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September 18, 2020

**By Electronic Filing**

The Hon. Vincent L. Briccetti
U.S. District Court for the Southern District of New York
United States Courthouse
300 Quarropas St., Room 360
White Plains, NY 10601

Re: *U.S. Bank National Association v. Windstream Holdings, Inc., et al.*, No. 20-cv-04276 (VB), and consolidated cases

Dear Judge Briccetti:

Pursuant to Federal Rule of Bankruptcy Procedure 8014(f), Appellees Windstream Holdings, Inc. and its debtor subsidiaries ("Debtors") respectfully submit this letter to inform the Court that the bankruptcy court has now denied the "request" by Appellant U.S. Bank, National Association ("U.S. Bank") for a stay pending appeal. Attached are the transcript of the bankruptcy court's oral ruling on September 16, Bankr.Dkt.2520 (Attachment 1) ("Tr."), and its subsequent written order on September 17, Bankr.Dkt.2519 (Attachment 2).

Appellants' motion in this Court for a stay pending appeal (Dkt.44, No.20-cv-4276) should be denied for the same reasons that the bankruptcy court gave below. As the bankruptcy court recognized, U.S. Bank's "request" for a stay below was "a sham and a procedural gambit" that "was not properly made as a motion," did not comply with Rule 8007, and appears to have been filed "either for some tactical reason" or "simply to increase the fees and costs of this case." Tr.21:14-19, 26:5-10, 28:4-7; *see also* Tr.19:12-20:11; Tr.21:13-22:1 (noting that a stay "should have been sought before [the bankruptcy court] well before [Appellants] sought it in front of [this Court]"); Tr.24:9-11 (noting that "there's been plenty of time to seek a stay"). Setting aside those procedural defects, the court correctly concluded that the request also failed on the merits, because U.S. Bank cannot satisfy any of the four stay factors. Tr.20:12-21:7, Tr.22:2-28:11. First, U.S. Bank conceded that it would not suffer irreparable harm, which "in and of itself, should defeat the motion." Tr.23:18-24:2. Second, there was "no discussion of potential harm to other parties," even though staying the plan on the cusp of consummation "would have substantial potential harm to the Debtor[s] and other parties in interest" by extending the Debtors' bankruptcy, and U.S. Bank

proposed no bond for that injury. Tr.24:3-26:3. Third, U.S. Bank failed to address the "strong public interest" in allowing the Debtors to consummate the plan and emerge from bankruptcy. Tr.26:12-15. Fourth, U.S. Bank showed no likelihood of success on appeal, because the challenged rulings "were correct." Tr.26:16-28:1. This Court should deny Appellants' stay motion for the same reasons.

Respectfully submitted,

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cc: All counsel of record (by CM/ECF)

# ATTACHMENT 1

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 19-22312-rdd

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In the Matter of:

WINDSTREAM HOLDINGS, INC.,

Debtor.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - x

United States Bankruptcy Court

300 Quarropas Street, Room 248

White Plains, NY 10601

September 16, 2020

10:07 AM

B E F O R E :

HON ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

ECRO: JUSTIN WALKER

HEARING re Notice of Agenda/ Agenda for September 16, 2020 Telephonic Hearing

HEARING re Debtors Motion Establishing Procedures in Furtherance of Plan Distributions (related document(s)2469)

HEARING re 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 (related document(s)2469) filed by J. Christopher Shore on behalf of US Bank National Association (ECF 2482)

Transcribed by: Sonya Ledanski Hyde

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P R O C E E D I N G S

THE COURT: Good morning, this is Judge Drain. We're here in In re: Windstream Holdings Inc. on the Debtor's motion for an order establishing procedures in furtherance of plan distributions to Class 4, the so-called Midwest Notes class. This is a wholly telephonic hearing. I'll ask you to identify yourself and your client the first time you speak. It's probably a good idea to do so if you speak later, just in case the court reporter can't put together your voice with your name.

There's one authorized recording of this hearing. It's taken by Court Solutions. If you want a transcript you can order it from the clerk's office or for it to be prepared from the clerk's office. Court Solutions provides a copy on a daily basis to our clerk's office.

So, with that introduction, why don't we proceed to the motion?

MR. WEILAND: Thank you, Your Honor. Good morning. How are you?

THE COURT: Fine, thanks.

MR. WEILAND: This is, for the record, Brad Weiland of Kirkland & Ellis, LLP, here for the Windstream Debtors. Appreciate the time this morning, Your Honor. Your Honor, just a little bit of background before getting to the motion. The motion is really an outgrowth of the

efforts the Debtors have taken since confirmation in June to prepare for emergence from Chapter 11. Since confirmation, one of the things the Debtors have done is go out and obtain committed financing consistent with the parameters for the exit facility contemplated by the plan and approved by Your Honor in connection with confirmation.

Under the plan, the Midwest noteholders, Your Honor, are to receive -- were to receive takeback debt in an equal -- in an amount equal to the current principal of their notes. And that takeback debt would be one piece of the greater exit facility.

What has happened as we've syndicated the exit facility is we're looking at two different types of debt and they're sort of two different animals. On the note side, for the Midwest notes, you have publicly traded notes, and we don't have today -- we've taken steps to try to develop, but we don't have today perfect visibility into the holders of those notes.

And on the other side -- and before moving on, Your Honor -- and those holders could be anyone. They're publicly traded notes. There's no obligation of the holder to disclose who they are the way there would be with a bank loan facility where there would be a lender list and an agent that tracks that sort of thing.

On the other hand, you have the new exit facility,

which is -- there is a notes component of some of the exit debt but what we're talking about today is a bank facility, as spelled out in the plan. And under that facility that has been negotiated over the last few months, there are requirements for an entity to be a lender under that -- under that debt. And for an entity to satisfy those requirements they have to step forward, they have to provide "know your customer" information to the agent, and they have to meet certain requirements, most notably being a financial institution and not an individual person or an actual person.

And so what we developed and what led to the filing of the motion with the Midwest Notes Indenture Trustee and with our exit facility agent, for procedures to go out and try to identify the holders of the Midwest Notes, we know a substantial majority of them today because they were part of a group that participated in the bankruptcy, but there remain, approximately, 20 percent of the holders that have not participated and haven't come forward. So, we want to send notices out to them. In fact, some notices have already gone out requesting some information and requesting that they make themselves known.

We also want to be able to deal with holders that may come forward. We don't know if there are any. We think that if there are, it's probably a small minority of the

Midwest Noteholders, but we want to be able to deal with holders that come forward and are not able to satisfy the lender requirements under the new exit facility while still getting them the recovery that they're entitled to under the plan.

And with that in mind, these procedures were developed to say, look, if a holder does come forward and is an individual person or otherwise doesn't satisfy the lender requirements, we will give them their recovery, which is 100 cent per recovery under the plan, but we can't give them debt because that's not permitted under the exit facility so we'll, in effect, prepay the debt that they would otherwise receive and we'll just -- we'll give them cash. And we think that's fair, we think that's consistent with the spirit of the plan, although certainly an additional gloss on giving them the debt in the first place. But that was -- that was the driving force behind these procedures.

The other thing that the procedures do which is permitted by the plan, they set a deadline for parties to come forward. And the plan talks about it in general terms. If someone can't be located to receive their distribution or if they never provide information or don't make themselves known, that distribution could go away. Here, all we've tried to do is sort of set that concrete date, which is one year from confirmation, for people to come forward. And

should they not come forward, then their loans that would've otherwise been allocated to them under the exit would just revert to the Debtor and be canceled. We think that's appropriate, given the additional notice that we're putting out now and will put out after these procedures are approved. But we think just from a practical and realistic standpoint, if someone does not come forward within a year to even make themselves known, then the Debtor should not be able to -- or should not be required to hold their distribution for a longer period of time than that and should be allowed to sort of cancel that out.

That, Your Honor, is in a long-story-short sort of version what this motion does or was intended to do and why we filed it. We are approaching the date where we think we'll be able to go effective under the plan. We've been working diligently, as has the company, as have a number of other parties who are supportive of the plan and working toward a closing with us to satisfy all the conditions to emergence. That includes, as Your Honor is aware, regulatory approval, given that we are a telecommunications company, we have state regulators in all states and have been proceeding through a regulatory approval process that we think is close to getting to a successful conclusion. And all of that is coming to a head and, hopefully, leading to the company being able to emerge very shortly.

So, we filed this motion in advance of emergence to try to set procedures that would govern this one wrinkle that developed post-confirmation. We think those procedures are completely appropriate and ought to be approved, Your Honor, but that's not really why we're here today, or it's not the only reason we're here today.

We're also here today to deal with the objection that was filed by U.S. Bank which we think is entirely inappropriate. I think this motion, which is, we think, completely appropriate, completely innocuous and should be approved, has been used by U.S. Bank to get in front of Your Honor to, one, mischaracterize what we're trying to do in the motion. Because whether through misunderstanding or mischaracterization, the objection says this motion is trying to do something inconsistent with the plan and make payments in advance of emergence, which is absolutely not what these procedures are trying to do. They're putting parameters around distributions that will be made under the plan on and after the effective date.

But then the objection goes further, Your Honor, and says that, in fact, because of the pending appeal, Your Honor should stay the confirmation order now, two-and-a-half months after confirmation, to let the appeals run their course. The motion, such as it is, was sort of shoehorned into the objection. We don't think that's appropriate and

we think gives Your Honor grounds to deny the motion without even reaching the merits. But on the merits, Your Honor, they don't satisfy what they would need to to obtain a stay.

Setting aside the fact that, you know, this is inappropriately late, in our view, they don't allege irreparable harm to U.S. Bank or its constituents, they don't credibly allege that there would be no harm to the Debtors -- there would, in fact, be significant harm. We've been working toward emergence for months now. We're on the cusp, we think, of emerging very shortly and we're spending over a million dollars a day between professional fees and fees under certain of the prepetition and post-emergence debt to get to that emergence. And that's ignored by U.S. Bank in its objection.

And -- but they don't even really try to allege grounds for a stay. They have not volunteered to post any sort of a bond. And we think, Your Honor, if you're going to consider that stay request as a properly filed motion on the merits -- again, we don't think it really is -- but we think it ought to be denied outright as completely inappropriate here.

So, with that, Your Honor, I'm happy to answer questions but I'll stop my rambling and answer your questions or cede the podium to Ms. Winters or Mr. Shore.

THE COURT: Okay. I do have some questions on the

motion itself and comments on the proposed form of order. But as you noted, the response, which is how it was couched by U.S. Bank, has kind of turned this hearing into a schizophrenic hearing in that the focus really isn't on the motion but on something else. So, maybe we should see where that response is at this point, now that the Debtors have clarified without any possibility of doubt that they're not looking to prepay before the effective date any portion of the new Midwest facility notes, to see whether any portion of that response is still going forward. And then we can deal with that and then I'll come back to my questions on what the motion was really about.

So, that's a longwinded way of saying I guess I should hear from counsel for U.S. Bank.

MR. SHORE: Good morning, Your Honor. Chris Shore from White & Case on behalf of U.S. Bank. Let me give you a brief update and then I'll answer the question you put to me. The underlying appeal was fully briefed as of last week. The reply's in. We're just awaiting scheduling of argument or ruling by Judge Briccetti. He hasn't called for argument yet.

We did, after we filed this motion, file a stay request in the District Court as soon as we got the Debtor's opposition on the appeal where they were saying they were going to exit in mid-September and that would preclude any

relief. Our stay motion is now fully briefed as well. No word from the District Court as to whether he's going to hold argument or just rule on the papers. The last motion the Court handled without argument and an opinion issued a few days after the briefing closed. We have advised Judge Briccetti in that pleading of the pendency of our request to stay in this court and we'll update him as the rule requires as to what happens today.

Our original pleading was focused on the motion. Our concern, as I think both Mr. Weiland and Your Honor noted, was that there was no temporal limitation on their ability to pay prior to the revision date and we were concerned about a scrambling of the eggs prior to the confirmation order. The Debtors did clarify that they weren't, but we did have an intervening event that I've tried to resolve and haven't been able to resolve with the Debtors.

In their opposition to the stay papers in front of Judge Briccetti, they have argued that he should not grant a stay until this court has considered the issue. I think they're misreading Rule 8007(a). In my experience, once a notice of appeal is filed in almost every case the District Court handles any stay requests. So, we tried to work this out with the Debtors and just said, look, don't -- if we withdraw the request and we can cancel the hearing, we just

don't want you to argue a foot fault saying that we should've had Judge Drain decide it. The Debtors refused and that's why we have the request still pending.

The Debtors -- I think that leaves three options. The Debtors have argued that the stay request is improperly noticed per the case management order. But in my experience, stay requests are often oral, but in any event, the pleading was filed and served. The Debtors noticed it for the hearing and put it on the agenda, so all interested parties have notice of our stay request. But the Court could require us to send it out on formal notice, effectively leaving it for Judge Briccetti to decide his motion in the next few days, which we would update Your Honor on.

Two, the Court could, as it did with the recent motion involving UM Bank and CQS, find that any notice defects were cured and go on to the merits. And one options is, of course, the Court to deny the motion. We'll let Judge Briccetti know, again, leaving it for him to decide.

And then, third, the Court could grant a stay for now and then let Judge Briccetti decide how long he needs to adjudicate the appeal. Again, the only thing we're trying to solve for is making the District Court's docket not what decides whether or not the appeal is or is not moot. Honestly, I've never seen a Bankruptcy Court stay its own

order unless there's a discrete constitutional or key code issue that we certify up to the circuit. That's not what's happening here.

I will say this case is extraordinary at this stage. We're just awaiting Judge Briccetti's action, either scheduling argument or deciding. It seems odd, as I said, to let this appeal be decided before Judge Briccetti can make time on his docket. If that's what ends up happening, that's what ends up happening, but it doesn't seem like it's in the public interest to make the court's document what decides whether or not an appeal will be heard.

Two, the Debtors --

THE COURT: Well, didn't you move -- didn't you move for an expedited appeal? I mean, that issue's already been decided, right?

MR. SHORE: We did. And the judge has -- he has set the briefing schedule, which we all complied with. He did not, as part of that scheduling, set it for argument, reserving the right to determine whether argument was necessary. So, we're in a period that's not covered by the scheduling order.

He did rule, in connection with that, that there was no irreparable harm shown to expedite further than that because the risk of equitable mootness was not irreparable harm. But the Debtors here, unlike any Debtor I've ever

seen, have already moved to dismiss the appeal as equitably moot in their opposition papers, arguing before the effective date, that once they consummate, there can be no review. They did that after we filed our request in this court.

So, I think what the Debtors are doing now is saying -- going on the record that there will be no Article 3 review of the -- of the confirmation order unless it is heard and determined before they consummate, because once they consummate, there will be no relief that the Court can grant.

And then, third -- I'd like to work this out with an understanding as to when the Debtors are going to be going effective. Over time we've heard -- you know, they were saying mid-August earlier. Earlier in the case, they said the end of Q3. It's unclear when they would exit and whether a stay, if granted, will actually stop anything. You know, I think they -- you know, some more clarity on that issue before this court and before Judge Briccetti as to what's holding up the plan effective date would be useful for determining the stay request here or the stay request there.

So, unless Your Honor has any questions, that's all I have.

THE COURT: When did you move for a stay pending

appeal before Judge Briccetti?

MR. SHORE: Two days after they filed their opposition brief in which they said that the appeal will be equitably moot as soon as we consummate because the Court can't grant any relief.

THE COURT: So, what day was that?

MR. SHORE: But then our view --

THE COURT: What day was that? I'm just looking at the date of the response, which was September 1.

MR. SHORE: September 4th. We got their brief, I think, on the 2nd.

THE COURT: Okay. I'm curious as to what you -- how you complied with 8007(b) to (a), which says that as part of an appeal -- I'm sorry, a request for a stay for the District Court, contrary to what the rule says in 8007, (a)(1), which is, quote: "Ordinarily, a party must move first in the Bankruptcy Court for a stay." But that (b) says that a motion for such relief may be made in the court where the appeal is pending, and then says that the motion must, A -- 2A, show that moving first in the Bankruptcy Court would be impractical. But I guess that's really a question for Judge Briccetti ultimately to ask you.

MR. SHORE: We did -- I'm sorry.

THE COURT: But I guess that may be one reason why the Debtors aren't prepared to negotiate with you about some

sort of agreement about the process for seeking the stay.

MR. SHORE: We did advise Judge Briccetti, as the rule requires, of a pending request in front of this Court when we filed that motion and, as I said, we'll update him, as the rule requires, with respect to the Court's disposition of this request.

THE COURT: Okay. So, I guess there was nothing about it being impractical to seek relief first in the Bankruptcy Court?

MR. SHORE: No, we did the other -- the or, which is advise the Court.

THE COURT: Okay. All right. Well, I do have the Debtor's reply to your request. The request really lays out, as set forth in the request itself, a statement that U.S. Bank will not suffer irreparable harm if the stay is not granted, and doesn't discuss harm to the Debtor or other parties in interest other than the speculation that Judge Briccetti may rule promptly on the appeal -- does not address the factor of substantial possibility of success on appeal, and does not address the public interest.

And, finally, does not make any offer with respect to posting a bond. And given that it was not filed as a motion, there's no attempt to develop a record as to whether a bond would appropriately offset the harm to other parties. So, given the factors that one needs to consider when

considering whether a movant for relief -- for a stay pending appeal has carried what has been characterized as a request for extraordinary relief or an extraordinary burden -- it seems to me a pretty question to answer, which is that the request should be denied. Right? I mean, there's no attempt to establish any record here or even argue a record for an appeal to be stayed.

MR. SHORE: Understood, Your Honor. We'll report to Judge Briccetti.

THE COURT: Well, let me give you a full ruling while we're at it then, so you can report that.

MR. SHORE: Okay.

THE COURT: Since this whole thing seems to have been a sham and a procedural gambit, having realized that the relief should have been sought before me well before you sought it in front of him, and the fact that it is pending in front of him.

It comes in the context of a, quote, "response" -- not even an objection to a motion. And the ostensible reason for seeking the stay in this context and the objection is that somehow the motion itself alters the aspects of the confirmation order there on appeal before Judge Briccetti. Briefing on the appeal is nevertheless proceeded in front of Judge Briccetti, notwithstanding the, quote, "request for a stay pending appeal" under Rule 8007,

which ordinarily would be brought before the Court.

The decision as to whether or not to grant a stay in an order pending appeal lies within the sound discretion of the Court. See In re: Sabine Oil & Gas Corp., 548 B.R. 675, 681 (Bankr. S.D.N.Y. 2016). It's been well-recognized and particularly in the context of an appeal of a confirmation order that the movant for a stay pending appeal bears a heavy burden to obtain such a stay. See, for example, In re: General Motors Corp., 409 B.R. 24, 30 (Bankr. S.D.N.Y. 2009).

The Court must consider four factors in exercising its discretion. One, whether the movants will suffer irreparable injury absent a stay. Two, whether a party will suffer substantial injury if a stay is issued. Three, whether the movant has demonstrated a substantial possibility, although less than a likelihood, of success on appeal. And, four, the public interest that may be affected. Again, see, In re: Sabine Oil & Gas Corp., 548 B.R. 581, quoting ACC Bondholder Group v. Adelphia Communications Corp., In re: Adelphia Communications Corp., 361 B.R. 337, 346 (S.D.N.Y. 2007). Appeal dismissed. Stay denied. Stay vacated. Writ of mandamus denied. 2007, U.S. App. 30722, 2d Cir., February 9, 2007.

As Judge Chapman notes in the Sabine opinion, Circuit Courts in this circuit have held if the inquiry

involves a balancing of the four factors and, quote, "the lack of any one factor is not dispositive to the success of the motion." While others have held that to be successful the party must show, quote, "Satisfactory evidence on all four criteria," neither she nor Judge Gerber in the General Motors case found that they needed to decide how to come out on that issue, although Judge Gerber noted that the trend is to permit balancing.

Judge Chapman notes in Sabine, as was again also noted in the General Motors case as well as numerous other cases including Triple Net Investments IX, LP v. DJK Residential, In re: DJK Residential, LLC (2008, W.L., 650389) at page 2, (S.D.N.Y., March 7, 2008) -- that "Where the movant seeks imposition of a stay without a bond, the applicant has the burden of demonstrating why the court should deviate from the ordinary full security requirements."

Here, in analyzing the four-factor test, I will note, as numerous have held, including the Sabine case at page 681, that a showing of probable irreparable harm is the principal prerequisite for the issuance of a stay, pursuant to Bankruptcy Rule 8007. And such harm must be neither remote or speculative but actual and imminent. See also In re: Adelphia Communications Corp., 261 B.R. 347. Here, as I've already noted, the request itself states that there is

no irreparable harm here to the movant. That, in and of itself, should defeat the motion.

In addition, there's no discussion of potential harm to other parties, notwithstanding the fact that it's generally well-recognized, as noted in the Adelphia case, the Sabine case, the GMC case, and numerous other cases dealing with appeals of a confirmation order. And a stay pending appeal of confirmation where confirmation is relatively imminent -- and I will note here there's been plenty of time to seek a stay to avoid the imminence of the effective date occurring -- would have substantial potential harm to the Debtor and other parties in interest.

Here, I could certainly take judicial notice of the fee applications that have been filed in these cases before me that show the substantial accrual of fees on a weekly and monthly basis, as well as the adverse effect, as was testified to at the confirmation hearing, of the course of these Chapter 11 cases and the fact that the Debtors have remained in Chapter 11 as long as they have on the Debtor's business.

The Debtors are seeking regulatory approval to emerge from bankruptcy, if one can reasonably infer, informed he regulators that they intend to exit promptly. Any delay of that process could also further harm the Debtors and their business. As Judge Gerber noted in the

General Motors case, concern over potential harm to the Debtor and third parties in such a context could potentially be ameliorated by the issuance of a bond pending appeal to address such harm. But, as I've noted, there's been no offer of posting such a bond.

I will note that in the GMC case at Page 368, Judge Gerber required the posting of a $7.9 billion bond. And in the Adelphia Communications Corp matter, Judge Scheindlin required the posting of a bond in excess of a billion dollars, noting that they were fully aware in each case of the difficulty in obtaining such a bond but also noting that this merely highlights the potential risk to the Debtors and other parties in interest on the other side of the appeal in the event of the denial of the appeal and in the intervening time the harm to the Debtor's estates from their plan not going effective.

The only attempt to show that there's no meaningful harm to the Debtors is speculation as to when Judge Briccetti might rule on the appeal. Judge Briccetti has already considered the issue of an expedited appeal and has issued his ruling on that point declining the request. In addition, I will note again that there was no attempt to make a motion for stay pending appeal until the beginning of this month, notwithstanding that the confirmation was entered in substantial time before then in which one could

have developed a more complete record and dealt with all of these issues which, of course, has not happened because of the timing of the request to seek the appeal.

It appears to me then that the request before me is a mere procedural gambit either for some tactical reason that can be represented to Judge Briccetti -- and to make sure that the record is clear, I wanted to give you a full ruling so that there could be no doubt as to the basis for that ruling -- or simply to increase the fees and costs of the case by requiring a response by the Debtors, in addition to the briefing and response pending before Judge Briccetti.

As the courts have well recognized, there is a strong public interest in proceeding to conclude and permit a plan to go effective. And that has not been addressed at all in the motion.

Finally, as to the issue on the merits, the only statement by U.S. Bank in its motion is, quote, U.S. Bank submits that it has more than a substantial likelihood of succeeding on an appeal a wholly conclusory allegation. Of course, it is always awkward to argue the substantial possibility of success on appeal before the judge whose order is being appealed. However, judges routinely deal with such points and recognize that the substantial possibility of success test is an intermediate level between possible and probable and is intended primarily to eliminate

frivolous appeals, particularly when one is focusing on the request for a stay from the court whose order is being appealed.

As noted by Judge Chapman, there's a further element to the analysis, quote, the probability of success that must be demonstrated as inversely proportional to the amount of irreparable injury that the plaintiff will suffer absent the stay. In other words, more of one excuses less of the other. In re Sabine Oil & Gas Corp., 548 B.R. 683-84, quoting 473 West End Realty Corp., which in turn cites Mohammed v. Reno, 309 F.3d 95, 101 (2d. Cir. 2002). As I've already noted, there's been no attempt to show here irreparable injury to the appellant or, for that matter, any meaningful attempt to show lack of harm to the Debtor or other parties on the other side of the appeal.

But, in any event, I will note that the rulings that are being appealed from -- namely the ruling to approve the unity settlement and with respect to confirmation in large part derived from lengthy evidentiary hearings, and further my believe that my rulings with regard to matters of pure law were correct. But even giving the appellant and the movant here, or more accurately the requester here, the benefit of the doubt, it would appear to me that the balancing test, enunciated by Judge Chapman in Sabine and the Second Circuit in Reno, simply have failed given the

deficiencies in this motion.

So I will ask the Debtor's counsel to submit a separate order denying the so-called request for a stay pending appeal on those grounds. It is true that the request was not properly made as a motion, and that prevented any further discovery that the Debtors might want to take in the context of a motion. But, frankly, the movant made such a half-hearted attempt to prosecute it that discovery probably wouldn't have been warranted. So I've given you this ruling rather than standing on the procedural defect the Debtors have pointed out.

So let me turn then to the Debtor's motion that was the awkward procedural vehicle for the request for a stay. I'm really focusing on the order, so you should get out the order and have that in front of you.

MR. WEILAND: I have that, Your Honor.

THE COURT: Okay. Good.

MR. WEILAND: Thank you. Happy to go through this.

THE COURT: All right. So the order uses defined terms from the motion. And if I were -- I mean as you point out in the motion, a little under 75 percent of the claimants in this class, Class 4, are represented by capable counsel, Sherman & Sterling. They're not really covered by this order. They're really reaching the other 27 or 28

percent or trying to, some of whom may be individuals.

So I think it's important to have a clear order so that they know what they need to do as well as a clear script consistent with the order for whoever it is that's going to be dealing with them, assuming that they comply with the notice and contact the Debtors.

So my first question goes to the defined terms eligible holders as used in the motion -- in the order. And, again, the order just incorporates the term from the motion. It's defined on Page 5 of the motion, and it's really defined fairly vaguely. It says it is those who are eligible to receive term loans. I think you need to drop a footnote in the order in Paragraph 2B and actually define what it is to be an eligible holder.

And when you were making your presentation in connection with this motion, Mr. Weiland, you said that it's based on the terms of the new Midwest facility itself. And I'm assuming that that probably dovetails with some exemption that requires one to be an accredited investor. But whatever the definition is, and it shouldn't be anything other than a legal requirement, I'm assuming -- well, let me just ask you. When you define eligible holders, it's only those who are barred from actually holding these new notes by law, correct, or regulation? You're not imposing any additional requirement on them.

MR. WEILAND: Your Honor, we are not imposing any additional requirements, but this is a bank credit facility. It's not dealing with securities.

THE COURT: Right.

MR. WEILAND: But one of the requirements under the facility is that lenders must be eligible financial institutions and not individuals. And that's something that is --

THE COURT: But I think that derives from applicable law. I mean --

MR. WEILAND: Same regulation. I believe --

THE COURT: -- you're not saying --

MR. WEILAND: -- I believe that's right, Your Honor.

THE COURT: -- that they have to be --

MR. WEILAND: No, we're not trying --

THE COURT: Right. I'm sorry to talk over you. You're not -- it's not saying, for example, that they have to be only the following five banks, you know, needs to be --

MR. WEILAND: No, Your Honor. No.

THE COURT: Right. So -- or, you know, a way that limits the pool beyond those who would be properly able to hold these types of notes. So I think you need to spell that out in a footnote where you define eligible -- where

you actually first use the term eligible holders in the proposed order.

And I would have a problem approving this on this record if the definition imposes additional requirements that are, you know, not flowing from law or regulation. You know, for example, a financial institution that we don't like because they have a record of being difficult on consent issues, you know, that would be a problem.

And I think -- I mean, and "to know your customer practices," it's the same comment. When it says "practices," those are, again, requirements under applicable law or regulation that banks understand. It's not, you know, some excuse to add additional hurdles that aren't that way. I'm not assuming -- I'm not saying that that's what you were doing. I just want to make it clear that I wouldn't be approving that on this record.

MR. WEILAND: Understood, Your Honor.

THE COURT: Okay. And then my other comments are just I think to make it clearer and then I have a question at the end. So the first -- let me just start on Page 2 then, Paragraph 2. It should say "the procedures as modified by this order," and then continue on with that sentence ending with "are hereby authorized and approved in all respects." And then I would move the last clause in Paragraph 2A to follow that sentence, and that clause says

"for the avoidance of doubt, those holders of Midwest notes claims represented by Sherman & Sterling, LLP, are all known holders and are not bound by the procedures."

So I guess they're also eligible holders, right?

MR. WEILAND: They are, Your Honor.

THE COURT: All right.

MR. WEILAND: All of the holders in that group are eligible.

THE COURT: All right. So you should say, I think, "are all eligible holders" -- I'm sorry -- "are all known holders and eligible holders and are not bound by these procedures." And then I'd just move that as a sentence to follow the first sentence of Paragraph 2, and then you'd continue on with the rest of that paragraph which says "without limiting the generality of the foregoing."

And then Paragraph A, I think this needs to read "The Debtors" not "are authorized" but "shall" because, again, you're barring people if they don't respond to the notice. So you need to give the notice. So "the Debtors shall use reasonable efforts included in the DTC notice to" and then add in a parenthetical: "A) obtain the contact information of currently known holders) -- I'm sorry -- "currently unknown holders of Midwest notes claims" and then "B) to inform them of this order." So you'd strike "pursuant to the procedures."

And then Paragraph B, again, you'd strike "pursuant to the procedures" and it would just being "eligible holders" and then you'd have the footnote which defines eligible holders "will have the later of, one, the reversion date" and then you should give that date here because I'm contemplating that this order will be the script for these folks and, in fact, you may want to give -- you know, have it handy to give them a copy so they know what they're supposed to do.

And then it continues on "or ii) two months from the date of contact." And then I think you need to add this proviso because, otherwise, two months from the date of contact could be years from now. It needs to say "provided that such contact occurs on or before the reversion date." And then you continue on to complete after -- you know, there's a comma after date and then "to complete the necessary documentation confirming their eligibility to hold term loans provided under Midwest notes' new exit term facility."

And then C should read -- you would strike "as provided in the procedures, to the extent that." And instead, you'd say -- just put in the word "if." So it would begin "if a holder of a Midwest notes claim is not an eligible holder, the Debtor shall satisfy such Midwest notes claim in cash" and then add this phrase "on or as promptly

as practicable after the plan's effective date," and you'd capitalize "plan" and "effective date."

And then you'd add a semicolon and add "provided, that such holder has contacted the Debtors on or before the reversion date." Right? Because you need to have them contact you to let them know that they are who they are.

MR. WEILAND: Yes, Your Honor.

THE COURT: Okay. And then in D, again, I'd strike the introductory clause which is "as provided in the procedures" and then just say, beginning with "any holder of Midwest notes claims that does not contact the Debtors or the exit facility agent" -- well, now you've added the exit facility agent. I don't know whether that should be there or not. I mean everywhere else it's contact the Debtors. If you want to put in contact them, you should add them everywhere else, too, i.e., the exit facility agent "by the reversion date and any eligible holder that does not provide the necessary customer and tax information as provided" -- and then add this phrase "as provided in Paragraph 2B here of, will have their claims to distributions" and then add this phrase "on account of such claims" -- and that C should be capitalized -- "under the plan terminated."

And then you'd go to the third line down from the top, and it should say there -- that line begins "respective such claims will revest in the Reorganized Debtors and" --

and then you'd add this phrase -- "any Midwest new exit facility" and then continue on with "term loans that would have been distributed in respect of such claims" -- and "claims" should be capitalized -- "shall be cancelled.

And then E should -- again, delete the introductory clause that says "as provided in the procedures" and just begin "The Debtors are authorized to prepay in cash on a non-pro rata basis any" -- and, again, you should add "Midwest new exit facility term loans." So you add the phrase "Midwest new exit facility" before "term loans."

And then my only question here is on F. Why is the trading -- I'm assuming the trading is suspended while you're working through this process so that you know who the -- DTC and you know who the holders are. That's the reason?

MR. WEILAND: That's right, Your Honor. I mean technically under the plan, on the effective date the Midwest notes are canceled. All this is saying is that they're publicly-traded notes, they're traded today, they'll continue to be traded until the effective date but trading will be frozen on emergence by the company so that we're not chasing a moving target.

THE COURT: Right. So I think even though you and I understand that when you refer to Midwest notes, it's the old notes not the new exit facility, I think you should

probably drop a footnote here, too, because, again, you're trying to reach people -- maybe there aren't any -- individuals. And when you look at this, it's just not -- you're not really sure what this means if you put yourself in their shoes. Are they referring to trading in the new exit facility notes? You know, it's -- I think you should just define it as the old notes --

MR. WEILAND: Sure, Your Honor.

THE COURT: -- the notes that provide the basis for the claims in Class 4. And then the last point, and I've considered this in light of your motion and the reply, this relief, I think, is by in large not a modification of the plan under Section 1127 of the Code. Clearly, giving notice to holders so that they can get their new instruments is not a modification. I don't think setting a deadline for that is a modification. I don't think exercising the right to prepay is a modification because the notes have a prepayment feature.

But I do think the cashout to the ineligibles might be a modification. The plan has not gone effective so, clearly, there's not been substantial consummation. So a modification is warranted here. It's entirely consistent with the plan concept that these people are unimpaired or, you know, that they get 100 cents on the dollar. So I think you should add a paragraph that says to the extent that the

relief granted in this order would constitute a modification of the plan under Section 1127(b) of the Code -- of the Bankruptcy Code, such modification is granted.

The motion recites that the holders of 73 percent have had notice of this. It really doesn't change the fundamental treatment under the plan to anybody. So I don't have any problem granting that relief, but I think you should put it in here so that there's no argument later that it should have been granted and wasn't.

I agree with the Debtor's statement in the reply to U.S. Bank's response that this modification would have nothing to do whatsoever with the appeal before the District Court, which is on or in respect of the treatment of a completely different class on completely different issues and, therefore, is as the Debtors note in their reply consistent with the case law on the so-called divestiture rule under which a lower court is divested of jurisdiction when there's a pending appeal of those aspects of the case involved in the appeal as opposed to either issues that are collateral to the appeal or where the Court that is being appealed from is merely deciding issues and proceedings that are different from the appeal or to implement the order being appealed as opposed to altering or expanding the order.

See, for example, In re Winimo Realty Corp., 270

B.R. 99,105 (Bankr. S.D.N.Y. 2001), in re Sabine Oil & Gas Corp., 548 B.R. 674,679 (Bankr. S.D.N.Y. 2016), and the cases cited therein, including In re Board of Directors of Hopewell International Insurance Limited, 258 B.R. 580,583 (Bankr. S.D.N.Y. 2001).

So I went through all of those. I didn't really give you a chance to response. But if I -- if you think I've gone too far or directed that a change be made to the order that shouldn't be made, you should let me know. Otherwise, I'll grant --

MR. WEILAND: No, not at all, Your Honor. Thank you for the guidance, and we're happy to make those changes and submit a revised order. The one point I would make just for the sake of clarity, that while the plan does talk about new exit term loans being earmarked for distribution to the Midwest noteholders, I do just want to be clear that there's not a separate Midwest notes facility or issuance post-emergence. That will all be part of the single exit facility term loan credit, just to make that point clear.

But I think with respect to all of the language changes you just walked through, we're happy to make changes and make clarifying additions in the form of footnotes or otherwise. And we'll do that today and submit --

THE COURT: Okay. Well --

MR. WEILAND: -- the revised order as soon as we

can.

THE COURT: All right. Well, then that would mean that you should not use the term "Midwest notes new exit term facility" where I told you to use it. You should use whatever it is that they're getting, although I'll note that the motion used that term. So if they're getting instead their pro rata share of a facility that isn't called that, has a different name but that's what they're getting on account of the Class 4 treatment, then you should use that term instead of the "Midwest notes new exit term facility" wherever I told you to use it in the motion.

MR. WEILAND: We can make that change, as well, Your Honor.

THE COURT: I'm sorry, wherever I told you to use it in your order, not the motion.

Okay. Very well. So I'll look for that order. So what I'll be getting is two orders, the order denying the request for a stay pending appeal and the -- secondly, the order granting the motion to establish procedures in furtherance of plan distributions.

MR. WEILAND: Absolutely, Your Honor.

THE COURT: Okay. Very well. Anything else in Windstream Holdings?

MR. WEILAND: Not today, Your Honor. Thanks very much for the time.

THE COURT: Okay. Very well. Thank you.

MR. WEILAND: Take care.

THE COURT: Bye bye.

(Whereupon these proceedings were concluded at 11:13 AM)

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

Date: September 17, 2020

# ATTACHMENT 2

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

| | | |
|---|---|---|
| In re: | ) | Chapter 11 |
| WINDSTREAM HOLDINGS, INC., *et al.*,[1] | ) | Case No. 19-22312 (RDD) |
| Debtors. | ) | (Jointly Administered) |

**ORDER DENYING REQUEST FOR STAY PENDING APPEAL**

Upon consideration of the request by U.S. Bank National Association for a stay pending appeal [Docket No. 2482] (the "Request"); and upon the objections to the Request; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(a)-(b) and 1334(b); and upon the record of the hearing held by the Court on the Request on September 16, 2020; and, after due deliberation and for the reasons stated by the Court in its bench ruling at the hearing, the Court having determined that U.S. Bank National Association has not carried its burden with respect to the Request, it is hereby ORDERED that

1. The Request is denied.

2. The Court retains jurisdiction with respect to all matters arising from or related to this Order.

White Plains, New York
Dated: September 17, 2020

/s/Robert D. Drain
United States Bankruptcy Judge

[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' 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.