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Charter Communications Operating, LLC

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

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

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Charter Communications Operating, LLC ("Charter") files this objection to the above-captioned debtors and debtors-in-possession's (before the effective date of their chapter 11 plan, the "Debtors", and after the effective date of their chapter 11 plan, the "Reorganized Debtors" or "Windstream") Motion (the "Motion") for entry of an order authorizing the assumption of the Charter Agreements[1] and granting related relief. In support of this Objection, Charter respectfully states as follows:

PRELIMINARY STATEMENT

For the last several months, business people from Charter and Windstream have been hard at work negotiating the terms under which Windstream would assume two executory contracts with Charter: a VAR Agreement and an Enterprise Agreement. Both sides thought it best to avoid another costly litigation—which would be a distraction to their businesses and incur unnecessary legal fees—and instead take a big step towards reestablishing their ordinary course business dealings.

The negotiations intensified towards the end of May. By all outward appearances, both parties were negotiating in good faith. Eventually the negotiations bore fruit: on June 18, 2021, the parties were able to reach an agreement whereby Windstream would pay Charter $12 million in order to provide the requisite "cure" due to Charter. To reflect this agreement, within a few days, counsel for Charter prepared a draft stipulation that reflected the parties' deal and sent it to Windstream on June 22, 2021. Consistent with the parties' ordinary business dealings, the stipulation stated that Windstream would pay Charter $12 million within 30 days of approval of that stipulation with the Court.

[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed in the Motion.

Approximately a week later, on June 30, 2021, counsel for Windstream sent an email to this Court with a proposed sixth amended scheduling order regarding the cure dispute. The cover email to Chambers and the proposed order indicated that the parties had settled the dispute. The Court signed that order later that day. *See* Sixth Amended Scheduling Order, Dkt. 139, June 30, 2021.

The following day, on July 1, 2021, having reported the agreement to the Court, Windstream emailed Charter stating that, while the parties had a binding settlement agreement on the cost of assuming the Charter Agreements, the parties had no deal on the timing of the payment. This made no sense to Charter. As is the case with many a settling party, the primary reason Charter was willing to settle for an over 30% haircut to its claim was so it could bring money in the door immediately. Unsurprisingly, Charter had expressed this business rationale for the settlement to Windstream as part of the negotiations on several occasions.

While Charter was surprised by Windstream's position, it continued to engage with Windstream, questioning the proposed inclusion of new terms and reiterating its position that the cure payment should be paid on ordinary business terms. However, on July 8, Windstream, with no prior notice to Charter, filed the 31-page Motion with this Court, attaching two declarations, and seeking to enforce the $12 million settlement term, but asking the Court to insert additional payment terms, which were prejudicial to Charter.

Thus, Windstream's Motion fails to acknowledge that the parties reached a binding oral agreement on June 18, 2021, with respect to the cure dispute, including the timing of the cure payment. That Windstream may have subsequently decided to extract new concessions from Charter is irrelevant to what the parties actually negotiated and agreed.

Alternatively, if the Court agrees with Windstream that the parties agreed to a cure amount of $12 million but failed to agree on the timing of the payment (which would have been a very curious agreement for business people to have reached), the Court cannot approve an assumption which permits Windstream to assume the Charter Agreements only to cure such contracts after some indefinite period of time. Section 365(b)(1) of the Bankruptcy Code requires that the debtor either "cure" contemporaneously with assumption or provide "adequate assurance that the trustee will promptly cure." Proposing to cure at some uncertain date in the future is neither. In light of the facts and circumstances of the parties' unrelated litigation (now on appeal and stayed upon the posting of a supersedeas bond), Windstream's new perspective—that the $12 million negotiated amount should be held hostage and provide even more collateral for that litigation—is inconsistent with the Bankruptcy Code's requirements.

Bankruptcy Courts have interpreted "prompt" to mean "quickly" and in "short order." Where courts have permitted much longer cure periods, this is typically in the case of long-term leases which have many years or decades of remaining lease term. None of these situations exists here, as the Enterprise Agreement and VAR Agreement provide for 30-45 day payment terms, and have four and nine months remaining on their terms respectively. Moreover, *each of the Charter Agreements explicitly call for a 30-day cure period following default, and further require the payment of interest for delayed payments*. These "facts and circumstances" compel a cure period of 30 days or less, paid upon assumption to Charter and not into escrow.

Finally, assuming *arguendo* that cure at some uncertain date in the future could possibly be deemed "promptly" under these facts and circumstances, Windstream is misguided as a matter of law that it could set-off cure payments against future legal fees that Windstream may hypothetically be awarded in connection with the ongoing appeal of the parties' unrelated

litigation—an award that is contingent on the District Court's determinations after considering the relative merits of the parties' positions. New York law does not permit set-off against future contingent claims. Furthermore, the Charter Agreements only provide for attorneys' fees for matters relating to those agreements and not the matters on appeal (Charter only appealed the Lanham Act and related automatic stay sanction, not the disconnects related to the VAR Agreement). And, in any event, Charter never agreed to waive its contractual accrual of monthly interest for the duration of *future* delay that Windstream now seeks to add. The settlement was premised on the expectation that the parties resolved the prior amounts due under the Charter Agreements (including the final negotiated element of past due interest for past delays) for a lump sum of $12 million. Windstream cannot belatedly raise a purported set-off right after the deal was reached.

The Motion should be granted to the extent of authorizing the Reorganized Debtors' assumption of the Charter Agreements upon the payment to Charter of the $12 million settlement amount promptly, and no later than 30 days after entry of the order.

FACTUAL BACKGROUND

Windstream emerged from Chapter 11 on September 21, 2020. Case No. 19-22312, Dkt. 2243. Windstream's Plan permitted the Reorganized Debtors to seek to assume executory contracts following the effective date. *Id*. On November 4, 2020, Windstream served on Charter Communications Operating, LLC ("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 Declaration (Dkt. 144), Exhibit A.

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. Case No. 19-22312, Dkt. 2692 (the "Cure Objection"). In its Cure Objection, Charter included a cure amount owed under the Enterprise Agreement (Hockett Declaration[2] ("Hockett Decl.") at Exhibit B) (the "Enterprise Agreement") of $15,295,846 and the cure amount owed under VAR Agreement (Hockett Decl. at Exhibit A) (the "VAR Agreement") of $3,566,856, for a total cure amount of $18,862,702. *Id*. Windstream has been regularly paying certain post-petition amounts (approximately $3 million per month) in accordance with the Charter Agreements and generally on a timely basis. Holmes Declaration[3] ("Holmes Decl.") at ¶ 4.

Shortly after Charter filed the Cure Objection, the parties began negotiating towards a settlement. Holmes Decl. at ¶¶ 4-5. The negotiations gained steam at the beginning of May 2021. *Id*. at ¶ 5. Mark Holmes was the chief negotiator on behalf of Charter. *Id*. at ¶ 4. His counterparty at Windstream was Wendy Hays. *Id*.

On May 11, 2021, Mr. Holmes had a meeting with Ms. Hays to discuss the outstanding balances between the parties under the Charter Agreements. *Id*. at ¶ 6. The following day, on May 12, 2021, Ms. Hays sent Mr. Holmes an email which included a "proposed resolution of the outstanding balances" under the Charter Agreements. *Id*. at ¶ 6. That email included a settlement proposal from Windstream which calculated a "Final Reconciled Balance" of $11,243,249. *Id.* Ms. Hays communicated that this "proposed balance below that would be paid by WIN would resolve all amounts, billed or unbilled, through December 31, 2020." *Id*.

Mr. Holmes reviewed Ms. Hays' proposed settlement against Charter's reconciliation and informed Ms. Hays that her offer would be acceptable if Windstream increased the amount to

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[2] This declaration was filed contemporaneously with this Objection.

[3] This declaration was filed contemporaneously with this Objection.

address two issues: (1) a "[r]e-term dispute" of $1.5 million; and (2) interest charges on long overdue amounts. *Id*. at ¶ 7. With respect to the (second) interest point, Mr. Holmes emphasized to Ms. Hays that even though Charter had agreed to "suspend interest charges [for several months] as our teams worked through reconciliation efforts[, i]n aggregate, total accrued interest is now $3.25M, and [Charter believes it is] owed this amount based on the underlying contracts." *Id*. Mr. Holmes made clear to Ms. Hays that, "We are good with the remaining elements you noted in your summary and want to highlight we are open to finding a common resolution to these two remaining items." *Id*. Mr. Holmes asked Ms. Hays to connect on Monday, May 25, 2021, so they could work to find a common resolution. *Id*.

On Monday, May 25, 2021, Mr. Homes and Ms. Hays had a phone conversation to further discuss the two open points. *Id*. at ¶ 8. Shortly thereafter, Mr. Holmes sent a follow-up email to Ms. Hays recapping their discussion. *Id*.

In his email, Mr. Holmes offered to split the difference on the "[r]e-term dispute" and, with respect to interest charges, Mr. Holmes explained to Ms. Hays that the "key issue" for Charter was a concern regarding the "time [Charter] waited on getting payment on the aged receivables (including Windstream's original proposed cure of $5.7M)." *Id*. at ¶ 9. Mr. Holmes urged Ms. Hays to work with him to "find some common ground on this piece." *Id*. From his perspective, he was focused on achieving a fair compromise that would bring cash in the door without further delay. *Id*.

Ms. Hays and Mr. Holmes spoke again a couple of days later, on May 26, 2021, primarily about the outstanding interest. *Id*. at ¶ 10. Ms. Hays asked Mr. Holmes to explain more about Charter's entitlement to interest for overdue amounts in light of the fact that Charter had not

included interest charges on post-petition invoices submitted to Windstream during the bankruptcy case. *Id*.

On June 4, 2021, Mr. Holmes had another phone conversation with Ms. Hays to reiterate that Charter needed some concession on the interest payments. *Id*. at ¶ 11. After the phone conversation, Mr. Holmes sent a follow up email to Ms. Hays further explaining why Charter believed it was lawfully entitled to charge interest, and why Charter did not believe it was appropriate to invoice interest for unpaid amounts during the bankruptcy case. *Id*. Mr. Holmes emphasized that Charter "did not agree to waive our contractual right to charge said late fees / interest." *Id*.

On June 7, 2021, Ms. Hays emailed Mr. Holmes regarding the last open item. *Id*. at ¶ 12. In that email, Ms. Hays stated that Windstream "can agree today" to a settlement amount of $12 million and that she "hope[d] that we can agree on the $12M and wrap this up." *Id*. Given that every other item had already been agreed upon, Ms. Hays specifically urged Mr. Holmes "to consider whether it is prudent to take only the matter of interest in front of Judge Drain." *Id*.

Between June 7, 2021 and June 18, 2021, Mr. Holmes had several conversations internally to determine if Charter could accept a payment of $12 million to settle the dispute. *Id*. at ¶ 13. Charter ultimately decided that it would compromise and do so. *Id*. On June 18, 2021, Mr. Holmes had a phone conversation with Ms. Hays. *Id*. On that phone call, Mr. Holmes agreed to compromise the last open point on interest for the overdue payments and accepted Ms. Hays' offer to resolve the matter in exchange for payment of $12 million. *Id*. From his perspective, this matter was then turned over to the lawyers to document the compromise. *Id*.

A few days later, on June 22, 2021, counsel for Charter sent counsel for Windstream an email stating "[i]t appears that our respective clients have resolved the cure dispute and the cure

amount of $12,000,000 will be paid to Charter for assumption of the contracts. I have prepared a stipulation and agreed order resolving those issues on those terms. A draft is attached. Please advise if you have any questions or comments on the draft." Hockett Decl., Exhibit C at 1. The attached draft stipulation called for a $12 million payment within 30 days and waived all claims between the two parties related to the cure dispute. Hockett Decl., Exhibit C at 2-3. Specifically, it contained the following material terms:

- Agreed Cure Amount. No later than thirty (30) days after the Stipulation Effective Date, the Debtors shall pay $12,000,000 (**Agreed Cure Amount**) in cash to Charter in full and final satisfaction of all pre-petition and post-petition claims of Charter, whether known or unknown, for services provided and charges accrued under the Charter Contracts on or before December 31, 2020, including any claims that accrued and that were not invoiced by Charter prior to December 31, 2020, any interest and/or late fees asserted in the Charter Cure Amount, and any early termination liability claims incurred under the Charter Contracts prior to the Effective Date of the Plan (collectively, the **Pre-Assumption Claims**). The Agreed Cure Amount shall be paid to Charter by wire transfer.

- Resolution of Cure Objection. Effective immediately upon Charter's receipt of payment of the Agreed Cure Amount, the Cure Objection shall be deemed resolved in its entirety, including without limitation, any objection to the assumption of the Charter Contracts.

- Mutual Release. Effective upon the payment of the Agreed Cure Amount, the 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, in law or in equity, known or unknown, which arise out of or are related to the Cure Dispute

- Resolution of Cure Objection. Effective immediately upon Charter's receipt of payment of the Agreed Cure Amount, the Cure Objection shall be deemed resolved in its entirety, including without limitation, any objection to the assumption of the Charter Contracts.

Hockett Decl., Exhibit C at 3-4.

One week later, on June 30, 2021, counsel for Windstream sent an email to this Court stating that "[a]s a result of additional time afforded by the foregoing Scheduling Orders, the Parties have reached *an agreement* regarding the Cure Dispute. The Parties are now in the process of preparing a stipulation to memorialize *that agreement*." Hockett Decl., Exhibit D at 1-2 (emphases added).

On July 1, 2021, nearly two weeks after the parties reached agreement, and one day after the Court was told that the parties had "reached an agreement regarding the Cure Dispute," something changed. Mr. Holmes received an unexpected email from Ms. Hays. Holmes Decl. at ¶ 15. In that email, Ms. Hays stated:

> Mark - I wanted to touch base with you regarding the stipulation your counsel prepared to memorialize our resolution of the cure dispute.
>
> The stipulation correctly states that Charter has accepted Windstream's offer of $12 million (inclusive of all interest and late fees) to completely resolve the cure dispute between us. However, we have comments on the manner and timing of payment. Windstream should not be forced to pay $12 million to Charter, in light of Judge Drain's ruling that Charter owes $19.1 to Windstream. I know that Charter is appealing that ruling, so Windstream is ok putting the $12 million into escrow. If Charter wins on appeal, the $12 million will be released and paid to Charter.
>
> Our counsel will be reaching out to your counsel later today to discuss. If you would like to discuss, please let me know.
>
> Thanks,
> Wendy

Mr. Holmes was surprised by Ms. Hays' email. *Id*. at ¶ 16. From his perspective, a material aspect—indeed, the key aspect—of the agreement was that Charter be paid promptly. *Id*. Ms. Hays never discussed the possibility of putting the $12 million settlement in escrow or otherwise delaying payment until after settlement. *Id*. In fact, the word "escrow" did not come up a single time during the settlement negotiations. *Id*. Mr. Holmes was also surprised by Ms. Hays's mention

of the unrelated bankruptcy litigation and an "appeal." *Id*. That also had not come up at all during the negotiations. *Id*. Mr. Holmes sent the following email to Ms. Hays the following day:

> Hi Wendy – I checked with my counsel on how we should respond, as I am not close to the other proceeding and wasn't expecting any connection between the two. Here's our response, but I would suggest our attorneys work this piece out at their levels.
>
> We are appealing the judgment in the adversary proceeding, and the appeal has not been decided yet. We believe we have good legal arguments that will change the amount of the adversary proceeding award you've noted below as a potential offset against the cure settlement. However, Charter has placed a security bond that guarantees Windstream will get paid for any amounts of the judgment from the adversary proceeding that remain at the conclusion of the appeal. Charter sees payment of the cure amounts as central to resolving the cure dispute, and we've never agreed to or discussed any sort of offset.
>
> Holmes Decl. at ¶¶ 16-17.

On July 8, 2021, Windstream filed the Motion without any advance notice to Charter. Dkt. 142.

While the parties were negotiating the cure dispute, this Court issued a decision and order in a separate adversary proceeding between the parties. Adv. Pro. No. 19-08246, Dkt. 332. In that decision, this Court granted Windstream a $19.18 million compensatory damages award. *Id*. at 45. Charter timely filed a notice of appeal. Adv. Pro. No. 19-08246, Dkt. 337. Charter also filed a motion with this Court pursuant to Federal Rule of Bankruptcy Procedure 8007(a)(1)(B) to approve the supersedeas bond to obtain a stay of judgment. Adv. Pro. No. 19-08246, Dkt. 336. Windstream filed an objection to Charter's motion. Adv. Pro. No. 19-08246, Dkt. 339. After holding a hearing on the terms of the bond, this Court approved it in the amount agreed by the parties. Adv. Pro. No. 19-08246, Dkt. 351. The bond provided for hundreds of thousands of dollars on top of the $19.18 million damages award, which could potentially cover costs Windstream incurred associated with the appeal, in the event that the District Court (or Second Circuit) awarded those fees to Windstream. *Id*. On May 13, 2021, Charter filed its Statement of Issues to be Presented on Appeal. Adv. Pro. No. 19-08246, Dkt. 341. As reflected in that filing,

Charter did not appeal this Court's award of sanctions against Charter for violations of the stay as it relates to the VAR Agreement. *Id*. at 20-21.

ARGUMENT

I. ON JUNE 18, 2021, THE PARTIES AGREED TO SETTLE THE CURE DISPUTE FOR A PAYMENT OF $12 MILLION

In its 31-page submission, Windstream does not once address the critical question that this Court will need to resolve for this Motion: when the parties agreed to settle the cure dispute for $12 million on June 18, 2021, did they have a meeting of the minds on the timing of the payment of the Cure Amount, and if so, when did they contemplate such a payment? As described in further detail below, the answer is ***yes***, the parties did have a meeting of the minds on the timing of the payment, which they agreed would be paid within ***30 days*** of the assumption of the Charter Agreements.

If this court finds that the parties did indeed have a meeting of the minds on June 18, 2021 (they did), the succeeding question then is whether Windstream may make subsequent unilateral changes to the parties' agreement. The answer to that question is ***no***.

For these reasons, this Court should enforce the oral agreement which was struck between Charter on Windstream on June 18, 2021 and which contemplated a payment of cash by Windstream within 30 days of when the Charter Agreements were assumed.

A. The Parties Formed A Binding, Oral Contract On June 18, 2021 Which Provided For Cash Payment

1. The Parties Formed A Binding Oral Agreement On June 18, 2021

"It is the intent of the parties that determines whether and when an oral contract was formed." *Power v. Tyco Int'l (US), Inc.*, No. 02-CIV-6444 (GEL), 2007 WL 1574044, at *16 (S.D.N.Y. May 30, 2007). Here, there is no dispute between the parties that an oral contract was

in fact formed. *See* Motion at ¶ 2 ("After extensive good faith negotiations, the parties have agreed that the cure amount for the Charter Agreements is $12 million."); Declaration of Wendy B. Hays, Dkt. 143 ("Hays Decl.") at ¶ 5 ("In connection with 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 filed by Charter, and any early termination liability claims incurred under the Charter Agreements prior to the Plan Effective Date"); Holmes Decl. at ¶ 13 ("Between June 7, 2021 and June 18, 2021, I had several conversations internally to determine if Charter could accept a payment of $12 million to settle the dispute. Charter ultimately decided that it could. On June 18, 2021, I had a phone conversation with Ms. Hays. On that phone call, I agreed on behalf of Charter to resolve the matter in exchange for a $12 million payment."). The parties only dispute the payment terms of the agreement.

The binding agreement between Charter and Windstream was formed on June 18, 2021. "To form an enforceable contract under New York law, there must be an offer, acceptance, and consideration, as well as a showing of a meeting of the minds, demonstrating the parties mutual assent and mutual intent to be bound." *Highland Capital Mgmt., L.P. v. UBS Sec. LLC* (*In re Lyondell Chem. Co.*), 491 B.R. 41, 52 (Bankr. S.D.N.Y. 2013) (internal citations and quotation marks omitted). Here, the undisputed evidence is that the primary negotiators for Charter and Windstream—Ms. Hays (Windstream) and Mr. Holmes (Charter)—came to an agreement on the terms of the settlement on a phone call, informed by prior discussions and emails. On May 12, 2021, Ms. Hays outlined the proposal by offering an amount that "would be paid by WIN."

Holmes Decl. at ¶ 6. On June 7, 2021, Ms. Hays emailed Mr. Holmes regarding the one last open item (interest for the delay) on the parties' ongoing negotiation to settle the cure dispute. *Id*. at ¶ 12. In that email, Ms. Hays offered that Windstream "can agree today" to a settlement amount of $12 million and that she "hope[d] that we can agree on the $12M and wrap this up." *Id*. Between June 7, 2021 and June 18, 2021, Mr. Homes had several conversations internally at Charter to determine if Charter would accept that offer. *Id*. at ¶ 13. Charter ultimately decided that it would. *Id*. On June 18, 2021, Mr. Holmes called Ms. Hays, and on behalf of Charter, accepted Ms. Hays's offer. *Id*. Mr. Holmes's acceptance of Ms. Hays's offer on June 18, 2021 created a binding, oral agreement between Charter and Windstream on that date that fully settled the cure dispute.

2. The Binding Oral Agreement On June 18, 2021 Unambiguously Contemplated Payment On Assumption

Because the parties had a binding oral agreement on June 18, 2021, the next question is what the terms of the agreement were. When a contract is unambiguous, the court does not consider extrinsic evidence of the parties' intent and instead focuses on the actual terms of the agreement. *Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 466 (2d Cir. 2010). To determine whether an ambiguity exists, a court considers whether the "contract could suggest more than one meaning objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology generally understood in the particular trade or business." *Id*. (internal quotations marks omitted).

Here, Ms. Hays's offer on behalf of Windstream unambiguously contemplated a payment of $12 million for which Windstream "[could] agree today" and that the payment would "wrap[] up" the cure dispute. Holmes Decl. at ¶ 12. In that email, Ms. Hays also stated that her offer would avoid the need of the parties to litigate the question of interest in front of this Court. *Id*. A

settlement would only obviate the need to litigate the question of interest (which, of course, compensates for the delay Charter would suffer in connection with payment), only if it contemplated payment upon assumption. This is because if payment was not made upon assumption, Charter would be entitled to contract interest rates until payment was made, as per the parties' agreements. *See infra* at II.C. The circumstances of the discussions, and the points from Ms. Hays's prior correspondence on May 12 and June 7 could reasonably be understood to mean only one thing—payment will be made by Windstream on assumption, or shortly thereafter.

Further, no one who is cognizant of the customs and practices of this trade or business would believe that the negotiated resolution was ambiguous. For experienced business negotiators like Ms. Hays and Mr. Holmes, when negotiating past-due receivables and interest amounts, terms such as "today" and "wrap this up" can only be viewed as an agreement to pay forthwith, or at least in the ordinary course of dealings. Holmes Decl. at ¶ 18. No reasonable business person would assume otherwise.

3. Extrinsic Evidence Confirms That Parties Intended Payment To Be Made On Assumption Or 30-Days Thereafter

Charter does not believe that the agreement between the parties was ambiguous. However, if this court does find the terms ambiguous, "the court must turn to extrinsic evidence to determine the parties' intent." *In re Lehman Bros. Inc.*, 478 B.R. 570, 586 (S.D.N.Y. 2012). Here all of the extrinsic evidence available supports the fact that the parties intended for payment to be made at the time the Charter Agreements were assumed, or shortly thereafter.

First, the negotiation history between the parties shows that Charter was only willing to settle the dispute (and take a greater than $6 million haircut on the total amounts it believes it was entitled to) because the agreed upon settlement contemplated money coming in the door immediately. For example, on May 25, 2021, Mr. Holmes sent an email to Ms. Hays about a

proposed settlement. Holmes Decl. at ¶ 8. In the email Mr. Holmes emphasized that the "key issue" for Charter in the negotiation was the "time [Charter's] waited on getting payment" and that Charter was willing to "find some common ground" to address this issue. *Id*. In other words, Charter made clear to Windstream throughout the negotiations that prompt payment was its driving motivation to settle.

The negotiation history also makes clear that Charter was concerned about the interest amounts that had piled up under the Charter Agreements. For example, on May 21, 2021, Mr. Holmes wrote an email to Ms. Hays stating that "even though Charter had agreed to "suspend interest charges [for several months] as our teams worked through reconciliation efforts[, i]n aggregate, total accrued interest is now $3.25M, and we believe we are owed this amount based on the underlying contracts." Holmes Decl. at ¶ 7. On June 4, 2021, Mr. Holmes wrote another email to Ms. Hays stating that Charter "did not agree to waive our contractual right to charge said late fees / interest." *Id*. at ¶ 11. It would make no sense for Charter focus so much of its negotiations on the late payments under the Charter Agreements, yet sign up to a settlement which did not contemplate prompt payment.

Second, the parties' intent is further reflected by the (substantially contemporaneous) draft stipulation that Charter's counsel sent to Windstream on June 22 to reflect the parties agreement. Hockett Decl., Exhibit C. The cover email unequivocally expressed Charter's understanding that payment would be made promptly and Section 1 of the stipulation could not have been more clear:

> Agreed Cure Amount. ***No later than thirty (30) days after the Stipulation Effective Date***, the Debtors shall pay $12,000,000 (Agreed Cure Amount) in cash to Charter in full and final satisfaction of all pre-petition and post-petition claims of Charter, whether known or unknown, for services provided and charges accrued under the Charter Contracts on or before December 31, 2020, including any claims that accrued and that were not invoiced by Charter prior to December 31, 2020, any interest and/or late fees asserted in the Charter Cure Amount, and any early termination liability claims incurred under the Charter

> Contracts prior to the Effective Date of the Plan (collectively, the Pre-Assumption Claims). The Agreed Cure Amount shall be paid to Charter by wire transfer.

Hockett Decl., Exhibit C at 3 (emphasis added). The parties' understanding of the deal was clearly documented that Charter would be paid within 30 days of assumption. Windstream's lack of objection to the draft stipulation reflects that Windstream had the same view, at least at that time. Not only did Windstream not object, Windstream informed the Court that there had been a settlement on June 30. Hockett Decl., Exhibit D. Windstream did not seek to modify the agreement until nearly two weeks after the parties' June 18 agreement, one week after Charter sent its nearly contemporaneous draft stipulation, and one day after the Court was informed of the settlement.

Third, the context of the dispute and the course of dealings between the parties evinces that the parties believed that the payments would be made within 30 days of the assumptions of the agreements. Specifically, the VAR Agreement contemplates that Windstream will make payments within 30 days of invoice. The payment terms for the VAR Agreement state (emphasis added) that:

> **Payment Terms**. During the Order Term for the applicable Order, Spectrum shall bill Windstream monthly in advance in accordance with Spectrum's regular billing cycle for all monthly recurring charges specific to the Spectrum Services ("MRCs') due under this Agreement; except that upon activation of a Company or an End User account for Spectrum Services, Spectrum shall bill Windstream monthly in arrears for the first month's prorated service fees applicable to such Company or End User. Spectrum invoices for non-recurring. one-time charges ('OTCs") for construction or installation charges after the billing start date or as specified in the Order. ***Windstream will make all payments to Spectrum for undisputed charges due under this Agreement within thirty (30) days after the date appearing on the applicable invoices***. Payments made under this Agreement after their due date will incur interest at a rate equal to one and one half percent (1 ½ %) per month or the highest rate permitted by applicable law, whichever is lower.
>
> VAR Agreement § 4.2 (emphasis added).

The Enterprise Agreement contemplates similar commercial terms, requiring payment within 45 days of invoicing:

> **MRCs and NRCs**. The MRCs and any applicable NRCs payable by Customer for each Service shall be set forth in another document agreed upon by the Parties (e.g., an Order, ASR and/or rate cards) and shall be paid after being invoiced as provided below. ***Customer agrees to pay any charges for the Services within forty-five (45) days after the date of the Invoice (the "Due Date")*** in immediately available funds to the address set forth on the respective Invoice. Customer acknowledges and agrees that rate cards may be updated by Spectrum from time to time with thirty (30) days' prior written notice to Customer, and are incorporated herein by reference.

Enterprise Agreement § 10(a) (emphasis added).

Critically, both Agreements also contemplate that cure payments will be made by any defaulting party within 30 days (or up to a maximum of 45 days). *See* VAR Agreement § 11.2.2 ("The other party materially breaches any provision of this Agreement and fails to remedy such breach within thirty (30) days after written notification by the non-breaching party of such breach, or, except in the case of breach of payment obligations, such longer period as may be reasonably required to cure the breach, up to a maximum of forty-five (45) days; provided that the breaching party within thirty (30) days after receiving written notice of such breach commenced diligent efforts to cure the breach."); *see also* Enterprise Agreement § 13 ("In the event that a Party commits a material breach of this Agreement and fails to cure such breach within thirty (30) days after receipt of written notice from the non-breaching Party in accordance with this Section 13, the non-breaching Party may terminate this Agreement or any affected Order(s) without penalty. Prior to such termination, the non-breaching Party shall first give the other Party written notice of its intent to terminate, which such notice shall clearly set forth the provision(s) of this Agreement alleged to have been breached along with a description of the specific circumstances alleged to constitute such breach. Nothing in this Section 13 shall be deemed to limit any other remedies available to Spectrum hereunder.").

Fourth, the context and course of dealing between the parties under each of the Charter Agreements contemplates that Windstream and Charter expected—and in fact received—

payments under the Charter Agreements in short order. For example, during the post-bankruptcy period, Windstream has been paying the amounts due, approximately $3 million per month, generally on a timely basis. Holmes Decl. at ¶ 4. Therefore, the extrinsic evidence suggests payments at the time of assumption of within 30 days thereafter.

There is zero evidence of any discussion of any putative terms providing for a delay in payment or payment of funds into escrow. The Court will see none. To the extent Windstream attempts to introduce new evidence that it believed payment would be made into an escrow or would be used as a contingent set-off for the unrelated litigation between the parties, those facts would not be relevant to the analysis. This is because under New York law, the subjective intent of the parties is invalid as extrinsic evidence; instead the finder of fact may only analyze objective manifestations of intent. *Faulkner v. Nat'l Geographic Soc.*, 452 F. Supp. 2d 369, 377 (S.D.N.Y. 2006). Therefore, "[a]n uncommunicated understanding is of no effect in contract negotiations." *CMMF, LLC v. J.P. Morgan Inv. Mgmt., Inc.*, 2013 WL 8480424, at *11 (Sup. Ct. Aug. 21, 2013).

In summary, all of the extrinsic evidence, including writings, actions, and course of dealing between the two parties strongly suggests that the parties agreed that payment would be made upon the assumption of the Charter Agreements or 30 days thereafter.

B. Windstream Is Not Permitted To Add New Terms To An Oral Agreement

Because the parties came to an agreement on June 18, 2021, including with respect to the timing and amount of payment, Windstream should be bound to those terms. "A party to a contract cannot unilaterally alter the contract's terms without the other party's consent." *Int'l Techs. Mktg. Inc. v. Verint Sys., Ltd.*, No. 15-CV-2457, 2019 WL 8806219, at *1 (S.D.N.Y. Mar. 18, 2019).

In its Motion, Windstream is attempting to cherry-pick portions of the settlement and add new terms never agreed by the parties. *See* Proposed Order at ¶ 4. ("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.") However, as described *supra* I.A.1, on June 18, 2021, Ms. Hays and Mr. Holmes concluded months of good-faith negotiations to settle the entirety of the cure dispute. At the time, the parties came to an oral agreement, including on the two material terms of the contract: the amount of the payment and timing of the payment, *i.e.*, Windstream would pay $12 million to Charter at the time that it assumed the Charter Agreements, or within 30-days thereafter. This Court should enforce the deal that was struck by the parties on June 18, 2021.

II. EVEN ASSUMING WINDSTREAM IS CORRECT THAT THE PARTIES NEVER AGREED ON A TIME OF PAYMENT, PAYMENT THAT IS NOT PROMPT WOULD NOT SATISFY 365(B)(1)'S REQUIREMENTS

As discussed *supra* I.A, Charter and Windstream entered into a binding settlement agreement whereby Windstream agreed to pay Charter $12 million within 30 days of assumption of the Charter Agreements, to settle the Cure Dispute in its entirety. However, if this Court finds that Windstream is correct that the parties *did agree* to the $12 million but *did not agree* to the time of payment, then this Court should still require Windstream to make payment within 30 days to ensure that Windstream's cure payment satisfies Section 365(b)(1) of the Bankruptcy Code.

A. Section 365(b)(1) Of The Bankruptcy Code Requires Prompt Payment

The Bankruptcy Code provides that "[i]f there has been a default in an executory contract …, the trustee may not assume such contract … unless, at the time of assumption of such contract …, the trustee—(A) *cures*, or provides adequate assurance that the trustee will *promptly cure*, such default." 11 U.S.C. § 365(b)(1) (emphases added). In other words, the debtor must either pay the cure amount immediately or provide "assurance" that it will "promptly cure." *Id.*

Here, Windstream does not seek to pay cure immediately and instead requests the Court to approve an "adequate assurance that [it] will promptly cure." Motion at 11-13.

Windstream argues that "promptly" can mean an indefinite period of time until the resolution of the parties' ongoing appeal, which could be many months or even longer than a year. *See* Proposed Order at ¶ 4. However, "there is no indication that Congress did not intend 'promptly' to have its ordinary dictionary meaning of 'in a prompt manner: at once: immediately, quickly.'" *In re Allison*, No. 95-10776, 1995 WL 930889 (Bankr. E.D. Va. Sept. 14, 1995); *see also United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("[W]here, as here, the [Bankruptcy Code's] language is plain, 'the sole function of the courts is to enforce it according to its terms.'").

Consistent with the statutory requirements, courts have typically required that a debtor curing an executory contract pay the "full cure amount … in short order." *In re Haynes*, No. 19-20601, 2019 WL 7945834, at *5 (Bankr. W.D.N.Y. Aug. 1, 2019) ("[T]he absence of a lump-sum payment to the chapter 13 trustee, in short order, is not a prompt cure. The use of the word 'prompt' by Congress strongly suggests that payment of the *full cure amount* is required to be made in short order, not by way of a leisurely stroll in that direction.") (emphasis in the original); *see also In re Cunningham*, 485 B.R. 275, 278 (Bankr. W.D.N.Y. 2013) ("In their respective cases, the debtors have proposed plans that contain no provision for any lump-sum payment to the trustee, but which are instead funded through equal monthly payments extending over a period of approximately five years.… Consequently, the trustee will lack sufficient means to satisfy the prerequisites [of] 11 U.S.C. § 365(b)(1)."). "Short order" is often measured in terms of days or weeks. *See, e.g.*, *Ontario Ent. Corp. v. Chi. Title & Tr. Co. (In re Ontario Ent. Corp.)*, 237 B.R. 460, 472 (Bankr. N.D. Ill. 1999) ("Under § 365, because there has been a default but the lease has not expired or been terminated, OEC has a right to assume the Lease provided that it promptly cures its default.

That cure must provide the following within a 30 day period …"); *In re Hartman*, 102 B.R. 90, 95 (Bankr. N.D. Tex. 1989) ("The Debtors will be given thirty days after the entry of an order in this matter to provide the cure and assurance with respect to the leases required by § 365(b)(1)"); *In re Health Sci. Prods.*, 191 B.R. 895, 909 (Bankr. N.D. Ala. 1995) (holding that 70 days considered prompt where "Debtor's current and projected financial conditions demonstrate[d] the ability to make these payments").

Even when bankruptcy courts have strayed from the plain meaning of "prompt," meaning "quickly" or in "short order," they have looked to the "facts and circumstances" of a particular case. *In re Rock 49th Rest. Corp.*, No. 09-14557, 2010 WL 1418863, at *10 (Bankr. S.D.N.Y. Apr. 7, 2010). In these situations, when interpreting the term "prompt," Courts analyze the provisions of the contract being assumed, often with a particular focus on the "remaining term" of the contract. *See, e.g.*, *In re Reed*, 226 B.R. 1, 2 (Bankr. W.D. Ky. 1998). For example, when assessing the meaning of the word "prompt," courts will typically compare the proposed time to cure period with the remaining number of years of the lease being assumed.[4] Of more relevance here, courts also analyze whether the contracts being assumed themselves specify deadlines under which cure payments must be made. *See, e.g.*, *In re Patriot Place, Ltd.*, 486 B.R. 773, 796 n.6 (Bankr. W.D. Tex. 2013) ("In light of ¶ 36 of the Shopping Center Lease which provides that 3LM

[4] In the cases where bankruptcy courts have approved extended cure periods, it is typically because the leases being assumed were lengthy, multi-year or even multi-decade leases. And even in such cases, courts have typically found a cure period to be "prompt" only where it was a small fraction of the overall term of the lease. *See, e.g. In re Valley View Shopping Ctr., L.P.*, 260 B.R. 10, 26 (Bankr. D. Kan. 2001) ("Debtor's proposal to pay the balance over two years is reasonable in light of the fact that the Lease has approximately 22 years remaining in its term."); *In re Berkshire Chem. Haulers, Inc.*, 20 B.R. 454, 458 (Bankr. D. Mass. 1982) ("For instance, a debtor with 90 years remaining on a 99 year lease, who proposes to cure its arrearage by monthly payments over an 18 month period, might be found to have offered adequate assurance of a *prompt cure*.") (emphasis in the original).

(as tenant) will cure any monetary defaults within 30 days of assumption, the Court finds that payment of the personal property taxes within 30 days is a prompt cure under 11 U.S.C. §365(b)(1)(A)") (internal citations omitted).

Here, if the Court were inclined to stray from the plain meaning of "promptly" (and it should not), the "facts and circumstances" and "provisions" of the VAR Agreement and the Enterprise Agreement all point to a meaning of "prompt" as days or weeks, and in any event substantially less than the indefinite term suggested by Windstream. For example, the Enterprise Agreement provides for payment terms of 45 days (Enterprise Agreement, § 10(a)); and cure period of 30 days (Enterprise Agreement, § 13 ("In the event that a Party commits a material breach of this Agreement and fails to cure such breach within thirty (30) days after receipt of written notice from the non-breaching Party In accordance with this Section 13, the non-breaching Party may terminate this Agreement or any affected Order(s) without penalty.")). Similarly the VAR Agreement provides for payment term of 30 days (VAR Agreement, § 4.2); and cure period of 30 to 45 days (VAR Agreement, § 11.2.2 ("The other party materially breaches any provision of this Agreement and fails to remedy such breach within thirty (30) days after written notification by the non-breaching party of such breach, or, except in the case of breach of payment obligations, such longer period as may be reasonably required to cure the breach, up to a maximum of forty-five (45) days; provided that the breaching party within thirty (30) days after receiving written notice of such breach commenced diligent efforts to cure the breach.")). Given these "facts and circumstances," Windstream's suggestion that "prompt" may mean some indefinite period of time (potentially up to year or more) is contrary to the commercial reality of the relationship between the parties.

Several of the cases cited by Windstream actually support *Charter's* position. For example, in *In re Uniq Shoes Corp.*, the court found that a four-year cure in a lease which had five years remaining on it was not prompt. *In re Uniq Shoes Corp.*, 316 B.R. 748, 752 (Bankr. S.D. Fla. 2004) ("The proposed payment period for the cure is essentially co-extensive with the remaining life of the lease or, in any event, is not sufficiently less than the complete period of the relationship between the parties and is not therefore 'prompt' cure. The Court cannot conclude, under the facts of this case, that a forty-eight (48) month time period to pay-off the Cure Amount constitutes a 'prompt' cure when approximately sixty (60) months remain on the Dolphin Mall Lease.").[5]

B. Payment Into Escrow Is Not Prompt Payment

Windstream next argues that "[i]f 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." Motion at ¶ 46. But payment to an escrow that does not give the non-debtor access to the funds is not "prompt." *In re A. Tarricone, Inc.*, 70 B.R. 464, 466 (Bankr. S.D.N.Y. 1987) (finding money paid into escrow "is not the equivalent prompt cure").

Windstream argues that "[n]umerous courts have approved such escrow arrangements in connection with the assumption of executory contracts." Motion at ¶ 47. That statement is misleading. To the extent bankruptcy courts have required debtors put money in escrow when

[5] The other cases cited by Windstream are also inapposite. For example, in *In re Coors of North Mississippi, Inc.*, the court did grant a lengthier cure time of three-years based on the non-debtor's inequitable actions, but those inequitable actions had directly caused the high cure costs. *In re Coors of N. Miss., Inc.*, 27 B.R. 918, 922 (Bankr. N.D. Miss. 1983) ("The aforementioned exaction of unlawful and preferential pre-petition indebtedness payments from debtor-in-possession has prevented a greater reduction in the unpaid indebtedness, as would be the case if debtor-in-possession had been in a more viable cash flow position since the commencement of this chapter 11 proceeding."). In this case, there is no suggestion that the amount of Windstream's cure costs is related to Charter's conduct.

they assume executory contracts, they do so to satisfy prong 365(b)(1)(C) of the bankruptcy code, which does not include a "prompt" requirement and merely requires a debtor assuming a contract to "provide[] adequate assurance of ***future performance*** under such contract or lease." 11 U.S.C. § 365(b)(1)(C) (emphasis added). In other words, debtors are often required to put money into escrow ***in addition to*** paying outstanding defaulted amounts promptly. *See, e.g.*, *In re Gold Standard at Penn, Inc.*, 75 B.R. 669, 674 (Bankr. E.D. Pa. 1987) ("In addition to curing and compensating or providing adequate assurance of promptly doing so, the Debtor must also provide adequate assurance of future performance pursuant to § 365(b)(1)(C). Although what will satisfy § 365(b)(1)(C) will vary from case to case, some possibilities can include sufficient financial backing, escrow deposits or other similar forms of security or guaranty, or even promises."). The cases cited by Windstream further support the proposition that escrow payments are typically made in support of Section 365(b)(1)(C) and not Section 365(b)(1)(A). *See Condal Distribs., Inc. v. 2300 Xtra Wholesalers, Inc* (*In re 2300 Xtra Wholesalers, Inc.*), 445 B.R. 113, 121 (S.D.N.Y. 2011) ("[T]he issue before the Bankruptcy Court was limited to whether the debtors could provide Condal with adequate assurance that the lease will be honored for the remaining part of the term and that your client will not find itself back in landlord/tenant court. At the conclusion of the hearing, the Bankruptcy Court ordered that, as a measure to assure future performance, Bogopa was to deliver additional security to Condal in the amount of $112,602. Xtra also agreed to perform certain repairs on the Property and deposit $250,000 in escrow to fund any other required repairs.") (citations and quotation marks omitted).

Finally, Windstream's offer to put money in escrow also lays bare its motives: it is seeking to use the "adequate assurance" provisions in Section 365(b)(1) to hurt Charter by keeping from it money that it is rightly owed under the Charter Agreements. This is inconsistent with the

Bankruptcy Code. Courts have noted that "[t]he primary purpose of the criteria of § 365 are to protect the other party to a contract" balanced against providing some leeway to allow the "debtor-in-possession to use valuable property of the estate." *In re Tama Beef Packing, Inc.*, 277 B.R. 407, 412 (Bankr. N.D. Iowa 2002). Instead of paying a lump sum immediately on assumption, the Bankruptcy Code permits some debtors who may not be able to immediately afford cure payments to delay payment for some limited period and/or pay amounts in installments over a short period of time. *See, e.g., In re Am. the Beautiful Dreamer, Inc.*, No. 05-47435, 2006 WL 2038646, at *2-3 (Bankr. W.D. Wash. May 18, 2006) (permitting cure payments in installments over several months based on an analysis of debtor's projected revenues). This is not the case here. Windstream has not argued it cannot afford the $12 million payment, rather it wishes to augment its rights in an unrelated litigation. Indeed, Windstream's offer to put money in escrow demonstrates that Windstream does not need the cash—it simply wants to keep the cash away from Charter to punish Charter, under the auspices of Section 365(b)(1). Windstream should not be permitted to use this provision of the code as a sword in a way it clearly was not meant to be used.

C. If the Court Approves A Settlement Payment Into Escrow Or Permits A Lengthy Time To Cure, Contract Interest Rate Would Be Mandated

As discussed *supra* II.A, prompt cure here requires payment within days or weeks of assumption, and in any event "quickly" or in "short order." Further, payment into escrow would not be "prompt" payment. *Supra* II.B. However, if the Court does approve an assumption of the Charter Agreements under the terms requested by Windstream in its Motion, it should require Windstream to pay the contract interest rate pending payment, as is required by law. *See, e.g., In re Callahan*, 158 B.R. 898, 904 (Bankr. W.D.N.Y. 1993) ("[C]ourts, including this one, have often held that when the proposed cure is not immediate but is to be accomplished over time, interest or a present value factor must be paid."); *In re Latitudes Cafe, LLC*, 2005 WL 1941641 at *2 (Bankr.

D.N.H. July 11, 2005) (denying approval of a proposed assumption because the terms did not account "for [contract] interest on late payments at the rate of 18% per annum"); *In re Valley View Shopping Ctr., L.P.*, 260 B.R. 10, 26 (Bankr. D. Kan. 2001) ("The Lease states that interest shall accrue until paid. Because the cure amount will not be paid in full on the Effective Date, interest will accrue at the contract rate of 10%.").[6]

Here, the VAR Agreement and the Enterprise Agreement each call for a contract interest rate of 1.5% per month, or 18% per annum. VAR Agreement at § 4.2; Enterprise Agreement at § 10(c). Indeed, avoidance of such charges was the last piece of the settlement to fall into place. Any approved assumption of the Charter Agreements that does not provide for prompt payment must include an accrual of interest at the contract rate until Charter actually receives the money owed.[7]

III. CHARTER IS NOT ENTITLED TO SET-OFF

Windstream's set-off claim is premised on the fact that if it wins the ongoing appeal of this Court's April 8, 2021 judgment, and it incurs additional legal fees defending that appeal, it will

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[6] If there was no requirement to pay interest, every debtor would try to push cure payments out as far as possible, which cannot be the result intended by the "adequate assurance" language of Section 365(b)(1).

[7] Windstream states that after May of 2020, Charter repeatedly breached the VAR Agreement in violation of this Court's preliminary injunction order. Motion at ¶¶ 41, 42. Windstream then argues that this "questionable, inequitable and unlawful conducts justifies deferring payment of the Agreed Cure Amount until the Appeal is concluded." Motion at ¶ 44. Windstream's allegations are baseless. As noted in the Rochester Declaration (Dkt. 144) certain alleged breaches of the VAR Agreement were communicated to Charter between May of 2020 and October of 2020. Dkt. 144. Charter investigated these allegations promptly and determined that these allegations were without merit and promptly wrote to Windstream advising them of their investigations and their findings. *See, e.g.*, Hockett Decl. E, F, and G. Until this Motion, Windstream never followed up on these allegations or raised these allegations with the Court, presumably because they knew they were baseless. To the extent this Court is inclined to grant relief to Windstream on the basis of these allegations, Charter requests an evidentiary hearing to prove that such allegations are completely meritless.

assert a claim for those legal fees against Charter under the terms of the Charter Agreements. *See* Motion at ¶ 3 ("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"). Said another way, Windstream believes that it can avoid paying the full $12 million to Charter *now* because it believes that it has some contingent claims against Charter *in the future*.[8]

The right to set-off current payments against future, contingent claims is plainly not permitted under New York law, which is the law that governs under the VAR Agreement and the Enterprise Agreement. *See* VAR Agreement § 18.1; Enterprise Agreement Section § 28(h)(i). "Section 151 of the New York Debtor and Creditor Law ('DCL') codifies New York's equitable and common law right to setoff." *In re Corp. Res. Servs., Inc.*, 564 B.R. 196, 200 (Bankr. S.D.N.Y. 2017). "It provides that a debtor has the right 'to set off and apply against any indebtedness, whether matured or unmatured' any amount owing from the debtor to the creditor." *Id.* (quoting N.Y. Debt. & Cred. Law § 151). However, "[b]oth New York state courts and courts in this Circuit are in agreement that DCL § 151 does not authorize the setoff of a contingent obligation." *Thai Lao Lignite (Thailand) Co. v. Gov't of the Lao People's Democratic Republic*, 2016 WL 958640, at *3 n.3 (S.D.N.Y. Mar. 8, 2016). "[C]laims that are not finally adjudicated are contingent." *In*

[8] As Windstream concedes in its motion, the Supersedes Bond approved by this Court on May 19, 2021 (Adv. Pro. 19-08246, Dkt. 351) *does* provide for a several hundred thousand dollar buffer to cover legal fees from appeal, to the extent the district court (or Second Circuit) grants those fees to Windstream. Therefore, Windstream presumably is only referring to a claim for legal fees above and beyond this buffer.

re Corp. Res. Servs., Inc., 564 B.R. at 201 (citing *Cytec Indus., Inc. v. Allnex (Luxembourg) & Cy S.C.A.*, 2015 WL 3762592, at *13 (S.D.N.Y. May 15, 2015)) ("Courts have declined to permit offsets directed toward damages in a pending litigation."). Because Windstream has no current, non-contingent claims against Charter in the Appeal Costs, it cannot claim set-off on those claims or use those claims as a basis to withhold payment Charter.

To support its claim for set-off, Windstream primarily relies on *In re C.W. Mining Co.*, but that case does that support its position. In that case, the bankruptcy court did permit an offset between damages awarded against the non-debtor and cure payments owed by the debtor to the non-debtor. But, critically, in that case, there was no indication that the damage award held by the debtor was in any way contingent, as it plainly is here. *In re C.W. Mining Co.*, No. 08-20105, 2010 WL 3123140, at *8 (Bankr. D. Utah Aug. 6, 2010).

Windstream has no right of set-off for another import reason: Charter's appeal does not concern the Charter Agreements. While Windstream accurately quotes the alleged contractual right to seek attorneys' fees (Motion at 6 n.3), it fails to apply it as written. Charter did not appeal from this Court's judgment with respect to sanctions related to the Charter Agreements. Adv. Pro. No. 19-08246, Dkt. 341 at 20-21.

Finally, Windstream—citing two decades-old, out-of-circuit cases—suggests again that by putting money in escrow, it may be able to somehow resuscitate its ability to set-off *current* cure payments against *future*, *contingent* claims. However, these cases again miss the mark, as each of them only deal with a debtors' ability to offset amounts owed to them under the agreements being assumed. For example, in *In re Docktor Pet Center*, the debtor disputed whether it had to pay any cure amounts under a contract because of pre-petition *breaches of that same underlying agreement* by the non-debtor. *In re Docktor Pet Ctr., Inc.*, 144 B.R. 14, 16 (Bankr. D. Mass. 1992) ("Having

found that there was a *prima facie* default, the Court must next decide whether AEP can meet the requirements of 11 U.S.C. § 365(b) by seeking the Court's determination that Kabi also committed a pre-petition breach."). Rather than litigate the issue in connection with the motion to assume, the court directed the debtor to pay the disputed cure amount into escrow and file an adversary proceeding to determine whether the non-debtors pre-petition breach would excuse payment. *Id.*[9] Similarly, in *In re Diamond Head Emporium, Inc.*, the debtor claimed that the non-debtor had breached the terms of a hotel lease by conspiring to "oust the Debtor from the hotel" which would give it claims and/or defenses under the lease being assumed. *In re Diamond Head Emporium, Inc.*, 69 B.R. 487, 493 (Bankr. D. Haw. 1987). The court therefore again directed the debtor to pay the cure amount into escrow pending the resolution of the parties claims and defenses that arose under that agreement. *Id.*

In each of these cases, unlike here,[10] the parties disputed the amounts due under the agreements being assumed and had claims, counterclaims, or defenses under those very agreements. In this case, however, the settlement (and Windstream's Motion) was premised on the expectation that the parties resolved the prior amounts due under the Charter Agreements for

[9] Windstream's cases acknowledge that "courts are divided as to the extent to which defenses and counterclaims may be raised" in connection with a motion to assume. *In re Docktor Pet Ctr., Inc.*, 144 B.R. at 16 (Bankr. D. Mass. 1992). The Second Circuit is firmly of the view that "a motion to assume should be considered a summary proceeding, intended to efficiently review the trustee's or debtor's decision to adhere to or reject a particular contract in the course of the swift administration of the bankruptcy estate. It is not the time or place for prolonged discovery or a lengthy trial with disputed issues." *Orion Pictures Corp. v. Showtime Networks (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1098-99 (2d Cir. 1993). Charter is not opposed to litigating these issues in connection with the motion to assume as long as similar procedural protections apply.

[10] Charter is not appealing this court's award of contempt sanctions for Charter's violations of the VAR Agreement.

a lump sum of $12 million. Windstream cannot belatedly raise a purported set-off right after the deal was reached.[11] Therefore, Windstream's claims for set-off must fail.

CONCLUSION

For the foregoing reasons, Charter respectfully requests this Court to deny the relief requested by Windstream in its Motion and instead enforce Windstream's oral agreement with Charter to pay $12 million to cure the Charter Agreements within 30 days of assumption.

Dated: New York, New York
July 22, 2021

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[11] If for example, the parties could continue to assert claims under the VAR Agreement after settlement, Charter could sue Windstream for attorneys' fees, which are provided for under Section 18.6 of the VAR Agreement. This would make no sense given the parties settlement.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd 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 proceeding.

Dated: July 22, 2021

By: */s/ Anil Makhijani*
Anil Makhijani