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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



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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

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 19-22312-rdd

4 - - - - - x

5 In the Matter of:

6

7 WINDSTREAM HOLDINGS, INC.,

8

9 Debtor.

10 - - - - - x

11

12 United States Bankruptcy Court

13 300 Quarropas Street, Room 248

14 White Plains, NY 10601

15

16 September 16, 2020

17 10:07 AM

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21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: JUSTIN WALKER

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

3
4 HEARING re Debtors Motion Establishing Procedures in
5 Furtherance of Plan Distributions (related document(s) 2469)

6
7 HEARING re Response of U.S. Bank National Association, as
8 Indenture Trustee, to the Debtors' Motion Establishing
9 Procedures in Furtherance of Plan Distributions and Request
10 for Stay Pending Appeals (related document(s) 2469) filed by
11 J. Christopher Shore on behalf of US Bank National
12 Association (ECF 2482)

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25 Transcribed by: Sonya Ledanski Hyde

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1 P R O C E E D I N G S

2 THE COURT: Good morning, this is Judge Drain.

3 We're here in In re: Windstream Holdings Inc. on the

4 Debtor's motion for an order establishing procedures in

5 furtherance of plan distributions to Class 4, the so-called

6 Midwest Notes class. This is a wholly telephonic hearing.

7 I'll ask you to identify yourself and your client the first

8 time you speak. It's probably a good idea to do so if you

9 speak later, just in case the court reporter can't put

10 together your voice with your name.

11 There's one authorized recording of this hearing.

12 It's taken by Court Solutions. If you want a transcript you

13 can order it from the clerk's office or for it to be

14 prepared from the clerk's office. Court Solutions provides

15 a copy on a daily basis to our clerk's office.

16 So, with that introduction, why don't we proceed

17 to the motion?

18 MR. WEILAND: Thank you, Your Honor. Good

19 morning. How are you?

20 THE COURT: Fine, thanks.

21 MR. WEILAND: This is, for the record, Brad

22 Weiland of Kirkland & Ellis, LLP, here for the Windstream

23 Debtors. Appreciate the time this morning, Your Honor.

24 Your Honor, just a little bit of background before getting

25 to the motion. The motion is really an outgrowth of the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 Two, the Debtors --

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

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

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

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

6 So, I think what the Debtors are doing now is
7 saying -- going on the record that there will be no Article
8 3 review of the -- of the confirmation order unless it is
9 heard and determined before they consummate, because once
10 they consummate, there will be no relief that the Court can
11 grant.

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

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

25 THE COURT: When did you move for a stay pending

1 appeal before Judge Briccetti?

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

6 THE COURT: So, what day was that?

7 MR. SHORE: But then our view --

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

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

12 THE COURT: Okay. I'm curious as to what you --
13 how you complied with 8007(b) to (a), which says that as
14 part of an appeal -- I'm sorry, a request for a stay for the
15 District Court, contrary to what the rule says in 8007,
16 (a)(1), which is, quote: "Ordinarily, a party must move
17 first in the Bankruptcy Court for a stay." But that (b) says
18 that a motion for such relief may be made in the court where
19 the appeal is pending, and then says that the motion must, A
20 -- 2A, show that moving first in the Bankruptcy Court would
21 be impractical. But I guess that's really a question for
22 Judge Briccetti ultimately to ask you.

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

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

1 sort of agreement about the process for seeking the stay.

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

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

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

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

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

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

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

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

12 MR. SHORE: Okay.

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

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

1 which ordinarily would be brought before the Court.

2 The decision as to whether or not to grant a stay
3 in an order pending appeal lies within the sound discretion
4 of the Court. See *In re: Sabine Oil & Gas Corp.*, 548 B.R.
5 675, 681 (Bankr. S.D.N.Y. 2016). It's been well-recognized
6 and particularly in the context of an appeal of a
7 confirmation order that the movant for a stay pending appeal
8 bears a heavy burden to obtain such a stay. See, for
9 example, *In re: General Motors Corp.*, 409 B.R. 24, 30
10 (Bankr. S.D.N.Y. 2009).

11 The Court must consider four factors in exercising
12 its discretion. One, whether the movants will suffer
13 irreparable injury absent a stay. Two, whether a party will
14 suffer substantial injury if a stay is issued. Three,
15 whether the movant has demonstrated a substantial
16 possibility, although less than a likelihood, of success on
17 appeal. And, four, the public interest that may be
18 affected. Again, see, *In re: Sabine Oil & Gas Corp.*, 548
19 B.R. 581, quoting *ACC Bondholder Group v. Adelphia*
20 *Communications Corp.*, *In re: Adelphia Communications Corp.*,
21 361 B.R. 337, 346 (S.D.N.Y. 2007). Appeal dismissed. Stay
22 denied. Stay vacated. Writ of mandamus denied. 2007, U.S.
23 App. 30722, 2d Cir., February 9, 2007.

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

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

9 Judge Chapman notes in Sabine, as was again also
10 noted in the General Motors case as well as numerous other
11 cases including Triple Net Investments IX, LP v. DJK
12 Residential, In re: DJK Residential, LLC (2008, W.L.,
13 650389) at page 2, (S.D.N.Y., March 7, 2008) -- that "Where
14 the movant seeks imposition of a stay without a bond, the
15 applicant has the burden of demonstrating why the court
16 should deviate from the ordinary full security
17 requirements."

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

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

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

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

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

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

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

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

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

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

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

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

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

4 As noted by Judge Chapman, there's a further
5 element to the analysis, quote, the probability of success
6 that must be demonstrated as inversely proportional to the
7 amount of irreparable injury that the plaintiff will suffer
8 absent the stay. In other words, more of one excuses less
9 of the other. In re Sabine Oil & Gas Corp., 548 B.R. 683-
10 84, quoting 473 West End Realty Corp., which in turn cites
11 Mohammed v. Reno, 309 F.3d 95, 101 (2d. Cir. 2002). As I've
12 already noted, there's been no attempt to show here
13 irreparable injury to the appellant or, for that matter, any
14 meaningful attempt to show lack of harm to the Debtor or
15 other parties on the other side of the appeal.

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

1 deficiencies in this motion.

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

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

16 MR. WEILAND: I have that, Your Honor.

17 THE COURT: Okay. Good.

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

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

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

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

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

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

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

4 THE COURT: Right.

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

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

11 MR. WEILAND: Same regulation. I believe --

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

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

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

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

17 THE COURT: Right. I'm sorry to talk over you.

18 You're not -- it's not saying, for example, that they have
19 to be only the following five banks, you know, needs to be
20 --

21 MR. WEILAND: No, Your Honor. No.

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

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

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

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

17 MR. WEILAND: Understood, Your Honor.

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

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

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

5 MR. WEILAND: They are, Your Honor.

6 THE COURT: All right.

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

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

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

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

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

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

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

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

7 MR. WEILAND: Yes, Your Honor.

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

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

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

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

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

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

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

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

8 MR. WEILAND: Sure, Your Honor.

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

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

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

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

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

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

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

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

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

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

24 THE COURT: Okay. Well --

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

1 can.

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

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

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

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

21 MR. WEILAND: Absolutely, Your Honor.

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

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

1 THE COURT: Okay. Very well. Thank you.

2 MR. WEILAND: Take care.

3 THE COURT: Bye bye.

4 (Whereupon these proceedings were concluded at
5 11:13 AM)

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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.

A handwritten signature in dark ink, reading "Sonya M. Ledanski Hyde". The signature is written in a cursive, flowing style. The first name "Sonya" is prominent, followed by the middle initial "M.", the last name "Ledanski", and the surname "Hyde".

Sonya Ledanski Hyde

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Date: September 17, 2020

[& - appeal]

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ATTACHMENT 2

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

In re:

WINDSTREAM HOLDINGS, INC., *et al.*,¹

Debtors.

)
) Chapter 11
)
) Case No. 19-22312 (RDD)
)
) (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.