David M. Posner, Esq. (Admitted *Pro Hac Vice*)
Kevin Zuzolo, Esq. (Admitted *Pro Hac Vice*)
OTTERBOURG P.C.
230 Park Avenue
New York, New York 10169
Telephone: 212-661-9100
Facsimile: 212-682-6104
Email: dposner@otterbourg.com
Email: kzuzolo@otterbourg.com

Michael D. Warner, Esq. (TX Bar No. 00792304)
COLE, SCHOTZ, MEISEL, FORMAN & LEONARD, P.A.
301 Commerce Street, Suite 1700
Fort Worth, Texas 76102
Telephone: 817-810-5250
Facsimile: 817-810-5255
Email: mwarner@coleschotz.com

COUNSEL FOR THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS

UNITED STATES BANKRUPTCY COURT
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 THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO THE DEBTORS' SECOND AMENDED JOINT CHAPTER 11 PLAN

The Official Committee of Unsecured Creditors (the "**Committee**") appointed in the chapter 11 cases of FiberTower Network Services Corp., *et al*. (collectively, the "**Debtors**"), by and through its undersigned co-counsel, submits this objection (the "**Objection**") to the *Debtors' Second Amended Joint Chapter 11 Plan*. In support thereof, the Committee represents and alleges the following:

PRELIMINARY STATEMENT[1]

1. The Committee is disappointed that the Debtors have put forth yet another plan that impermissibly favors the 2016 Noteholders to the detriment of all other creditors. After the October 29 Hearing on the Disclosure Statement, it appeared that the Debtors recognized that they could not confirm a plan that turned over all value (including unencumbered assets) to the 2016 Noteholders. Unfortunately, the fix proposed by the Debtors – the Litigation Trust – is not an actual fix. Rather, it is just a different vehicle that provides substantially all value to the 2016 Noteholders.

2. The Plan is fatally flawed because it is premised upon an unsupported valuation of the Reorganized Debtors ($8.5 million) that has been used to justify an incredibly large deficiency claim for the 2016 Noteholders ($89.5 million). Although the Debtors have no doubt suffered a loss of value due to the FCC's decision to cancel a majority of the Debtors' FCC Licenses, the Reorganized Debtors should be valued at substantially more than $8.5 million based upon the Partial Portfolio of licenses that they still retain. A valuation of the Reorganized Debtors based solely on potential revenue from just one spectrum leasing agreement already executed by the Debtors yields a total enterprise value more than the value being asserted by the Debtors. The valuation only increases thereafter when one considers additional leasing agreements that the Reorganized Debtors will assume or are expected to enter into upon emergence. As discussed more fully below, the Debtors must reduce the 2016 Deficiency Claim to an amount that reflects an appropriate valuation of the Reorganized Debtors.

3. The Debtors must also modify the Plan so that value is distributed appropriately in the event that the Debtors successfully appeal the FCC's decision to terminate

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[1] Capitalized terms used in the Preliminary Statement shall have the meanings ascribed below. All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Plan.

the FCC Licenses. Throughout these cases, the Committee has been supportive of the Debtors' efforts to challenge and appeal the FCC's decision. It is the Committee's view that such a reversal would be the only way that the Debtors and/or Reorganized Debtors achieve a valuation that would satisfy all of the Debtors' prepetition debt. Although the Committee has advocated for the pursuit of the Estate D&O Claims for the benefit of general unsecured creditors, such claims represent only a chance to recover a small percentage of the debt owed to unsecured creditors. A successful appeal is certainly a better outcome for these chapter 11 cases and it appears to be a real possibility given the sums and efforts being expended to either reverse the FCC Opinion or reach some other resolution with the FCC. If the appeal is successful, general unsecured creditors are entitled to share in the value of a reorganized entity if the senior secured creditors' claims are satisfied. The Debtors have not satisfied their burden of showing that the 2016 Noteholders are entitled to receive all of the potential upside associated with the Full Portfolio and, based upon the Committee's analysis, the Debtors will be unable to do so.

4. The Committee also objects to certain terms of the Litigation Trust Agreement. The Debtors have used the Litigation Trust and the Trust Advisory Board as an alternative mechanism to give the 2016 Noteholders complete control over the causes of action that the 2016 Noteholders would have directly retained under the prior versions of the Plan. The only assets that are being transferred to the Litigation Trust are the Estate D&O Claims and the Avoidance Actions (*i.e.*, causes of action that are unencumbered and intended to benefit general unsecured creditors). Given the lack of support for granting the 2016 Noteholders an $89.5 deficiency claim, it is inappropriate to give the 2016 Noteholders complete control over the Litigation Trustee and the Litigation Trust Claims.

5. The Committee also objects to the releases contained in the Plan. The Fifth Circuit has expressly prohibited the non-debtor releases contained in the Plan and the Debtors cannot justify such broad releases under the circumstances of these cases. Even in other circuits that permit releases in favor of non-debtors in extraordinary circumstances, such releases should be provided to a party only when the reorganization would be jeopardized in the absence of the release or the party is making a substantial contribution to the bankruptcy estate in exchange for the release. Here, the 2016 Noteholders are making no such contribution. Rather, they are attempting to extract more value from the Debtors' estates than they are entitled to and should not be rewarded with a release.

6. Based upon the objections as more fully set forth herein, the Committee requests that the Court deny confirmation of the Plan.

BACKGROUND

7. On July 17, 2012 (the "**Petition Date**"), each of the Debtors filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code (the "**Chapter 11 Cases**"). The Debtors continue to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

8. On July 26, 2012, the Office of the United States Trustee for the Northern District of Texas appointed the Committee pursuant to section 1102 of the Bankruptcy Code. No trustee or examiner has been appointed in the Chapter 11 Cases.

9. On August 6, 2013, the Committee filed the *Motion for Authority to Commence Certain Actions on Behalf of and for the Benefit of the Debtors' Estates* [Docket No. 875] (the "**Standing Motion**"). By the Standing Motion, the Committee sought authority to commence and prosecute certain claims and/or causes of action (the "**Estate D&O Claims**")

against the Debtors' current and former directors and officers (the "**D&Os**"), and any professionals that may have advised the D&Os, for breach of their fiduciary duties in connection with, *inter alia,* failure to maintain and preserve the Debtors' national spectrum of 24 GHz and 39 GHz wide-area spectrum licenses (the "**FCC Licenses**"). On August 30, 2013, the Debtors, the Ad Hoc 2016 Committee and the 2016 Agent filed objections to the Standing Motion which, among other things, asserted that the 2016 Noteholders had a lien on the Estate D&O Claims. On October 24, 2013, the Committee filed a reply to the objections [Docket No. 972].

10. On September 16, 2013, the Debtors filed a plan and disclosure statement. Multiple revised versions of the plan and disclosure statement were filed thereafter in advance of the hearing to approve the disclosure statement. On October 25, 2013, the Committee filed an objection to the disclosure statement.

11. On October 29, 2013, the Court held a joint hearing on the approval of the disclosure statement and the Standing Motion (the "**October 29 Hearing**"). At the October 29 Hearing, the Court approved the disclosure statement subject to certain modifications and denied the Standing Motion without prejudice. With respect to the disclosure statement, the Court ordered that the Debtors include additional information regarding the lien dispute on the Estate D&O Claims. The Court also ordered additional briefing on such lien dispute so that the Court could render a decision with respect to that issue prior to confirmation. Pursuant to the briefing schedule agreed at the October 29 Hearing, the 2016 Noteholders were to file an opening brief by November 10, 2013. The Court further ordered that the plan and disclosure statement would be modified to provide for a vehicle for avoidance actions and their proceeds to be distributed to unsecured creditors.

12. On December 4, 2013, the Debtors filed the *Debtors' Second Amended Joint Plan of Reorganization* [Docket No. 1007] (the "**Plan**") and a revised disclosure statement [Docket No. 1009] (the "**Disclosure Statement**"). As with all prior versions, the Plan contemplates that the 2016 Noteholders will receive one hundred percent (100%) of the new common equity in the Reorganized Debtors. Among other changes, the revised Plan now contemplates a Litigation Trust for the benefit of unsecured creditors to hold and administer the Litigation Trust Assets (consisting of claims or Causes of Action arising under Chapter 5 of the Bankruptcy Code (the "**Avoidance Actions**") and the Estate D&O Claims or the proceeds thereof).[2] Additionally, the Plan provides that the 2016 Noteholders will receive an Allowed 2016 Deficiency Claim in the amount of $89,529,772. The 2016 Deficiency Claim will be entitled to its pro rata share of Litigation Trust Interests together with other holders of Allowed General Unsecured Claims. On December 5, 2013, the Court entered an order approving the Disclosure Statement for the Plan.

13. On January 3, 2014, the Debtors filed the Plan Supplement [Docket No. 1029], including the proposed Litigation Trust Agreement [Exhibit E to the Plan Supplement] (the "**LTA**"). The Beneficiaries of the Litigation Trust are holders of (a) Allowed 2016 Deficiency Claims, (b) Allowed 2016 Guaranty Deficiency Claims, (c) Allowed 2012 Claims; (d) Allowed 2012 Guaranty Claims, and (e) Allowed General Unsecured Claims. The Litigation Trust Agreement provides for a Trust Advisory Board that "will oversee, review, and guide the activities and performance of the Litigation Trustee." LTA § 6.1(a). The Trust Advisory Board will initially be composed of two (2) members designated by the Ad Hoc 2016 Committee and

[2] No party filed an opening brief regarding whether the 2016 Noteholders have a lien on the Estate D&O Claims. By putting the Estate D&O Claims into the Litigation Trust for the benefit of unsecured creditors, the Debtors and the 2016 Noteholders have effectively conceded the issue.

one (1) member selected by the Committee. Id. Actions by the Litigation Trustee will generally be subject to approval of a majority of the Trust Advisory Board, except in certain circumstances that require unanimous approval. Pursuant to the Litigation Trust Agreement, the Litigation Trustee shall not pursue the Estate D&O Claims during the pendency the appeal of the FCC Opinion, and neither the Litigation Trust nor the Litigation Trustee may take any action in connection with the Estate D&O Claims until such time as (i) the Debtors' pending appeal of the FCC Opinion has been fully and finally resolved with the FCC, or (ii) there is a final disposition of such appeal. LTA § 4.6(d). Further, the Litigation Trustee may not take any action in connection with the Estate D&O Claims without the unanimous approval of the Trust Advisory Board. LTA § 4.2(viii).

ARGUMENT

I. The Plan Does Not Reflect an Appropriate Value for the Reorganized Debtors.

14. Throughout all versions the chapter 11 plans proposed in these cases, the Debtors have attempted to turn over all value to the 2016 Noteholders and leave virtually nothing for the unsecured creditors. After the Committee demonstrated that the Debtors were providing certain unencumbered assets solely to the 2016 Noteholders (*i.e.*, the Estate D&O Claims and the Avoidance Actions), the Debtors formulated the Litigation Trust to be established for the benefit of unsecured creditors and to hold and administer such causes of action. However, any benefit for general unsecured creditors from the Litigation Trust is almost entirely swallowed by the large deficiency claim that the Debtors are improperly granting to the 2016 Noteholders. Upon information and belief, the Allowed 2016 Deficiency Claim is based upon a strikingly low value of the Reorganized Debtors of $8.5 million.[3] The Committee submits that the Debtors have not

[3] $131,779,772 (Prepetition 2016 Claims) - $33,750,000 (cash distributions to holders of 2016 Notes during the bankruptcy case) - $8,500,000 (purported value of Reorganized Debtors) = $89,529,772.

established that the 2016 Noteholders are entitled to a deficiency claim in the amount of $89,529,772.

15. According to the Disclosure Statement, the Reorganized Debtors intend to continue the development and utilization of their 24 GHz and 39 GHz Spectrum Portfolio and will make its spectrum available for lease to other service providers. Currently, the Debtors own forty-nine (49) wide area licenses across both the 24 GHz and 39 GHZ bands (the "**Partial Portfolio**"). The Debtors are also engaged in an appeals process with the FCC for an additional 691 licenses that the FCC cancelled in November 2012 (together with the Partial Portfolio, the "**Full Portfolio**"). The financial projections set forth in the Disclosure Statement and which allegedly support the Debtors' Plan account for the continued legal expense of the appeals process and a go-forward business plan surrounding the 49 licenses that the Debtors still own. Neither the Plan nor the projections account for the possibility that the Debtors' appeal will be successful and that they retain some or all of the cancelled licenses.

A. The Plan Does Not Reflect an Appropriate Value of the Partial Portfolio

16. Although the valuation assumes that the Reorganized Debtors only hold the Partial Portfolio, the Debtors' own business transactions do not support such a low enterprise value. In September 2013, the Debtors entered into a Master Spectrum Lease Agreement with Vivint Wireless, Inc. (the "**Vivint Agreement**"). The Committee's professionals have analyzed the revenue that could be generated under the Vivint Agreement.[4] Using common valuation principles and taking into account only certain licenses fees payable under the Vivint Agreement, the total enterprise value of the Reorganized Debtors is approximately $9.9 million – more than the valuation of the Reorganized Debtors that is being put forth in the Plan. Id. ¶¶ 9 - 15.

[4] See Declaration of Matthew F. Flynn in Support of the Objection of the Official Committee of Unsecured Creditors to the Debtors' Second Amended Joint Chapter 11 Plan (the "**Flynn Declaration**") filed under seal contemporaneously with the Objection.

17. The Vivint Agreement is only one transaction that has been signed by the Debtors. According to the Disclosure Statement, the Debtors' go-forward business plan includes making its spectrum available for lease to other service providers and using the Spectrum Portfolio to provide backhaul networks supporting "small cell" networks. Given the finite amount of spectrum and other factors in the wireless industry, it is safe to assume that the Debtors will enter into additional leasing agreements similar to, or even more favorable than, the Vivint Agreement. Id. ¶¶ 16, 18. Additional transactions, such as the Vivint Agreement, will only increase the amount of revenue generated by the Debtors, which in turn will increase the total enterprise value. In fact, the Debtors recently filed Schedule 9.1(a) to the Plan as part of the Plan Supplement which identifies the executory contracts and unexpired leases to be assumed by the Plan. Such schedule includes fifteen (15) additional spectrum leases and potentially provides additional revenue to the Reorganized Debtors.

18. The Committee does not have access to the terms of the spectrum leases identified on Schedule 9.1(a) and it is, of course, impossible to predict with certainty the revenue that will be generated by all additional transactions that will be entered into by the Reorganized Debtors. The Committee's analysis takes a conservative approach and assumes that additional revenues will be generated if the Reorganized Debtors enter into only one or two additional leasing agreement (on terms identical to the Vivint Agreement). Id. ¶ 19. Based solely on the Reorganized Debtors' business that includes the Vivint Agreement for the Partial Portfolio plus one or two additional leasing agreements, the Total Enterprise Value of the Debtors would be approximately $23.4 million and $36.9 million, respectively. Id. ¶¶ 19 – 21.

19. The above analysis shows that the valuation of the Reorganized Debtors holding the Partial Portfolio (which has been used to determine the 2016 Deficiency Claim) is

unjustifiably low. It fails to account for the Debtors' own business plan in which they intend to enter into additional leasing agreements and similar transactions. The Court should deny confirmation until the Debtors put forth a plausible valuation and 2016 Deficiency Claim that is supportable under the circumstances.

B. The Plan Does Not Account for the Value Associated with the Full Portfolio.

20. As noted above, the Debtors have been pursuing an appeal of the FCC's decision to terminate 691 of the Debtors' FCC Licenses. Indeed, the Debtors' estates have been charged well over $1 million in fees by the law firms serving as the Debtors' Special FCC Counsel to pursue the appeal. This is a convincing suggestion that the Debtors (and the 2016 Noteholders whose cash collateral is funding the appeal) believe that that there is a strong likelihood that the Debtors will be successful in having some or all of the FCC Licenses reinstated through litigation or settlement with the FCC. The Plan, however, does not contain any mechanism to adjust for the possibility that the Debtors will get back the Full Portfolio. Should the 2016 Noteholders be the sole beneficiary of all the additional value with respect to the reinstated licenses and still retain an $89.5 million deficiency claim if the appeal is successful? **Absolutely not.** The Debtors' Plan cannot be confirmed without addressing this critical valuation issue. The Debtors and 2016 Noteholders have not shown that they are entitled to take all of the value of the Full Portfolio (assuming a successful appeal) and leave nothing behind for general unsecured creditors.

21. If the Debtors were to receive the Full Portfolio back from the FCC, there is potentially enough value to pay the 2016 Noteholders in full and provide a recovery to general unsecured creditors. Flynn Declaration ¶ 35. Indeed, by entering into the Vivint Agreement, the Debtors have already signed a potential revenue generating agreement for the Full Portfolio even

before the fate of the Debtors' terminated licenses has been finally determined. According to the Disclosure Statement, the Vivint Agreement allows Vivint Wireless to lease the terminated licenses in the event that the FCC grants the Petition for Reconsideration. Therefore, it is possible to determine the potential revenue that would be generated by the Debtors under the Vivint Agreement if the Debtors' appeal is successful.

22. If Vivint Wireless leases the Full Portfolio under the terms of the Vivint Agreement, the potential monthly and annual revenues are significantly increased. Id. ¶ 23. Using the same valuation methodologies as the Partial Portfolio, the Total Enterprise Value of the Reorganized Debtors would be approximately $86.5 million based on the Vivint Agreement for the Full Portfolio. Id. ¶¶ 24 - 29. The enterprise value of the Reorganized Debtors will be further increased if the Debtors enter into similar leasing agreements for the Full Portfolio with other customers. The Reorganized Debtors could achieve a Total Enterprise Value of approximately $218.2 million assuming just one additional leasing agreement. Id. ¶¶ 30 - 34. These valuations highlight why the Debtors would spend significant sums of money to purse the FCC appeal and sign agreements relating to the Full Portfolio. They are doing so, however, all for the sole benefit of the 2016 Noteholders and are seeking to confirm a plan that provides only illiquid causes of action to the general unsecured creditors *diluted by an $89.5 million deficiency of the 2016 Noteholders*. The Plan cannot be confirmed until the Debtors fix these incredible deficiencies and provide a mechanism for value to be appropriately distributed in the event of a successful appeal at the FCC.

II. The Litigation Trust Agreement Gives Complete Control of the Litigation Trust Assets to the 2016 Noteholders.

23. As noted above, the Debtors recently revised their Plan to provide for a Litigation Trust for the alleged benefit of the Debtors' general unsecured creditors. The only

assets that are being transferred to the Litigation Trust are claims and causes of the action that are not encumbered by the lien of the 2016 Noteholders (*i.e.*, the Estate D&O Claims and Avoidance Actions). The Litigation Trust, however, as evidenced by the Litigation Trust Agreement, gives no real assurances to general unsecured creditors that the Litigation Trust Claims will be pursued for their benefit. Just as the original plan provided that all causes of action (even those that were unencumbered) would be retained by the Reorganized Debtors (and effectively for the benefit of the 2016 Noteholders), the amended Plan has the same effect of giving the 2016 Noteholders complete control over the Litigation Trust Claims and making the 2016 Noteholders the primary beneficiary of any proceeds arising from the Litigation Trust Claims. The Committee objects to the Litigation Trust as currently proposed because it potentially offers absolutely nothing to the Debtors' general unsecured creditors.

24. The Litigation Trust is primarily flawed because the Debtors seek to establish a Trust Advisory Board that will have absolute authority over the Litigation Trust and will be majority represented by the 2016 Ad Hoc Committee. LTA § 6.1(a). Presumably, the Debtors believe this is justifiable because they assert that the 2016 Noteholders are the Debtors' largest unsecured creditor by way of their allowed $89.5 million deficiency claim. As shown above, the 2016 Deficiency Claim is grossly overstated and should not be approved by the Court. It is the holders of General Unsecured Claims, whose claims may be as high as $44 million according to the Disclosure Statement, that should have majority representation on the Trust Advisory Board. Therefore, the composition of the Trust Advisory Board under the Litigation Trust Agreement should also not be approved by the Court.

25. The Litigation Trust Agreement also makes the pursuit of the Estate D&O Claims illusory. Pursuant to Section 4.6(d), the Litigation Trustee cannot take *any action* in

connection with the Estate D&O Claims until the Debtors' appeal rights of the terminated licenses have been exhausted. First, it is inappropriate and unduly burdensome to prohibit "any action" while the FCC Claims are pending. There are numerous activities that the Litigation Trustee may wish to undertake that would be "in connection" with the Estate D&O Claims and yet would have no effect whatsoever on the pending FCC Claims. Second, it would still be objectionable even if the Litigation Trust Agreement were to be amended to prohibit only the commencement and prosecution of the Estate D&O Claims while the FCC Claims were pending. As it currently stands, the majority of the Debtors' spectrum portfolio was terminated and general unsecured creditors are being presented with a plan that provides them with no distribution other than causes of action. Those are the facts and, accordingly, there are colorable claims against the defendants of the Estate D&O Claims for losing the FCC Licenses. The fact that the defendants may later have a defense to the Estate D&O Claims if the FCC reverses its decision does not mean that the claims do not exist today or that they should not be pursued. The Debtors have been pursuing the appeal of the terminated license for over a year already. It is not reasonable to suggest that the Estate D&O Claims would be finally adjudicated before the appeal is concluded. Therefore, there is unlikely to be any prejudice to the Reorganized Debtors if the Estate D&O Claims are pursued prior to a final determination of the FCC Claims.

26. Additionally, there may well be damages even if the FCC Licenses are reinstated. Such damages could include all of the costs associated with the pursuit of reinstatement. Further, all of the costs of these Chapter 11 Cases may have been obviated if not for the decisions of the Debtors' directors and officers with respect to the FCC Licenses. Therefore, the restriction on pursuing the Estate D&O Claims during the pendency of the FCC appeal should be removed from the Liquidating Trust Agreement.

27. The Litigation Trust is further hampered by onerous provisions in the Litigation Trust Agreement. The Committee finds the following provisions highly objectionable.

- Section 4.2(viii): This provision provides the Litigation Trustee with the authority to deal with the Litigation Trust Claims, *"provided, however,* that any action taken by the Litigation Trustee in connection with the Estate D&O Claims shall be subject to unanimous approval by the Trust Advisory Board." This provision gives the 2016 Noteholders complete authority over the Estate D&O Claims through the unanimous approval requirement and composition of the Trust Advisory Board. This is inappropriate for the reasons noted above. (See also Section 6.1(a) providing for approval of the Trust Advisory Board with respect to any action taken in connection with the Estate D&O Clams).

- Section 4.2(iii): This provision requires a majority approval of the Trust Advisory Board "to enter into, perform and exercise rights under contracts binding upon the Litigation Trust (but not upon the Litigation Trustee in its respective individual or corporate capacity) which are reasonably incidental to the administration of the Litigation Trust and which the Litigation Trustee, in the exercise of its best business judgment, reasonably believes to be in the best interests of the Litigation Trust." First, the composition of the Trust Advisory Board gives control to the 2016 Noteholders over all actions taken pursuant to Section 4.2(iii) and the Committee objects to such control. Second, the provision is unduly burdensome. The Litigation Trustee should not be required to obtain approval of the Trust Advisory Board for the exceptionally broad actions as required by the provision. The Litigation Trustee should be afforded the discretion to act in its best business judgment on such matters without obtaining prior approval.

28. The Litigation Trust should benefit the Debtors' general unsecured creditors – not the 2016 Noteholders through an artificially created deficiency claim and complete control of the administration of the Litigation Trust. The Committee respectfully requests that the Court deny confirmation of the Plan until the Litigation Trust is appropriately modified.

III. The Releases Provided in the Plan are Not Permitted in this Circuit

29. The Plan contains broad release and exculpation provisions in favor of, among others, the Debtors, the 2016 Noteholders, and each of their current and former officers,

directors, members, employees, agents, representatives, financial advisors, professionals, accountants, and attorneys (collectively and as otherwise defined in the Plan, the "**Released Parties**"). The amended Plan carved out the Estate D&O Claims and Avoidance Actions from the causes of action to be released. Notwithstanding such revisions, the Committee is still compelled to object to the release provisions because the releases proposed under the Plan are unduly broad, overreaching, and do not comport with cases which have addressed the propriety and applicable standards for the granting of releases.[5]

30. The Fifth Circuit has expressly prohibited non-consensual non-debtor releases and takes a stricter approach to bankruptcy plan releases than some of its sister circuits. Recently, the Fifth Circuit reiterated this view consistent with prior rulings that "seem broadly to foreclose on non-consensual non-debtor releases and permanent injunctions." See Ad Hoc Group of Vitro Noteholders v. Vitro, S.A.B. de C.V. (In re Vitro, S.A.B. de C.V.), 701 F.3d 1031, 1061 (5th Cir. 2012) (citing Bank of New York Trust Co., NA v. Official Unsecured Creditors' Comm. (In re Pacific Lumber Co.), 584 F.3d 229, 252 (5th Cir. 2009)). In Vitro, the Fifth Circuit noted that even its sister circuits that have permitted non-debtor releases have "prohibit[ed] such releases in all but the rarest of cases." Id.

31. The Fifth Circuit's prohibition of non-debtor releases stems largely from the correct interpretation of Section 524(e) of the Bankruptcy Code. Section 524(e) provides that "discharge of a debt of the debtor does not affect the liability of any other entity . . . on such debt." 11 U.S.C. § 524(e). In Pacific Lumber, the Fifth Circuit relied on prior rulings finding that "Section 524(e) only releases the debtor, not co-liable third parties." 584 F.3d at 252. Section 524(e) also provided the basis for the Fifth Circuit to deny non-debtor releases in Feld v.

[5] The Committee also joins and adopts the *Objection of U.S. Bank Nation al Association, as Indenture Trustee and Collateral Agent, to Confirmation of Debtors' Second Amended Joint Chapter 11 Plan* [Docket No. 1031].

Zale Corp., 62 F.3d 746 (5th Cir. 1991). In Zale Corp, the Fifth Circuit held "the permanent injunction as entered improperly discharged potential debt of . . . a nondebtor." 62 F.3d at 761. The release at issue in Zale Corp arose in the context of an injunction in a settlement, however, Zale Corp, has been extended by this Court to release provisions in a reorganization plan. See In re Wool Growers Central Storage Co., 371 B.R. 768 (Bankr. N.D. Tex. 2007). Similarly, following the Fifth Circuit's decision in Pacific Lumber, this Court unequivocally held that "[b]ecause *Pacific Lumber* is binding precedent, the court may not, over objection, approve through confirmation of the Plan third-party protections, other than those provided to the [unsecured and equity committees], members of the [unsecured and equity committees], and the [unsecured and equity committee]'s Professionals." In re Pilgrim's Pride Corp., 2010 Bankr. LEXIS 72, *16 (Bankr. N.D. Tex. January 14, 2010).

32. The Fifth Circuit and its lower courts have been clear in its message that non-consensual releases of third parties will not be approved. Although the Fifth Circuit recognizes that its view on the subject is not universally shared, other circuits do not permit third party releases except in unusual circumstances. According to the Second Circuit, non-debtor releases are only proper in rare cases and when the estate receives substantial consideration. See Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.), 416 F.3d 136, 141-42 (2d Cir. 2005). In fact, in Metromedia, the Second Circuit stated "[a] nondebtor release in a plan of reorganization should not be approved absent the finding that truly unusual circumstances render the release terms important to the success of the plan. . . ." Id. at 143; see also In re Delphi Corp. 2009 WL 2482146, *19 (Bankr. S.D.N.Y. 2009) (Drain, J.) (confirming a plan with third party releases supported by "truly unusual circumstances", and finding that (a) the consideration provided by the releasees constituted a material, substantial

contribution to the debtors' estates, which contribution would not have been made absent the releases, (b) the contribution was necessary to the success of the plan, (c) the breadth of the releases was necessary to the plan and bore a reasonable relationship to the protection of the debtors' estates, and (d) the releases were integral elements of the restructuring and resolution of the debtors' cases).

33. Even if the Court were to adopt a lesser standard (which it may not do so under the binding Fifth Circuit precedent), the facts of this case are not comparable to the aforementioned standards in other circuits. Here, there has been no showing that the releases are important to the success of the Plan or that the estate has received substantial consideration in return for the releases. For example, there is no reason to give the 2016 Noteholders a release because the Plan is simply distributing the equity of the Reorganized Debtors to the 2016 Noteholders in satisfaction of their liens. The releases are not necessary to the reorganization because the Committee cannot envision how the Plan could be any worse or how any other stakeholders could be adversely affected if the releases were not given. Indeed, as shown above, the 2016 Noteholders are severely overreaching with respect their deficiency claim under the current Plan rather than making any kind of contribution. There is no justification for giving the 2016 Noteholders a release under the current circumstances.

34. The proposed releases are especially troublesome to the Committee given the circumstances of this case and the consistent attempts by the 2016 Noteholders to control the Chapter 11 Cases and retain all value. Under the Plan, there remains a real possibility that the Reorganized Debtors will receive back the Full Portfolio with value in excess of the 2016 Noteholders' debt and all other creditors are left with interests in the Litigation Trust that has no viable claims or prospects for recovery. The effect, in sum, is that the 2016 Noteholders will

have used the chapter 11 process to take ownership of the Debtors' valuable spectrum portfolio and cut out all general unsecured creditors from sharing in any of that value. The Committee is not willing to consent to a release for the 2016 Noteholders under these circumstances. Accordingly, the Committee respectfully submits that the proposed releases are prohibited in the Fifth Circuit and render the Plan unconfirmable. Any attempt by the Debtors to distinguish the facts of this case must be rejected because "there is nothing in the *Pacific Lumber* opinion which . . . can reasonably be read to limit its ruling to the facts of that case." Pilgrim's Pride, 2010 Bankr. LEXIS 72 at *16.

IV. Miscellaneous Objections to the Plan

A. The Definition of Estate D&O Claims Should Be Consistent with the Definition in the Committee's Standing Motion.

35. In the Committee's Standing Motion, the definition of Estate D&O Claims was defined as "actions against the D&Os and any professionals that may have advised the D&Os in connection with, *inter alia*, failure to maintain and preserve the FCC Licenses." See Standing Motion at 3-4. The Plan and the Litigation Trust Agreement define Estate D&O Claims as "such claims against the Debtors' current and former directors and officers asserted by the Committee in the [Standing Motion]." See Plan §1.1; LTA §2.2(a). The primary difference between the conflicting definitions is that the Estate D&O Claims as defined in the Standing Motion included possible causes of action against professionals that may have advised the D&Os.

36. As noted above, the proposed releases under the Plan are broad and include the professionals of the Debtors and their D&Os. The release section excludes releases of the Estate D&O Claims, but such exclusion would not apply to professionals under the definition in the Plan. In bringing the Standing Motion, the Committee recognized that the

D&Os may assert, among other defenses, that they relied upon the advice of their professionals. Accordingly, the Committee tailored the definition of Estate D&O Claims to bring such causes of action against the professionals as appropriate. The Committee requests that the definition in the Plan and Liquidating Trust be modified to be consistent with the definition in the Standing Motion so that such claims against the professionals are preserved and not released as part of the Plan.

B. The Committee's Professionals Should Be Compensated for Work Related to Final Fee Applications.

37. Section 6.10 of the Plan provides that the Committee will be dissolved on the Effective Date; *provided, however,* the Committee will exist, and its professionals retained, after the Effective Date with respect to applications filed to Sections 330 and 331 of the Bankruptcy Code. This provision is appropriate and necessary because the Committee's professionals will be required to prepare a final fee application and attend any hearings as may be scheduled by the Court. The Committee also has the fiduciary duty to review fee applications of other professionals in the Chapter 11 Cases as it has done with all prior fee applications. Section 6.10 of the Plan continues, however, to provide that "neither the Debtors nor the Reorganized Debtors shall be responsible for paying any fees or expenses incurred by any Committee after the Effective Date." The effect of Section 6.10 is that the Committee's professionals will incur fees for the preparation and review of final fee applications after the Effective Date and the Reorganized Debtors will have no obligation to pay such fees. The Committee is unsure if this is an intentional effect of Section 6.10 and requests modification so that the Committee's professionals may be compensated for their duties with respect to fee applications under the Bankruptcy Code and this Court's interim compensation order.

CONCLUSION

38. Based upon the foregoing, the Plan is not confirmable because (a) the Plan does not reflect an accurate or supportable valuation of the Reorganized Debtors; (b) the Plan and Litigation Trust Agreement provide complete control over the Estate D&O Claims and Avoidance Actions to the 2016 Noteholders; and (c) the Plan includes broad releases that are prohibited in this Circuit. The Committee respectfully requests that the Court deny confirmation of the Plan.

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WHEREFORE, the Committee respectfully requests that the Court deny confirmation of the Plan and grant such other and further relief as is just and proper.

DATED: January 8, 2014

By:/s/ Michael D. Warner
Michael D. Warner, Esq. (TX Bar No. 00792304)
COLE, SCHOTZ, MEISEL, FORMAN &
LEONARD, P.A.
301 Commerce Street, Suite 1700
Fort Worth, TX 76102
Telephone: (817) 810-5250
Facsimile: (817) 810-5255
Email: mwarner@coleschotz.com

and

David M. Posner, Esq. (Admitted *Pro Hac Vice*)
Kevin Zuzolo, Esq. (Admitted *Pro Hac Vice*)
OTTERBOURG P.C.
230 Park Avenue
New York, NY 10169-0075
Telephone: (212) 661-9100
Facsimile: (212) 682-6104
Email: dposner@otterbourg.com
Email: kzuzolo@otterbourg.com

COUNSEL FOR THE OFFICIAL COMMITTEE
OF UNSECURED CREDITORS