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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
WINDSTREAM HOLDINGS, INC., *et al.*,	Case No. 19-22397 (RDD)[1]
Debtors.	Jointly Administered

OMNIBUS RESPONSE OF CMN-RUS, INC. TO DEBTORS' TWENTIETH OMNIBUS OBJECTION TO CLAIM NOS. 8710 AND 8713

CMN-RUS, Inc. ("CMN") hereby responds (the "Response") to the *Debtors' Twentieth Omnibus Objection to Claims* (the "Omnibus Objection") (Docket No. 184), filed on August 31, 2021 by Debtors.[2] In support of this Response,[3] CMN states as follows:

[1] Formerly jointly administered under Lead case: Windstream Holdings, Inc., Case No. 19-22312.

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

[3] The same day, the Reorganized Debtors also filed their 16th Satisfaction of Claims (Docket # 185), listing three claims scheduled to Cinergy Metronet, Inc. The Reorganized Debtors have agreed to withdraw the 16th Satisfaction of Claims as it relates to the three Metronet claims. The Debtors previously filed similar notices of satisfaction in the 8th Satisfaction of Claims (Docket # 2688), but previously withdrew those as well. (*See* Docket # 2748)

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SUMMARY OF VARIOUS CLAIMS AND OBJECTIONS

1. The Debtors seek to disallow two of CMS's Proof of Claims: (i) an unsecured claim in the amount of $100,933.36 (Claim No. 8713) (the "Post-Petition Power/Rack Space Claim") and is duplicative of an earlier administrative claim motion filed by CMN;[4] and (ii), an unliquidated claim for rejection damages arising out of the Debtors rejection of a Fiber Transport Services/Dark Fiber Rights Exchange Agreement. (Claim No. 8710) (the "Rejection Claim" and with the Post-Petition Power/Rack Space Claim, the "Claims") both as "No Liability" Claims in the 20th Omnibus Objection. The Declarations attached to the Omnibus Response do not address the Claims directly.

2. The Debtors have previously sought to disallow CMS's Proof of Claim No. 5161, an unsecured claim in the amount of $432,439.00 (the "Pre-Petition Power/Rack Space Claim"), which is listed on Schedule 1 to the Sixth Omnibus Objection (Docket No. 5161) , on the grounds that "Pursuant to the Debtors' books and records, no amounts are due and no liability exists for this claimant." *See* Sixth Omnibus Objection, ¶ Schedule 4, line 45 page 58 of 92. CMN objected to the Debtors' Sixth Omnibus Objection on the grounds that a mere books and records objection is not sufficient to rebut the *prima facie* validity of the Pre-Petition Power/Rack Space Claim. *See Docket No. 2379.*

3. The Reorganized Debtors have raised a similar objection to the Claims, stating it is not listed on the books and records of the Debtors and the liability remains unliquidated. As such, the Twentieth Omnibus Objection also does not rebut the *prima facie* validity of the Rejection Claim. As to the Post-Petition Power-Rack Space Claim, the Reorganized Debtors also seek to

[4] *See CMN-RUS, Inc.'s Motion for Allowance of Administrative Claim For Post-Petition Services and Immediate Payment Thereof* (the "Admin Motion") (Docket # 2584). The Post-Petition Power/Rack Space Claim was filed out an abundance of caution in case the Admin Motion was denied administrative status.

claim offsets against CMN for claims some of which are over 10 years old that were disputed long ago by CMN, and until recently seemingly dropped by the Reorganized Debtors. Also, the Reorganized Debtors argue that they incorrectly paid CMN for rack space in Evansville Indiana (even though the payments made were called for under contract), and thus should be offset as a result of the Debtors' unilateral mistake. CMN disputes the validity of these defenses on both a factual and legal basis—but these are clearly affirmative defenses, which are factual in nature and will require discovery before they are adjudicated.

BACKGROUND

4. The Debtors commenced their respective cases under chapter 11 of the Bankruptcy Code on February 25, 2019. (the "Petition Date").

5. On June 26, 2020, the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"), entered an order [Docket No. 2243] confirming the First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al., Pursuant to Chapter 11 of the Bankruptcy Code (Technical Modifications) [Docket No. 2201].

6. The Effective Date of the Plan occurred on September 21, 2020. [Docket No. 2527].

7. The Post-Petition Power/Rack Space Claim and the Rejection Claim are valid claims. The Post-Petition Power/Rack Space Claim contains a description of the charges and listing of the invoice dates and amounts, and contains copies of the multiple invoices referenced therein (collectively, the "Invoices"), as well as the applicable contracts between CMN and the Debtors, i.e. the Collocation and Maintenance Agreement and Rack Space Swap Agreement (the "Contracts").

8. Similarly, the Rejection Claim is filed for the Debtors rejection of a Fiber Transport

Services/Dark Fiber Rights Exchange Agreement, a copy of which is attached to the Rejection Claim, along with the procedural history of the claim and the Debtors rejection thereof. Additionally, CMN included its proposal for calculation of damages flowing from the rejection even though it is unliquidated. Thus, it also meets the *prima facie* requirements for a claim, and the Reorganized Debtors have not rebutted the validity of the Rejection Claim.

LEGAL ARGUMENT

A. The Debtors Have Failed to Rebut the *Prima Facie* Validity and Amount of the Claim as Evidenced by the Proof of Claim

9. Pursuant to section 502 of the Bankruptcy Code, a proof of claim filed in a bankruptcy proceeding is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a); *see also In re Gran*, 964 F.2d 822, 827 (8th Cir. 1992).

10. Pursuant to Bankruptcy Rule 3001(f), the filing of a proof of claim constitutes *prima facie* evidence of its amount and validity. Fed. R. Bankr. P. 3001(f); *see also In re Be-Mac Transport Co., Inc.*, 83 F.3d 1020, 1025 (8th Cir. 1996); *In re Allegheny Int'l, Inc.*, 954 F.2d 167, 173 (3rd Cir. 1992); *In re Fidelity Holding Co.*, 837 F.2d 696, 698 (5th Cir. 1988); *In re Smurfit-Stone Container Corp.*, 2011 Bankr. LEXIS 58 (Bankr. D. Del. 2011). "A properly executed proof of claim constitutes *prima facie* evidence of its validity, and parties objecting to a claim bear the burden of going forward to meet, overcome or, at minimum, equalize the valid claim…." *In re Gridley*, 149 B.R. 128, 132 (Bankr. S.D. 1992); *see also In re Be-Mac Transport*, 83 F3d at 1025 (8th Cir. 1996); *In re Chateaugay Corp.*, 154 B.R. 29, 32 (Bankr. S.D.N.Y. 1993)

11. Pursuant to the express language of Bankruptcy Rule 3001(f), "[a] party objecting to a claim has the initial burden of presenting a substantial factual basis to overcome the *prima facie* validity of a proof of claim [and] [t]his evidence must be of a probative force equal to that of the creditor's proof of claim." *In re Hinkely*, 58 B.R. 339, 348 (Bankr. S.D. Tex. 1986), *aff'd*, 89

B.R. 608 (S.D. Tex. 1988), *aff'd* 879 F.2d 859 (5th Cir. 1989), *citing In Re Globe Parcel Service, Inc., 71 B.R. 323* (E.D. Pa. 1987) (emphasis added); *accord In re Allegheny*, 954 F.2d at 173; *In re Bennett*, 83 B.R. 248, 252 (Bankr. S.D.N.Y. 1988) (the debtor, as the objecting party, must go forward and produce sufficient evidence to rebut the claimant's *prima facie* case). The *prima facie* validity of a proof of claim is "strong enough to carry over a mere formal objection without more." *In re Schlehr*, 290 B.R. 387, 395 (Bankr. D. Mont. 2003). Where a debtor simply makes a *pro forma* objection without any evidentiary support, a court may summarily overrule such objections. *See e.g.*, *Garner v. Shier (In re Garner)*, 246 B.R. 617, 620, 623 (B.A.P. 9th Cir. 2000). Indeed, "[t]o overcome this prima facie evidence, the objecting party must come forth with evidence which, if believed, would refute at least one of the allegations essential to the claim." *In re Reilly*, 245 B.R. 768, 773 (B.A.P. 2d Cir. 2000).

12. In *Garner*, the debtor objected to a proof of claim by merely asserting that "there is no obligation to pay . . . and there are no written documents or other competent evidence of any valid obligations owed . . ." *Garner*, 246 at 620. Moreover, the debtor failed to offer any evidence at the hearing in support of such assertions. *Id.*. Consequently, the *Garner* Bankruptcy Court held that the debtor did not fulfill its burden of producing competent evidence rebutting the presumption of validity afforded the proof of claim. *Id.*

13. CMN's proof of claim includes copies of the underlying Invoices evidencing the validity and amount of the Claim and the signed copies of the Contracts supporting the Invoices. The Invoices from CMN are each itemized and are easily identified by the Debtor's name, the invoice number, the invoice date, and the invoice amount. This information should have been more than sufficient to allow the Debtors to locate some record of these transactions with CMN in the Debtors' books and records. The Invoices and Contracts are clearly sufficient to support

CMN's Claim. As a result, the Debtors' Objection to Claim should be overruled.

14. The situation before this Court, essentially, is no different than the situation presented to the *Garner* court. Here, the Debtors have failed to submit any "substantial factual" evidence satisfying the Debtors' burden to overcome the *prima facie* presumption of validity of the existence of the Claim or its amount as set forth in the Claim. Simply put, the Debtors' Omnibus Objection does not address with particularity (except in a conclusory fashion) the underlying facts supporting the Claim. Instead, the Omnibus Claims Objection merely states that "Pursuant to the Debtors' books and records, no amounts are due and no liability exists for this claimant." *See* Omnibus Objection, ¶ Schedule 4, line 45 page 58 of 92.

15. Standing alone, the Omnibus Objection does not satisfy the Debtors' burden of adducing "substantial factual" evidence rebutting any element of the Claim. *In re Willia*ms, No. 92-50546, 1994 WL 329328, *3 (Bankr. S.D. Ga. March 30, 1994) (merely disagreeing with the amount of a claim cannot rise to the level of producing evidence equal to the weight given to the claim itself as is necessary to rebut the presumption of prima facie validity). As in *Garner*, the Debtors in this case have merely asserted that there is "no liability for this claimant." *See Garner,* 246 B.R. at 620. This conclusory statement certainly does not overcome the *prima facie* evidence set forth in Claim which, "if believed, would refute at least one of the allegations essential to the claim." *In re Reilly*, 245 B.R. 768, 773 (2nd Cir. 2000). Where a debtor simply makes a *pro forma* objection without competent evidentiary support, a court should summarily overrule such objections. *See Garner,* 246 B.R. at 623. Under these circumstances, the *prima facie* validity of the Claim is "strong enough to carry over a mere formal objection without more." *In re Schlehr,* 290 B.R. at 395.

B. The Defenses Raised By the Reorganized Debtors are Affirmative Defenses on Which They Have the Burden of Proof and Which Need Discovery

16. The Reorganized Debtors have raised an affirmative defense of offset or setoff that the Reorganized Debtors are owed certain power payments for a facility in Indianapolis. Secondly, the Reorganized Debtors claim the affirmative defense that CMN owes the Reorganized Debtors for return of inadvertent payments made by the Debtors on account of racks in Evansville, Indiana that the Reorganized Debtors claim were supposed to be free of charge. Thus, raising mistake and offset as affirmative defenses to the Post-Petition/Power Rack Space Claim.

17. The Collocation and Maintenance Agreement, Rack Space Swap Agreement and the Fiber Transport Services/Dark Fiber Rights Exchange Agreement are governed under Indiana law.[5] Under Indiana law, offset is an affirmative defense. *See Allen v. Int'l Truck & Engine Corp.*, 2017 WL 1382610, at 5 (S.D. Ind. Apr. 18, 2017) (defendant employer bore the burden of proving affirmative defense of offset in employment case) *Travelers Cas. & Sur. Co. of Am. v. Consol. City of Indianapolis, Ind.*, , 2014 WL 5509312, at 8 n.6 (S.D. Ind. Oct. 31, 2014) (offset raised as affirmative defense, instead of affirmative claim) *See also* § 19:23. Setoff, Def Against a Prima Facie Case § 19:23 (Rev ed) ("Reduction or offset of damages is an affirmative defense that must be pleaded and proved."). The Reorganized Debtors bear the burden to prove their offset or setoff, which is subject to discovery in this case.

18. Reorganized Debtors assertion that amounts are owed by CMN regarding the Indianapolis facility is negated by the facts that neither the Debtors nor Reorganized Debtors have

[5] *See* Section 20 of the Collocation and Maintenance Agreement and Rack Space Swap Agreement and Section 26 of the Fiber Transport Services/Dark Fiber Rights Exchange Agreement providing that Indiana law governs. To the extent that New York law controls, offset is also an affirmative defense. *See In re Gaulsh*, 602 B.R. 849, 854 (Bankr. S.D.N.Y. 2019).

invoiced CMN for such amounts since December 2016.[6] Despite a joint audit between the parties in 2018, that the Reorganized Debtors did not dispute, the Reorganized Debtors never raised these issues again until long after CMN filed its claims. CMN asserts all defenses to that offset or setoff, including waiver, estoppel, laches, statute of limitations, failure to mitigate, and reserves its rights to assert others.

19. Reorganized Debtors also assert that amounts owed by the Debtors under the Post-Petition Power/Rack Space Claim should be offset by amounts paid as a result of a unilateral mistake by the pre-petition Debtors in executing an amendment to the Collocation and Maintenance Agreement. This is also an affirmative defense in which the Reorganized Debtors bear the burden of proof. *See Mirabal v. Gen. Motors Acceptance Corp.*, 576 F.2d 729, 733 (7th Cir. 1978) ("At trial it was the defendants who had the burden of establishing their affirmative defense of a bona fide mistake.") Thus, Reorganized Debtors bear the burden of proof as to this defense, which is clearly factual and subject to discovery by CMN.

20. The mistake argued by Reorganized Debtors deals with a license to provide a certain number of racks used by the Reorganized Debtors in Evansville, Indiana. Notably, under Indiana law a contract cannot be avoided for mistake unless there has been a mutual mistake or a unilateral mistake accompanied by fraud or inequitable conduct by the counter-party. As stated by one Indiana Court:

> "a contract generally may not be avoided for unilateral mistake unless the mistake was induced by the misrepresentation of the opposite party. [citation omitted]. Thus, equity has jurisdiction in only two well-defined situations: (1) where there is a mutual mistake; or (2) where there has been a mistake by one party, accompanied by fraud or inequitable conduct by the remaining party. *Plumlee v. Monroe Guar.*

[6] The last invoice presented to CMN by the Reorganized Debtors was in December 2016 and was for power supplied as far back as 2010. CMN disputed the charges in 2017. The Reorganized Debtors reduced the amount of the invoice, but CMN again disputed the amounts. The parties engaged in a joint audit, after completed the Reorganized Debtors never raised these issues again until CMN filed its claims, nor have they invoiced CMN for any additional amounts.

> *Ins. Co.*, 655 N.E.2d 350, 356 (Ind.Ct.App.1995) (discussing reformation of a contract), *reh'g denied, trans. denied*. However, equitable relief is not available if the mistake is a mistake of law. *Estate of Spry v. Greg & Ken, Inc.*, 749 N.E.2d 1269, 1275 (Ind.Ct.App.2001), *reh'g denied*. Equity should not intervene "where the complaining party failed to read the instrument, or, if he read it, failed to give heed to its plain terms." *Id*. (quoting *Gierhart v. Consol. Rail Corp.-Conrail*, 656 N.E.2d 285, 287 (Ind.Ct.App.1995)).

Mid-States Gen. & Mech. Contracting Corp. v. Town of Goodland, 811 N.E.2d 425, 435 (Ind. Ct. App. 2004). First, there is no mutual or unilateral mistake. Reorganized Debtors contracted for a specific amount of rack space, which CMN provided. It is immaterial if it was fully used or not under the terms of the agreement. Second, Reorganized Debtors' own records show they in fact use/used several of the racks they claim they mistakenly contracted for. Thus, there is no valid affirmative defense to the Post-Petition Power/Rack Space Claim.

21. Lastly, the Reorganized Debtors have not supported the objection to the Rejection Claim. The Debtors rejected the Fiber Transport Services/Dark Fiber Rights Exchange Agreement and pursuant to 11 U.S.C. § 365(g) that operates as a pre-petition breach of that agreement. CMN attached the applicable agreement to the Rejection Claim. Thus, the only issue in relation to the Rejection Claim is damages. CMN has provided backup and a formula for its proposed damages in the Rejection Claim. Thus, it satisfies the *prima facie* validity standard and has not been rebutted by the Reorganized Debtors.

Reservation of Rights and Discovery

22. As such, because of Debtors failure to rebut the *prima facie* validity of the Rejection Claim and the Post-Petition Power/Rack Space Claim, CMN reserves and any all rights to produce subsequent evidence, testimony, legal arguments and seek discovery from Debtors regarding any objections and grounds thereof to the Claims. CMN asserts the right to discovery, and to take discovery against the Reorganized Debtors.

23. CMN and the Reorganized Debtors have engaged in efforts to settle the Claims and defenses thereto. There are numerous emails and exchanges supporting the Claims and rebutting the affirmative defenses asserted. CMN does not waive the right to produce additional documents to the Reorganized Debtors. Pursuant to the Procedures for Filing and Serving Omnibus Claims Objections, CMN has determined that if a settlement is not reached, discovery will be necessary and that this Response is notice that the scheduled hearing will be treated as a scheduling conference. The Parties are still engaged in settlement discussions, and this Response was necessitated by the applicable deadline and CMN intends to continue with good faith settlement discussions.

24. The designated attorney for contact and authority to resolve this matter is: Andrew J. Nazar, Polsinelli PC. (816) 395-0641, anazar@polsinelli.com. CMN reserves the right to designate others on its behalf as well.

WHEREFORE, CMN seeks entry of an order denying the Omnibus Objection to the extent that it seeks disallowance of the Claims and such other and further relief as may be deemed just and proper under the circumstances.

Dated: Kansas City, Missouri
September 22, 2021

POLSINELLI PC

/s/ Andrew J. Nazar

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing response was filed with the Bankruptcy Court and served on all parties registered to receive notice via CM/ECF on September 23, 2021. Copies of the foregoing document were also served via overnight mail and email transmission, on the individuals listed below.

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