UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. BANK NATIONAL ASSOCIATION, Appellant, 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)

APPELLEE ELLIOTT INVESTMENT MANAGEMENT L.P.'S OPPOSITION TO APPELLANTS' MOTION TO PARTIALLY EXPEDITE THIS APPEAL OR FOR A STAY PENDING APPEAL

Appellee Elliott Investment Management L.P. ("Elliott"), by and through undersigned counsel, respectfully submits this Opposition to Appellant U.S. Bank National Association's ("U.S. Bank") Motion for (i) a Determination of Post-Effective Date Jurisdiction or (ii) in the Alternative, a Stay Pending Appeal (the "Motion"), which was joined by Appellant CQS (US) LLC ("CQS") (together with U.S. Bank, "Appellants"). *See* Dkt. No. 44 (Motion); *see also* Dkt. No. 45 (joinder).[1] Elliott hereby joins and incorporates by reference the *Opposition by the Debtors to Appellants' Motion to Partially Expedite this Appeal or for a Stay Pending Appeal*, Dkt. No. 51

[1] Citations to "Dkt. No." refer to docket entries in Case No. 20-cv-4276 unless otherwise indicated. Citations to "A___" refer to the Appellants' appendix on appeal (Dkt. No. 16-1 to -11). Capitalized terms used but not defined in this response have the meanings given in the Debtors' (Dkt. No. 37) and Elliott's opening briefs (Dkt. No. 41).

(the "Debtors' Opposition"), but writes separately to briefly address the purported remedies set forth in the Motion.

ARGUMENT

1. Having failed to timely seek a stay of the Confirmation Order, and despite the fact that this Court has already rejected their attempt to expedite this appeal, Appellants now seek an expedited determination of the equitable mootness of their appeal "prior to any consummation" of the Plan, which is expected to occur in the middle of September 2020. Appellants' belated, and repeated, request for this relief is meritless, and Elliott accordingly joins in full the Debtors' Opposition to the Motion. Elliott submits this brief separate submission to address in particular the two potential "remedies" that Appellants claim the Court could theoretically issue to resolve any concerns over equitable mootness.

2. In arguing that their appeal is not equitably moot, Appellants suggest that the Court could fashion two hypothetical—and inequitable—remedies even after the Plan is consummated. First, according to Appellants, the Court could force the Company to issue new equity to the unsecured creditors (and thereby dilute the equity to be received by Secured Creditors under the Plan and pursuant to the Rights Offering (as defined below)) or order the Secured Creditors to disgorge equity and give it to the unsecured creditors. Alternatively, according to Appellants, the Court could simply give the unsecured creditors hundreds of millions in cash from the Uniti Settlement. Either remedy would, however, plainly "knock the props out" from transactions between the Debtors and the Secured Creditors, upon which the Plan relies, in violation of well-established Second Circuit precedent. This latest last-ditch effort to derail the Plan should thus be rejected.

3. It is well established that an appeal challenging a bankruptcy plan of reorganization can avoid equitable mootness after consummation of that plan if, among other things, "a particular remedy can [still] be granted *without unjustly upsetting a debtor's plan of reorganization*." *In re Charter Commc'ns*, 691 F.3d 476, 481 (2d Cir. 2012) (emphasis added). Under this analysis, the critical issue is not whether any "effective relief could conceivably be fashioned," but rather, whether "implementation of that relief would be inequitable" because it would jeopardize the debtor's emergence from bankruptcy and harm other creditors. *Id.* (quoting *Off. Comm. of Unsecured Creditors of LTV Aerospace & Def. Co. v. Off. Comm. of Unsecured Creditors of LTV Steel Co. (In re Chateaugay Corp.)*, 988 F.2d 322, 325 (2d Cir. 1993)).

4. Under binding Second Circuit precedent, once a Plan is substantially consummated, an appeal of a confirmation order is equitably moot unless, among other things, "such relief will not unravel intricate transactions so as to knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the Bankruptcy Court." *In re Chateaugay Corp.*, 10 F.3d 944, 952-53 (2d Cir. 1993) (internal quotations omitted).

5. In connection with the Plan at issue in this appeal, the Secured Creditors agreed to (i) provide $750 million in new money through a rights offering, which is a source of funds for Plan distributions (the "Rights Offering"), and (ii) accept equity in Reorganized Windstream in lieu of cash as treatment for a portion of their claims. *See* A585. The agreement to put up $750 million in capital and to accept significant equity consideration was made in reliance upon multiple conditions. These conditions included knowing the share of equity in the Reorganized Debtors that they would receive; the proposed capital structure set forth in the Plan; and the long-term capital investments and nearly $500 million in quarterly cash payments to be made under the Uniti

settlement to support future operations of the Reorganized Debtors. Without the Secured Creditors' agreement to this treatment, the Plan cannot be consummated.

6. The alleged "remedies" Appellants propose would fundamentally alter the economic bargain underlying the Secured Creditors' commitment to provide $750 million in new cash through the Rights Offering. Diluting or disgorging the equity in the reorganized company purchased by Secured Creditors for new money, or diverting significant promised cash streams from the Reorganized Debtors to unsecured creditors, would "unravel" and "knock the props out from" the transactions contemplated under the Plan. *In re Chateaugay Corp.*, 10 F.3d at 953; *see also Ahuja v. LightSquared*, 644 F. App'x 24, 27 (2d Cir. 2016) ("vacating the confirmation order and redistributing the equity in [the] reorganized [company] is not the type of relief that can be undertaken without knocking the props out from under completed transactions or affecting the reemergence of the debtor from bankruptcy"). Without the support and new money from the Secured Creditors, the Debtors would be left without an option "to emerge from chapter 11 as a healthy and viable enterprise," A2008, and the bankruptcy court would be left with precisely the type of "unmanageable, uncontrollable situation" that the equitable mootness doctrine is meant to protect against.

7. Where appellants have similarly sought to gut an intricate and extensively negotiated plan, courts in this District have dismissed the appeals as equitably moot. In *In re Sabine Oil & Gas Corp.*, the court dismissed an appeal by the Official Committee of Unsecured Creditors as equitably moot where the committee sought (i) to have the releases of the secured lenders embodied in the Plan vacated and (ii) to vacate the settled amount of the secured lenders' adequate protection claims embodied in the Plan. 2017 WL 477780, at *5 (S.D.N.Y. Feb. 3, 2017). Relying on the fact that the releases and the settlement of the adequate protection claims were a

heavily negotiated point that "form[ed] the very heart of the reorganization plan," *see id.* at *6-7, the court concluded that granting the relief requested would "fundamentally reshape the reorganization plan" and risk sending the Debtors back into bankruptcy, *id.* at *5-6. The court explained that "Appellants' arguments 'overlook[ed] the fact that any changes to the Plan could not be made in isolation' and that granting the requested relief would 'require an entirely new reorganization plan.'" *Id.* at *5 (quoting *Freeman v. Journal Register Co.*, 452 B.R. 367, 374 (S.D.N.Y. 2010)). Moreover, the court found that "the lenders agreed to compromise those claims only in exchange for all the releases in the plan," and because the releases were the "integral component of the plan, vacating them would significantly alter the financial bargain struck by the lenders in relinquishing their claims in return for equity ownership in the Reorganized [company]." *Id*. (internal quotations omitted).

8. *In re Sun Edison, Inc.* further demonstrates the impropriety of the relief Appellants seek here. *See* 2018 WL 3849839 (S.D.N.Y. Aug. 13, 2018). In *Sun Edison*, two unsecured creditors appealed an order approving an Equity Commitment Agreement ("ECA") and the order confirming the Plan. *Id.* at *1. The ECA provided for a rights offering, under which secured creditors had the right to participate in a $225 million offering of shares in the reorganized debtors, and the proceeds of the rights offering were used to fund the Debtors' emergence from chapter 11. *Id*. The court dismissed the appeal as equitably moot, finding that unwinding the ECA would "unravel intricate transactions," *id.* at *7, and result in a string of falling dominoes that would create an unmanageable situation for the bankruptcy court by ultimately requiring renegotiation of an entirely new plan of reorganization, *see id.* at *6-7. Specifically, the court found that the proposed remedy would "deprive" secured creditors of their "ownership rights under the Plan[,]" which would lead to demand by those secured creditors for repayment of what they paid for the

shares purchased through the rights offering, ultimately depriving the debtors of the cash they needed to emerge from bankruptcy, all of which would result in renegotiation of an entirely new plan of reorganization. *Id.* at *7.

9. As in *Sabine* and *Sun Edison*, Appellants' proposed remedies would unravel the new equity investment decision and negotiated compromise between the Debtors and the Secured Creditors set forth in the Plan. The result of these alleged "remedies" would be an unraveling of the Plan, which would send the Debtors back into costly chapter 11 proceedings, deprive all creditors of potential recoveries, and leave the Debtors with no clear path to emerge from chapter 11 as a healthy and viable organization.

CONCLUSION

WHEREFORE, for the foregoing reasons, and the reasons set forth in the Debtors' Opposition, Elliott respectfully requests that the Court deny U.S. Bank's Motion in full.

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants.

/s/ *Keith H. Wofford*
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