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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 REPLY IN SUPPORT OF MOTION FOR (I) A DETERMINATION OF POST-EFFECTIVE DATE JURISDICTION OR (II) IN THE ALTERNATIVE, A STAY PENDING APPEAL

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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 reply in further support of its Motion for (I) a Determination of Post-Effective Date Jurisdiction or (II) in the Alternative, a Stay Pending Appeal (the "Motion") (20 CV 4276 Doc. #44), and in response to the Debtors' opposition (the "Debtors' Opposition") (20 CV 4276 Doc. #51) and Elliott's opposition (20 CV 4276 Doc. #52) (the "Elliott Opposition," and together with the Debtors' Opposition, the "Responses") to the Motion.

RESPONSE

1. With briefing on the appeals now completed, the Motion simply posits that this Court can and should protect, for some short period of time, its ability to vacate the Confirmation Order or render some other form of relief should it rule in Appellants' favor. In the twenty-four pages of briefing opposing that relief, the

[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.

Debtors and the Intervenors pose no substantive reason why this Court should allow its hands to be tied by consummation of the Plan while the appeal is fully submitted, except to suggest that it is part of a "normal" bankruptcy process. (Debtors' Opp. ¶ 11)

2. As to that process, however, Appellees have not been candid with the Court about when they expect the Plan to go effective, or the conditions to effectiveness that are still outstanding, or why – unlike their deference to other parties and bodies being asked to pass on the propriety of the Plan – they cannot provide this Court with a reasonable period in which to do so. After all, the effectiveness of the Plan is dependent entirely on the Confirmation Order, over which this Court now has exclusive jurisdiction. Clearly, the Debtors must have a target date for closing in "mid-September" and some sense of what they are waiting for. Threatening equitable mootness while leaving the Court and the Appellants in the dark about when that threat could ripen to irreparable harm is not appropriate. See MOAC Mall Holdings LLC v. Transform Holdco LLC (In re Sears Holdings Corp.), 616 B.R. 615, 618 (S.D.N.Y. 2020) (expressing regret at having appellees assert statutory mootness after the court spent "several weeks of concentrated work to write the forty-three-page decision disposing of the appeal").

3. Instead of addressing the substance of the Motion, the Responses focus almost entirely on alleged procedural foot faults by U.S. Bank. The Motion is, however, proper under the applicable rules and deserves, like the underlying appeal, to be addressed on the merits.

4. First, both the Debtors and Elliott refer to the Motion as one seeking to "partially expedite this appeal or for a stay pending appeal," (Debtors' Opp. at 1; Elliott Opp. at 1), and contend that the Motion fails to meet "the standard for expedition." (Debtors' Opp. ¶ 8) The Motion, however, is brought pursuant to Bankruptcy Rule 8013(a) and, because it does not seek expedited relief, there is no "standard for expedition" to be met here.[2] At this juncture, the Motion is fully briefed (as are the appeals) and the Court now has the authority to adjudicate the Motion.

5. Second, the Appellees contend that, because the Appellants have argued that the Settlement Order and Confirmation Order should be reversed, the Court is constrained to that draconian remedy if it finds fault with the rulings below. (Debtors' Opp. ¶¶ 13-14; Elliott Opp. ¶¶ 1-2) The Court, however, has the discretion

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[2] Nor does the Motion "expand the number of words [U.S. Bank has] available to brief their arguments." (Debtors' Opp. ¶ 12) U.S. Bank fully addressed the Debtors' premature equitable mootness argument in its Reply Brief. (See Reply Br. at 34-38)

to fashion whatever relief it believes is appropriate under the circumstances if it ultimately agrees (in whole or in part) with the Appellants – that is the natural consequence of a denial of any equitable mootness challenge. See 28 U.S.C. § 158(a)(1); see also Felton v. Sec'y, United States Dep't of Educ., 787 F.2d 35, 37 (2d Cir. 1986) ("The district court has broad discretion to fashion an equitable remedy that meets the practical demands of the situation, as well as the requirements of the Constitution.").

6. Third, the Responses argue that the request for a stay is untimely. (Debtors' Opp. ¶ 18; Elliott Opp. ¶ 1) Nothing in the Bankruptcy Rules or Chateauguay require that the movant seek a stay within a certain number of days following the appealed-from order. See In re St. Johnsbury Trucking Co., 185 B.R. 687, 691 (S.D.N.Y. 1995) (granting a stay sought more than a month after the appeal was filed and noting that the debtor's failure to declare the plan effective while "knowing that the government's appeal was outstanding and might yield a last-minute stay application that would interfere with consummation, does not leave it in the best position to complain of delay"). Indeed, this Court determined that a stay would be unavailable while the risk of equitable mootness remained circumspect. (20 CV 4276 Doc. #18, Mem. Op. and Order at 6)

7. The problem here is that equitable mootness is no longer just a theoretical possibility. Once the Debtors made clear to this Court that it is their intention to moot the appeals if they can, U.S. Bank filed the Motion within two days. See Cartalemi v. Karta Corp. (In re Karta Corp.), 342 B.R. 45, 53 (S.D.N.Y. 2006) (finding an appeal will not be equitably moot – even absent a motion for a stay – so long as the appellant did not stand "idly by" in pursuing its appeal); see also WHBA Real Estate Ltd. P'ship v. Lafayette Hotel P'ship (In re Lafayette Hotel P'ship), 96-CV-7476 (HB), 1997 U.S. Dist. LEXIS 14771, at *4, *12 (S.D.N.Y. Sept. 29, 1997) (allowing the appeal to proceed over equitable mootness objection where appellant filed its appeal nine days after the confirmation order was entered, but did not seek a stay of enforcement).

8. Fourth, the Responses critique the way in which U.S. Bank has also sought a stay pending appeal in the Bankruptcy Court. Cognizant of Bankruptcy Rule 8007 – which states that "[o]rdinarily, a party must move first in the bankruptcy court for . . . a stay . . . pending appeal," FED. R. BANKR. P. 8007(a)(1) (emphasis added) – U.S. Bank moved the Bankruptcy Court for a stay in connection with a motion by the Debtors that, on its face, appeared to extend the Bankruptcy Court's jurisdiction over appealed-from matters. (19 BK 22312 Doc. #2482, Response of U.S. Bank National Association, as Indenture Trustee, to the Debtors' Motion

Establishing Procedures in Furtherance of Plan Distributions and Request for Stay Pending Appeals) The fact that the Bankruptcy Court has not taken any action on that request, or might not address the issue at all, is not a bar to this Court's determination of the Motion. See In re Moreau, 135 B.R. 209, 212 (N.D.N.Y. 1992) (granting motion for stay where movant did not seek stay before bankruptcy court where appellant could provide "a tenable explanation for why this application is not before the bankruptcy court"); see also FED. R. BANKR. P. 8007(b); 10 Collier on Bankruptcy ¶ 8007.08 (16th 2020) (Motion for a stay "may be made in the court in which the appeal is pending; that is, in the district court, bankruptcy appellate panel, or court of appeals in the case of a direct appeal").

9. Fifth, the Responses cite a number of cases in which remedies similar to the ones proposed in the Motion were found to be inequitable under the facts and circumstances presented in those cases. However, in arguing that the Motion's proposed remedies "would upend the Debtors' entire new capital structure and unquestionably threaten their successful emergence from bankruptcy," the Responses simply highlight the need for a stay pending appeal if the Appellees are right. (Debtors' Opp. ¶ 16) In short, the relief sought in the Motion is binary: if the Court believes it can fashion a remedy after Plan consummation, then no stay is

necessary; if it believes that it cannot, then the Appellants will suffer irreparable harm and should be granted a short stay.

10. Importantly, the scenario in which the Court would be fashioning the remedies proposed in the Motion is where the Court has already determined that the Confirmation Order should be reversed. In that context, the potential prejudice to the Intervenors is irrelevant because they, along with the Debtors, prosecuted a plan that did not comport with the Bankruptcy Code. See Trib. Media Co. v. Aurelius Cap. Mgmt., L.P., 799 F.3d 272, 283 (3d Cir. 2015) (finding that while "[i]t would be *unfortunate* from the perspective of" certain third party creditors "to require disgorgement . . . if they were never entitled to that money in the first place, it is not *unfair*, and mootness must be fair (equitable in legalese) to be invoked").

11. Moreover, neither of the Responses discusses how the Motion's proposed remedies would be inequitable to third parties. Instead, the Responses provide conclusory statements with no explanation of what transactional props would be knocked out or what "resulting chaos" would ensue.[3] (Debtors' Opp. ¶ 17)

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[3] The cases cited by the Debtors and Elliott to support their claim of prejudice are inapposite. (See Debtors' Opp. ¶ 17; Elliott Opp. ¶¶ 7-9) In all of them, the plans of reorganization had already become effective and were substantially consummated before the appeal was adjudicated. Foster v. Granite Broad. Corp. (In re Granite Broad. Corp.), 385 B.R. 41, 50 (S.D.N.Y. 2008); Windels Marx Lane & Mittendorf, LLP v. Source Enters. (In re Source Enters.), 392 B.R. 541,

As it stands, the Plan simply takes unencumbered value – in the form of equity of the reorganized Debtors – that should have been made available to unsecured creditors, and gives that equity to the Intervenors. They are not third parties to the appeals, and they have been on notice of the appealed-from Plan defects from the moment U.S. Bank first noted its Plan objection.

CONCLUSION

Wherefore, for the reasons set forth in the Motion and herein, 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.

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549 (S.D.N.Y. 2008); In re Official Comm. of Unsecured Creditors v. Sabine Oil & Gas Corp. (In re Sabine Oil & Gas. Corp.), No. 16-CV-6054 (LAP), 2017 U.S. Dist. LEXIS 15675, at *10, *12 (S.D.N.Y. Feb. 3, 2017); CNH Partners, LLC v. SunEdison, Inc. (In re SunEdison), No. 1:17-cv-04778 (ALC), 2018 U.S. Dist. LEXIS 136533, at *15 (S.D.N.Y. Aug. 13, 2018). In addition, the cases cited by the Appellees involved plan consummation transactions with numerous third parties, not just transactions amongst the plan support parties. See, e.g., SunEdison, 2018 U.S. Dist. LEXIS 136533, at *15-16.

Dated: September 15, 2020
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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 1,934 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.

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