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ATTORNEYS FOR U.S. BANK NATIONAL ASSOCIATION, AS INDENTURE TRUSTEE AND COLLATERAL AGENT

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

In re:	Chapter 11
FIBERTOWER NETWORK SERVICES CORP., *et al.*,	Case No. 12-44027-DML-11
	Jointly Administered
Debtors.	

OBJECTION OF U.S. BANK NATIONAL ASSOCIATION, AS INDENTURE TRUSTEE AND COLLATERAL AGENT, TO CONFIRMATION OF DEBTORS' SECOND AMENDED JOINT CHAPTER 11 PLAN

U.S. Bank National Association, as successor indenture trustee and collateral agent ("U.S. Bank") for holders of the 9.00% Convertible Senior Secured Notes due 2012 ("2012

Notes" and holders of the 2012 Notes, the "2012 Noteholders") issued by FiberTower Corporation ("FiberTower"), respectfully submits this objection ("Objection") to confirmation of the Debtors' Second Amended Joint Chapter 11 Plan, and in support thereof, states as follows:

PRELIMINARY STATEMENT

1. The 2012 Notes were issued by FiberTower and guaranteed by each of the other Debtors, as well as certain FiberTower subsidiaries that are not debtors ("Non-Debtor Subsidiaries"), under an Indenture dated as of November 9, 2006, as amended by that certain First Supplemental Indenture dated as of December 7, 2009, and as further amended by that certain Second Supplemental Indenture dated as of December 16, 2009 (as the same has been and may be further amended, supplemented and modified, the "2012 Indenture"). The 2012 Notes are secured by second-priority liens on substantially all of the Debtors' assets.

2. U.S. Bank objects to confirmation of the Plan (as defined below) because it purports to grant impermissible releases and exculpations with respect to, among others, the Non-Debtor Subsidiaries.[1] Given that the Non-Debtor Subsidiaries have guaranteed the 2012 Notes, and neither U.S. Bank nor the 2012 Noteholders have consented to release the Non-Debtor Subsidiaries from their obligations under the 2012 Notes, the Plan's release provisions violate well-established Fifth Circuit law and should not be approved.

BACKGROUND

A. 2012 Notes

3. The 2012 Notes were issued by FiberTower on or about November 9, 2006. The 2012 Note obligations are jointly and severally guaranteed by the Debtors (other than

[1] In addition to the Plan's exculpation and release provisions, U.S. Bank has communicated proposed Plan changes to the Debtors to resolve U.S. Bank's drafting concerns related to the 2012 Indenture and understands that those changes are acceptable to the Debtors. Accordingly, U.S. Bank limits this Objection to the exculpation and release provisions on the understanding that its other concerns have been resolved.

FiberTower) and the Non-Debtor Subsidiaries.[2] The 2012 Note Obligations are further secured by a lien on substantially all of the assets of the Debtors and Non-Debtor Subsidiaries.[3] Wells Fargo Bank, National Association ("Wells Fargo") was originally the indenture trustee and collateral agent for the 2012 Notes, but was succeeded in March, 2012, by U.S. Bank.

4. On December 22, 2009, FiberTower conducted an exchange in which it redeemed approximately 90.8%, or $266,791,438 in principal amount, of the 2012 Notes ("2009 Exchange").[4] Holders of the 2012 Notes who participated in the 2009 Exchange received a combination of cash payments, equity interests and the 9.00% Senior Secured Notes due 2016 ("2016 Notes"). In connection with the 2009 Exchange, Wells Fargo, in its respective capacities as indenture trustee and collateral agent for both the holders of the 2016 Notes ("2016 Noteholders") and the 2012 Noteholders entered into that certain Amended and Restated Intercreditor Agreement, dated as of December 22, 2009 ("Intercreditor Agreement"), which provides, among other thing, that the liens securing 2012 Note Obligations are subject and subordinate to the liens securing the obligations related to the 2016 Notes.[5]

B. <u>Bankruptcy Filing and Proposed Plan</u>

5. On July 17, 2012 ("Petition Date"), each of the Debtors filed petitions under chapter 11 of the Bankruptcy Code.

6. On September 27, 2013, the Debtors filed their First Amended Joint Chapter 11 Plan (Docket No. 944) and a related disclosure statement (Docket No. 946). On October 24, the

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[2] *See* Declaration of Kurt Van Wagenen in Support of Chapter 11 Petitions and First Day Motions (Docket No. 2) ("First Day Declaration"), ¶ 13.

[3] *See id.*

[4] *See id.*, ¶ 11.

[5] The Intercreditor Agreement further provides that nothing therein waives or otherwise prevents U.S. Bank from exercising such rights and remedies as may be exercised by any unsecured creditor in these proceedings or otherwise appearing, taking action, and filing pleadings not inconsistent with its obligations under the Intercreditor Agreement.

Debtors filed a revised version of the disclosure statement (Docket No. 973). On October 25, 2013, U.S. Bank and the Official Committee of Unsecured Creditors ("Committee") each filed objections (Docket Nos. 977 and 978) to approval of the Debtors' disclosure statement.

7. After the disclosure statement hearing, the Debtors agreed to amend their plan to, among other things, establish a litigation trust ("Litigation Trust") for the benefit of unsecured creditors and transfer certain causes of action to the trust. On December 4, 2013, the Debtors filed their Second Amended Joint Chapter 11 Plan (Docket No. 1007) ("Plan") and an amended disclosure statement related thereto (Docket No. 1009) ("Disclosure Statement"). On December 5, 2013, the Court entered an order (Docket No. 1013) approving the Disclosure Statement.

8. In summary, under the Plan the Debtors propose to transfer 100% of the equity interests in a reorganized FiberTower to the 2016 Noteholders, and to transfer certain causes of action, including claims under chapter 5 of the Bankruptcy Code and certain claims of the Debtors' estates against the Debtors' current and/or former officers and directors, to the Litigation Trust for the benefit of unsecured creditors. Although the Disclosure Statement does not contain a valuation of the reorganized FiberTower equity interests to be transferred to the 2016 Noteholders on account of their secured claim, the Plan allows the 2016 Noteholders' unsecured deficiency claim in the amount of $89,529,772.

9. In addition, the Plan grants broad exculpations and releases to a broad group of parties, including, among others, the Debtors, each of the Debtors' current and former officers, and each of the Debtors' subsidiaries and affiliates, which would include the Non-Debtor Subsidiaries.[6] Indeed, section 11.3 exculpates the Released Parties from any liability for "any act or omission in connection with, or arising out of the Debtors' restructuring, including without

[6] *See id.* § 1.1 (definition of "Released Parties"); § 11.3 (broad exculpation for Released Parties); § 11.4(b) (broad release for Released Parties).

limitation, the negotiation, implementation and execution of this Plan, the Chapter 11 Cases, [or] the Disclosure Statement …."[7] Section 11.4(a) grants to the Released Parties a broad release of all claims that could be asserted by or on behalf of the Debtors or their bankruptcy estates.[8] Finally, section 11.4(b) grants to the Released Parties broad non-consensual releases of third party claims, stating, in relevant part, that:

> all holders of Claims and Interests . . . and each entity (other than the Debtors or the Reorganized Debtors) that has held, holds or may hold a Claim or Equity Interest, as applicable, will be deemed to have consented to this Plan for all purposes and the restructuring embodied herein and deemed to forever release, waive and discharge all claims, demands, debts, rights, Causes of Action or liabilities . . . against the Released parties . . . that are based in whole or in part on any act or omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the Debtors, their affiliates and former affiliates, the Reorganized Debtors, the Reorganization Cases, or this Plan or the Disclosure Statement . . . .[9]

BASIS FOR OBJECTION AND APPLICABLE AUTHORITY

10. After the Disclosure Statement was approved, and at U.S. Bank's request, the Debtors provided to U.S. Bank balance sheets for each of the Debtors and the Non-Debtor Subsidiaries. Based solely on those balance sheets,[10] it appears that, other than approximately $10 million of intercompany receivables, the Non-Debtor Subsidiaries do not have assets. Given that they have no assets but are obligated on FiberTower's principal debt, it is not clear why these entities did not file their own chapter 11 petitions. But since they did not file, they are not, under Fifth Circuit law, entitled to releases.

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[7] *Id.* § 11.3.

[8] *Id.* § 11.4(a).

[9] *Id.* § 11.4(b).

[10] U.S. Bank has not been paid for fees and expenses incurred during these cases. Accordingly, U.S. Bank has not conducted further independent analyses of the assets or operations, if any, of the Non-Debtor Guarantors. *See* Indenture § 8.01(e).

11. Section 524(e) of the Bankruptcy Code provides that "discharge of a debt of the debtor does not affect the liability of any other entity on . . . such debt."[11] Indeed, the United States Court of Appeals for the Fifth Circuit has unequivocally held, on multiple occasions, that section 524(e) prohibits non-consensual releases of claims against, and exculpations of, non-debtors.[12]

12. While the Fifth Circuit prohibition of non-debtor releases applies broadly to all non-debtor parties, the recent *Vitro* chapter 15 proceedings in this Court specifically involved an attempted release of non-debtor guarantors. In that case, Judge Hale declined to enforce a chapter 15 debtor's plan, which had been approved in a Mexican insolvency proceeding, based on the plan's release of claims against non-debtor subsidiary guarantors:

> [t]he *Concurso* Plan [approved in a Mexican insolvency proceeding] arguably would be unconfirmable in the United States under Chapter 11 because, *inter alia*, it releases guaranteed debt of Vitro's non-debtor subsidiaries, which are not parties to the Mexican *Concurso* proceedings. Under § 524 of the Bankruptcy Code, non-debtor discharges of debt are prohibited. This Court did not enforce the *Concurso* Plan, primarily for this reason.[13]

On direct appeal, the Fifth Circuit affirmed Judge Hale's ruling.[14]

13. In light of the above, the Plan's purported release of non-debtors, including non-debtor guarantors of the 2012 Notes, does not comply with section 524(e) of the Bankruptcy

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[11] 11 U.S.C. § 524(e).

[12] In *In re Pacific Lumber Co.*, the Fifth Circuit noted that "[i]n a variety of contexts, this court has held that Section 524(e) only releases the debtor, not co-liable third parties." 584 F.3d 229, 251-53 (5th Cir. 2009). Citing a long line of Fifth Circuit decisions, the court stated that "[t]hese cases seem broadly to foreclose non-debtor releases and permanent injunctions." *Id.* (citing *In re Coho Resources, Inc.*, 345 F.3d 338, 342 (5th Cir. 2003); *Hall v. National Gypsum Co.*, 105 F.3d 225, 229 (5th Cir. 1997); *Matter of Edgeworth*, 993 F.2d 51, 5-54 (5th Cir. 1993); *Feld v. Zale Corp.*, 62 F.3d 746 (5th Cir. 1995)); *see also In re Vitro S.A.B. De C. V*, 702 F.3d 1031, 1061 (5th Cir. 2012) ("This court has previously foreclosed the type of relief sought here [non-consensual non-debtor releases] in the context of a United States bankruptcy proceeding.").

[13] *In re Vitro S.A.B. De C. V*, Case No. 11–33335–HDH–15, 2012 WL 2367161, at *1 (Bankr. N.D. Tex. June 21, 2012).

[14] 702 F.3d at 1061.

Code. Thus, under section 1129(a)(1) of the Bankruptcy Code, the Plan should not be confirmed with the impermissible release and exculpation provisions.[15]

CONCLUSION

14. For all of the reasons set forth above, U.S. Bank objects to confirmation of the Plan as currently proposed.

Dated: January 8, 2014

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[15] Section 1129(a)(1) states that "[t]he court shall confirm a plan only if the following are met: (1) the plan complies with the applicable provisions of [the Bankruptcy Code] . . . ." 11 U.S.C. § 1129(a)(1).

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this 8th day of January, 2014, a true and correct copy of the above and foregoing document was served via electronic mail or First Class U.S. Mail postage prepaid on the following parties:

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