Docket #2413 Date Filed: 8/11/2020

Hearing Date: August 18, 2020 at 10:00 a.m. (Eastern)
Objection Deadline: August 11, 2020 at 4:00 p.m. (Eastern)

MORRISON & FOERSTER LLP
250 West 55th Street
New York, New York 10019
Telephone: (212) 468-8000
Facsimile: (212) 468-7900
Lorenzo Marinuzzi
Todd M. Goren
Jennifer L. Marines
Erica J. Richards

Counsel for the Official Committee of Unsecured Creditors

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO THE MOTION FOR RECONSIDERATION OF ORDER APPROVING STIPULATION OF SETTLEMENT PURSUANT TO BANKRUPTCY RULE 9023

[1] The last four digits of Debtor Windstream Holdings, Inc.'s tax identification number are 7717. Due to the large number of debtor entities 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.

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The Official Committee of Unsecured Creditors (the "Committee") of Windstream Holdings, Inc. and its debtor affiliates, as debtors and debtors-in-possession (collectively, the "Debtors"), submits this objection (the "Objection") to the *Motion for Reconsideration of Order Approving Stipulation of Settlement Pursuant to Bankruptcy Rule 9023* [Docket No. 2288] (the "Motion")[2] filed by CQS (US), LLC ("CQS"). In support of this Objection, the Committee respectfully states as follows:

OBJECTION

1. "Reconsideration of a previous order by the court is an 'extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources.'" *Cordero v. Astrue*, 574 F. Supp. 2d 373, 380 (S.D.N.Y. 2008) (quoting *In re Health Mgmt. Sys. Inc. Sec. Litig.*, 113 F. Supp. 2d 613, 614 (S.D.N.Y. 2000)); *see also In re Parikh*, 397 B.R. 518, 523 (Bankr. E.D.N.Y. 2008) ("A motion for reconsideration should be granted sparingly and in limited circumstances." (citations omitted)). A court may grant a motion for reconsideration "only if the movant satisfies the heavy burden of demonstrating 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" *Hollander v. Members of the Bd. of Regents of the Univ. of N.Y.*, 524 F. App'x 727, 729 (2d Cir. 2013) (quoting *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992))). Whether to grant a motion for reconsideration is within the sound discretion of the court. *See In re N.Y. Racing Ass'n*, No. 06-12618 (JLG), 2016 Bankr. LEXIS 3746, at *35 (Bankr. S.D.N.Y. Oct. 17, 2016) (citations omitted).

2. CQS raises no argument that reconsideration is justified here due to an intervening change of controlling law or the availability of new evidence. And, as explained

[2] Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Motion.

below, CQS has failed to meet its heavy burden to show that there is a need to correct a clear error and prevent manifest injustice here. Instead, CQS raises three primary objections to the Stipulation of Settlement, none of which withstands even mild scrutiny. Notably, no other holders of the 2024 Notes have joined the Motion.

3. *First*, CQS argues that UMB's entry into the Stipulation of Settlement constitutes a breach of UMB's fiduciary duties to the 2024 Noteholders and general unsecured creditors. (Motion at ¶¶ 1, 14). Not so. UMB did in fact "seek repayment of the 2024 notes and ensure that unsecured creditors receive as much value as possible from the Debtors' estates." (Motion at ¶ 14). This is evidenced by UMB's forceful opposition to confirmation of the Plan, and, only after its objection was overruled, entry into the Stipulation of Settlement.

4. Moreover, UMB's entry into the Stipulation of Settlement did not violate its fiduciary duty to all unsecured creditors of the Debtors' estates in its capacity as a Committee member. Each member of the Committee takes its fiduciary obligations seriously and has fulfilled those obligations accordingly during these cases. To that end, the Committee has taken various steps throughout these chapter 11 cases to further the interests of unsecured creditors. These actions include: conducting various investigations into potential causes of action; seeking standing in these chapter 11 cases to prosecute claims against Uniti Group, Inc. ("Uniti"); participating in the Debtors' adversary proceeding against Uniti and mediation regarding the issues surrounding the "Uniti Arrangement"; and vigorously opposing the Debtors' settlement with Uniti.

5. Most recently, the Committee opposed confirmation of the Plan, along with the indenture trustees for the Debtors' unsecured notes and CQS, on a variety of grounds. This Court overruled each of those objections following two days of hearing evidence and argument

presented by all parties. Following entry of the Confirmation Order, the Committee entered into negotiations with the Debtors, Elliott, and the First Lien Ad Hoc Group regarding resolution of a potential appeal. Ultimately, the Committee was presented with two options: (a) prosecute an appeal, or (b) enter into a settlement. The Committee, including UMB, deliberated on all relevant factors, including the likelihood of success on appeal, the potential recoveries that might be available to unsecured creditors if the appeal succeeded and the Debtors were required to pursue an alternative plan, and the risk that prolonging the Debtors' chapter 11 cases posed to the Debtors' ability to successfully reorganize. As a result of that process, the Committee determined that a settlement was in the best interests of unsecured creditors and voted to enter into the Stipulation of Settlement. UMB formally abstained from voting.

6. Critically, the payment to UMB under the Stipulation of Settlement is not being made to UMB because it is a Committee member. Rather, that payment is being made because UMB was one of only four objecting parties with standing to appeal. Two of the objectors—U.S. Bank and CQS—declined to settle, as is their right. Confusingly, CQS asserts that the Debtors "settl[ed] with UMB at the expense of holders of the Unsecured Notes." (Motion at ¶ 16.) But non-settling Unsecured Noteholders—*i.e.*, CQS and U.S. Bank—can still proceed with their appeal and are not harmed by the settlement in any way. CQS would clearly have preferred that the Committee and UMB join in its appeal instead of entering into the Stipulation of Settlement. But the fact that CQS has a different view than the Committee or UMB regarding the relative costs and benefits of the Stipulation of Settlement does not mean that the Committee or UMB "shirked" their fiduciary responsibilities. (Motion at ¶ 14.) They did not, and CQS provides no evidence suggesting otherwise.

7. *Second*, CQS argues that UMB's counsel is not entitled to payment of its professional fees under section 503(b)(4) of the Bankruptcy Code as an individual member of the Committee. CQS ignores the fact that UMB is not just a member of the Committee, but also is the indenture trustee for the 2024 Notes. The fees paid under the Stipulation of Settlement arise under the indenture governing the 2024 Notes, not in connection with UMB's role as a member of the Committee. *See* Indenture, dated as of December 13, 2017, among Windstream Services, LLC and Windstream Finance Corp., the guarantors party thereto and U.S. Bank National Association, as trustee and as collateral agent, Windstream Holdings, Inc., Current Report (Form 8-K) dated December 18, 2017 (the "2024 Notes Indenture").

8. Under the terms of the 2024 Notes Indenture, UMB, as indenture trustee, is entitled to (a) compensation for all services rendered in connection with the 2024 Notes, (b) reimbursement for reasonable expenses incurred in connection with such services (including attorney's fees), and (c) indemnification for certain losses arising in connection the performance of its duties. *See* 2024 Notes Indenture § 7.07 ("Compensation and Indemnity").

9. Courts have recognized that the Trust Indenture Act reflects Congressional concern for the "significant economic considerations" faced by indenture trustees, and Congress' intent to limit an indenture trustee's economic exposure. *See Meckel v. Cont'l Res. Co.*, 758 F.2d 811, 815-16 (2d Cir. 1985). To that end, the 2024 Notes Indenture provides UMB with a charging lien on account of its fees and expenses, pursuant to which UMB has a lien on any monies collected on account of the 2024 Notes to pay its fees prior to any distributions to noteholders. In other words, UMB is contractually authorized to deduct its fees from any distributions made on account of the 2024 Notes. 2024 Notes Indenture § 7.07(d).

10. CQS disregards the practical implications of UMB's charging lien by arguing that "UMB is hoarding value that should be paid to its constituents and/or other unsecured creditors." (Motion at ¶ 20 (citation omitted)). This argument ignores that there is insufficient settlement value to flow to holders of the 2024 Notes. Indeed, any distributions to holders of the 2024 Notes would be reduced by the full amount of UMB's fees and expenses because, absent the Stipulation of Settlement, UMB would have no choice but to exercise its charging lien.[3]

11. CQS accuses UMB of "double-dipping" by entering into the Stipulation of Settlement while preserving its right to exercise its charging lien. This argument is also misplaced. UMB can never recover more than what it is actually owed, even under a different plan, through the exercise of its charging lien.

12. *Third*, CQS argues that the Stipulation of Settlement violates the confirmed Plan because, "without a global settlement, any such payment must flow through Class 6A of the Plan and be distributed pro rata to all Class 6A creditors." (Motion at ¶ 2.) This proposition defies logic, and CQS points to no case law requiring such an outcome.

13. As an initial matter, U.S. Bank and CQS are not parties to the Stipulation of Settlement or bound by it, and there is no reason they are entitled to share in the consideration it provides. Furthermore, contrary to CQS's suggestion, section 503 of the Bankruptcy Code is not implicated by the Stipulation of Settlement. Instead, payments under the Stipulation of Settlement may be approved as an exercise of the Debtors' business judgment under section 363(b) of the Bankruptcy Code. The Court in *U.S. Trustee v. Bethlehem Steel Corp. (In re*

[3] CQS argues that "[i]nstead of seeking a recovery for all Class 6A claimants, UMB improperly diverted the distribution to itself and its professionals. The value being diverted from the Debtors' estates should be distributed to all Class 6A unsecured creditors *pro rata*, and to the extent UMB's fees and expenses are not satisfied by its directing noteholder(s), the charging liens of both UMB and U.S. Bank should attach in payment of their indenture trustee fees." (Motion at ¶ 16). Embedded in its own inflammatory statement, CQS acknowledges that the charging liens should attach to any value. In that scenario, value still would not flow to Class 6A unsecured creditors and would be subject to both UMB's charging lien and U.S. Bank's charging lien.

Bethlehem Steel Corp.) held that "subsections 503(b)(3)(D) and (b)(4) of the Bankruptcy Code do not bar a bankruptcy court from allowing a debtor in possession to reimburse a creditor for professional fees—provided, of course, that the standard for allowing transactions under § 363(b) has been met." No. 02 Civ. 2854 (MBM), 2003 WL 21738964, at *11 (S.D.N.Y. July 28, 2003); *see also In re Enron Corp.,* 335 B.R. 22 (S.D.N.Y. 2005) (stating that "authorization of certain types of payments under §363(b) is not prohibited simply because there is another section of the Bankruptcy Code related to the same type of payment" (citing *In re Bethlehem Steel Corp.*, 2003 WL 21738964, at *11)). Thus, any argument that the Debtors failed to exercise their business judgment by entering into the Stipulation of Settlement is without merit.

14. Moreover, courts have consistently rejected the very same arguments that CQS makes in the Motion. For example, in overruling a similar objection lodged by the United States Trustee, Judge Wiles recently observed that "[t]here is nothing in the code that says that a . . . valid pre-bankruptcy contract for an indenture[] trustee to get its fees must be dishonored in bankruptcy or cannot be paid or cannot be assumed or cannot be reinstated ***or cannot be made part of a modified deal after the case***." Transcript of Hearing held on April 1, 2019 at 24:25-25:5, *In re Aegean Marine Petroleum Network, Inc.*, Case No. 18-13374 (MEW) (Bankr. S.D.N.Y. Apr. 1, 2019) [Docket No. 563] (emphasis added). UMB is entitled to payment of its fees and expenses under the 2024 Notes Indenture, and is not improperly receiving consideration as a member of the Committee or otherwise.

15. There is no clear error to correct or manifest injustice to prevent that warrants the relief sought by the Motion. But, if the Motion is granted, the Committee and its constituents ***will*** suffer manifest injustice. The Committee entered into the Stipulation of Settlement before July 10, 2020, the last day to file an appeal of the order confirming the Plan. *See* Fed. R. Bankr.

P. 8001(a) ("a notice of appeal must be filed with the bankruptcy clerk within 14 days after entry of the judgment, order, or decree being appealed."). And, as consideration under the Stipulation of Settlement, the Committee and UMB agreed that "they will support the Plan and will not appeal the Confirmation Order." (Stipulation of Settlement at ¶ 4). If the Court grants the Motion and reverses its approval of the Stipulation of Settlement now (well after the deadline to file an appeal), the Committee and UMB will be deprived of both their right to prosecute an appeal and the agreed upon consideration under the Stipulation of Settlement. Absent the Stipulation of Settlement, it is likely that the Committee and UMB would have pursued an appeal. It would be fundamentally unfair to deprive the Committee and UMB of the benefits of the Stipulation of Settlement at a time where they can no longer pursue appellate remedies.

RESERVATION OF RIGHTS

16. The Committee reserves the right to raise further and other objections to the Motion or any amendment thereto, prior to or at the hearing.

CONCLUSION

17. The Committee respectfully requests that the Court enter an order (a) denying the Motion and (b) granting such other and further relief as the Court deems just and proper.

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Dated: August 11, 2020
New York, New York

Respectfully submitted,

/s/ Lorenzo Marinuzzi

MORRISON & FOERSTER LLP
Lorenzo Marinuzzi
Todd M. Goren
Jennifer L. Marines
Erica J. Richards
250 W 55th St.
New York, New York 10019
Telephone: (212) 468-8000
Facsimile: (212) 468-7900

Counsel for the Official Committee of Unsecured Creditors