this or any other court.

CONCLUSION

For the reasons set forth above, the Trustees respectfully request that the Court enter the order attached hereto as Exhibit A authorizing the Trustees to intervene in the Adversary Proceeding and grant such other relief as the Court deems just and proper.

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Dated: August 6, 2019
New York, New York

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*Special Counsel to UMB Bank, N.A.
and U.S. Bank N.A.*

Exhibit A

Proposed Order

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

In re:

WINDSTREAM HOLDINGS, INC., *et al.*,¹

Debtors.

WINDSTREAM HOLDINGS, INC., and
WINDSTREAM SERVICES, LLC,

Plaintiffs,

VS.

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.

Chapter 11

Case No. 19-22312 (RDD)

(Jointly Administered)

Adv. Pro. No. 19-08279 (RDD)

**ORDER GRANTING MOTION OF UMB BANK, NATIONAL ASSOCIATION
AND U.S. BANK NATIONAL ASSOCIATION, AS INDENTURE TRUSTEES,
TO INTERVENE IN ADVERSARY PROCEEDING**

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

Upon the motion (the “Motion to Intervene”)² of UMB Bank, National Association, solely in its capacity as indenture trustee (“UMB Bank”) and U.S. Bank National Association, solely in its capacities as indenture trustee (“U.S. Bank,” and together with UMB Bank, the “Trustees”) for entry of an order pursuant to section 1109 of the Bankruptcy Code and Federal Rule 24 (made applicable hereto by Bankruptcy Rule 7024), authorizing the Trustees to intervene in the Adversary Proceeding; and the Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Motion to Intervene and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and venue being proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion to Intervene having been provided; and objections, if any, to the requested relief having been withdrawn or overruled on the merits, and after due deliberation and sufficient cause appearing therefor, it is **ORDERED** that:

1. The relief requested in the Motion to Intervene is granted.
2. The Trustees are authorized to intervene in the Adversary Proceeding.
3. All pleadings and other papers required to be served on every party in the Adversary Proceeding shall be served on the Trustees.
4. The Trustees are authorized to take such steps and perform such acts as may be necessary to implement and effectuate the terms of this Order.
5. The terms and conditions of this Order are effective immediately upon entry.

² Capitalized terms used and not otherwise defined herein shall have the meaning(s) ascribed to them in the Motion to Intervene.

6. This Court shall retain jurisdiction with respect to any and all matters arising from or relating to the implementation or interpretation of this Order.

Dated: _____, 2019
White Plains, New York

HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE