

Hearing Date and Time: 1/16/2020 at 10:00 a.m.  
Objection Deadline: 1/9/2020 at 4:00 p.m.  
Reply Deadline: 1/13/2020 at 12:00 p.m.

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

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

**DEFENDANTS' MOTION TO STRIKE  
JOHN C. JAROSZ'S UNTIMELY DECLARATIONS**



Pursuant to Federal Rules of Civil Procedure 26 and 37, as incorporated by Federal Rules of Bankruptcy Procedure 7026 and 7037, Defendants respectfully move for an Order striking the declarations of John Jarosz filed on December 6, 2019 (ECF 148) and December 11, 2019 (ECF 165). In support of their motion, Defendants state as follows:

The supplemental declarations of John C. Jarosz represent a post hoc attempt to cure defects in his Federal Rule of Civil Procedure 26(a) report that preclude him from offering expert opinion testimony in this action. Debtors served these “supplemental” reports well after the close of discovery, well after his deposition, and after Charter filed a motion to exclude his testimony. These “supplemental” declarations do not respond to new facts or evidence. Debtors were required to ensure Mr. Jarosz’s expert report contained a complete statement of all opinions, the basis and reasons for those opinions, and the facts or data considered in forming those opinions. They cannot “fix” defects in his report with conclusory declarations served after the close of discovery, during briefing on dispositive motions. Therefore, this Court should strike these declarations.

### **FACTUAL BACKGROUND**

Debtors previously informed the Court that they were only pursuing damages through expert testimony. *See* ECF 95 at 2 (“Windstream has retained a damages expert who will provide a report setting out Windstream’s damages”). Debtors actively prevented damage discovery from fact witnesses. *See* ECF 132 **Ex. 1** (Auman Dep.) at 53:20-23 (“We’ve objected to this and said we’re not producing a witness on

this except for the expert, so he’s not here to testify about that.”) (emphasis added).

On October 11, 2019, Debtors disclosed John C. Jarosz, an economist whose specialty is intellectual property valuation and monetary relief, as an expert witness. Mr. Jarosz’s expert report reflects an intent to opine on causation, lost profits, and other damages allegedly asserted by the Windstream employees with whom he spoke. *See* ECF 117, Ex. 1. Mr. Jarosz’s expert report suffers from numerous flaws that render his testimony inadmissible. In an attempt to fix the deficiencies in Mr. Jarosz’s expert report, Windstream filed two declarations signed by Mr. Jarosz—one on December 11, 2019 in response to Charter’s motion to exclude (ECF 165) and the other on December 6, 2019 in response to Charter’s motion for summary judgment (ECF 148). These declarations should be stricken because they substantively fail to cure the admissibility of Mr. Jarosz’ opinions and are untimely and improper.

### LEGAL STANDARD

Fed. R. Civ. P. 26(a)(2)(B) requires that all expert reports include “a *complete* statement of all opinions,” “the basis and reasons for them,” and “the facts or data considered.” (emphasis added). “If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1). In other words, the rule mandates exclusion unless Debtors meet their burden to show substantial justification or harmlessness. *Id.* The purpose of these strict standards are to make sure that parties can safely assume that “*at the time* an expert issues his report, the report reflects his full knowledge and complete opinions on the

issues for which his opinion has been sought.” *See Lidle v. Cirrus Design Corp.*, No. 08 Ciiv. 1253(BSJ)(HBP), 2009 WL 4907201, at \*5-\*6 (S.D.N.Y. Dec. 18, 2008) (quoting *Sandata Technologies, Inc. v. Infocrossing, Inc.*, Nos. 05 Civ. 9546(LMM)(THK), 06 Civ. 1896(LMM)(THK), 2007 WL 4157163, at \*3-\*4 (S.D.N.Y. Nov. 16, 2007)) (emphasis added). Experts are not free to take multiple bites at the apple and “continually bolster, strengthen, or improve their reports.” *Sandata Technologies, Inc.*, 2007 WL 4157163, at \*8 (excluding supplemental expert report).

### ARGUMENT

Windstream’s second and third bites at the apple came in declarations disclosed more than a month after the close of discovery and weeks after Charter filed its Motion for Summary Judgment and Motion to Exclude the testimony of John C. Jarosz. These additional declarations do not supplement Mr. Jarosz’s report to address new evidence or facts. Courts in the Southern District of New York routinely strike similar supplementation efforts. *See, e.g., Mfon v. Cnty. of Dutchess*, No. 14-CV-6922 (KMK), 2017 WL 946303, at \*3-\*5 (S.D.N.Y. Mar. 9, 2017) (striking an expert declaration filed with the party’s summary judgment opposition because it went beyond the expert’s original report and the party made no attempt to amend the expert report or justify or assert the harmlessness of the original omissions). Mr. Jarosz has been denied a second bite at the apple before. *Accord Network Protection Sciences, LLC v. Fortinet, Inc.*, No. 12-cv-01106 (WHA), 2013 WL 5402089, at \*8 (N.D. Cal., 2013) (striking Jarosz’s expert report and denying plaintiff “a second bite at the apple”).

Exclusion of untimely declarations is proper when the information contained in the subsequent declaration(s) was fully available to the expert at the time of initial disclosure. *See Mfon*, 2017 WL 946303, at \*5 (“[A party’s] duty to supplement its initial expert report does not arise when it seeks to bolster its early submission, but rather, arises only if the expert subsequently learns of information that was previously unknown or unavailable, that renders information previously provided in an initial report inaccurate or misleading because it was incomplete.”) (quoting *Innis Arden Golf Club v. Pitney Bowes, Inc.*, No. 06-CV-1352, 2009 WL 5873112, at \*3 (D. Conn. Feb. 23, 2009)). For example, in *Lidle*, the court excluded the expert’s alleged “supplemental report” largely because it did not rely on any information that was not available to him at the time his initial report was due. 2009 WL 4907201, at \*5-6. (“Rule 26(d) is not...a vehicle to permit a party to serve a deficient opening report and then remedy the deficiency through the expedient of a ‘supplemental’ report.”). Such conduct cuts directly against the requirement that a Rule 26(a)(2) expert report contain a “complete” statement of all opinions, the basis and reasons for them, and the facts or data considered in forming them at the time of disclosure.

Debtors have not explained why the assertions in Mr. Jarosz’s post-discovery declarations were not included in his October 11, 2019 expert report. They do not contend that his declarations reflect any new information developed since October 11, 2019. Mr. Jarosz’s apparent effort to bolster his expert report that he initially produced is not permitted by the Federal Rules. *See Sandata*, 2007 WL 4157163, at \*6 (rejecting the expert’s attempt to improve upon his prior reports because such

conduct would require the parties to continue deposing the same expert multiple times in response to evolving arguments). Thus, Mr. Jarosz's untimely declaration is not substantially justified under Federal Rule of Civil Procedure 37.

Debtors likewise cannot demonstrate the harmlessness of their untimely declaration. Defendants have had no opportunity to test Mr. Jarosz's new claims because they were not made until after discovery closed and summary judgment and Daubert briefing was already well underway.

### **CONCLUSION**

Pursuant to Rules 26 and 37 of the Federal Rules of Civil Procedure, as incorporated by Federal Rules of Bankruptcy Procedure 7026 and 7037, Charter respectfully requests that this Court exclude John C. Jarosz's subsequent declarations (ECF 148 and 165) as improper and untimely.

Dated: December 26, 2019

Respectfully submitted,

THOMPSON COBURN LLP

By: /s/ John Kingston

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*Attorneys for Defendants Charter  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 26th day of December, 2019, I served a true and correct copy of ***Defendants Charter Communications, Inc. and Charter Communications Operating, LLC's Motion to Strike John C. Jarosz's Untimely Declarations*** via operation of the Court's Electronic Filing System upon all counsel of record in the adversary proceeding.

Undersigned counsel further certifies that on this 26th day of December, 2019, a true and correct copy of ***Defendants Charter Communications, Inc. and Charter Communications Operating, LLC's Motion to Strike John C. Jarosz's Untimely Declarations*** will be sent via United States Mail, postage prepaid, to the following:

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