

## District of Delaware: No Obligation to Disclose Outside Counsel Legal Opinion When Public Filings Sufficiently Disclosed Risk

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On November 4, 2020, the District of Delaware granted defendants' motion to dismiss all fraud-based claims arising out of Uniti's spinoff from Windstream Holdings, Inc. into a real estate investment trust ("REIT"). [SLF Holdings, LLC v. Uniti Fiber Holdings, Inc., 2020 WL 6484310 \(D. Del. 2020\) \(Stark, J.\)](#). The court held that plaintiff failed to plead an actionable omission also because defendants sufficiently disclosed the risks regarding the spinoff and REIT in their public filings, and defendants were not obligated to disclose the specific risks identified in the assessments of its accounting firm and outside counsel.

### **Background**

Uniti was created in 2015 when its former parent, Windstream, spun it off into a REIT. Windstream conveyed certain assets to the spinoff and Uniti entered into a master lease with Windstream (the "Master Lease") to lease those assets back to Windstream. An accounting firm provided Windstream "with an independent appraisal of the useful life of the assets being leased, which was a factor in concluding that the Master Lease was a true lease, and was not financing." Windstream also engaged outside counsel and received a legal opinion stating that "the IRS may argue that the proposed lease is merely a financing arrangement and that the purported lessor [Uniti] is, in substance, a secured creditor but holds no equity interest in the property." Before and after the spinoff, Uniti made public disclosures regarding Uniti's business, the Master Lease and spinoff. These disclosures included that "Uniti's success depended significantly on the viability of Windstream."

In July 2017, plaintiff in this case sold its membership interests in a fiber optic network provider to Uniti in exchange for cash and Uniti stock equivalents. Before the sale, "Uniti executives advertised the REIT structure, the Master Lease, Windstream's \$650 million in annual rental payments, and the iron-clad dividend that Uniti would be able to pay." However, neither the accounting firm's analysis nor the outside counsel's legal opinion were disclosed to plaintiff during the negotiations. In 2019, Windstream filed for bankruptcy. Subsequently, plaintiff filed the instant action alleging "a complex and multifaceted financial fraud arising out of Uniti's spinoff[.]"

### **No Need to Disclose Legal Opinion Identifying Specific Risks if Public Filings Are Sufficient**

Plaintiff claimed that "the general statements that Uniti would be dependent on [Windstream] to make payments under the Master Lease and

events could materially and adversely affect Uniti’s business were allegedly misleading because they failed to disclose the full spectrum of risk, including those identified by [the accounting firm and outside counsel].” However, the court stated that plaintiff “has failed to plead an actionable omission also because Defendants sufficiently disclosed the risks regarding the spinoff and REIT in their public filings.” The court pointed out that “[t]he spinoff documents, the Master Lease, the indentures, and Windstream’s statements to regulators were all publicly available.”

The court explained that “[t]he information disclosed in these materials identified the risks pertaining to the Master Lease, including that it could be recharacterized as something other than a true lease.” Further, “[i]t also disclosed that Uniti’s copper wiring had a useful life of 7-40 years.” The court stated that “[t]hese disclosures put Uniti’s shareholders and [plaintiff] on notice that the useful life of the copper assets could be shorter than the 15-year term of the Master Lease.” The court held that “[h]aving made these public disclosures, which [plaintiff] admits it reviewed, Defendants were not obligated to disclose the specific risks identified in the assessments of [the accounting firm and outside counsel].”

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