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

In re:	)	Chapter 11
DBSD NORTH AMERICA, INC., <i>et al.</i> , <sup>1</sup>	)	Case No. 09-13061 (REG)
Debtors.	)	(Jointly Administered)
	)	

**REPLY OF THE OFFICIAL COMMITTEE OF UNSECURED  
CREDITORS (I) IN SUPPORT OF DEBTORS' OMNIBUS  
OBJECTION TO PROOFS OF CLAIM FILED BY SPRINT  
NEXTEL CORPORATION AND (II) TO THE RESPONSE  
OF THE FEDERAL COMMUNICATIONS COMMISSION**

<sup>1</sup> The Debtors in these chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are: DBSD North America, Inc. (6404); 3421554 Canada Inc. (6404); DBSD Satellite Management, LLC (3242); DBSD Satellite North America Limited (6400); DBSD Satellite Services G.P. (0437); DBSD Satellite Services Limited (8189); DBSD Services Limited (0168); New DBSD Satellite Services G.P. (4044); and SSG UK Limited (6399). The service address for each of the Debtors is 11700 Plaza America Drive, Suite 1010, Reston, Virginia 20190.

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The Official Committee of Unsecured Creditors (the “**Committee**”) of DBSD North America, Inc., *et al.* (collectively, the “**Debtors**”), by and through its proposed conflicts counsel, files this Reply (the “**Reply**”) (i) in Support of Debtors’ Omnibus Objection to Proofs of Claim Filed by Sprint Nextel Corporation (“**Sprint**”) [Docket No. 225]<sup>1</sup> and (ii) to the Response of the Federal Communications Commission (the “**FCC**”) to Debtors’ Omnibus Objection to Proofs of Claim Filed by Sprint Nextel Corporation Regarding Debtors’ Joint and Several Liability [Docket No. 323]. In support of its Reply, the Committee states as follows:

**PRELIMINARY STATEMENT**

1. In their pleadings, Sprint and the FCC marshal an array of arguments to support their position that the issue of whether the Debtors are jointly and severally liable for the claims asserted by Sprint in identical proofs of claim in the amount of \$211,429,000 filed against each of the Debtors on June 25, 2009 (the “**Sprint Claims**”) should be transferred from this Court to the FCC. None of these arguments, however, can alter the nature of this issue into anything other than a question of the liability of the Debtors to their creditors. This Court regularly decides this issue with a high degree of competence, as contemplated by Congress when it drafted the Bankruptcy Code.

2. With this Reply, the Committee respectfully submits that the four factors generally considered by courts in the Second Circuit to determine whether an agency has primary jurisdiction over a matter favor this Court retaining authority to decide whether the Debtors are jointly and severally liable to Sprint for the cost of clearing bands of radio spectrum. Additional considerations, including (i) a balancing of the equities and (ii) the legislative intent behind the

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<sup>1</sup> Capitalized terms not otherwise defined herein shall have the meaning assigned to them in the Omnibus Claim Objection.

Bankruptcy Code to centralize the administration of debtors' estates and avoid piecemeal litigation, also weigh strongly in favor of this Court deciding the joint and several liability issue.

## **LEGAL ARGUMENT**

### **I. The Debtors' Analysis that the FCC Does Not Have Primary Jurisdiction is Correct**

3. As set forth in detail in the Reply of the Debtors to the Federal Communication Commission's Call for a Primary Jurisdiction Doctrine Referral (the "**Debtors' Reply**"), the doctrine of primary jurisdiction indicates in these cases that this Court should decide whether to allow the Sprint Claims against the Debtors. While there is no fixed formula for deciding whether to defer to an agency on the basis of primary jurisdiction, courts generally analyze the following four factors when deciding whether it has primary jurisdiction over a particular issue: (i) whether the resolution of the issue is within the conventional expertise of judges, (ii) whether the issue lies in the agency's discretion or is within the agency's particular expertise, (iii) the potential for inconsistent rulings and (iv) whether a prior application to the agency has been made. *In re Magnesium Corp. of America*, 278 B.R. 698, 708 (Bankr. S.D.N.Y. 2002); *In re: Methyl Tertiary Butyl Ether Products Liability Litigation*, 175 F. Supp. 2d 593, 617 (S.D.N.Y. 2001), *reconsideration denied by In re Methyl Tertiary Butyl Ether Products Liability Litigation*, MDL Case No. 1358, 2001 WL 1042051 (S.D.N.Y. Sep 07, 2001).

4. In the Debtors' Reply, the Debtors have thoroughly set forth the reasons why the primary jurisdiction factors favor this Court retaining its authority to decide the issue of the Debtors' alleged joint and several liability. Therefore, in the interest of efficiency, the Committee's argument as it relates to the aforementioned four factors is set forth in summary form below:

- **Conventional Expertise of Judges:** In order to determine whether the Debtors are jointly and severally liable for the Sprint Claims, the Court would primarily need to consider corporate law and common law principles of liability. There are no existing FCC orders

that provide for such joint and several liability, as Sprint's counsel conceded in his oral argument before this Court. *See* 8/20/2009 Hearing Transcript p. 49:12-13 ("There is nothing explicit in the orders that say that there is joint and several liability.") [Docket No. 299]. The law applicable to this case is therefore well within the conventional competence of this Court. This factor favors the Court retaining authority to decide the issue.

- Discretion or Particular Expertise of Agency: Conversely, the FCC is in no better position to apply corporate law and common law principles of liability to decide joint and several liability than the Court. The FCC Response contains extensive discussion of the FCC's role in dividing costs of clearing bands of radio spectrum under its authority to issue licenses for their use. *See* FCC Response, ¶¶ 13 -17. It, however, provides little analysis of how those Debtors other than New DBSD Satellite Services G.P. ("**New Satellite Services**"), which are not licensees (the "**Non-Licensee Debtors**"), could be compelled by the FCC to pay costs of clearing bandwidth in the first place. Analysis of this question is particularly important, considering that the FCC itself bases its authority to allocate costs of clearing radio spectrum on its power to issue licenses. *Id.* at 15 - 16 ("More broadly, the goal of the FCC's regulatory action is the exercise of its licensing authority ... As the Second Circuit has recognized, the FCC therefore has broad discretion – and, concomitantly, the courts have a sharply limited role – in licensing matters ...") (internal citations omitted).

By largely omitting analysis of the central issue before this Court, *i.e.* the basis for holding the Non-Licensee Debtors liable for the costs of clearing radio spectrum, the FCC demonstrates why this Court must retain authority to decide the issue. The Committee respectfully submits that the issue of joint and several liability of the Debtors to Sprint is not one for which the FCC has particular expertise or discretion.

- Danger of Inconsistent Rulings: There is little danger of inconsistent rulings on the issue of joint and several liability of the Debtors to Sprint precisely because this issue is one of corporate law and common law principles of liability. These statutes and principles are well-established and well within the conventional expertise of the Court. Since there is only one licensee, New Satellite Services, deciding whether any of the other Debtors are

liable would require the Court to conduct a fact-intensive analysis of whether there are grounds, such those that permit piercing of the corporate veil, for holding the Non-Licensee Debtors liable. As courts in this circuit have held, where an issue is factually intensive, based on a totality of circumstances, the danger of inconsistent rulings is minimal. See *National Communications Ass'n., Inc. v. American Tel & Tel. Co.*, 46 F.3d 220, 224-25 (2<sup>nd</sup> Cir. 1995) (holding that there was no risk of inconsistent rulings where the issue was a unique and narrow factual dispute); *United States ex rel. Taylor v. Gabelli*, 345 F.Supp. 2d 340, 356-57 (S.D.N.Y. 2004) (ruling that the district court deciding the issue of whether defendants' conduct violated FCC bidding rules related to de facto control is a narrow factual dispute with little danger of inconsistent rulings).

Furthermore, it is generally impossible to rule out the possibility that an administrative agency may issue a new regulation or order that would impact a debtor in a regulated industry. While there is some indication in this case that the FCC might issue administrative regulations or orders at some point in the future that might impact the Debtors, based on a Report and Order and Order and Further Notice of Proposed Rulemaking dated June 12, 2009, there is no such existing, legally binding regulation or order. Holding that the possibility of a future regulation that could impact a debtor is sufficient grounds to prevent it from conducting its chapter 11 case in a timely and efficient manner would erect a major roadblock to the reorganization of debtors in regulated industries.

- No Prior Application to FCC: Sprint's only possible claim to have made an application to the FCC on the issue of joint and several liability is its comments to the FCC's proposed rulemaking that it filed on July 14, 2009. Reply Comments of Sprint, WT Docket 02-55, filed July 24, 2009, at 2-3. The issue of joint and several liability was already before this Court at the time. In fact, it is possible that the submission of these comments by Sprint constituted a violation of the automatic stay in the Debtors' cases. Accordingly, these comments cannot be considered a prior application to the FCC and this factor militates in favor of this Court retaining authority to decide the issue.

## II. Balancing the Equities Militates in Favor of the Bankruptcy Court Deciding the Issue of Joint and Several Liability

5. As a court of equity, bankruptcy courts will “balance the equities” related to issues, such as primary jurisdiction, that could have a significant impact on parties-in-interest. *See Enron Power Marketing, Inc. v. Pub. Utility Dist. No. 1 of Snohomish County (In re Enron Corp.)*, 364 B.R. 489, 508 (Bankr. S.D.N.Y. 2007) (Noting that in addition to the four factor test for primary jurisdiction, “a court must balance the advantages of applying primary jurisdiction with the possible costs that may result from complications and delay in the administrative proceeding.”); *see also Methyl Tertiary*, 175 F. Supp. 2d at 617 (S.D.N.Y. 2001) (same); *see also In re Healthback, L.L.C.*, 226 B.R. 464, 471 (Bankr. W.D. Okla. 1998 (“The [primary jurisdiction] doctrine should only be invoked if the benefits of obtaining the agency’s aid would outweigh the need to resolve the litigation expeditiously.”); *see also In re Sunbelt Freight*, 162 B.R. 878, 884 (Bankr. N.D. Okla. 1994); *see also Gulf States Utils. v. Ala. Power Co.*, 824 F.2d 1465, 1471 – 73 (5<sup>th</sup> Cir. 1987).

6. In *Sunbelt Freight*, for example, the debtor brought an adversary proceeding against a shipper to recover freight undercharges. The shipper moved to defer the issue to the Interstate Commerce Commission under the doctrine of primary jurisdiction. *Id.* at 879. The bankruptcy court denied the shipper’s motion on the grounds that the bankruptcy case was nearing completion and deferring the case to the Interstate Commerce Commission would subject the debtors to unnecessary delay. The need to resolve the litigation expeditiously outweighed the benefits of obtaining the agency’s aid. *Id.* at 885.

7. In the Debtors’ cases, the equities strongly favor this Court retaining authority to decide the issue of their alleged joint and several liability to Sprint. Although Sprint was well aware of the essential facts that underlie its claim and, in fact, was engaged in prepetition litigation in the Eastern District of Virginia, it raised the issue of the Debtors’ alleged joint and several liability at an extremely late stage of the Debtors’ cases. The appearance of this issue at such an

advanced stage of these cases threatens to be a significant impediment to the Debtors' attempt to confirm and implement a plan of reorganization.

8. Among the adverse consequences of referring the issue of joint and several liability to the FCC would be upsetting the reasonable expectations of unsecured creditors as to the timing and amount of their distribution pursuant to the Debtors' plan of reorganization. Since the amount of the Sprint Claims is substantial, if the issue of joint and several liability were referred to the FCC, the Debtors would almost certainly need to wait for a decision on that issue before making any meaningful distribution. Additionally, the Debtors would likely need to incur additional fees and expenses due to activity in their open chapter 11 cases and the existence of an additional proceeding before the FCC, in which the Debtors would need representation. The Committee respectfully submits that, as the Court determined in *Sunbelt*, the serious harm that could be inflicted upon the Debtors and their creditors must be avoided.

9. On the other hand, it appears that little or no harm would result from the Court deciding the issue of joint and several liability. As described in more detail above, the FCC has no special need or expertise to decide the issue of the Debtors' joint and several liability. This Court and other bankruptcy courts routinely determine whether debtors are liable to parties-in-interest and, if so, the nature and amount of the liability. Furthermore, if the FCC promulgates a lawful regulation or rule in the future that applies to the reorganized Debtors, they will be obligated to follow it on a prospective basis, just as all other parties regulated by the FCC would be.

10. Even if the Court found that some harm to a party-in-interest would result if the FCC did not decide the joint and several liability question, such potential harm would be the direct result of Sprint failing to raise this issue at a much earlier stage in the case. Namely, Sprint could have filed a motion in the Debtors' cases at their inception for referral of the issue of the Debtors' joint

and several liability to the FCC under the primary jurisdiction doctrine, as was done in *Magnesium Corp. of America, supra*.

### **III. The Policy of Centralizing Administration and Avoiding Piecemeal Litigation Requires the Bankruptcy Court to Decide Issue of Joint and Several Liability**

11. Courts have consistently found that the legislative intent behind the Bankruptcy Code includes centralizing administration of the debtor's estate and thereby avoiding piecemeal litigation. *Cal. Public Employees Retirement Sys. v. Worldcom, Inc.*, 368 F.3d 86, 103 (2<sup>nd</sup> Cir. 2004), *Certiorari Denied by California Public Employees' Retirement System v. Ebbers*, 543 U.S. 1080 (2005); *see also Publicker Indus. v. U.S. (In re Cuyahoga Equip. Corp.)*, 980 F.2d 110, 117 (2<sup>nd</sup> Cir. 1992); *see also Eastern Airlines, Inc. v. Air Line Pilots Assn. (In re Ionosphere Club, Inc.)*, Case No. 89-8250, 1990 WL 5203, \*6 (Bankr. S.D.N.Y. Jan. 24, 1990) ("The policy of Chapter 11 is to permit successful rehabilitation of debtors; *the bankruptcy court is granted broad jurisdiction to promote that policy, and equitable power to protect that jurisdiction*") (internal citations omitted) (emphasis added).

12. In large part due to this legislative intent, bankruptcy courts are reluctant to transfer matters in a debtor's bankruptcy case to another jurisdiction or forum. In *Publicker Indus.*, for example, a debtor that had purchased a former distillery on which hazardous waste was discovered, sought bankruptcy court approval of a settlement with the United States. The settlement resolved the competing claims of several interested parties to funds in the debtor's estate. The seller of the former distillery, Publicker Industries, objected and moved to transfer the matter to the United States District Court for the Eastern District of Pennsylvania, the venue of an environmental proceeding against it and the debtor that sought to recover costs of remediation under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607 (1988) ("CERCLA"). *Id.* at 111 – 12. The bankruptcy court approved the settlement, subject to the

district court's final approval. The district court granted final approval and refused Publicker Industries' request to transfer the issue to the Eastern District of Pennsylvania. *Id.* at 113.

13. On appeal to the Second Circuit, Publicker Industries argued, *inter alia*, that even if jurisdiction existed in the Southern District of New York to decide whether to approve the settlement, the matter, or at least the CERCLA-related portion, should have been transferred for the convenience of the parties and in the interest of justice. *Id.* at 116 (citing 28 U.S.C. § 1404 (1988)). The Second Circuit rejected Publicker Industries' attempt to transfer the issue. It found no inconvenience or interests of justice that would justify the "extraordinary measures of severing the CERCLA claim from the bankruptcy claim." As a basis for its holding, the Second Circuit cited a "... strong bankruptcy code policy that favors centralized an efficient administration of all claims in bankruptcy court." *Id.* at 117.

14. As in *Publicker Indus.*, the attempt to take the issue of joint and several liability away from this Court and have the FCC decide the issue is an extraordinary request and an affront to the policy of centralized administration of the Debtors' estates. In both cases, the issues for which transfer was sought go to the heart of the respective bankruptcy cases: distribution of funds from a debtor's estate. In this case, if the issue of joint and several liability is transferred to the FCC, a determination of which parties have substantial claims against the Debtors' bankruptcy estates will be decided by an administrative agency that is completely separate from the Bankruptcy Court. Key issues related to the Debtors' estates would thereby be decided in a piecemeal fashion in separate forums.

15. As noted herein, there are very sound reasons why the issue of joint and several liability should be resolved by the Bankruptcy Court and not in a piecemeal manner. The FCC, for example, does not have particular expertise in deciding whether a party holds a claim against a debtor. The FCC also does not generally operate pursuant to the provisions of the Bankruptcy Code

and is not obligated to consider the effect of its decisions on the debtors and their creditors. The Sprint Claims are substantial in the context of these Debtors' cases and their disposition will greatly impact the Debtors' unsecured creditors. The uncertainty created by the piecemeal litigation of issues central to the Debtors' reorganization would likely upset the reasonable expectations of parties-in-interest to the Debtors' cases. There is also a possibility that the FCC might assert primary jurisdiction over other issues in the Debtors' cases and that new issues related to the Debtors' restructuring would arise and need to be resolved during the extended duration of the Debtors' cases required for the FCC to conduct its rulemaking with respect to joint and several liability. The Committee respectfully submits that for the Bankruptcy Code to fulfill the purpose that Congress intended, the fate of the Sprint Claims must be decided by this Court.

#### **CONCLUSION**

16. The issue of alleged joint and several liability of the Debtors to Sprint belongs before this Court. Factors generally considered by courts in the Second Circuit to determine whether an agency has primary jurisdiction, as well as several additional considerations applicable to this matter, all lead to the conclusion that this Court has the expertise and experience to decide the issue. Taking the issue away from this Court and transferring it to the FCC would considerably harm the Debtors and their creditors, as discussed in more detail above. In general and in the Debtors' cases in particular, assessing the liability of debtors to their creditors is a crucial function of bankruptcy courts and must not be taken away, except in the most exceptional of circumstances.

**WHEREFORE**, the Committee requests that the Court grant the Debtors the relief they seek in their omnibus objection to the Sprint claims and grant it such other relief as the Court may deem just and proper.

Dated: New York, New York  
September 8, 2009

By:           /s/ Edward E. Neiger          

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