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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
WINDSTREAM HOLDINGS, INC., *et al.,*	Case No. 19-22312 (RDD)
Debtors.	(Jointly Administered)

LIMITED OBJECTION AND RESERVATION OF RIGHTS OF ASPEN AMERICAN INSURANCE CO., ASPEN INSURANCE UK LIMITED, ASPEN SPECIALTY INSURANCE CO. TO DEBTORS' PROPOSED ASSUMPTION OF CERTAIN EXECUTORY CONTRACTS UNDER THE PLAN

Aspen American Insurance Co., Aspen Insurance UK Limited, and Aspen Specialty Insurance Co. (collectively, "Aspen"), by and through their undersigned attorneys, hereby make their limited objection (this "Limited Objection") to the Debtors' proposed assumption of certain executory contracts under the terms of the *First Amended Joint Chapter 11 Plan of Reorganization of Windstream Holdings, Inc. et al.* [Docket No. 1812] (as the same may be amended from time to time, the "Plan"), filed by the above-captioned debtors and debtors-in-possession (the "Debtors") on May 14, 2020. In support hereof, Aspen respectfully states as follows:

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BACKGROUND

1. On February 25, 2019 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). As of the Petition Date, Aspen had issued approximately 193 surety bonds, in the aggregate penal sum of approximately $10.2 million (collectively, the "Surety Bonds"), at the request and on behalf of various Debtors, as further set forth in the proof of claim (Claim No. 6035), filed by Aspen against Debtor Windstream Holdings, Inc. ("Holdings"), on July 15, 2019 (the "Proof of Claim").

2. Prior to the Petition Date, on April 12, 2018, Holdings and Debtor Windstream Services LLC ("Services" and together with Holdings, the "Indemnitors") executed a Commercial Surety General Indemnity Agreement (the "Indemnity Agreement") in favor of Aspen.[1] Under the terms of the Indemnity Agreement, each of the Indemnitors bound itself, among other things, to indemnify and save harmless Aspen from and against any and all liability, claims, demands, payments, losses, damages, expenses, and costs to investigate and/or resolve claims which Aspen may at any time incur or pay by reason of or arising out of Aspen's execution or non-execution of any Surety Bonds, including, without limitation, payment of Aspen's losses, attorney's fees and expenses, and consultant's fees and disbursements incurred and/or paid with respect to any Surety Bond, (a) to investigate and/or resolve any claims against the Surety Bonds, (b) in any action or proceeding between Indemnitors and Aspen, and/or (c) in any action or proceeding between Aspen and third party.

[1] On May 14, 2019, Aspen entered into a Commercial Surety General Indemnity Agreement with the Indemnitors (the "Post-Petition Indemnity Agreement") in connection with the issuance of surety bonds requested by the Debtors after the Petition Date. As an agreement entered into after the Petition Date, the Post-Petition Indemnity Agreement is not an executory contract under section 365 of the Bankruptcy Code, and is not a subject of this Limited Objection. Aspen hereby reserves all of its rights with respect to the Post-Petition Indemnity Agreement, including, without limitation, to seek allowance of administrative expense claims for any and all losses under the Post-Petition Indemnity Agreement or the surety bonds issued in reliance thereupon.

3. The Surety Bonds have been issued in consideration of, and in reliance upon, among other things, the Indemnity Agreement.

4. As of the date hereof, the aggregate amount that Aspen anticipates will be required to be paid by the Indemnitors in connection with the Surety Bonds is approximately $1,079,000, which amount may be increased (a) by future liability, claim, demand, loss, damages, expense, cost, attorney's fees and expenses incurred by Aspen in connection with the Surety Bonds that remain outstanding and/or (b) upon the resolution of pending claims that Aspen has received from third parties in connection with the Surety Bonds (such amounts, including the amount of future liability, the "Cure Amount").

5. On May 14, 2020, the Debtors filed the Plan, which provided, at Article V.A., that "all Executory Contracts or Unexpired Leases not otherwise assumed or rejected will be deemed assumed by the applicable Reorganized Debtor in accordance with the provisions and requirements of sections 365 and 1123 of the Bankruptcy Code, other than: (a) those that are identified on the Rejected Executory Contracts and Unexpired Leases Schedule; (b) those that have been previously rejected by a Final Order; (c) those that have been previously assumed by a Final Order; (d) those that are the subject of a motion to reject Executory Contracts or Unexpired Leases that is pending on the Confirmation Date; or (e) those that are subject to a motion to reject an Executory Contract or Unexpired Lease pursuant to which the requested effective date of such rejection is after the Effective Date." Article V.A. of the Plan also further provides that "[e]ntry of the Confirmation Order shall constitute an order of the Bankruptcy Court approving the assumptions, assumptions and assignments, or rejections of such Executory Contracts or Unexpired Leases as set forth in the Plan, the Assumed Executory Contract/Unexpired Lease Schedule or the Rejected Executory Contracts and Unexpired Leases Schedule."

6. On June 3, 10 and 15, 2020, the Debtors filed the *Notice of Filing of Plan Supplement* [Docket No. 1973], the *Notice of Filing of First Amended Plan Supplement* [Docket No. 2010] and the *Notice of Filing of Second Amended Plan Supplement* [Docket No. 2039] (collectively, as amended, and as may be amended from time to time, the "Plan Supplement"), which contained the Assumed Executory Contracts/Unexpired Leases Schedule (as Exhibit A to the Plan Supplement) and the Rejected Executory Contracts/Unexpired Leases Schedule (as Exhibit B to the Plan Supplement) that were referred to in Article V.A. of the Plan.

7. Neither the Assumed Executory Contracts/Unexpired Leases Schedule nor the Rejected Executory Contracts/Unexpired Leases Schedule lists any of the Surety Bonds or the Indemnity Agreement as an executory contract to be assumed or rejected by the Debtors. In addition, as of the date hereof, none of the Surety Bonds or the Indemnity Agreement are subject to a final order of this Court or a motion before this Court to be assumed or rejected by the Debtors.

8. The Debtors have not made any filings with this Court in which the Debtors proposed any cure amount under any of the Surety Bonds or the Indemnity Agreement.

ASPEN'S LIMITED OBJECTION

9. Under Section 365(b)(1)(A) of the Bankruptcy Code, the Debtors must cure any defaults under any executory contract in connection with any proposed assumption, and provide adequate assurance of future performance under such executory contract proposed to be assumed. *See* 11 U.S.C. § 365(b).

10. The payment of the Cure Amount represents the cure required under Section 365(b)(1)(A) of the Bankruptcy Code with respect to the Surety Bonds, and accordingly, the Debtors must cure or provide adequate assurance that the Debtors will promptly effect such cure, at the time the Surety Bonds are to be assumed by the Debtors.

11. Although the term "financial accommodation" is not defined in the Bankruptcy Code, many courts have held that surety bonds are financial accommodations, which cannot be assumed or assigned. *See*, *e.g.*, *In re Edwards Mobile Home Sales, Inc.*, 119 B.R. 857, 859 (Bankr. N.D. Fla. 1990) (surety bond issued to debtor, as prerequisite for debtor obtaining state license, was non-assumable financial accommodation because bond evidenced surety's obligation to pay debt of principal-debtor); *In re Wegner Farms Co. Inc.*, 49 B.R. 440, 444 (Bankr. N.D. Iowa 1985) (debtor's grain dealer's surety bond was "financial accommodation" within meaning of Bankruptcy Code sections 365(c) and 365(e)(2)(B)); *In re Adana Mortgage Bankers, Inc.*, 12 B.R. 977, 987 (Bankr. N.D. Ga. 1980) ("[t]he obligation to pay money on the obligation of another is a financial accommodation" within the meaning of section 365(c) and (e)).

12. Accordingly, the Surety Bonds issued by Aspen are financial accommodations for the Debtors that may not be assumed by the Debtors, at least not without Aspen's consent.[2]

13. The Plan, if approved and confirmed by this Court in form and substance filed by the Debtors, would effectively result in the assumption of the Surety Bonds and the Indemnity Agreement as of the Effective Date, without (a) the affirmative consent of Berkley, or (b) the need for the Debtors to cure, or provide adequate assurance that the Debtors will promptly cure, the defaults under the Surety Bonds.

14. Therefore, Aspen objects to the Plan and the Plan Supplement to the extent that the Plan and the Plan Supplement (a) do not provide that the Debtors will cure, or provide adequate

[2] By this Limited Objection, Aspen is not seeking to assert that the Indemnity Agreement is an executory contract subject to Section 365 of the Bankruptcy Code, and therefore assumed under the terms of the Plan. To the extent that the Surety Bonds are properly assumed by the Debtors with (a) the prior consent of Aspen and (b) satisfaction of Aspen's condition for such consent that the Debtors pay the Cure Amount or provide adequate assurance of such payment, Aspen has no objection to the assumption (to the extent applicable) of the Indemnity Agreement under Section 365 of the Bankruptcy Code.

assurance that the Debtors will promptly cure, the defaults under the Surety Bonds, and (b) seek to assume the Surety Bonds without the consent of Aspen.

15. Although Aspen does not consent to the Debtors' proposed assumption of the Surety Bonds at this time, it may do so upon the condition that the Debtors agree, whether by further amendments of the Plan or the Plan Supplement or otherwise, to either (a) pay the full amount of the Cure Amount to Aspen at the Effective Date, or (b) provide collateral or other adequate assurance of payment at the Effective Date to Aspen in an amount and upon terms reasonably satisfactory to Aspen.[3]

RESERVATION OF RIGHTS

16. Aspen reserves all of its rights to raise the issues contained in this Limited Objection and any other related issues in any contested matter including, without limitation, at the Sale Hearing. Aspen further reserves its rights to amend, modify, or supplement this Limited Objection in response to, or as a result of, any other submission filed by the Debtors or any other party in interest in connection with the Plan, the Plan Supplement or these chapter 11 cases, including, without limitation, (a) any submission seeking to re-classify or object to the Proof of Claim or any other claim that may be asserted by Aspen, or (b) any submission seeking to assume or reject the Surety Bonds. Finally, Aspen reserves its rights to adopt any other objections to the Plan or the Plan Supplement filed by any other party in interest.

[3] Aspen acknowledges that it currently holds an Irrevocable Letter of Credit in the amount of $200,000, to secure the Debtors' obligations under, among other things, the Surety Bonds and the Indemnity Agreement. The anticipated amount of the Cure Amount, however, is far in excess of the amount of the Irrevocable Letter of Credit.

WHEREFORE, for each of the reasons set forth above, Aspen respectfully requests that the Court sustain this Limited Objection and grant such other relief as is just and proper.

Dated: June 17, 2020
West Orange, New Jersey

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