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

In re:)	
)	Chapter 11
)	
WINDSTREAM HOLDINGS, INC., <i>et al.</i> , ¹)	Case No. 19-22312 (RDD)
)	
Debtors.)	(Jointly Administered)

**STATEMENT OF THE OFFICIAL COMMITTEE OF UNSECURED
CREDITORS REGARDING THE DEBTORS' MOTION TO
STAY PURPORTED APPLICATION OF THE DEADLINE UNDER
SECTION 365(d)(4) OF THE BANKRUPTCY CODE TO THE UNITI ARRANGEMENT**

The Official Committee of Unsecured Creditors (the "Committee") of Windstream Holdings, Inc. and its debtor affiliates, as debtors and debtors-in-possession (collectively, the "Debtors"), by and through its undersigned counsel, hereby files this statement (the "Statement") regarding the *Debtors' Motion to Stay Purported Application of the Deadline Under Section 365(d)(4) of the Bankruptcy Code to the Uniti Arrangement* [Docket No. 848] (the "Motion").²

In support of this Statement, the Committee respectfully represents as follows:

¹ The last four digits of Debtor Windstream Holdings, Inc.'s tax identification number are 7717. Due to the large number of Debtors in these chapter 11 cases, for which joint administration has been granted, a complete list of the debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors' claims and noticing agent at <http://www.kcellc.net/windstream>. The location of the Debtors' service address for purposes of these chapter 11 cases is: 4001 North Rodney Parham Road, Little Rock, Arkansas 72212.

² Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Motion.



STATEMENT

1. As this Court is well aware, the claims set forth in the complaint filed in the adversary proceeding commenced by the Debtors against Uniti, *Windstream Holdings, Inc. v. Uniti Group, Inc., et al.*, Adv. Pro. No. 19-08279 (the “Adversary Proceeding”) [Adv. P. Docket No. 1] (the “Complaint”), must be addressed in order for the Debtors to exit bankruptcy successfully. While that dispute is pending, the continued uncertainty regarding the status of the Master Lease is also critically impacting these chapter 11 cases. Under this cloud of uncertainty, the Debtors have continued to pay \$54 million a month to Uniti. If the recharacterization claims in the Adversary Proceeding are successful, then these continued payments will be payments to a prepetition, unsecured creditor. Thus, no matter the outcome of the Motion, something needs to be done about the Debtors’ continued payment of over-market “rent” under the Master Lease.

2. As the Debtors point out in the Motion and the Committee has consistently argued, the section 365(d)(4) deadline does not apply to the Master Lease because the Master Lease is not a true lease. *See In re PCH Assocs.*, 804 F.2d 193, 200 (2d Cir. 1986) (“We believe that reading a requirement of a true lease into section 365 is necessary to effectuate the purposes of that section.”). Moreover, as set forth in the complaint and recent opposition to Uniti’s motion to dismiss, even if the Master Lease is a true lease, it is not a lease of nonresidential real property. *See* Complaint ¶¶ 188–89; *see also Plaintiffs’ Opposition to Uniti’s Partial Motion to Dismiss* [Adversary Proceeding Docket No. 36] ¶¶ 22–25. Under either scenario, the section 365(d)(4) deadline does not apply.

3. Even assuming the Master Lease is a true lease, it is clear that, as a practical matter, the Debtors cannot afford to assume the Master Lease under its current terms. Indeed, the Committee’s professionals believe that the current payments under the Master Lease—approximately \$660 million per year—are significantly above the market rate to lease the

property covered by the Master Lease. The Debtors simply cannot reorganize under the yoke of this significant expense (along with other out of market terms related to the treatment of, among other things, tenant capital improvements). The current terms put the Debtors at a material competitive disadvantage in a highly competitive industry.

4. While it is difficult to imagine a scenario in which assumption of the Master Lease in its current form could ever make economic sense to the Debtors, the Committee has no objection to a limited one-month extension of the section 365(d)(4) deadline to January 2020. The Debtors are already required to pay December rent under the *Stipulation and Agreed Order to Extend the Deadline Under Section 365(d)(4) of the Bankruptcy Code as to the Uniti Master Lease* [Docket No. 965]. However, any payments to Uniti after December are either loan repayments to a prepetition unsecured creditor (if the Master Lease is recharacterized), or grossly above-market rent payments. Under either scenario, the Debtors' estates would likely never recoup these payments. The bleeding must stop. Any further extension of the section 365(d)(4) deadline beyond January should be on the condition that the payments made to Uniti under the Master Lease are paid into escrow, and/or adjusted to market rates.

5. Absent some relief regarding the Debtors' obligations to Uniti, the Committee believes that the economic and legal realities of the case require the Debtors to permit the section 365(d)(4) deadline to lapse (to the extent it even applies). If the deadline lapses, one of three things would be true (any of which justifies modification of the Debtors' payment obligations to Uniti):

- The Master Lease is, in fact, a real property lease, in which case it will be deemed rejected. The Debtors would then be entitled to remain in possession of the premises so long as they pay Uniti the fair market value of the rental obligations. *See, e.g., Farber v. Wards Co., Inc.*, 825 F.2d 684 (2d Cir. 1987) (reasoning that 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.”); *see also In re Kuvykin*, 2018 WL 4191854, at *6 (Bankr. S.D.N.Y. Aug. 31, 2018) (setting claim against debtor holdover tenant at fair market rent).

- The Master Lease is a lease of personal property; in which case, the Court can modify the Debtors’ lease obligations under the equities of the case exception in section 365(d)(5) of the Bankruptcy Code. *See, e.g., Amplicon, Inc. v. CNB Int’l, Inc.*, No. 04-CV-0394E(Sc), 2006 U.S. Dist. LEXIS 101199, at *23 (W.D.N.Y. Mar. 31, 2006) (noting modification of rent payments was warranted by the equities of the case exception in section 365(d)(5)). In light of the pending dispute as to whether the Master Lease is actually a lease and how grossly out of market the payments are, the Committee believes the equities of the case here clearly dictate modifying the Debtors’ payment obligations.
- The Master Lease is, as asserted in the Adversary Proceeding, a disguised financing arrangement. In this case, hundreds of millions already paid to Uniti during the case would be subject to clawback. At the very least, no further payments would be justified. At most, Uniti would be entitled to some form of adequate protection (which could presumably also take the form of “market rent” and/or escrowed payments).

6. Regardless of the outcome of the Motion, the Committee and other key stakeholders are prepared to support, with appropriate evidence, payments to Uniti in a reduced amount (and/or escrowing the payments). However, maintaining the *status quo* and requiring the Debtors to remit additional payments that could exceed \$200 million while the dispute as to the character of the Master Lease is pending is unacceptable. Indeed, this outcome will make crafting a confirmable chapter 11 plan significantly more difficult, if not impossible. The Committee, therefore, believes that the section 364(d)(4) deadline should be extended until January 7, 2020, and the Court should condition any additional extension on further briefing as to whether future payments should be made at market rates and/or paid into escrow pending the outcome of the Adversary Proceeding.

RESERVATION OF RIGHTS

7. The Committee reserves all rights with respect to the Motion, including the right to supplement this Statement and to raise additional arguments or objections before or at the hearing to consider the relief sought.

Dated: November 18, 2019
New York, New York

Respectfully submitted,

/s/ Lorenzo Marinuzzi

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