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,	§	
	§	CIVIL ACTION: 7:19-cv-04854-CS
v.	§	
	§	
WINDSTREAM HOLDINGS, INC.,	§	
ET. AL.,	§	
	§	
Appellees.	§	

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

REPLY BRIEF OF APPELLANT

Davor Rukavina, Esq.
Texas Bar No. 24030781
Admitted *Pro Hac Vice*
MUNSCH HARDT KOPF & HARR, P.C.
3800 Ross Tower, 500 North Akard
Dallas, Texas 75201
Telephone: (214) 855-7500
Facsimile: (214) 855-7584

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND RULES

CASES

REPLY 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 *Reply Brief* (the "Brief") as follows:

I. SUMMARY

The issue is not and never was whether GLM is a critical vendor. The issue is not whether it is ever permissible to pay prepetition amounts owed to critical vendors. Rather, the issue is whether the Bankruptcy Court must decide who is a critical vendor, or whether a debtor can decide that fact for itself. The issue is not the Debtors' discretion on who they propose to pay, for that discretion only applies once a vendor has first qualified as a critical vendor. The issue is whether the proposed critical vendor has been shown, through reliable and sufficient evidence, to meet the underlying legal and factual requirements. The issue is not GLM's standing. To suggest that a creditor lacks standing in the bankruptcy case of its debtor is a remarkable argument, to say the least. The issue is not whether the underlying relief granted to the Debtors is commonplace or widely recognized. It is not. And, the issue in this Appeal is not GLM seeking "to pressure the Debtors into payment of prepetition amounts owed." The Bankruptcy Court should not have gone down this unproven and irrelevant path, and GLM hopes that this Court will not do so.[1]

The reason why the Debtors engage in such misdirection is simple: they cannot cite this Court to a *single* opinion authorizing the entry of the order on review. That the Bankruptcy Court may have entered similar orders (not opinions) in other cases does not control. It may be that no creditor objected in those cases, or that no creditor mounted an appeal. But that something may be the practice, even if a long standing one, is no legal basis to justify its continued existence if it is wrong. Likewise, that the Debtors' case is a big case gives the Debtors no greater legal rights than any other debtor has, nor relieves them of the obligations imposed on every other debtor, large and small. The equality of creditors, transparency, due process, and the separation of the judiciary from the administration of the estate are critical cornerstones of the Bankruptcy Code. That the Debtors do not discuss any of these principles should tell this Court all it needs to know.

[1] GLM's motivation is irrelevant to the legal issues raised in this Appeal, and GLM had hoped to avoid finger-pointing. Nevertheless, as the Debtors smear GLM in their brief, a few brief factual responses to this attack are warranted. First, the Debtors are in bankruptcy because they, and they alone, violated a covenant in their senior unsecured notes indenture because they engaged in a prohibited sale-leaseback transaction, as this Court recently concluded. This Court labeled that, plus the litigation maneuvers and shenanigans the Debtors attempted, as "too cute by half." *See* Case No. 1:17-cv-07587 (February 15, 2019 at docket no. 245) at p. 54. It is because of the Debtors' misdeeds—not an economic downturn—that GLM and many other innocent vendors are now unpaid. Second, as the Debtors correctly point out, GLM's contract has been rejected and GLM can never be a critical vendor. How then do the Debtors explain GLM prosecuting this appeal, if GLM's motivation all along was to coerce the Debtors into paying it as a critical vendor? Third, for every action there is an equal and opposite reaction. Should anyone be surprised that a small vendor who financed the Debtors would seek legal redress when it goes unpaid, while many other unknown and unnamed creditors, perhaps much larger and much more able to absorb the shock of nonpayment, are paid in full on their claims?

II. STANDING

The Debtors make the remarkable argument that a creditor lacks standing in the bankruptcy case of its debtor.[2] This argument is nonsensical, offensive to an innocent creditor, and legally unsupported by the very opinion relied on by the Debtors: "[c]reditors ordinarily have standing to appeal bankruptcy court orders that make a disposition of estate property." *Licensing by Paolo v. Sinatra (In re Gucci)*, 126 F.3d 380, 388 (2d Cir. 1997).

The Debtor's first standing argument is a red-herring. That GLM's contract has been rejected and that GLM is no longer a vendor to the Debtors is irrelevant. The Debtors' argument is predicated on the belief that GLM's objection to the underlying motion was in reality an attempt by GLM to obtain critical vendor status for itself, which is no longer possible after the rejection of the GLM contract, such that the relief GLM sought is now moot. But GLM did not seek any relief below. GLM did not file a motion. GLM *objected* to the Debtors' motion, and lost. It was not GLM's hearing, burden of proof, or burden of persuasion. That GLM can no longer be a *critical vendor* has nothing to do with GLM's standing as a *creditor* of the Debtors, and it is undisputed and cannot be disputed that GLM is a creditor. As the Debtors state, "GLM's claim will always be that of a prepetition unsecured

[2] It is telling that the Debtors did not make their standing argument below. The Bankruptcy Court would have certainly found the argument odd, to say the least, since just about every contested hearing the Bankruptcy Court conducts is between a debtor and its creditor. After all, the Bankruptcy Court exists to adjudicate debtor-creditor rights, obligations, and disputes.

creditor." Appellee Brief at p. 12. But that is precisely the point: GLM is a creditor of a *res* held in the *custodia legis* of the Bankruptcy Court where almost $185 million of that *res* have been released to pay other creditors.

As support for their standing argument, the Debtors cite the Court to *Licensing by Paolo v. Sinatra (In re Gucci)*, 126 F.3d 380 (2d Cir. 1997). The Debtors correctly cite this case for the "aggrieved person" test for appellate standing, and they correctly point out all of the holdings of this case, except for the one most important and relevant to this Appeal. For, while the Debtors discuss the lessons of this opinion, they omit the following quotation:

> Creditors ordinarily have standing to appeal bankruptcy court orders that make a disposition of estate property since that sort of order directly affects the funds available to meet their claims.

Id. at 388. And of course a creditor is a person directly aggrieved when a debtor uses, for some other purpose, property of an estate against which it has a claim.

For example, the Second Circuit has held that a creditor has standing as an "aggrieved person" to appeal an order confirming a plan, because the plan "allocates estate assets among creditor groups and determines the extent to which each creditor is to be paid." *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 642 (2d Cir. 1988). That is precisely what the order below did: it allocated estate assets between creditor groups and determined the extent to which they would be paid by establishing three classes of creditors who will be paid in full and in cash, now, while others like GLM remain wholly unpaid. And, the result of the order below is that $185 million of cash held by the Debtors is spent, something that every creditor has a direct, pecuniary interest in. *See In re Bohack Corp.*, 607 F.2d 258, 262 (2d Cir. 1979) (agreeing that creditor has appellate standing over fees paid to legal counsel: "[l]oss of assets is certainly an adverse effect upon the interests of creditors, and is unquestionably related to the bankruptcy proceeding"). On this point, if the Court reverses the underlying order, then up to $185 million will come back into the estate. That money will be available to pay unsecured claims, including GLM's claim.

In Chapter 11, the estate is a *res* that belongs to the creditors. The debtor only manages that estate with fiduciary duties to its creditors. *See, generally, In re Smart World Techs. LLC*, 423 F.3d 166, 175 (2d Cir. 2005). The debtor does not own the property of the estate but instead holds it in trust. *See, e.g., In re Draiman*, 450 B.R. 777, 807 (Bankr. N.D. Ill. 2011). GLM, as a creditor, effectively owns a small portion of that estate, and whatever portion goes to another person necessarily reduces GLM's share. And that is precisely the point: the Bankruptcy Court authorized the Debtors to deplete the bankruptcy estate, thereby removing property available to satisfy GLM's claim, thereby *ipso facto* satisfying the "directly and adversely affected pecuniarily" element. To suggest otherwise is to suggest that a creditor lacks standing with respect to what their debtor will do and how their debtor will manage and dispose of the estate from which the creditor's recovery will come.

If the creditor lacks standing, then who does? The Debtors are playing their hand with chips belonging to their creditors (and playing that hand rather badly, at that). The one owning the chips has a say in how they are played.

A subsidiary argument of the Debtors concerns the lien claimants and 503(b)(9) claimants also the subject of the underlying motion, where the Debtors argue that GLM, as an unsecured creditor, has no economic interest and therefore no standing in these creditors being paid. That these creditors have superior priority rights does not matter: estate funds are still being used to pay them, meaning that less will be available for GLM, and GLM has a right to at least know who these creditors are in order that GLM can review whether these creditors do in fact have superior priority rights and otherwise valid claims.

III. REPLY

A. SECRECY OF THE PROCESS

As GLM pointed out, the secrecy of who the critical and other vendors are is incompatible with the Bankruptcy Code, is not justified by any exception, makes it impossible for GLM and other creditors to review the Debtors' actions, and makes it impossible for GLM to present detailed arguments to this Court regarding the merits of what the Debtors are doing. In response, the Debtors do not cite any statute, do not even discuss the statute, and do not cite any relevant opinion. Instead, they repeat that if they were required to make the information public, their business could potentially be harmed, and they cite multiple orders—but not opinions—from the Bankruptcy Court granting similar relief in other cases. But the sole justification for the secrecy is that disclosing the information will lead to a loss of bargaining leverage. That is insufficient as a matter of law.

A very recent opinion from the Bankruptcy Court confirms this conclusion. *See In re Ditech Holding Corp.*, 2019 Bankr. LEXIS 2271 (Bankr. S.D.N.Y., July 19, 2019). This opinion concerned a motion by the debtor to approve a settlement agreement, but substantial portions of the settlement agreement were redacted and filed under seal. *See id*. at *2. The debtor argued that the redaction was permissible because the redaction was "commercial information" under section 107(b) of the Bankruptcy Code, and because disclosing the information publicly would lead to "a competitive disadvantage if the Court unseals the redacted information because they will lose leverage in future negotiations." *In re Ditech Holding Corp.* at *31. The court rejected this justification as sufficient under section 107(b) or as constituting commercial information in the required way: bargaining leverage is not commercial information. *See id*.

Bankruptcy filings "*must* be made publicly available" unless the information falls within one of the categories of information specified in section 107(b). *See id*. at *26 (emphasis in original) (internal quotation omitted). The burden is on the party seeking to seal the information; this is a "heavy burden of proof;" there should be "an extraordinary circumstance or compelling need;" and "evidence, not just argument, is required." *Id*. at *26-*27 (collecting and construing cases). With respect to what qualifies as "commercial information," this requires a showing that disclosure would "cause an unfair advantage to competitors by providing them information as to the commercial operations of the debtor." *In re Orion Pictures Corp*., 21 F.3d 24, 27 (2d Cir. 1994). A potential loss of bargaining power or leverage is not commercial information and does not rise to the extraordinary circumstance or compelling need required. *See id*. at *31.

In arriving at its conclusion, the court also relied on this Court's holding in *Geltzer v. Anderson Worldwide S.C.*, 2007 U.S. Dist. LEXIS 6794 (S.D.N.Y. 2007). Exercising its original jurisdiction, this Court denied the trustee's motion for approval of a settlement and it denied the trustee's request that the Court review the matter *in camera* because the settlement failed to disclose the amount of the settlement payment. *See id*. at *6. In rejecting the trustee's motion, this Court summarized and explained its holding as follows:

> This is an extraordinary request. As our Court of Appeals has emphasized, there is a 'presumption of access' to judicial proceedings. This presumption 'is based on the need for federal courts . . . to have a measure of accountability and for the public to have confidence in the administration of justice . . . . [P]ublic monitoring is an essential feature of democratic control.' . . . Information most clearly due for disclosure includes any 'document which is presented to the court to invoke its powers.' A stipulation of settlement in a matter in which the Court must approve the substance of the settlement is most certainly such a document. The press and public could hardly make an independent

> assessment of the facts underlying a judicial disposition, or assess judicial impartiality or bias, without knowing the essence of what the court has approved. In the case of bankruptcy documents, moreover, this general presumption in favor of public filing is reinforced by an explicit statutory command.

Id. at * 6-*8 (internal citations and quotations omitted). The trustee argued that public disclosure of the amount a debtor was willing to pay for a settlement was "commercial information" which could be sealed. Normally, parties to civil litigation may settle their claims and dismiss the litigation without disclosure of a settlement amount. Not so in bankruptcy, however:

> This constitutes a rather remarkable and untenable redefinition of 'commerce.' Courts have treated as 'commercial information' in bankruptcy filings such data as the names of clients in a list of creditors, lest publication permit competitors of the debtor to identify its clients and recruit them away from the debtor. But the terms of the instant settlement have to do only with the instant litigation, and have nothing to do with the competitive business operations of the debtor or of Andersen, in any normal sense of the words. If the Trustee's definition were accepted, then not only would any paper filed by Andersen in the course of litigation likely constitute secret 'commercial information,' but secrecy under this exception would also extend to any of countless cases involving a business entity actively defending civil suits for damages.

Id. at *9-*10 (internal quotation and citation omitted).

Applying the foregoing cases, it is clear that the Debtors are wrong when they suggest to this Court that sealing the underlying information here is ordinary, routine, and the norm. It is not. In fact, it is the exception, and one that should be rarely invoked and only upon a compelling evidentiary showing of the underlying facts. It is also clear that the Bankruptcy Court's power to pay a creditor prior to a plan cannot be invoked without at least knowing the name of the alleged critical vendor, lien claimant, or 503(b)(9) claimant. Nor can the public or any creditor, like GLM, make an independent assessment of the facts underlying a judicial decision without this most fundamental of information

Most importantly, it is also clear that the sole justification given by the Debtors to justify the secrecy is not "commercial information" as a matter of law, because it has nothing to do with competitive advantages or disadvantages. The sole evidence given by the Debtors to justify the secrecy was that the Debtors would lose bargaining power with the vendors, as they sought to negotiate favorable credit terms, if the vendors knew that the Debtors were going to pay them in full anyway and thus had no motivation to agree to favorable terms. In other words, the Debtors intended to hold the prospect of payment as a "carrot" over the innocent vendor to drive that vendor into granting favorable terms, while using the threat of non-payment as a "stick." Given that critical vendor status is based on the doctrine of necessity, the Debtors' proposed tactic is unscrupulous at best. But setting that issue aside, it is not "commercial information" because it has nothing to do with competitors and competitiveness, but only with the Debtors' own bargaining power and leverage with its own creditors. Or, if it has some relevance to competitiveness in the sense that the Debtors might be required to do something that their nonbankrupt competitors do not have to do, then that is the result of the Debtors voluntarily filing bankruptcy in the first place.[3]

It is conceivable that the identity of a critical vendor, lien claimant, or 503(b)(9) claimant could be confidential commercial information. If a debtor has a product, say a drug, that itself depends on a product from a sole-course vendor, such as a secret chemical used as a catalyst to trigger a chemical reaction, and if it were known that that vendor supplies the debtor, then one could deduce how the debtor makes its product. Indeed, the Debtors now argue to this Court that "releasing such information could provide an unfair advantage to the Debtors' competitors by providing such competitors with information as to the Debtors' commercial

[3] There is something deeply troubling about the Debtors' practice, which admittedly is the practice in large cases. GLM does not question that there may be a handful of critical vendors who must be paid because otherwise the business, and therefore the reorganization, will be severely prejudiced. It is troubling that a vendor would hold the process hostage, but it happens and sometimes there is nothing that a bankruptcy court can do about it. Hence the doctrine of necessity, where economic discrimination is permitted not for the common, greater good, but to prevent disaster.

But this practice has been permitted to devolve into something entirely different, likely because the bankruptcy courts over the decades have allowed a little bit more here, and a little bit more there, to where the practice now "through a thousand cuts" is little more than a tool that a debtor uses to drive a hard bargain from its vendor. The debtor owes the vendor money, but the debtor claims that it is legally prohibited from paying the claim, but, if the vendor grants concessions, then the debtor and court will graciously permit the immediate payment.

Two things about this practice are most troubling. First is that the law and the courts are used as a "game" by a debtor, blaming the law and the courts for the inability to pay, and then using extraordinary and equitable relief to coerce concessions. The law and the courts should never be an instrumentality like that, and a bankruptcy court should never clothe a debtor with that kind of power. Second, what about all the other creditors who are not paid? They have to sit there for years before any recovery, usually a fraction of what they are owed, while they watch a debtor use the process to drive hard bargains not necessarily with their critical vendors, but rather with their most important vendors. Those most important vendors, however, are usually the least "critical," because they are usually replaceable and because their relationship with a large debtor is usually important enough for its their own business purposes that they will not require immediate payment as a condition of providing postpetition goods and services.

The process should be about critical vendors. Yet debtors, like the Debtors here, use it simply as a business tool. That they keep it secret is just further proof of this conclusion.

operations." Appellee Brief at p. 22. The problem with this argument is that it was neither made, argued, or evidenced below, and was not the basis of the Bankruptcy Court's decision. At this stage, it is just argument, and argument does not substitute for the heavy evidentiary burden of proof required to seal this information.

Again, the <u>sole</u> argument and testimony regarding the secrecy was that "[t]elling 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." Transcript at 80:13-24. The only explanation from the Bankruptcy Court was that secrecy was needed to prevent a "run on the bank," which is the same as a loss of bargaining leverage since vendors knowing they were deemed critical would demand immediate payment. Transcript at 106:25-107:2. All that goes solely to the same type of "leverage in negotiations" argument rejected by the Bankruptcy Court in the *Ditech* opinion discussed above, and it is an argument about vague and generalized information that a business might prefer to keep secret—an argument expressly rejected by this Court in the *Geltzer* opinion discussed above. It would be something indeed if a Chapter 11 debtor can keep what it is doing secret from its creditors, even as it enjoys protection from them, just to preserve negotiation leverage.

B. STANDARDS GOVERNING CRITICAL VENDOR STATUS

The Debtors argue, as the Bankruptcy Court held below, that section 363(b) of the Bankruptcy Code authorizes the relief granted. This is a paradoxical argument. Section 363(b), with certain exceptions not relevant here, provides that a debtor "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). This is a very simple rule. If the use of property of the estate is "in the ordinary course of business," then no court approval is required (such as selling one's product). If the use of property of the estate is not in the ordinary course of business, then a hearing is required (such as selling substantially all property of the estate). Thus, for transactions outside the ordinary course of business, court approval is required.

Here then is the paradox: if the payment of critical vendors, etc., was in the ordinary course of business, then the Debtors did not have to file a motion, the Bankruptcy Court did not have to conduct a hearing, and the Bankruptcy Court did not have to enter the order that it did. Therefore, the very fact that the Debtors filed a motion, a hearing was held, and the Bankruptcy Court entered an order, strongly indicates that the transactions were not in the ordinary course of business (and that the Debtors knew it). More generally, while the payment of debt is in the ordinary course of business outside of bankruptcy, it ceases being in the ordinary course of business because of other provisions of the Bankruptcy Code, the same as various other things that are normally within the ordinary course of business now expressly require court approval (such as hiring accountants, incurring new debt, and assuming contracts, *see, e.g.*, 11 U.S.C. §§ 327(a), 364, & 365(a)). *See, e.g., In re Berry Good LLC*, 400 B.R. 741, 745 (Bankr. D. Ariz. 2008) (holding that a Chapter 11 debtor cannot pay prepetition debt in the ordinary course of business and that such payments are not the "use, sale, or lease" of property within the meaning of section 363(b)(1)).

The relief sought, and the payments themselves, were not in the ordinary course of business as a matter of law. The Bankruptcy Court had the authority to permit the payments, but this brings into question not the business judgment rule, the Debtors' discretion, or the various other concepts applicable to ordinary course transactions, but instead the "doctrine of necessity." This is not GLM's *ipse dixit*; it is instead the precise holding of cases from this District. *See, e.g., In re Ionosphere Clubs Inc.*, 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989).

As GLM has briefed, that doctrine, in turn, requires various things, whether they be factors or elements. What is always required, and what is held in every opinion authorizing critical vendor payments, is the concept of criticality, which itself requires two considerations: is the good or service critical to the debtor's business or reorganization, and does the debtor have any meaningful alternative (such as a replacement provider) to an immediate payment, which in turn requires the consideration of a third question, which is whether the vendor is indeed requiring the payment as a condition of providing postpetition goods or services.

The Bankruptcy Court's order and the evidence fail to satisfy any of these requirements. As argued in GLM's brief, the Bankruptcy Court's order leaves the decision to the Debtors' discretion. Even if this Court can read into that order the various factors or considerations listed by the Debtors, *see* Appellee Brief at pp. 16-17, most of those considerations have nothing to do with the critical nature of the goods or services, or a demand that prepetition amounts be paid, or that the Debtors have no meaningful alternative to paying the vendor. It is therefore not the doctrine of necessity, but rather the doctrine of convenience; something that is incompatible with the Bankruptcy Code. And, as the Debtors' witness at the hearing confirmed, he did not even contact the "critical" vendors to determine whether they were demanding immediate and full payment in exchange for providing postpetition goods and services—the very cornerstone of the doctrine of necessity in the first place.

C. GLM IS NOT A CRITICAL VENDOR

The Debtors argue that, insofar as GLM is no longer a vendor, it cannot be a critical vendor. They are correct. This is irrelevant to this Appeal and to the issues before the Court.

IV. CONCLUSION

No one is prejudiced if the Court agrees with GLM and reverses the order below. The Debtors may lose some bargaining leverage by being required to make the information public, and the Debtors and the Bankruptcy Court may have to have additional hearings. But, if there are critical vendors, the Debtors will still have the ability to obtain relief from the Bankruptcy Court on that front, and if the Debtors have done their work well and have been absolutely honest about their list, then it is likely that few questions, if any, will be asked once the information is public. Conversely, affirming the order below risks the public's trust in the integrity of the process, legitimizes without adequate reasons the economic discrimination against GLM and other creditors, and risks reducing the authority and dignity of the federal courts by permitting the delegation of their exclusive function to a private litigant.

RESPECTFULLY SUBMITTED this 28th day of August, 2019.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina
Davor Rukavina, Esq.
Texas Bar No. 24030781
Admitted *Pro Hac Vice*
500 N. Akard Street, Suite 3800
Dallas, Texas 75201-6659
Telephone: (214) 855-7500
Facsimile: (214) 855-7584

ATTORNEYS FOR THE APPELLANT

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 4,511 words.

By: /s/ Davor Rukavina
Davor Rukavina, Esq.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 28th day of August, 2019, a true and correct copy of this Brief was electronically served by the Court's ECF system on counsel for the appellees.

By: /s/ Davor Rukavina
Davor Rukavina, Esq.