Hearing Date: June 24, 2020 at 10:00 a.m. (Eastern)
Objection Deadline: June 19, 2020 at 12:00 p.m. (Eastern)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO CONFIRMATION OF THE FIRST AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION OF WINDSTREAM HOLDINGS, INC., *ET AL.*, PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

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

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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"), submits this objection (the "Objection") to the *First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc., et al., Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 1812] (as amended or supplemented, the "Plan").[2] In support of this Objection, the Committee incorporates by reference the *Declaration of Lorenzo Marinuzzi in Support of the Objection of the Official Committee of Unsecured Creditors to Confirmation of the First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al., Pursuant to Chapter 11 of the Bankruptcy Code* (the "Marinuzzi Decl."), filed contemporaneously herewith, and respectfully states as follows:

I. PRELIMINARY STATEMENT[3]

1. The Plan propounded by the Debtors, and supported by the First Lien Creditors, fails to comply with the requirements of section 1129 of the Bankruptcy Code and cannot be confirmed in its present form. Specifically, the Plan improperly funnels to the First Lien Creditors the value of significant unencumbered assets—including, but not limited to, proceeds of the Uniti Settlement (the "Settlement Value"), other estate avoidance claims, and the Debtors' real estate interests—all of which instead must be distributed to unsecured creditors. The Debtors and the First Lien Creditors offer three justifications for this diversion of unencumbered value to the detriment of unsecured creditors of the Obligor Debtors. They argue that (a) the Settlement Value is subject to the Prepetition Liens; (b) all unencumbered value, including the Settlement Value, is subject to the DIP Liens (as defined in the Final DIP Order); and (c) all

[2] Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Plan or Disclosure Statement (defined below), as applicable.

[3] Capitalized terms used in this Preliminary Statement have the meanings ascribed to them below.

unencumbered value, including the Settlement Value, is subject to adequate protection liens in favor of the First Lien Creditors. The Debtors and the First Lien Creditors are wrong on all three purported justifications in support of the fatally flawed Plan.

The Settlement Value Is Not Encumbered by the Prepetition Liens

2. The Debtors' and the First Lien Creditors' blithe assertions that the Settlement Value is encumbered by the Prepetition Liens are without merit. As an initial matter, the First Lien Creditors released their liens on the assets purportedly transferred to Uniti in connection with the Uniti Transaction. As a result, the First Lien Creditors would not have been able to assert secured claims against those assets if the Debtors had prevailed in the Uniti Litigation and obtained the requested Court order deeming the assets to be estate property.

3. Nonetheless, the Debtors and the First Lien Creditors argue that estate claims against Uniti constitute prepetition "general intangibles" under the New York Uniform Commercial Code (the "UCC"), upon which they hold perfected liens, and the Settlement Value is therefore also subject to their liens as proceeds of those general intangibles. But the claim to recharacterize the Uniti Arrangement as a financing transaction ***under the Bankruptcy Code***, which was the primary claim resolved by the Uniti Settlement, arose only by virtue of the commencement of the Debtors' chapter 11 cases and was prosecuted exclusively postpetition with estate assets.[4] Indeed, the Debtors likely could not have even brought the recharacterization claim outside of bankruptcy. Moreover, the recharacterization claim is not a "general intangible" under the UCC. Recharacterization is an equitable remedy, not an action to "recover a debt, money, or thing." As a result, it does not qualify as a "thing in action" that would bring it within the UCC's definition of "general intangible." This view is supported by this Court's own

[4] Of course, the other significant claims resolved through the settlement with Uniti were potential fraudulent transfer claims, which unquestionably are not subject to the Prepetition Liens.

statement at the hearing on December 12, 2019 that a recharacterization claim is akin to a claim objection; it can be brought by any party in interest and is not personal to the Debtors. Since the recharacterization claim is not personal to the Debtors, it was never their personal property to pledge. And, even if the recharacterization claim does qualify as a general intangible, because the First Lien Creditors took their security interest in certain of the Debtors' assets in reliance on the fact that the Uniti Arrangement would ***not*** be recharacterized, under valid New York case law, the recharacterization claim was insufficiently choate at the time of the grant for liens to attach to it. As a result, neither the recharacterization claim nor any proceeds of that claim could have been subject to the Prepetition Liens as a matter of law.

The Settlement Value Is Not Encumbered by Postpetition Liens

4. The Settlement Value is also not subject to postpetition liens in favor of the secured lenders. The DIP Obligations (as defined in the Final DIP Order) are being satisfied in full and in cash under the Plan on the Effective Date. However, substantially all of the Settlement Value will be received by the reorganized Debtors ***after*** the Effective Date and ***after*** the postpetition DIP Liens are released. Thus, any argument that the Settlement Value is being distributed to the DIP Lenders in satisfaction of their secured claims is completely contrary to the facts.[5] The Debtors and the DIP Lenders cannot artificially allocate Settlement Value that will not yet have been received by the Debtors to satisfy the DIP Obligations, which will have already been satisfied by the time such value is received.

5. Pursuant to footnote 9 of the Final DIP Order, the Debtors, their secured lenders, and the Committee expressly reserved all rights and remedies with respect to the Uniti

[5] The only consideration from the Uniti Settlement that could possibly be received pre-Effective Date is the proceeds of the sale of certain of the Debtors' dark fiber assets. However, as was made clear during the trial on the Uniti Settlement, the value of such assets actually exceeds the consideration being paid. As a result, none of the proceeds of this sale were included in the build-up of the approximate $1.2 billion in Settlement Value.

Arrangement ***and*** carved the Settlement Value out of the scope of both the DIP Liens and adequate protection liens. Footnote 9 goes further than merely reserving the parties' rights by providing that nothing in the Final DIP Order shall "impact or prejudice the rights" of such parties (including the Committee) to "benefit from the adjudication or settlement of any claims" arising from the Uniti Arrangement. It follows then that the DIP Lenders are expressly prohibited from looking to Settlement Value to satisfy the DIP Obligations. Even if footnote 9 is a mere "reservation of rights" as claimed by the Debtors, it must be read as reserving rights for unsecured creditors to argue in connection with confirmation of the Plan that it is unfair and inequitable for the First Lien Creditors to be the sole parties to benefit from the Uniti Settlement. The Final DIP Order also requires the DIP Lenders to marshal away from (a) the proceeds of commercial tort claims that are not subject to perfected Prepetition Liens, which includes the Debtors' claims against Charter Communications, Inc. and Charter Communications Operating, LLC, as well as (b) proceeds of avoidance claims, including the avoidance claims against Uniti that were released as part of the Uniti Settlement.

Unencumbered Value Is Not Subject to Adequate Protection Claims and Liens

6. The Debtors and the First Lien Creditors also take the position that the Plan's failure to allocate any value to unencumbered assets is appropriate because the First Lien Creditors are entitled to that value on account of the adequate protection liens granted under the Final DIP Order. But the First Lien Creditors have not sought allowance of any adequate protection claims, and the Plan does not provide for the allowance of any such claims. Putting aside this procedural defect with the Debtors' adequate protection argument and the fact that the Settlement Value is excluded from those liens under the Final DIP Order, neither the Debtors nor

the First Lien Creditors have met their burden to show that the First Lien Creditors' ***prepetition collateral*** has decreased in value during these cases.

7. The Debtors and the First Lien Creditors attempt to establish a diminution in value of the secured lenders' collateral by making an overly simplistic argument comparing the Debtors' total enterprise value as of the Petition Date to enterprise value as of the Effective Date. This approach is flawed for at least three independent reasons. First, the Debtors' starting enterprise value calculation is based on a business plan that was created before entry of the judgment in the Aurelius litigation that was the catalyst for these bankruptcy cases. It completely ignores all of the intervening cascading events that began with the Aurelius litigation and culminated with cross-defaults on the Debtors' secured debt issuances and the subsequent bankruptcy filing. Moreover, the Debtors' comparable company analysis is based on a period that predates the commencement of the Aurelius litigation. Therefore, the Debtors' estimate of starting total enterprise value is simply not based on the condition of the company as it existed on the Petition Date.

8. Second, the Debtors' analysis fails to account for what assets actually constitute the First Lien Creditors' collateral. The comparison of total enterprise values presumes that the First Lien Creditors hold liens on the Debtors' full "turn-key" enterprise. They do not. In particular, they do not hold liens on the Debtors' interest in the Master Lease, which is the means through which the Debtors generate a substantial portion of their revenue, nor do they hold liens on any of the Debtors' owned real estate. The Debtors' investment banker acknowledged in his deposition that the First Lien Creditors do not have Prepetition Liens on the Master Lease, the Transferred Assets, Holdings, or Holdings' assets. *See* Marinuzzi Decl. Exh. A, Deposition of Nicholas Leone, June 17, 2020 (the "<u>Leone Dep.</u>") at 53:20-54:14. In order to meet their burden

of establishing adequate protection claims that will permit them to exercise liens against the Debtors' otherwise unencumbered assets, the First Lien Creditors first will need to demonstrate that the ***subset*** of Debtor assets that comprise their collateral has diminished in value during the chapter 11 cases. Because neither the Debtors nor the First Lien Creditors have undertaken this analysis, they have failed to carry their burden of establishing any adequate protection claim, much less one that is equal to all otherwise unencumbered value.

9. The third flaw in the Debtors' analysis is that not all reductions in value are compensable as adequate protection claims under the Bankruptcy Code. Under applicable law, the First Lien Creditors are only entitled to an adequate protection claim if they can demonstrate that the alleged decline in value of their collateral was attributable to the imposition of the automatic stay, the Debtors' use of their collateral, or the imposition of priming liens. Neither the Debtors nor the First Lien Creditors have even attempted to make this showing. The reality is that any decline in the value of the First Lien Creditors' collateral was due almost entirely to the need to resolve disputes related to the Uniti Arrangement before the Debtors could emerge as a going-concern operation—a point both the Debtors and the First Lien Creditors have acknowledged throughout these cases. It is beyond fantasy for the First Lien Creditors to assert that they could have actually realized the total enterprise value of the Debtors on the Petition Date without first addressing the issues surrounding the Uniti Arrangement. Moreover, the Debtors' analysis ignores the fact that they invested significant amounts of capital in their business throughout these cases in order to maintain and enhance the value of the First Lien Creditors' collateral. Such investments likewise do not give rise to adequate protection claims. As a result, any alleged decline in value of the First Lien Creditors' collateral is simply not a compensable adequate protection claim under the circumstances of these cases.

The Plan Cannot Be Confirmed

10. Despite the fact that the First Lien Creditors do ***not*** hold liens on a significant portion of the Debtors' assets, they are receiving substantially all of the value of those assets under the Plan. Based on the stipulated Plan Equity Value, the First Lien Creditors are undersecured. Under section 506(a) of the Bankruptcy Code, the First Lien Creditors' secured claim is only equal to the value of their collateral. Again, the Debtors and the First Lien Creditors have not even attempted to value the First Lien Creditors' collateral—relying instead on total enterprise value as a proxy for their collateral. However, because substantial unencumbered assets exist, the Plan's allocation of substantially all of the Obligor Debtors' unencumbered value to the First Lien Creditors means they are receiving payment on account of their deficiency claim while similarly situated general unsecured creditors are getting nothing. This treatment violates the "fair and equitable treatment" requirement under section 1129(b)(1) of the Bankruptcy Code because the Plan unfairly discriminates between the First Lien Creditors' unsecured deficiency claim and all other unsecured claims.

11. For all of these reasons and as set forth in more detail below, the Court should deny confirmation of the Plan.

II. BACKGROUND

A. Procedural Background

12. On February 25, 2019 (the "Petition Date"), the Debtors each filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code with this Court. The Debtors are authorized to continue operating their businesses and managing their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these chapter 11 cases.

13. These chapter 11 cases are being jointly administered pursuant to Bankruptcy Rule 1015(b) and the *Order Directing Joint Administration of Chapter 11 Cases* [Docket No. 56], entered on February 28, 2019.

14. On March 12, 2019, the United States Trustee for Region 2 appointed the Committee [Docket No. 136].[6]

B. Factual Background

1. The Debtors' Prepetition Capital Structure and DIP Financing

15. As of the Petition Date, Debtor Windstream Services, LLC ("Services") had outstanding funded debt obligations of nearly $5.6 billion in the aggregate, which is guaranteed by 127 out of the 205 Debtor entities (collectively, the "Obligor Debtors"). Services' and the other Obligor Debtors' liabilities arise under a revolving credit facility, two tranches under Services' term loan facility, one series of secured first lien notes, two series of secured second lien notes, six series of unsecured notes, and one issuance of secured subsidiary notes. *See* Disclosure Statement, Art. V.C. Approximately $4.5 billion of those obligations are secured by prepetition liens (the "Prepetition Liens"), of which approximately $3.2 billion is attributable to the Prepetition First Lien Debt Obligations (defined below). The security agreements relating to the prepetition secured debt expressly exclude from the scope of the lenders' collateral various categories of assets, including (a) certain real estate, fixtures, and other assets (the "Transferred Assets") that were contributed or otherwise transferred in connection with the Uniti Transaction; (b) certain licenses granted to the Debtors by the FCC and other federal and state agencies for which the requisite governmental approvals to grant security interests thereon have not been obtained; (c) 34% of the voting equity interests in foreign subsidiaries; (d) equity interests in and

[6] The members of the Committee are: (a) Pension Benefit Guaranty Corporation; (b) Communication Workers of America, AFL-CIO, CLC; (c) AT&T Services, Inc.; (d) VeloCloud Networks, Inc.; (e) Crown Castle Fiber; (f) LEC Services, Inc.; and (g) UMB Bank.

assets of the following Debtors: Birmingham Data Link, LLC, Nashville Data Link, Inc., Conversent Communications Resale, L.L.C., and Choice One Communications Resale, L.L.C.; and (e) various motor vehicles. The security agreements also do not grant a security interest in any of the Obligor Debtors' real property. Holdings and the remaining 77 Debtor subsidiaries (collectively, the "Non-Obligor Debtors") are not party to the Debtors' prepetition funded debt obligations.

16. On April 22, 2019, the Court entered an order approving a debtor-in-possession financing facility (the "DIP Financing"), which provided the Debtors with $1 billion in financing in the aggregate, and consensual use of cash collateral on a final basis [Docket No. 376] (the "Final DIP Order"). In particular, footnote 9 of the Final DIP Order, which was added to resolve informal objections by a number of parties including the Committee, provides that nothing therein impacts or prejudices the rights of Holdings, the DIP Lenders, the Prepetition Secured Parties, the Creditors' Committee, or the Debtors' creditors and equity holders to benefit from any adjudication or settlement of any claims arising from, asserted or that could have been asserted on account of the Uniti Spin-Off. *See* Final DIP Order, p. 42, n.9.

17. Under the Final DIP Order, the Debtors stipulated to, among other things, the extent, priority, and validity of the liens and security interests that purport to secure the Prepetition First Lien Debt Obligations (the "Lien Stipulations"). The Lien Stipulations are binding on third parties unless a challenge is commenced by a party with appropriate standing within the time limits set under the Final DIP Order. The deadline for the Committee to commence a challenge has been extended by agreement with the relevant parties to July 1, 2020, without prejudice to further extensions.

2. The Uniti Arrangement

18. The 2015 sale and lease back transaction (the "Uniti Transaction") that culminated in what has been referred to as the "Uniti Arrangement" has been at the center of these chapter 11 cases. In March 2015, Holdings and Services entered into a Separation and Distribution Agreement (the "Separation Agreement") with the entity now known as Uniti Group Inc. ("Uniti"), pursuant to which Services and certain of its subsidiaries (the "Transferor Subsidiaries," and together with Services, the "Transferors") purportedly transferred the Transferred Assets to Uniti and its subsidiaries. Thereafter, Holdings, as lessee, and a number of Uniti subsidiaries, as lessors, entered into a master lease (the "Master Lease"), by which Uniti and certain of its subsidiaries purported to lease certain of the Transferred Assets (the "Leased Assets") to Holdings. As a result of this sale and leaseback structure, the Transferor Subsidiaries (the government-approved owners and operators of the Leased Assets) would continue to use the Leased Assets just as they did before the Uniti Transaction. As of the Petition Date, Holdings—a Non-Obligor Debtor—was the sole tenant on the Master Lease.

3. The Uniti Litigation and Mediation

19. Various parties in interest investigated and raised concerns with the Uniti Arrangement from early on in these chapter 11 cases. The Committee's own investigation culminated in the *Motion of the Official Committee of Unsecured Creditors for (I) Leave, Standing, and Authority to Commence and Prosecute Certain Claims and Causes of Action on Behalf of Debtors' Estates and (II) Consent Rights to Settlement* [Docket No. 786] (the "Standing Motion"). Pursuant to the Standing Motion, the Committee sought standing to commence and prosecute various colorable recharacterization, fraudulent transfer, and other claims it identified in the course of its investigation of the Uniti Arrangement.

20. On July 12, 2019, the Debtors filed the *Debtors' Motion for Entry of an Order Appointing a Mediator* [Docket No. 803], seeking entry of an order appointing a mediator to resolve issues regarding the Uniti Arrangement.

21. On July 25, 2019, the Debtors commenced an adversary proceeding[7] (the "Uniti Litigation") by filing a complaint [Adv. Proc. Docket No. 1] seeking entry of a judgment against Uniti relating to the Uniti Arrangement as follows: (a) a declaration that the Uniti Arrangement, including the Master Lease, did not create a "lease" under the Bankruptcy Code, and instead should be recharacterized as a financing arrangement; (b) a declaration that the Master Lease is a lease of personal property, as opposed to real property; (c) constructive fraudulent transfer in connection with (i) over-market rent payments and (ii) tenant capital improvements made by the Debtors; (d) breach of contract against Uniti for violating certain provisions of the Master Lease; and (e) breach of the implied covenant of good faith and fair dealing for Uniti's conduct that deprived Holdings of important benefits under the Master Lease.

22. On July 30, 2019, the Court entered an order [Docket No. 874] appointing the Honorable Shelley C. Chapman to serve as mediator.[8] The Debtors, Uniti, and a number of intervenors (including the Committee) then proceeded on a dual-track process over the course of several months by participating in both the Uniti Litigation and mediation.

23. After discovery was substantially completed, the trial on the recharacterization claim was initially set to commence on March 3, 2020. However, on March 2, 2020, the Debtors notified the Committee that they had reached an agreement (the "Uniti Settlement") with Uniti, the First Lien Ad Hoc Group, and Elliott Investment Management LP and its affiliated funds ("Elliott"), obviating the need to proceed with trial. The Uniti Settlement formed the basis for

[7] Adv. Proc. No. 19-08279.

[8] In light of the mediation, the Committee adjourned the hearing on the Standing Motion *sine die*.

negotiations among the settling parties regarding the terms of the Debtors' restructuring, which culminated in the Plan Support Agreement, the Backstop Commitment Agreement, and, ultimately, the Plan.

24. On May 12, 2020, the Court entered orders approving the Debtors' entry into the Backstop Commitment Agreement [Docket No. 1806] and the Uniti Settlement [Docket No. 1807]. The order approving the Uniti Settlement expressly preserves the rights of all parties with respect to (a) the allocation of any proceeds of the Uniti Settlement among the Debtors and (b) any objections to confirmation of the Plan. *See* Docket No. 1807 at ¶ 40.

4. The Committee's Lien Investigation

25. Promptly following its appointment, the Committee commenced an investigation into the basis for the Lien Stipulations (the "Lien Investigation"). As part of the Lien Investigation, the Committee conducted a detailed review of the relevant prepetition security documents (the "Prepetition Security Documents") and UCC-1 financing statements of record for each of the Obligor Debtors, as well as other relevant documents and diligence provided to the Committee's professionals by the Debtors and certain prepetition secured parties.

26. As a result of the Lien Investigation, the Committee determined that potential challenges to the Lien Stipulations exist, including (but not limited to) claims and related causes of action (a) declaring that the Debtors' interests in the following categories of property are unencumbered and not subject to any liens or security interests (perfected or unperfected) of the prepetition secured parties, or (b) seeking to avoid any unperfected liens or security interests of the prepetition secured parties on such categories of property (and their postpetition proceeds):

- All real property interests held by the Debtors excluding fixtures that are equipment, as defined in the UCC;

- Cash in certain accounts holding not less than $8,423,991 in the aggregate as of the Petition Date;
- Tax attributes, including net operating losses, capital losses, and certain tax credits; and
- Commercial tort claims.

5. The Plan and Disclosure Statement

27. On April 1, 2020, the Debtors filed the initial version of the Plan [Docket No. 1631] and related disclosure statement [Docket No. 1632]. The Plan is conditioned on a number of transactions set forth in the Uniti Settlement (the "Uniti Settlement Transactions"), including certain asset sales, cash payments, ordinary course loan commitments, investment commitments, and entry into two amended lease agreements between the Debtors and Uniti. According to the Debtors, the Uniti Settlement Transactions provide the Debtors' estates with settlement consideration with a present value of approximately $1.2 billion in exchange for the release of various claims against Uniti.

28. Under the Plan, each Allowed DIP Facilities Claim, as well as other fees, interest, and other obligations owed to third parties under the DIP Credit Agreement or the DIP Orders, "shall be indefeasibly paid in full, in cash, by the Debtors . . . ." Plan, II.B. The DIP Obligations are also are projected to recover in full in a hypothetical chapter 7 liquidation, a scenario in which there would be no Uniti Settlement. *See* Disclosure Statement, Exh. B., Liquidation Analysis; *see also* Marinuzzi Decl. Exh. B, Deposition of Nicholas Grossi, June 18, 2020 (the "Grossi Dep.") at 41:6-9 [redacted] *id.* at 29:6-11 [redacted] Thus, under the Plan, the DIP Facilities are

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oversecured, and there is sufficient DIP Collateral to satisfy the DIP Obligations without looking to proceeds from the Uniti Settlement (the "Settlement Proceeds"), most of which the Debtors will only receive after the Effective Date. *See* Disclosure Statement, Exh. B., Liquidation Analysis at 2 (describing assumptions, including that the Uniti Arrangement is rejected).

29. Article III of the Plan separates creditors into the classes listed below with the voting rights as follows:

Class	**Claim / Interest**	**Status**	**Voting Rights**
1	Other Secured Claims	Unimpaired	Deemed to Accept
2	Other Priority Claims	Unimpaired	Deemed to Accept
3	First Lien Claims	Impaired	Entitled to Vote
4	Midwest Notes Claims	Impaired	Entitled to Vote
5	Second Lien Claims	Impaired	Entitled to Vote
6A	Obligor General Unsecured Claims	Impaired	Entitled to Vote
6B	Non-Obligor General Unsecured Claims	Unimpaired	Deemed to Accept
7	Intercompany Claims	Impaired/Unimpaired	Deemed to Reject/ Deemed to Accept
8	Intercompany Interests	Impaired/Unimpaired	Deemed to Reject/Deemed to Accept
9	Interests in Windstream	Impaired	Deemed to Reject

30. As contemplated by the Backstop Commitment Agreement, Article III of the Plan provides that holders of Allowed First Lien Claims[9] shall receive their pro rata share of: (a) 100% of the Reorganized Windstream Equity Interests, subject to dilution on account of the Rights Offering, the Backstop Premium, and the Management Incentive Plan; (b) cash; (c) the Distributable Subscription Rights; and (d) the First Lien Replacement Term Loans, as applicable. *See* Plan, III.B. 3. The Debtors estimate that recoveries for First Lien Claims will range between 62.8-71.3%. *See* Disclosure Statement, III. D.

31. The Plan contains two separate classes of general unsecured claims: (a) Class 6A (Obligor General Unsecured Claims), which is comprised of general unsecured claims against the Obligor Debtors, and (b) Class 6B (Non-Obligor General Unsecured Claims), which is comprised of general unsecured claims against the Non-Obligor Debtors. Non-Obligor General Unsecured Claims are projected to recover in full under the Plan. *See* Disclosure Statement, III.D. In contrast, the estimated range of recovery for Obligor General Unsecured Claims is 0.0–0.125%. *See* Disclosure Statement, III.D.

32. On May 14, 2020, the Debtors filed the current version of the Plan and an amended disclosure statement (the "Disclosure Statement") [Docket No. 1813]. That same day, the Court entered an order approving, among other things, the Disclosure Statement and solicitation procedures [Docket No. 1814].

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[9] Under the Plan, First Lien Claims include claims arising under that certain Credit Agreement, dated as of July 17, 2006 (as amended, restated, supplemented, or otherwise modified from time to time prior to the Petition Date in accordance with the terms thereof), by and among Services, as borrower, the lenders party thereto, and JPMorgan Chase Bank, N.A., as administrative agent and collateral agent (the "Prepetition Credit Agreement") (*see* Marinuzzi Decl. Exh. C), and that certain indenture agreement (as may have been amended, modified, supplemented, or amended and restated from time to time) dated November 6, 2017, among Services and Windstream Finance Corp., as co-issuers, the entities specified therein, as guarantors, and Delaware Trust Company, as successor to U.S. Bank National Association, as trustee and collateral agent (the "First Lien Notes Indenture") (*see* Marinuzzi Decl. Exh. D). The obligations under the First Lien Credit Agreement and the First Lien Notes Indenture are referred to herein as the "Prepetition First Lien Debt Obligations," and the holders of the First Lien Claims, the "First Lien Creditors."

III. OBJECTION

A. Confirmation Requirements

33. Section 1129(a) of the Bankruptcy Code provides that "[t]he court shall confirm a plan only if" it complies with "*all*" of the applicable requirements of section 1129(a). *See* 11 U.S.C. § 1129 (emphasis added). "The proponent of confirmation bears the burden of proof by a preponderance of the evidence." *In re Quigley Co.*, 437 B.R. 102, 125 (Bankr. S.D.N.Y. 2010); *Heartland Fed. Savs. & Loan Ass'n v. Briscoe Enters., Ltd. (In re Briscoe Enters.)*, 994 F.2d 1160, 1165 (5th Cir. 1993) (stating that "[t]he combination of legislative silence, Supreme Court holdings, and the structure of the Code leads this Court to conclude that preponderance of the evidence is the debtor's appropriate standard of proof both under § 1129(a) and in cramdown."); *see also In re Prudential Energy Co.*, 58 B.R. 857, 862 (Bankr. S.D.N.Y. 1986) (stating that "the Code imposes upon the Court the responsibility to determine whether the requirements of § 1129(a) of the Code have been met. . . . [I]n this the plan's proponents . . . have the burden of proof.") (citations omitted).

34. Here, the Debtors fail to carry their evidentiary burden of demonstrating that the Plan satisfies all of the confirmation requirements because the Plan violates sections 1129(a)(1) and 1129(b) of the Bankruptcy Code by inappropriately allocating the value of substantial unencumbered estate assets to the First Lien Creditors. This will provide the First Lien Creditors a return in excess of their pro rata share of the Debtors' unencumbered assets (to the extent the Plan Equity Value is understated) on account of their deficiency claim, and result in the disparate treatment of similarly situated claims.

B. The Obligor Debtors Hold Substantial Unencumbered Assets

1. The Settlement Value Is Not Encumbered by Prepetition Liens

35. The Debtors ascribe a value of over $1.2 billion to the Uniti Settlement. The Debtors and the First Lien Creditors incorrectly assert "that all or most of the value attributable to the Uniti Settlement would constitute collateral of the" First Lien Creditors. *See* Disclosure Statement, VII.G. Yet, neither the Debtors nor the First Lien Creditors have (a) ascribed value to the claims asserted against Uniti that have been settled or (b) allocated Settlement Value among the Debtors. *See* Leone Dep. 159:21-160:1 [redacted]. In fact, there has been no analysis to determine whether the proceeds of the Uniti Settlement are encumbered. *See* Marinuzzi Decl. Exh. E, Deposition of Tony Thomas, June 12, 2020 (the "Thomas Dep.") at 82:10-17 [redacted]; 99:24-100:1[redacted]. They instead assert that most or all of the Settlement Value is encumbered so allocation is irrelevant. This is incorrect.

36. The Settlement Value is unencumbered and should be preserved for the benefit of unsecured creditors. The Debtors have taken the position that an overwhelming majority of the Settlement Value is attributable to the recharacterization claim. *See, e.g.*, Thomas Dep. 82:19-83:6[redacted]; *see also* Leone Dep. at 121:15-19[redacted]

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[redacted]. Although there does not appear to be any analysis supporting the Debtors' contention that at least 90% of the Settlement Value is attributable to the recharacterization claim, the Committee does not dispute that a significant portion of the $1.2 billion in Settlement Value should be allocated to the settlement of that claim. Not only was the recharacterization claim the primary claim asserted in the Uniti Litigation, it posed an existential threat to Uniti and jeopardized the Debtors' ongoing operations and continued use of the Leased Assets under the Master Lease. As set forth below, the recharacterization claim (and its proceeds) are unencumbered. The Uniti Settlement also compromised other claims against Uniti, including avoidance claims. Those avoidance claims (and their proceeds) are postpetition causes of action that belong exclusively to the Debtors' estates and are therefore likewise not subject to the Prepetition Liens.

a. The Recharacterization Claim and Its Proceeds Are Not Encumbered by the Prepetition Liens

37. Both the recharacterization claim and the proceeds of that claim are not encumbered by the Prepetition Liens. The assets that were the subject of the recharacterization claim would not be the First Lien Creditors' collateral if such assets belonged to the Debtors (which was the relief sought in the recharacterization claim against Uniti) because the Transferred Assets are explicitly excluded from the collateral package securing the Debtors' prepetition debt obligations. In addition, the recharacterization claim itself is not subject to the First Lien Creditors' security interests. The outcome is no different now that the recharacterization claim has been settled.

(i) The Transferred Assets Are Not Prepetition Collateral

38. If the Debtors were successful in recharacterizing the Uniti Arrangement, the Transferors that purportedly "transferred" assets to Uniti in connection with the Uniti

Transaction would be deemed to own those assets.[10] *See, e.g.*, *Plaintiff's Opposition to Uniti's Partial Motion to Dismiss*, Adv. P. No. 19-08279 (RDD) [Docket No. 36] at ¶¶ 10–13 (noting that the effect of recharacterization is to disregard the underlying transaction "which, here, would mean that the assets never went to Uniti to begin with."); *see also Burke Invs. V. Nite Lite Inns (In re Nite Lite Inns)*, 13 B.R. 900, 909–910 (Bankr. S.D. Cal. 1981) (finding recharacterization resulted in "beneficial ownership of the [transferred] property never le[aving the transferor]."); *In re 4 W. Holdings, Inc.*, 593 B.R. 448, 456 (Bankr. N.D. Tex. 2018) ("recharacterization is effective as of the date of the execution of the subject agreements," and, therefore, purportedly leased properties "were never leased . . . under the Master Leases but were in fact owned by the Debtors all along until such time as they were transferred" to the purported lessor or its designees postpetition); *Mason v. Heller Fin. Leasing (In re JII Liquidating, LLC)*, 341 B.R. 256, 273 (Bankr. N.D. Ill. 2006) ("the characterization of a contract applies *ab initio*, that is, from the beginning of the transaction" (citation omitted)). These assets are unencumbered in the hands of the Debtors.

39. Indeed, the Prepetition Security Documents ***explicitly*** carve out "Contributed Assets" from the scope of their granting clauses.[11] Those documents define "Contributed Assets" to mean "the assets contributed or otherwise transferred on April 25, 2015 by certain of the Issuers and Guarantors to one or more subsidiaries of Communications Sales & Leasing,

[10] Twenty-five of the Transferor Subsidiaries are Obligor Debtors.

[11] *See* Marinuzzi Decl. Exh. F, Amended and Restated Security Agreement originally dated as of July 17, 2006, and amended and restated as of April 24, 2015, among Services, the guarantors party thereto, and JPMorgan Chase Bank, N.A., as collateral agent, Section 2(a); *see also* First Lien Notes Indenture, Section 1.01 "Excluded Assets" (including "Contributed Assets" in the definition of "Excluded Assets"); Marinuzzi Decl. Exh. G, Security Agreement dated as of November 6, 2017, among Services, Windstream Finance Corp., the guarantors party thereto, and U.S. Bank National Association as collateral agent, Section 1(c) "Contributed Assets" (defining "Contributed Assets"); Marinuzzi Decl. Exh. H, Offering Memorandum for the 8.625% Senior First Lien Notes due 2025 (the "Offering Memorandum") at 47-48 (defining "Contributed Assets" and noting the Contributed Assets are "Excluded Assets.").

Inc. . . . pursuant to certain assignment and assumption agreements dated as of April 24, 2015." The First Lien Creditors have taken the position that this definition means the Contributed Assets are only excluded to the extent they were actually transferred, which would not be the case if the recharacterization claim were successful. However, the Prepetition Security Documents must be interpreted in light of the parties' intentions and expectations at the time they were executed. *See, e.g.*, *Barclays Capital Inc. v. Giddens (In re Lehman Brothers Inc.)*, 478 B.R. 570, 585 (S.D.N.Y. 2012), *aff'd*, 761 F.3d 303 (2d Cir. 2014) ("As a threshold matter, a contract must be interpreted according to the parties' intent." (citations omitted)); *see also Cordis Corp. v. Bos. Sci. Corp.*, 868 F. Supp. 2d 342 (D. Del. 2012) (The primary consideration in interpreting a contract is to "attempt to fulfill, to the extent possible, the reasonable shared expectations of the parties ***at the time they contracted***.") (emphasis added) (citation omitted); *Foothills Tex., Inc. v. MTGLQ Invs., L.P. (In re Foothills Tex., Inc.)*, 476 B.R. 143, 152 n.40 (Bankr. D. Del. 2012) ("The intent of a contract is not changed simply because the circumstances do not precisely match the scenarios anticipated by the contract.") (citation omitted). The parties' intentions and expectations at the time the Prepetition Security Documents were executed do not support the First Lien Creditors' attempt to transform the definition of Contributed Assets into anything short of a carve out.

40. The Prepetition Security Documents were executed contemporaneously with the Uniti Transaction, and all parties clearly intended that no liens would be granted in favor of the Debtors' prepetition secured lenders on the assets that were the subject of the Uniti Transaction. In light of that fact, the better reading of the phrase "assets contributed or otherwise transferred" is that it is a succinct description of a category of excluded assets (as opposed to, for example, preparing and referencing an unwieldly schedule of all assets that were subject to the Uniti

Transaction), rather than a condition or limitation on the scope of that category. Thus, the Transferred Assets were never encumbered by the Prepetition Liens, and would not have become encumbered by the Prepetition Liens if the Debtors had litigated the recharacterization claim to a successful conclusion.

(ii) The Recharacterization Claim Is Not a "General Intangible"

41. Although their liens would not attach to the Transferred Assets if the Uniti Arrangement was actually recharacterized, the First Lien Creditors have nonetheless argued that they are entitled to the Settlement Value because the recharacterization claim itself is a "general intangible." Although the Prepetition Security Documents grant liens on general intangibles and their proceeds, the recharacterization claim is not a "general intangible" under applicable law. As such, the claim is not subject to the First Lien Creditors' liens.

42. Under the UCC, the term "general intangibles" includes "any personal property, including things in action." N.Y.U.C.C. § 9-102(a)(42). A "thing in action," or "chose in action," is in turn defined as "1. A proprietary right *in personam*, such as a debt owed by another person, a share in a joint-stock company, or a claim for damages in tort. 2. The right to bring an action to recover a debt, money, or thing. 3. Personal property that one person owns but another person possesses, the owner being able to regain possession through a lawsuit." BLACK'S LAW DICTIONARY. The Debtors' request in the Uniti Litigation for equitable, declaratory relief, recharacterizing the Uniti Arrangement does not fall within this definition.

43. The recharacterization claim is one for an equitable remedy, similar to a request for an injunction, rather than a claim to recover property from another party. As such, it is not the type of "proprietary right" that is generally assignable or transferrable. Nor would it have value in the hands of a third party, suggesting that it is not the type of right that a third party

would expect to be able to take a lien on to secure repayment of a debt. Moreover, the recharacterization claim is not personal to the Debtors. As this Court noted on the record of the hearing on December 12, 2019:

> It is suggested . . . that the recharacterization remedy is one in which only a debtor would have standing in that it is an estate cause of action such as a preference claim, a fraudulent transfer claim, or a veil-piercing claim where no particular creditor is uniquely injured. I believe, to the contrary, that recharacterization is essentially an objection to a claim and, therefore, can be pursued . . . by other parties in interest and a debtor.

See Marinuzzi Decl. Exh. I, Transcript of Hearing held on December 12, 2019 at 68:20-69:8, *Windstream Holdings, Inc. v. Uniti Grp. Inc.*, Adv. No. 19-08279 (RDD) (Bankr. S.D.N.Y. Dec. 12, 2019). Because it is not a personal right to obtain or recover something of value from another party, the recharacterization claim against Uniti is not the type of "personal property" captured by "general intangibles" under the UCC and is not subject to the Prepetition Liens.

(iii) The Recharacterization Claim Did Not Exist Prepetition

44. Even if the Court were to find that the recharacterization claim asserted in the Uniti Litigation did qualify as a general intangible, the claim is not encumbered by the Prepetition Liens because the claim did not exist at the time such liens were granted and could not have been pledged. It has long been held that "one can only assign a chose in action that is sufficiently choate." *Capital Nat'l Bank v. McDonald's Corp.*, 625 F. Supp. 874, 879 (S.D.N.Y. 1986). A "claim that existed at the time a security interest was granted, then unbeknownst to the creditor, does not 'partake of the requisite nature of collateral to which a security interest may adhere'" because it "cannot be the sort of 'personal property . . . customarily used as commercial security.'" *Id*. "[A]sssignment of a truly future claim or interest does not work a present transfer of property. It does not because it cannot; no property yet exists." *Capital Nat'l Bank v. McDonald's Corp.*, 625 F. Supp. at 779 (citing *Stathos v. Murphy*, 276 N.Y.S.2d 727, 730 (Sup.

Ct. 1966), *aff'd*, 19 N.Y.2d 883 (1967)). The recharacterization claim did not exist, or at the very least was not sufficiently choate, at the time the Prepetition Liens were granted.

45. In connection with the closing of the Uniti Transaction, the parties obtained a true lease opinion specifically to document their understanding that claims like the recharacterization claim in the Uniti Litigation would not be asserted. This occurred contemporaneously with the parties' execution of the Prepetition Security Documents in favor of the First Lien Creditors. Indeed, a portion of the consideration that Services received from Uniti in exchange for the Transferred Assets was used to retire a portion of the Debtors' debt obligations, some of which was held by certain of the First Lien Creditors. *See* Offering Memorandum at 2. Thus, the First Lien Creditors clearly assented to the transaction. Because both the Debtors and the First Lien Creditors took affirmative steps to ensure that a recharacterization claim would ***not*** arise in connection with the Uniti Arrangement and that the Transferred Assets could be transferred to Uniti free and clear of liens, they could not have intended to grant a security interest in such a claim.

46. Furthermore, the recharacterization claim did not become a present claim capable of assignment until ***after*** the Debtors' bankruptcy cases commenced. Therefore, the Prepetition Liens could never have attached to it. In fact, as parties to the Uniti Arrangement that took affirmative steps to ensure it was a "true lease," the Debtors were likely estopped from seeking to later recharacterize it. It was only upon the bankruptcy filing, when the Debtors' estates sprang into existence and the Debtors incurred a fiduciary duty to pursue claims that would inure to the benefit of their creditors, that the recharacterization claim became choate and cognizable. *See, e.g.*, *In re Homeplace Stores Inc.*, 228 B.R. 88 (Bankr. D. Del. 1998) (holding that, even if lessor was correct that the debtor was equitably estopped from arguing prepetition that a lease

should be recharacterized, the defense of equitable estoppel could not be maintained against debtors-in-possession when the defense would operate at the expense of the debtor's creditors or against creditors of the estate seeking standing to pursue such claims). Thus, the recharacterization claim was wholly inchoate (and therefore incapable of assignment) at the time the Prepetition Security Documents were executed, and it remained so until these chapter 11 cases were commenced.

47. Any argument that the recharacterization claim or the Settlement Proceeds attributable to such claim is captured by an after acquired property clause in the Prepetition Security Documents is unavailing. Although *some* inchoate causes of action might be included as collateral by virtue of an after acquired property clause, "the parties' intent controls." *See In re Heron, Burchette, Ruckert & Rothwell*, 148 B.R. 660, 683 (Bankr. D.D.C. 1992). The Debtors clearly intended to transfer the Transferred Assets to Uniti under the Separation Agreement. The Debtors' secured lenders excluded the Transferred Assets from the scope of their liens at that time. This logical step—carving out assets that the borrower no longer has an interest in and thus cannot pledge—is further evidence of the Debtors' intent to transfer the assets to Uniti. Not only were the assets intended to be transferred, the Debtor affirmatively took measures to ensure a recharacterization claim would not arise and jeopardize the Uniti Arrangement. The Debtors did not intend to pledge, and the First Lien Creditors did not intend to include, the Transferred Assets as part of the collateral package.

48. Moreover, the specific declaration sought by the Debtors in the Uniti Litigation was that the Uniti Arrangement is a not a "lease" ***under the Bankruptcy Code***. Of course, no such declaratory relief could be brought until after the Petition Date. And, at that point, section 552(a) of the Bankruptcy Code prevented the Prepetition Liens from attaching to the

recharacterization claim. *See* 11 U.S.C. § 552(a) (Except as provided in section 552(b), "property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case."). Any Settlement Value attributable to the recharacterization claim is not encumbered by the Prepetition Liens and should benefit unsecured creditors.

49. Even if the Court finds that the claims asserted in the Uniti Litigation are encumbered, the Settlement Value to be received by the Debtors' estates on account of such claims is not subject to the Prepetition Liens. Section 552(b) of the Bankruptcy Code provides an exception to the general rule in section 552(a) of the Bankruptcy Code set forth above. Section 552(b) permits a prepetition security interest to extend to proceeds, products, offspring, or profits acquired after commencement of the bankruptcy that are generated by prepetition collateral. In *In re Residential Capital*, the bankruptcy court held that section 552(b) of the Bankruptcy Code only allows a continuing security interest in postpetition proceeds of prepetition collateral if such proceeds are "directly attributable to [the prepetition collateral], without any other [estate] resources." *Official Comm. of Unsecured Creditors v. UMB Bank, N.A. (In re Residential Capital)*, 501 B.R. 549, 612 (Bankr. S.D.N.Y. 2013) ("*ResCap*") (citing Collier on Bankruptcy ¶ 552.02[2][a] ("Section 552(b) is intended to cover after-acquired property that is directly attributable to prepetition collateral, *without addition of estate resources*.") (emphasis in original)).

50. The First Lien Creditors would need to demonstrate that the Settlement Value is the "product" or "proceeds" of their prepetition collateral without the addition of estate resources in order to assert a lien against those proceeds. This is impossible. The Debtors were only able to recognize any value on account of their claims against Uniti by commencing the Uniti

Litigation, engaging in substantial motion practice and discovery, and participating in mediation. This involved significant "time, effort, and expense by the Debtors' estates." *ResCap*, 501 B.R. at 612; Thomas Dep. at 94:23-95:4 [redacted]. Here, as in *ResCap*, the Debtors "did not merely take some [prepetition collateral] and convert it into [Settlement Value] without any other resources." *ResCap*, 501 B.R. at 612. As a result, even if the Court concludes that the recharacterization claim and its proceeds were pledged to the First Lien Creditors prior to the Petition Date, the Settlement Value is not subject to the Prepetition Liens under section 552 of the Bankruptcy Code.

b. The Settlement Value Attributable to the Other Settled Claims Against Uniti Is Not Encumbered by the Prepetition Liens

51. Although the recharacterization claim was set for trial when the Uniti Settlement was announced, the Debtors also asserted other claims in the Uniti Litigation, including avoidance actions. Specifically, the Debtors sought to avoid as constructively fraudulent transfers (a) over-market rent payments and (b) certain tenant capital improvements made by the Debtors. Any Settlement Value attributable to those claims, and the value of any other potential avoidance actions that could have been brought against Uniti and were released under the Uniti Settlement, are similarly unencumbered.

52. Once a bankruptcy case commences, all recoveries under a trustee's or debtor-in-possession's avoiding powers (including those arising under state law) are property of the estate, "administered almost exclusively by the trustee [(or debtor-in-possession)] for the benefit of the estate as a whole rather than for any creditor individually . . . ." 5 Collier on Bankruptcy

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¶ 552.02[5][d] (16th Ed. 2019). As a result, such recoveries are deemed "after-acquired property" within the meaning of section 552(a), rather than proceeds of prepetition collateral under section 552(b)(1). *See Official Comm. of Unsecured Creditors v. UMB Bank, N.A. (In re Residential Capital, LLC)*, 497 B.R. 403, 414 (Bankr. S.D.N.Y. 2013) ("Avoidance actions, including those arising under state law, can only be brought by the trustee after the petition is filed under the trustee's section 554(b) [sic] rights. These claims, therefore, arise post-petition and must be considered after-acquired property belonging to the estate."); *see also* 5 Collier on Bankruptcy ¶ 552.02 (16th ed. 2019). "Further, because the [d]ebtor does not own the right to pursue a fraudulent transfer action in bankruptcy (since that action belongs to the trustee post-petition under section 554(b) [sic]), the [d]ebtor could not have encumbered or assigned that right prepetition." *See ResCap*, 497 B.R. at 414. Accordingly, the avoidance claims asserted in the Uniti Litigation, and any proceeds thereof (including the portion of the Settlement Value attributable to those claims), are not encumbered by the Prepetition Liens.

53. The other claims in the Uniti Litigation, including for breach of contract, that are not chapter 5 avoidance actions are also not encumbered by the Prepetition Liens. Holdings, the tenant under the Master Lease, is not an Obligor, and the Master Lease itself is unencumbered. Thus, any claims or causes of action arising from that contractual relationship are not subject to the Prepetition Liens. Even if the Court concludes that the breach of contract claims are subject to the Prepetition Liens, the Settlement Proceeds on account of those claims are still unencumbered. Like the recharacterization claim, the Debtors dedicated significant "time, effort, and expense" in commencing and prosecuting the Uniti Litigation and eventually obtaining approval of the Uniti Settlement; in other words [t]he Debtors did not merely take some

[prepetition collateral] and convert it into [Settlement Value] without any other resources." *ResCap*, 501 B.R. at 612.

2. The Settlement Value Is Not Encumbered by Postpetition Liens

a. The Final DIP Order Excludes Settlement Value From the Scope of the DIP Collateral

54. Settlement Value is excluded from the DIP Collateral by the terms of the Final DIP Order. Specifically, footnote 9 of the Final DIP Order provides:

> The DIP Agent and Prepetition Agent are each deemed a "Permitted Leasehold Mortgagee" under that certain Master Lease dated April 24, 2015, by and among CSL National, LP, the landlords party thereto and Holdings, as tenant (the "<u>Master Lease</u>"). Notwithstanding the foregoing and any rights granted by Holdings to and accepted by the DIP Lenders under the DIP Credit Agreement or otherwise provided in this Final Order with respect to Holdings (including releases), the DIP Lenders, the Prepetition Secured Parties, the Creditors' Committee, the Debtors' creditors and equity holders, and the Debtors each reserve all rights and remedies under applicable law, if any, with respect to the execution and performance of the Master Lease and the transactions giving rise to it (the "<u>Uniti Spin-off</u>"), and nothing in this Final Order shall impact or prejudice the rights of any such party to benefit from any adjudication or settlement of any claims arising from, asserted or that could have been asserted on account of the Uniti Spin-Off (but without limiting the effects and requirements of paragraph 21).

See Final DIP Order, p. 42, n.9.

55. "When interpreting orders, the Court should look first to the plain meaning of the language of the order." *In re Dynegy Inc.*, 486 B.R. 585, 591 (Bankr. S.D.N.Y. 2013). Put another way, the unambiguous terms of a court order "are entitled to their effect." *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 150 (2009); *see also In re SCBA Liquidation, Inc.*, 489 B.R. 666, 679 (Bankr. W.D. Mich. 2013) ("Like other written documents, unambiguous court orders are to be enforced as written.") (citing *Official Comm. of Unsecured Creditors v. Dow Chem. Corp. (In re Dow Corning Corp.)*, 456 F.3d 668, 676 (6th Cir. 2006)). This approach is consistent with contract interpretation principles. *See, e.g.*, *Silvervan v. Cent. Equities Credit (In*

re 18th Ave. Realty), Adv. No. 07-01717 (RDD), 2010 Bankr. LEXIS 1553, at *17-18 (Bankr. S.D.N.Y. May 7, 2010) ("[N]o provision of a contract should be left without force and effect." (citing *Manley v. AmBase Corp*., 337 F.3d 237, 250 (2d Cir. 2002); *Laba v. Carey*, 277 N.E.2d 641 (N.Y. 1971); *Muzak Corp. v. Hotel Taft Corp*., 133 N.E.2d 688 (N.Y. 1957); *Homemaker Indus., Inc. v. Official Comm. of Unsecured Creditors of HMKR, Inc*., No. 03-cv-9303 (DLC), 2004 U.S. Dist. LEXIS 6682, at *15 (S.D.N.Y. Apr. 20. 2004); Restatement (Second) of Contracts § 202(2))). The Court should construe the Final DIP Order in accordance with all of its terms and conclude that the Settlement Value is not DIP Collateral.

56. The first part of footnote 9 provides that the parties "each reserve all rights and remedies under applicable law, if any, with respect to the execution and performance of the Master Lease and the" Uniti Transaction. This is clearly a reservation of rights. However, the mandate in the second part of footnote 9 that "nothing in this Final Order shall impact or prejudice the rights of any such party [including the Committee] to benefit from any adjudication or settlement of any claims arising from, asserted or that could have been asserted on account of the [Uniti Arrangement]" is something more than a reservation of rights. Based on the principles set forth above, the Court should give this provision its intended effect in light of the entire footnote, not just the first part. The DIP Liens and the adequate protection liens and claims arise under the Final DIP Order. The only reasonable explanation of the intent behind footnote 9 is that it excludes the Settlement Value from the scope of the DIP Liens and the adequate protection liens.

57. Thus, based on the plain language of the entire provision, footnote 9 is more than simply a reservation of rights to raise arguments about allocation of value. It would undoubtedly "prejudice the rights" of unsecured creditors to benefit from the Uniti Settlement if the DIP

Secured Parties or the First Lien Creditors were entitled to assert liens against the otherwise unencumbered Settlement Value.[12] Based on the language of the Final DIP Order, any argument by the Debtors or the First Lien Creditors that the Settlement Value is DIP Collateral must fail.

58. Even if the Court finds that footnote 9 solely reserves the parties' rights, at the very least the Committee's right to now argue that the Settlement Value should not become DIP Collateral and exclusively benefit the First Lien Creditors is preserved. And, by reserving such rights, footnote 9 empowers the Court to fairly allocate the Settlement Value. As set forth above, the parties took steps to ensure that the Uniti Arrangement would not be recharacterized. The First Lien Creditors also assented to the Uniti Transaction by releasing liens on the Transferred Assets in order to facilitate the transfer to Uniti. Certain of those same lenders received direct benefits from the Uniti Transaction by virtue of the Debtors' use of consideration received by Uniti to effectuate the satisfaction and exchange of certain debt. *See* Offering Memorandum at 2. In exchange for these benefits, the First Lien Creditors were complicit in a transaction that was designed to side-step covenants in the indenture governing the Debtors' unsecured notes that restricted sale and leaseback transactions. *See U.S. Bank NA v. Windstream Servs. LLC*, No. 17-CV-7857 (JMF), 2019 WL 948120, at *5 (S.D.N.Y. Feb. 15, 2019) ("Services' former General Counsel, John Fletcher, admitted that one reason that Holdings was the only Windstream entity to sign the Master Lease was to avoid 'a clear violation' of the [unsecured notes] Indenture."). The First Lien Creditors profited at the expense of unsecured creditors at the time of the Uniti Transaction, and are attempting to do so again under the Plan. Equity demands that the Court

[12] *See* Leone Dep. at 49:6-50:10 [redacted]

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prevent the Debtors from diverting unencumbered Settlement Value in a manner that solely benefits the First Lien Creditors.

b. The DIP Lenders' Claims Are Being Satisfied Without Recourse to the Settlement Value

59. Under the Plan, the DIP Obligations are recovering in full and in cash on the Effective Date. *See* Plan, II.B. Yet, the vast majority of the Settlement Value will be realized by the Debtors after the Effective Date. For example, the value from the Uniti GCI Commitment and the equipment loan program is realized over ten years, and the cash transfer occurs over five years beginning after the Effective Date. *See* Disclosure Statement, VII.F; *see also* Leone Dep. at 50:14-18 [redacted] The only consideration from the Uniti Settlement that could possibly be received before the Effective Date is the proceeds of the sale of certain of the Debtors' dark fiber assets, which amounts to approximately $244 million. However, the Debtors' own analysis values the proceeds from the sale of the dark fiber assets at zero because the assets were of equal or greater value to the purchase price. *See Declaration of Nicholas Leone* [Docket No. 1746], ¶ 8. The Debtors exclude the sale proceeds from the $1.2 billion of Settlement Value. *See id.* Thus, as a practical matter, none of the Settlement Value is being used to satisfy the DIP Claims. Because substantially all of the Settlement Value will not even be realized by the Debtors until after the Effective Date, the DIP Claims cannot be deemed satisfied out of the Settlement Value. [13]

[13] Aside from recovering in full under the Plan, the DIP Obligations are projected to recover in full in a hypothetical chapter 7 liquidation, in which there would be no Uniti Settlement. *See* Grossi Dep. at at 41:6- [redacted] *id.* at 29:6-11 [redacted] The value of other DIP Collateral is sufficient to satisfy the DIP Obligations without recourse to the Settlement Value based on the Debtors' liquidation analysis.

60. Assuming the DIP Lenders could, as a practical matter, look to the Settlement Proceeds to satisfy their claims on the Effective Date (they cannot), as explained below, the Final DIP Order requires the DIP Secured Parties to "use commercially reasonable efforts to first satisfy [any DIP Obligations and DIP Superpriority Claims] from all other DIP Collateral" (which does not include the Settlement Value) before looking to the proceeds of avoidance actions or commercial tort claims. Final DIP Order, ¶ 10(d). At least some of the Settlement Value is attributable to avoidance actions (*i.e.*, the fraudulent transfer claim asserted in the Uniti Litigation). The DIP Secured Parties can only look to such proceeds as a last resort. Because the DIP Obligations are oversecured, the DIP Secured Parties cannot look to the portion of the Settlement Value that is attributable to avoidance actions under the terms of the Final DIP Order.

c. The First Lien Creditors Have Not Met Their Burden to Establish Allowed Adequate Protection Claims That Would Enable Them to Assert Adequate Protection Liens Against the Settlement Value or Other Unencumbered Assets

61. Paragraph 15 of the Final DIP Order provides the First Lien Creditors with adequate protection claims and liens "in an amount equal to the aggregate diminution in the value of each Prepetition Secured Party's respective interests in the applicable Prepetition Collateral (including Cash Collateral) from and after the Petition Date, if any, for any reason provided for under the Bankruptcy Code." *See* Final DIP Order, ¶ 15. The Debtors and the First Lien Creditors have taken the position that, even if the Settlement Value is not encumbered by the Prepetition Liens, the First Lien Creditors are entitled to the Settlement Value on account of their adequate protection claims and liens. However, the First Lien Creditors have not sought specific relief or taken any affirmative steps to assert an entitlement to adequate protection, and the Plan does seek the allowance of any such claims. This defect alone dooms the Plan. However, even if such claim were sought, the Debtors and the First Liens Creditors have not met

their burden to show they are entitled to any, much less all, of the Obligor Debtors' unencumbered value on account of adequate protection claims.[14]

(i) Allowance of Adequate Protection Claims

62. The purpose of "adequate protection" is to ensure that prepetition lenders receive the security they bargained for prior to the petition date. *ResCap*, 501 B.R. at 594 (citing *In re WorldCom, Inc*., 304 B.R. 611, 618–19 (Bankr. S.D.N.Y. 2004)); *In re YL W. 87th Holdings I* LLC, 423 B.R. 421, 442 n.46 (Bankr. S.D.N.Y. 2010) (stating that the purpose of adequate protection is to ensure that a secured creditor receives the value of its prepetition bargain). In doing so, adequate protection shields a secured creditor from diminution in value of its interest in the particular collateral during the period of use by the debtor. *See In re Pine Lake Vill. Apartment Co.*, 19 B.R. 819, 825–26 (Bankr. S.D.N.Y. 1982); *see also In re Mosello*, 195 B.R. 277, 289 (Bankr. S.D.N.Y. 1996) (adequate protection must "protect[] the secured creditor from diminution in the value of its collateral during the reorganization process.") (internal quotation and citation omitted).

63. Determining whether a lender is entitled to adequate protection is a relatively narrow inquiry. "To determine whether an entity is entitled to adequate protection and the type and the amount of adequate protection required, a court must determine the value of the collateral, the creditor's interest in the collateral and the extent to which the value will decrease during the course of the bankruptcy case." *In re Megan-Racine Assocs*., 202 B.R. 660, 663 (Bankr. N.D.N.Y. 1996) (quoting *In re Gallegos Res. Grp.*, 193 B.R. 577, 584 (Bankr. D. Colo. 1995)); *see also ResCap*, 501 B.R. at 594 (finding a secured creditor was entitled to adequate

[14] Throughout these chapter 11 cases, the First Lien Creditors have received approximately $471 million in monthly cash adequate protection payments. At the very least, these payments adequately protect the lenders for any diminution in value, including by virtue of the imposition of the automatic stay. The First Lien Creditors have not demonstrated that they are entitled to any more than these cash payments.

protection for diminution in value based on the proposed disposition of the collateral, *i.e.*, fair market value in the hands of the Debtors). Adequate protection is not meant to improve the position of undersecured creditors in relation to other creditors. *First Fed. Bank v. Weinstein (In re Weinstein)*, 227 B.R. 284, 297 (B.A.P. 9th Cir. 1998) (noting that "permitting such a bonus would be akin to providing the undersecured creditor with interest or lost opportunity costs which is expressly prohibited by *Timbers*."); *see also United Savs. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.)*, 793 F.2d 1380, 1387 (5th Cir. 1986), *aff'd*, 484 U.S. 365 (1988) (noting that certain provisions of the Bankruptcy Code "are premised on the equitable principle that the unencumbered assets of a debtor's estate will not be used to benefit one class of creditors at the expense of another class.").

(ii) The First Lien Creditors Have Not Met Their Burden to Show That the Value of Their Prepetition Collateral Has Decreased During the Bankruptcy

64. The First Lien Creditors have the burden of proof to show that the value of their prepetition collateral has diminished during the chapter 11 cases in order to be entitled to distributions on account of adequate protection claims. *See ResCap*, 501 B.R. at 590 ("In establishing its claim, a secured creditor generally bears the burden under section 506(a) of proving the amount and extent of its lien." (citing *In re Sneijder*, 407 B.R. 46, 55 (Bankr. S.D.N.Y. 2009); *In re HeritageHighgate, Inc.*, 679 F.3d 132, 140 (3d Cir. 2012))). Neither the First Lien Creditors nor, by proxy, the Debtors, have sufficiently demonstrated the requisite diminution in value.

65. The Debtors and the First Lien Creditors point to the difference between the Debtors' total enterprise value as of the Petition Date and total enterprise value as of the Effective Date to establish the extent of the diminution in value of the First Lien Creditors'

prepetition collateral. Based on that calculation, the Debtors estimate the diminution in value to be between [redacted] (if the Settlement Value is encumbered) or between [redacted] (if the Settlement Value is unencumbered). *See* Leone Report at ¶ 70. However, the basis for the purported diminution in value is fatally flawed in at least two respects.

66. First, the Petition Date enterprise valuation used by the Debtors is significantly inflated. The Debtors' investment banker relied in part on a discounted cash flow, or "DCF," analysis in calculating the Debtors' enterprise value as of the Petition Date. *See Expert Report of Nicholas Leone in Support of the Debtors' First Amended Joint Chapter 11 Plan of Reorganization* at ¶ 8. That DCF analysis is, in turn, informed by a business plan that predated the adverse ruling in the litigation brought by Aurelius. In addition, the Debtors' investment banker performed a comparable company analysis in connection with valuation. That analysis, however, was based on a period entirely predating the Aurelius litigation. The Debtors' investment banker testified at his deposition that the Debtors [redacted] Leone Dep. at 67:15-68:3. In valuing the Windstream enterprise as of the Petition Date, the Debtors admittedly failed to take into account the financial impact of the prepetition Aurelius litigation. However, that impact was severe and immediate. *See* Disclosure Statement, VI. B. ("The immediate consequences of the findings were severe. Because the findings stated that Aurelius' Notice of Default ripened into an Event of Default on December 7, 2017, Aurelius would be entitled to a money judgment in the amount of the 6 3/8% Notes it holds plus interest, a figure amounting to approximately $300 million, with additional

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interest accruing from July 23, 2018."); *see also Amended Complaint* [Uniti Litigation Docket No. 176], ¶ 176 ("As a result of the decline in Windstream's financial performance as well as incorporating the market's reaction to Aurelius, Windstream's expert determined following the Petition Date that Windstream was insolvent no later than the end of Q3 2017 . . . ."). In addition to a $300 million money judgment, the ruling led to cross defaults and the acceleration of the Debtors' other prepetition debt. *See* Disclosure Statement, VI.C. As a result, the Debtors "lacked the ability to fund day-to-day cash needs and faced a significant and near term liquidity shortfall." *Id.* The Debtors have acknowledged that the cascading effects from the ruling in favor of Aurelius necessitated the bankruptcy filings. *See, e.g.*, Disclosure Statement VI.B. ("In the absence of Windstream filing for chapter 11, these defaults would have permitted Aurelius to exercise remedies against Windstream and ultimately its assets, potentially leading to a value-destructive piecemeal liquidation, and the defaults would have allowed other parties to accelerate other debt obligations and exercise similar remedies."); *see also Declaration of Tony Thomas, Chief Executive Officer and President of Windstream Holdings, Inc., (I) In Support of Debtors' Chapter 11 Petitions and First Day Motions and (II) Pursuant to Local Bankruptcy Rule 1007-2* [Docket No. 27] at ¶ 14 ("Windstream commenced these chapter 11 cases to both obtain the benefit of the automatic stay to enjoin Aurelius and other parties from taking collection action and to gain access to critical debtor-in-possession financing . . . ."); *Id.* at ¶ 37 ("In the absence of Windstream filing for chapter 11, these defaults would have permitted Aurelius to exercise remedies against Windstream and ultimately its assets, potentially leading to a value-destructive piecemeal liquidation, and the defaults would have allowed other parties to accelerate other debt obligations and exercise similar remedies."). By failing to account for the significant impact of the Aurelius ruling on the Debtors that precipitated the bankruptcy filings, the Petition Date valuation is materially flawed and must be rejected. *See* Transcript of Continued Hearing on Debtors' Rule 3012 Motion at 231:1-4, *In re Sears Holdings Corp.*, No. 18-23538 (RDD) (Bankr. S.D.N.Y. July 31, 2019) [Docket No. 5475] ("That valuation is simply not tied to reality, *i.e.*, the normal realizable value of this collateral in the context at the start of this case."); *see also ResCap*, 501 B.R. at 596 ("[E]ven if the Court accepts that the assets were saleable on the Petition Date—before all of the of work conducted during the bankruptcy necessary to make them saleable—the . . . experts' valuation cannot be relied upon because it provides a fair market value of the assets in the hands of a solvent company."). As such, neither the Debtors nor the First Lien Creditors can show a diminution in value of the First Lien Creditors' collateral based on the purported Petition Date valuation.

67. Second, this approach should be rejected because the First Lien Creditors do not have a lien on the Debtors' total enterprise value. Rather, they have liens on a subset of the Debtors' assets, which does not include, among other things, the Debtors' interest in the Master Lease or real property utilized in the Debtors' network. In addition, the Debtors' approach fails to account for the fact that not all declines in value are compensable as adequate protection under the Bankruptcy Code. Because the Debtors have not even attempted to quantify the compensable diminution in value of the First Lien Creditors' actual collateral, the First Lien Creditors' adequate protection claim must fail. Even if the Debtors had attempted to quantify such diminution, all or substantially all of the alleged decline in value is not the result of these chapter 11 cases, but is instead a consequence of the need to fix the Uniti Arrangement before any reorganization of the Debtors could take place.

(1) The First Lien Creditors Do Not Have a Lien on the Debtors' Enterprise Value

68. Any asserted adequate protection claim for between approximately [redacted] presumes that the First Lien Creditors have a lien on the Debtors' enterprise value as of the Petition Date. Not so. As discussed above, the First Lien Creditors do not have perfected liens in "substantially all" of the Debtors' assets. As a result, it is inappropriate for them to assert an adequate protection claim based on any difference between the total enterprise value of the Debtors at the Petition Date versus the Debtors' stipulated enterprise value under the Plan.

69. In order to establish a valid claim over the enterprise value of the company, the First Lien Creditors must establish that their collateral constitutes a "turn-key" package enabling them to sell such collateral "as a package to an entrepreneur willing to add labor" who, with nothing else, could operate the business. *See Ardmor Vending Co. v. Kim (In re Kim)*, 205 B.R. 238, 243, 245 (B.A.P. 9th Cir.), *rev'd on other grounds*, 130 F.3d 863 (9th Cir. 1997). A party that does not hold a security interest in important assets constituting turn-key collateral does not have a security interest in a debtor's enterprise value. *See In re Chateaugay Corp.*, 154 B.R. 29, 34 (Bankr. S.D.N.Y. 1993) ("To the extent that the going concern value of a particular facility is enhanced by or attributable to assets in which the [secured creditors] do not have an interest, such value *will not* be credited towards 'the value of such creditor's interest.'"); *In re Okla. City Broad. Co.*, 112 B.R. 425 (Bankr. W.D. Okla. 1990) (rejecting the secured party's argument that it was entitled to have the amount of its secured claim determined by the debtor's going concern value merely because the debtor, a radio station, intended to reorganize and continue operation of its business). In *Oklahoma City*, the court held that, because the secured party's security interest in the debtor's assets did not include the debtor's broadcasting license, and "a television station

without a broadcasting license is not a going concern[,]" the appropriate value of the secured party's security interest was the market value of only those assets of the debtor which constituted the secured party's collateral. *See Id*. at 428-29.[15]

70. The importance of the broadcasting license to a radio station in the *Oklahoma City* case is closely analogous to the importance of the unencumbered real estate and the Master Lease to the Debtors' overall business. Indeed, the Leased Assets consist of a network of real property, cables, and the easements across which they run. Without the Master Lease and the ability to use the assets that are subject to it, the Debtors have no mechanism by which to supply services to customers of a significant portion of their business. In fact, the turn-key nature of the property in question is even more apparent in these cases. A broadcasting license is just one intangible right necessary for the business, and it is obtained from a single entity. In contrast, the easements and cables used in the Debtors' networks form a complicated system of tangible and intangible assets necessary to the Debtors' business. *See* Thomas Dep. at 89:24-90:7 [redacted]; *see also* Leone Dep. 43:24–44:3 [redacted]; 213:2-7 [redacted]; 213:19-24 [redacted]

[15] The court in *Oklahoma City* valued the secured party's collateral at liquidation value plus a small premium because the lender had moved for relief from the automatic stay to foreclose on its collateral. 112 B.R. at 429 n.5.

[redacted]. The Debtors simply could not continue to operate in their present form (or anything close to it) without access to these substantial assets.[16]

71. There are 78 Non-Obligor Debtors, including Holdings. Holdings is the tenant under the Master Lease, which is the contract that provides the Debtors with the ability to use the Transferred Assets and thereby generate substantial revenues. Without a lien on the assets of Holdings,[17] including its interest in the Master Lease, or the Debtors' real estate, the First Lien Creditors simply do not have a lien on "substantially all" of the Debtors' assets. *See* Leone Dep. at 53:20-54:14 [redacted]; Thomas Dep. at 112:12-16 [redacted]; *see also* Marinuzzi Decl. Exh. J, Deposition of Johannes Weber, June 10, 2020 (the "Weber Dep.") at 176:18-177:4; *see also* Offering Memorandum at 30 ("Not all of our and the guarantors' assets

[16] Moreover, the attendant cost and complexity associated with replacing the Uniti Arrangement would negatively impact the Debtors' operations and overall value. *See* Leone Dep. 218:14-1 [redacted]; *id.* at 246:16-22 [redacted]

[17] Holdings' assets also include a disbursement account, certain causes of action, interests in various insurance policies, and intercompany receivables. *See* Appendix to Schedule A/B of Windstream Holdings, Inc. [Docket No 506].

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secure the notes."); *see also Id.* at 47 ("The Security Documents provide that the ***Collateral of the Issuers*** secures the Obligations of the Issuers under the First Lien Notes, and ***collateral of each Guarantor*** secures the obligations of such Guarantor under its Guarantee . . . Not all assets of the Issuers and the Issuers' subsidiaries constitute Collateral." (emphasis added)). Indeed, the Debtors state in the Offering Memorandum for the First Lien Notes that "[n]ot all of our subsidiaries will be required to guarantee the notes, and the assets of any non-guarantor subsidiaries may not be available to make payments on the notes" and "claims in respect of the notes will be effectively subordinated to all of the liabilities of any of our subsidiaries that is not a guarantor." Offering Memorandum at 24. It follows then that the First Lien Creditors do not have a lien on the entire Windstream enterprise.

72. The First Lien Creditors may argue that they could have obtained rights to utilize the Leased Assets by way of an assignment of the Master Lease and related agreements. This argument misses the mark. Even if Uniti consented to an assignment or sublease that would enable the First Lien Creditors to hand over a "turn-key" enterprise to another operator, the Master Lease and the Leased Assets would still not be part of their collateral. *See, e.g.*, Offering Memorandum at 2 ("The Company and its subsidiaries do not lease the assets subject to the Master Lease, are not parties to the Master Lease and have no obligations under the Master Lease, but use such assets as permitted by the terms of the Master Lease."). The enterprise would still consist of their collateral, ***plus*** unencumbered contractual rights to operate the Leased Assets.

73. The First Lien Creditors simply do not have a lien on the entire Windstream enterprise, and as such, ***cannot*** establish that they are entitled to assert adequate protection liens against all of the Obligor Debtors' unencumbered assets based on an analysis of the Debtors'

total enterprise value. The First Lien Creditors would need to demonstrate the value of their collateral—which comprises ***some***, but not ***all*** of the Debtors' assets—as a starting point. As noted below, no such valuation has occurred, so the First Lien Creditors have not carried, and cannot carry, their burden of proof to assert adequate protection liens against the Obligor Debtors' unencumbered value.

(2) Neither the Debtors Nor the First Lien Creditors Have Provided a Valuation of the First Lien Creditors' Collateral as of the Petition Date or the Effective Date

74. The record is clear that the First Lien Creditors did not conduct a valuation of their collateral as of the Petition Date based on the testimony of David Brown, Jr., the representative for the ad hoc group of first lien lenders, and Johannes Weber, the representative for Elliott. *See* Marinuzzi Decl. Exh. K, Deposition of David Brown, Jr., June 10, 2020 (the "Brown Dep.") 24:6-16 [redacted]. The First Lien Creditors also did not conduct a valuation of their collateral as of the Effective Date. *See* Brown Dep. at 26:6-14 [redacted]; *see also Id.* at 31:22-32:1 [redacted]; Weber Dep. at 177:7-16 [redacted]

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[redacted]; *Id.* at 205:25-206:3 [redacted].

75. The Debtors have also failed to conduct an analysis of the value of the First Lien Creditors' collateral as of the Petition Date or the Effective Date. *See* Thomas Dep. at 98:3-15 [redacted]; Leone Dep. at 20:10-16 [redacted]; *Id.* at 21:11-23 [redacted]; *Id.* at 126:2-9 [redacted].

76. Similarly, the First Lien Creditors admit that they have not conducted a formal analysis of the diminution in value of their collateral, and instead rely on trading prices and vague market indicators to support the alleged diminution in collateral value. *See* Brown Dep. at 41:10-42:10 [redacted]; *Id.* at 42:24-25 [redacted]; *Id.* at 43:7-9 [redacted]; *see also* Weber Dep. at 189:20-190:1 [redacted].[18] However, trading prices are impacted by a number of factors apart from the value of collateral, and there is no specific analysis on the correlation of trading prices and any diminution in value of the collateral. *See* Leone Dep. at 299:23-300:4 [redacted]

[18] *See also* Brown Dep. at 40:3-10 [redacted]

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[redacted]

(3) The First Lien Creditors Have Not Demonstrated a Diminution in Value of Their Collateral That Would Entitle Them to Adequate Protection

77. The failure to demonstrate a diminution in value of the First Lien Creditors' actual collateral package dooms any request for adequate protection. Even if the Debtors' enterprise value could be used as a proxy for the value of the First Lien Creditors' collateral (which, as set forth above, it cannot), this is not enough to entitle the First Lien Creditors to adequate protection.

78. Not every decline in value will entitle a secured creditor to adequate protection. As previously stated, "[t]he goal of adequate protection is to safeguard the secured creditor from diminution in the value of its interest during the Chapter 11 reorganization." *In re 495 Cent. Park Ave. Corp.,* 136 B.R. 626, 631 (Bankr. S.D.N.Y. 1992) (citation omitted). The Final DIP Order provides that the First Lien Creditors are entitled to adequate protection for diminution in value of their collateral as provided in the Bankruptcy Code. *See* Final DIP Order, ¶ 15. Section 361 of the Bankruptcy Code provides for forms of adequate protection "to the extent that the stay under section 362 [of the Bankruptcy Code], use, sale, or lease under section 363 of [the Bankruptcy Code], or any grant of a lien under section 364 [of the Bankruptcy Code] results in a decrease in the value of such entity's interest in such property." 11 U.S.C. § 361(a).

79. The First Lien Creditors are not entitled to assert adequate protection liens against the Obligor Debtors' unencumbered assets because they have not demonstrated that any decline in the value of their collateral was attributable to the imposition of the automatic stay, the Debtors' use of their collateral, or the imposition of priming liens. To the contrary, any decline

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in enterprise value is based on market factors that would have impacted the value of the collateral ***despite*** the commencement of these chapter 11 cases. *See Bankers Life Ins. Co. of Neb. v. Alyucan Interstate Corp. (In re Alyucan Interstate Corp.)*, 12 B.R. 803, 809 (Bankr. D. Utah 1981) ("[N]ot every decline in value must be recompensed, only those which, but for the stay, could be and probably would be prevented or mitigated."). This is especially insufficient proof where the Debtors and the First Lien Creditors have failed to actually value the First Lien Creditors' collateral, and instead merely rely on the faulty notion that the Prepetition Liens attach to the Debtors' total enterprise value. The First Lien Creditors are not entitled to adequate protection for ***any*** decline in collateral value; rather, they must show that there has been a decline in the value of their collateral ***caused by the Debtors' chapter 11 cases***. *See In re Pine Lake Vill. Apartment Co.*, 19 B.R. at 826 (noting "if the loss is not attributable to the stay, the debtor should not be required to furnish the creditor with any further protection for his lien, especially [as] the express purpose [of adequate protection] is concerned with the preservation of the collateral securing the creditors' claims."); *see also In re Elmira Litho, Inc.*, 174 B.R. 892, 902 (Bankr. S.D.N.Y. 1994) ("[T]he secured creditor lacks adequate protection if the value of its collateral is declining as a result of the stay."); *Equitable Life Assurance Soc'y of the U.S. v. Barkley-Cupit Enters., Inc. (In re Barkley-Cupit Enters., Inc.*), 13 B.R. 86, 91 (Bankr. N.D. Ga. 1981), *aff'd sub nom. Barkley-Cupit Enters. v. Equitable*, 677 F.2d 112 (11th Cir. 1982) ("It is not the responsibility of the Court under 11 U.S.C. § 362 to require compensation [to a creditor] for any damages or losses it may have sustained . . . as a result of causes other than the automatic stay . . . The Court must determine whether the automatic stay has adversely affected [the creditor's] economic interest in property, and has prevented [the creditor] from protecting its interest in the property and, if so, how [the creditor's] interest, *as affected by the automatic stay*, may be protected." (emphasis in original)).

80. Neither the Debtors nor the First Lien Creditors have offered any proof of a diminution in value of the prepetition collateral based on the imposition of the stay, or for any reason other than general, ordinary market declines, the COVID-19 pandemic, or other factors that would have occurred regardless of the chapter 11 cases (*i.e.*, that would have occurred even if the First Lien Creditors had been able to foreclose against their collateral on the Petition Date). As noted above, the reality is that any decline in the value of the First Lien Creditors' collateral was due almost entirely to the need to resolve infirmities surrounding the Uniti Arrangement, which was required for the Debtors to reorganize. The Debtors and the First Lien Creditors have acknowledged this reality throughout these cases. *See, e.g.*, *Debtors' Motion for Entry of an Order Appointing a Mediator* [Docket No. 803], at ¶ 1 ("A resolution of issues regarding the Uniti Arrangement is central to these chapter 11 cases."); *Debtors' Second Motion to Extend the Debtors' Exclusive Periods to File a Chapter 11 Plan and Solicit Acceptances Thereof Pursuant to Section 1121 of the Bankruptcy Code* [Docket No. 1281], at ¶ 19 ("[T]he litigation against Uniti is a gating item in these chapter 11 cases that must be resolved in order for the Debtors to formulate a go-forward business model and file a viable chapter 11 plan."); *see also First Lien Ad Hoc Group's Statement in Support of Debtors' Motion for Entry of an Order Appointing a Mediator* [Docket No. 850], at ¶ 1 (noting the "characterization of the Uniti Arrangement" was "the pivotal issue in these cases."); *First Lien Ad Hoc Group's Statement in Support of Debtors' Preliminary Objection to the Motion of UMB Bank, National Association and U.S. Bank National Association, as Indenture Trustees, (I) to Strike the Uniti Master Lease from the Debtors' Schedule G and (II) to Modify the Cash Management Order* [Docket No. 761],

at ¶ 1 (noting characterization of the Master Lease was "a critical piece of the chapter 11 cases."); *The First Lien Ad Hoc Group's Omnibus Reply in Support of the Debtors' 9019 Motion, Backstop Motion and Disclosure Statement Motion* [Docket No. 1772], at ¶ 12 (noting "approval of the" motion to approve the Uniti Settlement "and consummation of the settlement are required before the Debtors can effectuate the Plan.").[19] Accordingly, to the extent there was any diminution in value of the First Lien Creditors' collateral, it was caused by the need to resolve the issues regarding the Uniti Arrangement (which would have needed to occur under any circumstances) and was not caused by the bankruptcy cases.

81. Judge Glenn's decision in *ResCap* is highly instructive here. In *ResCap*, the court refused to grant an adequate protection claim because the noteholders provided a flawed valuation that failed to take into account the distressed nature of the assets on the petition date. *See ResCap*, 501 B.R. at 597. There, the value of the collateral on the effective date did not exceed the value of the collateral on the petition date. That was "because the value of the collateral at the Petition Date was very substantially impaired by reason of existing defaults that

[19] *See also Debtors' Reply in Support of Debtors' Second Motion to Extend the Debtors' Exclusive Periods to File a Chapter 11 Plan and Solicit Acceptances Thereof Pursuant to Section 1121 of the Bankruptcy Code* [Docket No. 1335], at ¶ 5("[T]he objecting parties recognized, as they must, that resolution of the Uniti-related matters in these chapter 11 cases is a gating issue to the cases' proceeding to the plan process."); *Debtors' Fourth Motion to Extend Debtors' Exclusive Periods to File a Chapter 11 Plan and Solicit Acceptances Thereof Pursuant to Section 1121 of the Bankruptcy Code* [Docket No. 1977], at ¶¶ 2-3 (noting the Debtors "set these cases on a clear path to a successful resolution and emergence from chapter 11" since the "threshold issue [was] solved" by the Uniti Settlement.); *Declaration of Anthony Thomas* [Docket No. 1747], at ¶ 12 ("[T]he Uniti Settlement removes the gating item to Windstream's emergence from chapter 11, which has allowed Windstream to chart an exit path . . . 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."); *Limited Objection of the First Lien Ad Hoc Group to Debtors' Second Motion to Extend the Debtors' Exclusive Periods to File a Chapter 11 Plan and Solicit Acceptances Thereof Pursuant to Section 1121 of the Bankruptcy Code* [Docket No. 1315], at ¶ 4 ("Once the recharacterization litigation is resolved, the Debtors should be able to move forward immediately with a plan of reorganization."); *First Lien Ad Hoc Group's Statement in Support of Debtors' Reply in Support of Third Motion to Extend the Exclusive Periods to File a Chapter 11 Plan and Solicit Acceptances Thereof* [Docket No. 1700], at ¶ 1 ("[T]he Debtors, the First Lien Ad Hoc Group and the Debtors' other stakeholders have engaged in good-faith negotiations and mediation guided by the Honorable Judge Shelley C. Chapman regarding settlement of the Uniti litigation and ***related*** formulation of the plan." (emphasis added)).

prevented Debtors from disposing of most of their collateral at that time." *Id.* The court noted that "[t]hrough the settlements and consents achieved over many months, with great effort and expense, the Debtors successfully closed the sales of most of their assets on very favorable terms. The [secured creditors] and all estate creditors will benefit from this accomplishment." *Id.* Judge Glenn's reasoning in *ResCap* is applicable here because the Aurelius litigation and the Uniti Arrangement impacted the condition of the Debtors on the Petition Date and needed to be addressed (with substantial estate resources) in order for the Debtors to emerge from bankruptcy. Likewise, as discussed above, the Debtors and the First Lien Creditors here have not presented a reasoned Petition Date valuation from which the Court can conclude that there has actually been a diminution in value of the First Lien Creditors' collateral.

82. The Debtors' overly simplistic adequate protection analysis also fails to account for the fact that the Debtors made significant expenditures during these cases to improve and maintain the value of the First Lien Creditors' collateral. Such payments do not give rise to adequate protection claims and must be accounted for when determining how much adequate protection, if any, is actually warranted. The Debtors have used proceeds from the DIP Financing, which was secured by priming liens, to fund their operations while in bankruptcy. This involved maintaining the Debtors' networks, which include assets that are subject to the Prepetition Liens. By sustaining their business operations, the Debtors have made financial contributions to preserve the value of the First Lien Creditors' collateral. These expenditures alone are a form of adequate protection. *See, e.g.*, *In re Constable Plaza Assocs., L.P.*, 125 B.R. 98, 105 (Bankr. S.D.N.Y. 1991) (observing that debtor's use of rents to maintain and operate property "will serve to preserve or enhance the value of the building which, in turn, will protect the collateral covered by [the secured lender's] mortgage."); *In re Cardinal Indus. Inc.*, 118 B.R.

971, 981 (Bankr. S.D. Ohio 1990) (ruling that secured lenders were adequately protected by debtor's use of rents to maintain and manage encumbered properties).

83. By way of analogy, in permitting the use of cash collateral, courts have recognized that the preservation of the going concern value of a secured lender's collateral constitutes adequate protection of such lender's interest in the collateral. *See, e.g.*, *In re Salem Plaza Assocs.*, 135 B.R. 753, 758 (Bankr. S.D.N.Y. 1992) ("Allowing the Debtor to use [cash collateral] . . . will preserve the base that generates the income stream."); *Hartigan v. Pine Lake Vill. Apartment Co. (In re Pine Lake Vill. Apartment Co.)*, 16 B.R. 750, 756 (Bankr. S.D.N.Y. 1982) ("[T]he application of the rent income solely to maintain and repair the property . . . will enhance the . . . collateral . . . . clearly ensur[ing] that the . . . investment is adequately protected."); *In re 499 W. Warren St. Assocs., Ltd. P'ship*, 142 B.R. 53, 56 (Bankr. N.D.N.Y. 1992) (finding a secured creditor's interest in collateral adequately protected when cash collateral was applied to normal operating and maintenance expenditures on the collateral property); *In re Mullen*, 172 B.R. 473, 478 (Bankr. D. Mass. 1994) ("If the rents were not used to pay for management, taxes and maintenance of the properties, the value of [the secured lender's] mortgage interest would rapidly decline."); *In re Wrecclesham Grange, Inc.*, 221 B.R. 978, 981 (Bankr. M.D. Fla. 1997) ("[A]s long as the debtor generates a continuous income stream, the debtor's use of the rental income does not diminish the value of the collateral") (citation omitted). The adequate protection afforded to the First Lien Creditors by virtue of the Debtors' improvement and continued operation of prepetition collateral must be accounted for in determining the amount of any alleged adequate protection claim. Like the numerous other deficiencies in the Debtors' adequate protection analysis, the Debtors' failure to account for

payments that enhanced or maintained the value of the First Lien Creditors' collateral dooms their attempt to satisfy their burden of establishing an adequate protection claim.

(4) Adequate Protection Payments Made to the First Lien Creditors Should Be Recharacterized

84. The First Lien Creditors have received $471 million in monthly cash adequate protection payments during these chapter 11 cases. If, in fact, the First Lien Creditors are undersecured as they now assert, the hundreds of millions of dollars in adequate protection payments they received should be recharacterized as payments of principal and should offset any diminution in value they allege.

85. Under section 506(b) of the Bankruptcy Code, "[t]o the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose." 11 U.S.C. § 506(b). Undersecured creditors are not entitled to receive costs, fees, and related payments. *See ResCap* 501 B.R. at 623; *see also In re S. Side House, LLC*, 474 B.R. 391, 413 (Bankr. E.D.N.Y. 2012) ("Section 506(b) permits an oversecured creditor to receive post-petition interest and other charges, and generally prohibits an undersecured creditor from receiving these benefits . . . Stated another way, under Section 506(b) and *Timbers*, an undersecured creditor may not receive payment in excess of its original claim." (citing *Timbers*, 484 U.S. at 379-82; *In re 354 E. 66th St. Realty Corp.*, 177 B.R. 776, 781 (Bankr. E.D.N.Y. 1995)).

86. Paragraph 15(g) of the Final DIP Order provides that, "subject to reallocation or recharacterization as payment of principal under sections 506(a) and (b) of the Bankruptcy

Code," the First Lien Creditors are entitled to monthly payments in cash (the "Adequate Protection Payments") on account of:

- All unpaid interest accruing on all outstanding principal, interest, fees, and other amounts owing as of the Petition Date under the Prepetition Credit Agreement and the Prepetition First Lien Notes Indenture; and

- All outstanding unpaid fees and interest owing under sections 2.11 and 2.12 of the Prepetition Credit Agreement and interest accruing on the Notes (as defined in the First Lien Notes Indenture).

See Final DIP Order, ¶ 15(g).

87. The Debtors and the First Lien Creditors assert that the diminution of the Debtors' enterprise value entitles the First Lien Creditors to adequate protection, but it also renders them undersecured. It is well settled that undersecured creditors are not entitled to postpetition interest or fees. Therefore, the Adequate Protection Payments should be recharacterized under section 506 of the Bankruptcy Code as payments of principal.

88. The result of recharacterizing these payments is twofold. *First*, properly allocating the Adequate Protection Payments as payments of principal reduces the First Lien Creditors' prepetition claim. *Second*, by virtue of reducing their claim, the reallocated Adequate Protection Payments mitigate any purported diminution in value. Neither the Debtors nor the First Lien Creditors account for the Adequate Protection Payments in calculating the First Lien Creditors' prepetition claim, or any diminution in value of their collateral.

3. The Obligor Debtors Hold Other Valuable Unencumbered Assets

89. Putting aside the Settlement Proceeds, as a result of the Lien Investigation, the Committee determined that the following categories of assets of value also are not encumbered by the Prepetition Liens: (a) commercial tort claims; (b) certain real property interests; (c) cash

in certain accounts; (d) tax attributes; (e) certain copyrights; and (f) certain other Excluded Assets under the Prepetition Security Documents.[20]

90. Specifically, the Committee believes that all or some of the following assets should benefit unsecured creditors of the Obligor Debtors: (a) a portion of almost $20 million on account of recoveries in the Debtors' litigation against Charter Communications, Inc. (commercial tort claims are not subject to the Prepetition Liens), *see Debtors' Post-Trial Memorandum*, [Adv. Pro. No. 19-08246, Docket No. 317], at 38-39; (b) [redacted] on account of (i) land and buildings [redacted]; (ii) construction work-in-progress (consisting of in-progress fixed assets that have not yet been placed into service); (iii) leased facilities deferral; (iv) leasehold improvements; and (v) vehicles;[21] and (c) [redacted] in cash in unencumbered accounts. *See* Nystrom Report ¶¶ 15-20.

91. The Debtors take the position that the value of such assets is *de minimis* and encumbered by the DIP Liens and adequate protection liens. As an initial matter, as noted above, the First Lien Creditors have not established that the value of their prepetition collateral has diminished during these cases as required for them to assert their adequate protection liens against the Obligor Debtors' unencumbered assets.

[20] The Excluded Assets include, but are not limited to: (a) various motor vehicles; (b) certain licenses granted to the Debtors by the FCC and other federal and state agencies for which the requisite governmental approvals to grant security interests thereon have not been obtained; (c) 34% of the voting equity interests in foreign subsidiaries; and (d) equity interests in and assets of the following Debtors: Birmingham Data Link, LLC, Nashville Data Link, Inc., Conversent Communications Resale, L.L.C., and Choice One Communications Resale, L.L.C.

[21] These figures are based on net book values, but the Committee believes that replacement value is a more appropriate valuation metric for certain of these assets, including buildings and associated necessary refurbishing. Replacement value of those assets would be significantly greater than net book value. *See* Marinuzzi Decl. Exh. L, *Amended Rebuttal Expert Report of Kevin Nystrom in Support of Objection of the Official Committee of Unsecured Creditors to Confirmation of the First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc., et al., Pursuant to Chapter 11 of the Bankruptcy Code* (the "Nystrom Report") ¶ 17.

92. In addition, pursuant to the Final DIP Order, both the DIP Secured Parties and the First Lien Creditors are required to "use commercially reasonable efforts to first satisfy [any DIP Obligations, DIP Superpriority Claims, or Adequate Protection Claims] from all other DIP Collateral" before looking to the proceeds of avoidance actions or commercial tort claims. Final DIP Order, ¶ 10(d). This "soft marshaling" provision permits the DIP Secured Parties and the First Lien Creditors to look to proceeds of avoidance actions or commercial tort claims, but only as a last resort. Because the DIP Financing is being satisfied in full and in cash under the Plan and these unencumbered assets are not being sold to generate such value, the DIP Lenders cannot artificially dictate that such assets were used to satisfy their claims. This is especially so where the true value of the Uniti Settlement will be paid to the Debtors ***after*** the DIP Obligations have been satisfied.

IV. THE PLAN VIOLATES SECTION 1129(b) OF THE BANKRUPTCY CODE

93. In order to confirm the Plan over the objection of creditors in Class 6A, the Debtors must prove by a preponderance of the evidence that, among other things, the Plan does not "discriminate unfairly" and is "fair and equitable," as required by section 1129(b) of the Bankruptcy Code. 11 U.S.C. § 1129(b). The Debtors fail to meet their burden.

94. "[T]he unfair discrimination test assures fair treatment among classes of the same priority level . . . ." *In re SunEdison, Inc.*, 575 B.R. 220, 226 (Bankr. S.D.N.Y. 2017). The test "is designed to protect against horizontal discrimination in the same way that the absolute priority rule prevents against nonconsensual vertical discrimination." *Id.* In determining whether a plan unfairly discriminates against an impaired dissenting class, court consider whether "(i) there is a reasonable basis for discriminating, (ii) the debtor cannot consummate the plan without discrimination, (iii) the discrimination is proposed in good faith, and (iv) the degree

of discrimination is in direct proportion to its rationale." *In re Buttonwood Partners, Ltd.*, 111 B.R. 57, 63 (Bankr. S.D.N.Y. 1990).

95. To be fair and equitable, "(1) the plan may not give property to a junior class 'on account of' their claims or interests without holders of senior classes receiving the full value of their claims; and (2) the plan may not give property to senior classes in excess of the full value of their claims." *Ahuja v. LightSquared, Inc. (In re LightSquared, Inc.)*, 534 B.R. 522 (S.D.N.Y. 2015) (citation omitted), *aff'd*, 644 Fed. Appx. 24 (2d Cir. 2016); *accord In re Mayflower Cmtys., Inc.*, No. 19-30283 (HDH), 2019 WL 4732379, at *10 (Bankr. N.D. Tex. Sept. 26, 2019). In other words, a plan is not "fair and equitable" if secured creditors receive more than the value of their collateral, while unsecured creditors of the same entities receive nothing.

96. Here, if the stipulated Plan Equity Value is accurate and the First Lien Creditors are undersecured, then their secured claims are only for amounts equal to the value of their collateral, and the balance of their claims are unsecured. *See* 11 U.S.C. § 506(a)(1) ("An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim."). The First Lien Creditors have not met their burden to show that they are entitled to adequate protection. So, the value of the Obligor Debtors' unencumbered assets must be shared pro rata among all of the unsecured creditors of the Obligor Debtors, rather than diverted solely to the First Lien Creditors on account of their unsecured deficiency claims. The Debtors have failed to put forth any analysis, let alone any rational basis, to justify a contrary result. Thus, based on the Plan Equity Value, the First Lien

Creditors are receiving more than they are owed on account of their secured claims and the Plan unfairly discriminates against general unsecured creditors of the Obligor Debtors.

97. The Debtors have failed to take into account unencumbered value identified by the Committee in their projected recoveries under the Plan. *See, e.g.*, Grossi Dep. at 25:10-15 [redacted] *id.* at 25:22-26:14 [redacted]; *id.* at 18:20-24 [redacted]. The Committee believes that general unsecured creditors of the Obligor Debtors are entitled to at least some recovery, ranging [redacted]. *See* Nystrom Report ¶ 14. For example, assuming that all of the Settlement Value is unencumbered (it is), and such value is allocated to insolvent entities,[22] over [redacted] in value would flow to Class 5 (Second Lien Claims) and Class 6A (Obligor General Unsecured Claims), providing an estimated recovery of nearly [redacted] to Class 6A:

Unencumbered Value	**Obligor Debtor Administrative & Priority Claims**	**Excess Value**	**Recoveries to Class 6A After Deficiency Claims**
[redacted]	[redacted]	[redacted]	[redacted]

[22] The Committee does not take a view as to the correct method of allocating the Settlement Value among the Debtors. All of the Settlement Value is allocated to Services in this scenario, other than whatever portion of the Settlement Value was necessary to make the other Obligor Debtors administratively insolvent.

See Nystrom Report, Apx. 3.

98. If the Settlement Value is unencumbered (it is), and such value is allocated among the Debtors based upon the methodologies used by the Debtors in various analyses, any excess value at the Non-Obligor Debtors after all claims at the respective entities are paid in full is allocated to the First Lien Creditors on account of equity pledges. In this scenario, over [redacted] in value would flow to Class 5 (Second Lien Claims) and Class 6A (Obligor General Unsecured Claims), providing an estimated recovery of nearly [redacted] to Class 6A:

Unencumbered Value	Obligor Debtor Administrative & Priority Claims	Excess Value	Recoveries to Class 6A After Deficiency Claims
[redacted]	[redacted]	[redacted]	[redacted]

See Nystrom Report, Apx. 3.

99. Even if the Court finds that the Settlement Value is encumbered (it should not), general unsecured creditors at the Obligor Debtors are still entitled to a greater recovery than what is provided under the Plan. In this scenario, over [redacted] in value would flow to Class 5 (Second Lien Claims) and Class 6A (Obligor General Unsecured Claims), providing an estimated recovery of approximately [redacted] to Class 6A:

Unencumbered Value	Obligor Debtor Administrative & Priority Claims	Excess Value	Recoveries to Class 6A After Deficiency Claims
[redacted]	[redacted]	[redacted]	[redacted]

See Nystrom Report, Apx. 3.

100. In sum, because there are valuable unencumbered assets and the First Lien Creditors are not entitled to adequate protection, general unsecured creditors of the Obligor Debtors are entitled to more than what they are projected to recover under the Plan. The Plan

provides the First Lien Creditors with recoveries in excess of their pro rata share of the Debtors' assets, and diverts unencumbered value that should be preserved for general unsecured creditors to satisfy their deficiency claims. The Plan violates section 1129(b) of the Bankruptcy Code and cannot be confirmed.

V. RESERVATION OF RIGHTS

101. The Committee reserves the right to raise further and other objections to confirmation of the Plan or any amendment thereto, prior to or at the hearing, in the event additional information comes to light on account of continuing discovery being conducted by the Committee or it the event the Committee's objections raised herein are not resolved prior to such hearing.

VI. CONCLUSION

102. The Committee respectfully requests that the Court enter an order (a) denying confirmation of the Plan and (b) granting such other and further relief as the Court deems just and proper.

Dated: June 19, 2020
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Respectfully submitted,

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