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

In re:

WINDSTREAM HOLDINGS, INC., *et al.*,¹
Debtors.

WINDSTREAM HOLDINGS, INC., and
WINDSTREAM SERVICES, LLC,
Plaintiffs,

vs.

UNITI GROUP INC., *et al.*,
Defendants.

UNITI GROUP INC., *et al.*,
Third-Party Plaintiffs,

vs.

CAVALIER TELEPHONE, LLC, *et al.*,
Third-Party Defendants.

Chapter 11

Case No. 19-22312 (RDD)
(Jointly Administered)

Adv. Pro. No. 19-08279 (RDD)

**DEFENDANTS' MOTION *IN LIMINE* TO PRECLUDE TESTIMONY OF
ANTHONY THOMAS REGARDING THE SPINOFF AND MASTER LEASE
AGREEMENT**

¹ The last four digits of Debtor Windstream Holdings, Inc.'s tax identification number are 7717. A complete list of the debtor entities and the last four digits of their federal tax identification numbers may be obtained on the website of the Debtors' claims and noticing agent at <http://www.kccllc.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.



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Defendants (collectively, “Uniti”), by and through their counsel, respectfully move to preclude Plaintiffs (collectively, “Windstream”) from introducing evidence on various topics over which Windstream’s counsel asserted privilege at the deposition of Anthony Thomas.

BACKGROUND

1. On November 20, 2019, Uniti deposed Anthony Thomas, Windstream’s President and Chief Executive Officer, in his individual capacity and as a corporate representative of Windstream. *See* Declaration of Elliot Moskowitz, dated February 26, 2020 (“Moskowitz Decl.”)

Ex. 1, Thomas Tr. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

2. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

3. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED],

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

4. On February 26, 2020, Windstream submitted a declaration on behalf of Mr. Thomas. *See* Affidavit of Anthony Thomas, dated February 26, 2020 (the “Thomas Aff.”) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

ARGUMENT

5. It is well-settled that “the attorney-client privilege cannot at once be used as a shield and a sword.” *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991). Accordingly, a party cannot rely on evidence at trial after having previously withheld that evidence from its adversary during discovery on the basis of attorney-client privilege. *See In re Res. Cap., LLC*, 491 B.R. 63, 72 (Bankr. S.D.N.Y. 2013) (“[H]aving asserted the attorney-client privilege throughout discovery, the Debtors cannot now introduce the substance of whatever advice it sought and received.”). Where a party attempts to introduce at trial evidence previously withheld on the basis of privilege, exclusion is appropriate. *See id.* at 69 (“A court should exclude any testimony or evidentiary presentations by the Defendants at trial if that same

testimony or evidence was withheld from Plaintiffs during discovery based on attorney-client privilege.” (internal citation omitted)); *Cary Oil Co. v. MG Refining & Marketing, Inc.*, 257 F. Supp. 2d 751, 761 (S.D.N.Y. 2003) (“[T]o the extent that Defendants have withheld facts from discovery . . . they will not be allowed to introduce such facts in any form at trial.”). This includes situations where a party prevents “inquiry at a deposition” on the basis of attorney-client privilege. *See, e.g., Galindo v. Vanity Fair Cleaners*, 2012 WL 2510278, at *2 (S.D.N.Y. June 29, 2012).

6. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

RESERVATION

7. Uniti notes that the deadline for the submission of trial affidavits was only three hours prior to the deadline for the submission of motions *in limine*. Uniti submits this Motion based on the review of the Thomas Aff. and any related discovery materials it has been able to conduct during that time. Uniti reserves the right to amend this Motion to incorporate additional facts or case law upon a further review of any related discovery materials.

CONCLUSION

8. For the foregoing reasons, Uniti respectfully asks this Court to strike [REDACTED] of the Thomas Aff. and to preclude any live testimony on the same topic at trial.

Dated: New York, New York
February 26, 2020

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