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Conflicts Counsel to the Debtors and Debtors in Possession

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
WINDSTREAM HOLDINGS, INC., *et al*.,[1]	Case No. 19-22312 (RDD)
Debtors.	(Jointly Administered)
WINDSTREAM HOLDINGS, INC., *et al*.,	
Plaintiffs,	Adv. Pro. No. 19-08246
v.	
CHARTER COMMUNICATIONS, INC. and CHARTER COMMUNICATIONS OPERATING, LLC,	
Defendants.	

NOTICE OF HEARING ON DEBTORS' MOTION FOR LEAVE TO FILE UNDER SEAL PORTIONS OF DEBTORS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO EXCLUDE THE REBUTTAL EXPERT REPORT OF HENRY D. OSTBERG

PLEASE TAKE NOTICE that on January 13, 2020, Windstream Holdings, Inc. and its debtor affiliates, as debtors and debtors in possession in the above-referenced Chapter 11 cases

[1] The last four digits of Debtor Windstream Holdings, Inc.'s tax identification number are 7717. Due to the large number of debtor entities 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.

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(collectively, the "Debtors"), and as plaintiffs in the above-captioned adversary proceeding (this "Adversary Proceeding"), filed: *Debtors' Motion For Leave To File Under Seal Portions of Debtors' Reply Memorandum in Support of Their Motion to Exclude the Rebuttal Expert Report of Henry D. Ostberg* (the "Motion").

PLEASE TAKE FURTHER NOTICE that the hearing (the "Hearing") to consider entry of the proposed order attached as Exhibit A to the Motion (the "Order") will be held before the Honorable Robert D. Drain, United States Bankruptcy Judge, United States Bankruptcy Court for the Southern District of New York, at the United States Bankruptcy Court for the Southern District of New York, 300 Quarropas Street, White Plains, New York 10601, on **January 16, 2020 at 10:00 a.m. (prevailing Eastern Time).**

PLEASE TAKE FURTHER NOTICE that responses or objections to the Motion, if any, shall: (a) be in writing; (b) conform to the Federal Rules of Bankruptcy Procedure, the Local Rules for the United States Bankruptcy Court for the Southern District of New York, all General Orders applicable to Chapter 11 cases in the United States Bankruptcy Court for the Southern District of New York, and the *Final Order Establishing Certain Notice, Case Management and Administrative Procedures*, entered by this Court on April 22, 2019 [Bankr. Dkt. No. 392] (the "Case Management Order"); (c) be filed electronically with this Court on the docket of *In re Windstream Holdings, Inc., et al, v. Charter Communications, Inc. and Charter Communications Operating, LLC,* Case 19-08246-(RDD) by registered users of this Court's electronic filing system and in accordance with the General Order M-399 (which is available on this Court's website at http://www.nysb.uscourts.gov); and (d) be served by email on (i) the entities on the Master Service List (as defined in the Case Management Order and available on the Debtors' case website at http://www.kccllc.net/windstream) and (ii) any person or entity with a particularized interest in the subject matter of the Motion, so as to be actually received on or before **January 16, 2020 at 10:00 a.m. (prevailing Eastern Time) (**the

"Objection Deadline"), or such other time as the Court may hereafter order and of which you will receive subsequent notice.

PLEASE TAKE FURTHER NOTICE that if no objections are timely filed and served with respect to the Motion, the Debtors shall, within 24 hours after the Objection Deadline, submit to this Court a proposed Order, which Order this Court may enter with no further notice or opportunity to be heard.

PLEASE TAKE FURTHER NOTICE that the Hearing may be continued or adjourned from time to time without further notice other than an announcement of the adjourned date or dates at the Hearing. The Debtors will file an agenda before the Hearing, which may modify or supplement the Motion to be heard at the Hearing.

PLEASE TAKE FURTHER NOTICE that a copy of the Motion may be obtained free of charge by visiting the website of Kurtzman Carson Consultants LLC at http://www.kccllc.net/windstream. You may also obtain copies of any pleadings by visiting this Court's website at http://www.nysb.uscourts.gov in accordance with the procedures and fees set forth therein or contacting the undersigned counsel.

Dated: January 13, 2020

/s/ Terence P. Ross

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
WINDSTREAM HOLDINGS, INC., *et al*.,[1]	Case No. 19-22312 (RDD)
Debtors.	(Jointly Administered)
WINDSTREAM HOLDINGS, INC., *et al*.,	
Plaintiffs,	Adv. Pro. No. 19-08246
v.	
CHARTER COMMUNICATIONS, INC. and CHARTER COMMUNICATIONS OPERATING, LLC,	
Defendants.	

DEBTORS' MOTION FOR LEAVE TO FILE UNDER SEAL PORTIONS OF DEBTORS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO EXCLUDE THE REBUTTAL EXPERT REPORT OF HENRY D. OSTBERG

Windstream Holdings, Inc. and its debtor affiliates, as debtors and debtors in possession in the above-referenced Chapter 11 cases (collectively, the "Debtors"), and as plaintiffs in the above-captioned

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adversary proceeding (this "Adversary Proceeding"), respectfully state the following in support of this motion (the "Motion"):

RELIEF REQUESTED

1. The Debtors seek entry of an order, substantially in the form attached hereto as Exhibit A (the "Proposed Order"), authorizing the Debtors to file under seal certain portions of *Debtors' Reply Memorandum in Support of Their Motion to Exclude the Rebuttal Expert Report of Henry D. Ostberg* [Adv. Dkt. No. 229] (the "Sealed Document").

2. In addition, the Debtors seek entry of the Proposed Order directing that the Sealed Document shall remain under seal and shall not be made available to anyone other than the Court, the United States Trustee, counsel to the Defendants in this Adversary Proceeding, counsel to the Official Committee of Unsecured Creditors appointed in these Chapter 11 cases (the "Creditors' Committee"), and any other party as may be ordered by the Court or agreed to by the Debtors and a counterparty to any such document, in each case, under appropriate confidentiality agreements satisfactory to the Debtors.

3. In accordance with Rule 9018-1(b) of the Local Rules for the United States Bankruptcy Court for the Southern District of New York (the "Local Rules"), redacted copies of the Sealed Document have been filed on the Bankruptcy Court's docket.

JURISDICTION AND VENUE

4. The Court has jurisdiction over this Motion under 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.

5. Venue in this District is proper before this Court under 28 U.S.C. §§ 1408 and 1409. This is a core proceeding as defined in 28 U.S.C. § 157(b).

6. The statutory predicates for the relief requested herein are Sections 105(a) and 107 of the of Title 11 of the United States Code (as amended, the "Bankruptcy Code"), Rule 9018 of the Federal

Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Local Rule 9077-1(b).

BACKGROUND

7. The Debtors are a leading provider of advanced network communications and technology solutions for businesses across the United States. The Debtors also offer broadband, entertainment and security solutions to consumers and small businesses primarily in rural areas in 18 states. Additionally, the Debtors supply core transport solutions on a local and long-haul fiber network spanning approximately 150,000 miles. As of the Petition Date (defined below), the Debtors had approximately 13,000 employees.

8. As set forth in greater detail in the *Declaration of Tony Thomas, Chief Executive Officer and President of Windstream Holdings, Inc. (I) In Support of Debtors' Chapter 11 Petitions and First Day Motions and (II) Pursuant to Local Bankruptcy Rule 1007-2* [Bankr. Dkt. No. 27] (the "Thomas Declaration"), on February 15, 2019, the United States District Court for the Southern District of New York entered a Memorandum Decision and Order against Debtor Windstream Services, LLC after trial in the matter styled *U.S. Bank National Association v. Windstream Services, Inc. v. Aurelius Capital Master, Ltd.*, Case No. 17-cv-7857 (JMF), that found an event of default under the Debtors' prepetition unsecured bond indentures, which in turn gave rise to a cross-default under the Debtors' secured credit facilities and certain other material agreements.

9. 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 continue to operate their business and manage their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. Additional information regarding the Debtors' business, their capital structure, and the circumstances leading to these chapter 11 filings is contained in the Thomas Declaration.

10. On April 5, 2019, the Debtors filed a complaint [Adv. Dkt. No. 1] (the "Complaint") against Charter Communications, Inc. and Charter Communications Operating, LLC (collectively, the "Defendants" or "Charter"), commencing the Adversary Proceeding.

11. Also on April 5, 2019, the Debtors filed a *Motion for a Temporary Restraining Order, Preliminary Injunction and Other Equitable Relief Against Charter Communications, Inc. and Charter Communications Operating, LLC* [Adv. Dkt. No. 2] (the "TRO Motion").

12. On April 15, 2019, the Court conducted an evidentiary hearing to consider the relief requested in the TRO Motion. On April 16, 2019, the Court entered a temporary restraining order against Charter [Adv. Dkt. No. 25].

13. On May 16, 2019, the Court issued a preliminary injunction against Charter [Adv. Dkt. No. 61].

14. On June 6, 2019, the Debtors, Charter and the Creditors' Committee filed the C*onfidentiality Agreement and Stipulated Protective Order* (the "Protective Order") to, among other things, protect material that a party to the Adversary Proceeding seeks to maintain as confidential.[2]

15. On June 7, 2019, the Court entered the Protective Order [Adv. Dkt. No. 74].

BASIS FOR RELIEF

16. The Bankruptcy Code provides strong support for redacting certain portions of the Sealed Document. Section 107(b) of the Bankruptcy Code authorizes courts to issue orders that will protect entities from the potential harm that may result from the disclosure of certain confidential information. This section provides, in relevant part:

> (b) On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may—
>
> > (1) protect an entity with respect to a trade secret or confidential research, development, or commercial information;

11 U.S.C. § 107(b)(1).

[2] The Protective Order applies to all information, documents and things exchanged in or subject to discovery that is produced on or after April 5, 2019, either by a party to the Adversary Proceeding or a non-party, including without limitation, deposition testimony (whether based upon oral examination or written questions), interrogatories, answers to interrogatories, requests for admission, responses to requests for admission, documents, information and things produced (including documents, information and things produced to a Receiving Party for inspection and documents, whether in the form of originals or copies) as well as any and all copies, abstracts, digests, notes, summaries, and excerpts thereof (collectively referred to as "Discovery Material").

17. Bankruptcy Rule 9018 further defines the procedures by which a party may move for relief under Section 107(b) of the Bankruptcy Code, and provides, in part:

> On motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information . . . .

Fed. R. Bankr. P. 9018.

18. Once a court determines that a party in interest is seeking protection of information that falls within the ambit of Section 107(b), "the court is required to protect a requesting interested party and has no discretion to deny the application." *Video Software Dealers Ass'n v. Orion Pictures Corp.*, 21 F.3d 24, 27 (2d Cir. 1994).

19. The Second Circuit in *Video Software Dealers Ass'n* affirmed the bankruptcy court's order to seal a commercial agreement of the debtors in that case. *Id.* at 28. The Second Circuit noted that Section 107(b)(1) of the Bankruptcy Code creates an exception to the general rule that the court records are open to examination by the public. *Id.* at 27. Thus, under this exception, an interested party has to show only that the information it wishes to seal is "'confidential' and 'commercial' in nature." *Id.* Commercial information, however, need not rise to the level of trade secret to be protected under Section 107(b) of the Bankruptcy Code. *Id.* at 28.

20. In addition, pursuant to the Protective Order entered in this Adversary Proceeding, parties are entitled to designate Discovery Material as "Confidential Material" or "Confidential – Attorneys' Eyes Only Material" (any such Discovery Material, "Designated Material"), subject to the terms of the Protective Order. If a party wishes to file Designated Material with the Court, it must file such Designated Material under seal. See Protective Order, ¶¶ 8, 16.

21. For the foregoing reasons, the Debtors submit that good cause exists to authorize the filing under seal of an unredacted copy of the Sealed Document. The Sealed Document contains confidential information regarding the commercial relationship between Charter and Windstream and personal

information regarding Windstream customers that fall well within the scope of section 107(b) of the Bankruptcy Code. Additionally, the Sealed Document contains information that has been designated as Designated Material pursuant to the Protective Order.

MOTION PRACTICE

22. This 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 Debtors submit that this Motion satisfies Local Rule 9013-1(a).

NOTICE

23. The 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 Debtors respectfully submit that no other or further notice is necessary.

NO PRIOR REQUEST

24. Except as may have been the request of a prior sealing motion in this Adversary Proceeding, no prior request for the specific relief sought in this Motion has been made to this or any other court.

WHEREFORE, 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: January 13, 2020

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Conflicts Counsel to the Debtors and Debtors in Possession

Exhibit A

Proposed Order

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
WINDSTREAM HOLDINGS, INC., *et al.*,[1]	)	Case No. 19-22312 (RDD)
Debtors.	)	(Jointly Administered)
WINDSTREAM HOLDINGS, INC. *et al.*,	)	
Plaintiffs,	)	Adv. Pro. No. 19-08246
v.	)	
CHARTER COMMUNICATIONS, INC. and CHARTER COMMUNICATIONS OPERATING, LLC,	)	
Defendants.	)	

ORDER ON DEBTORS' MOTION FOR LEAVE TO FILE UNDER SEAL PORTIONS OF DEBTORS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO EXCLUDE THE REBUTTAL EXPERT REPORT OF HENRY D. OSTBERG

Upon the [unopposed] motion (the "Motion")[2] of the above-captioned debtors and debtors in possession (collectively, the "Debtors") for entry of an order (this "Order") under 11 U.S.C. § 107 authorizing the Debtors to file under seal certain portions of the *Debtors' Reply Memorandum in Support of Their Motion to Exclude the Rebuttal Expert Report of Henry D. Ostberg* [Adv. Dkt. No. 229] (the "Sealed Document"); and the Court having found that it has

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[2] Capitalized terms used herein shall unless otherwise defined have the meanings ascribed to them in the Motion.

jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(a)-(b) and 1334(b); and the Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and the Court having found that venue of the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having found that the Debtors provided due and sufficient notice of the Motion and that no other notice or hearing is required; and, after due deliberation, this Court having determined that the legal and factual bases set forth in the Motion establishes sufficient cause for the relief granted herein, in that the proposed information that the Motion seeks to restrict from the public docket of this case is properly protected under 11 U.S.C. § 107(b)(1) as confidential commercial information; now, therefore, it is hereby ORDERED that:

1. The Motion is granted as set forth herein.

2. The Debtors are authorized to file under seal portions of the Sealed Document, by providing it to the Clerk's Office at 300 Quarropas Street, White Plains, New York along with a copy of this Order, and (b) to file a redacted version thereof on the public docket of this case; provided, that the Debtors redact only that information that is considered confidential and commercially sensitive pursuant to Sections 105(a) and 107(b)(1) of the Bankruptcy Code, Bankruptcy Rule 9018, and Local Bankruptcy Rule 9018-1.

3. Except upon further order of the Court after notice to the Debtors, the Sealed Document shall remain under seal, and shall not be made available to anyone without the consent of the Debtors, with the exception that unredacted copies of the Sealed Document shall be provided to (a) the Court, (b) the United States Trustee, (c) counsel to Charter, (d) counsel to the Official Committee of Unsecured Creditors appointed in these Chapter 11 cases, and (e) any other party as may be ordered by the Court or agreed to by the Debtors and a counterparty to any such Sealed

Document, in each case, under appropriate confidentiality agreements satisfactory to the Debtors. Each party to whom disclosure is made shall keep the Sealed Document confidential.

4. The Debtors are authorized to take all actions necessary to effectuate the ruling set forth in this Order.

5. This Order is without prejudice to the rights of any party in interest, or the United States Trustee, to seek to unseal the Sealed Document or any part thereof.

6. Counsel for the Debtors shall contact the Clerk's Office regarding the return or other disposition of the Sealed Document within 10 days after resolution of the relief requested in the Complaint. If the Debtors fail to do so, the Clerk of the Court is authorized to destroy the Sealed Document.

7. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

Dated: _____, 2020
New York, NY

_____
THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY COURT JUDGE