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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. BANK NATIONAL ASSOCIATION, CQS (US), LLC, Appellants, v. WINDSTREAM HOLDINGS, INC., *et al.*, Appellees.	Case No. 20-cv-04276 (VB)
In re: WINDSTREAM HOLDINGS, INC., *et al.*, Debtors.	Appeal from Chapter 11 Case No. 19-22312 (RDD) (Jointly Administered)

U.S. BANK'S MOTION FOR (I) A DETERMINATION OF POST-EFFECTIVE DATE JURISDICTION OR (II) IN THE ALTERNATIVE, A STAY PENDING APPEAL

U.S. Bank National Association, solely in its capacities as indenture trustee ("U.S. Bank") for certain Windstream Services, LLC ("Services") unsecured notes,[1] hereby files this motion (the "Motion") pursuant to Rules 8007 and 8013 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") seeking (1) a determination of post-effective date jurisdiction, or in the alternative, (2) a stay pending appeal.

INTRODUCTION

1. Pending before this Court are the consolidated appeals of two orders entered by the Bankruptcy Court (1) approving the Debtors' Settlement (the "Settlement Order"), and (2) confirming the Debtors' Plan (the "Confirmation Order"), entered on May 12 and June 26, 2020, respectively. On July 29, 2020, U.S. Bank filed its consolidated opening brief (20 CV 4276 Doc. # 16) (the "Opening

[1] U.S. Bank is indenture trustee for (i) that certain indenture dated as of October 6, 2010 between it and Services as issuer of 7.75% Senior Notes due 2020, (ii) that certain indenture dated as of March 28, 2011 between it and Services as issuer of 7.75% Senior Notes due 2021, (iii) that certain indenture dated as of November 22, 2011 between it and Services as issuer of 7.50% Senior Notes due 2022, (iv) that certain indenture dated as of March 16, 2011 between it and Services as issuer of 7.50% Senior Notes due 2023, and (v) that certain indenture dated as of January 23, 2013 between it and Services as issuer of 6.375% Senior Notes due 2023.

Brief").[2] On September 2, 2020, the Debtors and Elliott filed their opening briefs (20 CV 4276 Doc. ## 37, 41) and the First Lien Ad Hoc Group (together with Elliott, the "Intervenors") filed a joinder (20 CV 4276 Doc. # 38). U.S. Bank intends to file its reply brief no later than September 8, 2020. As such, prior to the return date of this Motion, the appeals will be ready for determination, subject only to this Court hearing argument should it desire it.

2. In their opening brief, and as their lead argument, the Debtors adopt the unprecedented position that the Court should dismiss the appeals as equitably moot not because the Debtors have consummated the Plan (or even entered into a single Plan-effectuation transaction), but rather because they intend to do so. (Debtors' Br. at 18-23 [20 CV 4276 Doc. # 37]) In support of that argument, the Debtors assert that (i) they intend to consummate the Plan by "mid-September;" (ii) consummation will effectuate a series of transactions that cannot be undone by this or any other Court; (iii) given the nature of the transactions at issue, no court will be able to fashion any post-consummation remedy for the Appellants or the more than $2 billion in unsecured claims that are receiving no distribution under the Plan (no

[2] U.S. Bank incorporates its Opening Brief by reference into this Motion. Capitalized terms used but not defined herein have the meaning ascribed to them in the Opening Brief.

matter how contrary to the law that Plan might be); and (iv) because this Court, according to the Debtors, will assumedly not hear or determine the appeal before their threatened consummation, the appeals should be dismissed. In response and in an attempt to avoid burdening this Court unnecessarily, U.S. Bank specifically requested that the Debtors not consummate the Plan precipitously and instead allow this Court a reasonable time in which to hear and determine the appeals. The Debtors have refused.

3. The Appellees' hubris – that if a reviewing court does not bend its schedule to hear and determine the legality of a plan of reorganization in a multi-billion chapter 11 case on appellees' timeline, the appellee can thereby silence the court – seems to leave this Court with three pathways to preserve its jurisdiction and assure the parties that the Bankruptcy Court's decisions below will be reviewed: (1) it could hear and decide the appeal before the occurrence of the Debtors' shifting deadlines;[3] (2) it could find in connection with this Motion that the Court will, in

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[3] U.S. Bank is keenly aware of the heavy burdens of having this Court review briefs, prepare for argument, hear argument, and then render a decision all within a matter of weeks, particularly given the Debtors' vacillation on when it must exit from Chapter 11. During the Confirmation Hearing, the Debtors testified that they would exit bankruptcy at the end of August. (AX29, June 24, 2020 Hr'g Tr. at 68:14-17) Then, on August 18, 2020 the Debtors told the Bankruptcy Court that they were "proceeding apace" toward the effective date and expected to emerge "this month or next." (Aug. 18, 2020 Hr'g Tr. at 15:23-16:4) And on

fact, retain jurisdiction post-consummation to fashion appropriate relief, thereby giving the Debtors an opportunity to change course now; or (3) it could stay the effectiveness of the Confirmation Order to give the Court time to decide the soon-to-be fully briefed appeals.

4. By this Motion, U.S. Bank seeks one of two forms of relief. As set forth in Section A below, given the peculiar nature of the pre-consummation motion, U.S. Bank respectfully requests that this Court determine that the appeals will not be rendered equitably moot if and when the Debtors consummate the Plan. In the alternative, as discussed in Section B, U.S. Bank requests a stay pending appeal in light of the Debtors' stated intention to divest this Court of the ability to consider and decide the appeals on the merits.[4]

August 27 stated they were "rapidly approaching emergence" and sought entry of an order on September 4 "ahead of emergence." (19 BK 22312 Doc. # 2470 ¶ 10) As of September 2, the Debtors now estimate the effective date will be mid-September. (Debtors' Br. at 16) It is entirely unclear what is driving the shifting target, what the actual state of exit is, and to what extent the Debtors' projected emergence will be further pushed back yet again.

[4] U.S. Bank has a pending motion before the Bankruptcy Court to stay the effective date of the Plan, scheduled for a hearing on September 16, 2020. Pursuant to Bankruptcy Rule 8007(b), this Court can and should hear this Motion as well.

ARGUMENT

5. As explained in previous briefing, unchecked by this Court's review, effectuation of the Plan and Settlement would result in a fundamentally flawed application of key bankruptcy law concepts wiping out recovery to more than $2 billion in unsecured debt, while simultaneously delivering all of the value of the Debtors' estates and broad releases to the Debtors, their shareholders, Uniti and the Debtors' first lien lenders: the very same parties whose conduct this Court has already held breached U.S. Bank's indentures. (20 CV 05440 Doc. # 4) Further, as set forth in U.S. Bank's Opening Brief, the Settlement Order and Confirmation Order should both be reversed as they are unsupported by the record, are contrary to established law, and are the result of seriatim misapplications of the law to the facts of the case. (See generally Opening Br.) In more than 106 pages of briefing, Appellees and their Intervenors have simply failed to counter these arguments, as will be shown in U.S. Bank's forthcoming reply brief.

6. Indeed, seeking to avoid the bright light that can only be provided by the review of an Article III court, the Debtors devote the first five pages of their opening brief argument to the contention that the appeals before this Court should be dismissed as equitably moot. (See Debtors' Br. at 18-23) However, the appeals

certainly are not equitably moot now, and this Court should not permit the appeals to become equitably moot in the future.

A. This Court Should Determine at This Time That There is an Adequate Remedy at Law

7. In all appeals known to the undersigned, the issue of equitable mootness arises after a plan is consummated. The Debtors here have taken the incredible step of arguing that the appeals are equitably moot now, prior to consummation of the Plan. Given that unique procedural posture, U.S. Bank believes that it would be appropriate for this Court to weigh in on the issue of remedies prior to any consummation. In that regard, where, as here, the Court can still fashion a remedy, the Court need not dismiss an appeal on mootness grounds. See Chateaugay Corp. v. LTV Steel Co. (In re Chateaugay Corp.), 10 F.3d 944, 952-53 (2d Cir. 1993); see also Samson Energy Res. Co. v. SemCrude, L.P. (In re SemCrude, L.P.), 728 F.3d 314, 323-24 (3d Cir. 2013) (finding the appeal was not equitably moot where court could fashion a post-emergence remedy); Prudential Ins. Co. of Am. v. SW Bos. Hotel Venture, LLC (In re SW Bos. Hotel Venture, LLC), 748 F.3d 393, 403 (1st Cir. 2014) (same). Southern Pac. Transp. Co. v. Voluntary Purchasing Group, 246 B.R. 532 (E.D. Tex. 2000) (same).

8. Here, there are remedies that will be available, even following consummation of the Plan. As U.S. Bank will further address on reply, one of the

key issues on appeal is whether the Plan improperly provided for the distribution of unencumbered value to a defined group of holders of first lien debt (the vast majority of whom are Intervenors) in respect of their secured claims, when, by law, such unencumbered value should have been reserved for unsecured creditors.[5] Contrary to the Debtors' argument in their opening brief, if this Court were to reverse the Settlement Order and Confirmation Order after the Appellees consummate the Plan, it would have several remedies available to it, including the following:

9. First, because (a) a substantial portion of the distributable value in this case takes the form of non-publicly traded stock, and (b) the creditors receiving such distributable value are all either Intervenors or otherwise on notice of these appeals, this Court could order (1) the Debtors to issue additional shares to, or for the benefit of, unsecured creditors, diluting the value of the shares improvidently issued to the secured creditors (including the Intervenors who participated in the prosecution of

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[5] At confirmation, the Bankruptcy Court found that, if secured creditors were to receive value on account of unencumbered assets, the Plan would violate either the absolute priority rule or the prohibition against treating similar creditors dissimilarly. (AX30, June 25, 2020 Hr'g at 79:25-80:13, 81:11-21)

the unlawful Plan), or (2) disgorgement of stock from the secured creditors, including the Intervenors.[6]

10. Second, under the Settlement, Uniti is slated to pay almost $500 million to the reorganized Debtors post-emergence through quarterly payments of approximately $25 million per quarter. (AX20, Settlement Agreement § 8 [19 BK 22312 Doc. # 1807]) Those cash payments, which U.S. Bank contends in this appeal are unencumbered, as well as cash on hand, could be used to compensate unsecured creditors for their unpaid claims without unraveling the Plan transactions.

11. In sum, a determination by this Court regarding the availability of post-consummation relief would be an effective way to ensure that no party is prejudiced by the consummation of the Plan pending this Court's hearing and determination of the appeal.

B. In the Alternative This Court Should Stay Consummation of the Plan For a Short Duration

12. To the extent that the Court disagrees with U.S. Bank and believes that the foregoing remedies would be impermissible post-consummation, U.S. Bank respectfully requests a brief stay pending adjudication of these appeals. In the event

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[6] Indeed, these stock transfers would not be complete as of the Plan effective date because the stock cannot be transferred until the Debtors satisfy certain FCC foreign ownership rules.

that no remedy is available, a stay is plainly warranted under this Circuit's four-part test for evaluating a motion for stay pending appeal pursuant to Bankruptcy Rule 8007. That test considers: "(1) whether the movant will suffer irreparable injury absent a stay, (2) whether a party will suffer substantial injury if a stay is issued, (3) whether the movant has demonstrated 'a substantial possibility, although less than a likelihood, of success' on appeal, and (4) the public interests that may be affected." Country Squire Assocs. of Carle Place, L.P. v. Rochester Cmty. Savs. Bank (In re Country Squire Assocs. of Carle Place, L.P.), 203 B.R. 182, 183 (B.A.P. 2d Cir. 1996) (citing Hirschfeld v. Bd. of Elections, 984 F.2d 35, 39 (2d Cir. 1993)). This inquiry requires a balancing of factors that must be weighed and, thus, a stay is appropriate even if one of the four factors is not satisfied. ACC Bondholder Group v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns. Corp.), 361 B.R. 337, 347 (S.D.N.Y. 2007), appeal dismissed by, No. 02-41729, No. 07 Civ. 1172(SAS), 2007 WL 1002127 (S.D.N.Y. Apr. 2, 2007); see also In re General Motors Corp., 409 B.R. 24, 30 (S.D.N.Y. 2009).

13. First, there is a substantial possibility of U.S. Bank's success on appeal. The consolidated appeal is nearly fully briefed and will be ready for this Court's consideration in just a few days. As set forth in the Opening Brief, the Bankruptcy Court made several fundamental errors of law in how it applied settled legal

standards to the scant evidentiary record that the Debtors presented at both the Settlement and Confirmation hearings. (See generally Opening Br.) As U.S. Bank will set forth in its reply brief, the Debtors have failed to address substantially all of U.S. Bank's arguments and have, in essence, requested that this Court set aside the law in total deference to the Debtors' "reorganization" efforts.

14. Second, there is a strong public interest in not allowing the Debtors to attempt to divest this Court of jurisdiction when the appeals are fully submitted and all that is left to be done is for the Court to hear argument and/or decide the appeals. An appellate court simply should not be pressured to adjust its docket in order to maintain its jurisdiction over an appeal that one party is actively seeking to moot. This public interest is made even stronger here by the fact that, if the Bankruptcy Court's decision confirming the Plan were to stand on mootness grounds, it would create a dangerous precedent on secured lenders' entitlement to adequate protection by (a) benchmarking the diminution in value of their collateral to the pre-distressed enterprise rather than to the status quo on the petition date (see id. at 42-50), and (b) using total enterprise value as a proxy for the value of secured creditors' collateral even though substantial portions of the enterprise's assets are not subject to the creditors' liens.

15. Third, any stay of the effective date is likely to last only as long as this Court needs to hear and determine the appeals, causing little, if any, harm to the Debtors. That is particularly the case because the Debtors' plan exclusivity and debtor-in-possession financing permits them to remain (and have liquidity) in bankruptcy through October if necessary. (Order Amending the Final DIP Order, June 26, 2020 [19 BK 22312 Doc. # 2244])

16. Fourth, U.S. Bank and the unsecured noteholders it represents would face irreparable harm absent a stay. U.S Bank recognizes that, in connection with scheduling this appeal, this Court has ruled that the "risk" of equitable mootness "is not enough to show irreparable harm." (20 CV 4276 Doc # 18 at 6) But events have now proceeded past a mere "risk." The Debtors have announced their actual intent to take action which they themselves contend will moot this appeal and have informed this Court of the timeframe in which they intend to do so. While U.S. Bank believes this appeal cannot be mooted by consummation of the Plan, this Court has not yet determined the issue. If the Plan is consummated and this Court agrees that there is no appropriate remedy, the risk of equitable mootness would, in fact, immediately ripen to irreparable harm. In other words, if the Court does not believe it can fashion an adequate remedy to avoid mootness after the Plan is consummated, the irreparable harm factor is clearly met.

CONCLUSION

Wherefore, for the foregoing reasons, U.S. Bank respectfully requests that the Court (1) determine that these appeals will not be rendered equitably moot by the substantial consummation of the Plan because it can fashion an adequate remedy if Appellants are successful, or (2) grant a stay for such time it needs to adjudicate the appeals.

Dated: September 4, 2020
New York, New York

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Bankruptcy Procedure 8013(f) and 8015(a)(7)(B)(i), because it contains 2,713 words, excluding the parts of the brief exempted by Federal Rule of Bankruptcy Procedure 8015(g).

This brief complies with the typeface requirements of Federal Rule of Bankruptcy Procedure 8015(a)(5) and the type style requirements of Federal Rule of Bankruptcy Procedure 8015(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: September 4, 2020
New York, New York

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