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)

EMERGENCY MOTION IN LIMINE OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS AND UMB BANK, NATIONAL ASSOCIATION AND U.S. BANK NATIONAL ASSOCIATION, AS INDENTURE TRUSTEES, TO STRIKE CERTAIN TESTIMONY OF ALAN WELLS, TONY THOMAS AND NICK LEONE

The Official Committee of Unsecured Creditors (the "Committee") of Windstream Holdings, Inc. ("Holdings") and its debtor affiliates, as debtors and debtors-in-possession (collectively, the "Debtors"), along with UMB Bank, National Association, solely in its capacity as successor indenture trustee ("UMB Bank") under that certain indenture dated as of December 13, 2017 with Windstream Services, LLC ("Services") (as successor to Windstream Corporation) and Windstream Finance Corp. as co-issuers of 8.75% Senior Notes due 2024 and U.S. Bank National Association, solely in its capacities as indenture trustee ("U.S. Bank," and together with UMB Bank, the "Trustees") under (i) that certain indenture dated as of October 6, 2010 between it and Services as issuer of 7.75% Senior Notes due 2020, (ii) that certain indenture dated as of March 28, 2011 between it and Services as issuer of 7.75% Senior Notes due 2021, (iii) that certain indenture dated as of November 22, 2011 between it and Services as issuer of 7.50% Senior Notes due 2022, (iv) that certain indenture dated as of March 16, 2011 between it and Services as issuer of 7.50% Senior Notes due 2023, and (v) that certain indenture dated as of January 23, 2013

between it and Services as issuer of 6.375% Senior Notes due 2023, hereby file this emergency[1] motion in limine (the "Motion") to strike certain testimony of Alan Wells, Tony Thomas and Nick Leone[2] and respectfully submit as follows:

PRELIMINARY STATEMENT

1. In connection with the 9019 Motion, the Debtors have filed the Declaration of Alan Wells (attached hereto as Exhibit A), the Declaration of Tony Thomas (attached hereto as Exhibit B), and the Declaration of Nick Leone (attached here to as Exhibit C) in lieu of any direct testimony. In their declarations, these witnesses assert that, (1) the board of directors of Holdings and Services (collectively, the "Holdings/Services Board") received and relied on the advice of counsel in determining to authorize Holdings' and Services' entry into the Settlement, and (2) the settlement negotiations were conducted at arm's length and were hard fought throughout mediation. Messrs. Wells, Leone and Thomas were deposed by the Committee and Trustees on April 24, April 27 and April 28, respectively. Throughout those depositions (and the depositions of others supporters of the Debtors' 9019 Motion), the witnesses were repeatedly instructed not to answer questions about the deliberations of the Holdings/Services Board, or the analyses presented to, and deliberations of the Holdings/Services Board, or any matters relating to the negotiation process on the grounds of attorney-client privilege and/or mediation privilege. Given those instructions in discovery, Messrs. Thomas, Leone and Wells may not now testify about subjects

[1] Given the compressed time frame for the hearing on the 9019 Motion and the fact that the declarations in question were submitted on May 3, within the five-day notice period for motions in limine required by the Court's rules, the Committee and the Trustees were unable to file timely this Motion. The Committee and the Trustees respectfully request that the Court consider and rule on the Motion in advance of the declarants' testimony in order to streamline (and potentially shorten) their cross-examination.

[2] Capitalized terms used but not defined herein shall have the meaning ascribed to them in the Trustees' *Objection to the Debtors' Motion for Entry of an Order Approving the Settlement Between the Debtors and Uniti Group Inc., Including (i) the Sale of Certain of the Debtors' Assets Pursuant to Section 363(b) and (ii) the Assumption of the Leases Pursuant to Section 365(a)* (the "9019 Objection") [Dkt. No. 1774].

that the Committee and the Trustees were precluded from testing in discovery. Accordingly, the Court should strike the testimony highlighted in Exhibits A, B and C.

ARGUMENT

I. The Court Should Strike The Declarants' Testimony Concerning Reliance on the Advice of Counsel

2. It is black letter law that a party cannot rely on evidence that was withheld during discovery on the basis of attorney-client privilege. See United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991) (privilege "cannot at once be used as a shield and a sword."). See also In re Residential Capital, 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."); Mikulan v. Allegheny Cty., 2017 U.S. Dist. LEXIS 83315, at *16-17 (W.D. Pa. May 31, 2017) (granting a motion in limine to exclude all testimony, evidence, and argument based on undisclosed information and finding that, "it would be extremely unfair to allow [a party] to withhold [] evidence. . .in discovery and then allow [that party] to turn around and [present an argument] based on the withheld legal advice.").

3. In his Declaration, Mr. Thomas, a member of the Holdings/Services Board, explains the reason for his approval of the Settlement, concluding, "[b]ased on advice from my advisors," the releases in the Settlement are appropriate (id. ¶ 19), "[b]ased upon consultation with counsel and advisors," the Independent Committee determined which claims were and were not "worth pursuing," (id. ¶ 22), and ultimately, that the Holdings/Services Board approved the Settlement after receiving "advice from its legal and financial advisors," (id. ¶ 43).

4. During his deposition, however, Mr. Thomas was instructed not to answer on attorney-client privilege grounds more than ten times. Among other instances, Mr. Thomas was instructed not to answer questions regarding the merits of the recharacterization claim (JX 87,

Thomas Dep. Tr. at 37:14-18) and the likelihood of success on the recharacterization claim (id. at 50:4-8)

5. Mr. Thomas also spends 15 paragraphs discussing the claims investigation conducted by Kirkland & Ellis in April or May 2019. (Ex. C ¶¶ 21-35) However, in his deposition, Mr. Thomas was instructed not to answer regarding the conclusions of that investigation and the discussions the board had with respect to it. (See generally, JX 87, Thomas Dep. Tr. at 168-175) For example, during Mr. Thomas' deposition, he was asked the following questions and was given the following instruction with respect to the Kirkland investigation:

> Q And, yes or no, do you recall whether that -- that presentation touched on the issue of whether officers and directors had done anything inappropriately in connection with the spin?
>
> A Yes, I do recall that the presentation addressed that subject.
>
> Q And what was the conclusion?
>
> MR. HOWELL: Objection. Instruct you not to answer on the basis of attorney/client privilege.

(Id. at 168:17-169:1)

6. Mr. Wells similarly testifies in his declaration that the Holdings/Services Board and the Independent Committee thereof held "robust discussions," considered "the strengths and weaknesses of the Uniti litigation and the benefits and alternatives to the Uniti Settlement," the litigation risk "associated with each of our claims against Uniti," and "considered the total value from the settlement of all of Windstream's claims in the Uniti litigation." (Ex. A ¶¶ 11, 17, 18, 20) Mr. Wells also references reviewing "100 pages of claims investigation materials from outside counsel" and a "135 page presentation" from the board's "legal and financial advisors," and asserts that, "Windstream's advisors supported approval of the settlement, and advised us that they

estimated the total economic value of the settlement to be approximately $1.224 billion." (Id. ¶¶ 12, 19)

7. As in Mr. Thomas' deposition, Mr. Wells was instructed not to answer on attorney-client privilege grounds over 15 times during his deposition. In particular, Mr. Wells was instructed not to reveal the claims included in Kirkland's investigation (JX 85, Wells Dep. Tr. at 50:19-51:5), the merits of the recharacterization claim (id. at 102:23-103:3), whether the Debtors had ever proposed purchasing 19.99 percent of Unity stock (id. at 145:8-13), and the Holdings/Services Board's consideration of likelihood of success on the recharacterization claim (id. at 165:7-14).

8. In sum, because the Debtors precluded inquiry into what counsel advised, the Court should strike each of the passages relying on that advice, highlighted in blue in the attached Declarations of Mr. Thomas and Mr. Wells.

II. The Court Should Strike the Declarants' Testimony Regarding the Conduct of Negotiations in Mediation

9. Throughout the declarations, the witnesses make numerous references to the conduct of the mediation. Mr. Wells testifies that "[t]he process and negotiations of the Uniti Settlement were hard-fought and extensive." (Ex. A ¶ 15) Mr. Thomas also refers to the Settlement as being "the result of months of hard-fought, arm's-length negotiations" and asserts that the "mediation was instrumental in facilitating the Uniti Settlement." (Ex. B ¶¶ 3, 41) Similarly, Mr. Leone states that during the mediation, the parties "exchanged dozens of term sheets and proposals, and engaged in countless teleconferences to discuss various settlement provisions." (Ex. C ¶ 5) Mr. Leone adds that "[t]he Debtors' independent committee of the board of directors—in conjunction with their advisors—reviewed and evaluated numerous proposals at various stages of

the mediation and negotiation process." (Id.) Indeed, all of the witness testimony pertains to negotiations conducted during the mediation.

10. However, throughout the depositions of each declarant, the witnesses were instructed not to answer any questions regarding the nature of the settlement negotiations, the term sheets exchanged or the board's consideration of such term sheets. Collectively, the witnesses were given close to 40 instructions and cautions regarding the mediation privilege. For example, Mr. Thomas was asked the following question and was given the following instruction:

> Q. Do you have an understanding of what changed between this presentation and now with respect to the 2L ad hoc group?
>
> MR. HOWELL: I'm going to instruct you only to answer to the extent that you can give that answer without invading the mediation privilege.
>
> A All the information about why the 2L ad hoc group is no longer backstopping the $750 million rights offering I obtained through the mediation.

(JX 87, Thomas Dep. Tr. at 64:10-18)

11. Even subjects which the Debtors initially stated were outside the mediation – such as the Uniti Stock Sale and the Little Rock Meeting – became off limits to the extent matters related thereto were later repeated in mediation:

> MS. BYRNE: If you want to ask him questions about the final terms that are reflected in the settlement agreement and in the term sheet, you can do that. But discussions about those terms at the Little Rock meeting is covered by the mediation order.
>
> MS. GREER: But the Little Rock meeting was not a mediation session.
>
> MS. BYRNE: It wasn't. But the mediation order says very clearly, the mediation order says that discussions related to mediation, including negotiations and terms that are discussed in mediation, are covered by the order. So to the extent that they were discussing terms that were raised or negotiated in the mediation, those would be covered by the mediation order.

(Wallace Dep. Tr. at 82:22-83:11)[3]

12. Having chosen to preclude inquiry, the Debtors cannot now selectively provide to the Court those aspects of the mediation they believe support the conclusion that the negotiations were arm's length or hard fought. Bilzerian, 926 F.2d at 1292. See also In re Glieberman, 2017 U.S. Dist. LEXIS 171235, at *14 (E.D. Mich. Oct. 11, 2017) ("[T]he Bankruptcy Court abused its discretion confirming this compromise after refusing to permit the major creditor to discover vital information that the trustee relied upon in reaching the proposed compromise."); Bradfield v. Mid-Continent Cas. Co., 15 F. Supp. 3d 1253, 1256-57 (M.D. Fla. 2014) ("If Plaintiffs introduce evidence as to the reasonableness of the Mediation Settlement Agreement and Consent Final Judgment and as to the lack of bad faith—as they must to prevail—Plaintiffs cannot then hide behind the shield of privilege to prevent [defendant] from effectively challenging such evidence."); In re EXCO Resources, Inc., et al., (Bankr. S.D. Tex. Nov. 30, 2018) Bench Ruling at 39:20-25[4] ("I will grant the limine motion. I'm not going to allow the mediation to be used as a sword and shield. There will be no testimony by any party about the internal communications that occurred from the point that we issued the mediation order until the mediation either ended or ends.").

13. In light of the foregoing, the Court should strike the proffered testimony that the Settlement negotiations were either arm's length or hard fought.

[3] We can provide the Court a copy of the Wallace deposition transcript upon request.

[4] A copy of the transcript of Judge Isgur's bench ruling is attached hereto as Exhibit D.

CONCLUSION

For the reasons stated above, the Committee and the Trustees respectfully request that the Court strike the highlighted testimony of Mr. Wells set forth in Exhibit A, the highlighted testimony of Mr. Leone set forth in Exhibit B, and the highlighted testimony of Mr. Thomas set forth in Exhibit C.

Dated: May 5, 2020
New York, New York

MORRISON & FOERSTER LLP

By: /s/ *Lorenzo Marinuzzi*
250 West 55th Street
New York, NY 10019
Telephone: (212) 468-8000
Facsimile: (212) 468-7900
Lorenzo Marinuzzi
Todd M. Goren
Jennifer L. Marines
Steven T. Rappoport

Counsel for the Official Committee of Unsecured Creditors

WHITE & CASE LLP

By: *J. Christopher Shore*
Southeast Financial Center, Suite 4900
200 South Biscayne Blvd.
Miami, Florida 33131
Telephone: (305) 371-2700
Facsimile: (305) 358-5744
Thomas E Lauria, Esq. (admitted *pro hac vice*)

1221 Avenue of the Americas
New York, NY 10020-1095
Telephone: (212) 819-8200
Facsimile: (212) 354-8113

J. Christopher Shore, Esq.
Harrison Denman, Esq.
Philip M. Abelson, Esq.
Julia M. Winters, Esq.

Special Counsel to UMB Bank, N.A.
and U.S. Bank N.A.

Exhibit A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
WINDSTREAM HOLDINGS, INC., *et al.*,[1]	)	Case No. 19-22312 (RDD)
Debtors.	)	(Jointly Administered)

DECLARATION OF ALAN L. WELLS

[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' 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, Alan L. Wells, hereby declare as follows under penalty of perjury:

1. I am the Chairman of the Windstream Board of Directors (the "Windstream Board"). I have served as a Windstream director since 2010 and became the Chairman in May 2017. On April 4, 2019, the Windstream Board formed a Restructuring Committee tasked with, among other responsibilities, overseeing Windstream's claims investigation and later Windstream's litigation against and settlement discussions with Uniti. I also have served as the Chairman of the Restructuring Committee.

2. In addition to my roles at Windstream, I also am the founding partner of the private equity and investment banking firm, Financial Advisory Partners.

3. Before I joined Windstream, I held executive and management positions at various energy and telecom companies. For example, I served as CEO of a regional telecom provider, Iowa Telecommunication Services, from 2002 to 2010 and its Chairman of the Board from 2004 to 2010. Windstream acquired Iowa Telecom in 2009 for $1.1 billion. I am an accountant by education and have been a CPA for over 20 years.

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, and I have personal knowledge of the facts set forth below. I focus on the Windstream Board's process in guiding and analyzing the Uniti litigation and settlement, and ultimately approving the Uniti Settlement. In Section I, I discuss Windstream's formation of the Restructuring Committee and the claims investigation, which led to the filing of the Complaint against Uniti. In Section II, I summarize the Windstream Board's process for evaluating and approving the Uniti Settlement.

I. WINDSTREAM FORMS AN INDEPENDENT RESTRUCTURING COMMITTEE

5. One of the first things the Windstream Board considered upon the commencement of the Chapter 11 Cases was the need for a broad investigation into any claims the Company may have.

6. On April 4, 2019, the Windstream Board formed the Restructuring Committee. I was appointed as the Chairman of the Restructuring Committee.[2] The other members of the Restructuring Committee are Jeannie Diefenderfer, Julie Shimer, and Michael Stoltz, who are also members of the Windstream Board. The Windstream Board and Governance Committee determined that the members of the Restructuring Committee were qualified and independent.[3]

7. Among other things, one purpose of the Restructuring Committee was to conduct a broad investigation into any claims that the Company may hold. As part of this investigation, the committee worked closely with outside counsels and advisors.

8. The Restructuring Committee supervised all aspects of the investigation, and ultimately made determinations regarding which claims had sufficient value and merit to pursue. The Restructuring Committee also participated in the negotiations and mediations that ultimately led to the proposed settlement of these claims.

9. Since its formation, the Restructuring Committee has met on a near weekly basis. At every meeting, the Restructuring Committee has (a) received guidance and advice from a combination of management, legal counsel, and other outside advisors, (b) had the opportunity to ask questions and discuss issues with management and advisors, and (c) discussed issues as they

[2] A true and correct copy of the resolution forming the Restructuring Committee is JX 6.

[3] JX 6 incorporates the resolution determining the members' independence and qualifications. A true and correct copy of the resolution determining the members' independence and qualifications is JX 2.

arose. The advisors to the Restructuring Committee include, but are not limited to, Kirkland & Ellis ("Kirkland") and Norton Rose Fulbright (as counsel for the Windstream Board) ("NRF"), and PJT Partners, Inc. ("PJT").

II. CLAIMS INVESTIGATION

10. One of the Restructuring Committee's initial responsibilities was conducting a claims investigation and deciding which claims to bring—and not bring. We engaged multiple outside counsel, including but not limited to Kirkland and NRF. The claims the Restructuring Committee investigated (along with our outside counsel) to assist in this investigation included claims related to the 2015 Spin Transaction with Uniti, claims related to the subsequent unsuccessful litigation with Aurelius, claims against directors and officers of the Company, and claims against Uniti.

11. The Restructuring Committee held frequent meetings to supervise and receive updates on the status of the investigations. This included meetings of the entire committee plus advisors on April 16, 23, and 30; and May 7, 14, 21, 23, and 28. During these meetings, the Restructuring Committee asked many questions of management and its advisors and participated in robust discussions concerning potential claims. In short, this was a hands-on, active committee which understood the importance of its work.

12. On June 3, 2019, I attended an in person meeting that included the full Restructuring Committee, outside counsel from Kirkland and NRF, and a few other members of the Windstream management team. We reviewed over 100 pages of claims investigation materials from outside counsel, discussed the claims investigation process, and evaluated and discussed Windstream's potential litigation claims. At this meeting, other members of the Restructuring

Committee and I asked several questions and we discussed the investigation process and potential litigation claims with our advisors at length. The meeting lasted more than eight hours.

13. Following the June 3rd claims meeting, after careful consideration and multiple robust discussions, the Restructuring Committee recommended and the Windstream Board approved the filing of a lawsuit against Uniti. Windstream filed its Complaint on July 25, 2019.[4] The Committee considered other claims that had been investigated, and determined that they were not strong enough to pursue.

III. BOARD PROCESS AND APPROVAL OF THE UNITI SETTLEMENT

14. I understand that the Court appointed a mediator on July 30, 2019.[5] Throughout the seven-month mediation process, the Restructuring Committee received regular updates from Kirkland and PJT about the status of the Uniti litigation and settlement negotiations and continued to meet on a near weekly basis.

15. The Restructuring Committee considered proposals to and from Uniti and discussed these proposals at length with its advisors. I and other members of the Restructuring Committee also attended multiple in-person mediation sessions. The process and negotiations of the Uniti Settlement were hard-fought and extensive.

16. The full Windstream Board also received regular updates on settlement proposals and the mediation. Both the Restructuring Committee and full board considered proposals throughout the mediation process. As the final Uniti Settlement appeared closer to fruition, the

[4] A true and correct copy of the Complaint is JX 10. A true and correct copy of the Amended Complaint, filed January 22, 2020, is JX 18.

[5] A true and correct copy of the Order Appointing A Mediator is JX 11.

Restructuring Committee met simultaneously with the full Windstream Board to consider and discuss proposals. This included meetings of the full Windstream Board on:

- February 3, 2020 to discuss Uniti settlement proposals;[6]
- February 4-5, 2020 to discuss Uniti settlement proposals and mediation process;[7]
- February 9, 2020 to discuss Uniti settlement proposals and mediation process;[8]
- February 13, 2020 to discuss Uniti settlement proposals,[9]
- February 20, 2020 to discuss Uniti settlement proposals;[10] and
- February 28, 2020 to discuss Uniti settlement proposals.[11]

17. On March 1, 2020, the full Windstream Board met to consider what ultimately became the final Uniti Settlement.[12] In considering the proposal, the Windstream Board discussed and I considered the strengths and weaknesses of the Uniti litigation and the benefits and alternatives to the Uniti Settlement, including assumption or rejection of the Master Lease. I also considered my fiduciary duties as a Board member when evaluating the Uniti Settlement and potential objections to the Uniti Settlement.

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[6] A true and correct copy of the February 3, 2020 board presentation with redactions is JX 20. A true and correct copy of the draft February 3, 2020 board minutes with redactions is JX 21.

[7] A true and correct copy of the February 4-5, 2020 board presentation with redactions is JX 22. A true and correct copy of the draft February 4, 2020 board minutes with redactions is JX 23.

[8] A true and correct copy of the February 9, 2020 board presentation is JX 25. A true and correct copy of the draft February 9, 2020 board minutes with redactions is JX 26.

[9] A true and correct copy of the draft February 13, 2020 board minutes with redactions is JX 27.

[10] A true and correct copy of the February 20, 2020 board presentation with redactions is JX 30. A true and correct copy of the draft February 20, 2020 board minutes with redactions is JX 31.

[11] A true and correct copy of the February 28, 2020 board presentation with redactions is JX 35. A true and correct copy of the draft February 28, 2020 board minutes with redactions is JX 36.

[12] A true and correct copy of the March 1, 2020 board presentation with redactions is JX 38. A true and correct copy of the draft March 1, 2020 board minutes with redactions is JX 39.

18. I and the Board considered the litigation risk associated with each of our claims against Uniti. While I am not a lawyer, I understood that there was risk that the Court may determine the Master Lease was a true lease. Moreover, my understanding is that success on the recharacterization claim may result in a substantial claim against the Company in favor of Uniti that could undercut the benefit of "winning" the recharacterization claim. I also understood that to succeed on any of our fraudulent transfer theories, we would need to prove that Windstream had been insolvent at the time of any of the transfers, and that Windstream did not receive reasonably equivalent value for the transfer.

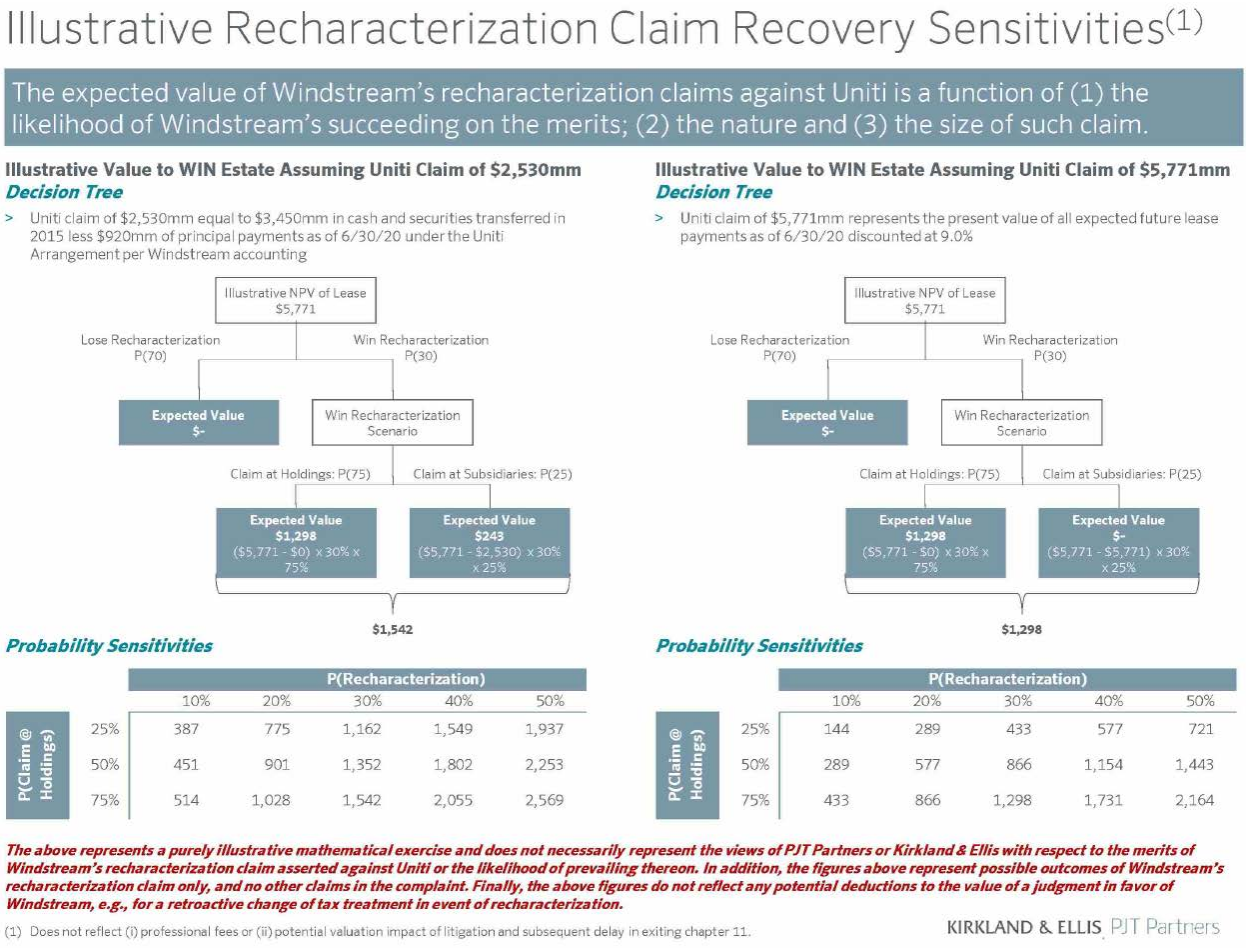
19. The Windstream Board also received advice from its legal and financial advisors, and received a 135 page presentation when evaluating the potential settlement.[13] Windstream's advisors supported approval of the settlement, and advised us that they estimated the total economic value of the settlement to be approximately $1.224 billion.

20. The Windstream Board viewed the settlement holistically and considered the total value from the settlement of all of Windstream's claims in the Uniti litigation. We did not consider settling some but not all of the claims because it was not a reasonable or practical alternative in light of the mediation negotiations, and did not consider any one aspect of the settlement consideration in isolation.

21. In considering the merits of the proposed settlement, the Windstream Board requested that PJT conduct a mathematical exercise showing potential recoveries in the litigation using a variable set of assumptions. This was reflected in a chart, which is excerpted below.[14]

[13] JX 38.

[14] JX 38.



22. This chart was one part of a broad discussion. The Windstream Board also asked questions of its counsel and advisors, considered the risks and benefits of the proposed settlement, as well as the potential costs, risks and benefits of pursuing the litigation.

23. The Windstream Board also considered other value metrics, including (a) the expense of further litigation and appeals, (b) whether Windstream could enforce any judgment against Uniti, (c) the cost to Windstream of remaining in chapter 11, (d) the consequences to Windstream from potentially rendering Uniti bankrupt, and (e) the consequences of rejection or assumption of the Master Lease. All of those factors were important to and considered by me and the Board when evaluating the Uniti Settlement.

24. Finally, I considered the holistic impact of the entire settlement on Windstream's enterprise. This includes, but is not limited to, the substantial operational benefit of Uniti's commitment to fund over $1.7 billion in network capital improvements in the coming years. If approved, this will allow Windstream to update and modernize the network, and remain a competitive business for years to come. I am not aware of any other source of funding that would have allowed the Company to make these important improvements and to emerge from bankruptcy as a viable telecommunications company.

25. The Windstream Board understands that the Settlement Agreement requires true lease opinions to be delivered and that either Uniti or Windstream must provide them. It is the Board's understanding that Uniti has engaged and consulted tax advisors and that Uniti is confident those true leases opinions will be timely obtained as required. Further, at the direction of the Windstream Board and the Restructuring Committee, Windstream's officers have been directed to coordinate the efforts, and are prepared, to obtain true lease opinions should, for some unforeseen reason, Uniti not obtain those opinions. Based on discussions with its advisors, the Windstream Board is confident Windstream would be able to timely obtain true lease opinions should Uniti not do so.

26. Based on the advice from advisors and my independent evaluation, I concluded that the Uniti Settlement was a win. The Uniti Settlement is in the best interests of the Debtors' estate and I believe it is well above the lowest point in the range of reasonableness I considered when the Windstream Board approved Windstream's Complaint against Uniti last summer and then as the litigation developed.

27. Moreover, I believe that all of the Windstream entities benefit from the settlement. The significant value that Windstream receives, both economic and noneconomic, allows

Windstream's businesses to not only continue to operate as a going concern but also remain competitive.

28. The Settlement was approved with the unanimous support of the full Windstream Board.[15] This included the full support of each member of the Restructuring Committee, each of whom is also a member of the Windstream Board. Given all of the definitive value that would be received, the various litigation and other risks Windstream faces should the Uniti Settlement not be approved or litigation continue, and the overall value of the settlement, it is the Windstream Board's and Restructuring Committee's view that the Uniti Settlement maximizes the value received by the estate and the stakeholders as a whole.

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29. In sum, the Windstream Board undertook a thorough, robust process to evaluate Windstream's claims and ultimately approve the Uniti Settlement. The Uniti Settlement provides significant value to Windstream and is in the best interest of the Debtors' estate.

[*Remainder of page intentionally left blank*]

[15] JX 39.

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

Dated: May 3, 2020
Urbandale, Iowa

/s/ Alan L. Wells
Alan L. Wells

Exhibit B

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
WINDSTREAM HOLDINGS, INC., *et al.*,[1]	)	Case No. 19-22312 (RDD)
Debtors.	)	(Jointly Administered)

DECLARATION OF ANTHONY THOMAS

[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' 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.[2] 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,

[2] 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,[3] 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

[3] 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.[4]

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.

[4] 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.[5] 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

[5] 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 that 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"),[6] 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.

[6] 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.[7] 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.[8] 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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[7] 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.

[8] 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.[9]

[9] 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.[10]

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.[11]

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,

[10] A true and correct copy of the Order Appointing A Mediator (the "Mediation Order") is JX 11.

[11] 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.[12] 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;

[12] 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.[13]

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

[13] 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 Exhiibt 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.

[*Remainder of page intentionally left blank*]

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

Exhibit C

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
WINDSTREAM HOLDINGS, INC., *et al.*,[1]	)	Case No. 19-22312 (RDD)
Debtors.	)	(Jointly Administered)

DECLARATION OF NICHOLAS LEONE

[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' 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, Nicholas Leone, hereby declare as follows under penalty of perjury:

1. I submit this declaration (this "Declaration") in support of the *Debtors' Motion For Entry of an Order Approving the Settlement Between the Debtors and Uniti Group, Inc., Including (I) the Sale of Certain of the Debtors' Assets Pursuant to Section 363(b) and (II) the Assumption of the Leases Pursuant to Section 365(a)* [Docket No. 1558] (the "9019 Motion") and the *Debtors' Motion for Entry of an Order Authorizing (I) the Debtors' Entry Into the Backstop Commitment Agreement and (II) Payment of Related Fees and Expenses* [Docket No. 1579] (the "BCA Motion").[2]

2. I am a Partner in the Restructuring and Special Situations Group at PJT Partners LP ("PJT"), the financial advisor and investment banker engaged in the above-captioned chapter 11 cases by Windstream Holdings, Inc. and its affiliates as debtors and debtors in possession (collectively, "Windstream" or the "Debtors"). I have 30 years of investment banking, corporate finance, capital raising, and restructuring experience. Both prior to and since joining PJT, I have provided restructuring advice to companies, creditors, shareholders, and other interested parties on restructuring transactions across numerous industries both in chapter 11 and on an out-of-court basis.

3. I understand that this Declaration is intended to be submitted in lieu of direct testimony and that I will be subject to cross-examination. The statements in this Declaration are, except where specifically noted, based on my personal knowledge or opinion, on information that I have received from the Debtors' employees or other advisors, or employees of PJT working

[2] Capitalized terms used but not otherwise defined herein shall have the meanings set forth in the 9019 Motion or the BCA Motion, as applicable.

directly with me or under my supervision, direction or control. I am not being specifically compensated for this testimony other than through payments received by PJT as a professional retained by the Debtors, pursuant to the engagement letter approved by this Court.

I. The Uniti Settlement.

A. The Settlement Negotiations.

4. On July 25, 2019, the Debtors commenced an adversary proceeding (the "Uniti Adversary Proceeding") against Uniti, seeking among other things, to recharacterize the Uniti Arrangement as a financing. Over the course of the next seven months, Windstream, Uniti, Windstream's stakeholders (collectively, the "Mediation Parties"), including their advisors, principals, board members, members of senior management, engaged in difficult, near non-stop negotiations. The mediation process led to a settlement (the "Settlement") that: (a) appropriately compensates the Debtors for claims against Uniti, (b) better aligns the long-term interests of the Debtors and Uniti, and (c) facilitates the Debtors' emergence from chapter 11.

5. In total, the Mediation Parties participated in twenty-seven in-person mediation sessions, spending over a hundred hours in negotiation. I personally participated in nearly every such session. The Mediation Parties exchanged dozens of term sheets and proposals, and engaged in countless teleconferences to discuss various settlement provisions. The Debtors' independent committee of the board of directors—in conjunction with their advisors—reviewed and evaluated numerous proposals at various stages of the mediation and negotiation process. The Mediation Parties worked tirelessly to develop the Settlement, which I believe is a successful result of such hard-fought negotiations. The Settlement is a core component of the Debtors' broader restructuring, the key terms of which are also a product of the mediation and are set forth in a plan support agreement ("PSA") entered into among the Debtors, Uniti, Elliott, and the ad hoc group of the Debtors' first lien lenders (the "First Lien Ad Hoc Group").

6. The Settlement is a significant step forward in these chapter 11 cases and allows the Debtors to avoid the significant expense and uncertainty related to a litigated outcome of the Uniti Adversary Proceeding. In addition, the Settlement alleviates significant business risk resulting from a delayed exit from chapter 11 and the uncertainty regarding the Debtors' access to the leased network as a consequence of pursuing such litigation.

B. Overview of the Settlement Terms.

7. The terms of the Settlement are memorialized in the Settlement Agreement, which provides for, among other things: (a) Uniti's commitment to fund $1.75 billion over approximately a ten year period in capital spending on fiber and other growth-related assets used by the Debtors; (b) Uniti to purchase certain assets from the Debtors; (c) additional cash consideration provided to the Debtors by Uniti; and (d) the amendment and bifurcation of the Master Lease into the CLEC and ILEC Leases (collectively, the "Leases").

8. As set forth below, I have determined that the net present value of this consideration totals approximately $1.224 billion. To walk the Court through the various categories of settlement consideration, I have prepared the following table:

Settlement Term	Net Present Value (in millions of $)
GCI Contribution	$1,133 *$1.56bn reimbursement*
Cap Rate Charge	($344) *8.0% Cap Rate through April 2030;* *1-Year holiday; 0.5% annual escalator*
Capital Leasing Program	$3 *8.0% Cap Rate through April 2030;* *No holiday; 0.5% annual escalator*
Incremental Rent Upon Renewal[(1)]	($294)
Removal of CLEC Fiber Strands from Renewal Rent	$290

Capex Savings[(1)]	$43
Total Settlement Consideration	**$831**
Upfront Cash	$285
Cash Transfer (Over Time)	$402 *Paid $25mm quarterly for 20 quarters*
Fair Market Value of Assets Sold	($294) *$29mm valued at ~10x*
Net Consideration to Windstream	**$1,224**

(1) Relative to a fixed wireless plan.

C. The Growth Capital Improvements ("GCI").

9. The Settlement provides that Uniti will fund up to an aggregate of $1.75 billion in GCI over approximately ten years according to the following schedule:

- Year 1: $125 million
- Years 2-5: $225 million per year
- Years 6-7: $175 million per year
- Years 8-10: $125 million per year

10. The Annualized Capitalization Rate for GCI commitments will be 8% payable beginning one year following the In Service Date of the GCI, with an Annualized Capitalization Rate escalator of 0.5%. The GCI will consist of long-term, value-accretive fiber and related assets in ILEC and CLEC territories governed by the current Master Lease. The Settlement also provides that Windstream may carry forward any unspent annual GCI into the following annual funding period, subject to a total GCI spending cap of $250 million in a given annual period. Uniti's commitment to fund the $1.75 billion in GCI will facilitate investments that will greatly increase the overall quality of the network and enable the Debtors to provide superior service to their customers. Such GCI spending by Uniti provides significant value to Windstream, because under the existing Uniti Arrangement, such investments are required to be funded by the Debtors.

11. Additionally, during the GCI funding period, Windstream may elect to receive up to an aggregate amount of $125 million in equipment loans from Uniti, subject to a $25 million annual cap, with a combined annual cap of $250 million for both GCI and equipment loans. Interest will accrue on such loans at an annual rate of 8%, with a principal maturity at the earlier of: (a) the expiration or earlier termination of either of the Leases; (b) the later of (i) the extinguishment of the useful life of the assets or (ii) the retirement of such assets from service; or (c) April 30, 2030. In total, the net present value of the benefit to the Debtors of the GCI commitments and equipment loans is approximately $792 million. This value is based on a 9% discount rate, which I believe is well within the range of reasonable discount rates.

D. Cash Consideration.

12. In addition to the GCI commitments, the Settlement provides additional cash consideration to be provided by Uniti to the Debtors including:

a. $244,549,865.10—conditioned on a completion of the Uniti stock sale;

b. $40 million for the purchase of certain Windstream-owned assets; and

c. $490,109,111, payable in twenty equal installments.

13. In addition, as part of the Settlement, Windstream will assign to Uniti certain dark fiber IRU contracts and Uniti will acquire a reversion of rights in certain Windstream-leased fiber strand miles, the majority of which are not currently being utilized by the Debtors. The Debtors will no longer be required to pay rent on the relinquished, unused fiber strands or the Uniti-owned Windstream leased fiber strands supporting the dark fiber IRU contracts beyond the initial term.

14. The asset purchase and cash payment provisions of the Settlement will provide the Debtors with an immediate infusion of capital at emergence and ongoing cash payments for up to five years thereafter. In addition, the Debtors will receive rent relief upon renewal by omitting payments made on account of certain fiber strands. The net present value of the benefit to the

Debtors of the asset purchase, cash payment, and rent relief provisions is approximately $683 million.

E. The Bifurcation of the Master Lease.

15. Finally, the Settlement provides that the current Master Lease will be bifurcated into two structurally similar but independent agreements governing the ILEC Facilities and the CLEC Facilities. Importantly, the Debtors will be able to assign, sell, or otherwise transfer their interest in either or both Leases, subject to certain conditions. The bifurcation of the current Master Lease will maximize the Debtors' strategic optionality.

II. The Settlement Agreement Is a Reasonable Exercise of the Debtors' Business Judgment.

16. Based on my experience and extensive participation in the negotiations and analysis, I believe that the Settlement is in the best interests of the Debtors, their estates, and their creditors. I believe that the Debtors will receive significant value pursuant to the Settlement while simultaneously avoiding the expense, delay, and uncertainty associated with continued litigation with Uniti.

17. ***First***, the Settlement resolves significant disputes between the Debtors and Uniti. I understand that the Debtors' probability of success in the litigation with Uniti is inherently uncertain. I understand that even if the Debtors successfully recharacterized the Master Lease as a financing, there would likely be continued disputes over the appropriate remedy. I understand that any such litigation could be lengthy and costly—and expend significant time that the Debtors could use towards charting a path to emergence.

18. ***Second***, the Settlement provides approximately $1.224 billion in net present value to the Debtors' estates. As noted in the table in paragraph 8 above, this includes:

- $285 million of consideration for assets sold net of the value of those assets, plus the present value of the $1.0 billion,

- net GCI funding,
- $490 million of cash transferred over time between the settlement Effective Date and April 30, 2030, and
- $1.3 billion in net cash flow benefit to the Debtors during the period of peak investment in the network (2020-2025).

19. ***Third***, the Settlement positions the Debtors towards emergence from chapter 11 with robust operations. The Uniti Arrangement was the gating item to the Debtors' emergence, and if the Settlement is approved, the Uniti Adversary Proceeding will be dismissed with prejudice on the settlement effective date so that both parties may work constructively towards a value-maximizing resolution of these chapter 11 cases. Further, the Settlement will improve the Debtors' relationship with Uniti by aligning the companies' incentives to invest in fiber.

20. ***Fourth,*** the Settlement is the product of good faith, arm's-length negotiations between the Debtors, Uniti, and various creditor constituencies. The parties reached consensus on the Settlement terms after seven months of mediation. I understand that the parties were represented by competent counsel and advisors, each of whom were actively engaged in the negotiation process. I believe the Settlement represents a favorable outcome for the Debtors at the culmination of hard fought but successful arm's-length negotiations.

III. The Backstop Commitment Agreement.

A. The Backstop Commitment Agreement Negotiations.

21. Since the Petition Date, the Debtors have engaged with their creditor constituencies to build support and momentum for a consensual restructuring transaction that would allow for an expedient exit from chapter 11. After months of engagement, including more than seven months of mediation, the Debtors reached an agreement on the terms of a comprehensive recapitalization of the Debtors, as set forth in the PSA. A key component of the PSA is the Rights Offering, which

is backstopped by the Equity Backstop Parties on the terms set forth in the Backstop Commitment Agreement.

22. The restructuring contemplated by the PSA is predicated on the Debtors raising significant capital to, among other things, satisfy administrative claims and partially pay down their first lien claims. The Debtors and their stakeholders explored a number of alternatives that would result in the full refinancing of first lien claims, including through rights offering participation by junior stakeholders. Ultimately, no junior stakeholder was willing to support a new capital investment sufficient to pay first lien claims in full, and, as a result, the Debtors negotiated the restructuring under the PSA supported by Elliott and other holders of first lien claims. Over the course of months of mediation, the Debtors did not receive any more favorable financing commitments than those contemplated in the Backstop Commitment Agreement.

23. The Equity Backstop Parties invested significant time and resources over several months negotiating the terms of the PSA. Without their commitment to support the Debtors' restructuring and backstop the full Rights Offering amount, the Debtors would not have a viable path to pursue the proposed plan. Moreover, the commitment of the Equity Backstop Parties sends a positive message to customers, vendors, and employees, as well as the market at a time when the Debtors will be seeking to raise the substantial exit financing contemplated by the PSA.

24. For these reasons, obtaining approval of the Backstop Commitment Agreement, and the authority to satisfy the obligations thereunder, is critical to the success of the Debtors' restructuring and is required as part of the Equity Backstop Parties' agreement to backstop the Rights Offering.

B. The Backstop Fees.

25. As part of the Backstop Commitment Agreement, the Debtors seek authority to enter into the Backstop Commitment Agreement and to perform the obligations set forth therein.

Specifically, the Debtors seek: (a) the authority to (i) pay to the Equity Backstop Parties upon the closing of the Rights Offerings a nonrefundable aggregate payment in an amount equal to $60 million in the form of New Common Shares in accordance with the Backstop Commitment Agreement (the "Equity Backstop Premium"), and (ii) immediately reimburse and pay the Equity Backstop Parties' legal and other advisors as provided for under the Backstop Commitment Agreement (the "Expense Reimbursement"); and (b) the allowance of the Equity Backstop Premium and Expense Reimbursement (together, the "Backstop Fees") as administrative claims in accordance with the Backstop Commitment Agreement.

26. In my view, the payment of the Backstop Fees—like the other terms of the Backstop Commitment Agreement—are the product of good faith, arm's-length negotiations between the Debtors and the Equity Backstop Parties, each of whom were represented by their respective experienced professionals. The Backstop Commitment Agreement was the subject of extensive negotiations, with a number of written and verbal proposals and counterproposals exchanged among the Debtors and the Equity Backstop Parties (and their respective counsel and advisors).

27. The Debtors' commitment to incur the Equity Backstop Premium was essential to inducing the Equity Backstop Parties to agree to fully backstop the Rights Offering in the aggregate amount of $750 million, which amount is required to make cash distributions at emergence from chapter 11 consistent with the PSA. It is both customary and reasonable to make payments to and reimburse the expenses of parties that have committed financing to a debtor, including, as here, backstopping a sizeable new equity investment.

28. It is also customary and reasonable to compensate parties for expending substantial time and resources negotiating and ultimately committing themselves to a backstop commitment agreement as an integral part of the restructuring, and thereby binding themselves to the transaction

and its terms. The financial institutions that have committed to backstop the Rights Offering must reserve $750 million of capital, which, therefore, cannot be deployed to fund other investment opportunities. It is my opinion that the Equity Backstop Parties are justified in requiring compensation for the economic benefits bestowed on the Debtors and that this is standard financial practice. As such, I believe it is both necessary and appropriate for the Debtors to pay the Backstop Fees.

C. Entry into the Backstop Commitment Agreement is in the Debtors' Best Interest.

29. In addition, I have assessed the Equity Backstop Premium and other key economic terms of the Backstop Commitment Agreement in light of (a) the overall terms and conditions of the Backstop Commitment Agreement, (b) the negotiations with the Equity Backstop Parties, and (c) the specific circumstances of these chapter 11 cases. Based on these factors, I believe that the Equity Backstop Premium is reasonable and within the range of similar payments that have been approved in connection with rights offerings in comparable chapter 11 cases.[3] Moreover, assuming a successful emergence from chapter 11, the Backstop Commitment Agreement provides that the Equity Backstop Premium is payable in the form of New Common Shares, thereby not negatively impacting the Debtors' liquidity position at the time of emergence.

30. I understand that in exchange for these payments and reimbursements the Debtors will receive substantial benefits that include, among other things, the Equity Backstop Parties' commitment to invest up to $750 million that, together with the other transactions contemplated by the PSA, provides a path for the Debtors' emergence from chapter 11. Given the Equity Backstop Parties' commitment, I believe that these payments and reimbursements are necessary

[3] A true and correct copy of a chart of payments that have been approved in connection with rights offerings in comparable chapter 11 cases is JX 92.

to the successful completion of the Rights Offering. The Backstop Fees are necessary inducements for the Equity Backstop Parties to enter into the Backstop Commitment Agreement.

31. For all of the foregoing reasons, I believe that entry into the Backstop Commitment Agreement, and paying the Backstop Fees associated therewith will—together with the other transactions contemplated in the PSA—optimize the Debtor's ability to efficiently emerge from chapter 11, while maximizing the value of their estates and are therefore in the best interest of the Debtors and their estates. If the Court does not approve the Backstop Commitment Agreement, the Equity Backstop Parties will no longer be obligated to provide the requisite capital to fund the Plan, and it is my opinion that there is a substantial risk that the Equity Backstop Parties will then exercise their right to terminate the PSA. A termination of the PSA will result in a protracted restructuring process, with the likely outcome being a diminution in value of the estate to the detriment of stakeholders.

IV. Conclusion.

32. In light of the foregoing, I believe that the Settlement is a reasonable compromise of the outstanding disputes between the Debtors and Uniti and will deliver significant value to the Debtors and their estates, which will inure to the benefit of all parties in interest. In my opinion, the Settlement properly balances the business risks attendant to the status quo based on financial projections regarding the Debtors' future cash flows and the legal risks faced by both parties as I understand them through consultation with the Debtors and their legal advisors.

33. Further, the Backstop Commitment Agreement allows the funding necessary for the Debtors to consummate the transactions contemplated by the PSA and emerge from chapter 11 as a viable company. Absent the Backstop Commitment Agreement, there is no assurance that the Equity Backstop Parties would continue to support the PSA or that the Debtors would have a viable path to confirmation of a chapter 11 plan.

34. For all the foregoing reasons, I believe that entering into the Settlement and the Backstop Commitment Agreement will benefit the Debtors and their estates, provide a clear path to emergence from chapter 11, and is the best possible outcome for the Debtors and their estates under the circumstances.

[*Remainder of page intentionally left blank*]

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

Dated: May 3, 2020
New York, New York

/s/ Nicholas Leone
Nicholas Leone
Partner
PJT Partners LP

Exhibit D

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

IN RE:	§	CASE NO. 18-30155-H1-11
	§	HOUSTON, TEXAS
EXCO RESOURCES, INC. ET AL.	§	FRIDAY,
	§	NOVEMBER 30, 2018
DEBTOR.	§	1:29 P.M. TO 2:25 P.M.

MOTION HEARING

BEFORE THE HONORABLE MARVIN ISGUR
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES: SEE NEXT PAGE

COURT RECORDER: RUBEN CASTRO

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APPEARANCES:

FOR THE DEBTORS:	KIRKLAND & ELLIS, LLP Michael B. Slade, Esq. Alexandra Schwarzman, Esq. 601 Lexington Ave New York, NY 10022 212-446-4800
FOR OFFICIAL COMMITTEE OF UNSECURED CREDITORS:	JACKSON WALKER LLP Patricia Tomasco, Esq. 1401 McKinney Street Suite 1900 Houston, TX 77010 713-752-4276
	BROWN RUDNICK LLP Kenneth Aulet, Esq. Sigmund Wissner-Gross, Esq. 7 Times Square New York, NY 10036 212-209-4930
FOR BLUESCAPE RESOURCES COMPANY, LLC:	BRACEWELL, LLP Stephen Crain, Esq. Bradley Benoit, Esq. Kurt Mayr, Esq. 711 Louisiana Suite 2300 Houston, TX 77002
LSP INVESTMENT ADVISORS, LLC:	WHITE & CASE, LLC Gregory Starner, Esq. Thomas E. Lauria, Esq. Michael C. Shepherd, Esq. 1155 Avenue of the Americas New York, NY 10036 212-819-8200
FAIRFAX FINANCIAL HOLDINGS LIMITED:	KASOWITZ BENSON Andrew K. Glenn, Esq. Markson Miller, Esq. 1633 Broadway New York, NY 10019 212-506-1700

HOUSTON, TEXAS; FRIDAY, NOVEMBER 30, 2018; 1:29 P.M.

THE COURT: Good afternoon. Please be seated.

All right. We are here in the EXCO Resources matter, it's 18-30155 and the Gen 4 Investment opportunities adversary proceeding which is 18-3295. We'll take appearances in court and then any on the telephone.

MR. SLADE: Good afternoon, Your Honor. Mike Slade and Alexandra Schwarzman for the Debtors.

THE COURT: Good afternoon.

MR. CRAIN: Stephen Crain and Brad Benoit from Bracewell for the Bluescape entities.

THE COURT: Good afternoon.

MS. TOMASCO: Good afternoon, Your Honor. Patty Tomasco, Jackson Walker on behalf of the Official Unsecured Creditors Committee.

THE COURT: Good afternoon.

MR. STARNER: Good afternoon, Your Honor. Greg Starner of White & Case on behalf of the LSP parties, here with my partner Michael Shepherd in the courtroom. I believe I'm also joined by my partner Tom Lauria on the line.

THE COURT: I think he is here, let me be certain. Mr. Lauria is that you on the line?

MR. LAURIA: That is me, Your Honor. Thank you. Tom Lauria of White & Case for LSP.

THE COURT: Good afternoon.

Who else is appearing in this case this afternoon?

MR. AULET: This is Ken Aulet from Brown Rudnick for the Creditors Committee, and I think Mr. Gross is also on the line from a different phone number.

THE COURT: All right. Thank you. From the 860 area code who do we have? 860-286-0448 is the number.

MR. GROSS: Your Honor, Sigmund Wissner-Gross on the other line for Brown Rudnick also for the committee.

THE COURT: I'm sorry, I just missed your name, could I get you to repeat that for me?

MR. GROSS: Sigmund Wissner-Gross from Brown Rudnick, also for the committee.

THE COURT: Thank you, sir.

From the 908 area code?

MR. GLENN: Good afternoon, Your Honor. Andrew Glenn, Kasowitz Bensen LLP on behalf of Fairfax, my colleague Markson Miller (phonetic) is also joining.

THE COURT: Thank you.

Mr. Mayr?

MR. MAYR: Yes, Your Honor. Kurt Mayr on behalf of the Bluescape entities joining my colleagues Mr. Benoit and Crain that are there in the courtroom with you.

THE COURT: Thank you. Good afternoon.

All right. Mr. Starner did you want to begin today?

MR. STARNER: Thank you, Your Honor. Greg Starner Wright & Case on behalf of the LSP parties. We're here on our Motion to Compel, Your Honor, as you know. What I thought I would do was kind of outline briefly what we're seeking and then how I think two privilege that have been asserted and discuss both of those kind of in turn. I think frankly, the key issue is the scope of the mediation privilege, you know, when it started, when it ended, and the scope of it. And if we can talk a little bit about the common interest privilege which is almost like a fall back privilege they're asserting here.

But just first, just to highlight what we are seeking, the subject of what we're looking for is, you know, we're seeking discovery we're going into negotiations of the settlement. We've talked with you, I think, a number of times now about the key issues we're focused on which includes the treatment of LSP's claim in connection with the settlement, particularly the fact they're being asked to give up 18 percent of their recoveries and also waive their deficiency claims as part of settling the claims. And that's what -- obviously one of the key issues in this case that goes to a number of our objections I think we outlined a number of those for you on Monday. I go into

classification, disparate treatment, whether the plan's been proposed in good faith and whether the settlement's fair and reasonable.

So those are the materials we are seeking, so what's being withheld? The Debtors and the settling parties -- we've asked for the similar materials from all of them -- all of them are asserting the same privileges and there's two. One, they're asserting the privilege under the mediation ADR local rule 1604(i) and their position is that they're not going to produce any communications between them as of July 19, 2018, to date. And the second privilege they're asserting is the common interest privilege which they assert began or existed as of August 7th. And so I'll just take each of those in turn, Your Honor.

The first, is just as a kind of threshold matter, as the Court I'm sure is fully aware, it's the parties that are proposing to withhold documents on the basis of privilege that have the burden. With respect to mediation privilege, so the local rule, you know, we believe on its face, the plain terms of the local rule applied to communications made during proceedings. And they're relying upon that rule to withhold four-and-a-half months of communications, you know, from the day the Court issued its order directing the parties to mediation to date. And we just believe that's an overly broad assertion and use of

that rule and not consistent with the intent of that rule. We believe it should it be limited to the discussions amongst the parties during mediation sessions.

Now, we're also not asking -- we're not seeking those communications, we're not seeking mediation statements submitted to Judge Jones, we're asking about communications to Judge Jones. The mediation here occurred on four discreet dates: August 6th, August 7th, August 27th, and September 21st. And we believe that the ADR mediation privilege should be limited to communications during those sessions.

THE COURT: Is there any authority that supports your position on that?

MR. STARNER: You know, Your Honor. There's not really a lot of law on this at all. You saw on both parties, nobody -- we were unable to find any cases that directly consider the scope of this particular rule. You know, there is some reference to the idea of a mediation privilege under Federal Law, kind of the general scope of that, but again I think that's generally is limited to mediation proceedings and has not been applied, certainly in none of the cases cited by the other parties, none of that was applied to a period of months.

And I think that would go, really contrary to the purpose of the rule. If parties to a proceeding can start

mediation day one of a case and continue that mediation perpetuated throughout the case, they can potentially use that as basis to withhold all the communication between the parties. We don't believe that was the intent of the rule. We think it should be limited to actual mediation proceedings.

There are other rules that may come into play. Obviously the Federal rule 408, which is a different rule that applies --

THE COURT: Well I don't -- I don't think rule 408 in general protects against discovery it protects against use.

MR. STARNER: Correct, Your Honor.

THE COURT: But the mediation rule, protects against discovery, and so I think they may do different functional things, I guess, it protects against discovery and use, but I guess if you can't discover you can't use it.

MR. STARNER: Right.

THE COURT: But is there -- they gave me some case law -- and I agree that it's not the strongest in the world -- but is there anything at all that would go with such a narrow interpretation, because yours seems awfully narrow.

I mean, it would -- if I read it the way that you're reading it then if there was a communication where

the mediator called people together before the proceedings started and it wasn't the face-to-face kind of in room thing, but it was a -- he picks up the phone and he calls and says tell me what your disputes about, probably excludes that, too, under quite the narrow reading that you're giving.

So is there anything that supports going as narrow as what you're saying?

MR. STARNER: But, I think, as I mentioned before, we're not asking for those type of communications, Your Honor.

THE COURT: You may not be asking for them, but I'm trying to live with the reading that you're giving me which is I think it was -- I don't mean to use some of the pejorative terms that they used about it -- because I think we are here on a hard question.

But yours was, if it didn't occur within the four walls of that mediation session, it isn't a mediation privilege, it may be something else, it may be you're not seeking it, but it isn't a mediation privilege. Is there anything that supports that at all, because I mean, I'm not seeing it?

MR. STARNER: We have not -- we didn't find any cases that have considered that question. So we didn't find any courts that come out really either way on that specific

question.

THE COURT: And is it the rule that makes it privileged or is federal policy that makes it privileged?

MR. STARNER: You know, I guess I would suggest that the local rule is the one that's kind of on point, but I think it's informed by maybe some of the policy considerations behind the idea of a mediation privilege. I don't think we were able to find necessarily any legislative history behind the rule, I think we looked for that, weren't able to find that.

THE COURT: I'm unaware of any as well. Okay.

MR. STARNER: So I think we have to kind of fall back on the plain terms. I agree, Your Honor, that some of the practical considerations are relevant here, and I guess I would suggest to the Court that one of those considerations should be on the facts of this case. That the idea that you would be able to assert the privilege for a period of four-and-a-half months, particularly after the period of time which they're taking the position they had an agreement, which I'll get to in a minute, their position is that for purpose of common interest, at least -- now whether that's inconsistent with this, they're positon on mediation privilege is another question -- but for common interest they say we had a deal as of August 7th.

So, you know, I think I would suggest to the

Court that at some point you have to cut off, there has to be a stop date for that mediation privilege.

THE COURT: So what do you do -- it's pretty common when I've done mediations that there's something that says, if the parties have a dispute about what this mediation agreement means, they can come back to me and I'll try and work through that. And, perhaps because I don't do such a good job, I have those often where people have to come back, but that must still be part of the mediation, right? So you have --

MR. STARNER: They go back --

THE COURT: You have what you think --

MR. STARNER: -- to the mediator, the neutral --

THE COURT: -- is an agreement --

MR. STARNER: -- and raise issues, you mean?

THE COURT: You have what you think is an agreement, and there's an interpretive dispute about it. Or sometimes you'll have an agreement between Party A and Party B, but not between Party A and Party C, and so you'll sign up the B agreement and then you'll come back with just A and C. How do I cavern this all out --

MR. STARNER: I think two things, Your Honor.

THE COURT: Yeah.

MR. STARNER: One the idea of going back to the neutral, the mediator, you know, Judge Jones in this

instance, I believe that would probably fall more, much more, closer to the intent of mediation proceedings in my view. You have the mediation sessions, but, if there are follow-ups, whether it includes all the parties or some subset, but particularly with that neutral involved with mediating, actively mediating, between the parties, I believe that would likely fall closer to the scope of the agreement.

However, that's not what's at issue here. The allegation is that there was a deal, a partial deal at least, between certain parties, which the Debtors are seeking to use affirmatively as a basis to support their plan, and to support their decision to treat the LSP and the other non-insider secured creditors a certain way.

THE COURT: When you say they're trying to use it, I think I've been pretty clear that part of what you're seeking they're going to have a really heavy burden to not get me to grant --

MR. STARNER: And I'll get to that. Yeah. Absolutely, Your Honor.

THE COURT: But using it to say, here's a deal which came out of a black box, but this is the deal that were implementing is one thing, and I think we all agree they get to say at least that much. And I think what I have told you preliminarily and I've seen nothing to change my

mind about it, is I'm not going to let them say, because it came out of that black box it was, therefore, done in good faith. If you're telling me --

MR. STARNER: And that may be --

THE COURT: -- some other thing. Then I need to understand.

MR. STARNER: And that may be the rules of the road that we need to get today, that may be helpful for us ultimately, but I think we'd still, you know, believe that at least on the facts in this case and what's at issue, the idea that there is no end date for the mediation that's been ongoing.

And particularly, Your Honor, there is --

THE COURT: Is it still ongoing, or has it stopped?

MR. STARNER: As far as I understand, that's the Debtors' position.

THE COURT: Do you know?

MR. STARNER: I'm afraid I -- well very good question. We have not been invited, we've certainly not been involved in mediation.

THE COURT: Okay.

MR. STARNER: I'll say this, at least with respect to it, there's a number of issues --

THE COURT: Do you want to go?

MR. STARNER: We're always open --

THE COURT: I could probably arrange that.

MR. STARNER: Your Honor, we are certainly always open to negotiate a resolution. And frankly the parties have been certainly working in that direction recently, we just have not been able to make progress unfortunately.

THE COURT: Okay.

MR. STARNER: But I'll say this, on the scope of the privilege, there just has to be some end date. In addition to that, there are issues that were still being negotiated and the difficulty we have is, okay, so there's still open issues that we believe are still being negotiated and a big issue here is their position that certain things, particularly the fact that we would pay for the settlement both out of our initial recoveries on our secured claim and give up our deficiency claim. That was somehow decided in mediation. And our view we were not asked to agree to that, we did not agree to that as part of that mediation, so --

THE COURT: But I don't think we have a dispute about that right? As I understand it, there is no dispute that they're saying that's what this class, were asking this class to vote to do, and we're trying to drag you along into that unwillingly and you have not volunteered to do that. I don't think we have a factual dispute there for which we need any discovery. And that's -- there is an agreement and

you're not a signatory. So I'm not sure where we need any discovery abut that question.

Am I wrong about that?

MR. STARNER: Well I think to the extent they're purporting to and I think we've addressed this in terms of sword and shield --

THE COURT: I don't think they're purporting to bind you at all.

MR. STARNER: Well, seeking to use the mediation --

THE COURT: They're purporting to try and bind you with 1129.

MR. STARNER: -- as a basis to rationalize or justify the treatment or their plan --

THE COURT: But I'm not going to do that.

MR. STARNER: Right. And that's a key issue, Your Honor, frankly that is important to us. Ultimately if --

THE COURT: Let me ask this. Does it make sense to see if they're going to fight you and me on that battle so that you know what you're arguing about?

Because again, I think it's really difficult for me to let them go into the interior of the mediation and to lock you out of discovery. Although I start with the belief that they can't do it, they want to argue against that and

maybe I should hear that and then come back to you to let you finish where you are.

MR. STARNER: That's a good point and I'm happy to do that, Your Honor. And I'll deal with that sword and shield piece after we hear what they're position is.

THE COURT: Okay.

MR. STARNER: Do you want me to briefly address the common interest privilege?

THE COURT: Let me just hear this one piece and well come right --

MR. STARNER: Certainly.

THE COURT: -- back to common interest.

Do you all want to speak to that, or is there one leader? Mr. Slade, your leader.

MR. SLADE: Mr. Slade is our leader.

THE COURT: All right. Is there a mediation agreement to that affect or that's just?

MR. SLADE: I can't talk about it, Your Honor, it's privileged.

(Laughter)

MR. SLADE: Good afternoon, Your Honor. Mike Slade for --

THE COURT: So just on this one --

MR. SLADE: -- the Debtors.

THE COURT: -- narrow question. Are you going to

argue that you can use events within the mediation to prove good faith?

MR. SLADE: Like the back and forth between the parties and the mediation? I don't intend to --

THE COURT: That you in fact -- are you going to use anyone saying we negotiated in good faith at the mediation?

MR. SLADE: I think the fact that there was a mediation --

THE COURT: There was a mediation.

MR. SLADE: Yes.

THE COURT: But as to what happened in it.

MR. SLADE: Yeah. We don't intend to put on evidence of what happened during the mediation other than the fact that this was mediated.

THE COURT: But even a conclusion that says -- I don’t think I can let you say -- have your witness say -- he can say we went to mediation, but he can't say we negotiated in good faith at the mediation, because that's telling me their position as to what occurred within the mediation. So I don't think I can let you do that and that's why, I want a clear statement about that.

MR. SLADE: I just want to step back for a second, because the confirmation standard under 1129(a)(3) has like literally nothing to do with that. I mean the

Fifth Circuit has said what that means in the *Sun Country* case that we cited and what LS Power cited in their brief.

What happened in that case, was there was a creditor that specifically argued that the plan was not in good faith. So what the Debtor had done in that case was change the treatment for a specific secured -- for a group of unsecured creditors from unimpaired to impaired and the argument was the specific reason they did that was to take advantage of the one secured creditor and confirm a plan around them, and the Fifth Circuit said, that's not relevant to good faith. They said what's relevant to good faith is what the purpose of the -- whether the purpose of the plan is --

THE COURT: I just want to know -- not whether you think it's relevant or not, I want to know whether you're going to ever have a witness that you attempt to say that what occurred within the mediation occurred in good faith?

MR. SLADE: I guess, I just don't know the answer to that question, Your Honor. I mean --

THE COURT: He's asking me to issue in effect -- I forget if he used these words -- but a limine -- a limine order that says you can't put on that testimony.

MR. SLADE: Testimony --

THE COURT: You can't have a witness testify that

what occurred in the mediation occurred in good faith without breaking the mediation privilege yourself. You can't do a sword and shield. It's one of the three things I think he asked me for.

MR. SLADE: I just don't think that could possibly be the answer, because what the mediation --

THE COURT: You don't think what could be the answer?

MR. SLADE: That can't be the answer, that we're barred from putting on testimony that the parties negotiated and they came up with -- and there was a mediation and they came up with this answer. Because what the mediation rule says is that the information cannot be disclosed. It's not discretionary. There's no indication that, that's something that can be -- it says cannot be disclosed to anyone including the Court. So how could -- there are situations like in any plan.

THE COURT: So you can't then have a witness tell me, that they negotiated in good faith at the mediation, right? How can he ever challenge that conclusion?

MR. SLADE: So what you're saying is that under the rule, the rule basically prohibits anyone from saying that on the witness stand at a hearing.

THE COURT: That's his motion and it seems to me that with you saying he can't figure out what happened at

the mediation that you can't have a witness that just gives me the conclusion. Everyone will stipulate. He'll stipulate that there was a mediation. His position is, that what occurred at the mediation was collusive activity to the disadvantage of his client. And, if you're guy wants to get up and give me the conclusion that what he did at the mediation was in good faith, and he can't prove that it was collusive, I've tied his hands unfairly.

And so I don't -- but I think the solution is, he probably can't get into whether there was collusion within the mediation but you can't testify as to the conclusion that it was in good faith because it's conclusionary and not subject to cross-examination.

MR. SLADE: Okay. I think I'm in the same place as Your Honor. I don't have -- I don't plan to have anybody sit on the stand and talk about what happened during the mediation, and so I'm not sure how that person --

THE COURT: How about a conclusion that it was in good faith?

MR. SLADE: That what actually took place at the mediation was in good faith?

THE COURT: No. Will there be a question for example, did you negotiate with the other side in good faith at the mediation?

MR. SLADE: Okay.

THE COURT: You can't ask that.

MR. SLADE: I understand what Your Honor is saying.

THE COURT: And do you have any argument against that?

MR. SLADE: I mean, I guess my argument would be under, Your Honor's interpretation of the rule then no one could ever elicit that testimony at a trial. Because the rule specifically says you can't disclose it to anyone including the Court. I don't think that, that would -- what Your Honor just said would kind of preclude anybody from testifying as to the good faith nature of a negotiation in any hearing --

THE COURT: Well, no.

MR. SLADE: -- because that's what this rule says.

THE COURT: Well, no, because you could have good faith negotiations outside of mediation.

MR. SLADE: Okay.

THE COURT: The question is, can you testify about good faith negotiations with in the mediation? And let me just say, I don’t really think I'm tying your hands behind your back, because if I'm going to bar him to go into it, it doesn’t seem to me at all fair, but you're burden isn’t to prove that you negotiated in good faith, it's to

prove you proposed in good faith. And those are different things.

MR. SLADE: Ms. Schwarzman and Ms. Tomasco are in violent agreement with Your Honor, so I'm going to join them and agree with Your Honor.

THE COURT: Well, let me ask Bluescape and Fairfax if they're going to agree to, because if so, then I may just start the hearing by granting the limine -- I'm sorry, I don't know if that's the word you used, but that's the way I'm thinking of it is a limine motion. I think you used -- he maybe even used that word. But basically granting the limine so we then know what the rest of the fights about.

MR. CRAIN: Stephen Crain from Bluescape, we would agree as well.

THE COURT: All right.

And Fairfax's position?

MR. GLENN: We also agree, Your Honor. For the record Andrew Glenn.

THE COURT: All right. Then I am granting what I'm describing as the limine part of the motion, and we'll figure out how to document that at the end of the hearing.

Now, you go ahead with the rest of your argument.

MR. STARNER: Thank you, Your Honor.

I'll turn now to the common interest privilege

and this I think there's two points here I wanted to raise with the Court. One's kind of scope and timing of the privilege that's been asserted and the second is really more of a reservation of rights, kind of, to be determined piece of this.

On the common interest, as I said, they're taking the position that they --

THE COURT: First of all, I'm glad you're thinking of it that way, because that's very much the way I was thinking of it coming in, but go ahead.

MR. STARNER: Some of this is a little bit premature and not before the Court --

THE COURT: No it's fair. It's fair.

MR. STARNER: -- but I do want to raise a few pieces of this.

They're taking the position they had an agreement as of August 7th. You know, it's our view that at least certain terms we believe a number of material terms are not agreed to as of that date. It's a little bit of a black box, of course, we don't know. But certainly from the record that is apparent to us, you know, there were certain issues that had not been agreed to as of that date.

So our position is, if they didn't have an agreement on particular terms or issues, they cannot have a common interest as to those issues. And that's kind of our

threshold issue and so were kind of stuck in a position where they're asserting we had this deal on all material economic terms, which is their definition they don't define what that means, they just said, take our word for it, all material terms were decided, and so you don't get anything. Now there's two or three problems with that.

First problem is, Your Honor, as you well know it's not just about having a common interest, the underlying communications have to privileged so that the communication has to be an attorney client privilege communication or a work product privilege. That's where I think I have to reserve my rights, because were not yet in a position really to test that.

I do have an issue to raise with the Debtors -- we only have one privileged log to date, it's the Debtors. And the only description I have on that privilege log -- and I'm happy to show the Court -- is "privileged communication." In our view that does not comply with rule 26, we have no way to assess whether or not a particular communication we believe in fact is privileged, at least inside the common interest piece of it. So that's an issue we have, because obviously the Court knows commercial discussions, business discussions those would not be privileged.

So for that piece we have to kind of reserve our

rights and we haven't yet had the privileged logs from Fairfax, Bluescape, or the Committee. So for that particular issue we believe that's going to be something we need further information from the parties about and may need to raise with the Court. Because we believe there are a number of commercial discussions that are being had. So to be clear, we've got nothing from (indiscernible).

THE COURT: I think, I'm a few degrees off of what you're saying, but not a magnitude off of what you're saying, which is --

MR. STARNER: Okay. So let me tap back towards, Your Honor.

THE COURT: What is that now?

MR. STARNER: If you tell me where you are, maybe I'll try to tap back towards you.

THE COURT: Well I just want to get you to maybe tell me why my definition, which is a few degrees off yours, is wrong.

MR. STARNER: Okay.

THE COURT: You can agree, it seems to me, that we're going to oppose LS Power at every step of the way with respects to whether they can scuttle the releases, and then have a common interest to be your enemy without having agreed on the details of how to do that. And that an issue could arise over which there wasn't an agreement on exactly

what to do and the parties get to discuss amongst themselves how to do -- how to implement their common interest which wouldn't really have been an agreement it would be implementation of the agreement, and I think that may still be covered by the common interest.

Conversely, if a new issue arose where a new enemy approached and it wasn't LS, and they approached from a different angle. The fact that they had a common interest with respect to opposing anything your client might have wanted to have done, would not extend that common interest to some new attack until they had reached an agreement on that.

So the common interest I don't think can protect every discussion they might have about everything, but I don't think it's so narrow that it can only protect discussions about things that are agreed upon. And I want to hear your feedback about that.

MR. STARNER: Your Honor, I think I'm close to that. I guess, I'll just put a slight twist on it and give you a particular example that we're concerned about.

We believe there are material terms that were still being negotiated after August 7th, what they're asserting as common interest. Specifically, the idea that they would be asking LSP as a non-insider, senior-secured creditor to give up its deficiency claim as part of the

settlement consideration, we believe that was not something that the parties had agreed about on August 7th.

Now, did Fairfax and Bluescape have an interest in selling the claims against them at that time, with the committee and the Debtors? Yes. That interest doesn't necessarily give them a common interest to then shield all their communications and negotiations about how they actually paid for that settlement though. And the fact that --

THE COURT: I'm not sure that I'm agreeing with you, because if they had a common interest in reaching goal A even if you weren't yet on the radar screen, I thought that the Fifth Circuit case law that I read would extend to that.

MR. STARNER: Well, Your Honor, you don’t have a common interest until you actually are aligned. So I mean arguably --

THE COURT: Agree with that.

MR. STARNER: -- when all the parties at the beginning of this case had a common interest --

THE COURT: But they don't need to be aligned on the detail they need to be aligned on the goal, right?

MR. STARNER: But, I mean, Judge, that may just go a little bit too far, I would suggest. The idea of being aligned on the goal. You know, everyone's goal is probably

to maximize their own interest. The Debtors have particular goals in mind of maximizing the interest of all the creditors.

THE COURT: Well, no the two have to agree on a common goal.

MR. STARNER: And I guess if they decide they're goals are aligned, I would just argue that if the details of how they would go about doing that. Because there's a big difference between saying, in this instance, Bluescape and Fairfax saying we're willing to pay out of our own recoveries and our own pocket for this settlement, you know in fact were willing to use other people's currency to do that. I think that's an important distinction as to where they were in the negotiations and why that would necessarily be fully aligned at that time.

THE COURT: Let me take your example, then. Let's just -- and I haven't -- as I read their answer, there is a formal joint interest agreement between them that has been withheld from you.

MR. STARNER: That's Fairfax and Bluescape. Yes. That's slightly different point. But yes they had an agreement prepetition.

THE COURT: So if Fairfax and Bluescape had a joint agreement, and that joint agreement was to pursue all avenues towards getting a release and that they agreed they

would bear that cost 70/30. I'm making stuff up. And then as they figure out how to implement that, one way to implement that is to get a class vote so that the whole class gets a release. It's not that they necessarily wanted to drag you along that's just what ended up happening in terms of the ultimate agreement.

I don't think they need to have agreed in the beginning that they were going to try and drag you along. They needed to agree in the beginning that they were going to do what it took to get a release and share costs in the example I gave. I'm not saying those are necessary events.

MR. STARNER: But you have -- just to that example, Your Honor, if I may. You have Fairfax and Bluescape on one side that may have a common interest. You have the committee on the other side and you have the Debtors on a third side. Each of them, I think, in approaching that question all have separate kind of interest and ultimately how they decide to resolve their -- you know, it's an adversarial process where they negotiated this.

THE COURT: So you're saying when Fairfax and Bluescape -- they could have a joint interest agreement where you can't get their documents, but if they then negotiate with the committee and there is no joint interest agreement with the committee, oral or written, that whatever occurs between them and the committee would be subject to

discovery?

MR. STARNER: I'm not necessarily limited to -- in my mind it does not turn on an agreement, written or oral, it's about whether or not those interests are aligned or whether they were negotiating --

THE COURT: Okay.

MR. STARNER: -- at arm's length.

THE COURT: But let's assume there was no agreement in your example between the committee on the one side and the Bluescape and Fairfax on the other? You're telling me that Bluescape and Fairfax their own discussions might be privileged but their discussions with the committee would not be.

MR. STARNER: We are focused on the discussions --

THE COURT: I'm not sure they disagree with that so I need to understand if there is -- there may or may not be a disagreement about that.

MR. STARNER: Okay. And I would just include --

THE COURT: I didn't realize we had a fight there.

MR. STARNER: -- the Debtors also in that three-part kind of conversation.

THE COURT: I don't know if we have a dispute about that or not. I was not aware of that particular line

drawing exercise until you just --

MR. STARNER: Well I'm hopeful that you and I don't have a dispute about it, I think I have a dispute with the Debtors, Fairfax, and Bluescape about that.

THE COURT: I don't know if we do or not. If we did, I missed it in the writing. I sort of missed you raising it, I missed them answering it, that's a new issue for me.

MR. STARNER: Okay.

THE COURT: But I wouldn't think --

MR. STARNER: You know, the nuances we put on it --

THE COURT: -- I will just tell you that my top of the head answer is that until you have a joint interest you can't protect the discussions. So, if the committee remained at loggerheads with Fairfax and Bluescape, those committee versus Fairfax and Bluescape discussions I doubt are governed by any joint interest privilege. So if we have a dispute about that, right now at least my first reaction is, your right.

MR. STARNER: And this is where I get to the reservation point, Your Honor, and needing more information, because frankly generally how you go about testing this issue is you get a privileged log, you see a description of the communication, you potentially ask for more details from

the party who's asserting the privilege, then you bring that particular -- those particular documents to the Court and say we think these are not covered by common interest.

THE COURT: How many documents do we have?

MR. STARNER: I believe the Debtors' privilege log was something, you know, a few hundred documents it was voluminous.

But in terms of the period that we're focused on obviously is just the common interest I think that hundreds of documents were withheld --

THE COURT: Mostly emails or like -- I'm trying to figure out if I have to read them all, what you're asking me to do. I don't know if you are going to ask me to read --

MR. STARNER: Well I think they are mostly emails.

THE COURT: Okay.

MR. STARNER: I don’t necessarily know were asking you to do anything yet, Your Honor, because right now --

THE COURT: But I mean it may make some sense at some point to take them for an in camera review --

MR. STARNER: Potentially.

THE COURT: --and I'm trying to figure out if I'm capable of doing that with time limits. But if it's a

hundred emails or two hundred emails, that's not a big deal. If it's 200, 60 page agreements, that's a pretty big deal.

MR. STARNER: My suggestion, Your Honor, is that the parties -- we still haven't got the privilege logs from the other parties, we need to get those, have an opportunity to review them, give us a chance to meet and confer, because I think the first question for us is going to be please provide us more details --

THE COURT: Right. Right.

MR. STARNER: And then potentially be able to tee it up, Your Honor, in a way that's manageable. So I think that's where I would go with the common interest piece.

THE COURT: Fair enough.

MR. STARNER: So I think I'll pause or stop there, unless of course there's any questions. I had some kind of discovery schedule kind of an update to provide to the Court, but maybe I'll reserve on that until after we finish arguing.

THE COURT: Thank you, Mr. Starner.

MR. STARNER: Thank you, Your Honor.

THE COURT: Mr. Slade?

MR. SLADE: Thank you, Your Honor. A few things, first. I think the common interest -- if the mediation privilege is what we've talked about it being I think the common interest privilege is of less relevance, because most

of the documents would be covered by the mediation privilege. But to the extent we get to the common interest privilege. Here's what happened.

We had mediations on August 6th and 7th. At the end of the 7th we had agreement in principle on all material, economic terms we actually had a hearing in front of Your Honor the next day, on August the 8th. In which Mr. Greco said we have agreement on all material economic terms. And I remember LS Power expressing, you know, they were unhappy with that agreement on economic terms, so there's not -- there's not a dispute that as of that date there was an agreement between the committee, the company, Fairfax, and Bluescape on any matter that would be relevant to LS Power.

The details that we were negotiating between then and the filing of the plan, you know, there were disagreements on some of the details that's sure, but I don't even understand why those would be relevant to LS Power.

And with respect to the common interest privilege, it's far broader than Mr. Starner suggested. I think the key case on that is Judge Clark's opinion in the *Harwood* case. I'm not sure if, Your Honor, had a chance to look at that. We cited it and they cited it also in their briefs. That was a case where Judge Clark found that there

was a common interest between the banks, the Debtors and the committee, because they were joining forces for the ultimate purpose of confirming a liquidating plan. That was the common goal. There were details that there were issues between the parties on, but that was the common goal. The three entities were working towards the common and ultimately accessible purpose of pursing a plan of reorganization that would get confirmed. And so that's, you know, pretty right on point --

THE COURT: But in Mr. Starner's example where you only have some of those parties, yet in bed together and other people haven't pulled the sheets over them yet, do you agree that there wouldn't be a joint interest privilege?

MR. SLADE: So I think it depends on whether there was a difference of opinion over something that was material to the common goal. If there was I agree with --

THE COURT: No. But we started off by me saying look you can have disputes about how to implement your common interest and that remains common interest, and he doesn’t disagree with that.

MR. SLADE: Yes.

THE COURT: But you have to start with a common interest. And so if it turns out -- and I want to go back to this hypothetical, because he gets to challenge what you're saying.

Bluescape and Fairfax have decided on a common interest, the committee hasn't joined in that common interest yet. The communications between Bluescape and Fairfax on the one hand and the committee on the other are not subject to a common interest privilege.

MR. SLADE: I agree, there's definitely no common interest privilege between the settling parties prior to August 7th, because prior to August 7th there hadn't been agreement on a common --

THE COURT: But if Bluescape and Fairfax may have had their own agreement that took place in June, their June to August discussions would have been privileged between themselves but not with the committee, right?

MR. SLADE: Yes.

THE COURT: Okay. Then I think we have somewhat of a consensus on that fine point that Mr. Starner agrees.

MR. SLADE: Yes. But I think where he -- where we part company and I think Your Honor parted company with LS Power on this also is, you know, there's agreement in principle on the material economic terms of the plan --

THE COURT: Every little dispute doesn't destroy that common interest, I agree with that.

MR. SLADE: Okay.

And just so Your Honor is clear on the amount of documents, I want to make sure -- it's correct that they've

had a privilege log since I think Monday, if they have issues with that, they should let us know. We haven't heard any issues with that privilege log yet, but were happy to address that with them. There are about, it's like a little less than 300 documents on the log, but just so we're clear that log only goes through August 7th. We have the documents since then up to the filing of the -- basically through the Disclosure Statement approval, but we have -- so there's no log of those, we would have to do that, if Your Honor ordered us to do that.

But there is a log and we have all the -- we produced all the documents prior to July 19th that hit their search terms. The period between that and August 7th is when -- is the nature of the log. So there's going to be -- if Your Honor orders us to produce more documents there will be a longer log.

THE COURT: Got it. Mr. Crain.

MR. CRAIN: Stephen Crain for the Bluescape entities. And I just wanted to, I guess, alert the Court is the right term to what we've done and our approach. So we have produced documents, a log will be forthcoming today, and we have -- there are fences around what we have produced and what we're logging, so prepetition we have a common interest agreement with Fairfax, so --

THE COURT: Is that in writing?

MR. CRAIN: It is in writing, Your Honor. It doesn't have to be, but it is.

So prepetition we received threats of litigation from creditors. Those threats then sort of blossomed into the complaint that was drafted by the Creditors Committee that now has been cribbed by LS Power, and so from the get go, we have potential co-defendants that have now become real co-defendants that are completely aligned, they're both large creditors alleged to have abused their insider status.

So that, that, that notion captures a group of documents that we claim are subject to privilege, those communications in the furtherance of our legal work as it relates between Bluescape, Bracewell, and Fairfax, and their Counsel.

THE COURT: Well that's limited then by communications between --

MR. CRAIN: It is.

THE COURT: -- Fairfax, Bluescape and their Counsel and not with any third parties, right?

MR. CRAIN: Correct. So among the documents produced would be documents between Bluescape and Debtors prior to the common interest privilege date of August 7th.

One thing I want to correct on something Mr. Starner said is that we -- and he hasn't seen our production so it's unfair for me to be critical of him, I just want to

correct the record on it -- he said we're using these privileges -- he broadly said all the parties are using these privileges to prevent the production of documents after June 19th. That's not true. There are certain documents that we're withholding between June 19th and August 7th that are subject --

UKNOWN: July.

MR. CRAIN: July 19th, I can't read my own writing. July 19th that's when the order for mediation came out. So there are -- let me back up. There are documents between the dates, July 19th and August 7th that we're withholding on the mediation privilege, but there are documents we're not withholding because they're not subject to that privilege.

So there are documents that are not subject to our joint common interest privilege with Fairfax that are there and are also not subject to any common interest privilege with the Debtors that are being produced in that time period. And then subsequent to August 7th were relying upon the same common interest privilege that Mr. Slade described.

THE COURT: All right. Thank you.

I want to take each thing individually.

First, does the mediation privilege apply outside of the four corners of the mediation rooms? My answer is it

does. The mediation privilege applies to all the communications in furtherance of the mediation proceedings. I accept the reasoning found in the response brief that a lot of the language in that would be irrelevant if it was only the four corners of the room; for example, the scheduling issue and the final document issue. But also the principle of it just makes no sense to limit it to the room. That the idea is to have confidential mediation.

Number two, I may have made an error in ordering the mediation without an end date, but my error isn't going to change the privilege. The argument that three or four months seems excessive for a mediation privilege has some appeal to me, but I'm not going to go back and rewrite history. If there's a party that thinks the order was too open-ended or that we should have terminated it or in otherwise limited it, that's something that should have come up, maybe I should have done it on my own, the argument has a lot of appeal, but there's no way that I can go back and redo that today.

Number three, as I indicated before, I will grant the limine motion. I'm not going to allow the mediation to be used as a sword and shield. There will be no testimony by any party about the internal communications that occurred from the point that we issued the mediation order until the mediation either ended or ends. And I don't know if it's

ended yet or not. That may be a factual issue for trial as to when it ends, or has ended. It's something I don't know, but until it ends or has ended either by my order or by the mediator declaring -- the mediator being Judge Jones -- declaring that it's over. One of those two things has to occur for it to end.

Normally these things end because there's a -- there really is a termination, everybody knows when they end it. This one seems to have dragged a lot, it seems to have been productive a lot, that's not a complaint, but this problem is not one that I can solve by, I think, retroactively changing the rules.

The common interest doctrine, I think there is no longer much of a dispute about between the parties. It only applies to parties that have a common interest, it does not apply to parties that are communicating with others, merely because the others have a common interest. But it does apply to the resolution of matters that arise by the parties that have the common interest if they have individualized disputes.

Number four, with respect to all documents that are pre-mediation documents or that are documents that arose after the mediation commenced but not as part of the mediation process for which a privilege is alleged, there does need to be appropriate descriptors as argued by

Mr. Starner. And I'll order the privilege logs -- I've set a deadline for you-all, if you can't make this deadline by today, I'm not saying you would violate the order, but the descriptors need to be added promptly to those. He's entitled to know what those documents are, so that he can challenge the privilege.

I'm not making that same order as to the mediation documents because I think they're sort of totally privileged, if they were within the mediation itself, and that no log would have to occur for those. That's not an attorney-client privilege matter, it's a mediation privilege matter.

With that said, I think Mr. Starner wanted to then address how we move ahead on the balance of discovery matters. So I'm going to call on him again and I'll also let people voice for the Record any further objections that they might have to that ruling.

MR. STARNER: Thank you, Your Honor. Thank you for your ruling. I think that gives the parties some directions. I will just say on the privilege log that'll be an issue that we're going to need to kind of work through and may need to get back in front of the Court on.

I just wanted to give the Court an update on where we are on discovery. To-date, I understand that, you know, we've gotten the documents that we're going to get

from the Debtors.

I understand there's been some start of a rolling production from some of the other parties. We haven't yet received all of the documents yet from the Committee, Fairfax, and Bluescape, but I believe that they are working towards the Court's deadline of today. So we'll see what we get.

So we'll need to look at those documents, we'll need to see those privilege logs, and kind of see if there are any issues or disputes that we need to raise between the parties and potentially with the Court.

In terms of depositions --

THE COURT: When do you think you might next need some time from me?

MR. STARNER: Well, it kind of goes into, you know, where we are on the schedule. Right now we've got about eight depositions scheduled for next week. We have an expert that we're working with and potentially seeking to confirm on liquidation. You know, we obviously took the Courts comments on valuation and identified a liquidation expert to assist us to what extent we kind of finally confirm and have him, you know, up and running is something we're working with him on.

The deposition of the Debtors' liquidation expert is today. My colleague is taking that deposition. And so

were working in that direction also. This is all just, I just wanted to highlight things we are doing within the schedule that we currently have and just highlight that.

In terms of the depositions, I just wanted to flag, there may be an issue or two there that we may have to raise with the Court. We don't yet have confirmed dates for Bluescape's 30(b)(6) or Mr. Wilder (phonetic). And I think we just recently were advised by Fairfax that they're not going to produce Mr. Watsa (phonetic), who's the principle kind of decision-maker for Fairfax. They are going to make a 30(b)(6) witness available and so we'll need to determine whether that's an issue we have to raise with the Court.

And just in terms of looking forward, one other issue that we are asking the Debtors for some information about is the exit financing. As the Court may recall, Counsel for the Debtors advised the Court that the schedule we're on in part turns on that exit financing. We haven't seen any documentation regarding the commitment on the new 2L financing, and it's our view that to the extent that exit financing is going to be, you know, kind of the basis for the current schedule or for a schedule, it would be important for, you know, that kind of documentation information to be in the record, and so we're going to kind of see where that is. We understand that may be kind of in flux a little bit.

So I just wanted to highlight those or kind of some of the moving parts, Your Honor. And so it may be helpful to have another Status Conference next week to see, you know, what's realistic in terms of a start date for confirmation.

THE COURT: What day would be most helpful in your mind to schedule that for?

MR. STARNER: Well, I think we're going to be in Dallas a lot next week, actually, Your Honor. But nonetheless if it can be done telephone --

THE COURT: There's a phone.

MR. STARNER: Whenever the Court's available, we're happy to make ourselves available.

THE COURT: Okay. I mean when -- forget that you're in Dallas or that I'm in --

MR. STARNER: Either Tuesday or Wednesday I think would give us a time just if there's some issues on the depositions, maybe Tuesday, Your Honor, if that works for the Court?

THE COURT: Tuesday is my worst day.

MR. STARNER: Okay.

THE COURT: Monday or Wednesday are better but I'll find a way to do it on Tuesday if we need to. But Wednesday afternoon would work much better for me if that accommodates the parties?

MR. STARNER: Okay. I think, from my perspective I think that might be helpful to have that at least placeholder.

THE COURT: Mr. Slade?

MR. SLADE: Thank you, Your Honor. Wednesday afternoon works fine for a Status Conference. There will be a deposition ongoing, but I'm sure we can have somebody else cover it while certain of us get on the phone with the Court.

As far as --

THE COURT: I'll be on the phone as well, by the way, I won't be here.

MR. SLADE: Okay.

THE COURT: But I can do it Wednesday.

MR. SLADE: That's great.

As far as the exit financing goes, this is the first time hearing of issues, but I'm happy to work with Counsel. We produced a lot of documents already that related to the exit financing, and the 2L process is ongoing, as I think everybody knows.

The one issue I wanted to raise is this issue of LS Power is going to have an expert, we've been asking, you know, when we would see a report so that we can have a deposition scheduled, and we haven't gotten an answer to that. So I'm not -- I'd just like to know when -- if

there's going to be an expert on the other side, when we're going to see a report and when we can take that person's deposition prior to confirmation.

THE COURT: Okay.

MR. SLADE: And I'm happy to have a call with Your Honor on Wednesday whenever you would like to set it.

THE COURT: I'm sorry what did you say about Wednesday afternoon?

MR. SLADE: I'm happy to have a call whenever Your Honor would like to set it.

THE COURT: So let me just look at my plane schedule for that day. And this is going to be a tentative conference, right> You-all are going to contact Ms. Do will be out of town, so can I get you-all to contact Mr. Castro and he'll arrange it with me, assuming that you want it. But I'll tentatively give you a time right now, but it won't be final until you tell him that you need it.

MR. SLADE: Absolutely.

THE COURT: It sounds like you're in depos and I'm at a Judicial Conference meeting, so.

Just looking for when my return flight is, so that I'm not talking to you from an airplane.

MR. SLADE: All right. That used to be possible.

THE COURT: What is that?

MR. SLADE: That used to be possible, the air

phones, no longer.

(Pause in proceedings.)

THE COURT: I didn't ask the folks on the phone whether Wednesday afternoon works for everybody, I'm assuming it's okay from the sort of silence I'm getting, but.

Do you-all want to call it for 2:00 o'clock Houston time?

MR. SLADE: That sounds fine for me, Your Honor.

MR. STARNER: That's fine for me.

THE COURT: Okay. We'll set a tentative further discovery conference for 2:00 o'clock p.m. Houston time Wednesday, December the 5th.

That conference will only occur if the parties jointly contact Mr. Castro and tell him to get me on the phone. So let him know if you would by the end of the day on Tuesday. I won't have any other plans, so it'll be fine if I learn that late.

Does that work for everybody?

(No audible answer.)

THE COURT: Is there anything else we can accomplish today?

What do we need to do to document the ruling, was it clear enough that you-all can just live with the tape, or do you-all want to get a written order on the ruling? What

do you-all want to do? I know you-all are really busy.

MR. SLADE: I think my inclination would be to just use the transcript and --

MR. STARNER: That's fine with me, Your Honor, I think the transcript probably is good enough for us.

THE COURT: Okay.

MR. STARNER: And if we have any disputes at the hearing, we can obviously raise it with the Court.

THE COURT: That's fine. All right.

If there's anything I can do to further the resolution of matters between all you-all let me know, I have expressed, tried to express a view that I think it is -- generally equitable subordination claims lose. I'm not sure this is one that's a loser is probably the best way of putting it, and it would probably be productive to have further discussions between the parties about it.

MR. SLADE: Yeah. The one thing I should tell Your Honor, is Your Honor last time we were here asked us to draft language that would make clear in the confirmation order that was preserved. We have done that and we have provided it to LS Power and we're just waiting for them to respond to it.

THE COURT: Yeah. I'm just not sure that this is a riskless event that we're heading into for anybody and you-all really ought to be having discussions, but -- I

mean, the other side of it is it's very interesting from my point of view. I get to worry about things I don't usually worry about. I'm just not sure that's very helpful to everybody else.

MR. SLADE: Yes.

THE COURT: I appreciate the quality of the argument and really the integrity with which everybody is arguing this, it's just so nice to see from all sides. So, I thank you all, and we'll be in adjournment.

MR. SLADE: Thank you.

MR. STARNER: Thank you.

THE CLERK: All rise.

(These proceedings concluded at 2:25 p.m.)

* * * * *

I certify that the foregoing is a correct transcript to the best of my ability produced from the electronic sound recording of the proceedings in the above-entitled matter.

/S/ MARY D. HENRY

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DATE FILED: DECEMBER 5, 2018