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Proposed Counsel to the Debtors and Debtors in Possession

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

In re:)	Chapter 11
WINDSTREAM HOLDINGS, INC., <i>et al.</i> , ¹)	Case No. 19-22312 (RDD)
Debtors.)	(Joint Administration Requested)

**DEBTORS’ MOTION SEEKING ENTRY OF AN
ORDER AUTHORIZING THE DEBTORS TO (I) RESTRICT
ACCESS TO CERTAIN CONFIDENTIAL FEE LETTERS RELATED
TO PROPOSED DEBTOR-IN-POSSESSION FINANCING AND (II) REDACT
CERTAIN TERMS IN THE DIP MOTION AND NICHOLAS LEONE DECLARATION**

Windstream Holdings, Inc. and its debtor affiliates as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the “Debtors”) respectfully state the following in support of this motion (this “Motion”):²

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 the Debtors have requested joint administration, 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’ proposed claims and noticing agent at <http://www.kcellc.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.

² Capitalized terms used but not immediately defined in this Motion have the meanings given to such terms elsewhere in this Motion, the First Day Declaration, or the DIP Motion (each as defined herein), as applicable.



Relief Requested

1. The Debtors seek entry of an order, substantially in the form attached hereto as **Exhibit A** (the “Order”) authorizing the Debtors to: (a) restrict access to certain confidential fee letters as defined in the DIP Motion (collectively, the “Fee Letters”) in connection with the *Debtors’ Motion for Entry of Interim and Final Orders Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364, 503, and 507 (I) Authorizing the Debtors to Obtain Senior Secured Superpriority Postpetition Financing, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Authorizing Use of Cash Collateral, (IV) Granting Adequate Protection, (V) Modifying the Automatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief* (the “DIP Motion”) solely to (i) the United States Bankruptcy Court for the Southern District of New York (the “Bankruptcy Court”), (ii) the United States Trustee for the Southern District of New York (the “U.S. Trustee”), (iii) counsel and financial advisors to any official committee of unsecured creditors appointed in the Debtors’ chapter 11 cases (on a confidential and professional eyes only basis), and (iv) any other party as may be ordered by the Bankruptcy Court or agreed to by the Debtors and the DIP Agent party to such Fee Letters, in each case, under appropriate confidentiality agreements reasonably satisfactory to the Debtors and the DIP Agent that preserve the confidentiality of such Fee Letters (and any information derived therefrom); and (b) redact the DIP Motion and *Declaration of Nicholas Leone in Support of the Debtors’ Motion For Entry of Interim and Final Orders Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364, 503, and 507 (I) Authorizing the Debtors to Obtain Senior Secured Superpriority Postpetition Financing, (II) Granting Liens And Superpriority Administrative Expense Claims, (III) Authorizing Use of Cash Collateral, (IV) Granting Adequate Protection, (V) Modifying the Automatic Stay; (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief*, filed contemporaneously

herewith, (the “Leone Declaration”) solely with respect to the confidential terms set forth in the Fee Letters.

Jurisdiction and Venue

2. The Bankruptcy Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the Southern District of New York*, dated February 1, 2012. The Debtors confirm their consent, pursuant to rule 7008 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), to the entry of a final order by the Bankruptcy Court in connection with this Motion to the extent that it is later determined that the Bankruptcy Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

3. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

4. The bases for the relief requested herein are sections 105(a) and 107(b) of the Bankruptcy Code, Bankruptcy Rule 9018, and Rule 9077-1(b) of the Local Bankruptcy Rules for the Southern District of New York (the “Local Rules”).

Background

5. The Debtors are a leading provider of advanced network communications and technology solutions for businesses across the United States. The Debtors also offer broadband, entertainment and security solutions to consumers and small businesses primarily in rural areas in 18 states. Additionally, the Debtors supply core transport solutions on a local and long-haul fiber network spanning approximately 150,000 miles. As of the date hereof, the Debtors had approximately 13,000 employees.

6. As set forth in greater detail in the *Declaration of Bob Gunderman, Chief Financial Officer of Windstream Holdings, Inc., (i) in Support of Debtors’ Chapter 11 Petitions and First*

*Day Motions and (ii) Pursuant to Local Bankruptcy Rule 1007-2 (the “First Day Declaration”), on February 15, 2019, the United States District Court for the Southern District of New York entered a *Memorandum Decision and Order* against Debtor Windstream Services, LLC after trial in the matter styled *U.S. Bank National Association v. Windstream Services, Inc. v. Aurelius Capital Master, Ltd.*, Case No. 17-cv-7857 (JMF), that recognized an event of default under the Debtors’ prepetition unsecured bond indentures secured, which in turn gave rise to a cross-default under the Debtors’ secured credit facilities and certain other material agreements. As of the date hereof, the Debtors are obligated for approximately \$5.6 billion in funded debt obligations. To avoid any precipitous action against the Debtors’ assets that would have harmed the Debtors’ businesses, the Debtors commenced these chapter 11 cases to obtain the protection of the automatic stay and preserve value for stakeholders enterprise wide.*

7. On February 25, 2019 (the “Petition Date”), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors continue to operate their business and manage their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. As of the date hereof, the Office of the United States Trustee for the Southern District of New York (the “U.S. Trustee”) has not appointed an official committee of unsecured creditors in these chapter 11 cases. Additional information regarding the Debtors’ business, their capital structure, and the circumstances leading to these chapter 11 filings is contained in the First Day Declaration.

Basis for Relief

8. The Bankruptcy Code provides strong support for sealing the Fee Letters and redacting certain portions of the DIP Motion and Leone Declaration. Section 107(b) of the Bankruptcy Code authorizes courts to issue orders that will protect entities from the potential harm

that may result from the disclosure of certain confidential information. This section provides, in relevant part:

- (b) On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may—
 - (1) protect an entity with respect to a trade secret or confidential research, development, or commercial information;

11 U.S.C. § 107(b)(1).

9. Bankruptcy Rule 9018 further defines the procedures by which a party may move for relief under section 107(b) of the Bankruptcy Code, and provides, in part:

On motion or its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information . . .

Fed. R. Bankr. P. 9018.

10. Once a court determines that a party in interest is seeking protection of information that falls within the ambit of section 107(b) of the Bankruptcy Code, “the court is required to protect a requesting interested party and has no discretion to deny the application.” *Video Software Dealers Ass’n v. Orion Pictures Corp.*, 21 F.3d 24, 27 (2d Cir. 1994).

11. The Second Circuit in *Video Software Dealers Ass’n v. Orion Pictures* affirmed the bankruptcy court’s order to seal a licensing agreement given that the release of any information regarding the agreement’s overall structure (or terms and conditions thereof) would have adversely affected the debtor’s ability to negotiate favorable promotional agreements, thereby providing the debtor’s competitors an unfair advantage. *Id.* at 28. The Second Circuit further noted that section 107(b)(1) of the Bankruptcy Code creates an exception to the general rule that court records are open to examination by the public. *Id.* at 27. Thus, under this exception, an interested party

has to show only that the information it wishes to seal is “‘confidential’ and ‘commercial’ in nature.” *Id.* Commercial information, however, need not rise to the level of a trade secret to be protected under section 107(b) of the Bankruptcy Code. *Id.* at 28.

12. Courts have further held that the resulting sealing order should be broad (*i.e.*, “any order which justice requires”). *In re Glob. Crossing, Ltd.*, 295 B.R. 720, 724 (Bankr. S.D.N.Y. 2003) (citing Fed. R. Bankr. P. 9018). “Courts have supervisory powers over their records and files and may deny access to those records and files to prevent them from being used for an improper purpose.” *In re Kaiser Aluminum Corp.*, 327 B.R. 554, 560 (D. Del. 2005). Indeed, the “authority goes not just to the protection of confidential documents, but to other confidentiality restrictions that are warranted in the interests of justice.” *In re Glob. Crossing, Ltd.*, 295 B.R. at 724. Moreover, section 105(a) of the Bankruptcy Code codifies the bankruptcy court’s inherent equitable powers and empowers it to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a).

13. In granting motions to seal “commercial information,” courts have defined this term as “information which would result in ‘an unfair advantage to competitors by providing them information as to the commercial operations of the debtor.’” *In re Alterra Healthcare Corp.*, 353 B.R. 66, 75 (Bankr. D. Del. 2006); *In re Glob. Crossing, Ltd.*, 295 B.R. at 725 (finding that the purpose of Bankruptcy Rule 9018 is to “protect business entities from disclosure of information that could reasonably be expected to cause the entity commercial injury”). Unlike its counterpart in Rule 26(c) of the Federal Rules of Civil Procedure, section 107(b) of the Bankruptcy Code does not require an entity seeking such protection to demonstrate “good cause.” *See, e.g., Video Software Dealers Ass’n v. Orion Pictures Corp.*, 21 F.3d at 28 (holding that a license agreement authorizing a licensee “to reproduce, manufacture, distribute, and sell videocassettes” of three

films contained confidential commercial information). As such, in *In re Northwest Airlines Corp.*, the court implemented the protection afforded by section 107(b) of the Bankruptcy Code to authorize a chapter 11 debtor to file a fee letter under seal in connection with the debtor's motion for approval of an exit financing facility. Case No. 05-17930 (ALG) (Bankr. S.D.N.Y. May 2, 2007) [Docket No. 6511]; *see also In re Calpine Corp.*, Case No. 05-60200 (BRL) (Bankr. S.D.N.Y. Jan. 29, June 21, and Dec. 14, 2007) [Docket Nos. 3494, 5028, and 7118] (authorizing debtors to file under seal fee letter with respect to debtors' refinancing effort and exit financing); *In re Adelpia Commc'ns Corp.*, Case No. 02-41729 (REG) (Bankr. S.D.N.Y. Jan. 25, 2007) [Docket No. 13092] (authorizing debtor to file under seal documentation of fee structure for underwriting agreement).

14. Here, the Fee Letters, the DIP Motion, and the Leone Declaration contain commercially sensitive information, thus satisfying one of the categories enumerated in section 107(b) of the Bankruptcy Code for sealing documents. Disclosing certain terms and provisions of the Fee Letters (and the corresponding terms as set forth in the Leone Declaration) could jeopardize the Debtors' ability to obtain debtor-in-possession financing at a desirable rate. The Fee Letters contain closely-guarded proprietary and commercial information that is highly sensitive to the Debtors and the DIP Agent. Because of the sensitivity of these materials, the Debtors have agreed to keep the specific information relating to the fees confidential and ask that the Bankruptcy Court authorize it to file those materials as redacted or under seal, as applicable, for that same reason.

15. The terms of the Fee Letters are the product of arm's-length, extensive and good-faith negotiations. The disclosure of certain terms of the Fee Letters would likely cause substantial harm to the Debtors and the DIP Agent, create an unfair advantage for the Debtors'

competitors, and violate the Debtors' agreement with the DIP Agent to keep the terms of the Fee Letters confidential. Indeed, the Fee Letters reflect detailed proprietary information describing fees to be paid in connection with the DIP Facilities, which information is customarily considered by the DIP Agent, in particular, as well as the finance lending industry, in general, to be highly-sensitive and confidential information not typically disclosed to the public. Given the highly competitive nature of the investment banking and lending industries, it is of the utmost importance that the details of the fee structures set forth in the Fee Letters be kept confidential so that competitors cannot use the information contained therein to gain a strategic advantage in the marketplace.

16. The Debtors therefore submit that good cause exists to authorize them to file the Fee Letters under seal and redact the corresponding terms in the DIP Motion and Leone Declaration because of the harm that would ensue if the sensitive and confidential commercial information contained in the Fee Letters became public information.

Motion Practice

17. This Motion includes citations to the applicable rules and statutory authorities upon which the relief requested herein is predicated and a discussion of its application to this Motion. Accordingly, the Debtors submit that this Motion satisfies Local Rule 9013-1(a).

Notice

18. The Debtors will provide notice of this Motion to the following parties and/or their respective counsel, as applicable: (a) the U.S. Trustee; (b) the holders of the 50 largest unsecured claims against the Debtors (on a consolidated basis); (c) Davis Polk & Wardwell LLP, counsel to the agent under the proposed postpetition debtor in possession financing facility; (d) the administrative agents and indenture trustees under the Debtors' prepetition credit agreement and note indentures; (e) Milbank LLP, counsel to an *ad hoc* group of second lien noteholders; (f) Paul,

Weiss, Rifkind, Wharton & Garrison LLP, counsel to an *ad hoc* group of first lien term lenders; (g) Shearman & Sterling LLP, counsel to the Midwest noteholders; (h) the Pension Benefit Guaranty Corporation; (i) the United States Attorney's Office for the Southern District of New York; (j) the Internal Revenue Service; (k) the United States Securities and Exchange Commission; (l) the attorneys general in the states where the Debtors conduct their business operations; (m) the Federal Communications Commission; and (n) any party that has requested notice pursuant to Bankruptcy Rule 2002. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

No Prior Request

19. No prior request for the relief sought in this Motion has been made to this or any other court.

[Remainder of page intentionally left blank.]

WHEREFORE, the Debtors respectfully request that the Bankruptcy Court enter the Order granting the relief requested herein and such other relief as the Bankruptcy Court deems appropriate under the circumstances.

Dated: February 26, 2019
New York, New York

/s/ Stephen E. Hessler, P.C.

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Proposed Counsel to the Debtors and Debtors in Possession

Exhibit A

Proposed Order

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

In re:)	Chapter 11
WINDSTREAM HOLDINGS, INC., <i>et al.</i> , ¹)	Case No. 19-19-22312 (RDD)
Debtors.)	(Joint Administration Requested)

**ORDER GRANTING DEBTORS'
MOTION SEEKING ENTRY OF AN ORDER
AUTHORIZING THE DEBTORS TO (I) RESTRICT
ACCESS TO CERTAIN CONFIDENTIAL FEE LETTERS
RELATED TO PROPOSED DEBTOR-IN-POSSESSION FINANCING AND
(II) REDACT CERTAIN TERMS IN THE DIP MOTION AND LEONE DECLARATION**

Upon the motion (the "Motion")² the above-captioned debtors and debtors in possession (collectively, the "Debtors") for entry of an order (this "Order"): (a) restricting access to certain letters regarding fees related to the DIP Facilities (collectively, the "Fee Letters"), and (b) authorizing the Debtors to redact certain related terms in the DIP Motion and Leone Declaration, each as more fully set forth in the Motion and upon the First Day Declaration; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(a)-(b) and 1334(b) and the *Amended Standing Order of Reference from the United States District Court for the Southern District of New York*, dated February 1, 2012; and that this Court may enter a final order consistent with Article III of the United States Constitution; and this Court having found that venue

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² Capitalized terms used herein but not herein defined shall have the meanings given to them in the Motion.

of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b); and this Court having found that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors and other parties in interest; and this Court having found that the Debtors' notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and no other notice need be provided; and this Court having reviewed the Motion and having heard the statements in support of the relief requested therein at a hearing before this Court (the "Hearing"); and this Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Motion is granted as set forth herein.
2. The Debtors are authorized to file the Fee Letters under seal and redact the DIP Motion and Leone Declaration with respect to the confidential terms set forth in the Fee Letters, subject to further order of the Court, pursuant to sections 105(a) and 107(b) of the Bankruptcy Code, Bankruptcy Rule 9018, and Local Bankruptcy Rule 9018-1. Any other pleadings filed in these chapter 11 cases that disclose the information contained in the Fee Letters shall be filed under seal and served only on those parties authorized to receive the Fee Letters in accordance with this Order.
3. Except upon further order of the Court after notice to the Debtors and the DIP Agent, each of the Fee Letters is confidential, shall remain under seal, and shall not be made available to anyone without the consent of the Debtors and DIP Agent party to such Fee Letters, except that copies of each Fee Letter shall be provided to (i) the Court, (ii) the U.S. Trustee,

(iii) counsel and financial advisors to any official committee of unsecured creditors appointed in these chapter 11 cases (on a confidential and professional eyes only basis), and (iv) any other party as may be ordered by the Court or agreed to by the Debtors and the DIP Agent, in each case, under appropriate confidentiality agreements satisfactory to the Debtors and the DIP Agent that preserve the confidentiality of such Fee Letters (and any information derived therefrom).

4. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion and the requirements of Bankruptcy Rule 6004(a) and the Local Rules are satisfied by such notice.

5. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order are immediately effective and enforceable upon its entry.

6. The Debtors are authorized to take all actions necessary to effectuate the relief granted in this Order in accordance with the Motion.

7. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

White Plains, New York
Dated: February ___, 2019

HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE