

Hearing Date: June 24, 2020 at 11:00 AM (Eastern Time)
Objection Deadline: June 19, 2020 at 4:00 PM (Eastern Time),
as extended for Lead Plaintiff by agreement with the Debtors
Re: Doc No. 1812

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

In re:

WINDSTREAM HOLDINGS, INC., *et al.*,¹

Debtors.

Chapter 11

Case No. 19-22312 (RDD)

(Jointly Administered)

**SECURITIES LEAD PLAINTIFF'S LIMITED OBJECTION TO CONFIRMATION OF
THE FIRST AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION OF
WINDSTREAM HOLDINGS, INC. *ET AL.***

Robert Murray ("Lead Plaintiff"), the court-appointed lead plaintiff in the securities class action captioned as *Robert Murray v. Earthlink Holdings Corp., et al.*, Case No. 4:18-cv-00202-jm (the "Securities Litigation"), pending in the United States District Court for the Eastern District of Arkansas (the "Arkansas District Court"), for himself and the putative class he seeks to represent in the Securities Litigation (the "Class"), hereby submits this limited objection (the "Limited Objection") 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 "Plan") [Doc No. 1812] proposed by the debtors-in-possession (collectively, the "Debtors") in the above-captioned chapter 11 cases (the "Chapter 11 Cases"). As and for this Limited Objection, Lead Plaintiff respectfully states as follows:

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



PRELIMINARY STATEMENT

1. Lead Plaintiff does not object to confirmation of the Plan as a general matter. Certain modifications to the Plan following the disclosure statement hearing, and certain additional language the Debtors have agreed to insert into the confirmation order, have resolved substantially all of Lead Plaintiff's concerns regarding the Plan. One issue remains unresolved. As discussed below, either the Plan or the confirmation order should reflect the fact that the Debtors' duties to preserve evidence in connection with the Securities Litigation survive confirmation and remain in effect until the conclusion of the Securities Litigation. Lead Plaintiff has proposed language below to address this concern.

BACKGROUND

2. The Securities Litigation is a putative class action arising from the 2017 merger (the "Merger") between Windstream Holdings Inc. ("Windstream"), now a Debtor in these Chapter 11 Cases, and EarthLink Holdings Corp. ("EarthLink" and together with Windstream, the "Debtor Defendants").

3. The *Amended Class Action Complaint for Violations of Federal Securities Laws* (the "Complaint")² filed in the Securities Litigation on July 27, 2018 asserts claims against the Debtor Defendants and certain of their current and former directors and officers (the "Individual Defendants" and collectively with the Debtor Defendants, the "Defendants") (a) under sections 11, 12(a)(2), and 15 of the Securities Act of 1933 (the "1933 Act"), on behalf of Lead Plaintiff and all other persons or entities, except for the Defendants, who purchased or otherwise acquired Windstream shares, pursuant and/or traceable to certain Merger offering documents, and (b) under

² References to the Complaint and the allegations therein are for informational purposes only, are qualified in their entirety by the Complaint itself, and do not constitute an admission or stipulation with respect to any factual allegations in the Securities Litigation.

sections 14(a) and 20(a) of the Securities Exchange Act of 1934, on behalf of Lead Plaintiff and all other persons or entities, except for the Defendants, who held EarthLink stock on the record date for the Merger.³ Among other things, the Complaint alleges that the Windstream shares issued in connection with the Merger, though ostensibly valued at \$1.1 billion at the time, were in fact almost worthless.

4. Lead Plaintiff timely filed a class proof of claim on behalf of itself and the Class against Windstream Holdings Inc. (the “Class Claim”) [Claim No. 6285] on July 15, 2019. The claims asserted in the Class Claim are subject to subordination pursuant to section 510(b) of the Bankruptcy Code.

OBJECTION

5. The Securities Litigation is subject to the Private Securities Litigation Reform Act of 1995 (“PSLRA”), 15 U.S.C. § 78u-4, which, among other things, mandates that

any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.

15 U.S.C. § 78u-4(b)(3)(C)(i). This mandatory requirement is subject to “sanction for willful violation.” 15 U.S.C. § 78u-4(b)(3)(C)(ii). In addition, Federal Rule of Civil Procedure 37(e) and common law require the Debtor Defendants to preserve electronically stored information and other potentially relevant evidence in connection with the Securities Litigation. See, e.g., Crown Battery

³ The claims asserted in the Complaint are based solely on strict liability and negligence, not on any reckless or intentionally fraudulent conduct by or on behalf of the Defendants. Lead Plaintiff has specifically disclaimed any allegation of fraud, scienter, or recklessness in connection with such claims. See Complaint, ¶ 7.

Mfg. Co. v. Club Car, Inc., 185 F.Supp.3d 987, 998 (N.D. Ohio 2016); Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 521 (D. Md. 2010).

6. The Debtor Defendants are parties to the Securities Litigation and thus are subject to the PSLRA's document preservation mandate, as well as the dictates of the Federal Rules of Civil Procedure and common law. Due to the operation of the automatic stay, the Securities Litigation is currently stayed with respect to the Debtor Defendants and, by order of the Court, with respect to the Individual Defendants, except to the extent necessary for the Arkansas District Court to rule on the pending motions to dismiss. The Debtors have agreed to incorporate language in the confirmation order preserving the claims of Lead Plaintiff and the Class against the Debtor Defendants to the extent of available insurance. In the event the Debtor Defendants cease (temporarily or otherwise) to be a party to the Securities Litigation, the PSLRA's document preservation mandate should continue to apply to the Debtors and later, the reorganized Debtors.

7. Continuing preservation of the Debtor Defendants' books, records, electronically stored information, and other items of evidence that are potentially relevant to the Securities Litigation post-confirmation is absolutely crucial to avoid prejudice to Lead Plaintiff and the putative Class. However, the Plan does not contain any affirmative requirement that the Debtors take any action to preserve evidence potentially relevant to the Securities Litigation through the completion of the Securities Litigation and comply with discovery requests and subpoenas, as applicable, in the future.

8. Inclusion of the following provision in the Plan or the confirmation order would resolve Lead Plaintiff's concerns with respect to the post-confirmation preservation of and access to evidence that is potentially relevant to the Securities Litigation:

Until the entry of a final and non-appealable order of judgment or settlement with respect to all defendants now or hereafter named in the litigation captioned as

Robert Murray v. Earthlink Holdings Corp., et al., Case No. 4:18-cv-00202-jm (the “Securities Litigation”), the Debtors, the Reorganized Debtors, and any transferee or custodian of the Debtors’ documents, electronically stored information, and tangible things (as those terms are used in Fed. R. Civ. P. 34) that are relevant or potentially relevant to the Securities Litigation, wherever stored (collectively, “Potentially Relevant Books and Records”), shall preserve and maintain the Potentially Relevant Books and Records as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure, and shall not destroy, abandon, transfer, or otherwise render unavailable such Potentially Relevant Books and Records. For the avoidance of doubt, nothing in the Plan or this Confirmation Order shall impact in any manner any rights of the lead plaintiff and the proposed class in the Securities Litigation to seek and obtain Potentially Relevant Books and Records through discovery in the Securities Litigation.

9. Absent such revisions, the Plan is not confirmable..

RESERVATION OF RIGHTS

10. Neither the filing of this Limited Objection nor anything contained herein are intended to limit, prejudice, or otherwise impact any rights of Lead Plaintiff or the putative Class in connection with the filing, solicitation, or confirmation of the Plan (or any other plan). Lead Plaintiff, on behalf of itself and the putative Class, hereby reserves all such rights, including but not limited to the rights to (a) object on any and all grounds to confirmation of the Plan, (b) opt out of the Third-Party Release and take any other action permitted or required under the Bankruptcy Code and other applicable law, on behalf of himself and the putative Class, and (c) seek, on behalf of itself and the putative Class, any other relief in connection with the foregoing.

11. For the avoidance of doubt, this Limited Objection does not, shall not, and shall not be deemed to:

- a. constitute a submission by Lead Plaintiff, either individually or for the putative Class or any member thereof, to the jurisdiction of the Bankruptcy Court;
- b. constitute consent by Lead Plaintiff, either individually or for the Class or any member thereof, to entry by the Bankruptcy Court of any final order in any non-core proceeding, which consent is hereby withheld unless, and solely to the extent, expressly granted in the future with respect to a specific matter;

- c. waive any substantive or procedural rights of Lead Plaintiff or the Class or any member thereof, including but not limited to (i) the right to challenge the constitutional authority of the Bankruptcy Court to enter a final order or judgment on any matter, (ii) the right to have final orders in non-core matters entered only after de novo review by a District Court judge, (iii) the right to trial by jury in any proceedings so triable herein, in the Debtors' chapter 11 cases, including all adversary proceedings and other related cases and proceedings (collectively, "Related Proceedings"), in the Securities Litigation, or in any other case, controversy, or proceeding related to or arising from the Debtors, their chapter 11 cases, any Related Proceedings, or the Securities Litigation, (iv) the right to have the reference withdrawn by a United States District Court in any matter subject to mandatory or discretionary withdrawal, or (v) all other rights, claims, actions, arguments, counterarguments, defenses, setoffs, or recoupments to which Lead Plaintiff or the Class or any member thereof are or may be entitled under agreements, at law, in equity, or otherwise, all of which rights, claims, actions, arguments, counterarguments, defenses, setoffs, and recoupments are expressly reserved.

12. For the avoidance of doubt, Lead Plaintiff, on behalf of himself and the Class and the members thereof, does not consent, and expressly objects, to this Court's entry of any final order or judgment that this Court lacks jurisdiction or statutory and/or constitutional adjudicatory authority to enter without the affirmative and knowing consent of all parties affected thereby, and reserves all rights to object to confirmation of the Plan, or any other plan proposed in the Chapter 11 Cases, on any basis, including but not limited to the fact that the Court lacks constitutional adjudicatory authority pursuant to Stern v. Marshall, 564 U.S. 462 (2011), and its progeny to approve a release of the claims of Lead Plaintiff and the putative Class against the Individual Defendants.

WHEREFORE, Lead Plaintiff respectfully submits that the Plan should not be confirmed unless the issue addressed in this Limited Objection is appropriately addressed as set forth above.

Dated: June 19, 2020

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