

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

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

**DECLARATION OF ANTHONY THOMAS**

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<sup>1</sup> 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' proposed 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.

Pursuant to 28 U.S.C. § 1746, I, Anthony Thomas, hereby declare as follows under penalty of perjury:

1. I am the President and Chief Executive Officer at Windstream and have held those positions since December 2014. I also have been a member of the Windstream Board of Directors since December 2014.

2. I have held a senior management position at Windstream since it was spun off from Alltel in 2006. I served as Windstream's Controller from 2006 to 2009 and as its CFO from 2009 to 2014. I also served as Windstream's Treasurer from 2012 to 2014. In August 2014, I was appointed President of the Real Estate Investment Trust Operations and oversaw the operations of the group that would go on to become Uniti until I was appointed Chief Executive Officer of Windstream. I am an accountant by training and obtained a MBA from Wake Forest University.

3. I support Windstream's settlement with Uniti.<sup>2</sup> This settlement, which I refer to as the "Uniti Settlement," is the result of months of hard-fought, arm's-length negotiations. The proposed settlement provides immense benefit to Windstream, its stakeholders, and its customers; and positions Windstream for success upon emergence from these chapter 11 cases. It is, in short, a win—well above the lowest point in the range of reasonableness I had in mind when Windstream first filed its Complaint against Uniti.

4. I understand that this Declaration is intended to be submitted in lieu of direct testimony and that I will be subject to cross-examination. I have personal knowledge of the facts set forth below. In Section I, I evaluate the Uniti Settlement's benefits to Windstream and its stakeholders from my perspective as Windstream's CEO and as a Board member. In Section II, I discuss Windstream's claims investigation, which led to the filing of the Complaint against Uniti,

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<sup>2</sup> A true and correct copy of the term sheet memorializing the Uniti Settlement is JX 51.

and our evaluation of the merits and risks of that lawsuit. In Sections III, IV, and V, I summarize the mediation process that facilitated the Uniti Settlement and Windstream Board's approval of—and the significant creditor support for—the Uniti Settlement. Last, in Section VI, I evaluate the Backstop Commitment Agreement.

## **I. THE UNITI SETTLEMENT**

5. With respect to the benefits to Windstream from the Uniti Settlement,<sup>3</sup> I understand that our financial advisor PJT Partners is submitting a separate declaration measuring the economic benefits of the Uniti Settlement—which I understand to be approximately between \$1.25–\$1.5 billion—and comparing that value to the potential litigation outcomes, including whether Windstream accepted or rejected the Master Lease if it lost. I agree with Mr. Leone that the Uniti Settlement produces approximately \$1.25 billion in value to the Windstream estates, including hundreds of millions of dollars of cash up front and a commitment to pay \$1.75 billion for essential capital improvements over the next 10 years. For this declaration, I will focus primarily on the business and non-economic (or not easily quantifiable economic) benefits of the Uniti Settlement.

6. *First*, the Uniti Settlement enables Windstream to remain viable as a going concern, which generates long-term value to Windstream's stakeholders. Windstream competes in a capex intensive business, and requires significant funds to reinvest in its network. Consumers demand faster and faster broadband speeds, and broadband providers like Windstream must continue to upgrade their networks to meet that demand and remain competitive. The future of broadband speeds is at least 1 Gb/s, and a copper network cannot facilitate those speeds. One of Windstream's

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<sup>3</sup> A true and correct copy of the Uniti Term Sheet is Exhibit B of JX 51. A true and correct copy of the Settlement Agreement is Exhibit A of JX 77.

principal challenges since before I became CEO in December 2014 has been finding enough funds to reinvest in its business.

7. Under the Uniti Settlement, Uniti now has committed to providing Windstream with the required funds for capital investments: \$1.75 billion in Growth Capital Improvements (“GCI”) through December 2029 at an 8.0% capitalization rate. The Uniti Arrangement in 2015 was an interim step for raising funds, and the Uniti Settlement is the next step for positioning Windstream for success.

8. Absent the Uniti Settlement, Windstream cannot match the benefits from Uniti’s GCI funding commitment. It is more favorable than what Windstream can obtain through the capital markets upon emergence—assuming Windstream is even able to exit chapter 11 absent a settlement with Uniti. Prior to Windstream’s chapter 11 filings and Aurelius’ notice of default, Windstream was raising secured debt at a rate of 8.6–9.5% and unsecured debt at a rate of 13%+. Depending on Windstream’s post-reorganization capital structure and whether the Master Lease is assumed, I cannot envision Windstream obtaining another \$1 to \$2 billion of capital on more favorable terms—if at all. Windstream’s post-emergence debt instruments could contain restrictions that preclude it from raising that amount of debt. Further, unless the Master Lease was reformed, Windstream’s fiber investments would become Uniti’s collateral—not Windstream’s—due to the undesirable Tenant Capital Improvements provisions.<sup>4</sup>

9. The long-term benefits from Windstream’s growth accrue to the benefit of the entire estate as well as the Company’s future equity holders.

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<sup>4</sup> A true and correct copy of the Master Lease is JX 1. Section 10.2(c) of the Master Lease governs Tenant Capital Improvements.

10. *Second*, the Uniti Settlement addresses the TCI provisions and realigns the incentives between Uniti and Windstream. Both companies now benefit when Windstream invests in overbuilding the copper network with fiber. Neither benefited under the existing Master Lease because Windstream had to fund capital investments that Uniti owned. Windstream, as a result, had been searching for alternatives to the Uniti network to avoid forfeiting ownership of these investments and facing increased rent costs at renewal terms. Now Uniti will both fund and own the capital investments.

11. *Third*, I understand that Uniti could not provide much more settlement consideration to Windstream without creating an undue risk to its own business.

12. *Last*, there are significant indirect benefits to Windstream from the Uniti Settlement. For example, the Uniti Settlement removes the gating item to Windstream's emergence from chapter 11, which has allowed Windstream to chart an exit path.<sup>5</sup> Otherwise, Windstream's exit path would have remained uncertain even though these chapter 11 cases have been pending for more than a year. Providing an exit path and ultimately emerging from bankruptcy is critical for Windstream's business in the long and short term as, despite the best efforts of Windstream, its advisors, its creditors and the Court, continuing to operate in bankruptcy comes at an ongoing cost to the business.

13. Moreover, the Uniti Settlement enables Windstream to avoid the significant expense from remaining in chapter 11 and continuing to litigate with Uniti. Ongoing litigation could have kept Windstream mired in chapter 11 for another 6 to 12 months—if not well over a year. Litigation would proceed until a trial on Windstream's recharacterization and/or fraudulent transfer claims, and also could include Windstream or Uniti (or both) appealing the Court's

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<sup>5</sup> A true and correct copy of the Second Amended Plan Support Agreement is Exhibit A of JX 61.

decisions. Extrapolating from the decline in Windstream's Q4 2019 performance (*i.e.*, I assumed a loss of at least \$100 million in revenue per quarter) and adding Windstream's \$30 million run rate per month in chapter 11, a one-year delay would cost Windstream over \$750 million.

14. The Uniti Settlement benefits all of the Windstream entities for the same reasons. The Uniti Settlement provides Windstream Holdings' subsidiaries, as operators of the network, the ability to upgrade their networks on more favorable terms than the Master Lease and what Windstream could otherwise obtain through the capital markets. The Uniti Settlement also eliminates strain and uncertainty with Uniti and the risks associated with litigation, which I discuss in detail below.

15. In addition to the non-economic benefits of the Uniti Settlement, and as I understand will be further detailed in Mr. Leone's declaration, Windstream will receive cash consideration in the amount of (i) \$490,109,111.00 paid in twenty equal installments (paid once per quarter for the next five years), (ii) \$244,549,854.10 in exchange for the sale of certain dark fiber IRU contracts and reversion of rights to 1.8 million Uniti-owned Windstream-leased fiber strand miles (the "APA Purchase Price"),<sup>6</sup> and (iii) \$40,000,000.00 in exchange for the sale of certain Windstream-owned assets and certain fiber IRU contracts (the "IRU Purchase Price").

16. I understand that Uniti is funding the APA Purchase Price through a closing of a purchase of Uniti common stock. Windstream was not involved in Uniti's decision to sell its common stock or its negotiations with third parties to purchase its common stock. However, Windstream will benefit significantly from the receipt of those payments for assets that, in many cases, were not being utilized.

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<sup>6</sup> A true and correct copy of the Asset Purchase Agreement is Exhibit B of JX 80.

17. In the event that Uniti is unable to fund the GCI funding commitments or quarterly payments, the Uniti Settlement provides Windstream with the right to offset its monthly rent amount if Windstream is in compliance with its covenants.

18. The current Master Lease agreement between Uniti and Windstream will be bifurcated into agreements governing the ILEC facilities and CLEC facilities, which provides Windstream with strategic optionality.<sup>7</sup> I understand that a true lease opinion is required for the ILEC and CLEC leases in order for the Uniti Settlement to be effective. Uniti is currently working to obtain those true lease opinions, and I understand that they believe they are likely to obtain those opinions.<sup>8</sup> Moreover, should Uniti not obtain true lease opinions by a date certain, Windstream would have the opportunity to seek those true lease opinions. Based on advice from my legal and tax advisors, I believe that it is likely that a true lease opinion will be issued for each lease.

19. As part of the Uniti Settlement, I understand that Uniti and Windstream agreed to mutual releases of all claims each may have against the other, including claims against current and former directors and officers. As I discussed above, Windstream agreed to the release of claims against Uniti in exchange for substantial value. And I understand those releases were an important part of the settlement consideration to Uniti as well. Based on advice from my advisors, I believe that these releases are appropriate.

20. The Uniti Settlement made all of the above benefits possible.

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<sup>7</sup> A true and correct copy of the ILEC Lease is Exhibit C of JX 81. A true and correct copy of the CLEC Lease is Exhibit D of JX 81.

<sup>8</sup> Wallace Dep. 55:4-18 (“Q. Do you have an understanding of what the likelihood of obtaining that true lease opinion by July 31, 2020 is? A. I believe that we will be able to obtain the true lease opinion and the REIT opinion referenced in the Section 16 by the date of --referenced also of July 31st.”). I have reviewed this portion of the deposition of Mark Wallace, Uniti’s Chief Executive Officer.

## II. EVALUATION OF WINDSTREAM'S CLAIMS AGAINST UNITI

21. Windstream undertook a claims investigation soon after it filed for chapter 11. A Restructuring Committee of the Windstream Board of Directors was formed and oversaw Windstream's claims investigation. I attended most of the Restructuring Committee meetings as a member of management to provide updates to the committee on Windstream's chapter 11 proceedings and mediation.

22. Multiple outside counsel undertook a comprehensive investigation of potential claims against various parties, including potential claims against Windstream's officers and directors, against Uniti, and against the company's advisors. The investigation lasted several months, and the Restructuring Committee received frequent updates on the status of the investigation. During the portions of meetings that I attended, the Restructuring Committee had the opportunity to, and did, raise many questions related to the claims to and the risks associated with litigation. Many members of management or employees at Windstream, including myself, were interviewed as part of the investigation. Counsel presented the results of the investigation to the Restructuring Committee in a 100-plus page presentation that lasted more than eight hours, which ultimately led to the filing of the Complaint against Uniti. Based upon consultation with counsel and advisors, the Restructuring Committee also determined that some of the investigated claims were not worth pursuing.

23. Though I believe that Windstream has compelling litigation claims against Uniti, there were significant risks to both sides, including the risks inherent in litigation itself. On our end, the merits-based risks included:

- **Contemporaneous Advice.** I, along with others at Windstream, worked with advisors over the course of two years to structure the Uniti Arrangement to be a true leasing arrangement and reflect fair market terms. Based on what I now know, I question some of the work and assumptions Windstream's advisors made to reach their conclusions. But I



do not question their credentials. These advisors issued true lease opinions, solvency opinions, and other statements that were obstacles to our recharacterization and fraudulent transfer claims.

- **Windstream's Intent.** We intended to structure the Master Lease as a true lease, and, based on advice from advisors, made that representation under oath to federal and state regulators.
- **Factual Disputes.** I understand that there were going to be contested factual issues for trial, including: (a) how long copper would remain competitive in Windstream's rural markets; (b) how much Windstream anticipated making in Tenant Capital Improvements and the effect of such investments on the life of the network; and (c) the likelihood that Windstream would renew the Master Lease.
- **Unresolved Questions of Law.** I understand that Windstream's recharacterization claim presented unresolved questions of law, including the applicable standards for measuring the life of the network and for determining when renewal terms should be counted for recharacterization purposes.
- **Solvency.** As part of the Uniti litigation, Windstream engaged Baker Tilly to analyze Windstream's constructive fraudulent transfer claims. Baker Tilly determined that it would be difficult to prove insolvency before Q3 2017.

24. Even if Windstream won, that did not guarantee a better outcome than the Uniti Settlement. While I am not a bankruptcy attorney, I have a general understanding that the value to Windstream of succeeding on its recharacterization claim is a function of the location and size of Uniti's resulting claim and where the transferred assets would be located. I understood that there was risk that even if Windstream prevailed on its recharacterization claim, the resulting Uniti claim could substantially dilute the actual benefit to the estates, depending on the details of how the Court ruled. In other words, we faced risk not only on the merits of the claims, but also on the remedies should we win (in particular on recharacterization, which was our largest and most important claim).

25. Further, Windstream would face challenges enforcing any judgment. I understood that a judgment against Uniti could push Uniti into its own chapter 11 filing. That would inject delay and uncertainty into Windstream's own restructuring and potential collateral challenges to a

favorable recharacterization decision. It also would be far more challenging for Windstream to negotiate a post-win settlement with a bankrupt Uniti.

26. And there were potential tax consequences associated with recharacterizing the Uniti Arrangement as not a sale and not a lease. While we believed these tax consequences should not occur upon a victory, it was possible that Windstream could incur substantial tax liabilities as a result of tax gains being triggered.

27. For these reasons, even a litigation win presented risk. And the Uniti Settlement mitigated that risk. The Uniti Settlement also was dramatically better for Windstream than a litigation loss. If Windstream lost the litigation, it faced two bad options with respect to the Master Lease: (a) accept the Master Lease as is or (b) reject the Master Lease, but with no guarantee that Uniti would renegotiate a new arrangement.

28. Accepting the Master Lease would not be economical, and would strain Windstream's business until 2030. The Master Lease locks Windstream into rent payments that are above market today for a copper-intensive network that is becoming obsolete. Under the existing Master Lease terms, Windstream would be unable to generate free cash flow before debt service that would allow for the critical investment necessary to enable competitive broadband speeds.

29. Further, Windstream would have limited options to improve the network and compete with the industry's increasing speed demands. Under the Master Lease, Windstream forfeits the ownership of fiber overbuilds and other capital investments to Uniti for no consideration.<sup>9</sup>

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<sup>9</sup> JX 1.

30. There was also a risk if we accepted the Master Lease, Windstream may not be able to get exit financing.

31. Rejecting the Master Lease could be even worse. It would force Windstream into a high-stakes negotiation as Windstream used rejection to renegotiate the Master Lease's terms. Windstream could have to liquidate absent renegotiation of the Master Lease, yet would lack complete insight into Uniti's negotiation leverage, including Uniti's options to re-lease or sell the network to others. Indeed, I learned during the course of the litigation that Uniti was having conversations with potential successor tenants to take over part or all of Windstream's current obligations under the Master Lease. As a fiduciary of the Windstream estate, I believed it was prudent to avoid such high risk situations where possible. Based on advice from advisors (and as outlined in Mr. Leone's declaration), Windstream thus assigned rejection a lower mid-point distribution value than assumption. This is so for several reasons:

32. *First*, rejecting the Master Lease would inject massive uncertainties into Windstream's business because Uniti could move to evict Windstream from the network. We estimated that Windstream's OIBDAR could be \$65 million to \$130 million lower as a result of the business disruption as a result of rejection. Further, about 70% of Windstream's business operations are dependent on the Uniti network, so eviction would jeopardize whether Windstream could remain viable as a going concern.

33. *Second*, Windstream would incur costs from rejection and potentially liquidation. Uniti would have a claim for 15% of the remaining lease obligation—or \$984 million if rejected on August 31, 2020.

34. *Third*, I anticipated that federal and state regulators could well oppose rejection and impose large penalties or fines assuming Windstream had to discontinue services in regulated

markets. Obtaining approval for the Uniti Arrangement from regulators was one of the central challenges for the Uniti Arrangement. And state regulators, in fact, began reaching out last year seeking assurances that Windstream's bankruptcy would not disrupt our ability to continue providing services to residents.

35. The Uniti Settlement addresses the above risks. While we were ready, willing and able to litigate our claims should we not receive what we believed to be fair value (and, indeed, were only two days away from the start of trial when we approved the settlement), I believe that the value we received for settling was easily sufficient to release our claims.

### **III. THE MEDIATION PROCESS**

36. On July 30, 2019, the Court appointed the Honorable Shelley C. Chapman to serve as the mediator.<sup>10</sup>

37. From July 30, 2019 until March 1, 2020 (when the Windstream Board approved the Uniti Settlement), Windstream, its secured and unsecured creditors, and Uniti engaged in an extensive mediation. All participating mediation parties were represented by sophisticated legal and financial advisors.

38. All other Windstream stakeholder could have requested to participate in the mediation, but I am not aware of any such requests being made.<sup>11</sup>

39. Over seven months, there were around 30 days (if not more) of mediation sessions. There were mediation sessions each month from August 2019 to February 2020, including sessions on February 3, 11, 12, 18, 19, 25, 26, and 27. I participated in over a dozen mediation sessions,

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<sup>10</sup> A true and correct copy of the Order Appointing A Mediator (the "Mediation Order") is JX 11.

<sup>11</sup> JX 11 ¶ 6 ("Additional parties other than the Mediation Parties may participate in the mediation (a) upon the written consent of the Debtors, Uniti, and the Mediator, and in consultation with the other Mediation Parties, or (b) further order of this Court.").

including traveling to New York to attend nine in-person mediation sessions. There were numerous other smaller group sessions, and informal telephone calls and emails that made up part of the mediation. I and other members of management spent hundreds of hours in the mediation process.

40. Windstream has filed three sets of cleansing materials from the mediation. The cleansing materials included prior iterations of the Uniti settlement term sheet and restructuring proposals from Windstream and its first-lien and second-lien noteholders.

41. The mediation was instrumental in facilitating the Uniti Settlement.

#### **IV. BOARD APPROVAL OF THE UNITI SETTLEMENT**

42. The Windstream Board of Directors received regular updates about the status of the Uniti litigation and settlement negotiations.

43. On March 1, 2020, the Board unanimously approved the Uniti Settlement.<sup>12</sup> The board received advice from its legal and financial advisors, and considered the factors I set forth above, including the value from the Uniti Settlement, the risks associated with the Uniti litigation, and alternatives to the Uniti Settlement.

#### **V. SUPPORT FOR THE UNITI SETTLEMENT**

44. There has been significant support for the Uniti Settlement, in particular from some of Windstream's largest stakeholders. Support for the Uniti settlement has been growing and, at present, the Uniti Settlement has the following support from the following stakeholders:

- owners of more than 92% of first-lien debt;
- owners of more than 52% of second-lien debt;

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<sup>12</sup> A true and correct copy of the March 1, 2020 Board Materials is JX 38. A true and correct copy of the draft March 1, 2020 Board Minutes is JX 39.

- owners of more than 39% of unsecured notes; and
- Windstream's largest creditor (Elliott Management Corporation and its affiliates).

45. Each of these stakeholders have been represented by competent and experienced counsel and financial advisors.

## **VI. BACKSTOP COMMITMENT AGREEMENT**

46. The Backstop Commitment Agreement provides Windstream fair value and enables emergence from chapter 11.<sup>13</sup>

47. *First*, the Backstop Commitment Agreement is necessary to fund the payments required by the Plan Support Agreement at emergence. To date, Windstream has not received any more favorable commitments. Without the backstop commitment by Elliott and certain first lien ad hoc group members, Windstream would not have sufficient cash to pay down the distributions set forth in the Plan Support Agreement.

48. *Second*, the Backstop Commitment Agreement is the result of arms' length, good faith negotiations. The terms were extensively negotiated, and numerous proposals were exchanged. Additionally, Windstream and its stakeholders considered alternatives, including a rights offering through junior stakeholders, however no junior stakeholders were willing to support an investment that would have allowed Windstream to fully pay down first lien claims.

49. Moreover, the payment of an 8% Equity Backstop Premium and payment of the Backstop Parties' professional fees were likewise negotiated at length. Windstream's commitment

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<sup>13</sup> A true and correct copy of the Backstop Commitment Agreement is Exhibit A of JX 60. A true and correct copy of the Amendment to the Backstop Commitment Agreement is Exhibit A, Second Amendment to the Backstop Commitment Agreement is Exhibit B, APA O&M Agreement is Exhibit D, Collocation Agreement is Exhibit E, and IRU Agreement is Exhibit E of JX 88.

to the backstop fees enabled an agreement to fully backstop the \$750 million rights offering in the Plan Support Agreement.

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50. In sum, the Uniti Settlement is a significantly better outcome than losing the litigation and either accepting the Master Lease as is or rejecting it. It well exceeds the floor for a reasonable settlement. The Uniti Settlement is the results of months of mediation and negotiation and has the full support of Windstream's management and Board of Directors. Further, the Backstop Commitment Agreement is a reasonable and necessary path to Windstream's emergence from chapter 11.

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51. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing  
is true and correct.

Dated: May 3, 2020  
Little Rock, Arkansas

/s/ Anthony Thomas  
Anthony Thomas