To: DC Secretary

Re: Issue Number 2019022501 (Bankruptcy Credit Event in respect of Windstream Services, LLC)

Date: March 11, 2019

Pursuant to Rule 3.3(d) of the 2018 ISDA Credit Derivatives Determinations Committee Rules (September 28, 2018 version) (the "DC Rules"), we, an Eligible Market Participant, hereby challenge the inclusion on the Supplemental List of (a) all of the New Notes (as defined below) bearing the CUSIPs 97381LAA6 and U9701LAA1 and (b) the Original Notes (as defined below) held by Aurelius Capital Master, Ltd. ("Aurelius") bearing the CUSIP 97381WAZ7 (such Original Notes, the "Aurelius Notes" and, together with the New Notes, the "Challenged Obligations").[1] Further, as required by Section 3.3(c) of the DC Rules to the extent this challenge with respect to the New Notes and the Aurelius Notes is unsuccessful, we hereby agree to pay the reasonable costs (if any) on a pro rata basis, incurred under Section 3.3(e) of the DC Rules. Capitalized terms used but not defined herein shall have the meanings set forth in the 2014 Credit Derivatives Definitions (the "2014 Definitions") and the 2003 Credit Derivatives Definitions (the "2003 Definitions" and together with the 2014 Definitions, the "Definitions"), or otherwise in the DC Rules.

For the following reasons, we believe that members of the Convened DC should Resolve not to include any of the Challenged Obligations on the Final List.

- The New Notes lack material documentation that must be reviewed and evaluated by the Convened DC to determine whether the New Notes satisfy the Deliverable Obligation Characteristics.

- Because the Outstanding Principal Balance ("OPB") of the New Notes cannot be determined with reasonable certainty, the Convened DC cannot determine whether the New Notes qualify as Deliverable Obligations under the 2003 Definitions or what the value of the instrument would be, which would result in an indeterminable Auction Final Price.

- Because the Aurelius Notes may be subject to equitable subordination by the Bankruptcy Court (as defined below), which would constitute a Prohibited Action that would result in the Aurelius Notes potentially having an Outstanding Principal Balance of zero (and therefore not qualify as Deliverable Obligations under the 2014 Definitions) and would cause the Aurelius Notes to fail the Not Contingent Deliverable Obligation Characteristic under the 2003 Definitions.

[1] If the Convened DC Resolves by a Supermajority pursuant to Section 3.2(d) of the DC Rules to amend the Credit Derivatives Auction Settlement Terms to prevent the delivery of any Aurelius Notes into the Auction, we would only challenge the inclusion on the Initial List of the Aurelius Notes. If, however, the Convened DC does not so Resolve, for all the reasons set forth herein, we challenge the inclusion on the Initial List of all Original Notes (approximately 64% of which are Aurelius Notes).

Given these problems in assessing key characteristics of the Challenged Obligations (each of which is discussed in more detail below), the Convened DC should not include them on the Final List. In considering whether an obligation should be included on the Final List, the Convened DC must put itself in the position of a credit protection seller accepting Delivery of such obligation. Credit protection sellers expect and demand certainty that instruments deliverable in the Auction are in fact Deliverable Obligations. Given the lack of any material documentation or a method for determining the OPB, there is no way to determine whether the New Notes constitute Deliverable Obligations or what their value should be in the Auction. Due to the much publicized possibility that the Aurelius Notes will be equitably subordinated by the Bankruptcy Court, requiring a credit protection seller to accept delivery of the Aurelius Notes would force such a seller to accept delivery of a note that may fail to meet even the basic characteristic of being Not Contingent under the 2003 Definitions or that have an Outstanding Principal Balance of zero under the 2014 Definitions. Including the Challenged Obligations on the Final List will likely result in artificially low Auction Final Prices, will not deliver to protection sellers and recipients of physical delivery the benefit of their bargain, and utterly destroy the integrity of the Auction. The Convened DC should avoid these consequences and reject inclusion of the Challenged Obligations on the Final List, instead setting a precedent that protects the certainty valued by purchasers and sellers of credit protection.

We set forth our concerns in more detail below.

The New Notes Lack Material Documentation Necessary to Evaluate their Deliverability.

1. Pursuant to Sections 3.3(b) and (c) of the DC Rules, in order to include an instrument on the Initial List or the Supplemental List, "all material documentation, including offering documents, pricing supplements, indentures and, as applicable, guarantees, or, in each case, equivalent documentation" must be provided. Such information is necessary so that the Convened DC can, among other things, evaluate whether the instrument satisfies the Deliverable Obligation Characteristics. In this case, the relevant material documentation for the New Notes cannot be provided because no such documentation exists.

2. The New Notes are not governed by the indenture governing the Original Notes (pursuant to which they were purported to be issued) and there is otherwise no Publicly Available Information that can properly be evaluated by the Convened DC to determine the deliverability of the New Notes.

    a. On November 6, 2017, Windstream Services, LLC and Windstream Finance Corp. (together, the "Issuers") purported to issue certain "Additional Notes" in the aggregate principal amount of $553,700,000 (the "New Notes") under the Indenture dated as of January 23, 2013 (the "2013 Indenture"), which governs the terms of the Issuers' 6 $^{3}/_{8}$% Senior Notes due 2023 originally issued on or about January 23, 2013 (the "Original Notes").[2]

    b. Aurelius subsequently sought a declaration in a case (case number 17-CV-7857 (JMF)) pending in the United States District Court for the Southern District of

[2] Approximately $464,979,000 aggregate principal amount of Original Notes remain outstanding.

New York (the "District Court") that the New Notes were issued in breach of the 2013 Indenture and do not constitute "Additional Notes" that are governed by the 2013 Indenture.

c. Following a trial, the District Court held, in a written decision dated and entered on the court's official docket on February 15, 2019, that "the New Notes do not constitute 'Additional Notes' within the meaning of the [2013] Indenture" and that those New Notes were, therefore, ineligible to consent to certain proposed amendments to the 2013 Indenture.

    i. The District Court explicitly recognized that because the New Notes are not Additional Notes, holders of the New Notes would have no "rights under the [2013] Indenture, including the right to vote on waivers and amendments[.]" The District Court does not at any point limit its holding to the voting provisions of the 2013 Indenture, and indeed there is no language within the 2013 Indenture that would allow notes that are not Original Notes or Additional Notes to be governed by the 2013 Indenture without holding any voting rights thereunder.

    ii. The relief granted by the District Court does not include any equitable modification or reformation of the express terms of the 2013 Indenture to address this issue. The District Court's decision (perhaps intentionally) does not contain any finding or declaration as to what documentation, if any, governs the New Notes. The District Court's decision is clear, however, that the New Notes are **not** governed by the 2013 Indenture.

d. The 2013 Indenture by its terms governs only "Notes", a term which is defined to mean the Original Notes and any Additional Notes issued thereafter. It does not govern any other type of note or instrument.

    i. As noted above, the District Court's decision is emphatically clear that the New Notes are not Additional Notes. **There is no avenue by which newly issued notes (notes other than the Original Notes) may be governed by the 2013 Indenture other than by being Additional Notes.** *A fortiori*, because the New Notes are not Original Notes or Additional Notes, the New Notes are not, and cannot be, Notes governed by the 2013 Indenture.

e. The precise nature and validity (or invalidity) of the obligations, if any, of the Issuers in connection with the New Notes is irrelevant to the Convened DC; but what is relevant is that the District Court has made a binding decision that the New Notes are not obligations governed by the 2013 Indenture.[3]

[3] Aurelius, and other market participants, have questioned the fundamental validity of the New Notes (see the press release dated February 19, 2019 in which Aurelius described the New Notes as having "dubious status"). The District Court pointedly and expressly declined to rule one way or the other on the validity or potential invalidity of

3. While the form of the New Notes does not appear to be publicly available,[4] it is likely similar to the form of the Original Notes under the 2013 Indenture. Assuming that it is, the certificated New Notes (if provided to the Convened DC) would not constitute material documentation sufficient to satisfy Sections 3.3(b) and (c) of the DC Rules.

   a. The form of the Original Notes attached to the 2013 Indenture provides that such note is issued under the 2013 Indenture and subject to all of the terms thereof and, in the event of any conflict, the terms of the 2013 Indenture govern and control. As noted above, however, the implication of the District Court's decision is that the New Notes are not governed by the 2013 Indenture under its terms, thereby creating a conflict between the certificate for the New Notes and the 2013 Indenture.

   b. Market participants may argue that a reference to the 2013 Indenture in the certificate for the New Notes nevertheless should render the terms of the 2013 indenture applicable to the New Notes under N.Y. U.C.C. § 8-202(a), which provides that the terms of a certificated security include "terms made part of the security by reference on the certificate to another instrument, indenture, or document[.]" However in this case, N.Y. U.C.C. § 8-202(a) does not (or, at a minimum, will not prospectively) make the 2013 Indenture applicable to the New Notes because that statute:

      i. applies only "as against a purchaser for value and without notice" and purchasers of the New Notes in the Auction would have notice of the District Court's holding that the New Notes are not "Additional Notes" under the 2013 Indenture;[5] and

      ii. is effective only "to the extent the terms referred to do not conflict with the terms stated on the certificate" — and the terms of the certificate of the New Notes and the 2013 Indenture are in conflict (as the District Court held, under the terms of the 2013 Indenture, the New Notes are not "Notes" governed by the 2013 Indenture).

4. The offering memorandum for the New Notes purportedly issued in the exchange offer for the Issuers' notes due in 2022 and April 2023 (the "<u>2022/2023 Offering Memorandum</u>") also cannot constitute "material documentation", as the District Court held in its decision that the transaction contemplated in the 2022/2023 Offering Memorandum was never consummated. The District Court specifically held that: "In short, giving effect to the plain terms of the 2022/2023 Offering Memorandum, the Court concludes that the Minimum Issuance Condition to the 2022/2023 Exchange Offer was

---

the New Notes in its decision. Although the validity of the New Notes is in doubt, there is no doubt that the New Notes are not governed by the 2013 Indenture.

[4] As noted in the Decision published on March 5, 2019, the Convened DC has invited market participants to send in the second supplemental indenture and related note documentation for the New Notes.

[5] Such purchasers would also have had notice of the repeated warnings of Aurelius that the New Notes would be subject to legal challenge.

not satisfied. That, in turn, means that the 2022/2023 Exchange Offer never closed and expired on its own terms."

5. The absence of an entered judgment memorializing Windstream's liability to Aurelius is of no import, and whether the Issuers decide to appeal the decision is also irrelevant. The District Court's decision is a public and official determination, the final decision of a court established pursuant to Article III of the United States Constitution, law of the case, binding on the Issuers, the other parties and all inferior courts (including the Bankruptcy Court (as defined below)). The only reason the District Court's decision has not been reduced to judgment is on account of the automatic stay precipitated by the Issuers' chapter 11 bankruptcy filing. The Issuers have given no indication that they intend to appeal the District Court's decision,[6] and it appears very likely that the District Court's decision will be the only binding authority on the issues it has decided.

6. Furthermore, the market appears to believe that because the New Notes have been found not to be Additional Notes, the New Notes do not constitute Notes governed by the 2013 Indenture. *See* Covenant Review, *Windstream: Initial Reactions to the Court's Ruling*, February 19, 2019 (observing that a "major confusing consequence" of the District Court ruling is that the New Notes would not constitute Notes "within the meaning of the [2013] Indenture.").

    a. The uncertainty concerning what governs the New Notes appears to be reflected in trading prices – according to TRACE, as of the close on March 8, 2019, the New Notes were trading at a 10% discount to the Original Notes.[7]

        i. The average discount from the filing of the Issuers' chapter 11 petitions until the present has been approximately 13.7%.[8]

    b. If the New Notes are included on the Final List, the lack of documentation and the resulting uncertainty about their governing terms, in addition to the other factors set forth herein, will likely result in an artificially low Auction Final Price and vitiate the integrity of the Auction.

7. Section 3.14 of the 2014 Definitions requires that, in order for an obligation to constitute a Deliverable Obligation, such obligation must satisfy each of the Deliverable Obligation Characteristics specified in the terms for a particular CDS transaction (*e.g.,* that the obligation (i) shall satisfy the Not Subordinated criteria, (ii) be payable in the currency specified in the related Confirmation, (iii) be Transferable, (iv) be, in the case of CDS

[6] Even were an appeal likely (and it is not), the possibility of an appeal does not prevent a Convened DC from considering any ruling of a federal court. Indeed, Section 1.35(a)(iii) of the 2014 Definitions defines "Publicly Available Information" to include "information contained in any . . . order . . . [or] decree . . . of . . . a court" without imposing any limitation that the order or decree be nonappealable.

[7] According to TRACE, the closing price for the Original Notes on March 8, 2018 was 30% of par; the closing price for the New Notes bearing the CUSIP 97381LAA6 on March 8, 2018 was 27% of par.

[8] This discount was calculated by comparing the average closing trading price of each CUSIP of New Notes against the closing trading price of the Original Notes for each day on which trading information from TRACE is available from February 25, 2019 to March 8, 2019.

governed by the 2003 Definitions, Not Contingent and (iv) have a maximum maturity of 30 years).[9]

a. In the absence of material documents governing the New Notes, the Convened DC is unable to review the characteristics of the New Notes to determine whether they satisfy the Deliverable Obligation Characteristics, and thus, cannot definitively determine whether the New Notes constitute Deliverable Obligations.

The OPB of the New Notes Cannot Be Determined With Certainty.

8. Additionally, the OPB of the New Notes cannot be determined with certainty. A definite OPB is needed, among other reasons, to determine the Auction Final Price[10] and whether an obligation qualifies as a Deliverable Obligation.

9. In cases where companies have filed for bankruptcy, the Committees have historically determined the OPB by reference to bankruptcy laws, including title 11 of the United States Code (the "Bankruptcy Code").

10. For the following two separate and independent reasons, the New Notes were issued with original issue discount ("OID"): (i) the New Notes were issued in exchange for other debt, but in a face amount greater than the face amount of the debt tendered; and (ii) at the time of the issuance of the New Notes, the tendered debt traded at a price below par.

11. Unamortized OID is generally treated as "unmatured interest" in bankruptcy and thus disallowed under section 502(b)(2) of the Bankruptcy Code. OID disallowed in bankruptcy would typically be subtracted from the OPB of the New Notes in accordance with Section 3.8(a) of the 2014 Definitions.

    a. Notwithstanding the general disallowance of OID in bankruptcy, the Second Circuit Court of Appeals[11] has held that OID generated in an exchange transaction that results in no change in the face amount of the debt outstanding is not subject to disallowance under section 502(b)(2) of the Bankruptcy Code. Under this precedent, OID resulting from an equal face amount out of court exchange should not be subtracted from the OPB of a Deliverable Obligation. However, the court's narrow holding expressly left undecided the question of how OID would be treated in bankruptcy following an exchange transaction in which the face amount of the debt outstanding *did* change as a result of the exchange.

    b. While the United States Bankruptcy Court for the Southern District of New York[12] has previously held that OID generated in an exchange transaction that

[9] The Deliverable Obligation Characteristics relating to CDS transactions on Standard North American Corporate Reference Entities are available at: https://www.isda.org/a/mPwEE/Credit-Derivatives-Physical-Settlement-Matrix-03052018.xlsx

[10] While the Convened DC has not yet decided upon the Transaction Auction Settlement Terms, it does not appear possible to determine an Auction Final Price without reference to a definite OPB.

[11] *See LTV Corp. v. Valley Fidelity Bank & Trust Co.* (*In re Chateaugay Corp.*), 961 F.2d 378 (2d Cir. 1992).

[12] *See Official Comm. of Unsecured Creditors v. UMB Bank, N.A.* (*In re Residential Capital, LLC*), 501 B.R. 549, 584-87 (Bankr. S.D.N.Y. 2013).

results in a *decrease* in the face amount of the debt outstanding is not subject to disallowance under section 502(b)(2) of the Bankruptcy Code, this decision is not binding precedent on the Bankruptcy Court. It is also factually distinguishable.

c. There is *no* precedent addressing the allowance or disallowance of OID for an exchange transaction that results in an *increase* in the face amount of debt (such as the exchanges that created the New Notes). It is entirely unclear as to whether the general rule of disallowance would apply, or whether another judicially-created exception would be devised for this case of first impression.

d. Moreover, the policy that persuaded certain courts to hold that OID generated in an exchange transaction that results in no change in, or a reduction of, the face amount of the debt outstanding is not subject to disallowance under section 502(b)(2) of the Bankruptcy Code was to encourage companies and creditors to restructure balance sheets outside of bankruptcy. That policy is arguably not applicable with respect to the Issuers, since the OID was generated as part of a failed attempt to create Additional Notes that would support an amendment to the 2013 Indenture supported by the Issuers, at the price of an actual *increase* in outstanding debt.

12. There can be no certainty as to whether or not the unamortized OID on the New Notes will be allowed in the Issuers' bankruptcy proceedings. Public statements by Aurelius have repeatedly highlighted this latent uncertainty.

a. On October 24, 2017, Aurelius sent a letter to potential holders of New Notes predicting that, "[s]ince the New Notes will be issued at a discount to par, they will likely have original issue discount ("OID") for U.S. federal income tax purposes and for U.S. bankruptcy purposes. . . . The bankruptcy issue deserves particular comment. When notes are issued at a discount to face amount – i.e., with OID – their allowed claim for U.S. bankruptcy purposes will be their face amount minus the unamortized OID." Reorg Alert, *CORRECTION: Aurelius Letter to Windstream Noteholders Warns of Bankruptcy Consequence Tied to 'Significantly Less Valuable' Exchange Notes*, October 24, 2017.

b. On October 24 2017, the Issuers sent a statement to potential holders of New Notes that "the applicable discount or premium, and change in face amount, under the newly issued bonds *should not be* subject to disallowance in a bankruptcy." Reorg Research, *Aurelius Says Windstream's Proposed Exchange Does Not Qualify as 'Fair Value Exchange,' Calls for Reformation of Uniti Lease*, October 30, 2017 (emphasis added by Aurelius).

c. Aurelius responded in a letter dated October 30, 2017 that: "The words 'should not be' are telling indeed. Even if (contrary to reality) Windstream had offered cogent support for this mealy mouthed conclusion, would you want to bet, say, 25 bond points of recovery in a bankruptcy on something that 'should not be'? Regardless how you handicap that risk, are you being adequately compensated for it?" *Id.*

d. On February 19, 2019, Aurelius issued a press release informing holders of New Notes that "we wish you luck with your exchange notes. Between their dubious status and OID risk in bankruptcy, we suspect you will need it."

13. Given the uncertainty both legally and in the market regarding how OID associated with the New Notes will be treated, it is possible that any determination by the Convened DC with respect to whether to subtract OID from the OPB would diverge from market expectations and implied pricing in the cash market, and result in an incorrect value in the Auction.

a. As noted above, while it is unclear how much of the divergence is caused by OID risk, how much is caused by the prospect of potential invalidity, and how much is caused by the uncertainty regarding the documentation governing the New Notes, it is clear that the New Notes have traded at an approximately 13.7% discount to the Original Notes since the Issuers filed chapter 11 petitions.[13]

b. It is not clear how the Convened DC can decide whether to (a) assume that all OID will be allowed by the Bankruptcy Court (which could result in New Notes being purchased at the Auction that are subsequently determined by the Bankruptcy Court to have substantially lower OPBs) or (b) assume that no OPB will be allowed by the Bankruptcy Court (which could result in an Auction Final Price for New Notes that is approximately 23.9% of par[14] lower than the true outstanding principal balance if the Bankruptcy Court rules that the OID shall be allowed). Either option risks destroying the integrity of the Auction. If the Convened DC treats the New Notes as Deliverable Obligations, the Convened DC will essentially have stepped into the shoes of the Bankruptcy Court to make the determination of how the OID should be treated – which is well outside the scope of its remit. The Convened DC must decline to make this determination as it is not a court of law and its role has never been understood by the marketplace as such.

<u>Because the Aurelius Notes Are Potentially Subject to Equitable Subordination, the Aurelius Notes Are Not Deliverable Obligations.</u>

14. The Aurelius Notes do not satisfy the definition of Deliverable Obligation in Section 3.2 of the Definitions.

a. Section 3.2 of the 2014 Definitions defines "Deliverable Obligation" as an obligation that has a positive OPB or Due and Payable Amount ("<u>DPA</u>").

b. Section 3.8(a)(ii) of the 2014 Definitions provides that the OPB will be reduced by any amount that "is subject to any Prohibited Action" or that "may otherwise

---

[13] See footnote 8.

[14] This percentage was calculated based on assessing the trading price at the time of the exchange offers of each of the notes that were exchanged for New Notes, thereby capturing the OID created by both (a) exchanging a distressed note for a par New Note and (b) the fact that more New Notes were issued than the par value of notes exchanged.

be reduced as a result of . . . the occurrence or non-occurrence of an event or circumstance." Section 3.9 provides that the DPA is subject to similar reductions.

c. Section 3.10 of the 2014 Definitions defines "Prohibited Action" to mean "any counterclaim, defense . . . or right of set-off by or of the Reference Entity or any applicable Underlying Obligor."

d. As discussed below, the Issuers have suggested that they will pursue a counterclaim for equitable subordination of the Aurelius Notes. Equitable subordination can be brought as a counterclaim. *See Oberman v. Weiner* (*In re Crispo*), 1997 WL 258482, at *10 (S.D.N.Y. May 13, 1997). Equitable subordination is clearly a "counterclaim" for purposes of Section 3.10 of the 2014 Definitions.

e. Equitable subordination of the Aurelius Notes would be a Prohibited Action that would cause the OPB and DPA of the Aurelius Notes to be reduced to zero.

15. The Aurelius Notes do not satisfy the Deliverable Obligation Characteristics applicable to transactions under the 2003 Definitions.

a. Section 3.14(b) of the Definitions defines "Deliverable Obligation Characteristics" to include, among other things, "Not Contingent".

b. Section 8.12 of the 2003 Definitions defines "Deliver" to require the delivery of Deliverable Obligations "free and clear of any and all . . . claims or encumbrances . . . , including, without limitation, any counterclaim, defense . . . or right of set-off by or of the Reference Entity. . . ."

c. Section 11.2 of the 2003 Definitions requires the Buyer to give representations on each Delivery Date that it has "conveyed to Seller . . . all right, title . . . and interest in the Deliverable Obligations being Delivered on such date free and clear of any and all . . . claims or encumbrances . . . , including, without limitation, any counterclaim, defense . . . or right of set-off by or of the Reference Entity . . . ."

d. As discussed below, both the Issuers and at least one major party-in-interest has suggested that they will pursue a claim for equitable subordination of the Aurelius Notes. Equitable subordination is a claim that can be brought by a Reference Entity or creditors thereof. *See AppliedTheory Corp. v. Halifax Fund, L.P.* (*In re AppliedTheory Corp.*), 493 F.3d 82, 86-87 (2d Cir. 2007). Equitable subordination is clearly a "claim" (and, as noted above, a "counterclaim") for purposes of Section 8.12 and 11.2 of the 2003 Definitions.

e. Equitable subordination of the Aurelius Notes would cause the Aurelius Notes to fail to satisfy the Deliverable Obligation Characteristic of being "Not Contingent". For the reasons set forth below, any purchasers of the Aurelius Notes at the Auction would likely acquire those notes subject to any equitable subordination thereof (which could mean that approximately 64% of the Original

Notes purchased at the Auction would subsequently become equitably subordinated and without value).

16. On February 25, 2019, the Issuers and certain of their affiliates filed chapter 11 bankruptcy petitions with the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). Section 510(c) of the Bankruptcy Code provides that a bankruptcy court may "under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim."

    a. Equitable subordination under section 510(c) is appropriate where (i) the claimant to be subordinated engaged in some type of inequitable conduct; and (ii) the misconduct caused injury to the creditors or conferred an unfair advantage on the claimant. *See In re Mobile Steel Co.*, 563 F.2d 692 (5th Cir. 1977). Even lawful actions taken by a non-insider creditor may give rise to equitable subordination, if the creditor's conduct is sufficiently inequitable. *See, e.g., In re Lightsquared Inc.,* 511 B.R. 253, 352-353 (Bankr. S.D.N.Y. 2014) (creditor's attempt to acquire the debtor by purchasing debt claims, though "perfectly legal," nonetheless constituted "inequitable conduct sufficient to warrant equitable subordination"); *see also In re Bernard L. Madoff Investment Securities LLC*, 511 B.R. 253 (Bankr. S.D.N.Y. 2014) (where creditor misled customers as to the financial condition of BLMIS, equitable subordination was appropriate; "[i]nequitable conduct 'encompasses conduct that may be lawful but is nevertheless contrary to equity and good conscience.'").

    b. Any purchaser of Aurelius Notes at the Auction may itself be subject to equitable subordination based on its notice of the inequitable conduct of Aurelius. *See Enron Corp. v. Springfield Assocs., L.L.C.* (*In re Enron Corp.*), 379 B.R. 425, 442 (S.D.N.Y. 2007) (Scheindlin, J.) ("purchasers of claims with actual notice of the inequitable conduct of the seller may be subject to equitable subordination based on their own misconduct"). Because all purchasers at the Auction either know or should know about all the actions of Aurelius set forth below, such purchasers seem unlikely to be able to claim to be good faith transferees or bona fide purchasers for value. Instead, any purchasers of the Aurelius Notes at the Auction appear likely to be purchasing a claim potentially subject to equitable subordination. The pricing distortion created by this very material risk will distort and undermine the integrity of the Auction.

    c. Based on Publicly Available Information, sophisticated parties-in-interest have suggested they may seek to equitably subordinate the Aurelius Notes.

        i. Tony Thomas, Chief Executive Officer and President of the parent company of the Issuers, stated under penalty of perjury in paragraph 37 of a declaration filed with the Bankruptcy Court that: "For the avoidance of doubt, the [Issuers] reserve all rights with respect to the findings [and actions by Aurelius in the District Court], including pursuit of remedies provided for under the Bankruptcy Code, such as equitable

subordination." Thomas Declaration (Dkt #27); *see also* Leone Declaration (Dkt #38). In a press release dated February 25, 2019, Windstream stated that it "believes Aurelius engaged in predatory market manipulation to advance its own financial position through credit default swaps at the expense of many thousands of shareholders, *lenders*, employees, customers, vendors and business partners." (Emphasis added).

ii. On February 26, 2019, during a hearing held by the Bankruptcy Court, counsel for certain of Windstream's secured creditors accused Aurelius of intentionally driving Windstream into bankruptcy, for the purpose of triggering its CDS contracts. *See* Transcript of Bankruptcy Court Hearing, February 26, 2019, 63:12-63:25 (counsel to an ad hoc committee of second lien noteholders, argued that Aurelius "prevailed. . . . But it's one thing to buy insurance on my neighbor's house. It's another to burn it down, my neighbor's house. It's a third thing to then collect a ton of money on the insurance. And it's a very, very different thing to then to be expected to be welcomed at my neighbor's table. And I say that because it is -- it should be a fool's conclusion to think . . . that all the claims should be treated pari as a result of that behavior.").

d. The prospect of the Aurelius Notes being equitably subordinated is highly credible based on the following conduct of Aurelius.

i. Immediately following the asset sale and leaseback transaction in 2015, the Original Notes traded at or just below par. For more than two years, no holder of Original Notes made even a suggestion that the asset sale and leaseback transaction created a "Default" under the 2013 Indenture.

ii. Aurelius did not begin purchasing Original Notes until on or around 2017. On or around September 22, 2017, Aurelius delivered a notice of default under the 2013 Indenture, in which it alleged that the 2015 asset sale and leaseback transaction breached the 2013 Indenture.

1. During the period between August 3, 2017, when the Issuers released their earnings, and September 25, 2017, when the notice of default delivered by Aurelius was publicly disclosed, the market price of Original Notes dropped precipitously by over 20% of par (according to TRACE). This decline was likely caused in significant part by the strategy of Aurelius to imperil the business of the Issuers and thereby increase the value of its credit default swap ("CDS") position.

iii. Aurelius directed the indenture trustee for the Original Notes to pursue prolonged litigation against Windstream, which drove the price of the Original Notes significantly lower. Aurelius proceeded to prosecute certain claims independent of the indenture trustee and pursue remedies

that served to benefit Aurelius alone, at the expense of every other holder of Original Notes.

iv. The apparent motivation of Aurelius in pursuing the litigation against the Issuers (*i.e.*, to profit on its investment in CDS protection, not on its Original Notes) has been widely-reported. *See, e.g.,* Debtwire, *"Windstream's grim refi prospects and Aurelius sideshow bring recovery valuations to the forefront,"* dated October 2, 2017 (stating that Aurelius "holds CDS tied to the credit and is short Uniti's stock."); Bloomberg, *"Hedge Fund and Rural Phone Company Face off in Court Over Debt Drama,"* dated December 13, 2017 (noting "Aurelius' ulterior motives (*i.e.*, CDS position)," in the litigation).

v. On February 15, 2019, the District Court issued its decision against the Issuers, following which, according to TRACE, the Original Notes traded from 45% of par to below 36% of par, a price decline of approximately 20% apparently caused by the ultimate success of the strategy of Aurelius to obtain a judgment that would cause a Credit Event to occur and drive the price of the Original Notes and New Notes into deeply distressed territory.

1. Aurelius subsequently issued a press release in which it taunted holders of New Notes, who stood to lose in the event that the Issuers filed for bankruptcy as a result of the ruling. *See* Aurelius Press Release, dated February 19, 2019 ("To noteholders . . . we wish you luck with your exchange notes. Between their dubious status and OID risk in bankruptcy, we suspect you will need it.").

e. The equitable subordination of the Aurelius Notes would mean the Aurelius Notes are subject to a Prohibited Action which would reduce the OPB to zero and cause the instrument to fail to qualify as Not Contingent. While the Convened DC need not decide whether the Aurelius Notes will be equitably subordinated, it is not reasonable for the Convened DC to include the Aurelius Notes on the Final List, given the significant inherent risk that (a) the Aurelius Notes will be equitably subordinated and (b) the credit protection sellers' notice of inequitable conduct by Aurelius would eliminate any defense that the purchaser is a good faith transferee or bona fide purchaser for value with respect to Aurelius Notes being purchased at the Auction that are subsequently equitably subordinated. Given the specter of equitable subordination and the extreme negative consequence of purchasing equitably subordinated Aurelius Notes at the Auction, inclusion of the Aurelius Notes on the Final List will likely result in an artificially low Auction Final Price and destroy the integrity of the Auction.

f. If the Convened DC Resolves by a Supermajority pursuant to Section 3.2(d) of the DC Rules to amend the Credit Derivatives Auction Settlement Terms to prevent the delivery of any Aurelius Notes into the Auction, there is no issue with treating the remaining Original Notes as Deliverable Obligations. If, however,

that solution is not feasible, then, for all the reasons set forth herein, all Original Notes (approximately 64% of which are Aurelius Notes) should not be treated as Deliverable Obligations. As noted above, any other result would likely result in an artificially low Auction Final Price and destroy the integrity of the Auction.

g. The Convened DC should preserve the integrity of the Auction by ensuring – as required by the Definitions – that obligations whose status, amount and/or validity are fundamentally in question are not deemed Deliverable Obligations. If the Convened DC were to fail to do so, the result would surely be a distorted Auction Final Price and the integrity of the auction process and the CDS market as a whole would be seriously damaged.