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Hearing Date: July 29, 2021 at 10:00 a.m. (prevailing Eastern time)
Objection Deadline: July 22, 2021 at 4:00 p.m. (prevailing Eastern time)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
WINDSTREAM FINANCE, CORP., *et al*.,[1]	Case No. 19-22397 (RDD)
Reorganized Debtors.	(Formerly Jointly Administered under Lead Case: Windstream Holdings, Inc., 19-22312)

REORGANIZED DEBTORS' MOTION FOR ENTRY OF AN ORDER AUTHORIZING ASSUMPTION OF THE CHARTER AGREEMENTS AND GRANTING RELATED RELIEF

[1] The last four digits of Reorganized Debtor Windstream Finance, Corp.'s tax identification number are 5713. Due to the large number of Reorganized Debtors in these Chapter 11 cases, for which joint administration has been granted, a complete list of the Reorganized Debtors 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 Reorganized Debtors' claims and noticing agent at http://www.kccllc.net/windstream. The location of the Reorganized Debtors' service address for purposes of these Chapter 11 cases is: 4001 North Rodney Parham Road, Little Rock, Arkansas 72212.

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The above-captioned debtors and debtors-in-possession (before the effective date of their chapter 11 plan, the "Debtors", and after the effective date of their chapter 11 plan, the "Reorganized Debtors") file this motion (the "Motion") for entry of an order authorizing the assumption of the Charter Agreements (defined below) and granting related relief. In support of this Motion, the Reorganized Debtors respectfully state as follows:

PRELIMINARY STATEMENT[2]

1. On April 8, 2021, this Court issued its Memorandum of Decision holding Charter in contempt for violating the automatic stay as a result of (a) Charter terminating service to the Debtors' customers in an attempt to collect prepetition debt and (b) the literally false and intentionally misleading advertising campaign conducted by Charter that wrongfully interfered with the Debtors' customer contracts and goodwill. The Court sanctioned Charter for more than $19.1 million for the losses caused by Charter's violations of the automatic stay and entered a Judgment accordingly. Charter has appealed that Judgment (the "Appeal").

2. By this Motion, the Reorganized Debtors seek to assume the Charter Agreements. To do so, the Reorganized Debtors must cure the existing defaults under the Charter Agreements. After extensive good faith negotiations, the parties have agreed that the cure amount for the Charter Agreements is $12 million. If the Judgment is affirmed at the conclusion of the Appeal, the Reorganized Debtors may seek, pursuant to the terms of the Charter Agreements and applicable law, to set off the Judgment and their costs, including attorneys' fees, incurred in connection with the Appeal (the "Appeal Costs") against the Agreed Cure Amount. Charter is appealing the Judgment. Unfortunately, Charter is also using its appeal as a sword to demand immediate payment of the Agreed Cure Amount. In an effort to resolve this dispute, the Reorganized Debtors

[2] Capitalized terms used in this Preliminary Statement shall unless otherwise defined herein have the meaning ascribed to such terms subsequently in the Motion.

offered to escrow the Agreed Cure Amount in full, which would have preserved their right to set off the Judgment and their Appeal Costs while also ensuring payment of the Agreed Cure Amount to Charter if it is successful on appeal. Charter, however, refused this offer, leading to this Motion.

3. Compelling the Reorganized Debtors to pay the Agreed Cure Amount now would compound inequity upon inequity. In addition to the substantial damages already incurred because of Charter's unlawful conduct, the Reorganized Debtors will also lose their right to set off the Judgment and their Appeal Costs against the Agreed Cure Amount, and will ultimately have to vindicate their rights once again if Charter's appeal fails, this time in a restitution action. While the Supersedeas Bond secures the Judgment, it does so only up to $19.5 million. This will almost certainly not cover all of the Appeal Costs if the Reorganized Debtors prevail in the Appeal – particularly if the ever-litigious Charter appeals a loss in the District Court to the Second Circuit or even the United States Supreme Court. If the Reorganized Debtors are required to pay the Agreed Cure Amount now, they will thus lose their right to set off their Appeal Costs against the Agreed Cure Amount. For example, if the Judgment is affirmed and the Reorganized Debtors incur a mere $500,000 in Appeal Costs, the Reorganized Debtors will be forced to chase Charter to collect more than $100,000 in Appeal Costs owed to the Reorganized Debtors – *i.e.,* $19.6 million (Judgment plus Appeal Costs) less $19.5 million (amount of Supersedeas Bond).

4. Charter, on the other hand, faces no risk here. If Charter's appeal fails, it will be in the same position it is in now. If the Appeal succeeds, there is no risk that the Agreed Cure Amount will remain unpaid, as the Reorganized Debtors will be compelled to cure promptly and completely. For the reasons set forth above, as described in further detail below, the law and the equities of this case both strongly favor the Reorganized Debtors. Accordingly, the Reorganized Debtors respectfully request that the Court grant the Motion.

JURISDICTION AND VENUE

5. The United States Bankruptcy Court for the Southern District of New York (the "Court") has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order of Reference from the United States District Court for the Southern District of New York, dated February 1, 2012. The Reorganized Debtors confirm their consent, pursuant to Rule 7008 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

6. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

7. The bases for the relief requested herein are Sections 105(a), 365, 558 and 1123(b)(2) of title 11 of the United States Code (the "Bankruptcy Code"), Bankruptcy Rule 6006, and Rule 6006-1(a) of the Local Rules of the United States Bankruptcy Court for the Southern District of New York (the "Local Rules").

FACTUAL BACKGROUND

8. On February 25, 2019 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtors' Chapter 11 cases were subsequently consolidated for procedural purposes and jointly administered under Case No. 19-22397 (the "Main Docket") pursuant to Bankruptcy Rule 1015(b).

9. On May 15, 2020, the Debtors filed the *First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al, Pursuant to Chapter 11 of the Bankruptcy Code* (Main Dkt. No. 1812) (the "Plan").

10. On June 26, 2020, the Court confirmed the Plan pursuant to its *Findings of Fact, Conclusions of Law, and Order Confirming First Amended Joint Chapter 11 Plan of Windstream Holdings, Inc. et al, Pursuant to Chapter 11 of the Bankruptcy Code* (Main Dkt. No. 2243) (the "Confirmation Order").

11. On September 21, 2020 (the "Plan Effective Date"), the Plan went effective. (*See Notice of (I) Entry of Confirmation Order, (II) Occurrence of Effective Date, and (III) Related Bar Dates*) (Main Dkt. No. 2527).

12. Pursuant to the Plan and the Confirmation Order, the Debtors and Reorganized Debtors, as applicable, had the right to alter, amend, modify, or supplement the Assumed Executory Contract and Unexpired Lease Schedule (as defined in the Plan) at any time up to forty-five (45) days after the Plan Effective Date (the "Contract Assumption Schedule Amendment Deadline") (Plan Art. V(A); Confirmation Order, ¶ 72).

13. On November 4, 2020, and prior to the Contract Assumption Schedule Amendment Deadline, the Reorganized Debtors served on Charter Communications, Inc. and Charter Communications Operating, LLC (together, "Charter") the *Notice of (A) Executory Contracts to Be Assumed by the Reorganized Debtors Pursuant to the Plan, (B) Cure Amounts, and (C) Related Procedures in Connection Therewith* (the "Cure Notice") (Rochester Dec., Exhibit A). A copy of the Cure Notice is attached as Exhibit A to the Declaration of Shaya Rochester (the "Rochester Dec.") filed contemporaneously herewith.

14. The Cure Notice notified Charter of the Reorganized Debtors' intent to assume two executory contracts: (a) the Carrier Master Service Agreement entered into on or about December

14, 2018 (the "MSA Agreement") and (b) the Spectrum Business Value Added Reseller Agreement entered into on or about April 11, 2018 (the "VAR Agreement").[3]

15. The Cure Notice also notified Charter of the Reorganized Debtors' proposed cure amounts for the Charter Agreements: (a) $4,098,377.88 for the MSA Agreement and (b) $1,643,717.97 for the VAR Agreement, for a total proposed cure amount of $5,742,095.85. (Cure Notice, Exhibit A-7).

16. The Cure Notice expressly reserved the Reorganized Debtors' rights "to set off and/or recoup any sanctions award granted to the Reorganized Debtors in the Adversary Proceeding to satisfy all or a portion of the Cure Amount, if any." (*Id.*)

17. The Cure Notice set a deadline to object to the proposed assumption of the Charter Agreements and the cure amounts associated therewith and expressly stated that "any counterparty to an Executory Contract that fails to file a timely Objection shall be deemed to have assented to the proposed assumption of an Executory Contract, any Cure Amount associated therewith ***and any other matter pertaining to assumption of such Executory Contract***." (*Id.*, p. 3) (emphasis added).

18. On November 18, 2020, Charter filed its *Objection to Notice of Filing of Ninth Amended Plan Supplement and Notice of (A) Executory Contract to be Assumed by the Reorganized Debtors Pursuant to the Plan, (B) Cure Amounts and (C) Related Procedures in Connection Therewith* (Main Dkt. No. 2692) (the "Cure Objection"). By the Cure Objection,

[3] The VAR Agreement expressly provides that the prevailing party in any suit or proceeding relating to the VAR Agreement is entitled to recover from the other party, among other things, attorneys' fees incurred in the suit or proceeding, including fees incurred in connection with any appeal. (VAR Agreement, Section 18.6) ("***In any suit or proceeding relating to this Agreement***, ***the prevailing party will have the right to recover from the other its costs and reasonable fees and expenses of attorneys, accountants, and other professionals incurred in connection with the suit or proceeding, including costs, fees and expenses upon appeal, separately from and in addition to any other amount included in such judgment***. This provision is intended to be severable from the other provisions of this Agreement, and shall survive and not be merged into any such judgment.") (emphasis added).

Charter alleged that the cure amount owed under the MSA Agreement was $15,295,846 and the cure amount owed under VAR Agreement was $3,566,856, for a total cure amount of $18,862,702. (Cure Objection at 5-8).

19. Notably, the Cure Objection objected only to the proposed cure amounts for the Charter Agreements and no other part of the proposed assumption of the Charter Agreements.

20. Subsequent to the filing of the Cure Objection, the parties met and conferred in an attempt to reconcile their accounting records and reach an agreement on the cure amounts for the Charter Agreements. These extensive negotiations resulted in seven separate consensual *Scheduling and Pre-Trial Orders* that were entered by the Court on December 1, 2020, (Main Dkt. No. 2728), December 21, 2020 (Main Dkt. No. 2756), January 27, 2021 (Main Dkt. No. 2781), March 5, 2020 (Dkt. No. 58), April 8, 2021 (Dkt. No. 83), June 15, 2021 (Dkt. No. 124) and June 30, 2021 (Dkt. No. 139).

21. As a result of these negotiations, the parties ultimately negotiated and agreed upon an aggregate cure amount for the Charter Agreements in the amount of $12,000,000 in full and final satisfaction of all pre-petition and post-petition claims of Charter for services provided and charges accrued under the Charter Agreements on or before December 31, 2020, including any claims that accrued but were not invoiced by Charter prior to December 31, 2020, any interest and/or late fees asserted in the Cure Objection, and any early termination liability claims incurred under the Charter Agreements prior to the Plan Effective Date (the "Agreed Cure Amount"). *See* Declaration of Wendy E. Hays (the "Hays Dec.") filed contemporaneously herewith, ¶¶ 4-5.

22. The parties, however, were not able to agree on the timing and manner of payment of the Agreed Cure Amount. (Hays Decl., ¶¶ 6-7). This Motion is necessitated by that failure to reach agreement on the timing and manner of payment.

THE ADVERSARY PROCEEDING

23. On April 5, 2019, the Debtors filed a complaint against Charter (Adv. Dkt. No. 1) (the "Complaint") and thereby commenced an adversary proceeding (the "Adversary Proceeding") alleging seven causes of action. Count I alleged a violation of Section 43(a) of the Lanham Act. 15 U.S.C. § 1125(a). (Adv. Dkt. No. 1, ¶¶ 39-54). Counts II-IV alleged violation of state deceptive trade practice laws. (*Id*. at ¶¶ 55-68). Count V alleged common law breach of contract. (*Id*. at ¶¶ 69-78). Count VI alleged a violation of the Bankruptcy Code's automatic stay. (*Id*. at ¶¶ 79-84). Count VII set out a claim for equitable subordination. (*Id*. at ¶¶ 85-86).

24. On March 3, 2020, the Court entered an Order granting in part the *Debtors' Motion for Partial Summary Judgment on Liability*. (Adv. Dkt. No. 274) (the "Summary Judgment Order"). Specifically, the Court granted summary judgment on liability on Counts I-V of the Complaint. (*Id.* at 2-3). The Court granted in part and denied in part the Debtors' motion with respect to Counts VI and VII. (*Id.* at 3-4). With respect to Count VI, the Court granted summary judgment and found that Charter had violated the Bankruptcy Code's automatic stay through two actions: (1) "the Defendants' breach of the VAR agreement, by terminating service to the Debtors' customers without the required prior notice in an effort to enforce a pre-petition debt and/or to control property of the estate," and (2) "the Defendants' literally false and misleading advertising in an effort to control property of the Debtors' estate, namely, the Debtors' customers or contracts with those customers." (*Id.*). The Court denied summary judgment on the remaining elements of the cause of action alleged in Count VI. (*Id.* at 4). With respect to Count VII, the Court granted summary judgment that Charter Communications Operating, LLC had filed proofs of claim against certain Debtors in the Chapter 11 cases and had "engaged in inequitable conduct tantamount to fraud and misrepresentation through its literally false and misleading advertising, with an intent to

deceive, in violation of the Lanham Act and related state deceptive trade practices laws." (*Id*. at 5). The Court denied summary judgment on the remaining elements of the cause of action alleged in Count VII. (*Id*.).

25. In a Memorandum of Decision dated March 17, 2020, the Court held that Charter was entitled to a jury trial on the damages to be assessed against it on Counts I-V. (Adv. Dkt. No. 281 at 12-17). The Court also held that Charter was not entitled to a jury trial on Counts VI and VII. (*Id*. at 9-12). Moreover, the Court held that a trial on Counts VI and VII would not have to be stayed until after a trial on the damages to be assessed on Counts I-V. (*Id*. at 17-18).

26. The Court conducted a four-day trial on Counts VI and VII in April and May 2020.

27. On April 8, 2021, the Court issued its Memorandum of Decision on Counts VI and VII (Adv. Dkt. No. 33)] (the "Decision"), holding Charter "in contempt of the automatic stay and jointly and severally liable for compensatory sanctions therefor constituting [the Reorganized Debtors'] resulting losses in the aggregate amount of $19,184,658.30," and equitably subordinating Charter Operating's Class 6A claims in full. (*Id*. at 44-45). On April 15, 2021, the Court entered judgment in favor of the Reorganized Debtors. (Adv. Dkt. No. 334) (the "Judgment"). On April 29, 2021, Charter commenced the Appeal. (Adv. Dkt. No. 337). On May 19, 2021, the Court approved a supersedeas bond (the "Supersedeas Bond"), which secured Charter's obligation to pay the Judgment, post-judgment interest, and all costs that have been and may be awarded, up to $19.5 million, in the event the Judgment is affirmed by the United States District Court for the Southern District of New York (the "District Court") (Adv. Dkt. No. 351). The Appeal remains pending in the District Court under Case No. 21-cv-04552 (CS).

RELIEF REQUESTED

28. The Reorganized Debtors seek entry of an order, substantially in the form attached hereto as Exhibit A (the "Proposed Order"), authorizing the assumption of the Charter Agreements (a) without requiring the Reorganized Debtors to pay the Agreed Cure Amount while the Appeal is pending or, in the alternative, (b) authorizing the Reorganized Debtors to pay the Agreed Cure Amount into escrow while the Appeal is pending.

BASIS FOR RELIEF REQUESTED

I. WINDSTREAM IS NOT REQUIRED TO PAY THE AGREED CURE AMOUNT WHILE THE APPEAL OF THE JUDGMENT IS PENDING.

29. Section 365(b) of the Bankruptcy Code sets forth the conditions that a debtor must satisfy to assume an executory contract. In pertinent part, Section 365(b) provides:

> (1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—
>
> > (A) cures, ***or provides adequate assurance that the trustee will promptly cure,*** such default….;
> >
> > (B) compensates, or provides adequate assurance that the trustee 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.

11 U.S.C. § 365(b)(1) (emphasis added).[4]

30. In its Cure Objection, Charter objected only to the proposed cure amounts for the Charter Agreements (*supra*, ¶ 19). Further, the parties have agreed upon the amount of the

[4] Section 1123(b)(2) of the Bankruptcy Code effectively sets forth the same conditions when the debtor seeks to assume an executory contract pursuant to a chapter 11 plan. 11 U.S.C. § 1123(b)(2) ("[S]ubject to section 365 of this title, [a plan may] provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section."

Reorganized Debtors' cure obligation (*see supra*, ¶ 21). Accordingly, under the Cure Notice and the Plan, the only basis on which Charter can now object to the proposed assumption of the Charter Agreements is whether the Reorganized Debtors have "provide[d] adequate assurance that [they] will promptly cure" the defaults under the Charter Agreements, as required under Section 365(b)(1)(A). (Cure Notice, p. 2; Plan, Art. V(C)).

31. As a general matter, courts interpreting Section 365(b)(1)(A) of the Bankruptcy Code have held that adequate assurance of prompt cure requires only that "there be a firm commitment to make all payments and at least a reasonably demonstrable capability to do so." *In re Embers 86th Street, Inc.*, 184 B.R. 892, 900-01 (Bankr S.D.N.Y. 1995) (quoting *In re R.H. Neil, Inc.*, 58 B.R. 969, 971 (Bankr. S.D.N.Y. 1986)). "Such adequate assurance can be demonstrated by establishing a 'foundation that is nonspeculative and sufficiently substantive to assure the [counterparty] that it will receive the amount of the default.'" *In re PRK Enterprises, Inc.*, 235 B.R. 597, 602 (Bankr. E.D. Tex. 1999).

32. Because the Bankruptcy Code does not define the phrase "adequate assurance [of] prompt[] cure," numerous courts have held that "'[w]hether a cure is prompt depends on the facts and circumstances of each case.'" *In re Rock 49th Rest. Corp.*, No. 09-14557, 2010 WL 1418863, at *10 (Bankr. S.D.N.Y. Apr. 7, 2010) (quoting *In re Embers 86th Street, Inc.*, 184 B.R. at 900); *In re Senior Care Centers, LLC*, 607 B.R. 580, 588 (Bankr. N.D. Tex. 2019); *In re Valley View Shopping Ctr., L.P.*, 260 B.R. 10, 26 (Bankr. D. Kan. 2001).

33. "In determining whether a cure is 'prompt', many courts consider several factors, including a debtor's past financial performance, ***any inequitable conduct engaged in by the non-debtor party***, and the remaining term of a lease or relationship between the parties." *In re Uniq Shoes Corp.*, 316 B.R. 748, 751 (Bankr. S.D. Fla. 2004) (emphasis added); *Embers*, 184 B.R. at

900 (citing *In re Mako, Inc.*, 102 B.R. 818, 821 (Bankr. E.D. Okla. 1988)). In other words, complete payment of cure may occur months, or indeed even years, after assumption of the executory contract if the facts and circumstances justify the delay. *Compare In re Coors of N. Mississippi, Inc.*, 27 B.R. 918 (Bankr. N.D. Miss. 1983) (cure over a period of three years was prompt where the contract counterparty unlawfully compelled the debtor to make payments on account of pre-petition debts without the approval of the bankruptcy court) *with Embers*, 184 B.R. at 900-01 (cure over a twenty-nine month period was not "prompt" where, *inter alia*, the counterparty to executory contract had not engaged in inequitable conduct).

34. Moreover, the requirement under Section 365(b)(1)(A) to provide adequate assurance of prompt cure does not necessitate a cash payment. A court should consider all of a debtor's applicable defenses before setting the cure amount and ordering that cash change hands between the parties. *See, e.g., Webster Place Athletic Club, LLC v. Ramco-Webster Place, LLC (In re Webster Place Athletic Club, LLC)*, 605 B.R. 526, 532, 536-37 (Bankr. N.D. Ill. 2019) ("Under Defendant's version of events, [Plaintiff would pay the cure amount] and only then would the Court look to Plaintiff's defenses - after the money has already changed hands - to determine if any … money needs to go back to Plaintiff … . Procedurally, this is nonsense.").

35. Indeed, and of particular relevance to the instant dispute, courts have permitted setoff of a judgment in an adversary proceeding, ***including for violations of the automatic stay***, to satisfy a debtor's cure obligations. *See, e.g., In re C.W. Mining Co.*, No. 08-20105, 2010 WL 3123140, at *8 (Bankr. D. Utah Aug. 6, 2010), *opinion clarified sub nom. In re C.W. Min. Co.*, No. ADV 11-2250, 2013 WL 5442385 (Bankr. D. Utah Sept. 30, 2013) (debtor may set off the proceeds of a successful adversary proceeding for violations of the automatic stay, contempt of court, and breach of contract to satisfy cure amounts owed under its lease); *cf. In re Galaz*, 480

Fed. App'x 790, 795 (5th Cir. 2012) (affirming bankruptcy court's ruling that denied a motion to compel payment of priority domestic support obligations while an adversary proceeding against the non-debtor spouse was ongoing, as the amounts owed could have been set off).

36. In *C.W. Mining*, the debtor was the exclusive operator of coal mines pursuant to lease. *In re C.W. Mining Co.*, No. ADV. 08-2338, 2009 WL 4809632, at *2 (Bankr. D. Utah Dec. 9, 2009). The lessor alleged that the debtor was in default under the terms of the lease and took numerous unauthorized remedial actions against the debtor post-petition, including purporting to terminate the lease, re-leasing the coal mine to another entity, evicting the debtor from the premises, and permitting removal of coal from the mines under the new purported lease. *Id*. at *5-6. The Court had previously held the lessor in contempt on multiple occasions. *Id.* at 4-6. Eventually, the Chapter 7 trustee brought an adversary proceeding against the lessor, seeking damages for breach of contract and violations of the automatic stay. *Id.* at *4. The Court held that the debtor would be able to set off any damages against any future cure amount owed to the lessor. *Id.* at *6. In subsequent proceedings, the lease was assumed and assigned to a buyer, at which time the debtor's damages were set off against the cure amount. *In re C.W. Mining Co.*, 2010 WL 3123140, at *8, 19-20.

37. Based on the foregoing authorities as applied to the facts and circumstances of the instant dispute, the Reorganized Debtors have satisfied their obligation under Section 365(b)(1)(A) and, therefore, should be permitted to assume the Charter Agreements without being required to pay the Agreed Cure Amount while the Appeal is pending. First, there is no dispute that the Reorganized Debtors are committed to paying the Agreed Cure Amount and have the financial wherewithal to do so. *See Embers*, 184 at 90; *R.H. Neil*, 58 B.R. at 971; *Uniq Shoes*, 316 B.R. at 751.

38. Second, it would be "non-sensical" to require the Reorganized Debtors to pay the Agreed Cure Amount now and then, "after the money has already changed hands, to determine if any money needs to go back" to the Reorganized Debtors if and to the extent the Judgment is affirmed on appeal and the Supersedeas Bond is not sufficient to cover the Appeal Costs. *Webster Place Athletic Club,* 605 B.R. at 437.

39. Third, courts have allowed debtors to defer paying cure amounts associated with assumed contracts while they have claims pending against the counterparties to such contracts. *See, e.g., C.W. Mining*, 2010 WL 3123140, at *8 (permitting setoff of cure amount eight months after entry of order finding non-debtor counterparty violated the automatic stay and excusing payment of remaining cure amount until sale of debtor's assets closed).

40. Fourth, in determining whether a cure is "prompt" under Section 365(b)(1)(A), courts specifically consider whether the counterparty engaged in inequitable conduct. Indeed, but for its inequitable conduct, the Debtors would have likely elected to assume the Charter Agreements much earlier in the Chapter 11 cases. Instead, the Debtors were forced to assess the advantages of assuming the Charter Agreements against the risks of continuing to do business with Charter. *See Uniq Shoes Corp.*, 316 B.R. at 751; *See id*. ("The Adolph Coors Company has not come into this court with clean hands as is required in a court of equity. Its actions have forced debtor-in-possession to take longer to cure."). Here, as the Court is well aware, the record is replete with unlawful and inequitable conduct by Charter. For example, during the pendency of the Adversary Proceeding, the Court found that Charter:

- "engaged in inequitable conduct tantamount to fraud and misrepresentation through its literally false and misleading advertising, with an intent to deceive, in violation of the Lanham Act and related state deceptive trade practices laws." (Summary Judgment Order, at 3);

- engaged in "unnecessary discovery disputes" (Decision, at 41-42); and

- prolonged the litigation by engaging in "questionable litigation choices" which included "misguided motions for summary judgment, judgment on the pleadings and Daubert witness exclusion, the filing of a mammoth motion for judicial notice on the eve of trial and then later withdrawn, and, after the Court specifically directed the parties not to do so, the filing of purported proposed findings of fact and conclusions of law." (*Id.*).

41. Moreover, during the pendency of the Adversary Proceeding, Charter repeatedly breached the VAR Agreement in violation of this Court's preliminary injunction order (Adv. Dkt. No. 61) (the "Preliminary Injunction Order"). For example, in May 2020, ***after entry of the Preliminary Injunction Order***, the Debtors learned that one of Charter's direct sales representatives told a customer of the Debtors in Nebraska that Windstream "was going bankrupt," the customer's services were going to "double in cost," and that the customer could lose service if he did not switch to Charter. (Rochester Decl., Exhibit B). Such false representations to the Debtors' customers were precisely the type of unlawful activity prohibited under the Preliminary Injunction Order. (*Id*. at 4-6; Adv. Dkt. No. 84, 113:14-20 ("I'm particularly concerned about the risk that Charter/Spectrum sales people will be misrepresenting Windstream's prospects for future to Windstream customers and so the cease and desist language should include a direction to those people making it clear to them what they cannot do when they communicate regarding Windstream.")).

42. Moreover, in July 2020, the Debtors learned that Charter was attempting to directly bill and collect from the Debtors' customers and threatening to disconnect their service in violation of the Preliminary Injunction Order and the VAR Agreement. (Rochester Decl., Exhibit C). Charter's excuse for doing so was that the Debtors were allegedly past-due on payment for a long-standing master account servicing nearly 800 "last mile" customers (the "Master Account"). (*Id.* at 1). Charter's representatives informed the Debtors that once the Master Account is past due it

will "start to drop off and then disconnect." (*Id*.). In other words, Charter would disconnect service to the Debtors' individual customers because of alleged amounts owed by the Debtors on the Master Account. Charter attempted to collect from at least two individual Windstream customers in this manner. (*Id*.). Such conduct likewise violated the Preliminary Injunction Order and the VAR Agreement (Preliminary Injunction Order, ¶ 1(i)) (ordering Charter and its representatives to "cease and desist from taking any action or inaction, whether directly or indirectly, to interrupt, disrupt, switch or otherwise impair service to the Debtors' customers absent an order of the Court"); Joint Trial Ex. 1 at §§ 4.2, 9.1 (improperly using confidential customer information and directly billing Windstream's customers)).

43. The Debtors, through counsel, objected to this unlawful conduct. (Rochester Decl., Exhibit C). In response, Charter's counsel suggested that one of the Debtors' customers that Charter billed directly was also a Charter customer. (Rochester Decl., Exhibit D). That explanation omitted the fact that the Debtors' customer was ***no longer*** a Charter customer after switching services from Charter to Windstream, and that Charter had failed to switch over all of the customer's services from the Charter modem to the Windstream modem. (Rochester Decl., Exhibit E).

44. Charter's long list of questionable, inequitable and unlawful conducts justifies deferring payment of the Agreed Cure Amount until the Appeal is concluded. Indeed, were it not for such conduct, the Charter Agreements likely would have been assumed long ago, negating all the costs and expenses incurred and judicial resources consumed in connection with the litigation with Charter.

45. For the foregoing reasons, the Court has ample basis to find that the Reorganized Debtors should not be required to pay the Agreed Cure Amount while the Appeal is pending.

Moreover, such a ruling presents little to no risk for Charter. If the Judgment is affirmed on appeal, then the Reorganized Debtors are entitled, pursuant to the terms of the Charter Agreements and applicable law, to set off the Judgment and the Appeal Costs against the Agreed Cure Amount, thereby reducing the amounts owed by Charter. *See* VAR Agreement, Section 18.6; *C.W. Mining*, 2010 WL 3123140, at *8; *cf. In re Schwartz-Tallard*, 803 F.3d 1095, 1101 (9th Cir. 2015) (citing *Voice v. Stormans, Inc.*, 757 F.3d 1015, 1016 (9th Cir. 2014) ("When a party is entitled to an award of attorney's fees in the court of first instance, . . . she is ordinarily entitled to recover fees incurred in successfully defending the judgment on appeal.")). If, on the other hand, at the conclusion of the Appeal, the Judgment is reversed, the Proposed Order expressly directs the Reorganized Debtors to pay the Agreed Cure Amount in full in cash to Charter. Accordingly, the Court should permit the assumption of the Charter Agreements without requiring the Reorganized Debtors to pay the Agreed Cure Amount while the Appeal is pending.

II. IN THE ALTERNATIVE, WINDSTREAM CAN SATISFY ITS CURE OBLIGATIONS BY PLACING THE AGREED CURE AMOUNT INTO ESCROW PENDING RESOLUTION OF THE APPEAL.

46. If the Court is not inclined to grant the relief requested above, then, in the alternative, Windstream can satisfy its cure obligations under Section 365(b)(1) by paying the Agreed Cure Amount into escrow pending the resolution of the Appeal. More specifically, if the Judgment is affirmed at the conclusion of the Appeal, then a portion of the Judgment will be set off in full and final satisfaction of the Agreed Cure Amount. On the other hand, if at the conclusion of the Appeal, the Judgment is reversed, the Agreed Cure Amount will be released from escrow in full and final satisfaction of the Agreed Cure Amount. Indeed, prior to filing this Motion, the Reorganized Debtors made this proposal to Charter in an attempt to resolve the dispute on a consensual basis. Charter, however, rejected the proposal.

47. Numerous courts have approved such escrow arrangements in connection with the assumption of executory contracts. *See, e.g., Condal Distributors, Inc. v. 2300 Xtra Wholesalers, Inc. (In re 2300 Xtra Wholesalers, Inc.)*, 445 B.R. 113, 123-24 (S.D.N.Y. 2011) (affirming bankruptcy court's holding that cure obligations were satisfied by providing an additional security deposit and escrowing $250,000 to repair the leased building); *In re Docktor Pet Ctr., Inc.*, 144 B.R. 14, 16 (Bankr. D. Mass. 1992) (directing that the full cure amount be placed into escrow "until the merits of setoff are determined"); *In re Diamond Head Emporium, Inc.*, 69 B.R. 487, 493-95 (Bankr. D. Haw. 1987) (ordering cure amount be placed into escrow pending resolution of debtors' claims against landlord for conspiracy to oust the debtor from the leased premises, which had not been asserted in a formal proceeding as of the time of that opinion).

48. Notably, in *Docktor Pet Center* and *Diamond Head Emporium*, the debtor had only cursorily asserted claims against the contract counterparty, but the claims had not been adjudicated on the merits, let alone reduced to a judgment against the counterparty, as is the case here. *See re Docktor Pet Ctr., Inc.*, 144 B.R. at 16 (debtor had not commenced an adversary proceeding against contract counterparty for breach of contract, but intended to do so in order to set off cure); *In re Diamond Head Emporium, Inc.*, 69 B.R. at 490 (same).

49. Courts that have approved escrow arrangements in the cure context have explained that such arrangements protect the rights of both the debtor and non-debtor counterparty. Specifically, escrowing the cure amount ensures that the debtor's setoff rights are preserved in the event its claims against the non-debtor counterparty are adjudicated in the debtor's favor. *See In re Docktor Pet Ctr.*, 144 B.R. at 16. This obviates the need for a restitution action, and related costs and expenses, to recover funds the debtor was improperly required to pay if the court rules in the debtor's favor on setoff. *See, e.g., United Healthcare Workerswest v. Borsos (In re Borsos)*,

544 B.R. 201, 204-206 (Bankr. E.D. Cal. 2016) (citing Restatement (Third) of Restitution and Unjust Enrichment § 18 (2011)). On the other hand, escrowing the cure amount ensures the non-debtor counterparty that it will receive payment in full of the agreed upon cure amount in the event it is determined that the debtor has no valid claims against the non-debtor counterparty. *See Docktor*, 144 B.R. at 16 (stating that if the debtor did not commence the proposed adversary proceeding against the contract counterparty within 60 days, the contract counterparty could submit a motion for disbursement of the escrowed funds).

50. The bankruptcy court's decision in *Docktor Pet Ctr.* is particularly instructive. In that case, the debtor, a distributor of pharmaceutical products, sold substantially all of its assets and assigned certain of its executory contracts to a third-party buyer, including a supply contract with a counterparty that was allegedly in breach of the contract. The counterparty objected to the proposed assumption and assignment, stating that the debtor was in default under the terms of the supply contract. *See id*. In response, the debtor argued that the supplier was in breach of the contract and that the debtor intended to set off its damages claims against the supplier to satisfy its cure obligations under the contract. *See id*. at 15-16. In order to provide the debtor an opportunity to pursue its breach of contract claims, while at the same time providing adequate assurance of prompt cure to the pharmaceutical supplier, the Court ordered that the cure amount be placed into escrow pending resolution of the debtor's claims, and for the debtor to file its breach of contract claim within 60 days of the escrow date. *See id*. at 16. If the debtors failed to timely pursue their breach of contract claim, the Court would release the escrowed funds. *See id*.

51. Here, based on the foregoing authorities, the Court has ample basis to authorize the assumption of the Charter Agreements by requiring the Reorganized Debtors to place the Agreed Cure Amount into escrow pending the resolution of the Appeal. As found by the bankruptcy court

in *Docktor Pet Center* and other cases, escrowing an agreed upon cure amount strikes a fair and equitable balance that both preserves a debtor's setoff rights and ensures the non-debtor that the cure amount will be paid. Accordingly, while the Reorganized Debtors respectfully submit that no escrow is necessary in light of the pending Judgment against Charter (*see supra*, Part I), if the Court is not inclined to grant that relief, then the correct result is to require the Reorganized Debtors to place the Agreed Cure Amount into escrow. In no event, however, should the Reorganized Debtors be required to pay the Agreed Cure Amount while the Appeal is pending.

MOTION PRACTICE

52. The Motion includes citations to the applicable rules and statutory authorities upon which the relief requested herein is predicated and a discussion of its application to this Motion. Accordingly, the Reorganized Debtors submit that this Motion satisfies Local Rule 9013-1(a).

NOTICE

53. The Reorganized Debtors have provided notice of this Motion to: (a) the entities on the Master Service List (as defined in the Case Management Order and available on the Debtors' case website at www.kccllc.net/windstream) and (b) any person or entity with a particularized interest in the subject matter of this motion. The Reorganized Debtors respectfully submit that no other or further notice is necessary.

NO PRIOR REQUEST

54. No prior request for the relief sought in this Motion has been made to this or any other court.

CONCLUSION

55. For the foregoing reasons, the Debtors respectfully request that the Court enter the Proposed Order granting the relief requested herein and such other relief as the Court deems appropriate under the circumstances.

Dated: July 8, 2021
New York, NY

/s/ Terence P. Ross

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Conflicts Counsel to the Reorganized Debtors

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July 2021, I caused a true and correct copy of the foregoing document to be filed electronically using the CM/ECF System, which will then send a notification of such filing (NEF) to all counsel of record in this lawsuit.

Dated: July 8, 2021

/s/ Terence P. Ross
Terence P. Ross

EXHIBIT A

Proposed Order

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
WINDSTREAM FINANCE, CORP., *et al*.,[1]	)	Case No. 19-22397 (RDD)
Reorganized Debtors.	)	(Formerly Jointly Administered under Lead Case: Windstream Holdings, Inc., 19-22312)

ORDER AUTHORIZING ASSUMPTION OF THE CHARTER AGREEMENTS AND GRANTING RELATED RELIEF

Upon the motion (the "Motion")[2] of the above-captioned debtors and debtors in possession (before the effective date of their chapter 11 plan, the "Debtors", and after the effective date of their chapter 11 plan, the "Reorganized Debtors") for entry of an order (this "Order"), authorizing the Reorganized Debtors to assume the Charter Agreements and granting related relief, all as more fully set forth in the Motion; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order of Reference from the United States District Court for the Southern District of New York, dated February 1, 2012; and that this Court may enter a final order consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interests of the Reorganized Debtors' estates, their creditors, and other parties in interest;

[1] The last four digits of Reorganized Debtor Windstream Finance, Corp.'s tax identification number are 5713. Due to the large number of Reorganized Debtors in these Chapter 11 cases, for which joint administration has been granted, a complete list of the Reorganizes Debtors 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 Reorganized Debtors' claims and noticing agent at http://www.kccllc.net/windstream. The location of the Reorganized Debtors' service address for purposes of these Chapter 11 cases is: 4001 North Rodney Parham Road, Little Rock, Arkansas 72212.
[2] Capitalized terms used in this Order and not immediately defined have the meanings given to such terms in the Motion.

and this Court having found that the Reorganized Debtors' notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and no other notice need be provided; and this Court having reviewed the Motion and having heard the statements in support of the relief requested therein at a hearing before this Court (the "Hearing"); and this Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Motion is granted to the extent set forth herein.

2. The Reorganized Debtors are hereby authorized to assume the Charter Agreements pursuant to Sections 365 and 1123(b)(2) of the Bankruptcy Code.

3. The assumption of the Charter Agreements shall be effective as of December 31, 2020 (the "Assumption Effective Date").

4. The aggregate cure amount for the Charter Agreements is $12,000,000 (the "Agreed Cure Amount"). Upon entry of this Order, the Charter Agreements shall be deemed cured under Sections 365 and 1123(b)(2) of the Bankruptcy Code; provided, the Reorganized Debtors shall not, unless otherwise directed by the Court, be required to pay the Agreed Cure Amount or any portion thereof while the appeal of the Judgment is pending.

5. In the event a court of competent jurisdiction enters a final, non-appealable order affirming the Judgment, the Reorganized Debtors shall, without further notice to Charter or order of the Court, be entitled to set off a portion of the Judgment and the Appeal Costs in full and final satisfaction of the Agreed Cure Amount.

6. In the event a court of competent jurisdiction enters a final, non-appealable order reversing the Judgment, the Reorganized Debtors shall, within 30 days of the entry of such order, pay the Agreed Cure Amount in full in cash to Charter.

7. In the event a court of competent jurisdiction enters a final, non-appealable order:

a. affirming the Judgment, in part, such that the so-affirmed judgment is more than the Agreed Cure Amount but less than the Judgment, the Reorganized Debtors shall, without further notice to Charter or order of the Court, be entitled to set off a portion of the so-affirmed judgment and the Appeal Costs in full and final satisfaction of the Agreed Cure Amount; or

b. affirming the Judgment in part such that the so-affirmed judgment is more than zero but less than the Agreed Cure Amount, the Reorganized Debtors shall, within 30 days of the entry of such order, be entitled to set off the so-affirmed judgment in partial satisfaction of the Agreed Cure Amount and pay to Charter the remaining portion of the Agreed Cure Amount after such setoff has been effectuated.

8. If the Court determines at the Hearing, or any point thereafter, that additional adequate assurance of prompt cure is required under Section 365(b)(1)(A) of the Bankruptcy Code, the Reorganized Debtors shall place any amount ordered by the Court into an interest bearing escrow account (the "Escrow Account"). If and solely to the extent the Agreed Cure Amount is paid with the funds in the Escrow Account, Charter shall be entitled to all interest that accrues in the Escrow Account. No disbursements from the Escrow Account shall be made without prior approval of the Court.

9. The assumption of the Charter Agreements pursuant to this Order shall constitute a full release and satisfaction of any and all pre-petition and post-petition claims of Charter, whether known or unknown (whether monetary or nonmonetary, including defaults of provisions restricting the change in control or ownership interest composition or other bankruptcy-related defaults, arising under either or both of Charter Agreements), for services provided and charges accrued under the Charter Agreements on or before Assumption Effective Date, including any claims that accrued but were not invoiced by Charter prior to the Assumption Effective Date, any interest and/or late fees asserted in the Cure Objection, and any early termination liability claims incurred under the Charter Agreements prior to the Plan Effective Date (collectively, the "Claims"). Charter is forever barred and enjoined from asserting against the Reorganized Debtors or their property any such Claims. Without limiting the generality of the foregoing, any assertion of any cure amounts in addition to the Agreed Cure Amount is hereby barred.

10. Except as modified under this Order, Charter and the Reorganized Debtors shall perform their respective obligations pursuant to and in accordance with the parties' ordinary course of business and the terms of the Charter Agreements. Except as modified under this Order, all services provided by Charter to the Reorganized Debtors under the Charter Agreements after the Assumption Effective Date shall be invoiced by Charter and paid by the Reorganized Debtors (or otherwise resolved between the parties) pursuant to and in accordance with the parties' ordinary course of business and the terms of the Charter Agreements.

11. The Reorganized Debtors, on the one hand, and Charter, on the other hand, and each of their respective predecessors in interest, parents, subsidiaries, affiliates, partners, members, officers, directors, managers, shareholders, employees, agents, representatives, attorneys, trustees, heirs, successors and assigns, forever release and discharge the other from any and all manner of

action or actions in relation, cause or causes of action, claim or claims (including, without limitation, the Claims), in law or in equity, whether known or unknown, which arise out of or are related to any matter pertaining to the assumption of the Charter Agreements; provided, however, that this release and discharge shall not apply to the obligations and rights set forth in this Order. Notwithstanding anything herein to the contrary, nothing in this Order shall limit the right of the Reorganized Debtors to seek to set off the Appeal Costs against the Agreed Cure Amount.

12. Assumption of the Charter Agreements or payment of the Agreed Cure Amount does not represent a waiver by the Reorganized Debtors of any rights, claims, or defenses in connection with or arising under any other executory contract or lease or against any third party

13. The Reorganized Debtors are authorized to take all actions necessary to effectuate the relief granted under this Order.

14. Notwithstanding any Bankruptcy Rule to the contrary, this Order is effective immediately upon approval by this Court.

15. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation, and/or enforcement of this Order.

Dated: _____, 2021
White Plains, New York

/s/
THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY COURT JUDGE