

WHITE & WILLIAMS LLP
James C. Vandermark
7 Times Square, Suite 2900
New York, New York 10036-6524
Telephone: (212) 244-9500
Facsimile: (212) 244-6200
E-mail: vandermarkj@whiteandwilliams.com

and

BIALSON, BERGEN & SCHWAB
Lawrence Schwab (Cal. Bar No. 85600)
Thomas M. Gaa, (Cal. Bar No. 130720)
Gaye N. Heck, (Cal. Bar No. 170804)
633 Menlo Ave., Suite 100
Menlo Park, CA 94025
Telephone: (650) 857-9500
E-mail: lschwab@bbslaw.
Tgaa@bbslaw.com
gheck@bbslaw.com

Counsel to salesforce.com, Inc.

IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:))	Chapter 11
WINDSTREAM HOLDINGS, INC., <i>et al.</i> , ¹))	Case No. 19-22312 (RDD)
Debtors.))	(Jointly Administered)

**LIMITED OBJECTION OF SALESFORCE.COM, INC. TO THE PROPOSED
ASSUMPTION OF CERTAIN EXECUTORY CONTRACTS AND CURE COSTS IN
CONNECTION WITH THE DEBTORS JOINT CHAPTER 11 PLAN OF
REORGANIZATION, AND RESERVATION OF RIGHTS**

¹ Due to the large number of Debtors in these chapter 11 cases, for which joint administration has been granted, a complete list of the debtor entities may be obtained on the website of the Debtors' claims and noticing agent at <http://www.kccllc.net/windstream>.



salesforce.com, Inc. (“**Salesforce**”), by and through its undersigned counsel, hereby files its objection and reservation of rights (the “**Assumption Objection**”) to (A) the assumption of that certain executory contract (the “**Salesforce Contract**” as hereinafter identified) by and between Salesforce and the Debtors and (B) the amount of the monetary default the Debtors contend must be paid (the “**Cure Costs**”) as a condition of approving the assumption of the Salesforce Contract pursuant to the Plan (as hereinafter identified).²

Subject to entry of an order granting requested and the reservation of its rights (the “**Reservation of Rights**”) as set forth in this Assumption Objection, Salesforce does not object to assumption of the Salesforce Contract pursuant to the Plan.

Similarly, if the Salesforce and the Debtors (the “**Parties**”) are unable to resolve the Assumption Objection consensually prior to a hearing to consider approval of the Amended Proposed Plan, Salesforce consents to adjournment of any hearing on the Assumption Objection until a later hearing date as permitted pursuant to the Plan.

RELIEF REQUESTED

Salesforce seeks entry of an order (the “**Assumption Order**”) protecting its rights and interests by including the following:

A. Findings of fact stating that: (1) the Salesforce Contract (as hereinafter identified)³ constitutes a single, integrated executory contract for purposes of assumption pursuant to 11 U.S.C. §365; (2) only the Salesforce Contract constitutes an “Assumed Contract” subject to assumption pursuant to the Plan⁴ and the applicable *Cure Notice* (as

² Defined Terms used in this Assumption Objection, but which are not specifically defined herein, shall have the meanings ascribed to them in the Ramirez Declaration filed concurrently herewith and, if not defined in the Ramirez Declaration, a Defined Term shall have the meaning set forth in the Plan or the Cure Notice, respectively, that are referenced in this Assumption Objection.

³ See *Salesforce Cure Amount Summary* attached as Exhibit A to the Ramirez Declaration at ¶14.

⁴ See *First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al., Pursuant to Chapter 11 of the Bankruptcy Code (Technical Modifications)* [ECF 2201] as amended, supplemented, or otherwise modified from time to time, the “**Plan**”)

hereinafter identified);⁵ (3) pursuant to the Salesforce Contract, not less than the aggregate amount of US\$ 652,040.00 (the “**Salesforce Cure Amount**”) is due and owing, but unpaid, as of this date;⁶ and (4) pursuant to the Salesforce Contract, the aggregate amount of US\$ 5,401,891.67 (the “**Future Revenues**”) will become due and owing for Salesforce Services to be provided from and after October 30, 2020 through February 7, 2022.⁷

B. The requirement that, as a condition of approving the assumption of the Salesforce Contract, the Debtors shall pay not less than US\$ 652,040.00 (*i.e.*, the Salesforce Cure Amount) to cure the monetary defaults of the Salesforce Contract, plus any additional amounts as may accrue prior to the effective date of the assumption of the Salesforce Contract (the “**Effective Assumption Date**”);

C. The requirement that, if the Salesforce Contract is assumed pursuant to the Plan and, thereafter, the Debtors seek to assign the assumed Salesforce Contract, the Court require the Debtors provide adequate assurance of future performance of all terms and conditions of the Salesforce Contract (including, without limitation, payment of the Future Revenues) by the prospective assignee of the Salesforce Contract

D. The requirement that, in the event the Salesforce Contract is not assumed by the Debtors, the Debtors shall be obligated pay any and all amounts that are due and owing pursuant 11 U.S.C. §503 and 507 (the “**Salesforce Administrative Expense**”) for Salesforce Services provided from and after Petition Date (as hereinafter identified) to the date

⁵ See *Notice of Filing of Eighth Amended Plan Supplement* [ECF 2522] (the “**Cure Notice**”).

⁶ See *Salesforce Cure Amount Summary* attached as Exhibit A to the Ramirez Declaration at ¶15.

⁷ *Id.* at ¶16.

the Court enters its order approving the rejection of the Salesforce Contract.

E. The requirement that, in the event the Salesforce Contract (a) is not assumed and (b) an order (the “**Rejection Order**”) is entered approving the rejection of the Salesforce Contract, the automatic stay imposed by 11 U.S.C. §362 (the “**Stay**”) shall be terminated, pursuant to 11 U.S.C. §§362(d)(1) and/or (d)(2), to the extent the Stay pertains to the Salesforce Contract (including, without limitation, the right of Salesforce to terminate the Salesforce Contract) without (i) Salesforce having to file a separate motion seeking termination of the Stay or (ii) the Court entering any order other than the Rejection Order, and such termination of the Stay shall be effective as of the date the Rejection Order is entered;

F. Approval of the Reservation of Rights (as set forth hereinafter) including, without limitation, all rights under the Plan and sections 365 and 1123(b)(2) of the U.S. Bankruptcy Code with respect to payment of the Salesforce Cure Amount in full and provision of adequate assurance of future performance by any subsequent assignee to whom the Salesforce Contract is assigned pursuant to the Plan; and

G. Grants such other relief as may be just and proper.

The Assumption Objection is based on the matters set forth herein, the *Declaration of Kevin Ramirez In Support of Objection of Salesforce.Com, Inc. to the Proposed Assumption of Certain Executory Contracts and Cure Costs, and Reservation of Rights* (the “Ramirez Declaration”) filed in support hereof, the files and the records in this case, and such other and further evidence as may be submitted at or before the trial on this matter.

Salesforce requests that the Court take judicial notice of the pleadings filed in this case and the facts set forth in the Court’s orders, findings of fact and conclusions of law pursuant to

Rule 201 of the Federal Rules of Evidence (as incorporated by Rule 9017 of the Federal Rules of Bankruptcy Procedure).

BACKGROUND

1. Salesforce is a Delaware corporation and, among other activities, it provides on-demand customer relationship management and software application services (collectively, the “**Salesforce Services**”) to Salesforce’s business customers. *See* Ramirez Declaration at ¶2.

SALESFORCE CONTRACT

2. The Debtors entered into certain Order Forms (the “**Salesforce Orders**”) ⁸ whereby (a) the Debtors ordered certain Salesforce Services and became obligated to pay the aggregate full contract amount for the such services, and Salesforce became obligated to provide such services to the Debtors. *See* Ramirez Declaration at ¶6.

3. Salesforce Orders are subject to the terms and conditions set forth in the *Master Subscription Agreements* effective September 15, 2011 and *Master Subscription Agreement* effective July 5, 2005 through November 30, 2005 (the “**MSAs**” together the Salesforce Orders, collectively constitute the “**Salesforce Contract**”). A copy of the Salesforce Contract is not attached hereto due to its confidentiality provisions. However, subject to appropriate non-disclosure protections, a copy of the Salesforce Contract will be made available to the Debtors and the Official Committee of Unsecured Creditors (the “**Committee**”) in connection with this Cure Objection.

BANKRUPTCY CASE

4. On February 15, 2019 (the “**Petition Date**”), Windstream Holdings, Inc. and the other above-captioned Debtors (collectively, the “**Debtors**”) ⁹ filed their individual,

⁸ The SFDC Orders are identified on the “SFDC Cure Amount Summary” that is attached hereto as Exhibit A and incorporated by reference herein as if fully set forth.

⁹ Due to the large number of Debtors in these chapter 11 cases, for which joint administration has been granted, a complete list of the debtor entities may be obtained on the website of the Debtors’ claims and noticing agent at <http://www.kccllc.net/windstream>.

voluntary petitions in the above-captioned Court (the “**Court**”) seeking relief under chapter 11 of title 11 of the United States Code (11 U.S.C. §§ 101–1532) (the “**U.S. Bankruptcy Code**”).

5. On June 22, 2020, the Debtors filed their plan of reorganization (the “**Plan**”)¹⁰ seeking, among other things, approval of the procedures (the “**Assumption Procedures**”) for the assumption of the Debtors’ executory contracts and unexpired leases (the “**Assumed Contracts**”) and the determination of the amount necessary to cure any defaults thereunder (the “**Cure Costs**”).

6. On June 26, 2020, the Court entered its the order approving the Plan and Assumption Procedures governing the assumption of executory contracts.¹¹ The Assumption Procedures provide, in pertinent part, that (a) any Cure Objection or Adequate Assurance Objection must be filed and served by the Cure Objection Deadline, and (b) if a timely Cure Objection is received and such objections cannot otherwise be resolved by the parties, these objections shall be heard at a scheduled Hearing.¹²

7. On September 18, 2020, the Debtors filed their *Notice of Filing of Eighth Amended Plan Supplement* [ECF 2522] (the “**Cure Notice**”) that identifies the executory contracts and/or unexpired leases of the Debtors that may be assumed pursuant to the confirmed Plan. Pursuant to the confirmed Plan, any objection by a counterparty to an Executory Contract or Unexpired Lease to the proposed assumption, assumption and assignment or related cure amount must be filed, served and actually received by the Debtors on or before 14 days following distribution of the applicable Cure Notice. Accordingly, the

¹⁰ See *First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al., Pursuant to Chapter 11 of the Bankruptcy Code (Technical Modifications)* [ECF 2201] as amended, supplemented, or otherwise modified from time to time, the “**Plan**”

¹¹ See *Findings of Fact, Conclusions of Law, and Order Confirming the First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al., Pursuant to Chapter 11 of the Bankruptcy Code* [ECF 2243] (the “**Confirmation Order**”)

¹² *Id.*

deadline to object to the Cure Notice is October 2, 2020 (the “**Cure Objection Deadline**”).¹³

8. The *Cure Notice* identifies the following executory contract to which Salesforce is a counterparty as an Assumed Contract, and the Cure Amount the Debtors contend must be paid as a condition of such contract:

Ref	Counterparty	Debtor Counterparty	Description of Contract	Cure Amount
2514	Salesforce.com, Inc 415 Mission Street, 3 rd Floor San Francisco, CA 94105	Windstream Communications, LLC	Order Form 10/30/18	\$ 36,350.72
2515	Salesforce.com, Inc 415 Mission Street, 3 rd Floor San Francisco, CA 94105	Allworx Corp	Order Form with Allworx dated October 12, 2018	See above

9. On September 21, 2020, the Debtors filed their *Notice of (I) Entry of Confirmation Order, (II) Occurrence of Effective Date, and (III) Related Bar Dates* [ECF 2527] (the “**Effective Date Notice**”) which notifies parties that the Plan became effective as of September 21, 2020 (the “**Plan Effective Date**”).

CURE AMOUNT

10. Based upon review of its books and records pertinent to the Debtors’ account, Salesforce submits that (as of October 1, 2020), (a) the Debtors have failed to pay all Fees due and owing pursuant to the Salesforce Contract, and (b) more specifically, as of this date, not less than US\$ 652,040.00 (the “**Salesforce Cure Amount**”) remains due and owing to Salesforce pursuant to the Salesforce Contract. [See Salesforce Cure Amount Summary attached as Exhibit A to the Ramirez Declaration at ¶14.]

11. Further, based on its review of its books and records that are pertinent to the Debtors’ account, Salesforce submits that an additional US\$ 5,401,891.67 (the “**Future Revenues**”), will become due and owing for additional unbilled Salesforce Services to be provided through the end of the term of the Salesforce Contract. [See Salesforce Cure Amount

¹³ See *First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al., Pursuant to Chapter 11 of the Bankruptcy Code (Technical Modifications)* [ECF 2201] as amended, supplemented, or otherwise modified from time to time, the “**Plan**”) at page 43.

Summary attached as Exhibit A to the Ramirez Declaration at ¶15.]

12. Salesforce further submits that it is possible that Salesforce Cure Amount may increase if (A) the Debtors identify either (a) additional orders (the “**Additional Salesforce Orders**”) that are part of the Salesforce Contract (but which have not been identified on Exhibit “A” to my declaration) and/or (b) any executory contracts other than the Salesforce Contract (collectively, the “**Additional Salesforce Contracts**”) for assumption by the Debtors. In the event that any such Additional Salesforce Orders or Additional Salesforce Contracts are designated for assumption, it will be necessary for Salesforce to review its records to determine whether any monetary defaults exist with respect to such Additional Salesforce Orders or any Additional Salesforce Contracts. [See Ramirez Declaration at ¶16.]

13. Subsequent to filing this Assumption Objection, Salesforce expects to cooperate with the Debtors to reconcile the status of payments made by the Debtors and, accordingly, resolve the Salesforce Cure Amount consensually if possible. That being said, Salesforce reserves its rights under the Plan with respect to payment of the Salesforce Cure Amount.

GROUND FOR THE RELIEF REQUESTED

The Salesforce Contract Constitutes An Integrated Contract That Must Be Assumed in Its Entirety

14. Pursuant to the U.S. Bankruptcy Code, a debtor-in-possession has the power, with court approval, to assume or reject most executory contracts or unexpired leases. 11 U.S.C. §365(b)(1)(A). As a practical matter, a commercial relationship often includes several agreements that, taken together, constitute an integrated relationship. The threshold issue for the Court in determining whether to approve the assumption of an executory contract is to identify the agreements that constitute the “executory contract” at issue. *Lewis Bros. Bakeries, Inc. v. Interstate Brands Corp. (In re Interstate Bakeries Corp.)*, 751 F.3d 955, 961 (8th Cir.2014) (To determine the applicability of this provision, the Court “must first identify what constitutes the agreements at issue.”) Where multiple contracts are intended to comprise one

agreement or transaction, a party may not sever them for purposes of assumption or rejection. *See, e.g., In re LG Philips Displays USA, Inc.*, No. 06–10245(BLS), 2006 WL 1748671, at *4 (Bankr. D. Del. June 21, 2006) (“[A]ll of the contracts that comprise an integrated agreement must be either assumed or rejected, since they all make up one contract.”).

15. Where, as is the situation in the case before this Court, more than one agreement between the parties exists “it is well-settled that state law governs whether the agreements are separate or indivisible for purposes of §365.” *In re New York Skyline, Inc.*, 432 B.R. 66, 77 (Bankr. S.D.N.Y. 2010) (applying New York state law). *Accord, Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co., Inc.*, 913 F.3d 409, 416 (4th Cir. 2019); *Countryside Orthopaedics, P.C. v. Peyton*, 261 Va. 142, 541 S.E.2d 279, 284 (2001) (“Where two papers are executed at the same time or contemporaneously between the same parties, in reference to the same subject matter, they must be regarded as parts of one transaction, and receive the same construction as if their several provisions were in one and the same instrument.” (citations omitted); *Am. Realty Tr. v. Chase Manhattan Bank, N.A.*, 222 Va. 392, 281 S.E.2d 825, 831 (1981) (a court must give effect to the intent of the parties in determining whether two agreements should be construed as constituting one contract).

16. As previously noted, the Salesforce Orders are subject expressly to the terms and conditions set forth in the MSA and these agreements together constitute the Salesforce Contract. *See* Ramirez Declaration at ¶7. By the express terms of the MSA, the Salesforce Orders are governed by California law.¹⁴

17. “Under [California] Civil Code section 1642, “[s]everal contracts relating to the

¹⁴ Each of the Orders constituting the Salesforce Contract expressly states that: “This Order Form shall be governed by the Master Subscription Agreement between salesforce.com and the Debtor (the “MSA”) and any applicable addenda thereto . . .” Section 12.9 of the MSA, in turn, specifies that California law is the governing law of the Order itself. [A copy of the MSA may be found at <http://www.salesforce.com/company/msa/jsp>.] Due to confidentiality constraints imposed by the MSA, none of the agreements constituting the Salesforce Contract have been filed at this time. However, copies of the agreements will be made available to the Debtor if requested. *See* Ramirez Declaration at ¶7.

same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together.” *Fuentes v. TMCSF, Inc.*, 26 Cal. App. 5th 541, 548, 237 Cal. Rptr. 3d 256, 261 (Ct. App. 2018). In determining whether a series of agreements constitute an integrated contract or separate contracts, the intention of the parties is the first and foremost factor considered by a court. *Id. citing (Goodman v. Severin (1969) 274 Cal.App.2d 885, 895, 79 Cal.Rptr. 555.)* The determination whether a series of agreements constitute an integrated contract is made by analyzing the plain language of the Master Agreement between the parties. *Id.*

18. Salesforce submits that, in order for the Debtors (or any assignees in the event of Salesforce Contract is assigned by the Debtors) to utilize the same Salesforce Services (*i.e.*, after confirmation of the Plan) as the Debtors have utilized until now, the Debtors must assume and assign the entire Salesforce Contract. Accordingly, Salesforce asserts that the entire Salesforce Contract¹⁵ – that is, the MSA, *and* the Salesforce Orders – constitute a single, integrated executory contract and this Salesforce Contract must be assumed by the Debtors.

19. Salesforce, further, submits that the *Cure Notice* is deficient because it fails to identify the integrated Salesforce Contract (*i.e.*, the MSA and the Salesforce Orders) that must be assumed *in toto*. Accordingly, Salesforce requests that the Court enter an Assumption Order that includes findings of fact that (A) the Salesforce Contract, for purposes of assumption pursuant to 11 U.S.C. §365, is an integrated contract that is comprised of (i) the MSA and (ii) the Salesforce Orders, and (B) the entire Salesforce Contract is to be assumed and assigned.

All Defaults Under an Assumed Contract Must Be Cured

20. Where (as in the case before the Court) the debtor has defaulted on an executory contract, the Bankruptcy Code prohibits the debtor from assuming the contract unless the

¹⁵ See the Ramirez Declaration at ¶7 and Exhibit A attached thereto.

debtor:

- (A) cures, or provides adequate assurance that the [debtor] will promptly cure, such default
- (B) compensates, or provides adequate assurance that the [debtor] will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
- (C) provides adequate assurance of future performance under such contract or lease.

See 11 U.S.C. §365(b)(1)(A).

21. “Once an assumption order is entered, the creditor must perform in accordance with the terms of the assumed agreements. . . . In other words, the debtor must cure all defaults, assure future performance, and make the other contracting party whole before it may be permitted to assume the agreement.”. *In re Kiwi Intern. Air Lines, Inc.*, 344 F.3d 311, 318 (3rd Cir. 2003); *In re Columbia Gas System Inc.*, 50 F.3d 233, 238–39 (3d Cir.1995) (“the Bankruptcy Code provides that the cost of performing the debtor's obligations is an administrative expense of the estate. . . .”).

22. As previously stated, Salesforce expects the Parties to undertake a reconciliation of the Debtors’ Account. Accordingly, Salesforce acknowledges that the Salesforce Cure Amount may be adjusted – either increased or decreased. That being said, Salesforce reserves its rights under the Plan with respect to payment of the Salesforce Cure Amount.

23. That being said, the evidence submitted by Salesforce establishes that, as of this date, not less than US\$ 652,040.00 (*i.e.*, the Salesforce Cure Amount) is due and owing, but unpaid, pursuant to the Salesforce Contract. *See* Ramirez Declaration at ¶14. Accordingly, based on the evidence before the Court, Salesforce submits that the Debtors are obligated to cure this monetary default in full as a condition of assumption of the Salesforce Contract

pursuant to 11 U.S.C. §365(b)(1)(A).

RESERVATION OF RIGHTS

24. Salesforce does not object to assumption of the Salesforce Contract *per se provided* the Assumption Order (a) requires payment of the Salesforce Cure Amount (plus all additional amounts that may accrue from date through the Effective Assumption Date) in full and (b) includes the other relief requested by this Assumption Objection. More specifically, although Salesforce expects to cooperate with the Debtors to reconcile the Debtors' Account and, thereby, resolve the Salesforce Cure Amount consensually, Salesforce hereby reserves all rights under the Plan, and sections 365 and 1123(b)(2) of the U.S. Bankruptcy Code, with respect to payment of the Salesforce Cure Amount and provision of adequate assurance of future performance by any subsequent assignee to whom the Salesforce Contract is assigned pursuant to the Plan.

25. Further, with respect to any and all other executory contracts and/or unexpired leases to which it is a counterparty (individually, an "**Excluded Contract**" and, collectively, the "**Excluded Contracts**") other than the Salesforce Contract as identified in this Assumption Objection, Salesforce hereby expressly reserves (the "**Reservation of Rights**") all rights, interests, claims, counterclaims, rights of setoff and recoupment and/or defenses pertaining to any or all Excluded Contracts including, without limitation, (a) the right to object to the assumption and/or assignment by the Debtors of any such Excluded Contract, (b) the right to payment of all monetary defaults and the cure of all non-monetary defaults that exist with respect to each such Excluded Contract, (c) the right to assert any Cure Costs due and owing with respect to any Additional Salesforce Orders and/or Additional Salesforce Contract(s) that hereinafter are designated for assumption and assignment by the Debtors, and/or (d) the right to have the

assignment of any such Excluded Contract specifically conditioned on the Court finding, based on competent evidence, that the actual assignee of such contract is capable of performing all terms and conditions of such Excluded Contract including, without limitation, payment of all amounts that will come due and owing subsequent to any such assignment.

WHEREFORE, if the Court determines to approve assumption of the Salesforce Contract, Salesforce requests that the Assumption Order include the following relief:

A. Findings of fact stating that: (1) the Salesforce Contract¹⁶ constitutes a single, integrated executory contract for purposes of assumption pursuant to 11 U.S.C. §365; (2) the Salesforce Contract constitutes an “Assumed Contract” subject to assumption pursuant to the Plan and the *Cure Notice*; (3) not less than the aggregate amount of US\$ 652,040.00 (*i.e.*, Salesforce Cure Amount) is due and owing, but unpaid, as of this date, pursuant to the Salesforce Contract; and (4) the aggregate amount of US\$ 5,401,891.67 (*i.e.*, the Future Revenues) will become due and owing for Salesforce Services to be provided, from and after October 30, 2020 through February 7, 2022, pursuant to the Salesforce Contract;

B. The requirement that, as a condition of approving the assumption of the Salesforce Contract, the Debtors shall pay not less than US\$ 652,040.00 (*i.e.*, the Salesforce Cure Amount) to cure the monetary defaults of the Salesforce Contract, plus any additional amounts as may accrue prior to the effective date of the assumption of the Salesforce Contract (*i.e.*, the Effective Assumption Date);

C. The requirement that, if the Salesforce Contract is assumed pursuant to the Plan and, thereafter, the Debtors seek to assign the assumed Salesforce Contract, the Court require

¹⁶ See *Salesforce Cure Amount Summary* attached as Exhibit A to the Ramirez Declaration at ¶14.

the Debtors provide adequate assurance of future performance of all terms and conditions of the Salesforce Contract (including, without limitation, payment of the Future Revenues) by the prospective assignee of the Salesforce Contract;

D. The requirement that, in the event the Salesforce Contract is not assumed by the Debtors, the Debtors shall be obligated pay any and all amounts that are due and owing pursuant 11 U.S.C. §503 and 507 (*i.e.*, the Salesforce Administrative Expense) for Salesforce Services provided from and after Petition Date to the date the Court enters its order approving the rejection of the Salesforce Contract.

E. The requirement that, in the event the Salesforce Contract (a) is not assumed and (b) an order (*i.e.*, the Rejection Order) is entered approving the rejection of the Salesforce Contract, the Stay imposed by 11 U.S.C. §362 shall be terminated, pursuant to 11 U.S.C. §§362(d)(1) and/or (d)(2), to the extent the Stay pertains to the Salesforce Contract (including, without limitation, the right of Salesforce to terminate the Salesforce Contract) without (i) Salesforce having to file a separate motion seeking termination of the Stay or (ii) the Court entering any order other than the Rejection Order, and such termination of the Stay shall be effective as of the date the Rejection Order is entered;

F. Approval of the Reservation of Rights including, without limitation, all of Salesforce's rights under the Plan, and sections 365 and 1123(b)(2) of the U.S. Bankruptcy Code, with respect to payment of the Salesforce Cure Amount and provision of adequate

assurance of future performance by any subsequent assignee to whom the Salesforce Contract is assigned pursuant to the Plan; and

G. Grants such other relief as may be just and proper.

Dated: October 2, 2020

Respectfully submitted,

WHITE AND WILLIAMS LLP

/s/ James C. Vandermark

James C. Vandermark, Esq.
7 Times Square, Suite 2900
New York, New York 10036-6524
Telephone: (212) 244-9500
Facsimile: (212) 244-6200
E-mail: vandermarkj@whiteandwilliams.com

-and-

BIALSON, BERGEN & SCHWAB,
A Professional Corporation
Thomas M. Gaa, Esq.
633 Menlo Avenue, Suite 100
Menlo Park, CA 94025
Telephone: (650) 857-9500
Fax: (650) 494-2738
E-mail: Tgaa@bbslaw.com

Attorneys for Creditor salesforce.com, Inc.

WHITE & WILLIAMS LLP
James C. Vandermark
Amy Vulpio
7 Times Square, Suite 2900
New York, New York 10036-6524
Telephone: (212) 244-9500
Facsimile: (212) 244-6200
E-mail: vandermarkj@whiteandwilliams.com
vulpioa@whiteandwilliams.com
and

BIALSON, BERGEN & SCHWAB
Thomas M. Gaa, (Cal. Bar No. 130720)
633 Menlo Ave., Suite 100
Menlo Park, CA 94025
Telephone: (650) 857-9500
E-mail: Tgaa@bbslaw.com

Counsel to salesforce.com, inc.

IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:)	Chapter 11
WINDSTREAM HOLDINGS, INC., <i>et al.</i> , ¹)	Case No. 19-22312 (RDD)
Debtors.)	(Jointly Administered)

**DECLARATION OF KEVIN RAMIREZ IN SUPPORT OF THE OBJECTION OF
SALESFORCE.COM, INC. TO THE PROPOSED ASSUMPTION OF CERTAIN
EXECUTORY CONTRACTS AND CURE COSTS IN CONNECTION WITH THE
DEBTORS JOINT CHAPTER 11 PLAN OF REORGANIZATION,
AND RESERVATION OF RIGHTS**

I, Kevin Ramirez, declare as follows:

¹ The last four digits of Debtor Windstream Holdings, Inc.'s tax identification number are 7717. Due to the large number of Debtors in these chapter 11 cases, for which joint administration has been granted, a complete list of the debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors' claims and noticing agent at <http://www.kccllc.net/windstream>. The location of the Debtors' service address for purposes of these chapter 11 cases is: 4001 North Rodney Parham Road, Little Rock, Arkansas 72212.

1. I am the AR Analyst-Write-offs for salesforce.com, inc. ("**Salesforce**") and I am authorized to execute this Declaration on behalf of Salesforce. If called to testify, I could and would competently testify to the facts set forth herein based on my personal knowledge of those facts, events and transactions.²

2. Salesforce is a Delaware corporation and, among other activities, it provides on-demand customer relationship management and software application services (collectively, the "**Salesforce Services**") to Salesforce's business customers. (individually, a "**Salesforce Customer**" and, collectively, "**Salesforce Customers**"). This declaration is filed in support of the *Objection of Salesforce.com, Inc. to the Proposed Assumption of Certain Executory Contracts and Cure Costs, And Reservation of Rights* (the "**Assumption Objection**") filed by Salesforce with respect to the possible assumption by the Debtors of those certain executory contract to which the Creditors are a counterparty (as hereinafter identified).

MAINTENANCE OF BUSINESS RECORDS

3. In my official capacity, I have personal knowledge of the method by which Salesforce maintains permanent records of its transactions (individually, a "**Transaction**" and, collectively, the "**Transactions**") with its customers and, thereupon, I declare and state that Salesforce maintains permanent records of all Transactions in a computerized accounting system. All amounts due and owing to Salesforce with respect to any Transaction with a Salesforce Customer including, but not limited to, payments related to the Salesforce Services, taxes, interest owed with respect to any Service or agreement, fees, and other charges (individually, an "**Obligation**" and, collectively, the "**Obligations**"), are entered in this accounting system at, or near, the time such Obligations are incurred. Likewise, all payments made by a Salesforce Customer with respect to any Obligation or

² Capitalized terms used in this Declaration, but which are not defined herein, shall have the meanings ascribed to them in the Cure Objection filed concurrently herewith.

Transaction, and all other credits and debits related to any Obligation or Transaction, are entered in this accounting system at, or near, the time such payment is received and/or such credit or debit is made or incurred. Each such entry is made in the regular course of business by employees of Salesforce who process these payments, receipts, credits, and debits. If necessary, Salesforce can print hard copies of all entries.

4. I have personal knowledge of the manner by which Salesforce maintains records of its agreements, contracts, order forms, statements of work, schedules and any related documents, and all amendments to any of the foregoing (individually, a “**Salesforce Agreement**” and, collectively, the “**Salesforce Agreements**”) with its Customers. As a regular part of its business, Salesforce maintains permanent records of the Salesforce Agreements and these records are compiled at the time, or near the time, that a Salesforce Agreement is received or processed.

SALESFORCE CONTRACT

5. I have personally reviewed Salesforce’s records relating to the Debtors, with respect to the Transactions, the Obligations and the Salesforce Agreements, and I am personally familiar with Salesforce’s Account with the above-named Debtors.

6. The Debtors entered into certain Order Forms (the “**Salesforce Orders**”)³ whereby (a) the Debtors ordered the Salesforce Services and became obligated to pay the aggregate full contract amount for the such services, and Salesforce became obligated to provide such services to the Debtors.

7. The Salesforce Orders are subject to the terms and conditions set forth in the *Master Subscription Agreements* effective September 15, 2011 and *Master Subscription Agreement* effective July 5, 2005 through November 30, 2005 (the “**MSAs**” together the Salesforce Orders, collectively constitute the “**Salesforce Contract**”). A copy of the

³ The SFDC Orders are identified on the “SFDC Cure Amount Summary” that is attached hereto as Exhibit A and incorporated by reference herein as if fully set forth.

Salesforce Contract is not attached hereto due to its confidentiality provisions. However, subject to appropriate non-disclosure protections, a copy of the Salesforce Contract will be made available to the Debtors and the Official Committee of Unsecured Creditors (the “**Committee**”) in connection with this Cure Objection.

BANKRUPTCY CASE

8. Based upon information and belief, I am informed that, on February 15, 2019 (the “**Petition Date**”), Windstream Holdings, Inc. and the other above-captioned Debtors (collectively, the “**Debtors**”) filed their individual, voluntary petitions in the above-captioned Court (the “**Court**”) seeking relief under chapter 11 of the United States Bankruptcy Code.

9. Based on information and belief, I am informed that, on June 22, 2020, the Debtors filed their plan of reorganization (the “**Plan**”) ⁴ seeking, among other things approving the procedures (the “**Assumption Procedures**”) for the assumption of the Debtors’ executory contracts and unexpired leases (the “**Assumed Contracts**”) and the determination of the amount necessary to cure any defaults thereunder (the “**Cure Costs**”).

10. Based on information and belief, I am informed that, on June 26, 2020, the Court entered its the order approving the Plan and Assumption Procedures governing the assumption of executory contracts.⁵ Further, I understand that the Assumption Procedures provide, in pertinent part, that (a) any Cure Objection or Adequate Assurance Objection must be filed and served by the Cure Objection Deadline, and (b) if a timely Cure Objection is received and such objections cannot otherwise be resolved by the parties, these

⁴ See *First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al., Pursuant to Chapter 11 of the Bankruptcy Code (Technical Modifications)* [ECF 2201] as amended, supplemented, or otherwise modified from time to time, the “**Plan**”

⁵ See *Findings of Fact, Conclusions of Law, and Order Confirming the First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al., Pursuant to Chapter 11 of the Bankruptcy Code* [ECF 2243] (the “**Confirmation Order**”)

objections shall be heard at a scheduled Hearing.⁶

11. Based upon information and belief, I am informed that, on September 18, 2020, the Debtors filed their *Notice of Filing of Eighth Amended Plan Supplement* [ECF 2522] (the “**Cure Notice**”) that identifies the executory contracts and/or unexpired leases of the Debtors that may be assumed (“**Assumed Contract**”) pursuant to the confirmed Plan. Pursuant to the confirmed Plan, any objection by a counterparty to an Executory Contract or Unexpired Lease to the proposed assumption, assumption and assignment or related cure amount must be filed, served and actually received by the Debtors on or before 14 days following distribution of the applicable Cure Notice. Accordingly, the deadline to object to the Cure Notice is October 2, 2020 (the “**Cure Objection Deadline**”).⁷

12. Based upon information and belief, I am informed that the *Cure Notice* identifies the following executory contract to which Salesforce is a counterparty as an Assumed Contract, and the Cure Amount the Debtors contend must be paid as a condition of such contract:

Ref	Counterparty	Debtor Counterparty	Description of Contract	Cure Amount
2514	Salesforce.com, Inc 415 Mission Street, 3 rd Floor San Francisco, CA 94105	Windstream Communications, LLC	Order Form 10/30/18	\$ 36,350.72
2515	Salesforce.com, Inc 415 Mission Street, 3 rd Floor San Francisco, CA 94105	Allworx Corp	Order Form with Allworx dated October 12, 2018	See above

13. Based on information and belief, I am informed that, on September 21, 2020, the Debtors filed their *Notice of (I) Entry of Confirmation Order, (II) Occurrence of Effective Date, and (III) Related Bar Dates* [ECF 2527] (the “**Effective Date Notice**”) which notifies parties that the Plan became effective as of September 21, 2020 (the “**Plan**”).

⁶ *Id.*

⁷ See *First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al., Pursuant to Chapter 11 of the Bankruptcy Code (Technical Modifications)* [ECF 2201] as amended, supplemented, or otherwise modified from time to time, the “**Plan**”) at page 43.

Effective Date”).

CURE AMOUNT

14. Based upon my review of Salesforce’s books and records pertinent to the Debtors’ account, I declare and state that (as of October 1, 2020), (a) the Debtors have failed to pay all Fees due and owing pursuant to the Salesforce Contract, and (b) more specifically, as of this date, not less than US\$ 652,040.00 (the “**Salesforce Cure Amount**”) is due and owing to Salesforce pursuant to the Salesforce Contract. A summary of the Salesforce Cure Amount (the “**Salesforce Cure Amount Summary**”) is attached hereto as Exhibit A and incorporated by reference herein as if fully set forth. Copies of the Invoices are not attached hereto due to the confidentiality provisions contained within the Salesforce Contract. However, subject to appropriate non-disclosure protections, a copy of the Invoices will be made available to the Debtors and the Committee in connection with this Cure Objection.

15. Further, based on my review of Salesforce’s books and records that are pertinent to the Debtors’ account, I declare and state that an additional US\$ 5,401,891.67 (the “**Future Revenues**”), will become due and owing for additional unbilled Salesforce Services to be provided through the end of the term of the Salesforce Contract. See Exhibit “A” attached hereto and incorporated by reference herein as if fully set forth.

16. It is possible that Salesforce Cure Amount may increase if (A) the Debtors identify either (a) additional orders (the “**Additional Salesforce Orders**”) that are part of the Salesforce Contract (but which have not been identified on Exhibit “A” to my declaration) and/or (b) any executory contracts other than the Salesforce Contract (collectively, the “**Additional Salesforce Contracts**”) for assumption by the Debtors. In the event that any such Additional Salesforce Orders or Additional Salesforce Contracts are designated for assumption, it will be necessary for Salesforce to review its records to

determine whether any monetary defaults exist with respect to such Additional Salesforce Orders or any Additional Salesforce Contracts.

I declare under penalty of perjury that the foregoing is true and correct. Executed
10/1/2020
this ____ day of October 2020 at San Francisco, California

DocuSigned by:
Kevin Ramirez
C23C74F9942B40F...

Kevin Ramirez

Petition Date: 2/25/19

Contract No.		Debtor	Order No.	Date	Term	Invoice No.	Date	Service Period	Amount	Pre-petition	Administrative Expense Accrued	Future Billing
2018717	MSA 9/15/11	Windstream Communications	Q-02151079	10/30/2018	10/30/18 to 10/29/21	TBD		10/30/20 to 10/29/21	\$ 3,092,931.17			\$ 3,092,931.17
2214891	MSA 9/15/11	Windstream Communications	Q-02898456	9/11/2019	8/31/19 to 10/30/21	17523965	8/14/2020	9/13/20 to 9/12/21	\$ 167,040.00		\$ 167,040.00	
2500953	MSA 9/15/11	Windstream Services, LLC.	Q-03835635	9/11/2020	10/5/20 to 10/4/21	17716445	9/14/2020	10/5/20 to 10/4/21	\$ 485,000.00		\$ 485,000.00	
2474891	MSA 9/15/11	Windstream Services, LLC.	Q-03731097	7/31/2020	8/15/20 to 8/14/23	TBD		8/15/21 to 4/14/23	\$ 2,212,432.80			\$ 2,212,432.80
2023963	MSA_07082005-11302005	Allworx Corp*	Q-02038482	10/30/2018	11/8/18 to 2/7/22	TBD		11/8/20 to 11/7/21	\$ 77,222.16			\$ 77,222.16
2023963	MSA_07082005-11302005	Allworx Corp*	Q-02038482	10/30/2018	11/8/18 to 2/7/22	TBD		11/8/21 to 2/7/22	\$ 19,305.54			\$ 19,305.54
									\$ 6,053,931.67	\$ -	\$ 652,040.00	\$ 5,401,891.67

*ALLWORX, Corp REJECTED CONTRACT per Second Amended Plan Supplement ECF 2039, added back on to assumption list on 8th Amended Plan ECF 2522