Case Nos. 7:20-cv-4276-VB; 7:20-cv-5440-VB; 7:20-cv-5529-VB

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE WINDSTREAM HOLDINGS, INC., et al., *Debtors.*

U.S. BANK NATIONAL ASSOCIATION, in its capacity as Indenture Trustee,
Appellant,
v.
WINDSTREAM HOLDINGS, INC., *et al.*,
Appellees.
(*Caption continued on inside cover*)

On Appeal from the U.S. Bankruptcy Court for the
Southern District of New York, Bankr. Case No. 19-22312 (RDD)

BRIEF OF INTERVENOR-APPELLEE ELLIOTT INVESTMENT MANAGEMENT L.P.

Dated: September 2, 2020

ROPES & GRAY LLP
Keith H. Wofford
Gregg M. Galardi
Daniel G. Egan
1211 Avenue of the Americas
New York, NY 10036
Telephone: (212) 596-9000
Facsimile: (212) 596-9090

ROPES & GRAY LLP
Matthew L. McGinnis (admitted *pro hac vice*)
Stephen Moeller-Sally (admitted *pro hac vice*)
William L. Roberts (admitted *pro hac vice*)
Prudential Tower
800 Boylston Street
Boston, MA 02119
Telephone: (617) 951-7000
Facsimile: (617) 951-7050

CQS (US), LLC,

Appellant,

v.

Windstream Holdings, Inc., et al.,

Appellees.

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 8012 of the Federal Rules of Bankruptcy Procedure, Intervenor-Appellee Elliott Investment Management L.P. respectfully states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Elliott Investment Management L.P. ("Elliott") joins and adopts by reference the arguments in the brief submitted by co-appellees Windstream Holdings, Inc. ("Windstream Holdings"), Windstream Services, LLC ("Windstream Services"), and their affiliated debtors (collectively, the "Debtors," and the brief submitted by the Debtors, the "Debtors' Brief") [Dkt. No. 36], but writes separately to further address certain of Appellants' arguments with respect to the Confirmation Order.[1] Elliott also joins in and adopts by reference the Questions Presented and Statement of the Case sections of Debtors' Brief.

BASIS OF APPELLATE JURISDICTION

This Court has jurisdiction to hear appeals from decisions of a bankruptcy court pursuant to 28 U.S.C. § 158(a), which provides in relevant part that "[t]he district courts of the United States shall have jurisdiction to hear appeals . . . from final judgments, orders, and decrees[ ] . . . of bankruptcy judges[.]"

STANDARD OF REVIEW

A district court reviews a bankruptcy court's findings of fact for clear error and its conclusions of law de novo. *Overbaugh v. Household Bank, N.A. (In re Overbaugh)*, 559 F.3d 125, 129 (2d Cir. 2009); *see also Pereira v. Sonia Holdings, Ltd. (In re Artha Mgmt., Inc.)*, 91 F.3d 326, 328 (2d Cir. 1996) ("[T]he bankruptcy

[1] Capitalized terms used but not defined herein have the meanings ascribed to them in Debtors' Brief.

court's findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous." (internal quotations omitted)); *In re Hoti Enters., L.P.*, No. 12 CV 8030 (VB), 2013 WL 1812197, at *9 (S.D.N.Y. Apr. 26, 2013) (same). "A bankruptcy court's decision to confirm a plan of reorganization is reviewed for abuse of discretion." *In re Kirwan Offices S.à.r.l.*, 592 B.R. 489, 500 (S.D.N.Y. 2018) (citations omitted).

SUMMARY OF ARGUMENT

The bankruptcy court properly exercised its discretion in confirming the Plan and, accordingly, this Court should affirm the Confirmation Order. Appellants' sole argument below and on appeal hinges on an effort to devalue the Secured Creditors' prepetition and adequate protection liens and claims through an improper valuation methodology that contravenes the law.

Basic bankruptcy law is clear—before any asset value can be allocated to unsecured creditors, secured creditors must be paid first, up to the full value of their secured claims, *including* all adequate protection claims. If, as was the case here, a secured creditor's adequate protection claims exceed the value of any potentially unencumbered assets, then unsecured creditors are not entitled to any recovery. The record below more than amply establishes that the Secured Creditors' combined prepetition secured claims and adequate protection claims leave no unencumbered value to distribute to unsecured creditors. Indeed, the bankruptcy court found that,

"based on the record before [the court]," the Secured Creditors' adequate protection claim "far exceeds any reasonable assumption" of the value of any potentially unencumbered assets by "hundreds of millions of dollars." A2560.

Appellants' alternative argument—that the Secured Creditors' prepetition liens did not encumber the recharacterization claim against Uniti or its proceeds—is equally flawed. Despite Appellants' mischaracterizations of the law, lease recharacterization claims and litigation settlement proceeds are general intangibles covered by the Secured Creditors' prepetition liens. But even if they were not encumbered by the prepetition liens, they are subject to the Secured Creditors' adequate protection liens and claims, thus leaving no value for unsecured creditors.

The bankruptcy court's analysis was based on established law and valuation principles, and its factual findings were fully supported by the record and certainly not the product of clear error. The unsecured noteholders at all times sat behind holders of approximately $4.4 billion of first and second lien claims, and there is no question that the Secured Creditors are not being paid in full under the Plan. There is simply no legal or factual basis for Appellants to jump ahead of the Secured Creditors to receive a distribution to which they are not entitled under the fundamental priority scheme in bankruptcy.

Accordingly, for these reasons and as set forth in detail below, and for the additional reasons set forth in Debtors' Brief, this Court should affirm the

Confirmation Order and Settlement Order or, alternatively, dismiss the appeal as equitably moot.

ARGUMENT

I. THE BANKRUPTCY COURT CORRECTLY DETERMINED THAT THE SECURED CREDITORS' ADEQUATE PROTECTION CLAIMS AND LIENS ENTITLE THEM TO THE UNITI SETTLEMENT VALUE AND OTHER ASSETS

A. The Secured Creditors Have Valid Adequate Protection Liens and Claims Against All of the Debtors' Property and Proceeds

A threshold issue, which Appellants do not refute, is the existence and scope of the Secured Creditors' adequate protection liens and claims. At the outset of the bankruptcy cases, the Secured Creditors were granted broad, perfected postpetition liens against and allowed superpriority administrative expense claims payable from all of the Debtors' prepetition ***and*** postpetition property, whether existing on the Petition Date or thereafter acquired, including, among other things, all proceeds or property recovered from avoidance actions, "whether by judgment, settlement or otherwise," general intangibles, rights to payment, contracts, real and personal property, and the proceeds, products, rents and profits of each of the foregoing. A339-43, A349-55. The broad scope of these liens and claims necessarily includes the Uniti Settlement proceeds.

These liens and claims—which compensate the Secured Creditors for any diminution in the value of their interest in collateral during the Debtors' bankruptcy cases—are statutorily and constitutionally required. Adequate protection is a

fundamental right of secured creditors in bankruptcy cases, the purpose of which is to "insure that the secured creditor receives in value essentially what he bargained for." H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 339 (1977); *Resolution Tr. Corp. v. Swedeland Dev. Grp., Inc. (In re Swedeland Dev. Grp., Inc.)*, 16 F.3d 552, 564 (3d Cir. 1994) (adequate protection is intended to "insure that the [secured] creditor receives the value for which he bargained prebankruptcy"); *In re Medcorp. Inc.*, 472 B.R. 444, 452 (Bankr. N.D. Ohio 2012) ("The concept of adequate protection is founded on the Fifth Amendment to the United States Constitution, and its protection of private property interests.") (citation omitted); *In re M.D. Moody & Sons, Inc.*, No. 3:09-bk-06247 (JAF), 2010 WL 6982486, at *7 (Bankr. M.D. Fla. Mar. 5, 2010) ("The concept of adequate protection is a fundamental tenet of the equitable balance between a debtor's right to reorganize and a secured creditor's right to protect its interest in collateral during the course of the bankruptcy case.") (citation omitted). The Secured Creditors were granted adequate protection under the terms of a final order entered by the bankruptcy court—in order to protect against any diminution in the value of their interests in the Debtors' property during the bankruptcy cases. *See* 11 U.S.C. §§ 361, 362, 363, and 364; *In re WorldCom, Inc.*, 304 B.R. 611, 618-19 (Bankr. S.D.N.Y. 2004) (the purpose of adequate protection is to maintain the status quo for a secured creditor and ensure that, during the chapter 11 cases, it receives the value that it bargained for prior to the petition date).

Appellants do not dispute the existence of the Secured Creditors' allowed adequate protection liens and claims under the Final DIP Order or that the treatment given to Secured Creditors under the Plan was on account of their prepetition secured claims and their secured adequate protection claims. A568 (defining First Lien Claims as "all claims derived from or based upon the Credit Agreement and First Lien Notes Indenture," including, for the avoidance of doubt, any Prepetition Credit Facility Secured Party's Prepetition Adequate Protection Claims and any First Lien Notes Secured Party's Prepetition Adequate Protection Claims (as such terms are defined in the Final DIP Order)); A2539-40 [June 25 Hr'g Tr. at 79:25-80:1-3] ("Here, the allowed claim is the secured claim, in effect, the combined secured claim under the pre-petition agreements and the DIP/cash collateral/adequate protection order.").

Appellants also presented no competing testimony on adequate protection at the confirmation hearing. In the absence of any alternative valuation to support their case, and knowing they cannot disturb the Final DIP Order, with its express grant of these liens and claims, Appellants instead attack the bankruptcy court's methodology in determining the extent of the Secured Creditors' combined prepetition and postpetition adequate protection liens and claims. But to prevail, Appellants must show that the bankruptcy court committed clear error in finding that the aggregate amount of the Secured Creditors' prepetition secured claims and

postpetition adequate protection claims exceeded the aggregate value of the Plan distributions to Secured Creditors. Appellants cannot satisfy this heavy burden on appeal, as the evidence presented below clearly showed that Plan distributions fell well short of the total secured claims. As the bankruptcy court found, Appellants' unusual approaches to measuring adequate protection are unsupported by law or fact and, thus, were properly rejected.

B. The Bankruptcy Court Correctly Found that the Adequate Protection Claims Should Be Measured Based on Going Concern Value

The parties agree that the starting point for the adequate protection analysis is the Supreme Court's decision in *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997). As set forth in *Rash*, the value of collateral must be considered in light of its "proposed disposition or use." *Id.* at 954; *In re Sabine Oil & Gas Corp.*, 555 B.R. 180, 263 (Bankr. S.D.N.Y. 2016) (*Rash* stands for "the widely accepted proposition that collateral must be valued in light of its 'proposed disposition or use' for purposes of deciding whether foreclosure value, going concern value, or some alternative value is most relevant"); *Official Comm. of Unsecured Creditors v. UMB Bank, N.A. (In re Residential Capital LLC)*, 501 B.R. 549, 594 (Bankr. S.D.N.Y. 2013) (the proper valuation methodology must account for the proposed disposition or use of the collateral).

The "proposed disposition or use" of the Debtors' assets was at all times as a going concern. Accordingly, a going concern valuation methodology was

appropriate. *See In re Residential Capital*, 501 B.R. at 592 (a going concern value is appropriate where the debtors intended to market and sell their properties as a going concern); *In re Sabine Oil & Gas Corp.*, 547 B.R. 503, 577 (Bankr. S.D.N.Y. 2016), *aff'd* 562 B.R. 211 (S.D.N.Y 2016) (the proper method for measuring the value of a creditor's collateral for purposes of estimating the creditor's adequate protection claims was a going concern valuation when the debtors sought to hold and operate their assets through consummation of a chapter 11 plan of reorganization). The Debtors and the bankruptcy court applied that methodology here, using a going concern value as the starting point and then deducting the value of any unencumbered assets. A2561 [June 25 Hr'g Tr. 101:11-17] (where, as here, "a secured creditor has a lien on substantially all . . . of the assets that have value, the proper methodology—not just a methodology but the proper methodology—is to do a going concern valuation of the business and then subtract the value of the assets" that are not subject to the lien).

Well aware of this controlling law, Appellants nevertheless advocate for a piecemeal, item-by-item collateral valuation—*i.e.*, foreclosure valuation. But the Debtors never intended any foreclosure or liquidation in the bankruptcy cases. To the contrary, the focus of the bankruptcy was at all times to consummate a plan of reorganization with the Debtors continuing to operate as a going concern. A6 [BK 27 ¶ 15] (Debtors' declarant stating on the Petition Date that the Debtors were

seeking "an efficient and value maximizing restructuring" with the goal of "protect[ing] its business as a going concern"). Accordingly, an item-by-item valuation methodology would run afoul of *Rash* and its progeny.

Appellants mistakenly rely on *Sabine* for the proposition that a going concern valuation is improper. In *Sabine*, the court found that "at all relevant times" the Debtors "sought to hold and operate their assets through consummation of a chapter 11 plan . . . [and] [a]s a result, the proper methodology for measuring the value of the Reserves for purposes of estimating the Adequate Protection Claims is a going-concern valuation in the hands of the Debtors pursuing a standalone reorganization." 555 B.R. at 264. Contrary to Appellants' arguments, the *Sabine* court adopted and applied a going concern valuation, but rejected the creditors' committee's arguments that such value should be reduced by applying various indirect costs as deductions where the creditors' committee's goal, like Appellants' goal here, was to "result in a *de minimis* estimate of the size of the Adequate Protection Claims." *Id.* at 266.

Appellants also contend that a going concern valuation was improper because the Secured Creditors' liens did not attach to 100% of the Debtors' assets. Appellants are wrong for at least four reasons. First, the law is clear that going concern value is the appropriate methodology even if a secured creditor holds a lien on the primary assets, but not all assets, of a debtor. *See In re Hawaiian Telcom Commc'ns, Inc.*, 430 B.R. 564, 604 (Bankr. D. Haw. 2009) ("There is no precedent

that supports the conclusion that a secured creditor with a lien on the debtor's primary assets is not entitled to the debtor's enterprise value when the debtor proposed to use that collateral in its business under a plan of reorganization."); *In re Chateaugay Corp.*, 154 B.R. 29, 34 (Bankr. S.D.N.Y. 1993) (going concern value is appropriate even where the underlying lien attached to hard assets but not intangibles).

Here, the Secured Creditors' held broad prepetition liens covering substantially all of the Debtors' property, including revenue-generating assets such as customer contracts. A306 (Debtors stipulating that as of the Petition Date, the Secured Creditors had, among other things, "a first priority security interest in and continuing lien on [] substantially all of [the Debtors'] assets and property"). The Debtors identified limited buckets of unencumbered assets, including certain real estate and motor vehicles, but the approximately $125 million book value of such assets is minimal compared to the Debtors' overall assets and is a *de minimis* fraction of the Secured Creditors' prepetition claims totaling over $3.15 billion. A2542-44.

Second, Appellants ignore that the Debtors and the bankruptcy court ***did*** subtract the value of potentially unencumbered assets from the going concern valuation of the Debtors' assets. A1963-65; A2560 [June 25 Hr'g Tr. at 100:1-4] (finding that "we have a range of unencumbered assets that may be in the $200

million to $300 million range").[2] The reality is that the Secured Creditors' adequate protection claims dwarfed the value of those potentially unencumbered assets. A2560 [June 25 Hr'g Tr. at 100:5-17] (finding that the adequate protection claims and liens exceeded the value of any unencumbered assets by "an order of magnitude of hundreds of millions of dollars"); A1967 ("The Secured Creditors now hold an adequate protection claim that is sufficient to consume any unencumbered value that would be available to unsecured creditors in a reorganization.").

Third, Appellants misrepresent the Master Lease as a valuable unencumbered asset when it in fact was a ***liability*** of the Debtors. A2558 [June 25 Hr'g Tr. at 98:24-25] (finding that the Master Lease, "although nominally an asset, is in fact in and of itself a liability."). As the bankruptcy court observed, "the lease itself lacks value." A2559 [June 25 Hr'g Tr. at 99:23-24]. Not only did Appellants fail to present any evidence to the contrary, earlier in the cases Appellants argued that the Master Lease had no value. A133 [BK 1219 ¶ 5] (arguing that the rent under the Master Lease is "excessively over market" to the tune of "approximately $22 to $25 million per month").

---

[2] Appellants also blatantly mischaracterize testimony of the Debtors' expert, arguing that Mr. Leone conceded that using total enterprise valuation was not based on generally accepted methodology. *See* Appellants' Br. at 45. That is simply not true, and the relevant transcript pages cited by Appellants simply reveal Mr. Leone's testimony that the market value of secured claims are a helpful data point for value, but, consistent with Mr. Leone's valuation, an enterprise valuation is appropriate.

Further, it is undisputed that Windstream Services and its subsidiaries at all times had full access to operate the underlying leased assets. U.S. District Court Judge Furman found that the arrangement amounted to an "implied-in-fact sublease" in favor of Windstream Services. *U.S. Bank Nat'l Assoc. v. Windstream Servs., LLC*, No. 17-cv-7857 (JMF), 2019 WL 948120, *17 (S.D.N.Y. Feb. 15, 2019). Thus, any revenues associated with the Master Lease were captured by the Secured Creditors' liens, whether as accounts or general intangibles. A2558 [June 25 Hr'g Tr. at 98:19-23] (finding that "[t]here is no colorable argument that has been made or can be made that the 1-L and 2-L Creditors don't have a lien on the proceeds, the cash of their collateral that have gone to pay—that have been lent to Holdings to pay the lease, which now Holdings owes to Services"); A2560 [June 25 Hr'g Tr. at 100:18-20] ("[T]he secured creditors have liens on substantially all of the assets of the Debtors.").

Fourth, Appellants' argument that the bankruptcy court's ruling veered from the decision in *Sears* ignores the stark contrasts between that case and Windstream's case. The lenders' liens in *Sears* encumbered only a subset of the debtors' assets—inventory and accounts receivable for certain retail stores—and Sears was at risk of liquidation since well before its bankruptcy cases. As the bankruptcy court recognized, the expectation from the outset of the Sears bankruptcy was a quick sale process that could pivot to a liquidation, whereas a going concern reorganization

was always contemplated in the Windstream Debtors' bankruptcy. And Judge Drain better than anyone would fully understand those critical distinctions, as he also presided over the Sears bankruptcy. A2564-65 [June 25 Hr'g Tr. 104:22-105:2] ("This obviously is different [from] . . . my recent ruling in the Sears case, where rather than supporting a going concern bankruptcy from day one, the secured lenders and all other parties contemplated a prompt sale process that would inherently diminish collateral value.").

The bankruptcy court rightly rejected Appellants' improper valuation arguments. The Appellants put forth ***no*** competing valuation expert or analysis to support their arguments. Instead, they manufactured arguments in an effort to grossly understate the amount of the Secured Creditor's adequate protection claims and skew value away from senior secured creditors. The Debtors' methodology for valuing the Secured Creditors' interest in the prepetition collateral was consistent with *Rash* and evidences the inescapable conclusion in the cases below—unsecured noteholders were simply out of the money.

C. The Bankruptcy Court Correctly Anchored the Petition Date Value of the Secured Creditors' Collateral in Projections Formulated Just Prior to the Petition Date

Appellants' remaining adequate protection argument—that the starting point valuation for determining diminution in value should be discounted for projected diminution arising from the bankruptcy—defies law and logic.

Adequate protection liens and claims are designed to protect secured parties from any diminution in the value of their interests in collateral during the pendency of a bankruptcy case. Accordingly, diminution in value is measured by comparing value at two points in time—the Petition Date ("Time 1") and the anticipated Effective Date of the Plan ("Time 2").[3] *See, e.g.*, *In re Residential Capital*, 501 B.R. at 592 (noting that adequate protection claims protect secured creditors from any diminution of value "from the Petition Date to the Effective Date"); *see also In re Emerge Energy Servs. LP*, No. 19-11563, 2019 WL 7634308, at *14 (Bankr. D. Del. Dec. 5, 2019) ("[T]he Court must measure the difference in value of a secured creditor's interest in collateral at two different relevant points in time . . . the petition date and the Plan's effective date.").

The bankruptcy court correctly credited the uncontroverted expert testimony of the Debtors' expert witness, which established the value of the Secured Creditors' collateral as of the Petition Date using projections from February 2019 that were created shortly before the Petition Date. A2564. But despite the common sense and

[3] Appellants purport to quote *Rash* as providing that the "Time 1" valuation is "as of *or after* the Petition Date." Appellants' Br. at 47 (emphasis added). That quote does not appear anywhere in the *Rash* opinion. Appellants appear to be merely manufacturing a justification for using a later-conducted set of future business projections, which is simply not appropriate for determining value as of the date of the bankruptcy filing. In addition, the Final DIP Order expressly provides that the adequate protection liens and claims are granted to protect against any diminution in value "from and after the Petition Date." A349.

legal propriety of using the projections existing at the time of the filing to calculate the Petition Date value, Appellants argue as a matter of law that the bankruptcy court was compelled to use postpetition projections from March 2019 to ascertain Petition Date valuation. The March 2019 projections are inapplicable to ascertaining Petition Date value, as they constitute future projections based in the Debtors' actual postpetition experience operating in bankruptcy. Thus, the March 2019 projections already factor in expected diminution in value. A2227-28 [June 24 Hr'g Tr. 64:20-65:13; *Id.* 146:9-20] (Debtors' expert testifying that the subsequent projections took into account, among other things, anticipated professional fee payments and adequate protection payments during the cases).

By advocating for a starting point valuation that accounts for anticipated decline in value for a prolonged bankruptcy, Appellants are effectively arguing for an adequate protection analysis that compares "Time 2" to "Time 2." That is simply not the law. The essence of adequate protection is to give the secured creditor the benefit of its bargain and protect it from any decline of its interest in a debtor's collateral during the course of the case. *See In re Armenakis*, 406 B.R. 589, 620 (Bankr. S.D.N.Y. 2009) ("[T]he 'general rule is that for adequate protection purposes a secured creditor's position *as of the petition date* is entitled to adequate protection against deterioration.'" (quoting *Travelers Life and Annuity Co. v. Ritz–Carlton of D.C., Inc. (In re Ritz–Carlton of D.C., Inc.)*, 98 B.R. 170, 173 (S.D.N.Y.

1989)); *In re WorldCom*, 304 B.R. at 618-19 ("[T]he purpose of providing adequate protection is to insure that the secured creditor receives the value for which the creditor bargained for prior to the debtor's bankruptcy.") (citation omitted). Accordingly, as the bankruptcy court observed, for the Time 1 valuation, the court "need[s] to look at the petition date" and such valuation should "not project in the effect of the subsequent bankruptcy" as was the case with the March 2019 projections. A2565 [June 25 Hr'g Tr. 105:9-16]

Indeed, Appellants' arguments threaten the basic notion of adequate protection. A starting point valuation that bakes in expected future decline in value would defeat the purpose of adequate protection and deprive secured creditors of their constitutionally protected property right interests. As the bankruptcy court properly found, the February 2019 projections that formed the basis for the Debtors' adequate protection analysis were appropriate under the circumstances, particularly where the secured lenders supported a going concern reorganization from the outset of the cases. In addition, Judge Drain "considered as of the petition date the effect of the Aurelius lawsuit and concluded that it in itself did not effect the value of the collateral" and, thus, the Debtors' valuation was appropriate. A2565 [June 25 Hr'g Tr. 105:9-16].

Appellants have presented no valid basis to disturb the bankruptcy court's findings on valuation and do not dispute that, based on the February 2019 projections,

the Secured Creditors have a massive adequate protection claim that precludes any right of recovery for junior creditors.[4] Indeed, absent express consent of the Secured Creditors, any distribution to the junior unsecured noteholders would be prohibited under section 1129 of the Bankruptcy Code.

II. THE BANKRUPTCY COURT CORRECTLY CONCLUDED THAT THE UNITI SETTLEMENT PROCEEDS WERE ENCUMBERED BY THE SECURED CREDITORS' PREPETITION LIENS

The vast majority of the Uniti Settlement proceeds—in the range of 80% to 90%—are attributable to the lease recharacterization claim, and such claim and the proceeds thereof were encumbered by the Secured Creditors' prepetition liens. Accordingly, even absent the Secured Creditors' additional adequate protection liens and claims, the settlement proceeds were payable to the Secured Creditors on account of their prepetition secured claims.

---

[4] Appellants also argue that the adequate protection findings were somehow flawed because they were made in reliance on the Debtors' expert rather than any Secured Creditor expert. *See* Appellants' Br. at 40. But an independent expert from the Secured Creditors was not required. The Secured Creditors were already granted an allowed adequate protection claim under the Final DIP Order, and the Debtors, as plan proponents, bore the burden of demonstrating that their treatment of claims was in accordance with Bankruptcy Code. For example, in *In re Emerge Energy Services LP*, the court relied on the debtors' liquidation analysis in determining that "the value of the assets, substantially all of which are the lenders' collateral, has been declining since prior to the petition date," despite having "not received a specific valuation of going concern value of the Debtors' assets on the petition date." 2019 WL 7634308, at *15; *see also In re Sabine*, 555 B.R. at 309-10 (confirming chapter 11 plan that settled adequate protection claims without any requirement for the lenders to affirmatively assert such claim by motion or application).

Appellants' first mistaken premise in arguing to the contrary is that a lease recharacterization claim is a postpetition claim existing solely under bankruptcy law in the context of bankruptcy cases. Well-established law in the Second Circuit and elsewhere, which finds that recharacterization is a common law claim existing outside of bankruptcy, undermines this premise. *See Hassett v. BancOhio Nat'l Bank (In re CIS Corp.)*, 172 B.R. 748, 756 (S.D.N.Y. 1994) (concluding that a proceeding to recharacterize a lease transaction as financing arrangement was noncore because the proceeding was "fundamentally an action to determine disputed *ownership* in property" and that "[s]uch an action arises under state law ... and is independent and outside the reach of the bankruptcy process.") (internal citations omitted); *Leonia Bank v. Kouri*, 772 N.Y.S.2d 251, 254 (App. Div. 1st Dep't 2004) (recharacterizing conveyance of deed as a mortgage/financing outside of chapter 11); *Citipostal, Inc. v. Unistar Leasing*, 724 N.Y.S.2d 555 (App. Div. 4th Dep't 2001) (holding that a transaction was a security agreement rather than a lease); *Collins v. Cty. of Monroe Indus. Dev. Agency (COMIDA)*, 561 N.Y.S.2d 995 (App. Div. 4th Dep't 1990) (finding that "[t]he sale and lease back transaction amounted to no more than a financing mechanism"); *see also Matter of Pioneer Health Servs., Inc*., 739 F. App'x 240, 243 (5th Cir. 2018) (assessing whether an agreement was a sales contract or a lease and noting that "[w]e look to state law to determine whether a contract is in fact a lease") (citations omitted); *Gibraltar Fin. Corp. v. Prestige Equip.*

Corp., 949 N.E.2d 314, 320-21 (Ind. 2011) (analyzing whether a purported equipment lease was in fact a secured financing under the state law Uniform Commercial Code).

Appellants also misconstrue the Second Circuit's ruling in *In re PCH Associates*. Appellants' Br. at 51-52. The Second Circuit in *In re PCH Associates* expressly found that the recharacterization claim arose prepetition, independent of the bankruptcy case, stating as follows:

> [A]ny claim that [the lessor] possessed against the PCH estate arose prior to the initiation of the PCH bankruptcy proceedings . . . . The Sale Agreement and the Ground Lease were both executed well before the Chapter 11 petition was filed; therefore, any claims stemming from those agreements did not arise after the bankruptcy commenced. The mere fact that PCH challenged the nature of [the lessor's] interest does not negate the fact that [the lessor's] claim, if any, arose prior to the filing of the petition.

Liona Corp. v. PCH Assocs. (In re PCH Assocs.), 949 F.2d 585, 594 (2d Cir. 1991).

Accordingly, the bankruptcy court properly found that recharacterization claims "are not confined to bankruptcy cases," and the facts and timing of the transactions at issue here clearly demonstrate that the underlying claim arose prior to the Debtors' bankruptcy. A2551-52 [June 25 Hr'g Tr. at 91:10-92:17].

Because the recharacterization claim is a prepetition, contract-based claim, it follows that such claim and all proceeds thereof—including the Uniti Settlement proceeds—constitute a general intangible over which the Secured Creditors held a

valid and perfected first priority security interest. A3067 ("The Company, the Co-Issuer and each Guarantor listed on the signature pages hereof, in order to secure its Secured Obligations, hereby grants . . . a continuing security interest in . . . (vi) all General Intangibles."); *see Insurance Co. of N. Am. v. Della Indus., Inc.*, 229 F.3d 1135 (2d Cir. 1999) (unpublished table decision) ("'General Intangibles' ordinarily include legal claims" other than tort claims); *In re Doctors Hosp. of Hyde Park, Inc.*, 504 B.R. 900, 907 (Bankr. N.D. Ill. 2014) (finding that a bank's liens extended to all general intangibles under the collateral documents, "which necessarily included the settlement proceeds from non-tort lawsuits[.]"); *In re Metro Motor Sales*, 160 B.R. 267 (Bankr. D. Conn. 1993) (finding that settlement proceeds were encumbered by the secured creditor's liens as the proceeds of general intangibles).

Appellants nevertheless contend that the Secured Creditors' lien on general intangibles does not capture the recharacterization claim because Windstream Holdings, a non-obligor, was the party to the lease and, thus, recharacterization was not a claim that could be pursued by Windstream Services. Yet, it was established in both the bankruptcy court and in this court in the prior Aurelius litigation that Windstream Services was the true economic party in interest with respect to the Master Lease, holding an implied-in-fact sublease. A2559; *U.S. Bank Nat'l Assoc.*, 2019 WL 948120, at *17. The bankruptcy court thus correctly held that the lien granted in favor of the Secured Creditors by Windstream Services, as "the entity that

actually paid the lease payments through lending the lessee the money or advancing the money to the lessee," encumbered the recharacterization claim. A2554 [June 25 Hr'g Tr. at 94:16-18]. As discussed *supra*, any revenues relating to leased assets were generated through Windstream Services' operations and customer contracts and use of such assets and were also encumbered by the Secured Creditors' liens, whether as accounts or general intangibles.

In addition, Appellants' argument is directly contrary to the position they took below in opposing Uniti's motion to dismiss Windstream Services as a plaintiff in the recharacterization action. A282 [AP 37 ¶ 1] (stating that Uniti's argument "that Services lacks standing to test the character of the Master Lease . . . is not in accordance with applicable law."). Appellants cannot now reverse course and argue that Windstream Services lacked standing to assert the recharacterization claim. *See Simon v. Safelite Glass Corp.*, 128 F.3d 68, 71 (2d Cir. 1997) ("Judicial estoppel prevents a party in a legal proceeding from taking a position contrary to a position the party has taken in an earlier proceeding.") (citing *Bates v. Long Island R.R. Co.*, 997 F.2d 1028, 1037-38 (2d Cir. 1993)).

Finally, Appellants argue that any recharacterization claim of Windstream Services would have been "doomed to failure" because Windstream Services had previously labeled the Master Lease as a true lease. This argument is misplaced and has no bearing on whether the claim and proceeds thereof were part of the Secured

Creditors' collateral package. First, as the bankruptcy court observed, "[a]ll of these [recharacterization] cases make it clear, as do countless others, that in making this determination, one looks to the actual substance of the transaction, not to the label upon which the parties have described it in their contract[.]" A2552 [June 25 Hr'g Tr. 92:18-24]. Second, any potential estoppel argument would be a defense that Uniti would be entitled to assert, but it would not eliminate the existence of the recharacterization claim. *In re Assante*, 470 B.R. 707, 711 (Bankr. S.D.N.Y. 2012). The strength of the claim would have been tested in the course of the litigation had it proceeded on the merits. Here, however, the parties ultimately settled that litigation.

Accordingly, under applicable law and as found by the bankruptcy court, the recharacterization claim and the settlement proceeds thereof are general intangibles subject to the Secured Creditors' liens.

III. THE SECURED CREDITORS' PREPETITION AND ADEQUATE PROTECTION LIENS AND CLAIMS ENCUMBER ALL VALUE OF THE DEBTORS' ESTATES, WHETHER THE UNITI SETTLEMENT PROCEEDS ARE DETERMINED TO BE ENCUMBERED OR UNENCUMBERED

The bankruptcy court correctly concluded "that the claim as asserted by the secured creditors . . . far exceeds any reasonable assumption of unencumbered assets in an order of magnitude of hundreds of millions of dollars." A2560 [June 25 Hr'g Tr. 100:12-17]. In reaching this conclusion, the bankruptcy court applied its findings

that (i) the Secured Creditors' prepetition liens encumbered the Debtors' recharacterization claim against Uniti and the settlement proceeds thereof, (ii) the Secured Creditors' adequate protection liens attached to all unencumbered assets of the Debtors' estates, and (iii) that an enterprise valuation of the Debtors was an appropriate starting point for determining the value of the collateral securing the Secured Creditors' claims. Appellants presented no evidence to the contrary at the Confirmation Hearing—indeed, they presented no evidence at all—and nothing in the record contradicts these findings.

Appellants' legal argument that the proceeds of the Uniti Settlement are unencumbered by the Secured Creditors' prepetition liens would not, even if true, affect the bankruptcy court's conclusion. Even if those settlement proceeds were entirely unencumbered, the record establishes that the Secured Creditors' adequate protection claims would increase by an equivalent amount and thus still exceed any potentially unencumbered assets by hundreds of millions of dollars.

A. The Secured Creditors' Adequate Protection Claim Far Exceeds the Value of Any Unencumbered Assets

1. *The Bankruptcy Court Found that Nearly All of the Debtors' Assets Were Subject to Prepetition Liens*

After a thorough analysis, the bankruptcy court correctly concluded that the Secured Creditors' prepetition liens encumbered the vast majority of the Debtors' assets. Of the billions of dollars in value comprising the Debtors' estates, the

bankruptcy court found that there were potentially "$200 million to $300 million" in unencumbered assets, and that the figure "could be well below that."[5] A2560 [June 25 Hr'g Tr. 100:2-4]. The bankruptcy court found that this potentially unencumbered value derived from two sources: (i) assets "specifically excluded" from the Secured Creditors' prepetition collateral package and (ii) a portion of the Uniti Settlement proceeds.

First, the bankruptcy court found that the small number of "specifically excluded" assets had a value "in a range from $50 million to $125 million." A2544 [June 25 Hr'g Tr. 84:11-12]. These excluded assets include "real estate, commercial tort claims, a portion of the stock of foreign subsidiaries, [ ] vehicles, and certain other assets." A2541-42 [June 25 Hr'g Tr. 81:25-82:2]. In determining the value of these excluded assets, the bankruptcy court considered the testimony of the Official Committee of Unsecured Creditors' (the "UCC") expert witness—the only witness proffered by any objecting party.[6] A2542 [June 25 Hr'g Tr. 82:7-11].

The bankruptcy court next analyzed potentially unencumbered value associated with the Uniti Settlement proceeds. As a starting point, the bankruptcy

---

[5] Despite this clear finding, Appellants incorrectly state that the bankruptcy court found that between $200 million and $400 million in value was unencumbered by prepetition liens. Appellants' Br. at 18.

[6] The UCC objected to confirmation of the Plan, but did not appeal the Confirmation Order. None of the Appellants proffered a witness at the Confirmation Hearing.

court accepted the Debtors' uncontested valuation of the settlement proceeds of $1.245 billion. A2544 [June 25 Hr'g Tr. 84:21-24]. Then, as discussed above, *see supra* Section II, the bankruptcy court correctly held that the value of the settlement associated with the recharacterization claim was subject to the Secured Creditors' prepetition liens. Finally, based on the uncontroverted testimony of the Debtors' CEO and the court's own view of the Debtors' claims against Uniti, the bankruptcy court concluded that the vast majority of the settlement value—approximately 80-90%—was attributable to the recharacterization claim, and thus, at most, up to 10-20% of the settlement value (or approximately $124-248 million) was potentially unencumbered. A2558 [June 25 Hr'g Tr. 98:1-5].

2. *The Bankruptcy Court Credited the Expert Testimony Proffered by the Debtors in Determining the Size of the Secured Creditors' Adequate Protection Claim.*

In determining the size of the adequate protection claim, the bankruptcy court accepted the going concern valuations proffered by the Debtors' expert witness. A2562-63 [June 25 Hr'g Tr. 102:23-103:13]. No objector put forth a competing valuation.[7] The bankruptcy court also found that the Debtors used the appropriate methodology in deducting the value of assets not subject to the Secured Creditors'

[7] Although Appellants argue that the bankruptcy court erred by accepting the Debtors' use of prepetition projections from February 2019 as the basis of its valuation, no objecting party offered evidence as to the impact of using postpetition projections as the basis of a Petition Date valuation.

prepetition liens. A2562-63 [June 25 Hr'g Tr. 102:23-103:13]. The bankruptcy court then performed its own deductions from the Debtors' going concern valuations "based on [its] arguable range of unencumbered assets." A2562-63 [June 25 Hr'g Tr. 102:23-103:13]. As shown in the chart below,[8] the bankruptcy court's analysis reflects a diminution of collateral value in the range of approximately $1.3 to $1.4 billion.

[8] This chart reflects the analysis the Debtors' expert performed, which the bankruptcy court credited. *See* A1964-65; A2557-58 [June 25 Hr'g Tr. 84:11-12, 97:24-98:5]. The range of diminution is obtained by subtracting the high-end and low-end collateral values at Time 2 from the respective high-end and low-end collateral values at Time 1. Elliott has added the rows shaded in gray to show the bankruptcy court's findings regarding unencumbered assets.

Finally, the value of any "adequate protection payments that were made" during the chapter 11 cases must be deducted from the diminution of value from the Petition Date to the Plan Effective Date. A2562-63 [June 25 Hr'g Tr. 102:23-103:2]. The postpetition cash payments made to the Secured Creditors during the chapter 11 cases as adequate protection will be between $471 million (as of August 31, 2020) and $500 million (as of October 31, 2020). A1966-67 [Leone Decl. Ex. A at ¶ 70]. This results in an adequate protection claim of between $851 million and $902 million—over *half a billion dollars* more than the up to $200 to $300 million in potentially unencumbered value.

[redacted]

B. Even if the Uniti Settlement Proceeds Were Entirely Unencumbered, the Adequate Protection Claim Would Far Exceed the Value of any Unencumbered Assets

As discussed above, *see supra* Section II, Appellants incorrectly argue that the proceeds of the Uniti Settlement are entirely unencumbered by the Secured Creditors' prepetition liens. But even if this were the case, it would have no effect on the bankruptcy court's conclusion that the Secured Creditors' adequate protection claim "far exceeds any reasonable assumption of unencumbered assets in an order

of magnitude of hundreds of millions of dollars." A2560 [June 25 Hr'g Tr. 100:11-17].

In this scenario, the $1.245 billion in settlement value would be added to the $50 to $125 million in "Excluded Assets," and the range of potentially unencumbered assets would be between $1.295 billion and $1.370 billion. But there would also be a corresponding diminution in the value of the Secured Creditors' collateral between the Petition Date and Plan Effective Date. Using the same methodology as above—*i.e.*, subtracting the high-end and low-end collateral values at Time 2 from the respective high-end and low-end collateral values at Time 1—there would be a diminution in collateral value in the range of approximately $2.4 to $2.5 billion in this scenario.

After deducting the interest payments to the Secured Creditors during the chapter 11 case, there would be an adequate protection claim of $1.899 to $2.022 billion. As in the prior scenario, the adequate protection claim would be over half a billion dollars more than the approximately $1.3 billion in potentially unencumbered value.

CONCLUSION

For the reasons set forth above and in the Debtors' Brief, this Court should affirm the Settlement Order and Confirmation Order or dismiss this appeal as equitably moot.

Dated: September 2, 2020
New York, New York

ROPES & GRAY LLP

/s/ Keith H. Wofford
Keith H. Wofford
Gregg M. Galardi
Daniel G. Egan
1211 Avenue of the Americas
New York, NY 10036
Telephone: (212) 596-9000
Facsimile: (212) 596-9090

ROPES & GRAY LLP
Matthew L. McGinnis (admitted *pro hac vice*)
Stephen Moeller-Sally (admitted *pro hac vice*)
William L. Roberts (admitted *pro hac vice*)
Prudential Tower
800 Boylston Street
Boston, MA 02119
Telephone: (617) 951-7000
Facsimile: (617) 951-7050

Counsel for Intervenor-Appellee Elliott Investment Management L.P.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Rule 8015(a)(7)(B) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and the Court's August 14, 2020 Order, because it contains 6123 words, excluding the parts of the brief exempted by Bankruptcy Rule 8015(a)(7)(B)(iii). This brief also complies with the typeface requirements of Bankruptcy Rule 8015(a)(5) and the typestyle requirements of Bankruptcy Rule 8015(a)(6) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

Dated: September 2, 2020

/s/ Keith H. Wofford