

OBJECTION

1. The Debtors' Motion seeks to stay the purported deadline (the "Assumption Deadline") to assume or reject the Master Lease with Uniti "until 30 days after entry of a final, non-appealable judgment" on the Debtors' complaint, which, in turn, seeks, among other things, to recharacterize the Debtors' overall contractual arrangement with Uniti as a disguised financing.⁴ Motion, ¶ 6. The Debtors assert that the Court should stay the Assumption Deadline with respect to the Master Lease because such relief is "necessary and appropriate" to allow the Debtors to pursue the claims in their adversary complaint, which, if successful, would make the Assumption Deadline inapplicable to the Master Lease. Id. at ¶ 19.

2. Given that the Debtors are required under the Stipulated Extension Order to make a payment in December for "rent" under the Master Lease through January 7, 2020,⁵ the Ad Hoc Committee would support granting a stay of the Assumption Deadline through such date. While the Ad Hoc Committee has participated in good faith in mediation and will continue to take all necessary steps to work towards a settlement, the Ad Hoc Committee recognizes that a settlement may not materialize in the near term. If litigation is the only path forward, the Debtors must pursue their claims against Uniti while maximizing the value of their estates.

3. The extraordinary extent of the relief the Debtors are seeking, however, is neither necessary nor appropriate. The Motion seeks relief that is unquestionably both futile and detrimental to the interests of the Debtors' estates, and the alignment of the Debtors' key creditor constituency with Uniti in opposing the Motion highlights the misguided nature of the requested

⁴ See Windstream Holdings, Inc. v. Uniti Group, Inc., Adv. Pro. No. 19-08279 (Bankr. S.D.N.Y. July 25, 2019) [ECF No. 1].

⁵ See Stipulation and Agreed Order to Extend the Deadline Under Section 365(d)(4) of the Bankruptcy Code as to the Uniti Master Lease [ECF No. 965] (the "Stipulated Extension Order").

relief. If the Assumption Deadline is extended until 30 days after entry of a final, non-appealable judgment on the Debtors' complaint, it would only preserve the Debtors' ability to assume the Master Lease, which the Debtors clearly should never do. As the Debtors' counsel has acknowledged, "Windstream believes that the terms of its business relationship with Uniti are significantly out of market and that resolution of the parties' views of this arrangement is the touchstone gating item for being able to file and confirm a plan of reorganization."⁶ Indeed, upon information and belief, the Debtors have been making "rent" payments to the tune of hundreds of millions of dollars in excess of the market rate (on top of the significant monthly administrative expense burn in these cases), which has and continues to deplete the valuable cash that the Debtors need to sustain operations and effectuate a successful restructuring.

4. For these reasons, if the Assumption Deadline is extended for the length of time contemplated by the Motion and in the absence of any conditions on the making of further payments under the Master Lease, this expensive and unsustainable *status quo* will continue. Because the assumption of the Master Lease in its current form would endanger the prospects for a successful reorganization in these cases, preserving optionality to pursue a course of action that the Debtors cannot reasonably pursue is certainly not necessary.

5. A more appropriate path forward would be to allow the Assumption Deadline to pass after January 7, 2020. If this purported deadline lapses, Uniti would at most be entitled to payment of "rent" *at market rates*. As the Second Circuit has recognized, where a "debtor occupies property under a rejected lease, the debtor is liable only for the reasonable value of its use and occupancy of the property." Farber v. Wards Co., Inc., 825 F.2d 684, 689 (2d Cir. 1987); see also In re Kuvykin, 2018 WL 4191854, at *6 (Bankr. S.D.N.Y. Aug. 31, 2018) (setting

⁶ June 17, 2019 Hr'g Tr. 12:12-17 [ECF No. 896].

claim against debtor holdover tenant at fair market rent); In re Macomb Occupational Health Care, LLC, 300 B.R. 270, 293 (Bankr. E.D. Mich. 2003) (lessor's post-rejection claim determined by reference to amount debtor-lessee would have paid for alternative comparable lease). And, if the Court finds that the Master Lease is a disguised financing, given the hundreds of millions of dollars already paid to Uniti thus far, Uniti should not be entitled to receive any further payments at all.

6. Indeed, given the ongoing dispute as to whether the Master Lease is a true lease or a disguised financing, this Court has the power to direct Windstream Services, LLC to escrow the future payments under the Master Lease pending the outcome of that dispute regardless of the outcome of the Motion. See, e.g., In re Circuit-Wise, Inc., 277 B.R. 460, 462–64 (Bankr. D. Conn. 2002) (denying purported lessor's motion to compel payment of "rent" on a current basis when the proper characterization of the lease was in dispute, and reasoning that under section 365 of the Bankruptcy Code "it is well-settled that the term 'lease' . . . refers only to 'true' or 'bona fide' leases and does not refer to agreements which, although labelled 'leases', are actually disguised 'security agreements' . . ."). Because Uniti is a real estate investment trust which uses substantially all of its cash to pay dividends to its shareholders, such relief would protect the Debtors' estates from irreparable harm should the Court find that the Master Lease is a disguised financing since the Debtors' attempts to recover the "rent" improperly paid to Uniti post-petition might not be successful. But if an order is not entered directing the escrowing of the payments under the Master Lease and the Debtors are unwilling to drastically reduce their largest recurring expense, the Court should ensure that the Debtors' key stakeholders have an opportunity to seek to reduce the future payments under the Master Lease by presenting evidence of the market rate.

7. Accordingly, if the Court decides to stay the application of the Assumption Deadline beyond January 7, 2020, the Ad Hoc Committee submits that the Court should either

- (i) direct Windstream Services, LLC to escrow the future payments under the Master Lease at the contract rate until a final decision has been issued on the true nature of the Master Lease or
- (ii) adjust the future payments under the Master Lease to the market rate, as determined by the Court at a hearing scheduled before January 7, 2020.

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CONCLUSION

8. For the foregoing reasons, the Ad Hoc Committee respectfully requests that the Court deny the Motion and condition any stay of the application of the Assumption Deadline beyond January 7, 2020 on the terms set forth herein.

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