IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
WHITE PLAINS DIVISION

IN RE: WINDSTREAM HOLDINGS, INC., *ET. AL.*, Debtors.	§	
GLM DFW, INC., Appellant, v. WINDSTREAM HOLDINGS, INC., *ET. AL.*, Appellees.	§	CIVIL ACTION: 7:19-cv-04854-CS

On Appeal From The United States Bankruptcy Court
For Southern District of New York, White Plains Division,
Honorable Robert D. Drain, United States Bankruptcy Judge

BRIEF OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Bankruptcy Rules 8012 and 8014(a)(1), GLM DFW, Inc. hereby discloses that it has no parent corporation or publicly held corporation that owns 10% or more of its stock. 100% of the stock of GLM DFW, Inc. is owned by Mary Jane Galvan.

/s/ Davor Rukavina
Davor Rukavina, Esq.

STATEMENT ON ORAL ARGUMENT

GLM DFW, Inc. believes that oral argument would be of benefit to the Court given the importance of the issues raised in this Appeal, and therefore it requests the same.

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BRIEF OF APPELLANT

TO THE HONORABLE CATHY SEIBEL, U.S. DISTRICT JUDGE:

COMES NOW GLM DFW, Inc. ("GLM"), the appellant in this bankruptcy appeal (the "Appeal"), and files its *Brief* (the "Brief") as follows:

I.
STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction over this Appeal under 28 U.S.C. § 158(a)(1) because the United States Bankruptcy Court for the Southern District of New York, White Plains Division (the "Bankruptcy Court"), entered a final order against GLM.

II.
STATEMENT OF ISSUES AND STANDARD OF APPELLATE REVIEW

This Appeal concerns the Bankruptcy Court's final order authorizing Windstream Holdings, Inc. and its affiliated Chapter 11 debtors-in-possession (collectively, the "Debtors") to pay certain prepetition debt. Specifically:

(i) Did the Bankruptcy Court commit reversible error by abdicating its judicial function and by impermissibly delegating that function to the Debtors, when it permitted the Debtors to decide who were the "critical vendors," "lien claimants," and "503(b)(9) Claimants" to be paid their prepetition claims, instead of it deciding this itself upon proper evidence, notice, and hearing?

(ii) Did the Bankruptcy Court commit reversible error by keeping confidential and under seal from creditors, including GLM, the identity of the "critical vendors," "lien claimants," and "503(b)(9) Claimants," and how much they were paid, in violation of the Bankruptcy Code, the Bankruptcy Rules, and GLM's due process rights?

(iii) Did the Bankruptcy Court commit reversible error by imposing no standard, or an incorrect standard, on which vendors would qualify as "critical vendors."

On appeal, a bankruptcy court's conclusions of law are reviewed *de novo*. *See In re Bonnanzio*, 91 F.3d 296, 300 (2d Cir. 1996). A bankruptcy court's findings of fact are reviewed for "clear error." *See Robbins Int'l Inc. v. Robbins MBW Corp. (In re Robbins Int'l Inc.)*, 275 B.R. 456, 464 (S.D.N.Y. 2002). "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Metzen v. United States*, 19 F.3d 795, 797 (2d Cir. 1994).

III.

STATEMENT OF THE CASE

On February 25, 2019, the Debtors filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code (the "Bankruptcy Code"),

thereby initiating their jointly administered bankruptcy case before the Bankruptcy Court (the "Bankruptcy Case"). The Debtors, providers of network communication services and broadband services for business and residential customers, filed the Bankruptcy Case due to an adverse ruling from this Court, which had ruled that the Debtors defaulted under their unsecured bond indentures. *See* Motion (defined below) at ¶¶ 5-6.

On February 25, 2019, the Debtors filed with the Bankruptcy Court the *Debtors' Motion for Entry of Interim and Final Orders Authorizing the Debtors to Pay Certain Prepetition Claims of (i) Critical Vendors, (ii) Lien Claimants, and (iii) Section 503(b)(9) Claimants In the Ordinary Course of Business on a Postpetition Basis* (the "Motion"). *See* Bankruptcy Case Docket No. 16. By the Motion, the Debtors sought authority to pay certain prepetition debt that they would otherwise be prohibited from paying under the Bankruptcy Code prior to the confirmation of a plan:

(i) 263 so-called "critical vendors," with claims totaling approximately $80 million (a critical vendor generally being one whose continuing provision of goods or services on a postpetition basis is critical to a debtor's business), *see* Motion at p. 7;

(ii) approximately $91 million to an undisclosed number of so-called "lien claimants" (claimants who had liens against property of the Debtor securing their claims); *see* Motion at p. 9 and

(iii) approximately $13 million to so-called "503(b)(9) claimants" (claimants who provided goods within 20 days of bankruptcy and are

> therefore entitled to administrative priority under section 503(b)(9) of the Bankruptcy Code). *See* Motion at p. 10.

Importantly, the Motion failed to disclose the identity of each of the alleged critical vendors, lien claimants, and 503(b)(9) claimants, and the amounts allegedly owed to each.

On February 28, 2019, the Bankruptcy Court entered its *Interim Order Authorizing the Debtors to Pay Certain Prepetition Claims of (i) Critical Vendors, (ii) Lien Claimants, and (iii) Section 503(b)(9) Claimants In the Ordinary Course of Business on a Postpetition Basis* (the "Interim Order"). *See* Bankruptcy Case Docket No. 61. The Interim Order granted the Motion on an interim basis, subject to provisions enabling creditors to object to the Motion being approved on a final basis.

The Bankruptcy Court entered the Interim Order without evidence as to the identity of, and the amounts paid to, the prepetition creditors. *See* Interim Order at p. 1 (referencing "First Day Declaration" as evidentiary basis for Interim Order); Bankruptcy Case Docket No. 27 at pp. 13-17 (so-called "First Day Declaration" discussing Motion but offering no details regarding identities or amounts). The Interim Order required the Debtors to provide a list of the various prepetition creditors and amounts paid only to the United States Trustee and Official Committee of Unsecured Creditors, and to make the list available for an *in camera* inspection, but did not require the Debtors to provide this information to any other

party to the Bankruptcy Case, whether creditor, party-in-interest, or otherwise. *See* Interim Order at p. 3. Additionally, the Interim Order authorized the Debtors to decide, in their sole discretion, which prepetition creditor qualified as a critical vendor, lien claimant, or 503(b)(9) claimant. *See* Interim Order at p. 3.

GLM is a prepetition creditor of the Debtors, having provided waste management, hauling, and recycling brokerage and advisory services to the Debtor, with an unsecured claim for almost $2 million.[1] Deeply concerned that other creditors of equal priority were being paid in full while it was not being paid, and suspicious that the Debtors were not really interested in the criticality of a vendor—GLM is responsible for waste removal at more than 600 of the Debtors' locations, something that would appear to be "critical" under any metric, yet the Debtors informed GLM that it was not a critical vendor—GLM objected to the Motion and to the relief in the Interim Order being granted on a final basis.

GLM objected to the Motion on three bases: (i) that it was for the Bankruptcy Court to decide who was a critical vendor, lien claimant, or 503(b)(9) claimant, and not the Debtors; (ii) that the Bankruptcy Code required the disclosure of the identity of the prepetition creditors being paid and the amounts being paid,

[1] The Bankruptcy Court has ordered that claims be filed with claims agent KCC as opposed to being filed on the Bankruptcy Court's docket and claims register. Therefore, GLM's claim is not on the Bankruptcy Court's docket. Nevertheless, it has been filed with KCC and has been assigned Claim No. 501. Pursuant to 11 U.S.C. § 502(a), this claim is deemed allowed unless objected to. The claim has not been objected to as of this filing.

and that no grounds to seal this information existed; and (iii) that the Bankruptcy Court either failed to impose any standard, or identified an impermissible standard, on what facts and circumstances qualified a creditor to be a critical vendor.

The Bankruptcy Court held a hearing on the Motion on April 16, 2019, at which a representative of the Debtors' financial advisor testified in support of the Motion. *See* Transcript of April 16, 2019 Hearing attached to GLM's Designation of Record on Appeal (the "Transcript"). At the hearing, the Bankruptcy Court refused to permit questioning as to the identity of the prepetition creditors proposed to be paid, and no evidence on that point was offered. GLM will otherwise discuss the evidence so offered and accepted below as it pertains to discrete arguments. In any event, the Bankruptcy Court rejected all of GLM's arguments and entered its *Final Order Authorizing the Debtors to Pay Certain Prepetition Claims of (i) Critical Vendors, (ii) Lien Claimants, and (iii) Section 503(b)(9) Claimants In the Ordinary Course of Business on a Postpetition Basis* (the "Order"). *See* Bankruptcy Case Docket No. 377.

In a nutshell, the Bankruptcy Court authorized the Debtors, "in their sole discretion, to continue their prepetition business operations, policies, and programs and pay any accrued but unpaid prepetition Vendor claims on a postpetition basis in the ordinary course of business." *See* Order at p. 2. As with the Interim Order, the Order requires the Debtors to maintain a list identifying creditors paid, amounts

paid, the nature of goods and services provided, etc., and to make that list available to the United States Trustee and to the Committee of Unsecured Creditors, and to make it available for *in camera* inspection. *See* Order at pp. 2-3.

This Appeal of the Order timely followed.

IV.
SUMMARY OF THE ARGUMENT

The Bankruptcy Court authorized the Debtors to pay prepetition debt, in their sole discretion, to 263 unnamed critical vendors, totaling $80 million, another $91 million to an undisclosed number of unnamed lien claimants, and yet another $13 million to an undisclosed number of unnamed 503(b)(9) claimants. Unsecured creditors like GLM are forced to watch as almost $185 million of other claims are paid in violation of the priority scheme of the Bankruptcy Code, while their claims remain unpaid, without even being told who is being paid.

Chapter 11 bankruptcy gives debtors-in-possession relief and protection that is unique in world. It asks for little in return. But what it asks for in return is critical to the Bankruptcy Code and the integrity of the process: the equality of creditors, transparency, and a judge making judicial decisions as the final arbiter of disputes. Here, the Order violates all three of these core principles. The Bankruptcy Court permitted the Debtors to pay some prepetition debt in preference to others, thereby violating the principle of equality; it permitted the Debtors to do

so confidentially, thereby violating the principle of transparency; and it permitted the Debtors to decide who they would pay as critical vendors, lien claimants, and 503(b)(9) claimants, thereby impermissibly delegating its judicial function.

At stake is the integrity of the process and the Bankruptcy Code itself. For, without equality, transparency, and a judge deciding the facts, the Bankruptcy Code loses its integrity and its very purpose, and becomes simply a business tool that debtors use as leverage to obtain better business terms—as the Debtors frankly admitted at the hearing below. The rule that a "critical" vendor can be paid under the Doctrine of Necessity is changed from a rule of necessity, to a rule of convenience. If unsecured creditors are to watch others be paid in full while they are not paid, then at a minimum the process' fundamental integrity requires that they are told who is being paid, that the Debtors justify the necessity for the payments, and that the Bankruptcy Court decide the facts after a full hearing.

The Bankruptcy Court labeled this position as "parochial." According to the Bankruptcy Court, this is a very large case and accommodations must be made. This view is not without some wisdom, and GLM is not unsympathetic to the realities of the case. The problem, however, is that expediency is no substitute for justice. There is no "big case" exception in the Bankruptcy Code. It is for Congress to fix whatever perceived problems there may be. Being told that this is a "big case" is cold comfort indeed to one being discriminated against.

V.

ARGUMENT

A. THE LAW ON CRITICAL VENDORS

A debtor in Chapter 11 is generally prohibited from paying prepetition debt postpetition prior to the confirmation of a plan.[2] *See Sea Trade Co. Ltd. v. FleetBoston Fin. Corp.*, 2008 U.S. Dist. LEXIS 67221 at * 18, 2008 WL 4129620 (S.D.N.Y. 2008); *In re Compania de Alimentos Fargo S.A.*, 376 B.R. 427, 435 (Bankr. S.D.N.Y. 2007) ("an automatic stay prohibits . . . the debtor from paying its pre-petition debts"). *See also Official Committee of Unsecured Creditors v. Mabey*, 832 F.2d 299, 302 (4th Cir. 1987); *In re Allegheny Int'l Inc.*, 118 B.R. 282, 296 (Bankr. W.D. Pa. 1990) ("[i]t is beyond dispute that a debtor may not pay creditors outside of a plan of reorganization").

Some courts have created a bright-line rule where no unsecured prepetition debt may be paid prior to a plan. *See In re Kmart Corp.*, 359 F.3d 866, 871 (7th Cir. 2004). GLM does not advocate for such a rule. Rather, recognizing that there may be situations where the payment of prepetition debt is critical, most courts have adopted a process whereby a debtor can seek permission to pay certain prepetition unsecured debt to so-called "critical vendors," usually under the Doctrine of Necessity. This Court, too, has recognized that a bankruptcy court has

[2] There are exceptions related to leases, domestic support obligations, criminal matters, etc., which are not applicable here.

the authority to authorize a debtor to pay a prepetition debt prior to a plan. *See In re Chateaugay Corp.*, 80 B.R. 279, 285 (S.D.N.Y. 1987).

The problem is that the equality of creditors of a similar priority is a fundamental policy of the Bankruptcy Code, one on which much of the Bankruptcy Code relies. *See, e.g., Begier v. IRS*, 496 U.S. 53, 58 (1990). This policy is so strong that Congress even created a cause of action whereby otherwise lawful payments made to prepetition creditors in the ninety (90) days prior to bankruptcy can be clawed-back as preferences. *See* 11 U.S.C. § 547(b). Therefore, while the courts generally acknowledge that there may be certain instances in which prepetition unsecured debt can be paid postpetition prior to the confirmation of a plan, those instances are rare and represent exceptional circumstances.

Thus, the courts in this District authorize the payment to the "critical vendor" when the payment is "critical to the debtor's reorganization." *In re Financial News Network Inc.*, 134 B.R. 732, 736 (Bankr. S.D.N.Y. 1991). *Accord In re Ionosphere Clubs Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989). As the Bankruptcy Court held in a seminal opinion on "critical vendors":

> [t]he necessity of payment doctrine permits immediate payment of claims of creditors where those creditors will not supply services or material essential to the conduct of the business until their pre-reorganization claims shall have been paid . . . the *sine qua non* for the application of the necessity of payment doctrine is the possibility that the creditor will employ an immediate economic sanction, failing such payment.

In re Ionosphere Clubs Inc., 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989) (internal citations and quotations omitted).

At a minimum, criticality requires that: (i) the creditor require immediate payment in order to continue providing goods and services; (ii) which goods or services are "essential to the conduct of the business," usually meaning that the debtor cannot find a meaningful replacement vendor; and (iii) the creditor will not provide such goods or services without the immediate payment. *See id*. However, "[e]ven if a vendor is critical to the success of the debtor, the court cannot allow the position to be abused. Critical vendor status must take into account the rights of all of the creditors of the estate and the remedy must be crafted to the circumstances of the case . . . but not a windfall." *In re United Am. Inc.*, 327 B.R. 776, 784 (Bankr. E.D. Va. 2005). Otherwise, as explained by the Bankruptcy Court, to "allow the payment would be to read the doctrine as one of *convenience* rather than *necessity*." *In re Financial News Network Inc.*, 134 B.R. at 736 (emphasis added).

Various oft-cited opinions demonstrate the high standard that the Bankruptcy Court formulated years ago:

> First, it must be critical that the debtor deal with the claimant. Second, unless it deals with the claimant, the debtor risks a probability of harm, or, alternatively, loss of economic advantage to the estate or the debtor's going concern value, which is disproportionate to the amount of the claimant's pre-petition claim. Third, there is no

> practical or legal alternative by which the debtor can deal with the claimant other than by payment of the claim.

In re CoServ L.L.C., 273 B.R. 487, 497 (Bankr. N.D. Tex. 2000) (permitting payments to "critical vendors" only in the most "extraordinary circumstances").

The key is "necessity," as explored and explained by another important opinion on point:

> These two cases underline the strictness of the necessity prong of the Doctrine of Necessity. There are two aspects to necessity. Necessity requires that there be no alternative. There must be no substitute vendor available even at a greater expense. Alternative means of obtaining the vendor's cooperation in supplying his goods or services must be exhausted. There must be no other 'practical or legal alternative' with which the debtor can deal with the claimant. This means that the vendors' goods or services are essential and that the critical vendor will, in fact, not provide them without exceptional treatment. Both require an evidentiary basis.

In re United Am. Inc., 327 B.R. at 782-83.

The basis for the Bankruptcy Court's authority to permit payments to "critical vendors" is most often cited as section 105(a) of the Bankruptcy Code, which permits a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Here, it is not clear whether the Bankruptcy Court based its ruling on section 105(a), or on section 363(b) of the Bankruptcy Code, because the Motion referenced "ordinary course" under section 363(b) and the Bankruptcy Court expressly referenced it during its oral ruling. *See* Transcript at 109:10-17.

With certain inapplicable exceptions, section 363(b) of the Bankruptcy Code authorizes a debtor to continue use property of the estate in the "ordinary course of business," without the need for a motion or a hearing. 11 U.S.C. § 363(b)(1). But the payment of prepetition debt cannot be in the "ordinary course of business" because then the Debtors would never be prohibited from paying prepetition debt. Indeed, the *reductio ad absurdum* here is the fact that the Debtors had to file a motion seeking permission to pay prepetition debt and that the Bankruptcy Court had to enter an order granting this relief. If payment of such debt was truly in the "ordinary course of business," then no motion or order would have been required at all. And, once a motion and order become required, the matter is no longer one of the Debtors' business judgment and discretion, but it is a judicial process where a court is being asked to order relief.

In any event, the law on critical vendors and the Doctrine of Necessity is reasonably clear and is consistently pronounced amongst those courts (the majority) who recognize the doctrine:

- the creditor must be a supplier of goods or services to the debtor;
- the continued furnishing of those goods or services must be critical to the debtor's business and, therefore, to its reorganization;
- the creditor must have conditioned its willingness to provide goods or services postpetition on its prepetition claim being paid immediately;
- the debtor must have no practical alternative to the payment, in the form of being able to locate a replacement supplier;

- the creditor is in fact likely to follow through on its threat of not supplying the critical goods or services postpetition without the immediate payment;

- the doctrine must be used in rare and most exceptional cases; and

- the doctrine must not be watered-down to one of "convenience," as opposed to "necessity."

The foregoing applies to so-called critical vendors, who otherwise have ordinary, unsecured claims like GLM's. A lien claimant has a lien on property of a debtor and therefore has differing rights and differing priorities. Similarly, a 503(b)(9) claimant has a different priority. So long as a creditor truly is a lien claimant or a 503(b)(9) claimant, a debtor does not discriminate against unsecured creditors if it pays these claims first, and in full. With respect to lien claimants and 503(b)(9) claimants, therefore, GLM does not question that the Bankruptcy Court could authorize these claimants to be paid prior to a plan. Rather, GLM's appeal regarding these issues is limited to keeping the identities of these creditors confidential and secret, and to the fact that the Bankruptcy Court permitted the Debtors to decide which creditors qualified, rather than making that decision itself.

B. THE BANKRUPTCY COURT'S IMPERMISSIBLE DELEGATION OF AUTHORITY

The most serious problem with the Order is the delegation of the judicial function to the Debtors, whereby the Bankruptcy Court has permitted the Debtors to decide questions of fact: who is a critical vendor, who is a lien claimant, and

who is a 503(b)(9) claimant? This problem is serious because it undermines what it means to be a court itself, and because it renders meaningless much of the Bankruptcy Code, where it is the Bankruptcy Court, and not the debtor, that adjudicates questions of fact. It is also a fundamental problem of due process for, without evidence, hearing, and argument, how is one to cross-examine or contest what a debtor does in its mind and pursuant to its own discretion?

As noted above, whether a creditor is a "critical vendor" is a question of fact:

> There are two aspects to necessity. . . Both require an evidentiary basis. The essential nature of the goods or services is a relatively straight-forward factual matter. The critical vendor's stated intent not to provide his goods or services in the future is not as straight-forward. . . His mere statement that he will not supply the goods or services is rarely sufficient. Anyone can say that. The real question is whether he means it, that is, his actual intent.

In re United Am. Inc., 327 B.R. 776, 782-83 (Bankr. E.D. Va. 2005).

The Bankruptcy Court delegated to the Debtors this essential evidentiary and judicial function, or otherwise completely authorized *carte blanche* authority without any need that a creditor fit what it means to be a "critical vendor":

> The Debtors are authorized, but not directed, <u>in their sole discretion</u>, to continue their prepetition business operations, policies, and programs and <u>pay any accrued but unpaid prepetition Vendor claims on a postpetition basis</u> in the ordinary course of business or as may be necessary to secure a vendor's agreement to continue business with the Debtors on Customary Trade Terms, up to the amount set forth for each category of Vendor Claims set forth in the Motion.

Order at p. 2 (emphasis added).

One of two alternative conclusions is therefore inescapable. First, the Bankruptcy Court simply permitted the Debtors to pay any and all prepetition debt in their sole discretion. If this is what the Bankruptcy Court ordered, then it fails as a matter of law under any recognized standard of when prepetition debt can be paid prior to a plan, and it basically writes out of the Bankruptcy Code the prohibition on paying prepetition debt. Second, and what GLM believes that the Bankruptcy Court did, is to instead delegate its authority to decide who is a critical vendor to the Debtors based on the non-binding factors identified by the Debtors in their Motion; *i.e.* the Debtors, and not the Bankruptcy Court, would decide whether any given creditor satisfies those factors on an evidentiary basis.

But that is no different from the Bankruptcy Court authorizing the Debtors to pay their attorneys a "reasonable" fee, even though the Bankruptcy Code provides that it is the Bankruptcy Court that makes this decision. *See* 11 U.S.C. § 330. By analogy, it would be the equivalent of this Court, upon a criminal conviction, telling the U.S. Attorney to impose a sentence "consistent with the law," or with this Court compelling a plaintiff to produce responsive documents "in its sole discretion."

The Bankruptcy Court did not shy from the fact of its delegation, and it candidly explained its reasoning. As GLM argued that the Debtors should prove

the elements of critical vendor for each creditor, the Bankruptcy Court asked "[w]ith 263 separate hearings." *See* Transcript at 105:3. As explained by the Bankruptcy Court:

> I'm asking you, what testimony would suffice, where you wouldn't run a material risk that by the time you completed that specific evidentiary hearing, which is triggered, I believe, by your belief that you need to show that they're walking that day, that the Debtor wouldn't expire? How, practically, would you do that?
>
> * * *
>
> Right, uh huh. And that's when they're backing up the trucks and taking the equipment away, or refusing to provide the access to the customers who want to watch the NCAA tournament? And I am to break, and the Debtors are to break each time, without having actually dealt with their vendors, who they have a long-term relationship, and create an adversary hearing with evidence regarding the process, and with them making the threat? That's what you want to have happen?

Transcript at: 105:14-106:10. As the Bankruptcy Court continued even after it had ruled on the Motion:

> Well, I also have a 400-matter docket tomorrow in this very courtroom, but of course I could break for 264 hearings on it in camera on these matters. You could look at my schedule for the next three months, sir, and you will see that there is absolutely no time for that.

Transcript at: 110:21-25. Most tellingly, the Bankruptcy Court labeled GLM's view that the Debtors should be required to prove the requirements of critical vendor status with respect to each creditor a "parochial narrow objection." *See* Transcript at 109:3-5.

GLM is not unsympathetic: yes, this is a big case that consumes large judicial resources, and yes accommodating the debtors to some degree in order to preserve their business protects all creditors, including GLM. But the Bankruptcy Court overstated the problem: if it was known who the alleged critical vendors were such that creditors could verify the Debtors' position, and if the Debtors were doing their job correctly, then in all likelihood no creditor would object to the vast majority of the critical vendors. And, nothing prevented the Debtors from seeking to approve 264 critical vendors once, through one motion, as is in fact what happens in almost every large Chapter 11 case. But even if the Bankruptcy Court is correct that having to decide who a critical vendor is on a case-by-case basis would overwhelm the court's docket, the solution lies with Congress.

That takes GLM back to its opening point: there are many benefits to being a debtor-in-possession, but there are also certain obligations and requirements. It may well be burdensome to a debtor to go through the critical vendor process, but then that is one of the drawbacks of Chapter 11—in fact, the more burdensome the process, the more likely it is that a debtor will invoke the process sparingly, for true necessity. It may well be a huge burden on the Bankruptcy Court's docket, but there are ways to streamline an evidentiary hearing (such as through the use of affidavits), the Bankruptcy Court is accustomed to holding emergency evidentiary

hearings, and the Bankruptcy Court has the protections of Bankruptcy Rule 9011 and 28 U.S.C. § 1927 to protect against abuses of the process.

But no remedy can justify judicial abdication. Nothing, much less expediency, justifies a court delegating to a litigant—not even some neutral third party—its essential judicial function. A court simply cannot function as a court if it does that. To delegate to a litigant what it can do "in its sole discretion" is to clothe that litigant with judicial power and immunity that cannot be cross examined or questioned, or appealed, or even verified. This is not hyperbole and it is not trivial:

> The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given. . . It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order. For the weight ascribed by the law to the findings --their conclusiveness when made within the sphere of the authority conferred --rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear.

Morgan v. United States, 298 U.S. 468, 480-81 (1936). That is what the Bankruptcy Court did here: it delegated to the Debtors the fact-finding that is at the core of the judicial function. Even where a limited delegation of fact-finding is permissible, such as to a magistrate, the practice is permissible under due process

grounds because it is always the Article III judge who makes the final fact determination: "that delegation does not violate Art. III so long as the ultimate decision is made by the district court." *United States v. Raddatz*, 447 U.S. 667, 683 (1980). The Order does not even preserve that safeguard.

And, the Supreme Court has expressly held that a judge may not delegate a finding of fact. *See Holiday v. Johnston*, 313 U.S. 342, 351-52 (1941). In *Holiday*, the federal courts in California had a practice of referring *habeas corpus* proceedings to a commissioner in the nature of a special master, which practice the Supreme Court rejected despite its longevity:

> It is plain, as the respondent concedes, that a commissioner is not a judge . . . We cannot sanction a departure from the plain mandate of the statute on any of the grounds advanced. . . The Congress has seen fit to lodge in the judge the duty of investigation. One of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony. Plainly it was intended that the prisoner might invoke the exercise of this appraisal by the judge himself. We cannot say that an appraisal of the truth of the prisoner's oral testimony by a master or commissioner is, in the light of the purpose and object of the proceeding, the equivalent of the judge's own exercise of the function of the trier of the facts.

Id. Just as expediency, efficiency, and custom did not permit the judges to delegate the fact-finding role with respect to *habeas corpus* in *Holiday*, so too does the Bankruptcy Court's docket, or the Debtors' burden, not justify the delegation of its exclusive judicial authority by the Bankruptcy Court.

The premise of Chapter 11 is that, except with respect to ordinary course of business issues, the debtor first exercises its discretion in proposing a certain course of conduct, and the bankruptcy court then determines whether such discretion is appropriate in light of the governing standards, after all affected parties have had a chance to weigh the debtor's discretion and to review whether the prosed action comports with the law. Allowing a debtor to make the final determination "in its sole discretion" vitiates this whole process. No court has, to GLM's knowledge, adopted or ratified such a view in any published opinion.

On the contrary, as held by one bankruptcy court, "[d]ebtors are not free to choose which of their pre-petition creditors they pay. To allow such conduct would destroy the integrity of the bankruptcy system." *In re Lively*, 266 B.R. 209, 216 (Bankr. N.D. Okla. 1998). Stated differently, "permitting the Chapter 11 debtor to selectively pay pre-petition indebtedness serves to create priorities among the general unsecured creditor body that are inconsistent with the distributive scheme envisioned by [the Bankruptcy Code]." *In re Structurlite Plastics Corp.*, 86 B.R. 922, 932 (Bankr. S.D. Ohio 1988). *Accord In re Braniff Airways Inc.*, 700 F.2d 935, 940 (5th Cir. 1983) ("[t]he debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan").

It was for the Bankruptcy Court to decide which creditor qualified for critical vendor status, or which creditor was a proper lien claimant or a proper 503(b)(9) claimant. The Bankruptcy Court's delegation of that decision making role to the Debtors was error as a matter of law, justifying the reversal of the Order *in toto*.

C. REVERSIBLE ERROR REGARDING CONFIDENTIALITY AND SEALING

Compounding the due process problem, and as an offshoot of that problem and much of the rest of the problems occasioned by the Order, was that the Bankruptcy Court permitted the Debtors to keep secret from GLM and almost all other creditors the identities of all critical vendors, lien claimants, and 503(b)(9) claimants. It is not a question of mere curiosity. GLM and other participating creditors have an interest in ensuring that only those prepetition creditors who actually qualify as critical, or who have perfected and unavoidable liens, or who qualify for 503(b)(9) administrative status, receive the preferential treatment proposed by the Debtors. After all, not only are unsecured creditors being discriminated against, but it is their money being used to make the payments in the form of reduced recoveries, here to the tune of almost $185 million.

Chapter 11 has a strong policy of encouraging creditor participation. *See, e.g., In re W. Asbestos Co.*, 318 B.R. 527, 531 (Bankr. N.D. Cal. 2004); *In re Coral Petroleum Inc.*, 60 B.R. 377, 383 (Bankr. S.D. Tex. 1986). Part of this policy is to

enable and to encourage creditors to protect their own interests by questioning and testing what it is that a debtor or trustee is doing. *See, e.g., In re Jeppson*, 66 B.R. 269, 288 (Bankr. D. Utah 1986) ("[t]he main protection theme in reorganizations under the Bankruptcy Code is that adequately informed classes of creditors and shareholders can look after their own interests"); *Armstrong World Indus., Inc. v. James A. Phillips, Inc. (In re James A. Phillips, Inc.)*, 29 B.R. 391, 395 (Bankr. S.D.N.Y. 1983) (noting that identifying creditors to be paid is critical in ensuring that creditors can review the proposal for potential preferential or fraudulent purposes). These goals of participation and the important function of a self-policing system are lost when creditors are denied basic, vital information from which they can test a debtor's proposed course.

This is all the more important in this Bankruptcy Case where, not only is GLM entitled to adequate information in order to test what the Debtors proposed to do on the merits (*e.g.* is a vendor really critical), but the professionals in this Bankruptcy Case (Debtors' counsel, Debtors' financial advisors, Committee's[3] counsel, and Committee's financial advisors) have filed disclosures in the Bankruptcy Case disclosing that they have past or present connections and representations of *hundreds* of other creditors, parties-in-interest, and their

[3] The Committee has a role with respect to critical vendors because the Bankruptcy Court clearly stated its belief that the Committee would adequately police the Debtors' discretion with respect to critical vendors.

professionals also involved in the Bankruptcy Case. GLM is entitled to know, for example, whether any alleged critical vendor also happens to be a client of the Debtors' attorneys or the Debtors' financial advisors, as such a fact would go to the credibility of the determination. While there may be nothing there, the credibility of the system is challenged because, so long as the necessary transparency is denied, creditors like GLM can never know whether the Debtors are exercising their discretion free from these and other inappropriate considerations.

It is for these and other reasons that the Bankruptcy Code mandates that this information be public. Papers filed in a bankruptcy case, such as the list of critical vendors and lien claimants, and the amounts paid to the same, are "public records and open to examination by an entity at reasonable times without charge." 11 U.S.C. § 107(a). The only exception is for "a trade secret or confidential research, development, or commercial information." *Id*. at § 107(b). The Bankruptcy Rules enable the Court to seal matters, but only for "a trade secret or other confidential research, development, or commercial information," or "against scandalous or defamatory matter contained in any paper filed in a case under the Code," or "to protect governmental matters that are made confidential by statute or regulation." FED. R. BANKR. P. 9018. As the Second Circuit has held, the exception to the policy of public access to court records exists only in "compelling or extraordinary

circumstances." *Video Software Dealers Ass'n v. Orion Pictures Corp.*, 21 F.3d 24, 27 (2d Cir. 1994) (emphasis added).

With respect to the grounds for why the list of lien claimants and 503(b)(9) claimants should be secret and under seal, the Debtors offered no justification or evidence either in the Motion or at the hearing. On that basis alone, the Court should reverse the Bankruptcy Court with respect to lien claimants and 503(b)(9) claimants—not only with respect to having to list these on the public docket, but with respect to permitting payments to these entities since GLM was denied a meaningful opportunity to test whether the alleged creditors qualified for these standards.

Indeed, at the hearing, the sole witness for the Debtors admitted that he had undertaken no analysis of whether a lien claimants' lien was avoidable and that he did not even know whether such an analysis was being undertaken. *See* Transcript at 91:1-11. Similarly with respect to 503(b)(9) claimants, the witness had not reviewed the merits of the claims or whether the claimants were subject to avoidance actions. *See* Transcript at 91:12-92:1. Perhaps, had GLM been provided the necessary information, GLM could have acted to protect its rights—as the Bankruptcy Code envisions—by performing this basic analysis which apparently the Debtors had not bothered to do before paying more than $100 million of these claims.

With respect to critical vendors, the Debtors' representative testified as to the basis for keeping this list secret:

> Telling a vendor that they're on a list deprives us of any leverage that the company may have in a negotiation with that vendor, number one. Number two, if you were to publish that list, my concern is that you would have what was essentially a run on the bank. We've received relief for critical vendor dollars of $81 million. If that list were made public, I can almost assure you that you would have most vendors on that list very quickly calling a company and demanding payment that's on that list. That would be a massive working capital impact. It would also disrupt the business, so I would not recommend sharing those.

Transcript at 80:13-24.

This answer proves GLM's fundamental point: for the Debtors, the process was not about necessity, but about convenience. The Debtors frankly admitted that the first reason they wanted to keep this information secret was to use the potential of critical vendor treatment as "leverage" in negotiations with the vendor; *e.g.* 'we will pay your prepetition claim now if you extend credit terms to net 60 from net 30.' Sure, the Debtors would like to have economic leverage, and they would like to avoid a "run on the bank," and there is wisdom in that. But that is a backwards analysis: a vendor is a critical vendor precisely because it has demanded immediate payment in exchange for continuing to provide goods or services. That is why the vendor is on the list, or rather why the vendor *should* be on the list, in the first place. That the vendor is on the list does not make the vendor a "critical vendor."

Moreover, the Debtors' witness completely negated his own evidence by testifying that, at the end of the day, he expected that all of the creditors identified by the Debtors as critical vendors will in fact be paid as such even though only 12 had been by the time of the hearing:

> So at the end of the validation process, did all 263 [creditors on the secret list of "critical vendors"] get validates [*sic*] by Alvarez as legitimate critical vendors?
>
> A Sure. Through our process, there were a handful that came off; there were a handful that went on. But we fully believe that the company did a good job in developing that analysis and we feel that the critical vendor amount that was sized is the appropriate amount and that was determined through that validation process.
>
> Q Okay. So maybe not 263, but maybe in the neighborhood of 250, 240, somewhere around there?
>
> A I think you'll see that there's probably 260 vendors that –
>
> Q So –
>
> A -- fell into that category.
>
> Q So there will be upwards of $80 million or $81 million at the end of the day?
>
> A I believe so.

Transcript at 85:3-20.

How can there be any "run on the bank," meaning a fear that creditors will jump out of the woodwork to demand critical vendor status, when all of the creditors on the secret list will at the end of the day be paid as critical vendors?

And, none of this explains why the information must continue to be secret *after* critical vendors are paid, at a time when there can no longer be any reasonable concern of a "run on the bank," or why the Bankruptcy Court could not have entered a protective order or other order enabling creditors to learn of the information while still preventing the information from being misused.

The result, again, is not one of criticality, but one of convenience. The Debtors simply wanted the added leverage they would have with respect to their negotiations with a vendor by virtue of having been authorized to pay that vendor's prepetition claim, which they could use to obtain better credit or other terms, and which leverage would be gone if the creditor already knew it was a critical vendor. While a "run on the bank" is a material and legitimate concern, it is a backwards analysis, but even if it were not, it still goes to convenience: the Debtors would like to save money. None of this rises to the level of "compelling or extraordinary circumstances" to keep the information secret, as required by the Second Circuit. *See Video Software Dealers Ass'n*, 21 F.3d at 27. Obtaining financial leverage or saving money is not a trade secret, it is not research and development information, it is not commercial information, it is not scandalous or defamatory material, and it is not a governmental matter, as would be required to seal the information. *See* 11 U.S.C. § 107(b); FED. R. BANKR. P. 9018. The Order writes the fundamental policy of transparency out of the Bankruptcy Code with no adequate justification.

No opinion that GLM has located permits a debtor to keep the identity of "critical vendors" confidential. *See, e.g., In re CoServ, LLC*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002) (identifying the name and amount to be paid to each critical vendor and analyzing whether each is critical, and denying critical vendor status to five of the seven critical vendors at issue); *In re Ionosphere Club, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (identifying that all employees should be paid and deemed critical). On the contrary, as noted by the Bankruptcy Court below years ago, when it identified the creditors to be paid:

> these are the sorts of issues on which creditors in the chapter 11 proceeding should have an opportunity to be heard, however summarily, before the accelerated payments are formally authorized by a Bankruptcy Court. Such an opportunity would ensure that the facts alleged by the debtor in possession are at least colorably supported, and would avoid preferential payments that may be commercially unsupportable or downright fraudulent.

Armstrong World Indus., Inc. v. James A. Phillips, Inc. (In re James A. Phillips, Inc.), 29 B.R. 391, 395 (Bankr. S.D.N.Y. 1983).

Thus, as a matter of law, the Bankruptcy Court erred by keeping confidential the identity of the lien claimants and 503(b)(9) claimants as there was no justification even attempted with respect to these creditors. With respect to critical vendors, the Bankruptcy Court erred because the two justifications offered do not rise to the levels required, either individually or jointly, to keep the information secret from creditors such as GLM as a matter of law.

D. RESULTING DENIALS OF DUE PROCESS

Based on both the Bankruptcy Court's delegation of its judicial function and on its sealing of the identity of the critical vendors, GLM's procedural due process rights have been violated. The proceeding before the Bankruptcy Court was unquestionably a judicial proceeding, with the Bankruptcy Court exercising this Court's original jurisdiction pursuant to this Court's reference. As a judicial proceeding, that brings into play all due process guarantees and concerns as they would apply to any federal court proceeding.

"The fundamental requisite of due process of law is the opportunity to be heard." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "[P]rocess which is a mere gesture is not process." *Id*. at 315. As this Court has aptly summarized:

> As a matter of procedural due process, the hearing must accord the plaintiff the opportunity to prove or disprove a particular fact or set of facts when, and only when, the fact in question is relevant to the inquiry at hand. . . Put simply, a person being deprived of a liberty or property interest has a procedural due process right to challenge the existence or non-existence of certain facts if, and only if, such facts would be relevant to the underlying substantive standard.

Nnebe v. Daus, 184 F. Supp. 3d 54, 63-64 (S.D.N.Y. 2016) (internal quotations and citations omitted).

GLM has an interest in the *res* of the bankruptcy estate, much like a trust beneficiary has an interest in the *res* of the trust. Here, some (at $185 million,

actually quite a lot) of that *res* was being used to pay favored creditors in preference to GLM and that *res* will no longer be available to pay GLM, meaning that GLM had a valid property interest it was being deprived of—in addition to the interest of not being discriminated against. In any event, the Debtors were required to prove certain facts "relevant to the inquiry at hand," that being whether the factors governing critical vendor status were satisfied. Moreover, the Bankruptcy Code expressly grants GLM statutory standing:

> 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).

That GLM was denied its basic right to due process and to be heard on any issue is evident from the hearing on the Motion. At the hearing, GLM raised its due process argument noting that the Debtors have failed to provide the identities of the creditors proposed to be paid in full. *See* Transcript at 68:4-69:11. The Bankruptcy Court noted that this was not a matter for evidence, but for argument after the evidence. *See* Transcript at 69:12-20. When GLM asked the Debtors' witness for the names of the critical vendors he spoke to, the Debtors objected on relevance. *See* Transcript at 87:4-14. GLM responded that that was precisely the point of the hearing: "[w]ho is a critical vendor." *See* Transcript at 87:15-17. The Bankruptcy Court sustained the objection, adding its belief that GLM was seeking

this information in order to "harm the company" and that this information is "of no use whatsoever to the objectant." *See* Transcript at 87:21-24.

But the whole point of the hearing was, or should have been, whether certain vendors were critical vendors, which never could be addressed without knowing at least the identities of these creditors. That this information was of no use whatsoever, except apparently to harm the company, at least according to the Bankruptcy Court, turns due process on its head. And, if this harms the company, so be it—the Debtors voluntarily chose to file bankruptcy, and due process is far more important than any alleged harm that they may suffer by being required to disclose nothing more than who they are proposing to pay and how much.

E. REVERSIBLE ERROR ON THE MERITS OF "CRITICAL VENDOR"

The final reason why this Court should reserve the Bankruptcy Court is because neither the Bankruptcy Court's ruling nor the evidence underpinning that ruling justify the critical vendor payments under any standard identified by the case law.

First, as noted above, the Bankruptcy Court authorized the Debtor to pay any creditor as a critical vendor in the Debtors' "sole discretion." On its face, this authorization contains no factors or elements recognized by the case law justifying critical vendor status, and writes the prohibition on the payment of prepetition unsecured debt out of the Bankruptcy Code. It is reversible error on its face.

Second, what it appears that the Bankruptcy Court intended to do was to authorize the Debtors to determine who is a critical vendor based on the factors identified by the Debtors in their Motion. *See* Motion at ¶ 13 (identifying 10 factors the Debtor proposed to use to determine who is a critical vendor). These 10 factors do not include the critical requirement that the vendor have refused to supply on a postpetition basis without its prepetition claim being paid. These factors do not include the requirement that the vendor is a sole-source provider because, as an alternative to being sole-sourced, the Debtors also provided that the vendor be "a high-volume supplier of goods or services critical to the Debtors' business operations." *See* Motion at ¶ 13. These factors include various other factors that are irrelevant, such as the degree to which replacement costs exceed the vendor's claim (something having to do with convenience, not necessity); whether the lack of payment could trigger financial distress for the vendor; the location and nationality of the vendor; and whether the failure to pay could result in a contraction of trade terms under non-bankruptcy law (again, something going to convenience, not necessity).

Thus, the factors—if they even apply—do not address the three most critical aspects of the Doctrine of Necessity identified in one way or another by each opinion that recognizes the doctrine: that the vendor will refuse to provide goods or services postpetition, that the goods or services are critical to the business, and that

the debtor have no meaningful alternative to the vendor. Because the Debtors' factors either ignore the case law, or include irrelevant factors, or are so numerous and indefinite as to constitute no guidance at all, this Court should reverse the grant of authority to pay prepetition debt as being outside the permissible bounds of, and incompatible with, the Bankruptcy Code and the case law.

Third and finally, the evidentiary record does not support the authority granted by the Bankruptcy Code and proves GLM's overall points that this authority was not based on permissible *necessity* but was instead based on impermissible *convenience*. As noted above, the number one reason identified by the Debtors was for business leverage. And, while the Debtors attempted to represent at the hearing that only 12 creditors had been paid as critical vendors by then, the truth, once pressed, was that they intended to pay all 263 as critical vendors—meaning that nothing had changed in the intervening weeks, that not even *one* creditor or situation had changed. Clearly, it was not the facts that mattered or that drove the process for the Debtors.

But it is the following exchanges during the hearing that best proves GLM's point, as GLM was cross-examining the Debtors' sole witness:

> Q Okay. Can you say here, sir, that of all of the 263 vendors that each of them has or will refuse to provide services or goods post-petition without payment in full of its prepetition claim?
>
> A Can you repeat the question, please?

> Q Yes, sir. Can you state, sir, today under oath, that all 263 critical vendors have or will refuse to provide services or goods post-petition without the full payment of their prepetition debt?
>
> MR. HOWELL: Object to foundation. (Indiscernible) answer what all of those are going to do, Your Honor.
>
> THE COURT: I'm sorry, I didn't hear the last part. Object to foundation.
>
> MR. HOWELL: He doesn't have knowledge of what all of those vendors are going to do.
>
> THE COURT: That's -- I really didn't understand the purpose of the question.
>
> MR. RUKAVINA: Well, Your Honor, it goes to the factors identified by the caselaw as to what –
>
> THE COURT: No, it doesn't. You don't get the point. The reason they've only paid 12 to date is because they haven't asked. He's only going to deal with them if they do ask. You want them to pay a blank check for the full amount. So I'm going to sustain the objection, basically, on ground of relevance and legal acuity.

Transcript at 92:2-93:2.

The Bankruptcy Court likewise sustained an objection to, and did not permit an answer to, the following question:

> Can you state that you believe that for all 263 critical vendors there is no other cover or replacement vendor -- I forget the term you used before -- that you would have available if those vendors discontinued services?

Transcript at 93:10-94:1.

The Bankruptcy Court did permit GLM to ask the following question, to which it obtained the following answer from the Debtors' sole witness:

> Q. One more question on a similar basis. For all 263 potential critical vendors, can you say that the failure to pay the prepetition debt will lead to irreparable injury to the estate?
>
> A. I can't say that with certainty. As I said earlier, they're all independent decisions.

Transcript at 93:2-7.

The Bankruptcy Court and the Debtors thus found it irrelevant, and did not require or provide evidence regarding, whether any alleged critical vendor would discontinue providing goods or service without payment. Yet that is the most important element or factor. The Bankruptcy Court and the Debtors also found it irrelevant, and did not require or provide evidence regarding, whether the Debtor had an alternative vendor to provide cover or replacement goods or services. Yet that is the second most important element or factor. The *sine qua non* of what it means to be a critical vendor was not only lacking, but was considered to be irrelevant.

The Bankruptcy Court did find it relevant, and did permit evidence on, whether the failure to pay a critical vendor would lead to irreparable injury to the Debtors. Yet even here, instead of an affirmative answer, the response was "I can't say that with certainty." The question was not asked, however, "with certainty." Clearly the witness was hedging, because he know the answer to be "no." In any

event, there was no evidence—despite the opportunity having been given to provide testimony on this point—that the failure to pay any alleged critical vendor would lead to potentially irreparable injury to the Debtors, the third, or overall the only, element or factor considered by the case law.

On what evidence then did the Bankruptcy Court enter the Order, and on what grounds did the Debtors seek the extraordinary relief that they sought? Simply that the Debtors sought to pay certain vendors in full in order to negotiate favorable credit terms. The Bankruptcy Court has now permitted precisely what it cautioned years ago against: "to read the doctrine as one of *convenience* rather than *necessity*." *In re Financial News Network Inc.*, 134 B.R. 732, 736 (Bankr. S.D.N.Y. 1991) (emphasis added).

VI.
CONCLUSION

It should be the rule that, before a bankruptcy court authorizes a debtor to take an action that is discriminatory and that represents a rare departure from the normal rules of the Bankruptcy Code, there should be extraordinary and compelling circumstances, all relevant information should be provided to all creditors, and the debtor should be held to a strict evidentiary standard. The Bankruptcy Code demands this, due process requires it, and the integrity of the bankruptcy system and of the judicial function depend on it. A creditor should not

be criticized, accused of seeking to harm the debtor, or labeled "parochial" for requesting that these things be provided. It is the debtor that is seeking something extraordinary, while the creditor is merely seeking to protect its legitimate interests. It is the debtor that has something to prove, not the creditor. And it is the debtor that filed bankruptcy and caused the situation, not the creditor, meaning that it is the debtor that must live with the consequences of that decision.

This Court should therefore reverse the Order with instructions that, upon remand, the Debtors be required to disclose the identities of all critical vendors, lien claimants, and 503(b)(9) claimants, and that the Debtors be required to prove, with respect to each such creditor, the various elements and factors justifying payment prior to the confirmation of a plan under the Doctrine of Necessity or otherwise, but not in the ordinary course of business and not in *their* discretion.

RESPECTFULLY SUBMITTED this 15th day of July, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Bankruptcy Rule 8015(a)(C), I hereby certify compliance with that Rule and certify that this Brief, excluding the portions excluded under the Rule, contains 9,556 words.

By: /s/ Davor Rukavina
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 15th day of July, 2019, a true and correct copy of this Brief was electronically served by the Court's ECF system on counsel for the appellees.

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