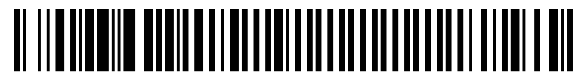
Docket #0094 Date Filed: 2/24/2020

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
WINDSTREAM HOLDINGS, INC., *et al.*,	Case No. 19-22312 (RDD)
Debtors.	(Jointly Administered)
WINDSTREAM HOLDINGS, INC. and WINDSTREAM SERVICES, LLC,	
Plaintiffs,	Adversary Proceeding
v.	Case No. 19-08279 (RDD)
UNITI GROUP, INC., *et al.*	
Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' PARTIAL MOTION TO DISMISS DEFENDANTS' ANSWER TO PLAINTIFFS' AMENDED COMPLAINT, AFFIRMATIVE DEFENSES, COUNTERCLAIMS AND THIRD PARTY COMPLAINT

Windstream Holdings, Inc. ("Holdings") and Windstream Services, LLC ("Services," and together with Holdings and their subsidiary counterclaim co-defendants, "Windstream") respectfully submit their memorandum of law in support of their Partial Motion to Dismiss the Sixth and Seventh Causes of Action of Defendants' Answer to Plaintiffs' Amended Complaint, Affirmative Defenses, Counterclaims, and Third Party Complaint [Adv. Pro. Docket No. 80] ("Countercl.").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PRELIMINARY STATEMENT

1. One month before trial, Uniti filed seven counterclaims, including a counterclaim for constructive fraudulent transfer that would require this Court to make a factual determination regarding Uniti's alleged insolvency without the benefit of any fact or expert discovery.

2. The counterclaims are all contingent on the court's determination on Windstream's claim for recharacterization. Five of the seven counterclaims are aimed at *how* the Court should recharacterize the underlying agreements and Uniti's purported interest in the Leased Property in the event the Court recharacterizes the Uniti Arrangement. Counts VI and VII, however, seek relief regarding the Transaction Consideration Uniti paid as part of the Arrangement. While not conceding any of the counterclaims, Windstream herein seeks dismissal of Counts VI and VII.[1]

3. Counterclaim VI for constructive fraudulent transfer and Counterclaim VII for unjust enrichment would inject complicated questions of fact into the upcoming trial if they were allowed to proceed. However, both counterclaims are barred by decades (or, in the case of Counterclaim VI - many centuries) of black letter law. This court may, and should, dispose of these now.

4. In Counterclaim VI, Uniti is seeking to use constructive fraudulent transfer law to avoid its own transfers; that is improper as a matter of law. *Eberhard v. Marcu*, 530 F.3d 122, 131 (2d Cir. 2008) ("Fraudulent conveyances are binding on all non-creditors, including the transferor himself.")

5. In Counterclaim VII, Uniti asserts a claim for unjust enrichment arising from the payments it made as part of the sale leaseback with Windstream, while also alleging

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[1] If the Court rules in favor of Windstream on its recharacterization claim, Windstream will respond at such appropriate time to Uniti's claims as to *how* the Arrangement should be recharacterized and the resulting impact on Uniti's claim, if any, regarding the Leased Property.

that this transaction was governed by written contract. That is also grounds for immediate dismissal. *In re Cavalry Constr., Inc.*, 2013 WL 5682741, at *5 n.7 (Bankr. S.D.N.Y. Oct. 18, 2013)

BACKGROUND

6. Uniti's allegations in Count VI and VII center on the Separation and Distribution Agreement ("SDA"), which it is uncontested that the parties entered into to effectuate the purported spin-off of Windstream's telecommunications network assets (the "Spinoff"). Am. Compl. ¶¶ 70, 84, 90. Pursuant to that executed contract, Uniti alleges that it made several transfers to Services. Countercl. ¶¶ 498-502.

7. Around 2013, Windstream desired to deleverage so it could expand its fiber network and provide high-speed, reliable internet to more of its customers without sacrificing its historical, steady dividend. *Id.* ¶ 353. To achieve that goal, Windstream contemplated a multi-step, integrated Spinoff transaction resulting in the Uniti Arrangement. The Spinoff created a second company, which could be classified as a REIT. The REIT could continue paying dividends to investors while also collecting on the related tax benefits; Windstream would have increased cash flow to invest in its fiber network to appeal to growth investors. *Id.*

8. The first step of the transaction was the transfer of certain telecommunications assets from Windstream to Uniti. *Id.* ¶ 365. The parties signed the SDA on March 26, 2015, which effectuated this "transfer". *Id.* ¶ 84. In exchange, Uniti assumed certain Windstream liabilities,

paid approximately $1.0335 billion in cash to Services, and transferred certain debt securities and loans to Services in the amount of $2.5 billion. *Id.*

9. In the second step of the transaction, Services distributed 80.4% of the Uniti Common Stock to Holdings, which Holdings then distributed to its existing shareholders. *Id.* ¶ 365.

10. Holdings then leased all of the assets back from Uniti pursuant to the Master Lease. *Id.* ¶ 90. Holdings is the sole tenant under the Master Lease. Services could not be a party to the Master Lease without violating its debt covenants. *Id.* ¶¶ 387-88. Both parties were aware at the time of signing that Holdings would serve as the sole "tenant" under the Master Lease. *Id.* Uniti's management acknowledged that it agreed to the Master Lease despite being aware that it would have been more beneficial for Uniti to have direct privity with Services. *Id.* ¶ 387. Uniti knew that it was strategically advantageous for Windstream if Services was not a party to the Master Lease. *Id.* Nonetheless, Uniti decided it was sufficiently beneficial to both parties such that it signed the agreement.

11. Now, Uniti argues that if this court equitably recharacterizes the transaction, then Uniti's transfers would amount to a fraudulent transfer and unjust enrichment of the transferee. *Id.* Counts VI-VII.

LEGAL STANDARDS

12. To survive a motion to dismiss under Rule 12(b)(6), made applicable to these proceedings by Fed. R. Bankr. P. 7012, a complaint must contain factual allegations that plausibly suggest the defendant is liable for the conduct alleged. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). While the court must accept as true all factual allegations contained in the pleading when ruling on a Rule 12(b)(6) motion, *Erickson v. Pardus*, 551 U.S. 89, 94 (2007), it is not "bound

to accept as true [any] legal conclusion couched as a factual allegation." It is improper to assert claims that violate centuries of controlling authority, and such claims are properly dismissed on a Rule 12 motion. *See* FRCP 12(b).

ARGUMENT

I. Uniti, as Transferor, Cannot Sue to Avoid its Own Transfers (Count VI)

13. Uniti, the alleged transferor, seeks to avoid ***its own transfer***. That is not how the law works. "[U]nder New York law, the transferor lacks standing to avoid its own fraudulent transfer." *Helicon Partners, LLC v. Kim's Provision Co.*, 2013 WL 1881744, at *7 (Bankr. S.D.N.Y. May 6, 2013); *see also Eberhard*, 530 F.3d at 131 ("Fraudulent conveyances are binding on all non-creditors, including the transferor himself.").[2]

14. This rule goes back to the 16th Century and was embodied in the foundational fraudulent transfer law enacted by English Parliament. *Eberhard*, 530 F.3d at 129 ("This proposition is hardly novel—section 276 is a direct descendant of the Statute of Elizabeth, enacted by Parliament in 1570.").

15. In the intervening 450 years the rule has not changed, and it has been reiterated time and again by US Courts, *see, e.g. Helicon Partners,* 2013 WL 1881744, at *7 (holding that a "transferor lacks standing to avoid its own fraudulent transfer."); *United States v. Watts*, 786 F.3d 152, 162 (2d Cir. 2015) ("In order to contest the validity of a transfer under § 273, it is thus well settled under New York law that the challenger must be a creditor.") (internal quotation marks omitted); *In re Vaughan Co.*, 498 B.R. 297, 306 (Bankr. D.N.M. 2013) (holding that a transferor does not have standing "to avoid its own transfers."); *Lefmann v. Brill*, 142 F. 44, 45 (6th Cir.

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[2] Of course, federal bankruptcy law permits debtors and debtors in possession to avoid pre-petition transfers for the benefit of the estate's creditors. *See* 11 USC 548. Uniti is not a debtor or debtor in possession.

1905) ("The statute of Elizabeth is only intended to protect creditors, as to all others the mortgage or conveyance is valid."); *In re Friedman's, Inc.*, 372 B.R. 530, 545 (Bankr. S.D. Ga. 2007) (finding that only creditors and trustees can "unwind transactions that would otherwise be legal and binding between the transferor and transferee."); *In re Hirsch*, 339 B.R. 18, 29 (E.D.N.Y. Bankr. 2006) ("The New York statute does not permit the transferor himself to recover any property he has fraudulently transferred…"); *In re Murphy*, 331 B.R. 107, 124 (Bankr. S.D.N.Y. 2005) ("Fraudulent conveyance laws were not designed to affect the legal relationship between the transferor and the transferee."); *Pattison v. Pattison*, 92 N.E.2d 890, 894 (N.Y. 1950) ("The general rule, that courts will…extend no remedy to a grantor or vendor of property…is too well settled to be now called in question.");

16. Because Uniti lacks standing to avoid its own transfers on a fraudulent transfer theory, this claim must be dismissed.[3]

II. Unjust Enrichment is Precluded Where a Valid and Enforceable Contract Governs the Subject Matter at Issue (Count VII)

17. Count VII must be dismissed because Uniti has alleged that the relationship between the parties was governed by a valid contract.

18. Uniti seeks to recover the "Transaction Consideration" under a theory of unjust enrichment. *See* Countercl. ¶¶ 498-502. "Transaction Consideration" is defined in Uniti's own pleading as a combination of cash and securities paid pursuant to the Separation and Distribution Agreement. *See Id.* ¶ 84 (defining Transaction Consideration and "respectfully refer[ring] the

[3] Even if the counterclaim for constructive fraudulent transfer were not subject to dismissal as a matter of law, it would be improper to consider it at the upcoming trial because it would require this Court to make a factual determination regarding Uniti's alleged insolvency without the benefit of any fact or expert discovery on such issue.

Court to the Separation and Distribution Agreement for its contents."). Plainly, this was a transfer governed by a contract.

19. Courts have repeatedly held that claims for unjust enrichment are "precluded by the existence of a contract or contracts governing the subject matter at issue." *In re Cavalry Constr.,* 2013 WL 5682741, at *5 n.7 (citing *Pappas v. Tzolis*, 20 N.Y.3d 228, 234 (2012); *Clark–Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 388–89 (1987)).

20. Unjust enrichment is a quasi-contractual claim that "ordinarily can be maintained only in the absence of a valid, enforceable contract." *Ohio Players, Inc. v. Polygram Records, Inc.*, 2000 WL 1616999, at *4 (S.D.N.Y. Oct. 27, 2000); *See Diesel Props. S.r.l. v. Greystone Bus. Credit II LLC*, 631 F.3d 42, 54 (2d Cir. 2011) (affirming the dismissal of an unjust enrichment claim "in light of the agreements among the parties").

21. It does not matter that some of the counterclaim Defendants are not parties to the SDA. "[I]n the last two decades, decisions both in New York state courts and in this district have consistently held that claims for unjust enrichment may be precluded by the existence of a contract governing the subject matter of the dispute even if one of the parties to the lawsuit is not a party to the contract." *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162, 202 (S.D.N.Y. 2011) (internal quotation marks omitted) (collecting cases). "That principle applies even where 'the party seeking to dismiss the claim is not a party to the contract.'" *Teachers Ins. & Annuity Ass'n of Am. v. CRIIMI MAE Servs. Ltd. P'ship*, 681 F.Supp. 2d 501, 511 (S.D.N.Y. 2010); *Law Debenture v. Maverick Tube Corp.*, 2008 WL 4615896, *13 (S.D.N.Y. Oct. 15, 2008) ("The Court finds the trend of recent New York state and federal decisions to be persuasive and concludes that a claim for unjust enrichment, even against a third party, cannot proceed when there is an express agreement between two parties governing the subject matter of the dispute.").

22. This result will not change if the Court recharacterizes the sale leaseback as a financing. A financing contract has the same preclusive effect on this claim as the SDA and Master Lease do. In light of the valid, enforceable contracts among the parties, the Court should dismiss Uniti's claim that it is entitled to recover from Windstream for unjust enrichment.

23. Further, both Counts VI and VII fundamentally mischaracterize Windstream's claim for recharacterization. If the Court recharacterizes the transaction as a financing, the result will not be that Uniti paid consideration in exchange for nothing; the result will be that Uniti made a ***loan*** that Holdings—and only Holdings—agreed to repay as disguised rent under the Master Lease.

24. In order to recover for unjust enrichment, Uniti must demonstrate that Windstream was enriched at Uniti's expense. Under New York law, unjust enrichment is meant to remedy circumstances in which the defendant is in possession of property that "in equity and good conscience" he ought not retain. *In re Chowaiki & Co. Fine Art Ltd.*, 593 B.R. 699, 720 (Bankr. S.D.N.Y. 2018). This cannot be true for Uniti. If the Master Lease was recharacterized, Uniti would receive exactly what it bargained for: a financing agreement. *See Marino v. Coach, Inc.*, 264 F.Supp. 3d 558, 573 (S.D.N.Y. 2017) ("In order to state a claim for unjust enrichment, a plaintiff must allege that the benefit he or she received…was not what was bargained for."); *see also In re Canon Cameras*, 237 F.R.D. 357, 359 (S.D.N.Y. 2006) (holding that to prove unjust enrichment, plaintiff must receive less than what he bargained for).

25. The fact that this putative claim for repayment lies at Holdings only, resulting in at most a structurally subordinated claim, is due entirely to Uniti's own decision to limit its privity under the Master Lease to Holdings alone. Uniti cannot claim unjust enrichment simply because

its agreement has been found to be exactly what the economic realities of the transaction dictate. None of this gives rise to a claim for either fraudulent transfer or unjust enrichment.

26. For Uniti to decide it no longer benefits from the agreement it negotiated and signed does not suddenly mean Windstream is in possession of property in violation of "equity and good conscience." Not only is Uniti attempting to duplicate its breach of contract claim through the equitable remedy of unjust enrichment, it also is trying to create a claim where there is none. *See Digizip.com Inc. v. Verizon Servs. Corp.*, 139 F. Supp. 3d 670, 682–83 (S.D.N.Y. 2015) ("[U]njust enrichment is not a catchall cause of action to be used when others fail.") (internal quotation marks omitted).

Conclusion

For the foregoing reasons Windstream respectfully asks that the Court grant this partial motion to dismiss Uniti's counterclaims VI and VII.

Dated: February 24, 2020
New York, New York

/s/ Stephen E. Hessler, P.C.

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