

No. 7:19-CV-04854-CS

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

In re WINDSTREAM HOLDINGS, INC., *et al.*,

Debtors.

GLM, DFW, INC.,

Appellant,

v.

WINDSTREAM HOLDINGS, INC. *et al.*,

Appellees.

Appeal from the United States Bankruptcy Court
for the Southern District of New York, No. 19-22312 (RDD)
Honorable Robert D. Drain, United States Bankruptcy Judge

APPELLEES' RESPONSE BRIEF

Stephen E. Hessler, P.C.

Marc Kieselstein, P.C.

KIRKLAND & ELLIS LLP

KIRKLAND & ELLIS

INTERNATIONAL LLP

601 Lexington Avenue

New York, New York 10022

Telephone: (212) 446-4800

Facsimile: (212) 446-4900

Email: shessler@kirkland.com

mkieselstein@kirkland.com

James H.M. Sprayregen, P.C.

Ross M. Kwasteniet, P.C.

Brad Weiland

KIRKLAND & ELLIS LLP

KIRKLAND & ELLIS

INTERNATIONAL LLP

300 North LaSalle Street

Chicago, Illinois 60654

Telephone: (312) 862-2000

Facsimile: (312) 862-2200

Email: jsprayregen@kirkland.com

rkwasteniet@kirkland.com

bweiland@kirkland.com

Counsel to the Debtors-Appellees Windstream Holdings, Inc., et al.



CORPORATE DISCLOSURE STATEMENT

Pursuant to Bankruptcy Rules 8012 and 8014(a)(1), Windstream Holdings, Inc. hereby discloses that it has no parent corporation or publicly held corporation that owns 10% or more of its stock.

/s/ Stephen E. Hessler

Stephen E. Hessler, P.C.

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INTRODUCTION¹

The relief requested in the Vendor Motion (and granted by the bankruptcy court below (the “Bankruptcy Court”)) is firmly rooted in the Bankruptcy Code’s authorizing provisions and widely recognized by courts in this jurisdiction. These courts recognize that it is not only appropriate in certain instances for chapter 11 debtors to pay prepetition claims of vendors, but necessary to preserve and maximize the value of the bankruptcy estate. Appellant GLM DFW, Inc. (“GLM,” or the “Appellant”), recognizes, as it must, this legal principle and does not ask this Court to find otherwise.² Instead, GLM relies on spurious assertions that the Bankruptcy Court abdicated its judicial function in granting the Vendor Motion, allowed the Debtors to apply an inappropriate standard to determine Critical Vendor designation, and erred in not requiring the Debtors to publish a list of Critical Vendors.

GLM’s true goal in this appeal (and in its objection below), however, is to pressure the Debtors into payment of prepetition amounts owed to GLM in

¹ Capitalized terms used but not otherwise defined herein shall have the meanings given to them in 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* [Docket No. 16] (Doc. 1) (the “Vendor Motion”).

² See Appellant Br. at 9 (“Some courts have created a bright-line rule where no unsecured prepetition debt may be paid prior to a plan. . . . GLM does not advocate for such a rule.”).

contravention of the Vendor Motion. Indeed, as summarized by Judge Drain at the hearing on the Vendor Motion:

It's obvious to me that someone who wants to be a critical vendor is trying to harm this company by getting it to disclose information that is detrimental to the company and of no use whatsoever to the objectant. . . . Who has taken a strategy to violate the automatic stay and cut itself off from the potential of having its executory contract being assumed and its defaults cured.

Doc. 6 at 87:21–88:4. GLM provided waste management and brokerage services to the Debtors prepetition. In that capacity, GLM contracted with various waste removal entities on behalf of the Debtors to remove waste from certain facilities in Texas. GLM was providing these services pursuant to an executory contract under which it would have been obligated to continue to perform pending the Debtors' decision to assume or reject (or GLM's obtaining relief from the Bankruptcy Court). GLM ultimately did not perform postpetition, and the Debtors elected to replace GLM with an alternative vendor. Indeed, the Debtors have rejected their contract with GLM, and GLM is no longer an active vendor at all.

Bankruptcy courts in the Southern District of New York routinely defer to a debtor's business judgment in determining whether to pay prepetition claims of vendors deemed critical. Here, the Bankruptcy Court approved a limited number of dollars for critical vendor relief, which the Debtors were authorized to deploy in their business judgment based on a detailed set of criteria set forth in the Vendor Motion.

The Debtors exercised their business judgment to designate for payment a select few critical vendors who are essential to the Debtors' business and continued operations. GLM is simply not one of those vendors.

This Court should dismiss this appeal and/or affirm the Bankruptcy Court's approval of the Vendor Motion on both procedural and substantive grounds. ***First***, as a procedural matter, since GLM's contract has been rejected and GLM is not an active vendor of the Debtors in any capacity, GLM lacks appellate standing. None of the relief granted by the Bankruptcy Court in approving the Vendor Motion will have any effect on GLM, which is free to pursue recovery on its claim through a chapter 11 plan. Under no circumstances could the Debtors reasonably pay a prepetition claim of an inactive vendor prior to the effectiveness of a confirmed chapter 11 plan. The relief requested in the Vendor Motion will not otherwise have any substantive effect on GLM's pecuniary interests. This is the precise sort of appeal the more stringent appellant standing doctrine is meant to avoid.

Second, on the substantive merits, the Bankruptcy Court correctly concluded that the Debtors should be allowed to exercise their business judgment when making critical vendor designations within the standards set forth in the Vendor Motion. In disputing this, the Appellant ignores or misrepresents several key points. The Appellant argues that it is the duty of the Bankruptcy Court, and the Bankruptcy Court alone, to determine who is a critical vendor irrespective of the practical

realities and immense judicial resources that such an undertaking would require of the Bankruptcy Court without the Debtors' input and business judgment. It also ignores the fact that the relief requested in the Vendor Motion is firmly rooted in the Bankruptcy Code's authorizing provisions and widely recognized by bankruptcy courts across the country. Equally improper is the Appellant's assertion that the Debtors should be required to publicly disclose a list of critical vendors. As recognized by the Bankruptcy Court, this would essentially eliminate the Debtors' bargaining power and cause a "run on the bank" with critical vendors and sap the Vendor Motion of significant value to the Debtors' estates. As described in greater detail herein, these arguments should be rejected as substantively wrong and little more than a thinly veiled attempt of a non-critical vendor to pressure the Debtors into payment of its prepetition claims.

The realities and complexities of the Debtors' chapter 11 cases require that the Debtors exercise their business judgment, subject to review by the Bankruptcy Court, when designating critical vendors. To decide otherwise would unnecessarily strain the resources of the Bankruptcy Court and run counter to the vast weight of precedent in the Southern District of New York. Furthermore, the Debtors have exercised reasonable business judgment throughout this matter, including when declining to designate the Appellant as a critical vendor. For these reasons and the reasons set forth below, the Bankruptcy Court's judgment should be affirmed.

STATEMENT OF THE CASE

The Debtors are a leading provider of advanced network communications and technology solutions for businesses across the United States. (Doc. 2). The Debtors also offer broadband, entertainment and security solutions to consumers and small businesses primarily in rural areas in 18 states. (Doc. 2). Additionally, the Debtors supply core transport solutions on a local and long-haul fiber network spanning approximately 150,000 miles and have over 11,000 employees. (Doc. 2). GLM historically provided certain waste management and brokerage services to the Debtors and was one of many thousands of vendors of the Debtors.

On February 25, 2019 (the “Petition Date”), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. A detailed description of certain facts and circumstances surrounding these chapter 11 cases is set forth in the *Declaration of Tony Thomas, Chief Executive Officer and President of Windstream Holdings, Inc., (I) in Support of Debtors’ Chapter 11 Petitions and First Day Motions and (II) Pursuant to Local Bankruptcy Rule 1007-2* [Docket No. 27] (Doc. 2) (the “First Day Declaration”), filed on the Petition Date.

Also on the Petition Date, the Debtors filed the Vendor Motion, seeking entry of interim and final orders authorizing the Debtors to pay certain prepetition vendor claims. (Doc. 1). Through identifying and paying prepetition claims of these certain vendors, the Debtors sought to maintain stability during the chapter 11 cases and

avoid jeopardizing the Debtors' ability to service their customers going forward. (Doc. 1). In exercising their business judgment to select critical vendors, the Debtors spent significant time reviewing and analyzing their books and records, consulting operations managers and purchasing personnel, reviewing contracts and supply agreements, and analyzing applicable law, regulations, and historical practice. Following the analysis and review of approximately 16,000 active vendors, the Debtors identified approximately 263 vendors as critical vendors for purposes of sizing the \$80 million of Critical Vendor relief requested in the Vendor Motion. (Doc. 1). (As set forth in the Vendor Motion, the Debtors also identified approximately \$91 million in Lien Claims and \$13 million in 503(b)(9) Claims that the Debtors sought authority to pay in their business judgment.) The Appellant was not one of the designated critical vendors, and its claim did not otherwise qualify for payment as a secured lien claim or priority claim under section 503(b)(9) of the Bankruptcy Code. The Debtors did not publish a list of vendors used to size the amount of relief requested in the Vendor Motion but did provide an illustrative list of Critical Vendors to the Office of the United States Trustee, the advisors to the official unsecured creditors' committee, and the Bankruptcy Court for *in camera* review. (Doc. 1).

On March 29, 2019, the Appellant filed the *Objection of GLM DFW, Inc. to Debtors' Motion for Authority to Pay Critical Vendors and Lien Claimants* [Docket

No. 204] (Doc. 3) (the “Objection”), raising certain of the arguments set forth in his appeal brief. No other party in interest objected to the Vendor Motion. In response to the Objection, the Debtors filed the *Debtors’ Reply in Support of 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* [Docket No. 291] (Doc. 4) (the “Reply”).

On April 16, 2019, the Bankruptcy Court presided over the hearing (the “Hearing”) where the Debtors and the Appellant offered their arguments in favor of and in opposition to the Vendor Motion. (Doc. 6). Despite GLM’s arguments in its appeal brief related to Lien Claims and 503(b)(9) Claims, such objections were not pressed at the Hearing—the hearing instead focused almost exclusively on Critical Vendor designation. (Doc. 6).

During the Hearing, the Bankruptcy Court overruled the Objection and granted the Vendor Motion in full. (Doc. 6). Among other things, the Bankruptcy Court upheld the Debtors’ practice of not publicly releasing the critical vendor list, instead opting to only release the list to the entities best positioned to review that information. (Doc. 6). Significantly, the Bankruptcy Court remarked that the Objection was parochial and narrowed to the Appellant’s interests, even though couched as if it were brought on behalf of all vendors. (Doc. 6). Moreover, the

Bankruptcy Court reaffirmed the factors set forth in the Vendor Motion, which the Debtors' have referred to in designating Critical Vendors. (Doc. 6). As specifically found by the Bankruptcy Court:

If you decided it your way . . . you would be paying far more people with far more disruption, and reach the same result, I believe, that you're reaching here. If a Debtor misuses this process, the creditors' committee and the U.S. Trustee will point it out. ***This is a parochial narrow objection, couched as if it's being brought on behalf of all vendors, and it just isn't.***

And if I granted this, we would be back to the old days of having to disclose information that precludes Debtors who actually do have good working relationships with their vendors managing that situation, and creating the type of disruption that this rule is intended to prevent. ***And 363(b), which allows Debtors to spend money to provide a net benefit to their estate in their business judgment, as reviewed by the Court, and the Court can review the process to determine that, is sufficient, particularly where the alterative kills the process, and kills the relief that Courts see fit to grant, which is to protect the Debtor's business for all constituents.***

Doc. 6 at 108:24–109:17. As set forth above, the Bankruptcy Court ultimately concluded that the Debtors' business judgment, as reviewed by the Bankruptcy Court, was the correct standard by which to protect the Debtors' business for all constituents and approved the Vendor Motion. (Doc. 6).

The Bankruptcy Court subsequently issued the *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 Postposition Basis [Docket No. 377] (Doc. 5) (the “Order”) approving the Vendor Motion. Notably, the Order provides that (a) the relief granted would provide a material net benefit to the Debtors’ estates and creditors after taking into account the Bankruptcy Code’s priority scheme and (b) that the procedures for determining the application of the relief granted were calculated to result only in the payment of those claims necessary to the operation of the Debtors’ business upon appropriate terms. (Doc. 5).

The Debtors ultimately determined that GLM did not warrant designation as a critical vendor. Nor does GLM hold a secured or section 503(b)(9) claim that would be eligible for payment under the Order. Due primarily to GLM’s failure to provide required services postpetition and the Debtors’ determination that GLM’s services were replaceable, the Debtors subsequently successfully rejected its contract with GLM, pursuant to the *Notice of Rejection of Certain Executory Contracts*, filed on May 15, 2019 [Docket No. 536] (the “Rejection Notice”), and the *Order Authorizing and Approving the Rejection of Certain Executory Contracts*, entered on July 15, 2019 [Docket No. 808] (the “Rejection Order”). The Debtors currently have no active vendor relationship with GLM.

GLM appealed the Bankruptcy Court’s Order. For the reasons set forth below, the District Court should affirm the Bankruptcy Court’s ruling and dismiss this appeal.

STATEMENT OF JURISDICTION

The Bankruptcy Court had jurisdiction over the proceeding giving rise to this appeal pursuant to 28 U.S.C. §§ 157 and 1334. The matter was a core proceeding under 28 U.S.C. § 157(b).

This Court has jurisdiction to hear and determine this appeal pursuant to 28 U.S.C. § 258(a).

STANDARD OF REVIEW

This District Court reviews the Bankruptcy Court's granting of the Vendor Motion *de novo*. *In re Manhattan Inv. Fund Ltd.*, 397 B.R. 1, 7 (S.D.N.Y. 2007) (“We review the Bankruptcy Court’s order . . . *de novo*.”).

Where the Bankruptcy Court made factual findings—such as in identifying the purpose of the different agreements or in identifying conflicting terms in the agreements—such factual findings are reviewed for clear error. *Bessemer Trust Co., N.A. v. Branin*, 618 F.3d 76, 85 (2d Cir. 2010) (“Similarly, in reviewing a grant of summary judgment, we . . . review a district court’s factual findings for clear error.”).

ARGUMENT

I. GLM LACKS APPELLATE STANDING.

Under Second Circuit precedent, an appellant must be considered an “aggrieved person” to have standing to appeal a ruling of a bankruptcy court. *Licensing by Paolo, Inc. v. Sinatra (In re Gucci)*, 126 F.3d 380, 388 (2d Cir. 1997); *In re Ashford Hotels, Ltd.*, 235 B.R. 734, 738 (S.D.N.Y. 1999). An aggrieved person

is defined as “a person directly and adversely affected pecuniarily by the challenged order of the bankruptcy court.” *Gucci*, 235 B.R. at 388 (internal quotations omitted); *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 641 (2d Cir. 1988) (“[a] person who seeks to appeal an order of the bankruptcy court must be directly and adversely affected pecuniarily by it” (internal quotations omitted)).

The Second Circuit has held that the aggrieved person standard serves to restrict appellate standing; otherwise, “bankruptcy litigation will become mired in endless appeals brought by the myriad of parties who are indirectly affected by every bankruptcy court order.” *Id.* at 642. The aggrieved person standard is stricter than the “injury in fact” test for standing under Article III. *See id.* at 642 n. 2 (noting that “[t]his standing limitation is more exacting than the constitutional case or controversy requirement imposed by Article III, for under the constitutional ‘injury in fact’ test, the injury need not be financial”).

As described above, the Debtors have rejected GLM’s contract and do not have an active vendor relationship with GLM. GLM did not object to the Rejection Notice, nor did it move to stay proceedings related to rejection of its contract pending the District Court’s decision. Any claim of GLM as a result of rejection will be treated as an unsecured prepetition claim and dealt with under any plan ultimately confirmed in the Debtors’ chapter 11 cases. *In re Lavigne*, 114 F.3d 379, 387 (2d Cir. 1997) (“Rejection gives rise to a remedy for breach of contract in the non-debtor

party. The claim is treated as a pre-petition claim, affording creditors their proper priority.”).

GLM is a prepetition unsecured creditor with no active relationship with the Debtors, and reversing or altering the Vendor Motion would not directly or adversely affect GLM pecuniarily. GLM’s claim will always be that of a prepetition unsecured creditor and the Debtors would not (and could not) pay GLM’s prepetition claim pursuant to the Vendor Motion. Nor does payment of other vendors pursuant to the Order adversely affect GLM’s pecuniary interests. Both Lien Claims and 503(b)(9) Claims are senior to GLM’s unsecured claim and would thus be entitled to payment prior to GLM irrespective of timing. Payment of Critical Vendor Claims, as recognized by the Bankruptcy Court, increases and indeed maximizes the value of the Debtors’ bankruptcy estates. Thus, payment of those claims would not negatively affect GLM’s ability to ultimately secure payment on its unsecured claim under a confirmed chapter 11 plan.

As recognized by the Bankruptcy Court, these claims are simply different—payment consistent with the standards set forth in the Vendor Motion is simply a recognition of disparate creditor rights:

Because the parties have different rights. So yes, it is unequal, because their rights are different. One party is a party to an executory contract. There are other parties that have rights under 503(b)(9). There are other parties that simply provide their services on a day-to-day basis, perhaps under purchase orders. There are other parties

who have liens. To jumble them all together and say they all have to be treated the same is just putting blinders on, because they are in fact different.

Doc. 6 at 102:17–103:1. The fact that GLM’s claim does not share these characteristics does not mean that GLM is aggrieved—it is free to pursue its claim to the maximum extent of the law. Alteration or reversal of the Order granting Vendor Motion will have no effect on this outcome vis-à-vis GLM. Accordingly, GLM is not an aggrieved party under Second Circuit precedent and lacks standing to bring this appeal. For this reason, the District Court should dismiss the appeal.

II. THE BANKRUPTCY COURT DID NOT COMMIT REVERSIBLE ERROR.

Even if the District Court were to determine that GLM has standing to pursue this appeal, GLM’s arguments fail on the merits.

First—although not disputed by GLM on appeal—the vast weight of authority holds that it is appropriate for courts to authorize the payment of prepetition obligations, including payments to prepetition vendors, where necessary to protect and preserve the estate. *See, e.g., Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 985 (2017) (noting that courts “have approved . . . ‘critical vendor’ orders that allow payment of essential suppliers’ prepetition invoices”); *see also In re C.A.F. Bindery, Inc.*, 199 B.R. 828, 835 (Bankr. S.D.N.Y. 1996); *In re Fin. News Network Inc.*, 134 B.R. 732, 735–36 (Bankr. S.D.N.Y. 1991). In so doing, these courts acknowledge

that several legal theories rooted in sections 105(a) and 363(b) of the Bankruptcy Code, among others, support the payment of prepetition claims.

Section 363(b) of the Bankruptcy Code allows payment of prepetition claims where such payment represents a sound exercise of the Debtors' business judgement. *See In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (noting that section 363(b) provides the court "broad flexibility" to authorize a debtor to honor prepetition claims where supported by an appropriate business justification); *see also James A. Phillips Inc.*, 29 B.R. 391, 397 (S.D.N.Y. 1983) (relying upon section 363(b) as a basis to allow a contractor to pay the prepetition claims of suppliers who were potential lien claimants). Additionally, under section 105(a) of the Bankruptcy Code courts may authorize payments of prepetition obligations when essential to the continued operation of a debtor's businesses. *See C.A.F. Bindery, Inc.*, 199 B.R. at 835. Courts use the power given to them under section 105(a) of the Bankruptcy Code to authorize payment of prepetition obligations pursuant to the "necessity of payment" rule (also referred to as the "doctrine of necessity"). *Ionosphere Clubs, Inc.*, 98 B.R. at 176. Under the doctrine of necessity, the Debtors must demonstrate the payment of the claims are critical to the Debtors' organization. *See Fin. News Network Inc.*, 134 B.R. at 735–36.

While GLM does not dispute as a general matter that Debtors may be granted authority to pay prepetition claims of vendors in certain circumstances, it does

dispute the guidelines to designate critical vendors approved by the Bankruptcy Court here. In the Vendor Motion, the Debtors sought relief to pay a highly selective population of Critical Vendor Claims identified because such vendors are essential to the Debtors' businesses and necessary to enable the Debtors to continue operations, thereby maximizing value of the Debtors' estates. In the Vendor Motion, the Debtors have laid out in detail the criteria used to identify Critical Vendor Claims for purposes of the relief requested in the Vendor Motion. (Doc. 1 at ¶¶ 13–14). The Debtors additionally sought authority to pay certain secured and priority vendor claims (*i.e.*, the Lien Claims and 503(b)(9) Claims) on the basis that payment of such claims will maximize value of the Debtors' estates and since such claims are secured or priority in nature, payment is simply a matter of timing. GLM did not genuinely dispute that the Vendor Motion should be granted with respect to Lien Claims and 503(b)(9) Claims below, instead focusing almost exclusively on the Critical Vendor components of the Vendor Motion.

The Debtors' business judgment is a key consideration for the court when analyzing whether a debtor should be authorized to make payments to critical vendors. *Ionosphere Club*, 98 B.R. at 175 (“the debtor must articulate some business justification, other than mere appeasement of major creditors, for using, selling or leasing property out of the ordinary course of business, before the court may permit such disposition under § 363(b).”); *see In re United Am., Inc.*, 327 B.R. 776, 782

(Bankr. E.D. Va. 2005); *In re Tropical Sportswear Int'l Corp.*, 320 B.R. 15, 17 (Bankr. M.D. Fla. 2005).

In the Vendor Motion, the Debtors employed their business judgment by examining each of their many thousands of vendor relationships using a specific set of criteria to select **only** those vendors that were absolutely essential to the Debtors' estates. The factors considered by the Debtors (and approved by the Bankruptcy Court) include the following:

- whether certain specifications or contract requirements prevent, directly or indirectly, the Debtors from obtaining goods or services from alternative sources;
- whether a vendor is a sole-source, limited-source, or high-volume supplier of goods or services critical to the Debtors' business operations;
- whether an agreement exists by which the Debtors could compel a vendor to continue performing on prepetition terms;
- whether alternative vendors are available that can provide requisite volumes of similar goods or services on equal (or better) terms and, if so, whether the Debtors would be able to continue operating while transitioning business thereto;
- the degree to which replacement costs (including, pricing, transition expenses, professional fees, and lost sales or future revenue) exceed the amount of a vendor's prepetition claim;
- whether the Debtors' inability to pay all or part of the vendor's prepetition claim could trigger financial distress for the applicable vendor;
- the likelihood that a temporary break in the vendor's relationship with the Debtors could be remedied through use of the tools available in these chapter 11 cases;

- whether failure to pay all or part of a particular vendor's claim could cause the vendor to hold goods owned by the Debtors, or refuse to ship inventory or to provide critical services on a postpetition basis;
- the location and nationality of the vendor; and
- whether failure to pay a particular vendor could result in contraction of trade terms as a matter of applicable non-bankruptcy law or regulation.

See Doc. 1 at ¶ 13.

The Bankruptcy Court specifically analyzed and approved these factors at the hearing on the Vendor Motion. In approving these factors as sufficient evidence that the Debtors have satisfied their burden to demonstrate payment of Critical Vendor Claims is a valid exercise of their business judgement, the court observed as follows:

These are the very questions that I started asking of Debtors ten years ago, and that's how this process got developed. That was from bitter experience in practice, and in earlier cases, where cases literally died because judges didn't believe they had this authority, notwithstanding Section 363(b), which was perfectly clear to Judge Easterbrook, who cited 363(b) in K-Mart, but left it up to the Courts to adopt *a proper evidentiary framework for making the determination, which I believe exists here.*

Doc. 6 at 108:15–23.

Courts in this jurisdiction regularly approve critical vendor motions where debtors employ such criterion, similar to the relief sought in the Debtors' Vendor Motion. See, e.g., *In re Synergy Pharmaceuticals Inc.*, Case No. 18-14010 (JLG) (Bankr. S.D.N.Y. Jan. 7, 2019) (upholding the debtors' procedure and list of criteria as a valid exercise of the debtors' business judgment); *In re Sears Holdings Corp.*,

Case No. 18-23538 (RDD) (Bankr. S.D.N.Y. Nov. 16, 2018) (same); *In re Tops Holding II Corp.*, Case No. 18-22279 (RDD) (Bankr. S.D.N.Y. Mar. 22, 2018) (same); *In re Avaya Inc.*, Case No. 17-10089 (SMB) (Bankr. S.D.N.Y. Feb. 10, 2017) (same); *In re SunEdison, Inc.*, Case No. 16-10992 (SMB) (Bankr. S.D.N.Y. Jun. 8, 2016) (same); *In re Relativity Fashion, LLC*, Case No. 15-11989 (MEW) (Bankr. S.D.N.Y. Aug. 27, 2015) (same); *In re The Great Atlantic & Pacific Tea Co., Inc.*, Case No. 15-23007 (RDD) (Bankr. S.D.N.Y. Aug. 11, 2015) (same); *In re The Great Atlantic & Pacific Tea Co., Inc.*, Case No. 10-24549 (RDD) (Bankr. S.D.N.Y. Jan. 12, 2011) (same).³

In addition to being a valid exercise of the Debtors' business judgment, the criteria and procedures that the Debtors lay out serve to reduce the administrative burden on the Bankruptcy Court. As recognized by the Bankruptcy Court, it is simply not feasible for the Bankruptcy Court to make a ruling on each and every Critical Vendor payment:

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? And you want to publish the list, so they all know

³ Because of the voluminous nature of the orders cited herein, such orders have not been attached to this motion. Copies of these orders are available upon request of the Debtors' counsel.

they'll be paid right away? What is the effect on the cash flow of this company if that happens?

Doc. 6 at 106:3–10. The Bankruptcy Court ultimately determined that the construct that GLM argues in favor of is simply not feasible. The Bankruptcy Court ultimately found that, so long as the Debtors follow the factors set forth in the Vendor Motion, it is within the Debtors' business judgment to pay certain Critical Vendor Claims, as well as Lien Claims and 503(b)(9) Claims. This is a finding of fact that should not be disturbed absent clear error, which is not present here.

For the reasons described above and set forth in multiple judicial decisions in this jurisdiction, it is not an impermissible abdication of judicial duty to approve relief as set forth in the Vendor Motion. It is simply a recognition that sections 105(a) and 363(b) allow a Bankruptcy Court to approve payment of prepetition amounts within certain parameters where the circumstances warrant. And the multi-factor standard approved by the Bankruptcy Court here is both reasonable and supported by the vast weight of authority in this jurisdiction. Thus, neither allowing the Debtors to pay Critical Vendor Claims in their business judgement, nor the standard approved by the Bankruptcy Court to delineate whether the Debtors' exercise of business judgment was in fact appropriate, constitutes reversible error here.

Indeed, courts in this jurisdiction have approved analogous procedures based on similar considerations—for example, procedures utilized by chapter 11 debtors

for rejection of executory contracts, with the understanding that such procedures are a valid expression of a debtor's business judgment as well as a means of facilitating a complex chapter 11 case. *In re MF Global Holdings Ltd.*, 466 B.R. 239, 242 (Bankr. S.D.N.Y. 2012) ("It would be an unwarranted financial burden on the Debtors' estates to file individual motions to reject executory contracts. Moreover, the rejection of burdensome executory contracts and the attendant reductions in the estates' administrative costs (as a result of the rejection procedures) clearly reflects the proper exercise of business judgment. Establishing an efficient and effective procedure will also relieve the Bankruptcy Court of the burden of hearing numerous motions seeking the same relief."); *see also In re Old Carco LLC*, 406 B.R. 180, 194 (Bankr. S.D.N.Y. 2009) ("[T]he procedures utilized by the Debtors to determine which contracts would be assumed and assigned to the purchaser was a reasonable exercise of the Debtors' business judgment."). Far from being an impressive delegation of authority as GLM suggests, the procedures and criteria that the Debtors utilize are a proper exercise of their business judgment that similarly serve to ease the administrative burden on the Bankruptcy Court.

Second, the fact that the Bankruptcy Court did not require that the Debtors publish a list of Critical Vendors (or Lien Claimants or 503(b)(9) Claimants) does not constitute reversible error. As stated by the Debtors' witness during the Hearing,

publication of a list of critical vendors would severely handicap the Debtors' bargaining power:

I've never, in 13 years, published a list or articulated to a vendor that they were on a list. 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.

Doc. 6 at 80:7–12. The Bankruptcy Court echoed Mr. Grossi's concern, recognizing that “[i]f every vendor knew it, every vendor could object, and immediately you would have the run on the bank.” (Doc. 6 at 107:25–108:2).

For this reason, courts in this jurisdiction frequently approve critical vendor relief without requiring publication of a list of critical vendors, justifying this practice as a proper exercise of the Debtors' business judgment. *See, e.g., In re Aegean Marine Petrol. Network Inc.*, Case No. 18-13374 (MEW) (Bankr. S.D.N.Y. Dec. 6, 2018) (critical vendor order providing trade claimant matrix to professionals of the committee of unsecured creditors under the condition that the matrix is kept confidential); *In re Avaya Inc.*, Case No. 17-10089 (SMB) (Bankr. S.D.N.Y. Feb. 10, 2017) (critical order motion providing creditor matrix on a “confidential and professionals'-eyes-only basis”); *In re BCBG Max Azria Glob. Holdings, LLC*, Case No. 17-10466 (SCC) (Bankr. S.D.N.Y. Mar. 29, 2017) (critical vendor order providing creditor matrix to committee of unsecured creditors and counsel to DIP

lender on condition that these parties “shall not disclose any of the information in the matrix to anyone . . . without prior written consent”); *In re Hawker Beechcraft, Inc.*, Case No. 12-11873 (SMB) (Bankr. S.D.N.Y. May 30, 2012) (critical vendor order providing creditor matrix to U.S. Trustee and professionals retained by committee of unsecured creditors on the condition that these parties “keep the matrix confidential and shall not disclose to anyone” the names of critical vendors and the amount they are being paid).⁴

Likewise, the Debtors should not be required to publicly disclose a list of vendors or vendor payments to support the relief requested in the Vendor Motion. If the Debtors were required to make such disclosures, the Debtors’ businesses would potentially be harmed. For example, releasing such information could provide an unfair advantage to the Debtors’ competitors by providing such competitors with information as to the Debtors’ commercial operations. Additionally, such disclosure could impair the Debtors’ ability to reach fair settlements with each vendor on claim amounts and trade terms. Notably, the Debtors have successfully extracted certain concessions from vendors by leveraging this position. The Bankruptcy Court recognized these practical realities in granting

⁴ Because of the voluminous nature of the orders cited herein, such orders have not been attached to this motion. Copies of these orders are available upon request of the Debtors’ counsel.

the Vendor Motion. Moreover, to balance the competing interests of transparency and confidentiality, the Debtors have agreed to provide a matrix with the complete list of the Debtors' Critical Vendors to the U.S. Trustee, the creditors' committee, and to the Bankruptcy Court for an in camera review. The Debtors have also agreed to provide reporting regarding payments made to Critical Vendors to the U.S. Trustee and the creditors' committee.

GLM's arguments to the contrary miss the point entirely. As a baseline matter, there is no affirmative obligation under the Bankruptcy Code or otherwise to disclose the vendors the Debtors considered in sizing the quantum of relief requested in the Vendor Motion. And the fact that the Debtors identified and referenced certain vendors for the purpose of sizing such relief does not create an affirmative disclosure obligation. This stands in contrast to, for example, a chapter 11 debtor's obligation to make various disclosures in their schedules of assets and liabilities and statement of financial affairs. The fact that the Debtors identified specific vendors that would potentially meet the criteria approved by the Bankruptcy Court is only relevant to whether the Debtors satisfied their burden with respect to business judgment—a burden the Bankruptcy Court found the Debtors carried without requiring public disclosure of specific vendors. Moreover, to the extent GLM sought disclosure (even while no other vendor sought the same disclosure) to confirm whether it is a

Critical Vendor, the record below clearly indicates that the Debtors determined that GLM is not.

Thus, section 107(b) of the Bankruptcy Code and Bankruptcy Rule 9018 are simply not implicated. And even if those provisions were relevant, the Debtors have satisfied their burden to demonstrate that the identities of specific vendors are worthy of protection as confidential commercial information. As recognized by the Bankruptcy Court, disclosure of the identities of potential Critical Vendors would potentially be damaging to the Debtors' businesses and their estates. This finding, too, should not be disturbed absent clear error.

For these reasons, the Debtors respectfully submit that the District Court should, to the extent appropriate to consider the merits at all, affirm the Bankruptcy Court's decision to grant the Vendor Motion.

III. GLM IS NOT A CRITICAL VENDOR.

The Debtors take seriously their duty and commitment to pay only vendor claims that fall within the approved criteria. Indeed, as described at the hearing on the Vendor Motion, the Debtors have used only a limited portion of the relief requested in the Vendor Motion.

It is undisputed that GLM does not hold a Lien Claim or 503(b)(9) Claim. And the Debtors' decision to not designate GLM as a critical vendor was a proper exercise of their business judgment. GLM acts as a broker for waste removal groups

to dispose of the Debtors' waste. (Doc. 3 at ¶ 6). The Debtors applied the above-described factors and the Debtors' business judgment to assess whether GLM's role justifies designation of critical vendor status. (Doc. 1 at ¶ 13). Third party waste management services are not indispensable for the operation of a telecommunications company. Nor are those services irreplaceable. Indeed, the Debtors were able to secure a replacement waste services provider and have successfully rejected GLM's contract.

As it stands today, not only is GLM not a critical vendor, they are not a vendor of any kind as it relates to the Debtors. Ultimately, the Objection is nothing more than an effort to secure payment of GLM's prepetition claim—an effort that must fail.

CONCLUSION

For the foregoing reasons, the Debtors respectfully request that the District Court dismiss this appeal due to GLM's lack of appellate standing. Alternatively, for the reasons set forth herein, the Debtors request that the District Court affirm the Bankruptcy Court's ruling.

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Dated: August 14, 2019
New York, New York

/s/ Stephen E. Hessler

Stephen E. Hessler, P.C.

Marc Kieselstein, P.C.

KIRKLAND & ELLIS LLP

KIRKLAND & ELLIS INTERNATIONAL LLP

601 Lexington Avenue

New York, New York 10022

Telephone: (212) 446-4800

Facsimile: (212) 446-4900

- and -

James H.M. Sprayregen, P.C.

Ross M. Kwasteniet, P.C.

Brad Weiland

KIRKLAND & ELLIS LLP

KIRKLAND & ELLIS INTERNATIONAL LLP

300 North LaSalle Street

Chicago, Illinois 60654

Telephone: (312) 862-2000

Facsimile: (312) 862-2200

*Counsel to the Debtors-Appellees Windstream
Holdings, Inc. et, al.*

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type volume limitations of Rule 8015(a)(7)(B) because this brief contains 6,081 words, excluding the parts of the brief exempted by Rule 8015(g). This brief complies with the typeface requirements of Fed. R. Bankr. P. 8015(a)(5) and the type-style requirements of Fed. R. Bankr. P. 8015(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, in 14 point Times New Roman :

/s/ Stephen E. Hessler

Stephen E. Hessler, P.C.

CERTIFICATE OF SERVICE

I certify that on August 14, 2019, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States District Court for the Southern District of New York.

/s/ Stephen E. Hessler

Stephen E. Hessler, P.C.