

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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

**LIMITED OBJECTION OF CMN-RUS, INC. TO REORGANIZED DEBTORS’
MOTION FOR ENTRY OF AN ORDER (I) CLOSING THE CHAPTER 11 CASE,
(II) ENTERING A FINAL DECREE, (III) TERMINATING SERVICES
OF CLAIMS AND NOTICING AGENT, AND (IV) GRANTING RELATED RELIEF**

COMES NOW CMN-RUS, INC. (“CMN”), by and through its counsel, and files this *Limited Objection* (the “**Limited Objection**”)¹ to the *Reorganized Debtors Motion for Entry of An Order (I) Closing the Chapter 11 Case, (II) Entering a Final Decree, (III) Terminating Services of Claims and Noticing Agent, and (IV) Granting Related Relief* (Docket # 241) (the “**Second Final Decree**”)² and states in support as follows.

Introduction

1. CMN does not oppose the closing of the Remaining Case, but files this Limited Objection after not reaching an agreement with the Reorganized Debtors on: (i) requested reservation of rights language CMN asks this Court to include in the order granting the Second Final Decree to clarify that the reservation of jurisdiction contained in the Reorganized Debtors’ proposed order granting the Second Final Decree does not alter the pending arbitration between CMN and Reorganized Windstream KDL, LLC and does not alter the claims or defenses asserted

¹ Reorganized Debtors agreed to an extension for CMN of the objection date to September 9, 2022 at 4:00 pm eastern time.

² Capitalized terms not otherwise defined herein, have the same meaning as in the Final Decree.



therein; and (ii) a requested reserve in the total amount asserted of CMN's Outstanding claims in the arbitration of no less than \$4,908,686.50, and CMN asks this Court to establish that amount as a Court ordered reserve to assure CMN that if it is successful in the underlying arbitration that such reserve funds will be available to pay its award.

Bankruptcy Background

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

3. 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] (the "**Confirmation Order**") 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] (the "**Plan**").

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

5. On September 28, 2020, the Reorganized Debtors filed the Reorganized Debtors' Motion for Entry of a Final Decree Closing the Chapter 11 Cases [Docket No. 2544], which the Court granted by entering, on October 23, 2020, the Final Decree Closing the Chapter 11 Cases [Docket No. 2627] (the "**Final Decree**"). The Final Decree closed each of the dockets in the Chapter 11 Cases other than the docket of the Case Number 19-22397 (the "**Remaining Case**"), which has been the sole docket remaining for the Chapter 11 Cases where all motions, notices and other pleadings relating to any of the Debtors or the Reorganized Debtors were filed, administered, and adjudicated without the need to reopen the closed case dockets.

6. The Reorganized Debtors now seek to close the Remaining Case under the Second Final Decree, but reserve jurisdiction regarding the "Outstanding Matters" which are the

unresolved claims and counter-claims asserted between Reorganized Windstream KDL, LLC and CMN-RUS, Inc., now being litigated in the pending arbitration.

CMN Claims and Objections Background

7. CMN filed three claims against Windstream KDL, LLC: (i) Proof of Claim No. 5161, an unsecured claim in the amount of \$432,439.00 (the “**Pre-Petition Power/Rack Space Claim**”) (ii) 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;³ and (iii), 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 Pre and Post-Petition Power/Rack Space Claims, the “**CMN Claims**”)

8. The Reorganized Debtors previously sought to disallow the Pre-Petition Power/Rack Space Claim, which is listed on Schedule 1 to the Sixth Omnibus Objection (Docket No. 5161). *See* Sixth Omnibus Objection, ¶ Schedule 4, line 45 page 58 of 92. On August 7, 2020, CMN objected to the Debtors’ Sixth Omnibus Objection. *See Docket No. 2379*. The Reorganized Debtors also objected to the Post-Petition Power/Rack Space Claim and the Rejection Claims in *Debtors’ Twentieth Omnibus Objection to Claims* (Docket No. 184) filed on August 31, 2021. On September 21, 2021, CMS objected to the Debtors’ 20th Omnibus Objection. *See* Docket No. 189.

³ *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.

9. On October 21, 2021, the Reorganized Debtor filed an adversary complaint with the Bankruptcy Court as Case Number 21-07095-rdd (the “**Adversary**”) seeking affirmative relief against CMN.

10. In response to the Adversary, CMN moved to compel arbitration (Docket # 8 in the Adversary). Instead of disputing motion to compel arbitration of the Adversary, the Reorganized Debtors voluntarily dismissed the Adversary. (See Docket # 16 in the Adversary).

11. The same day the Reorganized Debtors dismissed the Adversary they also filed a demand for arbitration (the “**Arbitration**”) for the same claims sought in the Adversary. (See Second Final Decree, footnote 11). In the Arbitration, CMN has counter-claimed for the same causes of action arising out of the Claims, including amounts accruing thereafter (including after the Effective Date of the Plan). In the Second Final Decree, the Reorganized Debtors refer to the claims and counter-claims in the pending Arbitration as the “Outstanding Matters” in the Second Final Decree.

12. In the Arbitration in its answer and counter-claims, CMN has sought specific damages for the Rejection Claim in the amount of \$3,933,094.00, as well as damages for its other claims. CMN has shared with the Reorganized Debtors its calculations of its Rejection Claim damages as part of the parties’ attempts to settle their dispute.

13. Thus, although filed as an unliquidated claim in the Bankruptcy Cases, the amount sought in the Rejection Claim is over 3.9 million dollars. With the other amounts sought on the Claims, plus post Effective Date interest for amounts coming due after the Effective Date, CMN’s total claims for the Outstanding Matters amount to approximately 4.9 million dollars.

14. CMN requests that order granting the Second Final Decree require that this amount be segregated and reserved from the remaining 10.5 million dollars represented in the Motion as

being held in reserve for claims. (See Second Final Decree, ¶ 18). CMN's requested language would require the Reorganized Debtors to hold this amount pending an order of this Court or agreement of CMN to ensure that if CMN is successful in the Arbitration, the funds to pay its Claims are available and have not otherwise been transferred or are unavailable.

Relief Requested

15. CMN requests that the Court grant the Second Final Decree, but with the proposed redlined order attached hereto as Exhibit 1 which: (1) includes language that the general reservation of jurisdiction in the proposed order does not negate the jurisdiction of the pending Arbitration and that closing of the Remaining Case does not prejudice the claims and counter-claims advanced in the Arbitration; and (2) setting up a reserve in the amount of \$4,908,686.50 for the Outstanding Matters, so that there is no diminution of the outstanding 10.5 million dollar reserve below that amount, after the closing of the Remaining Case.

Basis for Relief Requested

A. The Court Should Order That the Debtors Set a Reserve for the CMN Claims in the Full Sought in the Arbitration of Approximately \$4.9 Million Dollars Out of the Remaining \$10.5 Million Dollars

16. In the motion seeking approval of the Second Final Decree, the Reorganized Debtors state that there is a 10.5 million dollar claim reserve but the liquidated claims of CMN only amount to roughly \$533,000. Since filing of the Arbitration, CMN has stated that the amount of its damages from the Rejection Claim is roughly \$3.9 million dollars. Given the proposed closing of the last Remaining Case and that statements in the motion seeking approval of the same, CMN is concerned the granting of the Second Decree could later be argued to cap CMN's recovery at the amount of the liquidated claims in an amount of \$533,000 instead of full amounts sought in the Arbitration of 4.9 million dollars.

17. CMN has no objection to the closing of the Remaining Case and the continuation of the Arbitration to resolution after the closing of the Remaining Case, but asks this Court that after this Court closes the Remaining Case, the funds reserved to pay Claims are not otherwise diverted or diluted to negate CMN's potential successful recovery in the Arbitration. CMN has suggested language that sets a required reserve after closing, which cannot be changed without the order of this Court or agreement of CMN. Thus, after settlement or conclusion of the Arbitration, these remaining funds can be dealt with, without the necessity of maintaining the Remaining Case as open, while at the same time not prejudicing CMN's recovery by reducing the available funds for recovery.

18. If the reserve was not continued, CMN would not have the benefit that the Plan provided to all other non-obligor unsecured creditors, and could be at a substantial disadvantage post-closing if it is successful in its Claims in Arbitration. This potential modification of the Plan and treatment of CMN as an unsecured creditor should not be permitted with an application for the Second Final Decree, which seeks to close a cause if administration is complete, not potentially prejudice creditor recovery.⁴

B. The Order Granting the Second Decree Should Not Divest Jurisdiction or Venue from the Pending Arbitration or Waive, Release or Impair Any Causes of Action or Claims between the Parties Therein

19. The proposed order states that this Court will retain jurisdiction over the Outstanding Matter. CMN asks this Court to include additional language in its order clarifying

⁴ See *In re Kliegl Brothers Universal Electrical Stage Lighting Company, Inc.*, 238 B.R. 531, 546 (Bankr. E.D.N.Y. 1999) "*at a minimum, the concept [of "fully administered"] must mean that administrative claims have been provided for at least to the extent that assets exist out of which administrative claims can be partly or wholly paid.*" While we have not been able to find a case specifically holding that "fully administered" requires that administrative creditors be provided for, we note that Section 507(a)(2) administrative expenses are required by Section 1129(a)(9) to be provided for in full in the plan as a prerequisite to confirmation except to the extent that the holder of such claim has otherwise agreed." (emphasis added).

that this retention of jurisdiction does not impair or divest the pending Arbitration of jurisdiction and venue for the dispute between the parties. As the Reorganized Debtors themselves instituted the Arbitration, this language is appropriate so that there is no question as to the appropriate venue and jurisdiction for the dispute going forward.

20. Lastly, CMN asks this Court to include language that the closing of the Remaining Case does not impair, waive, release or alter any of the parties' pending claims or defenses in the Arbitration. This request is made out of an abundance of caution, so that the pending Arbitration is not adversely affected by the procedural closing of the Remaining Case.

21. At least one bankruptcy Court has not allowed closing of a bankruptcy case when there were contested matters that remained pending, including an administrative expense claim.⁵ Here, CMN is not contesting the Reorganized Debtors desire to close the Remaining Case, only that in doing so there is no prejudice to claims and defenses asserted in the Arbitration, and that the current reserve to pay claims, including CMN's Claims remains following closing.

⁵ *In re Swiss Chalet, Inc.*, 485 B.R. 47 (Bankr. D. Puerto Rico 2012) Chapter 11 estate had not been "fully administered," and case could not be closed in order to save debtor the expense of continuing to pay quarterly fees to the United States Trustee, where there was still a pending adversary proceeding to be resolved as well as other contested matters, including request for allowance of administrative expense.

THEREFORE, CMN asks this Court to grant the Second Final Decree, but to use CMN's proposed, redlined order attached hereto as **Exhibit 1** and such relief as the Court deems just and proper.

Dated: New York, New York
September 9, 2022

POLSINELLI PC



By: _____

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Exhibit 1

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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

FINAL DECREE CLOSING THE CHAPTER 11 CASES

Upon the motion (the "Motion")² of the Reorganized Debtors for the entry of an order (this "Order") closing the Remaining Case, all as more fully set forth in the Motion; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(a)-(b) and 1334(b) and the *Amended Standing Order of Reference from the United States District Court for the Southern District of New York*, dated February 1, 2012, as a core proceeding pursuant to 28 U.S.C. § 157(b) that this Court may decide by a final order consistent with Article III of the United States Constitution; and this Court having found that venue in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the Reorganized Debtors' notice of the Motion's request for relief and the opportunity for a hearing thereon were appropriate under the circumstances and no other notice thereof need be provided; and upon the record of the hearing held by the Court, if any, and all of the proceedings herein; and, after due deliberation, this Court having determined that the legal and factual bases set forth in the Motion and at the hearing establish good and sufficient cause for the relief granted herein; and this Court having determined, in light of the nature and status of the claims objection as to each of the Outstanding Claims (*i.e.*, Claim Nos. 5161, 8710, and 8713), that the interests of judicial economy, convenience to the parties,

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

² Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion.
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fairness and comity are served by the retention of jurisdiction over the Outstanding Matter, therefore, it is HEREBY ORDERED THAT:

1. The Motion is granted as set forth herein.

2. The docket of the chapter 11 case *In re Windstream Finance Corp., et al.*, Case No. 19-22397 (LGB) (the "Remaining Case") is hereby closed; *provided that* the Court shall retain jurisdiction in accordance with Article XI of the Plan (Retention of Jurisdiction); *provided further that* the Court shall retain jurisdiction over the Outstanding Matter.

3. KCC shall, to the extent applicable, (i) prepare a final claims register(s) for the Clerk's Office pursuant to the guidelines for implementing 28 U.S.C. § 156(c) and (ii) box and transport all claims (if any) to the Federal Archives, at the direction of the Clerk's Office. The services to be rendered by KCC in accordance with the preceding sentence shall be charged to the Reorganized Debtors.

4. Except as provided herein, KCC is hereby terminated and released as claims and noticing agent in these Chapter 11 Cases under Bankruptcy Rule 2002, 28 U.S.C. § 156(c), and the KCC Order.

5. Entry of this Order is without prejudice to the rights of the Debtors or the Reorganized Debtors or CMN to seek to reopen the Chapter 11 Cases for good cause shown in accordance with 11 U.S.C. § 350(b), including, for the avoidance of doubt, to resolve the Outstanding Claims. Upon reopening of any of the Chapter 11 Cases, quarterly fees will be imposed and paid pursuant to 28 U.S.C. § 1930(a)(6) and calculated based upon all disbursements for the period of reopening.

6. Notwithstanding anything else in the Motion or this Order, and for the avoidance of doubt, the closing of the Remaining Case and the retention of jurisdiction of the Outstanding Matter in this Order shall not: (i) divest, alter or otherwise diminish in anyway the jurisdiction or venue of pending arbitration between CMN and Reorganized Debtor over the Outstanding Matter; or (ii)

prejudice, waive, release, or otherwise diminish in anyway the claims, counter-claims, or the defenses related thereto of CMN in the pending arbitration.

5.7. Notwithstanding anything else stated in the Motion, the Debtors and Reorganized Debtors must continue to separately reserve funding under the Plan for CMN's asserted claims in an amount no less than \$4,908,686.50 (the "CMN Reserve"). The CMN Reserve shall not be transferred, assigned, diminished, liened, hypothecated or paid without agreement of CMN or an order of this Court. For the avoidance of doubt the CMN Reserve shall not establish a total cap on the claims of CMN relating to the Outstanding Matter.

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6.8. The Reorganized Debtors and their agents are authorized to take all actions necessary to effectuate the relief granted in accordance with the Motion and pursuant to this Order.

7.9. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

8.10. Notice of the Motion shall be deemed good and sufficient, and the applicable requirements of the Bankruptcy Rules and Local Bankruptcy Rules have been satisfied.

9.11. This Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

10.12. The Reorganized Debtors shall reserve sufficient funds to pay the Office of the U.S. Trustee the amount of any quarterly fees due pursuant to 28 U.S.C. § 1930 and any applicable interest due pursuant to 31 U.S.C. § 3717, which fees and interest, if any, shall be paid within fifteen (15) days of the entry of this Order. Within five (5) days after the entry of the Order, the Debtors shall provide to the United States Trustee an affidavit indicating cash disbursements for the period from July 1, 2022 to the date that the Order has been entered.

New York, New York

Dated: _____, 2022

THE HONORABLE LISA G. BECKERMAN
UNITED STATES BANKRUPTCY JUDGE

