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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' OMNIBUS MOTION *IN LIMINE*



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Defendants Charter Communications, Inc. (CCI) and Charter Communications Operating, LLC (CCO) (collectively, Defendants) respectfully move *in limine* that Plaintiffs be prohibited from presenting testimony, other evidence, or argument, on the following issues:

1. The Count VII Plaintiffs should be prohibited from presenting any evidence of alleged creditor injury because they have not disclosed a single witness under Rule 26(a)(1)(i) or a single document under Rule 26(a)(1)(ii) related to their creditors.
2. Plaintiffs should be prohibited from presenting any evidence of damages under Counts VI and VII because they consistently refused to disclose a Rule 26(a)(1)(iii) damage computation or identify supporting documents.
3. Plaintiffs should be prohibited from introducing damage evidence at trial because they refused to answer Defendants' discovery requests and blocked other avenues of damage-related discovery and therefore Defendants were unable to test Plaintiffs' damage figures and computations before trial.
4. Plaintiffs should be prohibited from presenting any non-expert damage testimony evidence because they expressly disclaimed non-expert opinion evidence and prevented discovery on damages from non-expert witnesses.
5. Plaintiffs should be prohibited from presenting expert testimony on Counts VI and VII because they disclosed no experts for those counts under Rule 26(a)(2).
6. This Court should exclude the trial declaration of John Jarosz because he has disclosed no opinions on Counts VI and VII and Plaintiffs successfully opposed Defendants' Motion to Continue by representing that "there are no common issues of fact left for trial" and told the Court Mr. Jarosz would not be testifying on those Counts.
7. Plaintiffs should be prohibited from using any documents that were not made available for copying or inspection during discovery.
8. Debtors' Exhibit 104 is inadmissible because it constitutes inadmissible hearsay and the declarant has withdrawn and been ethically walled off from this adversary proceeding due to a conflict of interest and therefore cannot have personal knowledge under Federal Rule of Evidence 602.

INTRODUCTION

Plaintiffs' conduct with respect to the upcoming trial represents a blatant effort to engage in trial by ambush. For example, Jeffrey Auman's trial testimony declaration claims \$4,033,425 in damages. That trial testimony is literally the first time Defendants have seen that damage figure. There is not a single reference to \$4,033,425 in any of Plaintiffs' Rule 26(a) disclosures served during discovery (nor is there any reference to \$4,033,425 in the "supplemental" Rule 26 disclosure Plaintiffs served 4 minutes before filing their opposition to Charter's motion for summary judgment on damages). Notwithstanding the express mandate of Rule 26(a), Plaintiffs have not identified or produced a single document allegedly supporting that \$4,033,425 figure. They even refused to let Mr. Auman answer questions related to damages in his deposition. Charter has had no opportunity to prepare a defense to Mr. Auman's testimony that some plaintiffs suffered \$4,033,425 in damages because that damage claim was never disclosed before trial.

Plaintiffs' disclosures related to the alleged injury to creditors of the 36 plaintiffs asserting proofs of claims are equally representative. Plaintiffs have never identified a single witness under Rule 26(a)(1)(ii) that will testify about alleged creditor injuries or a single document under Rule 26(a)(1)(ii). With trial starting on Monday, Defendants have no idea what people or documents those 36 plaintiffs will use to support their equitable subordinations claims.

As discussed below, these deficiencies are merely the tip of the iceberg. Plaintiffs have ignored both their independent disclosures obligations and refused to respond to Defendants' discovery requests. They have taken positions of convenience with regard to which witnesses will testify regarding which claims. They have made no credible effort to explain or correct these failures. Plaintiffs' conduct mandates an order precluding the admission of much of the testimony and documents Plaintiffs propose to introduce at trial.

BACKGROUND

A. *Throughout the entire discovery period, Plaintiffs refused to disclose a computation of damages or identify damage-related documents as mandated by Federal Rule of Civil Procedure 26(a)(1)(A)(iii).*

On June 19, 2019, Plaintiffs served their Initial Disclosures under Fed. R. Civ. P. 26(a)(1). The disclosures stated, “Windstream is unable to estimate the range of provable damages.” Plaintiffs’ Initial Disclosures are attached as **Exhibit 1**.

On August 29, 2019, Plaintiffs served their Supplemental Initial Disclosures. The disclosures again stated, “Windstream is unable to estimate the range of provable damages.” Plaintiffs’ Supplemental Initial Disclosures are attached as **Exhibit 2**.

On September 6, 2019, Plaintiffs served their Second Supplemental Initial Disclosures. The disclosures again stated, “Windstream is unable to estimate the range of provable damages.” Plaintiffs’ Second Supplemental Initial Disclosures are attached as **Exhibit 3**.

When discovery closed on October 31, 2019, not a single plaintiff had disclosed a damage computation or identified any damage-related documents.

B. *In August 2019, this Court declined to conduct a discovery dispute teleconference regarding Plaintiffs’ refusal to provide damage disclosures mandated by Rule 26(a) because Plaintiffs told the Court they would prove damages solely through a damage expert.*

Well before the October 31, 2019 close of discovery, Defendants requested that Plaintiffs provide damage computations mandated by Fed. R. Civ. P. 26. On August 28, 2019, after Plaintiffs refused to provide the requested computations, Defendants sent this Court a letter seeking a discovery dispute teleconference. *See* Defendants’ August 28, 2019 discovery dispute letter, attached as **Exhibit 4**. In response, on August 29, 2019, Plaintiffs admitted they did not actually have a damage calculation: “There is no requirement to make up a damages calculation that [Plaintiffs] do not actually have.” *See* Plaintiffs’ August 29, 2019 discovery dispute letter, attached

as **Exhibit 5**. Crucially, Plaintiffs also represented to the Court that their damage evidence or calculations would be set forth in their damage expert's report. *Id.* ("Windstream has retained a damages expert who will provide a report setting out Windstream's damages."). Based on these representations, this Court found no need for a teleconference. *See* September 3 and 4 electronic mail chain (**Exhibit 6**) ("I see no need for a conference.").

C. *Plaintiffs refused to produce a corporate representative to provide deposition testimony about damages and refused to permit their non-expert witness to answer questions about damages.*

Defendants requested that Plaintiffs produce a corporate representative to testify about, *inter alia*, "claimed damages in this adversary proceeding." *See* Topic No. 16, Plaintiffs' Corp. Rep. Deposition Objections, attached as **Exhibit 7**. Stating they would "**produce an expert to testify on this topic at the appropriate time,**" Plaintiffs refused to produce a witness on the topic. *See id.* During the corporate representative deposition on September 24, 2019, Plaintiffs' counsel refused to let the witness answer damage questions. Auman Dep. Transcript (attached as **Exhibit 8**) 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.").

D. *Plaintiffs failed to respond to requests for the production of documents that would permit Defendants to test and explore damage claims.*

On September 18, 2019, Plaintiffs served their Responses and Objections to Defendants' discovery requests, in which they refused to substantively respond to a wide variety of Defendants' discovery requests. *See* Responses and Objections to Defendants' Request for Production, collectively attached as **Exhibit 9**. Specifically, Plaintiffs refused to produce any documents from which Defendants could discover any of their claims for damages, including documents relating to Plaintiffs' allegedly lost subscribers, the alleged credits provided to customers as a result of the disconnects, and the alleged harm to Plaintiffs' goodwill:

- Plaintiffs produced no documents evidencing credits provided to customers as a result of the alleged disconnects in response to a request for documents concerning the allegation that “Windstream has been damaged as a result of the alleged disconnection of service to approximately 300 Windstream customers.” *See Plaintiffs’ Responses and Objections to First Set of Request for Production, No. 24* (Def. Ex. 13 at 22):
- Plaintiffs produced no documents “evidencing the monthly total number of Windstream customers from January 1, 2014 to present, including by relevant market.” *See Plaintiffs’ Responses and Objections to Third Set of Request for Production, No. 24* (Def. Ex. 25 at 24).
- Plaintiffs produced no documents “evidencing Windstream’s calculation or basis for estimating the Average Customer Life is 49 months.” *See Plaintiffs’ Responses and Objections to Third Set of Request for Production, No. 25* (Def. Ex. 25 at 24-25).
- Plaintiffs produced no documents “evidencing the weekly total number of Windstream customers from January 1, 2014 to present.” *See Plaintiffs’ Responses and Objections to Third Set of Request for Production, No. 39* (Def. Ex. 25 at 36).
- Plaintiffs produced no documents “evidencing the monthly total number of Windstream customer requested disconnections from January 1, 2014 to present, including by relevant market.” *See Plaintiffs’ Responses and Objections to Third Set of Request for Production, No. 40* (Def. Ex. 25 at 36-37).
- Plaintiffs produced no documents “evidencing the weekly total number of Windstream customer requested disconnections from January 1, 2014 to present, including by relevant market.” *See Plaintiffs’ Responses and Objections to Third Set of Request for Production, No. 41* (Def. Ex. 25 at 37-38).
- Plaintiffs produced no documents “evidencing the monthly total number of Windstream involuntary disconnections, other than those disconnections requested by customers, from January 1, 2014 to present, including by relevant market.” *See Plaintiffs’ Responses and Objections to Third Set of Request for Production, No. 42* (Def. Ex. 25 at 38-39).
- Plaintiffs produced no documents “evidencing the weekly total number of Windstream customer requested disconnections from January 1, 2014 to present, including by relevant market.” *See Plaintiffs’ Responses and Objections to Third Set of Request for Production, No. 43* (Def. Ex. 25 at 39).
- Plaintiffs produced no documents “evidencing the monthly total number of new customers Windstream added from January 1, 2014 to present, including by relevant market.” *See Plaintiffs’ Responses and Objections to Third Set of Request for Production, No. 44* (Def. Ex. 25 at 40).

- Plaintiffs produced no documents “evidencing the weekly total number of new customers Windstream added from January 1, 2014 to present, including by relevant market.” *See Plaintiffs’ Responses and Objections to Third Set of Request for Production, No. 45* (Def. Ex. 25 at 40-41).
- Plaintiffs produced no documents responsive to a request for documents “evidencing any financial analysis regarding the lifetime and/or annual loss of losing a subscriber, including impacts on goodwill, if any.” *See Plaintiffs’ Responses and Objections to Third Set of Request for Production, No. 56* (Def. Ex. 25 at 48-49).
- Plaintiffs produced no documents “evidencing Windstream’s projections for new subscribers generally, and by market, whether on a monthly, quarterly, annual, or other basis.” *See Plaintiffs’ Responses and Objections to Third Set of Request for Production, No. 58* (Def. Ex. 25 at 50-51).
- Plaintiffs produced no documents “evidencing Windstream’s projections for subscriber loss generally, and by market, whether on a monthly, quarterly, annual, or other basis.” *See Plaintiffs’ Responses and Objections to Third Set of Request for Production, No. 59* (Def. Ex. 25 at 51-52).

E. Plaintiffs confirmed they produced all documents or ESI that they may use to support a claim or defense on September 6, 2019.

In Plaintiffs’ Supplemental Initial Disclosures (served August 29, 2019), they identified fifteen (15) distinct categories of documents in their possession, custody, or control that they may use to support their claims. *See Ex. 2.*¹ On September 3, 2019, to ensure they received all such documents, Defendants sent Plaintiffs a letter requesting to inspect and copy any documents in Plaintiffs’ “possession, custody, or control that [Plaintiffs] may use to support [their] claims or defenses.” *See Defendants’ September 3, 2019 Letter*, attached as **Exhibit 10**. On September 6, 2019, Plaintiffs confirmed that they have produced to Defendants all documents they might use to support their claims or defenses. *See September 6, 2019 email chain*, attached as **Exhibit 11** (“The

¹ On September 6, 2019, Plaintiffs’ served their Second Supplemental Initial Disclosures. Those disclosures identified the same fifteen (15) categories of documents as the August 29, 2019 disclosures. *See Ex. 3.*

documents we intend to rely on for Rule 26(a) purposes have all been supplied to Charter's counsel electronically and are in it's counsel's possession.").

The following exhibits on Plaintiffs' exhibit list were generated before September 6, 2019, but were not supplied to Defendants or identified in their Rule 26(a) disclosures before September 6, 2019: Plaintiffs' Exhibits 67-74, 76, 80-86, 88.

F. Jeff Auman testified that he has no personal knowledge related to the "Last Mile Contract" between Charter Operating and Windstream Services.

On September 24, 2019, Defendants deposed Jeff Auman, Plaintiffs' Senior Vice President of Sales and Distribution. In that deposition, Mr. Auman admitted that he has no personal knowledge related to the Spectrum Business Value Added Reseller Agreement (the "Last Mile" Contract) between CCO and Plaintiff Windstream Services:

Q: Mr. Auman, do you have any responsibility related to the Spectrum Business Value Added Reseller Agreement?

A: No.

Q: Do you have any personal knowledge related to the Spectrum Business Value Added Reseller Agreement?

A: No.

Ex. 8, at 34:21-35:24.

Notwithstanding Mr. Auman's representation that he has no responsibility or knowledge relating to the Last Mile Contract, his trial declaration primarily consists of testimony relating to the Last Mile Contract. *See* Trial Declaration of J. Auman (**Exhibit 12**)² at ¶¶ 5-14 (testifying to

² For the first time at trial, Plaintiffs provided the specific amounts of their alleged damages for their breach of contract claim and for the cost of promotions and discounts they allegedly provided to their customers. *See* Ex. 12, at ¶¶ 14-15. Plaintiffs still fail to provide an analysis or computation for their alleged loss of customer goodwill. *See id.* at ¶ 17 (merely stating "Windstream suffered a loss of customer goodwill, as well as damage to its brand").

the parties' relationship under the Last Mile Contract, including the parties' specific obligations under the contract).

G. Plaintiffs produced John C. Jarosz' expert report, which only addresses damage calculations under the Lanham Act and related state statutes.

On October 11, 2019, Plaintiffs produced the expert report of John C. Jarosz (the Jarosz Report). *See* the Jarosz Report, attached as **Exhibit 13**. The Jarosz Report only purported to address Plaintiffs' alleged lost profits and corrective advertising costs (i.e., damages for Counts I-V); it did not identify any damages for alleged harm to Plaintiffs' goodwill or damages relating to Plaintiffs' breach of contract claim. *See* Ex. 13. Moreover, the Jarosz Report contained no computations or analyses from which Defendants could conduct any meaningful damage-related discovery. *See generally, id.* Instead, the Jaros Report merely included a handful of summary documents, such as a single summary for approximately \$7,966,371.00 in purported costs related to a promotional offer and another summary claiming millions in lost profits. *Id.* at p. 40, n.150. However, Defendants were unable to inquire about these summaries in discovery because Plaintiffs failed to provide the documents underlying these calculations.

H. More than a month after the close of discovery, Plaintiffs filed untimely declarations from Mr. Jarosz in an attempt to cure deficiencies in the Jarosz Report.

On December 6, 2019, well after the October 31 close of discovery, Plaintiffs filed a Declaration of John C. Jarosz. *See* Dkt. No. 148. Then, five days later, Plaintiffs filed another Declaration of John C. Jarosz. *See* Dkt. No. 165. Of course, Defendants did not have the opportunity to conduct any discovery on the opinions provided by Mr. Jarosz in these untimely declarations.

I. Not one plaintiff has ever identified a single witness or document that it might use to support the claim that one of its creditors was injured or disadvantaged in its debt-collection efforts.

As discussed above, Plaintiffs filed three sets of Rule 26(a)(1) Initial Disclosures before the close of discovery. *See* Exhibits 1-3. On December 6, 2019—more than a month after the close of discovery—Plaintiffs filed their Third Supplemental Disclosure in which they finally provided a conclusory³ statement regarding their alleged damages. *See* Plaintiffs’ Third Supplemental Initial Disclosures, attached as **Exhibit 14**. None of Plaintiffs’ four disclosures identifies a single witness—expert or otherwise—or document that any plaintiff might use to support its claim that one of its creditors was injured or disadvantaged in its debt-collection efforts.

J. Based on Plaintiffs’ representation that there are “no common issues of fact left for trial,” this Court informed the parties they should not be preparing for a bench trial “regarding the parties’ damages calculations under the Lanham Act and related state statutes.”

In their response Defendants’ motion to continue, Plaintiffs represented to this Court that **“there are no common issues of fact left for trial.”** *See* ECF No. 263. Then, on February 13, 2020, during oral argument on Defendants’ motion to continue trial, Plaintiffs admitted that Mr. Jarosz’s opinions were limited to Counts I-IV and that Mr. Jarosz’s report treats Lanham Act damages (Counts I-IV) differently from equitable subordination and breach of the automatic stay (Counts VI and VII):

THE COURT: You all have identified -- you all have your expert reports at this point, right? Do the expert reports treat the damages issues for purposes of the Lanham Act claims differently than equitable subordination [or] breach of the automatic stay?

³ Plaintiffs’ disclosures relating to damages simply reiterate the Lanham Act damages discussed in Mr. Jarosz’ expert report. *See* Ex. 12. With respect to breach of contract damages (Count V), the disclosures state—without any analysis whatsoever—that Plaintiffs suffered “as much as \$5,000 to \$16,000 in damages in the form of customer credits associated with Charter’s sudden disconnection of service.” Ex. 12. That statement remains the only information Plaintiffs have produced relating to their breach of contract damages; they have not produced *any* documents or testimony relating to the alleged customer credits.

MR. ROSS: Yes, Your Honor. We're the only one to put in an actual damage report on damages.

THE COURT: Okay.

MR. ROSS: *And it was quite clear that his report went to the Counts 1 through 4.*

Feb. 13, 2020 Tr. at 80:6-16 (emphasis added), attached as **Exhibit 15**.

On February 24, 2020, this Court informed the parties that, in light of the February 13 hearing and the briefing, the Court did not "believe that the parties should be preparing for a March 30 bench trial before me *regarding the parties' damages calculations under the Lanham Act and related state statutes.*" See Hon. Robert R. Drain, Feb. 24, 2020 Electronic Mail Message, at 1 (attached as **Exhibit 16**). After receiving this Court's guidance in late February, Defendants informed the expert witnesses who would be rebutting Plaintiffs' "damage calculations under the Lanham Act" that they would not be testifying at a bench trial and discontinued preparation efforts for those witnesses.

On March 9, 2020, this Court reiterated that the bench trial would only proceed on Counts VI and VII. See March 9, 2020 Hearing Transcript, at 8:14-15 (attached as **Exhibit 17**) ("I'm not sure whether it will take a full day, given that we're just going ahead on Counts 6 and 7, and given, as I understand it, the limited extent of damages and/or sanctions that Windstream is seeking to show or establish here."). Plaintiffs' counsel then inquired about the start time and length of trial. See *id.* at 8:21-9:1. In response, the Court again made clear the trial would only be on Counts VI and VII and suggested the trial would finish in just over a day. See *id.* at 9:2-15 ("Well, given that, again, we just had the two causes of action"). Plaintiffs' counsel was well aware that a trial involving Mr. Jarosz will take much longer than one day. Still, through this entire exchange, Plaintiffs' counsel made no mention that Plaintiffs expected Mr. Jarosz to testify regarding Lanham Act damages during the upcoming bench trial.

On March 17, 2020, this Court denied Defendants’ request for a continuance on the basis of Plaintiffs’ representation that “there are no common issues of fact left for trial.” *See* Dkt. No. 263 at 8; Dkt No. 281 at 5. It was not until a week later, on March 23, 2020, that Plaintiffs stated that—despite their clear representations to the contrary—they intended to offer the testimony of Mr. Jarosz at trial to “opine as to the number of customers lost by Charter’s unlawful conduct.” Dkt No. 286 at 2. Lost profits from allegedly lost subscribers are the centerpiece of Windstream Holdings’ damage calculation under the Lanham Act and related state statutes. *See* Dkt. No. 131, Ex. 16. The “parties’ damages calculations under the Lanham Act and related state statutes” are precisely the issues that this Court advised the parties would NOT be the subject of a bankruptcy court bench trial. *See* Ex. 16, at 1.

On April 20, 2020, Plaintiffs served the Trial Declaration of John Jarosz (attached as **Exhibit 18**), which primarily consisted of testimony relating to Plaintiffs’ “damages calculations under the Lanham Act and related state statutes.” *See generally*, Ex. 18; Ex. 16, at 1. The lost profit damage calculation in Mr. Jarosz’ Trial Declaration directly contradicts (1) Plaintiffs’ representations that “there are no common facts left for trial” because Mr. Jarosz would not be testifying on Counts VI and VII, and (2) this Court’s instruction that the parties need not prepare for a trial on “the parties’ damages calculations under the Lanham Act and related state statutes.” *See* Ex. 16, at 1.

K. Having been ethically walled off since April 29, 2019, Mr. Reisman cannot have personal knowledge of any matters relating to this Adversary Proceeding.

Effective April 29, 2019, Mr. Reisman withdrew as Debtors’ conflict counsel. *See* ECF No. 32. The Notice of Limited Withdrawal states that Mr. Reisman will only appear as conflicts counsel to the debtors in “matters unrelated to the Adversary Proceeding.” *Id.* Following his withdrawal, Debtors’ counsel emailed Defendants’ counsel to explain that Katten had

implemented “an ethical screen that ‘walls off’ Mr. Reisman from the Litigation [i.e., this adversary proceeding].” May 1, 2019 Email re Reisman Ethical Wall, attached as **Exhibit 19**. The need for withdrawal and the ethical wall arose because Mr. Reisman represented Charter in the 2009 DirecTV litigation, Case No 4:09-cv-730 RWS (E.D. Mo. 2009). Given Mr. Reisman’s withdrawal from this proceeding, and Katten’s implementation of an ethical wall, Mr. Reisman cannot possibly have first-hand, personal knowledge about this proceeding after April 29, 2019.

ARGUMENT

I. Plaintiffs should be prohibited from presenting testimony or documents in support of the claim that any of their creditors were harmed or disadvantaged because they did not disclose creditor-related witnesses documents under Rule 26(a)(1)(A)(ii).

Federal Rule of Civil Procedure 26(a)(1)(A)(ii) requires a plaintiff to disclose “a copy of all documents ...in its possession, custody or control” that it “may use to support its claims or defenses.” And again, if “a party fails to provide information or identify a witness as required by Rule 26(a) ... 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. Proc. 37. *In re Mirena IUD Prod. Liab. Litig.*, 169 F. Supp. 3d 396, 470–71 (S.D.N.Y. 2016) (Seibel, J.); *Middle Mkt. Fin. Corp. v. D’Orazio*, 96CIV8138SWKHBP, 2002 WL 31108260, at *4 (S.D.N.Y. Sept. 23, 2002).

Here, none of Plaintiffs’ four initial disclosures identify a single document in support of the claim that any of their creditors were harmed in connection with their claim for equitable subordination. *See* Exs. 1-3, 13. And Plaintiffs certainly have not produced any such documents. *See* Ex. 9. Accordingly, under Rule 37, Plaintiffs should be prohibited from presenting any testimony or documents in support of their claim that any of their creditors were harmed or disadvantaged in their debt collection efforts. *See also In re Sunbeam Corp.*, 284 B.R. 355, 364 (Bankr. S.D.N.Y. 2002) (“When a non-insider or non-fiduciary is involved, courts have required

that a claimant's conduct be egregious and severely unfair to other creditors before its claim will be equitably subordinated.").

II. Plaintiffs should be prohibited from presenting any evidence of damages under Counts VI and VII because they consistently and willfully violated Rule 26(a)(1)(iii) by refusing to provide a damage computation or identify supporting documents.

Plaintiffs violated Federal Rule of Civil Procedure by failing to provide a damage computation and failing to identify and produce any documents supporting their alleged damages. Because Plaintiffs have made no effort to show that their failure to produce a damage computation or supporting documents is substantially justified or harmless, Federal Rule of Civil Procedure 37 mandates preclusion of any damage evidence.

First, Federal Rule of Civil Procedure 26(a)(1)(iii) requires a plaintiff to disclose "a computation of each category of damages claimed by the disclosing party." To provide defendants a fair opportunity to test any claimed damages, Rule 26(a) "requires more than merely setting forth the figure demanded"; a party must provide at least "some analysis" of its damage claim. *See Max Impact, LLC v. Sherwood Grp., Inc.*, 09 CIV. 902 (JGK) (HBP), 2014 WL 902649, at *5 (S.D.N.Y. Mar. 7, 2014) (citations and internal quotation marks omitted). *See also id.* ("[Rule 26] contemplates an estimate of damages and 'some analysis.'" (quoting *U.S. Bank Nat'l Ass'n v. PHL Variable Ins. Co.*, 12 CIV. 6811, 2013 WL 5495542, at *5 (S.D.N.Y. Oct. 3, 2013))); *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 295 (2d Cir. 2006) (Rule 26(a) "requires a computation supported by documents" and "[t]he need for computation and supporting documents is especially necessary ... where the damages claim is for lost profits"). As discovery progresses, Rule 26 mandates that supplemental disclosures contain "much greater detail than previously provided" to satisfy Rule 26(a). *Design Strategy*, 469 F.3d at 295.

Second, Rule 26(a)(1)(A) also requires the production of “the documents or other evidentiary material...on which each computation is based.” *See Estate of Jaquez v. Flores*, 2016 WL 1060841, at *7 (S.D.N.Y. March 17, 2016); Fed. R. Civ. P. 26(a)(1)(A)(iii) (a plaintiff must identify and “make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, **including materials bearing on the nature and extent of injuries suffered**”) (emphasis added). Thus, Rule 26 “imposes a burden of disclosure that includes the functional equivalent of a standing Request for Production under Rule 34.” *Design Strategy, Inc.*, 469 F.3d at 296 (2d Cir. 2006) (quoting Fed. R. Civ. P. 26 Advisory Committee Notes to 1993 Amendments). *See also Champion Foodservice, LLC v. Vista Food Exch., Inc.*, No. 1:13-CV-1195, 2016 WL 4468000, at *12 (N.D. Ohio Aug. 23, 2016) (the purpose of this requirement is to provide the other party with the ability to “independently analyze” the damage computations).

Federal Rule of Civil Procedure 37 requires the preclusion of any evidence that a party failed to provide to the opposing party. Fed. R. Civ. Proc. 37 (“If a party fails to provide information or identify a witness as required by Rule 26(a) ... 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.”). “Rule 37 is self-executing,” and its “automatic sanction” for violation is preclusion. *In re Mirena*, 169 F. Supp. 3d at 470–71 (citation omitted); *Middle Mkt. Fin. Corp.*, 2002 WL 31108260, at *4 (“The automatic sanction for a violation of Rule 26(a) is preclusion.”). *See also* Fed. R. Civ. P. 37(c) advisory committee’s note (1993) (“The revision provides a self-executing sanction for failure to make a disclosure required by Rule 26(a), **without need for a motion**.”) (emphasis added); Federal Rules of Civil Procedure, Rules and Commentary Rule 37 (“By itself, the fact that the party failed to disclose or supplement triggers

application of the sanctions scheme.”). The burden is on the violating party to establish that the violation is substantially justified or harmless.⁴ *In re Mirena*, 169 F. Supp. 3d at 470.

Courts in the Southern District of New York have consistently recognized the propriety of precluding parties from introducing evidence relating to damage theories where those parties failed to comply with their Rule 26 disclosure obligations. *See e.g., Design Strategy, Inc.*, 469 F.3d 284, 296 (2d Cir. 2006) (lost profits); *Thompson v. Jamaica Hosp. Med. Ctr.*, No. 13 CIV. 1896 RWS, 2015 WL 3824254, at *4 (S.D.N.Y. June 19, 2015) (precluding evidence of damages not yet produced in discovery); *Pub. Adm'r of Queens Cty. ex rel. Estate & Beneficiaries of Guzman v. City of New York*, No. 06 CIV. 7099, 2009 WL 498976, at *12 (S.D.N.Y. Feb. 24, 2009) (dismissing a wrongful death claim because plaintiff “failed to provide furnish any evidence establishing pecuniary loss as a result of [decedent's] death”); *24/7 Records, Inc. v. Sony Music Entm't, Inc.*, 566 F. Supp. 2d 305, 318 (S.D.N.Y. 2008) (preclusion of evidence of loss of income-producing asset theory).

Here, Plaintiffs consistently and willfully violated Rule 26(a)(1)(iii) by refusing to provide a damage computation or identify supporting documents. First, Plaintiffs never provided any computation of their alleged goodwill damages, and therefore should be precluded from introducing any evidence such damages. *See* Ex. 12 (“Windstream also discloses that it has suffered harm to its goodwill and reputation resulting from the wrongful acts by Charter.”). *See also Ellis v. Asset Prot. & Sec. Servs., LP*, No. 09 CIV. 6555 RJH, 2011 WL 4472331, at *1–2

⁴ The Southern District of New York has recognized that the four factors in *Softel, Inc. v. Dragon Medical & Scientific Communications, Inc.* do not apply where the other side simply refuses to provide information. *In re Mirena.*, 169 F. Supp. 3d 396, 471 n.70 (S.D.N.Y. 2016) (Seibel, J.) (“The four factors set forth by the Second Circuit in *Softel, Inc. v. Dragon Medical & Scientific Communications, Inc.*, to determine whether excluding testimony as a sanction is appropriate are not directly applicable here because they concern a late disclosure.”).

(S.D.N.Y. Sept. 27, 2011) (precluding evidence of damages where no computation of any kind was ever produced); *Design*, 469 F.3d at 295 (“Design's failure to comply with this requirement was especially troubling because, as noted by the District Court, the IT Defendants specifically requested a calculation of damages.”).

In addition, Plaintiffs produced no documents supporting their alleged goodwill damages or the alleged “customer credits” associated with Defendants’ disconnection of service to certain of Plaintiffs’ customers. Instead, Plaintiffs merely state—without any proof—that they incurred such damages. But Rule 26 of the Federal Rules of Civil Procedure “**does not** require defendants to take plaintiff’s word for it.” *See Champion Foodservice, LLC*, 2016 WL 4468000, at *17 (citing *Bessemer & Lake Erie R.R. Co. v. Seaway Marine Transp.*, 596 F.3d 357 (6th Cir. 2010)) (emphasis added). The party must produce documentation that allows the opposing party to “independently analyze” the claimed damages. *Id.*

For their breach of contract damages claim, Plaintiffs’ Third Supplemental Initial Disclosures state, in conclusory fashion, “Windstream also incurred damages as a result of Charter’s breach of contract, namely, at least as much as \$5,000 to \$16,000 in damages in the form of customer credits associated with Charter’s sudden disconnection of service to Windstream customers.” Ex. 13. Plaintiffs provide no further analysis and fail to identify any documents upon which they relied in arriving at that number. The disclosures omit any discussion of how Plaintiffs calculated the customer credits and why they have produced no documents relating to the alleged customer credits. Courts have found similar barebones disclosures insufficient (and even sanctionable) under Rule 26(a)(1). *See Commonwealth Motorcycles, Inc. v. Ducati North America, Inc.*, 2017 WL 3701192, at *2 (E.D. Ky. Aug. 25, 2017) (imposing sanctions against plaintiff for failing to provide a damage computation and stating, “[b]ringing a case against any

defendant requires some amount of responsibility on the part of the [p]laintiff, the most basic of which is letting the [d]efendant know with as much certainty as possible the damages they are to dispute at trial so that the [d]efendant can develop a defense to all damages claimed.”). *See also id.* (“[A] reasonable computation of damages is necessary to adequately plan and prepare for trial’ and a [d]efendant should not be expected to go into a trial ‘blind as to the damages claim of the plaintiff.’”); Ex. 12 (only providing a damage computation for Plaintiffs’ alleged Lanham Act damages).

Plaintiffs’ failure to provide sufficient damage computations and to identify documents supporting their claim for damages violates Rule 26 and warrants exclusion under Rule 37. *See id.* Indeed, the “penalty of exclusion” endorsed in Rule 37 was designed for this very situation. *See* Federal Rules of Civil Procedure, Rules and Commentary Rule 37 (The penalty of exclusion “is designed to prevent parties from ‘sandbagging’ the other side” and “creates a powerful incentive for disclosure and production—at least as to *helpful* information that the parties might find useful.”) (Emphasis in original).

III. Plaintiffs should be prohibited from introducing damage evidence at trial because they refused to answer Defendants’ discovery requests and blocked other avenues of damage-related discovery, and Defendants were therefore unable to test Plaintiffs’ damage figures and computations before trial.

Based on the representation that their expert would address all damage-related issues, Plaintiffs refused to answer Defendants’ discovery requests and blocked fact witness examinations into the bases of Plaintiffs’ damage claims.⁵ *See* Ex. 8 (Plaintiffs’ counsel objecting to damage-

⁵ *See* Ex. 9, at Request No. 24 (refusing to provide documents related to total customers by relevant market); No. 25 (refusing to produce documents related to average customer life); Nos. 39-45 (refusing to produce documents related to voluntary customer disconnects and connections); No. 56 (refusing to produce documents related to financial analysis regarding lifetime loss of losing a subscriber, including the impacts on goodwill, if any); Nos. 58-59 (refusing to produce documents related to projections of new subscribers and advertising budgets).

related questions at Mr. Auman's deposition, stating "we're not producing a witness on this except for the expert, so he's not here to testify about that"); Ex. 5 ("Windstream has retained a damages expert who will provide a report setting out Windstream's damages."). Plaintiffs subsequently produced an expert report that only opined on damages relating to Plaintiffs' Lanham Act claims (Counts I-V). *See* Ex. 14 at 80:6-16 (Plaintiffs' counsel admitting "it was quite clear that [Mr. Jarosz'] report went to the Counts 1 through 4"). And even the with respect to those damage "computations," Plaintiffs failed to produce any supporting documents or any substantive analysis as required by Rule 26. *See Champion Foodservice, LLC*, 2016 WL 4468000, at *17 (Rule 26 requires the party seeking damages to engage in "robust" damage-related discovery, including producing documents sufficient to "independently analyze" the damages computations). Plaintiffs' expert simply parroted attorney-created summaries that he did not prepare.

Now, at trial and despite their clear representations to the contrary, Plaintiffs for the first time made Defendants aware that they seek to (1) introduce damage evidence through Mr. Auman, who refused to answer damage-related discovery at his deposition, and (2) present their expert, Mr. Jarosz, at trial to opine on damages relating to Counts VI and VII. *See* Exs. 12, 18. Put simply, Defendants will be severely prejudiced if this Court allows Plaintiffs to present any damage evidence at trial because Plaintiffs' gamesmanship prevented Defendants from conducting any meaningful damage-related discovery or otherwise test their damage computations before trial. In addition, because Plaintiffs misrepresented the scope of Mr. Auman and Mr. Jarosz' trial testimony (and this Court's instruction that Lanham Act damages would not be at issue at the bench trial), Defendants were unable to adequately prepare any rebuttal witnesses for Plaintiffs' witnesses.

On April 20, 2020, after stating all damage evidence would come through their expert, Plaintiffs served Mr. Auman's trial declaration, which discloses *new* damage calculations and their

new supporting bases. *See* Ex. 12, at ¶ 14 (disclosing for the first time that Plaintiffs’ allegedly provided at least \$5,278.85 in customer credits);⁶ *id.* at ¶ 15 (disclosing for the first time that Plaintiffs alleged offered \$4,033,425 in “customer upgrades, discounts, and pricing promotions to customers.”); *id.*, at ¶¶ 18, 27, and 34 (testifying on matters relating to Plaintiffs’ Lanham Act lost profits theory).⁷ Of course, like Plaintiffs’ other damage computations, Defendants will not have the opportunity to conduct any discovery or test Mr. Auman’s computations before trial.

Plaintiffs also submitted the trial declaration of Mr. Jarosz on April 20, 2020, in which he opines almost exclusively on Lanham Act damages. *See* Ex. 18. But again, Defendants have never had the opportunity to discover Mr. Jarosz’ Lanham Act damage computation because Plaintiffs’ refused to produce any substantive analysis or supporting documents.⁸ And Plaintiffs consistently refused to respond to discovery relating specifically to Plaintiffs’ Lanham Act damages. *See* Ex. 9, at Request Nos. 39-45 (refusing to produce documents related to voluntary customer disconnects and connections). Those documents would have allowed Defendants to analyze, *inter alia*, whether “lost customers” can reasonably be attributed to Defendants’ alleged conduct.

⁶ The last damage “computation” Plaintiffs provided to Defendants for its breach of contract claim simply stated that damages were “at least as much as \$5,000 to \$16,000.” *See* Ex. 14. Plaintiffs have not provided any other “computation,” analysis, or supporting documents to Defendants relating to their breach of contract damages.

⁷ Plaintiffs still have not identified which of the 205 plaintiffs provided those customer credits, customer upgrades, discounts, and pricing promotions.

⁸ The Jarosz Report only included a handful of summary documents, such as a single summary for approximately \$7,966,371 in purported costs related to a promotional offer and another summary claiming millions in lost profits. *See* Ex. 13 at p. 40 n. 150; *see also* Champion Foodservice, LLC, 2016 WL 4468000, at *12 (finding plaintiff’s summary documents of purported lost profits failed to provide sufficient information for defendants to verify or test plaintiff’s calculation). Charter was unable to inquire about these summaries at Mr. Jarosz’s deposition because Plaintiffs refused to produce any of the documents supporting the computation.

In short, if this Court allows Plaintiffs to introduce damage-related evidence at trial, Defendants will be severely prejudiced because they did not have the opportunity to meaningfully test the strength and underlying support for Plaintiffs' theories and will not be in a position to adequately prepare the necessary rebuttal witnesses.

IV. Plaintiffs should be prohibited from presenting non-expert damage testimony because they consistently refused to respond to non-expert damage discovery.

In yet another attempt to gather information regarding Plaintiffs' damages, Defendants asked Plaintiffs to produce a corporate representative to testify about "claimed damages in this adversary proceeding." *See* Ex. 7, Topic No. 16. Plaintiffs refused to provide any non-expert testimony on damages. *See id.* ("Windstream further objects to this Topic as impermissibly seeking unqualified expert testimony . . . Windstream will produce an expert to testify on this topic at the appropriate time."). Then, during the corporate representative deposition, Plaintiffs' counsel refused to let the witness answer damage questions. Ex. 8 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.").

Plaintiffs also continually refused to produce any documents in support of their damage claims. *See* Ex. 9, at No. 24 (refusing to provide documents related to total customers by relevant market); No. 25 (refusing to produce documents related to average customer life); Nos. 39-45 (refusing to produce documents related to voluntary customer disconnects and connections); No. 56 (refusing to produce documents related to financial analysis regarding lifetime loss of losing a subscriber, including the impacts on goodwill, if any); Nos. 58-59 (refusing to produce documents related to projections of new subscribers and advertising budgets). Because Plaintiffs refused to provide any non-expert deposition testimony or documents supporting their damage claims, they should be prohibited from introducing any non-expert damage testimony at trial.

V. Plaintiffs should be prohibited from presenting expert opinion testimony related to their claims on Counts VI and VII because they disclosed no experts under Federal Rule 26(a)(2).

Plaintiffs represented to this Court that they (1) “retained a damages expert who will provide a report setting out Windstream’s damages,” and (2) “are not seeking damages in this Adversary Proceeding other than those to be described in an expert report.” Ex. 5. Plaintiffs’ subsequently produced the expert report of John Jarosz, which only opined on damages for Counts I through IV. *See* Ex. 13. Indeed, Plaintiffs’ counsel confirmed that “it was quite clear that [Mr. Jarosz’s] report went to the Counts 1 through 4.” Ex. 14 at 80:6-16.

Plaintiffs’ failure to disclose any expert damage opinions relating to Counts VI and VII mandates the preclusion of any expert testimony on those claims under Rule 37. *See Middle Mkt. Fin. Corp.*, 2002 WL 31108260, at *4 (“Before an expert can testify at trial, the disclosures set forth in Rule 26(a)(2) *must* be made. The “automatic sanction” for a violation of Rule 26(a) is preclusion.”); *Design Strategy, Inc.*, 469 F.3d at 295 (“Design’s failure to comply with this requirement was especially troubling because, as noted by the District Court, the IT Defendants specifically *requested* a calculation of damages.”).

VI. This Court should exclude the trial declaration of John Jarosz because he has disclosed no opinions on Counts VI and VII and Plaintiffs successfully opposed Defendants’ Motion to Continue by representing that “there are no common issues of fact left for trial” because John Jarosz would not be testifying on those Counts.

In response to Defendants’ motion to continue, Plaintiffs represented to this Court that “there are no common issues of fact left for trial” because Mr. Jarosz would not be testifying on Counts VI and VII. *See* ECF No. 263. Then, at the hearing on Defendants’ motion, Plaintiffs admitted that the Jarosz Report treated “damage issues for purposes of Lanham Act claims differently than [Counts VI and II].” *See* Ex. 15, at 80:6-16. Based on these representations, this Court informed that parties that he did not “believe that the parties should be preparing for a March

30 bench trial before me regarding the parties' damages calculations under the Lanham Act and related state statutes." Ex. 16, at 1. Plaintiffs were silent when this Court again suggested that Mr. Jarosz would not be testifying on damages during the March 9, 2020 pretrial conference. *See* Ex. 17, at 8:14-15 (Your Honor stating he is not sure if the trial will take a full day "given, as I understand it, the limited extent of damages and/or sanctions that Windstream is seeking to show or establish here"). On March 17, 2020, this Court ultimately denied Defendants' request for a continuance on the basis of Plaintiffs' representation that "there are no common issues of fact left for trial." *See* Dkt. No. 263 at 8; Dkt No. 281 at 5.

Still, on April 20, 2020, Plaintiffs served a Trial Declaration from John Jarosz in which he opines almost exclusively on Plaintiffs "damages calculations under the Lanham Act and related state statutes." *See generally*, Ex. 18. Given Plaintiffs' representations and that Mr. Jarosz' declaration testimony primarily consists of the very issues this Court informed the parties they should not be preparing for, this Court should exclude Mr. Jarosz trial declaration in its entirety.⁹

VII. Plaintiffs should be prohibited from using any documents that were not made available for copying or inspection during discovery.

On August 29, 2019, Plaintiffs served their Supplemental Initial Disclosures, in which they identified fifteen (15) distinct categories of documents in their possession, custody, or control that they may use to support their claims. *See* Ex. 2. On September 3, 2019, to ensure they received all such documents, Defendants requested to inspect and copy any documents in Plaintiffs'

⁹ On December 6, 2019 and December 11, 2019, over a month after the close of discovery and in an attempt to cure deficiencies in the Jarosz Report, Plaintiffs filed untimely declarations of John Jarosz. *See* Dkt. Nos. 148, 165. Because these declarations were untimely and Plaintiffs have provided no explanation as to why the assertions in the post-discovery declarations were not included in the October 11 Jarosz Report, this Court should exclude the post-discovery declarations. *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).

“possession, custody, or control that [Plaintiffs] may use to support [their] claims or defenses.” *See* Ex. 10. On September 6, 2019, Plaintiffs confirmed all documents they “intend to rely on for Rule 26(a) purposes have all been supplied to Defendants’ counsel electronically and are in it’s counsel’s possession.” *See* Ex. 11. Therefore, Plaintiffs should be prohibited from using any documents in support of their claims that were not in Defendants’ counsel’s possession on September 6, 2019.

VIII. Debtors’ Exhibit 104 is inadmissible because it constitutes inadmissible hearsay and the declarant has withdrawn and been ethically walled off from this adversary proceeding due to a conflict of interest and therefore cannot have personal knowledge under Federal Rule of Evidence 602.

Debtors’ Exhibit 104 is Katten Muchin Rosenman LLP’s Third Interim Fee Application supported by the declaration of Steven J. Reisman. Debtors’ Exhibit 104 is inadmissible because (1) the declarant has withdrawn and been ethically walled off from this adversary proceeding due to a conflict of interest and thus cannot have sufficient personal knowledge under Federal Rule of Evidence 602 to support the fee application; and, (2) even if Mr. Reisman weren’t operating under an ethical conflict, Debtors’ Exhibit 104 constitutes inadmissible hearsay.

Effective April 29, 2019, Mr. Reisman withdrew as Debtors’ conflict counsel due to his representation of Charter in the 2009 DirecTV litigation, Case No 4:09-cv-730 RWS (E.D. Mo. 2009). *See* ECF No. 32. The Notice of Limited Withdrawal states that Mr. Reisman will only appear as conflicts counsel to the debtors in “matters unrelated to the Adversary Proceeding.” *Id.* Following his withdrawal, Debtors’ counsel emailed Defendants’ counsel to explain that Katten had implemented “an ethical screen that ‘walls off’ Mr. Reisman from the Litigation [i.e., this adversary proceeding].” *See* Ex. 19. An ethical wall is created to prevent a transfer of facts or client confidences amongst attorneys within a firm for purposes of avoiding disqualification. *See, e.g., Fund of Funds, Ltd. v. Arthur Anderson & Co.*, 567 F.2d 225, 229-30 (2d Cir. 1977)

(explaining the use of ethical walls); *Hempstead Video, Inc. v. Incorporated Village of Valley Stream*, 409 F.3d 127, 137-39 (2d Cir. 2005) (same).

Federal Rule of Evidence 602¹⁰ provides that a witness may only testify to a matter if he has personal knowledge of that matter. Given Mr. Reisman's withdrawal from this proceeding, and Katten's implementation of an ethical wall, Mr. Reisman cannot possibly have first-hand, personal knowledge about this proceeding after April 29, 2019.

Even absent Rule 602, Debtors' Exhibit 104 is inadmissible hearsay under Federal Rule of Evidence 802 because it contains out-of-court statements by a witness whom Defendants cannot cross-examine. *See, e.g., UPS Store, Inc. v. Hagan*, No. 14cv1210(WHP), 2017 WL 3309721, at *5 (S.D.N.Y. Aug. 2, 2017) (concluding declaration inadmissible where it does not fall within hearsay Rule 803's hearsay exceptions).

CONCLUSION

For the foregoing reasons, Defendants respectfully request this Court enter an order prohibiting Plaintiffs from presenting testimony, other evidence, or argument, on the facts and issues discussed herein.

¹⁰ FRE 602 provides as follows:

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

Dated: April 22, 2020

Respectfully submitted,

/s/John Kingston

John Kingston (pro hac vice)

Michael Nepple (pro hac vice)

Brian Hockett (pro hac vice)

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Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd of April, 2020, I served a true and correct copy of the foregoing ***Defendants' Omnibus Motion in Limine*** via operation of the Court's Electronic Filing System upon all counsel of record in the adversary proceeding.

Undersigned counsel will send a true and correct copy of ***Defendants' Omnibus Motion in Limine*** via email to the following:

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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
)	
vs.)	
)	
CHARTER COMMUNICATIONS, INC. and CHARTER)	
COMMUNICATIONS OPERATING, LLC,)	
)	
Defendants.)	
)	

**INITIAL DISCLOSURES OF PLAINTIFF
WINDSTREAM HOLDINGS, INC. AND AFFILIATED DEBTORS**

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 the Debtors have requested joint administration, 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' proposed 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.

Pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure and Rule 7026 of the Federal Rules of Bankruptcy Procedure, the debtors and debtors in possession in the above-captioned Chapter 11 cases (collectively, the “Debtors” or “Windstream”) provide the following initial disclosures to Defendants Charter Communications, Inc. and Charter Communications Operating, LLC (collectively, “Charter”).

The disclosures contained herein are based solely on information and documents as presently available and known to Windstream as of the date of these disclosures. Windstream reserves the right to clarify, supplement, and/or amend these disclosures at a later date. In making its disclosures, Windstream does not waive any objections based upon relevance, materiality, competence, privilege, immunity from disclosure or other grounds.

A. DISCLOSURES UNDER FRCP 26(a)(1)(A)(i): INDIVIDUALS

Windstream discloses the following individuals, presently known to Windstream, pursuant to Fed. R. Civ. Pro. 26(a)(1)(A)(i), that may have information that Windstream may use to support its claims and/or defenses. By indicating the general subject matter of information that witnesses possess, Windstream is not representing that this is the only relevant information that these witnesses possess.

Windstream Employees

The following Windstream employees may be contacted through Windstream’s counsel of record:

1. *Lewis Langston*

- Windstream’s Chapter 11 Cases;
- Windstream’s operations and business prior to the Chapter 11 filing;
- Windstream’s Kinetic internet campaign;

- Charter's false advertising campaign regarding Windstream's Chapter 11 filing;
- Windstream's cease and desist letters to Charter;
- Customer confusion caused by Charter's false advertising campaign;
- The harm to Windstream caused by Charter's false advertising campaign;
- Charter's disconnection of Windstream customers in or around March 2019; and
- Charter's disconnection of Windstream customers after the Court's Temporary Restraining Order and Preliminary Injunction Order.

2. *Jerry Wayne Parrish*

- Statements made by Charter direct sales representative Emmitt Walker on or around April 8, 2019.

3. *Shonne Bandy*

- Disconnection of Windstream customer by Charter in May 2019.

4. *Timothy Wyatt*

- Windstream customer's complaint of false statements made by Charter employee, Latisha Truong, regarding Windstream's bankruptcy on or around May 9, 2019.

Charter Employees, Agents, and/or Representatives

The following Charter employees may presumably be contacted through Charter's counsel of record:

1. *Kelly Atkinson*

- Charter's false advertising campaign, including the decision to launch the campaign, the design of the advertisements, the recipients and geographic scope of the campaign, and the use of the advertisements;

- Communications with present or potential customers referring to Windstream;
and
- Windstream customers that switched to Charter.

2. *Keith Dardis*

- The role of Charter direct sales representatives; advertising campaigns conducted by Charter direct sales representatives;
- Disconnection of Windstream customers by Charter; and
- Communications to Charter employees regarding the Court's Temporary Restraining Order and Preliminary Injunction.

3. *Jennifer Smith*

- The design of Charter's advertisements relating to Windstream's Chapter 11 cases, including the design of the outer envelope; and
- Internal communications relating to Charter's false advertising campaign regarding Windstream's Chapter 11 cases.

4. *Chris Czekaj*

- Charter's false advertising campaign, including the decision to launch the campaign, the design of the advertisements, the recipients and geographic scope of the campaign, and the use of the advertisements; and
- Internal communications relating to Charter's false advertising campaign regarding Windstream's Chapter 11 cases.

5. *R2 Creative*

- The design of Charter's advertisements relating to Windstream's Chapter 11 cases, including the design of the outer envelope; and

- Internal communications relating to Charter's false advertising campaign regarding Windstream's Chapter 11 cases.

6. *Latisha Truong*

- Statements made on or around May 2019 to Windstream customers regarding Windstream's Chapter 11 filing.

7. *Additional Charter employees, agents, and/or representatives*

- The design of Charter's advertisements relating to Windstream's Chapter 11 cases, including the design of the outer envelope;
- Internal communications relating to Charter's false advertising campaign regarding Windstream's Chapter 11 cases;
- The training of Charter's representatives and agents relating to Windstream's Chapter 11 cases;
- Windstream customers that have switched their service to Charter from February 2019 through the present;
- Customer responses and customer confusion arising from Charter's false advertising campaign relating to Windstream's Chapter 11 cases;
- Charter's profits relating to its false advertising campaign concerning Windstream's Chapter 11 cases;
- Customer calls or communications from Windstream customers whose services were disconnected or terminated under the Spectrum Business Value Added Reseller Agreement from February 2019 through the present;

- The interruption or disconnection of service to Windstream customers between February 2019 through the present, including but not limited to, the disconnection of Windstream customer in San Antonio, Texas;
- Charter's efforts to comply with the Bankruptcy Court's April 16, 2019 Temporary Restraining Order, including any violations thereof;
- Charter's efforts to comply with the Bankruptcy Court's May 16, 2019 Preliminary Injunction, including any violations thereof; and
- Charter's efforts to comply with the Bankruptcy Court's automatic stay, including any violations thereof.

Windstream reserves the right to disclose additional witnesses to supplement its initial disclosures as additional information becomes known or available to it.

B. DISCLOSURES UNDER FRCP26(a)(1)(A)(ii): DOCUMENTS

Pursuant to FRCP 26(a)(1)(A)(ii), Windstream identifies the following categories of documents and tangible things that, unless otherwise noted, are in the possession, custody, or control of Windstream, and that Windstream may use to support its claims or defenses (unless solely for impeachment):

- Documents relating to the products and services provided by Windstream;
- Documents relating to the targeted customers and geographic regions for which Windstream offers its products and services;
- Documents filed with the United States Patent and Trademark Office in connection with Windstream's registrations for its WINDSTREAM trademarks (publicly available);
- Windstream's Chapter 11 filings (publicly available);

- Documents relating to Windstream's operations throughout its Chapter 11 cases;
- Documents relating Windstream's Kinetic internet advertising campaign;
- Documents relating to Charter's false advertising campaign concerning Windstream's Chapter 11 cases;
- Documents relating to Windstream's customer responses to Charter's false advertising campaign;
- Documents relating to customer confusion caused by Charter's false advertising campaign;
- Documents relating to the harm to Windstream caused by Charter's false advertising campaign;
- Documents relating to damage control efforts that Windstream has had to undertake in response to Charter's false advertising campaign;
- Documents relating to Charter's violations of the Court's Temporary Restraining Order;
- Documents relating to Charter's violation of the Bankruptcy Court's automatic stay;
- Documents relating to agreements between Windstream and Charter for the provision of "last mile" services; and
- Communications between Windstream and Charter.

Windstream may also rely on documents that are in the possession, custody or control of Charter and/or third parties, as well as documents that Windstream may learn of, find, or determine are significant. Windstream reserves the right to supplement its initial disclosures as

such documents become known and available to it, and once additional information regarding its claims can be adequately ascertained through discovery.

C. DISCLOSURES UNDER FRCP26(a)(1)(A)(iii): DAMAGES

In its Complaint, Windstream seeks, among other things, a permanent injunction enjoining Charter from engaging in any advertising that falsely states or implies that Windstream's Chapter 11 filing means that it is going out of business or will impair or otherwise adversely impact Windstream's ability to provide service to its customers. Windstream also seeks an award of Charter's profits, Windstream's lost profits, and monetary damages, caused by Charter as a result of its false and misleading advertising, in addition to treble and punitive damages, attorneys' fees, costs, and any pre-judgment and post-judgment interest. Windstream also seeks equitable subordination and/or equitable disallowance of any and all claims asserted by Charter against the Debtors, and any other equitable relief as the Court may deem just and proper.

At this time, due to the need for discovery relating to Charter's profits and the continuing investigation regarding Windstream's lost profits and the potential need for expert discovery on the topic, Windstream is unable to estimate the range of provable damages.

D. DISCLOSURES UNDER FRCP26(a)(1)(A)(iv): INSURANCE

Windstream is presently unaware of any insurance agreement applicable to the claims asserted in the Complaint, and thus has no disclosure relevant to Rule 26(a)(1)(A)(iv) of the Federal Rules of Civil Procedure.

Dated: June 19, 2019

/s/ Terence P. Ross

Terence P. Ross

Tami Kameda Sims (*admitted pro hac vice*)

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Conflicts Counsel to the Debtors and Debtors in Possession

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of June 2019, a true and correct copy of the *INITIAL DISCLOSURES OF DEBTORS AND PLAINTIFF WINDSTREAM HOLDINGS, INC.* was served by email on all counsel of record in the adversary proceeding.

Dated: June 19, 2019

/s/ Tami Kameda Sims

Tami Kameda Sims

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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
)	
vs.)	
)	
CHARTER COMMUNICATIONS, INC. and CHARTER)	
COMMUNICATIONS OPERATING, LLC,)	
)	
Defendants.)	
)	

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 the Debtors have requested joint administration, 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' proposed 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.

**SUPPLEMENTAL INITIAL DISCLOSURES OF PLAINTIFF
WINDSTREAM HOLDINGS, INC. AND AFFILIATED DEBTORS**

Pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure and Rule 7026 of the Federal Rules of Bankruptcy Procedure, the debtors and debtors in possession in the above-captioned Chapter 11 cases (collectively, the “Debtors” or “Windstream”) provide the following supplemental initial disclosures to Defendants Charter Communications, Inc. and Charter Communications Operating, LLC (collectively, “Charter”).

The disclosures contained herein are based solely on information and documents as presently available and known to Windstream as of the date of these disclosures. Windstream reserves the right to clarify, supplement, and/or amend these disclosures at a later date. In making its disclosures, Windstream does not waive any objections based upon relevance, materiality, competence, privilege, immunity from disclosure or other grounds.

A. INDIVIDUALS

Pursuant to Fed. R. Civ. Pro. 26(a)(1)(A)(i) of the Federal Rules of Civil Procedure, Windstream discloses the following individuals that may have information that Windstream may use to support its claims and/or defenses in this lawsuit. By indicating the general subject matter of information that witnesses possess, Windstream is not representing that this is the only relevant information that these witnesses possess.

At least the following individuals are believed to have discoverable information on the indicated subject(s) that may be used to support Windstream's claims and defenses.

Name and Contact Information	Subject(s)
<p>Jeffrey Auman <i>Executive Vice President, Sales and Marketing</i> Windstream Holdings, Inc.</p> <p>11329 W. 160th Street Overland Park, KS 66221</p>	<ul style="list-style-type: none">• Windstream's Chapter 11 Cases;• Windstream's operations and business prior to the Chapter 11 filing;• Windstream's Kinetic internet campaign;• Charter's false advertising campaign regarding Windstream's Chapter 11 filing;• Windstream's cease and desist letters to Charter;• Customer confusion caused by Charter's false advertising campaign;• The harm to Windstream caused by Charter's false advertising campaign;• Charter's disconnection of Windstream customers in or around March 2019;• Charter's disconnection of Windstream customers after the Court's Temporary Restraining Order and Preliminary Injunction Order;• Windstream's corrective advertising efforts in response to Charter's false advertising campaign; and• Windstream's responses to Charter's discovery requests in this proceeding.

<p>Lewis Langston <i>Retired</i> Windstream Holdings, Inc.</p> <p>Address Unknown</p>	<ul style="list-style-type: none"> • Windstream's Chapter 11 Cases; • Windstream's operations and business prior to the Chapter 11 filing; • Windstream's Kinetic internet campaign; • Charter's false advertising campaign regarding Windstream's Chapter 11 filing; • Windstream's cease and desist letters to Charter; • Customer confusion caused by Charter's false advertising campaign; • The harm to Windstream caused by Charter's false advertising campaign; • Charter's disconnection of Windstream customers in or around March 2019; and • Charter's disconnection of Windstream customers after the Court's Temporary Restraining Order and Preliminary Injunction Order.
<p>Jerry Wayne Parrish <i>Vice President of Kinetic National Sales</i> Windstream Holdings, Inc.</p> <p>2208 Customs House Court Raleigh, NC 27615</p>	<ul style="list-style-type: none"> • Statements made by Charter direct sales representative Emmitt Walker on or around April 8, 2019.
<p>Shonne Bandy <i>Trouble Resolution Specialist II</i> Windstream Holdings, Inc.</p> <p>3000 Columbia House Blvd Suite 106 Vancouver, WA 98661</p>	<ul style="list-style-type: none"> • Disconnection of Windstream customer by Charter in May 2019.
<p>Timothy Wyatt <i>Customer Service Technician</i> Windstream Holdings, Inc.</p> <p>776 Hopewell Drive Heath, OH 43056</p>	<ul style="list-style-type: none"> • Windstream customer's complaint of false statements made by Charter employee, Latisha Truong, regarding Windstream's bankruptcy on or around May 9, 2019.

<p>Kelly Atkinson <i>Head of Consumer Marketing of Small and Medium Businesses</i> Charter Communications, Inc.</p> <p>Address Unknown</p>	<ul style="list-style-type: none"> • Charter's false advertising campaign, including the decision to launch the campaign, the design of the advertisements, the recipients and geographic scope of the campaign, and the use of the advertisements; • Communications with present or potential customers referring to Windstream; and • Windstream customers that switched to Charter.
<p>Keith Dardis <i>Vice President of Small and Medium Business and Residential Direct Sales</i> Charter Communications, Inc.</p> <p>Address Unknown</p>	<ul style="list-style-type: none"> • The role of Charter direct sales representatives; authorized or unauthorized advertising campaigns conducted by Charter direct sales representatives; • Disconnection of Windstream customers by Charter; and • Communications to Charter employees regarding the Court's Temporary Restraining Order and Preliminary Injunction.
<p>Jennifer Smith Charter Communications, Inc.</p> <p>Address Unknown</p>	<ul style="list-style-type: none"> • The design of Charter's advertisements relating to Windstream's Chapter 11 cases, including the design of the outer envelope; and • Internal communications relating to Charter's false advertising campaign regarding Windstream's Chapter 11 cases.
<p>Chris Czekaj Charter Communications, Inc.</p> <p>Address Unknown</p>	<ul style="list-style-type: none"> • Charter's false advertising campaign, including the decision to launch the campaign, the design of the advertisements, the recipients and geographic scope of the campaign, and the use of the advertisements; and • Internal communications relating to Charter's false advertising campaign regarding Windstream's Chapter 11 cases.

<p>Emmitt Walker Charter Communications, Inc.</p> <p>1801 Elyria Avenue Lorain, OH 44055</p>	<ul style="list-style-type: none"> • The distribution of false advertisement by Charter employees; • Charter's false advertising campaign; • Statements made by Charter employees that Windstream would no longer provide its services in the future; and • Charter's communications to employees regarding the Court's Temporary Restraining Order and Preliminary Injunction.
<p>Andrew Sites Charter Communications, Inc.</p> <p>3100 Elida Road Lima, OH 45805</p>	<ul style="list-style-type: none"> • The distribution of false advertisement by Charter employees; • Charter's false advertising campaign; • Statements made by Charter employees that Windstream would no longer provide its services in the future; and • Charter's communications to employees regarding the Court's Temporary Restraining Order and Preliminary Injunction.
<p>R2 Creative</p> <p>Address Unknown</p>	<ul style="list-style-type: none"> • The design of Charter's advertisements relating to Windstream's Chapter 11 cases, including the design of the outer envelope; and • Internal communications relating to Charter's false advertising campaign regarding Windstream's Chapter 11 cases.
<p>RAPP Worldwide, Inc.</p> <p>220 East 42nd Street New York, NY 10017</p>	<ul style="list-style-type: none"> • The design of Charter's advertisements relating to Windstream's Chapter 11 cases; and • Internal communications relating to Charter's false advertising campaign regarding Windstream's Chapter 11 cases.
<p>Latisha Truong</p> <p>Address Unknown</p>	<ul style="list-style-type: none"> • Statements made on or around May 2019 to Windstream customers regarding Windstream's Chapter 11 filing.

Additional Charter employees, agents, and/or representatives	<ul style="list-style-type: none">• The design of Charter’s advertisements relating to Windstream’s Chapter 11 cases, including the design of the outer envelope;• Internal communications relating to Charter’s false advertising campaign regarding Windstream’s Chapter 11 cases;• The training of Charter’s representatives and agents relating to Windstream’s Chapter 11 cases;• Windstream customers that have switched their service to Charter from February 2019 through the present;• Customer responses and customer confusion arising from Charter’s false advertising campaign relating to Windstream’s Chapter 11 cases;• Charter’s profits relating to its false advertising campaign concerning Windstream’s Chapter 11 cases;• Customer calls or communications from Windstream customers whose services were disconnected or terminated under the Spectrum Business Value Added Reseller Agreement from February 2019 through the present;• The interruption or disconnection of service to Windstream customers between February 2019 through the present, including but not limited to, the disconnection of Windstream customer in San Antonio, Texas;• Charter’s efforts to comply with the Bankruptcy Court’s April 16, 2019 Temporary Restraining Order, including any violations thereof;• Charter’s efforts to comply with the Bankruptcy Court’s May 16, 2019 Preliminary Injunction, including any violations thereof; and• Charter’s efforts to comply with the Bankruptcy Court’s automatic stay, including any violations thereof.
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Windstream reserves the right to disclose additional witnesses to further supplement its initial disclosures as additional information becomes known or available to it.

B. DOCUMENTS

Pursuant to Rule 26(a)(1)(A)(ii) of the Federal Rules of Civil Procedure, Windstream identifies the following categories of documents and tangible things that, unless otherwise noted, are in the possession, custody, or control of Windstream, and that Windstream may use to support its claims or defenses:

- Documents relating to the products and services provided by Windstream;
- Documents relating to the targeted customers and geographic regions for which Windstream offers its products and services;
- Documents filed with the United States Patent and Trademark Office in connection with Windstream's registrations for its WINDSTREAM trademarks (publicly available);
- Windstream's Chapter 11 filings (publicly available);
- Documents relating to Windstream's operations throughout its Chapter 11 cases;
- Documents relating Windstream's Kinetic internet advertising campaign;
- Documents relating to Charter's false advertising campaign concerning Windstream's Chapter 11 cases;
- Documents relating to Windstream's customer responses to Charter's false advertising campaign;
- Documents relating to customer confusion caused by Charter's false advertising campaign;

- Documents relating to the harm to Windstream caused by Charter's false advertising campaign;
- Documents relating to damage control efforts that Windstream has had to undertake in response to Charter's false advertising campaign;
- Documents relating to Charter's violations of the Court's Temporary Restraining Order;
- Documents relating to Charter's violation of the Bankruptcy Court's automatic stay;
- Documents relating to agreements between Windstream and Charter for the provision of "last mile" services; and
- Communications between Windstream and Charter.

Windstream may also rely on documents that are in the possession, custody or control of Charter and/or third parties, as well as documents that Windstream may learn of, find, or determine are significant. Windstream reserves the right to supplement its initial disclosures as such documents become known and available to it, and once additional information regarding its claims can be adequately ascertained through discovery.

C. DAMAGES

Pursuant to Rule 26(a)(1)(A)(iii) of the Federal Rules of Civil Procedure, Windstream discloses that it is seeking an award of monetary damages caused by Charter as a result of its false and misleading advertising, in addition to treble and punitive damages, attorneys' fees, costs, and any pre-judgment and post-judgment interest. Windstream also seeks equitable subordination and/or equitable disallowance of any and all claims asserted by Charter against the Debtors, and any other equitable relief as the Court may deem just and proper.

At this time, due to the need for discovery relating to Charter's profits and the continuing investigation regarding Windstream's lost profits and the potential need for expert discovery on the topic, Windstream is unable to estimate the range of provable damages.

D. INSURANCE

Pursuant to Rule 26(a)(1)(A)(iv) of the Federal Rules of Civil Procedure, Windstream discloses that it is presently unaware of any insurance agreement applicable to the claims asserted in the Complaint.

Dated: August 29, 2019

/s/ Terence P. Ross
Terence P. Ross
Michael R. Justus (*pro hac vice pending*)
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Conflicts Counsel to the Debtors and Debtors in Possession

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August 2019, a true and correct copy of the *SUPPLEMENTAL INITIAL DISCLOSURES OF DEBTORS AND PLAINTIFF WINDSTREAM HOLDINGS, INC.* was served by email on all counsel of record in the adversary proceeding.

Dated: August 29, 2019

/s/ Kristin Lockhart

Kristin Lockhart

Terence P. Ross
Michael R. Justus (*pro hac vice pending*)
Shaya Rochester
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Facsimile: (212) 940-8776

Conflicts Counsel to the Debtors and Debtors in Possession

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

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In re:)	Chapter 11
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WINDSTREAM HOLDINGS, INC., et al., ¹)	Case No. 19-22312 (RDD)
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WINDSTREAM HOLDINGS, INC., et al.,)	
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Plaintiffs,)	Adv. Pro. No. 19-08246
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CHARTER COMMUNICATIONS, INC. and CHARTER)	
COMMUNICATIONS OPERATING, LLC,)	
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Defendants.)	
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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 the Debtors have requested joint administration, 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' proposed 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.

**SECOND SUPPLEMENTAL INITIAL DISCLOSURES OF PLAINTIFF
WINDSTREAM HOLDINGS, INC. AND AFFILIATED DEBTORS**

Pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure and Rule 7026 of the Federal Rules of Bankruptcy Procedure, the debtors and debtors in possession in the above-captioned Chapter 11 cases (collectively, the “Debtors” or “Windstream”) provide the following second supplemental initial disclosures to Defendants Charter Communications, Inc. and Charter Communications Operating, LLC (collectively, “Charter”).

The disclosures contained herein are based solely on information and documents as presently available and known to Windstream as of the date of these disclosures. Windstream reserves the right to clarify, supplement, and/or amend these disclosures at a later date. In making its disclosures, Windstream does not waive any objections based upon relevance, materiality, competence, privilege, immunity from disclosure or other grounds.

A. INDIVIDUALS

Pursuant to Fed. R. Civ. Pro. 26(a)(1)(A)(i) of the Federal Rules of Civil Procedure, Windstream discloses the following individuals that may have information that Windstream may use to support its claims and/or defenses in this lawsuit. By indicating the general subject matter of information that witnesses possess, Windstream is not representing that this is the only relevant information that these witnesses possess.

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<p>RAPP Worldwide, Inc.</p> <p>220 East 42nd Street New York, NY 10017</p>	<ul style="list-style-type: none"> • The design of Charter's advertisements relating to Windstream's Chapter 11 cases; and • Internal communications relating to Charter's false advertising campaign regarding Windstream's Chapter 11 cases.
<p>Latisha Truong</p> <p>Address Unknown</p>	<ul style="list-style-type: none"> • Statements made on or around May 2019 to Windstream customers regarding Windstream's Chapter 11 filing.

Additional Charter employees, agents, and/or representatives	<ul style="list-style-type: none">• The design of Charter’s advertisements relating to Windstream’s Chapter 11 cases, including the design of the outer envelope;• Internal communications relating to Charter’s false advertising campaign regarding Windstream’s Chapter 11 cases;• The training of Charter’s representatives and agents relating to Windstream’s Chapter 11 cases;• Windstream customers that have switched their service to Charter from February 2019 through the present;• Customer responses and customer confusion arising from Charter’s false advertising campaign relating to Windstream’s Chapter 11 cases;• Charter’s profits relating to its false advertising campaign concerning Windstream’s Chapter 11 cases;• Customer calls or communications from Windstream customers whose services were disconnected or terminated under the Spectrum Business Value Added Reseller Agreement from February 2019 through the present;• The interruption or disconnection of service to Windstream customers between February 2019 through the present, including but not limited to, the disconnection of Windstream customer in San Antonio, Texas;• Charter’s efforts to comply with the Bankruptcy Court’s April 16, 2019 Temporary Restraining Order, including any violations thereof;• Charter’s efforts to comply with the Bankruptcy Court’s May 16, 2019 Preliminary Injunction, including any violations thereof; and• Charter’s efforts to comply with the Bankruptcy Court’s automatic stay, including any violations thereof.
--	--

Windstream reserves the right to disclose additional witnesses to further supplement its initial disclosures as additional information becomes known or available to it.

B. DOCUMENTS

Pursuant to Rule 26(a)(1)(A)(ii) of the Federal Rules of Civil Procedure, Windstream identifies the following categories of documents and tangible things that, unless otherwise noted, are in the possession, custody, or control of Windstream, and that Windstream may use to support its claims or defenses:

- Documents relating to the products and services provided by Windstream;
- Documents relating to the targeted customers and geographic regions for which Windstream offers its products and services;
- Documents filed with the United States Patent and Trademark Office in connection with Windstream's registrations for its WINDSTREAM trademarks (publicly available);
- Windstream's Chapter 11 filings (publicly available);
- Documents relating to Windstream's operations throughout its Chapter 11 cases;
- Documents relating Windstream's Kinetic internet advertising campaign;
- Documents relating to Charter's false advertising campaign concerning Windstream's Chapter 11 cases;
- Documents relating to Windstream's customer responses to Charter's false advertising campaign;
- Documents relating to customer confusion caused by Charter's false advertising campaign;

- Documents relating to the harm to Windstream caused by Charter's false advertising campaign;
- Documents relating to damage control efforts that Windstream has had to undertake in response to Charter's false advertising campaign;
- Documents relating to Charter's violations of the Court's Temporary Restraining Order;
- Documents relating to Charter's violation of the Bankruptcy Court's automatic stay;
- Documents relating to agreements between Windstream and Charter for the provision of "last mile" services; and
- Communications between Windstream and Charter.

Windstream may also rely on documents that are in the possession, custody or control of Charter and/or third parties, as well as documents that Windstream may later learn of, find, or determine are significant. Windstream states that the documents above, including those documents in the possession, custody or control of Charter, that it may rely upon are: WIN000001 - WIN002487; Charter_000001 - Charter_020883; and Charter_Marketing_000001 - Charter_Marketing_005316. Windstream reserves the right to supplement its initial disclosures as such documents become known and available to it, and once additional information regarding its claims can be adequately ascertained through discovery, including by third-party subpoenas.

C. DAMAGES

Pursuant to Rule 26(a)(1)(A)(iii) of the Federal Rules of Civil Procedure, Windstream discloses that it is seeking an award of monetary damages caused by Charter as a result of its false and misleading advertising, in addition to treble and punitive damages, attorneys' fees, costs, and

any pre-judgment and post-judgment interest. Windstream also seeks equitable subordination and/or equitable disallowance of any and all claims asserted by Charter against the Debtors, and any other equitable relief as the Court may deem just and proper.

At this time, due to the need for discovery relating to Charter's profits and the continuing investigation regarding Windstream's lost profits and the potential need for expert discovery on the topic, Windstream is unable to estimate the range of provable damages.

D. INSURANCE

Pursuant to Rule 26(a)(1)(A)(iv) of the Federal Rules of Civil Procedure, Windstream discloses that it is presently unaware of any insurance agreement applicable to the claims asserted in the Complaint.

Dated: September 6, 2019

/s/ Terence P. Ross
Terence P. Ross
Michael R. Justus (*pro hac vice pending*)
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Conflicts Counsel to the Debtors and Debtors in Possession

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of September 2019, a true and correct copy of the *SECOND SUPPLEMENTAL INITIAL DISCLOSURES OF DEBTORS AND PLAINTIFF WINDSTREAM HOLDINGS, INC.* was served by email on all counsel of record in the adversary proceeding.

Dated: September 6, 2019

/s/ Kristin Lockhart

Kristin Lockhart



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August 28, 2019

VIA ELECTRONIC MAIL

Judge Robert D. Drain
U.S. Bankruptcy Court
for the Southern District of New York
300 Quarropas St.
White Plains, NY 10601-4140

Re: Charter's Request for Telephonic Discovery Dispute Conference
Windstream Holdings, Inc., et al., v. Charter Communications, Inc. and Charter Communications Operating, LLC, Adv. Pro. No. 19-08246

Dear Judge Drain:

Defendants Charter Communications, Inc. and Charter Communications Operating, LLC (Charter) respectfully request a telephonic discovery conference regarding Windstream Holdings, Inc.'s (1) refusal to honor notices of deposition for Windstream employees that Windstream insisted be contacted through counsel and/or previously agreed to produce and (2) refusal to provide a computation of damages as required by Federal Rule of Civil Procedure 26(a).

Background

Windstream served its initial disclosures under Federal Rule of Civil Procedure 26(a) on June 19, 2019. *See Exhibit A.* Windstream identified Lewis Langston, Jerry Wayne Parrish, and Shonne Bandy and instructed that **“these Windstream employees may be contacted through Windstream’s counsel of record.”** Windstream did not provide telephone numbers and addresses for these Windstream employees as required by Rule 26(a).

Windstream’s damage computation disclosure reiterated the categories of damages identified in Windstream’s Complaint and stated that “[a]t this time, due to the need for discovery relating to Charter’s profits and the continuing investigation regarding Windstream’s lost profits and the potential need for expert discovery on the topic, Windstream is unable to estimate the range of provable damages.” *Id.* at ¶ C.

On June 25, 2019, Charter followed Windstream's instruction to contact Ms. Bandy through counsel of record and served a notice of her deposition on Windstream. *See* ECF 81. Windstream did not object to producing Ms. Bandy pursuant to that notice.

On July 2, 2019, the parties mutually agreed to toll discovery obligations, including depositions, while they pursued settlement discussions. Windstream's counsel confirmed via email that Charter's scheduled deposition of Shonne Bandy would be put "on hold," but again did not object to the manner of service for Ms. Bandy's deposition. *See Exhibit B.*

During settlement discussions, Windstream provided Charter with an informal damage computation based on alleged lost profits. But Windstream has not supplemented its Initial Disclosure to include any computation of damages.

When discovery resumed, Charter served notices of deposition for Lewis Langston and Jerry Wayne Parrish in mid-August, and an amended notice of deposition for Ms. Bandy. *See* ECF 89-91. For all three individuals, Charter reiterated that it would work with Windstream's counsel to conduct depositions at a mutually agreeable time and place.

On August 20, 2019, Windstream's counsel objected to Charter's deposition notice served pursuant to F.R.C.P. 30 for the first time. *See* August 20, 2019 correspondence enclosed as **Exhibit C**. Notwithstanding its prior agreement to produce Ms. Bandy and its instruction to contact Windstream employees through counsel of record, Windstream stated that neither Mr. Parrish nor Ms. Bandy would appear to testify because they had not been subpoenaed. *See Ex. C*. Windstream further claimed that as of July 1, 2019, Mr. Langston—special adviser to Chief Executive Officer Anthony Thomas and the individual responsible for coordination of Windstream's bankruptcy operation—was no longer a Windstream employee. *Id.* To date, Windstream has not provided a telephone number or address for Mr. Langston.

On Thursday, August 22, 2019, Charter presented four discovery issues to Windstream's counsel for resolution, two of which the parties ultimately resolved.¹ *See Exhibit D.*

¹ The first resolved issue concerns Charter's request that Windstream provide a verified response to Interrogatory No. 1 (served on April 17, 2019), which seeks the identity of all "last mile" customers referenced in paragraph 31 of Windstream's Complaint. Windstream had informally provided a list of 4,843 "last mile" customers. On the August 22, 2019 conference call, Windstream's counsel confirmed that Windstream had 4,843 such customers and agreed to provide a verified interrogatory answer certifying the accuracy of the previously provided list. The second resolved issue concerns Charter's request that Windstream respond to Interrogatory No. 2 (served on June 3, 2019) which seeks the identity of all Windstream customers that Windstream contends received Charter's advertisements at issue. Windstream agreed to produce for Charter a list of Windstream customers so that Charter could crosscheck that list against its own mailing list.

Argument

The first unresolved issue is whether Windstream can decline to produce Mr. Parrish and Ms. Bandy despite its prior agreement to produce Ms. Bandy and explicit instruction that both she and Mr. Parrish be contacted “through Windstream’s counsel of record.”²

Having (1) instructed Charter that Windstream employees identified witnesses should be contacted through Windstream’s counsel, (2) declined to provide contact information notwithstanding Rule 26(a) instructions to do so, and (3) already agreed to produce the lowest level employee on its witness list, Shonne Bandy, in response to a notice of deposition in June, Windstream should not now be permitted to insist that Charter subpoena the witnesses at issue.

Moreover, even low-level employees may qualify as managing agents for purposes of Rule 30. *See Atmosphere Hospitality Mgmt., LLC v. Curtullo*, No. 5:13-CV-05040-KES, 2015 WL 136120, at *14 (D. S.D. Jan. 9, 2015) (“Even lower-level employees may qualify as managing agents for purposes of the rules of discovery where those employees’ duties and activities are closely linked with the events giving rise to the lawsuit.”) (internal quotations omitted). Charter notes that Windstream listed Ms. Bandy in its initial disclosures as a witness with knowledge of a Windstream customer disconnection. Windstream itself has linked Ms. Bandy with the events giving rise to this lawsuit.

The second unresolved issue concerns Windstream’s failure to produce a damages computation and to provide all documents supporting such calculation as required by Federal Rule of Civil Procedure 26(a)(1). The Federal Rules are unequivocal: Windstream should have provided its damages calculation in its Initial Disclosures and, if not then available, it should have supplemented in a timely manner. *See Richmond v. General Nutrition Centers, Inc.*, No. 08 Civ. 3577 (PAE)(HBP), 2012 WL 762307, at *6-*7 (S.D.N.Y. Mar. 9, 2012) (noting FRCP 26(a)(1)(A)(iii) requires a computation of damages along with documentary support and that FRCP 26(e) requires supplementation in a timely manner).

Windstream’s production of a damage computation in settlement discussions does not alter its obligation to produce a computation as mandated by the Rule 26(a). *See Richmond*, 2012 WL 762307, at *7 (statements made during settlement discussions do not discharge the requirements of Rule 26(a)(1)). As the *Richmond* Court notes, “figures bandied in a settlement context cannot be considered a reliable indicator of the damages [sought].” *Richmond*, 2012 WL 762307, at *7 (internal quotations omitted).

Windstream’s position is that Windstream’s “expert would provide the damages calculation required under Rule 26(a), as is the norm.” **Exhibit D**. But, the Federal Rules expressly do not permit a party to wait until the expert report disclosure deadlines to produce damage computations. *See Broussard v. Go-Devil Manufacturing Co. of La., Inc.*, No. 08-124-D-M2,

² Indeed, Charter would have risked violating the Rules of Professional Conduct by attempting to communicate *ex parte* with witnesses following service of Windstream’s initial disclosures limiting the means by which Charter could contact these witnesses. *See Atmosphere Hospitality Mgmt., LLC v. Curtullo*, 2015 WL 136120, at *12 (D. S.D. Jan. 9, 2015) (noting that a party’s failure to update initial disclosures left opposing counsel “with the continuing belief” that the party remained represented and deprived opposing counsel of an address).

2009 WL 10669961, at *1 n.2 (M.D. La. Aug. 13, 2009) (“At this point, Gator Tail simply indicates that it is not going to produce its damages calculation until the deadline for its expert’s report. Under the federal rules of civil procedure, however, Go-Devil is not required to wait until the expert report deadlines to obtain Gator Tail’s damage computations and is permitted to obtain that information through initial disclosures and discovery requests preceding the production of expert reports.”). Windstream can obviously supplement and update its damage computation with an expert opinion. But if Windstream currently has information regarding its alleged damages on any claim, that information should be provided. Fact discovery in this adversary proceeding closes on September 25, 2019.

Pursuant to Local Rule 7007-1(a) and your Chamber Rules covering discovery disputes, Charter made a good faith effort to resolve these disputes with Windstream’s counsel and only seeks this Court’s assistance because of an impasse.

Sincerely,

Thompson Coburn LLP



By

John S. Kingston

Enclosures

Terence P. Ross
Tami Kameda Sims (*admitted pro hac vice*)
Shaya Rochester
KATTEN MUCHIN ROSENMAN LLP
575 Madison Avenue
New York, NY 10022
Telephone: (212) 940-8800
Facsimile: (212) 940-8776

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
)	
vs.)	
)	
CHARTER COMMUNICATIONS, INC. and CHARTER)	
COMMUNICATIONS OPERATING, LLC,)	
)	
Defendants.)	
)	

**INITIAL DISCLOSURES OF PLAINTIFF
WINDSTREAM HOLDINGS, INC. AND AFFILIATED DEBTORS**

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 the Debtors have requested joint administration, 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' proposed 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.

Pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure and Rule 7026 of the Federal Rules of Bankruptcy Procedure, the debtors and debtors in possession in the above-captioned Chapter 11 cases (collectively, the “Debtors” or “Windstream”) provide the following initial disclosures to Defendants Charter Communications, Inc. and Charter Communications Operating, LLC (collectively, “Charter”).

The disclosures contained herein are based solely on information and documents as presently available and known to Windstream as of the date of these disclosures. Windstream reserves the right to clarify, supplement, and/or amend these disclosures at a later date. In making its disclosures, Windstream does not waive any objections based upon relevance, materiality, competence, privilege, immunity from disclosure or other grounds.

A. DISCLOSURES UNDER FRCP 26(a)(1)(A)(i): INDIVIDUALS

Windstream discloses the following individuals, presently known to Windstream, pursuant to Fed. R. Civ. Pro. 26(a)(1)(A)(i), that may have information that Windstream may use to support its claims and/or defenses. By indicating the general subject matter of information that witnesses possess, Windstream is not representing that this is the only relevant information that these witnesses possess.

Windstream Employees

The following Windstream employees may be contacted through Windstream’s counsel of record:

1. *Lewis Langston*

- Windstream’s Chapter 11 Cases;
- Windstream’s operations and business prior to the Chapter 11 filing;
- Windstream’s Kinetic internet campaign;

- Charter's false advertising campaign regarding Windstream's Chapter 11 filing;
- Windstream's cease and desist letters to Charter;
- Customer confusion caused by Charter's false advertising campaign;
- The harm to Windstream caused by Charter's false advertising campaign;
- Charter's disconnection of Windstream customers in or around March 2019; and
- Charter's disconnection of Windstream customers after the Court's Temporary Restraining Order and Preliminary Injunction Order.

2. *Jerry Wayne Parrish*

- Statements made by Charter direct sales representative Emmitt Walker on or around April 8, 2019.

3. *Shonne Bandy*

- Disconnection of Windstream customer by Charter in May 2019.

4. *Timothy Wyatt*

- Windstream customer's complaint of false statements made by Charter employee, Latisha Truong, regarding Windstream's bankruptcy on or around May 9, 2019.

Charter Employees, Agents, and/or Representatives

The following Charter employees may presumably be contacted through Charter's counsel of record:

1. *Kelly Atkinson*

- Charter's false advertising campaign, including the decision to launch the campaign, the design of the advertisements, the recipients and geographic scope of the campaign, and the use of the advertisements;

- Communications with present or potential customers referring to Windstream; and
- Windstream customers that switched to Charter.

2. *Keith Dardis*

- The role of Charter direct sales representatives; advertising campaigns conducted by Charter direct sales representatives;
- Disconnection of Windstream customers by Charter; and
- Communications to Charter employees regarding the Court's Temporary Restraining Order and Preliminary Injunction.

3. *Jennifer Smith*

- The design of Charter's advertisements relating to Windstream's Chapter 11 cases, including the design of the outer envelope; and
- Internal communications relating to Charter's false advertising campaign regarding Windstream's Chapter 11 cases.

4. *Chris Czekaj*

- Charter's false advertising campaign, including the decision to launch the campaign, the design of the advertisements, the recipients and geographic scope of the campaign, and the use of the advertisements; and
- Internal communications relating to Charter's false advertising campaign regarding Windstream's Chapter 11 cases.

5. *R2 Creative*

- The design of Charter's advertisements relating to Windstream's Chapter 11 cases, including the design of the outer envelope; and

- Internal communications relating to Charter's false advertising campaign regarding Windstream's Chapter 11 cases.

6. *Latisha Truong*

- Statements made on or around May 2019 to Windstream customers regarding Windstream's Chapter 11 filing.

7. *Additional Charter employees, agents, and/or representatives*

- The design of Charter's advertisements relating to Windstream's Chapter 11 cases, including the design of the outer envelope;
- Internal communications relating to Charter's false advertising campaign regarding Windstream's Chapter 11 cases;
- The training of Charter's representatives and agents relating to Windstream's Chapter 11 cases;
- Windstream customers that have switched their service to Charter from February 2019 through the present;
- Customer responses and customer confusion arising from Charter's false advertising campaign relating to Windstream's Chapter 11 cases;
- Charter's profits relating to its false advertising campaign concerning Windstream's Chapter 11 cases;
- Customer calls or communications from Windstream customers whose services were disconnected or terminated under the Spectrum Business Value Added Reseller Agreement from February 2019 through the present;

- The interruption or disconnection of service to Windstream customers between February 2019 through the present, including but not limited to, the disconnection of Windstream customer in San Antonio, Texas;
- Charter's efforts to comply with the Bankruptcy Court's April 16, 2019 Temporary Restraining Order, including any violations thereof;
- Charter's efforts to comply with the Bankruptcy Court's May 16, 2019 Preliminary Injunction, including any violations thereof; and
- Charter's efforts to comply with the Bankruptcy Court's automatic stay, including any violations thereof.

Windstream reserves the right to disclose additional witnesses to supplement its initial disclosures as additional information becomes known or available to it.

B. DISCLOSURES UNDER FRCP 26(a)(1)(A)(ii): DOCUMENTS

Pursuant to FRCP 26(a)(1)(A)(ii), Windstream identifies the following categories of documents and tangible things that, unless otherwise noted, are in the possession, custody, or control of Windstream, and that Windstream may use to support its claims or defenses (unless solely for impeachment):

- Documents relating to the products and services provided by Windstream;
- Documents relating to the targeted customers and geographic regions for which Windstream offers its products and services;
- Documents filed with the United States Patent and Trademark Office in connection with Windstream's registrations for its WINDSTREAM trademarks (publicly available);
- Windstream's Chapter 11 filings (publicly available);

- Documents relating to Windstream’s operations throughout its Chapter 11 cases;
- Documents relating Windstream’s Kinetic internet advertising campaign;
- Documents relating to Charter’s false advertising campaign concerning Windstream’s Chapter 11 cases;
- Documents relating to Windstream’s customer responses to Charter’s false advertising campaign;
- Documents relating to customer confusion caused by Charter’s false advertising campaign;
- Documents relating to the harm to Windstream caused by Charter’s false advertising campaign;
- Documents relating to damage control efforts that Windstream has had to undertake in response to Charter’s false advertising campaign;
- Documents relating to Charter’s violations of the Court’s Temporary Restraining Order;
- Documents relating to Charter’s violation of the Bankruptcy Court’s automatic stay;
- Documents relating to agreements between Windstream and Charter for the provision of “last mile” services; and
- Communications between Windstream and Charter.

Windstream may also rely on documents that are in the possession, custody or control of Charter and/or third parties, as well as documents that Windstream may learn of, find, or determine are significant. Windstream reserves the right to supplement its initial disclosures as

such documents become known and available to it, and once additional information regarding its claims can be adequately ascertained through discovery.

C. DISCLOSURES UNDER FRCP26(a)(1)(A)(iii): DAMAGES

In its Complaint, Windstream seeks, among other things, a permanent injunction enjoining Charter from engaging in any advertising that falsely states or implies that Windstream's Chapter 11 filing means that it is going out of business or will impair or otherwise adversely impact Windstream's ability to provide service to its customers. Windstream also seeks an award of Charter's profits, Windstream's lost profits, and monetary damages, caused by Charter as a result of its false and misleading advertising, in addition to treble and punitive damages, attorneys' fees, costs, and any pre-judgment and post-judgment interest. Windstream also seeks equitable subordination and/or equitable disallowance of any and all claims asserted by Charter against the Debtors, and any other equitable relief as the Court may deem just and proper.

At this time, due to the need for discovery relating to Charter's profits and the continuing investigation regarding Windstream's lost profits and the potential need for expert discovery on the topic, Windstream is unable to estimate the range of provable damages.

D. DISCLOSURES UNDER FRCP26(a)(1)(A)(iv): INSURANCE

Windstream is presently unaware of any insurance agreement applicable to the claims asserted in the Complaint, and thus has no disclosure relevant to Rule 26(a)(1)(A)(iv) of the Federal Rules of Civil Procedure.

Dated: June 19, 2019

/s/ Terence P. Ross

Terence P. Ross

Tami Kameda Sims (*admitted pro hac vice*)

Shaya Rochester

KATTEN MUCHIN ROSENMAN LLP

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tami.sims@kattenlaw.com

srochester@kattenlaw.com

*Conflicts Counsel to the Debtors and Debtors in
Possession*

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of June 2019, a true and correct copy of the *INITIAL DISCLOSURES OF DEBTORS AND PLAINTIFF WINDSTREAM HOLDINGS, INC.* was served by email on all counsel of record in the adversary proceeding.

Dated: June 19, 2019

/s/ Tami Kameda Sims

Tami Kameda Sims

Walker, Kristine

From: Sims, Tami Kameda <tami.sims@kattenlaw.com>
Sent: Tuesday, July 2, 2019 1:18 PM
To: Kingston, John S.
Cc: Hockett, Brian W.; Shredl, Steven A.; Ross, Terence P.; Rochester, Shaya; Lockhart, Kristin
Subject: Windstream v. Charter: contempt motion and discovery

Hi John,

Terry tried to call you yesterday and left a voicemail. Since he did not yet get a response, we thought it was best to reach out over email.

As you know, we are waiting to hear your client's response to Windstream's settlement proposal. As a demonstration of our good faith efforts to engage in settlement negotiations, we propose the following: Windstream will agree to adjourn its motion for contempt/sanctions a result of Charter's violation of the preliminary injunction and the automatic stay, if you will agree to mutually toll the parties' respective discovery. That way, the parties can focus on settlement negotiations without incurring additional costs.

Specifically, the proposal is as follows:

- Windstream will still produce responses to Charter's second set of document requests and second set of interrogatories and its corresponding document production on July 3, 2019, given that Charter has already provided responses to Windstream's document requests and its document production.
- Windstream will adjourn its motion for contempt/sanctions until a later hearing date, no earlier than September 16, 2019.
- All other pending discovery will be tolled until either party notifies the other party that it considers settlement discussions to be at an impasse. The specific discovery tolled is as follows:
 - All noticed depositions (Charter's 30(b)(6), Windstream's 30(b)(6), Latisha Truong, and Shonne Bandy) will be on hold.
 - Charter's third set of interrogatories and first set of requests for admissions are tolled.
- Upon notification of settlement impasse, the pending discovery will resume as follows:
 - The parties will work out mutually agreeable locations and dates for the depositions.
 - Windstream will provide responses to Charter's third set of interrogatories within 15 days of the notification, and responses to Charter's first set of requests for admissions within 22 days of the notification.

Please let us know if you agree to the foregoing.

Thanks,
Tami

Tami Kameda Sims

Partner

Katten Muchin Rosenman LLP

2029 Century Park East, Suite 2600 / Los Angeles, CA 90067-3012

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=====

CONFIDENTIALITY NOTICE:

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=====
NOTIFICATION: Katten Muchin Rosenman LLP is an Illinois limited liability partnership that has elected to be governed by the Illinois Uniform Partnership Act (1997).
=====

Katten

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KRISTIN LOCKHART
kristin.lockhart@kattenlaw.com
202.625.3558 direct
202.298.7570 fax

August 20, 2019

Via E-Mail

Nino Przulj, Esq.
Thompson Coburn LLP
One US Bank Plaza
St. Louis, MO 63101
nprzulj@thompsoncoburn.com

Re: Windstream Holdings Inc., et al. v. Charter Communications, Inc. and Charter Communications Operating, LLC, Adv. Pro. No. 19-08246 (RDD) (Bankr. S.D.N.Y.)

Dear Mr. Przulj:

As you know, our firm is counsel to Windstream Holdings, Inc. and its affiliated debtors and debtors in possession (collectively, the “Debtors” or “Windstream”) in the above-referenced adversary proceeding against your client, Charter Communications, Inc. and its affiliates (collectively, “Charter”). We write in regard to three (3) Notices of Deposition that Charter recently served on Windstream. (*See Exhibit A*).

As you are aware, a corporate employee who does not qualify as an officer, director, or managing agent is not subject to deposition by notice under Rule 30 of the Federal Rules of Civil Procedure. Instead, such employee is deemed a non-party witnesses and must be subpoenaed pursuant to Rule 45 of the Federal Rules. *See, e.g., United States v. Afram Lines (USA), Ltd.*, 159 F.R.D. 408, 415 (S.D.N.Y. 1994). Neither Mr. Parrish nor Ms. Bandy qualify as an officer, director, or managing agent under Federal Rule 30. Thus, Windstream considers such notices to be legally null, and neither Mr. Parrish nor Ms. Bandy are under any present obligation to appear to testify.

Further, as of July 1, 2019, Mr. Langston is no longer an employee of Windstream. Thus, Mr. Langston is also not subject to deposition by notice under Federal Rule 30. Windstream similarly considers such notice to be legally null, and Mr. Langston is under no present obligation to appear to testify.

Very truly yours,

/s/ Kristin Lockhart

Kristin Lockhart



August 20, 2019
Page 2

cc: Terence P. Ross, Esq. (via email: terence.ross@kattenlaw.com)
Shaya Rochester, Esq. (via email: shaya.rochester@kattenlaw.com)
John Kingston, Esq. (via email: jkingston@thompsoncoburn.com)
Brian Hockett, Esq. (via email: bhockett@thompsoncoburn.com)
Steven T. Rappoport, Esq. (via email: srappoport@mofo.com)

(Enclosures – Exhibit A)

EXHIBIT A

John Kingston (pro hac)
 Brian Hockett (pro hac)
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 bhockett@thompsoncoburn.com

*Attorneys for Defendants Charter Communications, Inc.
 and Charter Communications Operating, LLC*

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

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

NOTICE OF DEPOSITION OF JERRY WAYNE PARRISH

To: Terence Ross and Shaya Rochester
 Katten Muchin Rosenman LLP

Deponent: Jerry Wayne Parrish

Date & Time: September 5, 2019, 9:00 a.m. EST

Place: Thompson Coburn, LLP
 One U.S. Bank Plaza, Ste. 3500
 St. Louis, MO 63101

PLEASE TAKE NOTICE that pursuant to Rule 30 of the Federal Rules of Civil Procedure, made applicable by Rule 7030 of the Federal Rules of Bankruptcy Procedure, Charter Communications, Inc. and Charter Communications Operating, LLC will take the deposition of Jerry Wayne Parrish at the date, time, and place identified above. The deposition will proceed before a Notary Public or some other officer authorized to administer oaths. The deposition will be taken upon oral examination for discovery, cross examination, and all other purposes allowed by law. The deposition will continue, if not completed on the above-identified date, at a mutually agreeable date and time. The deposition testimony will be recorded via video and stenographic means.

Dated: August 19, 2019

By: /s/ John Kingston
John Kingston (pro hac)
Brian Hockett (pro hac)
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Inc. and Charter Communications Operating, LLC*

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*Attorneys for Defendants Charter Communications, Inc.
 and Charter Communications Operating, LLC*

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

<p>IN RE</p> <p>WINDSTREAM HOLDINGS, INC., et al.,</p> <p>Debtors.</p>	<p>Chapter 11</p> <p>(Jointly Administered)</p> <p>Case No. 19-22312 (RDD)</p>
<p>WINDSTREAM HOLDINGS, INC., et al.,</p> <p>Plaintiffs,</p> <p>vs.</p> <p>CHARTER COMMUNICATIONS, INC. and CHARTER COMMUNICATIONS OPERATING, LLC,</p> <p>Defendants.</p>	<p>Adv. Proc. No. 19-08246 (RDD)</p>

CERTIFICATE OF SERVICE
NOTICE OF DEPOSITION OF JERRY WAYNE PARRISH

The undersigned counsel hereby certifies that a true and accurate copy of the NOTICE
 OF DEPOSITION OF JERRY WAYNE PARRISH was served on August 19, 2019, by
 electronic mail on the following:

Terence Ross
Shaya Rochester
Katten Muchin Rosenman LLP
575 Madison Avenue
New York, NY 10022-2585
terence.ross@katten.com
shaya.rochester@kattenlaw.com

Respectfully submitted,

THOMPSON COBURN LLP

By /s/ John Kingston

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Brian W. Hockett (pro hac)
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*Attorneys for Defendants Charter Communications, Inc.
 and Charter Communications Operating, LLC*

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

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

AMENDED NOTICE OF DEPOSITION OF SHONNE BANDY

To: Terence Ross and Shaya Rochester
 Katten Muchin Rosenman LLP

Deponent: Shonne Bandy

Date & Time: September 6, 2019, 9:00 a.m. EST

Place: Thompson Coburn, LLP
 One U.S. Bank Plaza, Ste. 3500
 St. Louis, MO 63101

PLEASE TAKE NOTICE that pursuant to Rule 30 of the Federal Rules of Civil Procedure, made applicable by Rule 7030 of the Federal Rules of Bankruptcy Procedure, Charter Communications, Inc. and Charter Communications Operating, LLC will take the deposition of Shonne Bandy at the date, time, and place identified above. The deposition will proceed before a Notary Public or some other officer authorized to administer oaths. The deposition will be taken upon oral examination for discovery, cross examination, and all other purposes allowed by law. The deposition will continue, if not completed on the above-identified date, at a mutually agreeable date and time. The deposition testimony will be recorded via video and stenographic means.

Dated: August 19, 2019

By: /s/ John Kingston

John Kingston (pro hac)

Brian Hockett (pro hac)

THOMPSON COBURN LLP

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*Attorneys for Defendants Charter Communications, Inc.
 and Charter Communications Operating, LLC*

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

<p>IN RE</p> <p>WINDSTREAM HOLDINGS, INC., et al.,</p> <p>Debtors.</p>	<p>Chapter 11</p> <p>(Jointly Administered)</p> <p>Case No. 19-22312 (RDD)</p>
<p>WINDSTREAM HOLDINGS, INC., et al.,</p> <p>Plaintiffs,</p> <p>vs.</p> <p>CHARTER COMMUNICATIONS, INC. and CHARTER COMMUNICATIONS OPERATING, LLC,</p> <p>Defendants.</p>	<p>Adv. Proc. No. 19-08246 (RDD)</p>

CERTIFICATE OF SERVICE
AMENDED NOTICE OF DEPOSITION OF SHONNE BANDY

The undersigned counsel hereby certifies that a true and accurate copy of the AMENDED NOTICE OF DEPOSITION OF SHONNE BANDY was served on August 19, 2019, by electronic mail on the following:

Terence Ross
Shaya Rochester
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Respectfully submitted,

THOMPSON COBURN LLP

By /s/ John Kingston

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*Attorneys for Defendants Charter Communications, Inc.
 and Charter Communications Operating, LLC*

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

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

NOTICE OF DEPOSITION OF LEWIS LANGSTON

To: Terence Ross and Shaya Rochester
 Katten Muchin Rosenman LLP

Deponent: Lewis Langston

Date & Time: September 23, 2019, 9:00 a.m. EST

Place: Thompson Coburn, LLP
 One U.S. Bank Plaza, Ste. 3500
 St. Louis, MO 63101

PLEASE TAKE NOTICE that pursuant to Rule 30 of the Federal Rules of Civil Procedure, made applicable by Rule 7030 of the Federal Rules of Bankruptcy Procedure, Charter Communications, Inc. and Charter Communications Operating, LLC will take the deposition of Lewis Langston at the date, time, and place identified above. The deposition will proceed before a Notary Public or some other officer authorized to administer oaths. The deposition will be taken upon oral examination for discovery, cross examination, and all other purposes allowed by law. The deposition will continue, if not completed on the above-identified date, at a mutually agreeable date and time. The deposition testimony will be recorded via by video and stenographic means.

Dated: August 15, 2019

By: /s/ Brian Hockett
John Kingston (pro hac)
Brian Hockett (pro hac)
THOMPSON COBURN LLP
One U.S. Bank Plaza, Suite 2700
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*Attorneys for Defendants Charter Communications, Inc.
 and Charter Communications Operating, LLC*

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

<p>IN RE</p> <p>WINDSTREAM HOLDINGS, INC., et al.,</p> <p>Debtors.</p>	<p>Chapter 11</p> <p>(Jointly Administered)</p> <p>Case No. 19-22312 (RDD)</p>
<p>WINDSTREAM HOLDINGS, INC., et al.,</p> <p>Plaintiffs,</p> <p>vs.</p> <p>CHARTER COMMUNICATIONS, INC. and CHARTER COMMUNICATIONS OPERATING, LLC,</p> <p>Defendants.</p>	<p>Adv. Proc. No. 19-08246 (RDD)</p>

CERTIFICATE OF SERVICE
NOTICE OF DEPOSITION OF LEWIS LANGSTON

The undersigned counsel hereby certifies that a true and accurate copy of the NOTICE OF DEPOSITION OF LEWIS LANGSTON was served on August 15, 2019, by electronic mail on the following:

Terence Ross
Shaya Rochester
Katten Muchin Rosenman LLP
575 Madison Avenue
New York, NY 10022-2585
terence.ross@katten.com
shaya.rochester@kattenlaw.com

Respectfully submitted,

THOMPSON COBURN LLP

By /s/ Brian Hockett

John S. Kingston (pro hac)
Brian W. Hockett (pro hac)
One US Bank Plaza
St. Louis, Missouri 63101
314-552-6000
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jkingston@thompsoncoburn.com
bhockett@thompsoncoburn.com

*Attorneys for Defendants Charter Communications,
Inc. and Charter Communications Operating, LLC*

Archived: Tuesday, August 27, 2019 10:23:30 AM

From: Kingston, John S.

Sent: Thu, 22 Aug 2019 16:31:16

To: Ross, Terence P.

Cc: Przulj, Nino

Subject: RE: Windstream v. Charter --- Meet and Confer

Sensitivity: Normal

I misunderstood you on item 6.

Your proposal to provide a list of Windstream customers so Charter to do the heavy lifting is acceptable. Please provide that list.

Regards,

John

John S. Kingston

jkingston@thompsoncoburn.com

P: 314.552.6464

F: 314.552.7000

M: 314.602.6464

Thompson Coburn LLP

One US Bank Plaza

St. Louis, Missouri 63101

www.thompsoncoburn.com

From: Ross, Terence P. <terence.ross@kattenlaw.com>

Sent: Thursday, August 22, 2019 4:26 PM

To: Kingston, John S. <jkingston@thompsoncoburn.com>

Subject: RE: Windstream v. Charter --- Meet and Confer

John,

With respect to #3, I did not tell you that we need not produce these witnesses. Rather, I confirmed what we told you in our prior letter – that these persons are not subject to deposition by notice under the Federal Rules; they must be subpoenaed. I indicated we were willing to work with you on this, but in light of your desire to rush to court on the damages calculation issue, I told you we might as well take this issue to court as well. We remain willing to work out all discovery issues in such a way that the parties do not need to go to court over any issue.

With respect to #4, I don't think this is what I said. What I told you was that our expert would provide the damages calculation required under Rule 26(a), as is the norm.

With respect to #6, there was no discussion of the three KCC mailings. And, you did not make a proposal to me, rather I proposed to you that I provide you with a list of Windstream customers and you would then do the heavy lifting of comparing it to the list of recipients of the false advertising. If you want me to consider this proposal instead, let me know and I will look into it.

Terry

From: Kingston, John S. <jkingston@thompsoncoburn.com>

Sent: Thursday, August 22, 2019 4:44 PM

To: Ross, Terence P. <terence.ross@kattenlaw.com>

Subject: RE: Windstream v. Charter --- Meet and Confer

EXTERNAL EMAIL – EXERCISE CAUTION

The original corrective mailings sent by Kurtzman Carson Consultants on April 16, 19, and 24.

EXHIBIT D

John S. Kingston

jkingston@thompsoncoburn.com

P: 314.552.6464

F: 314.552.7000

M: 314.602.6464

Thompson Coburn LLP

One US Bank Plaza

St. Louis, Missouri 63101

www.thompsoncoburn.com

From: Ross, Terence P. <terence.ross@kattenlaw.com>
Sent: Thursday, August 22, 2019 3:40 PM
To: Kingston, John S. <jkingston@thompsoncoburn.com>
Subject: RE: Windstream v. Charter --- Meet and Confer

What are the "three KCC mailings" referenced in #6 below?

From: Kingston, John S. <jkingston@thompsoncoburn.com>
Sent: Thursday, August 22, 2019 4:36 PM
To: Ross, Terence P. <terence.ross@kattenlaw.com>
Cc: Przulj, Nino <nprzulj@thompsoncoburn.com>
Subject: Windstream v. Charter --- Meet and Confer

EXTERNAL EMAIL – EXERCISE CAUTION

Terry,

Thanks for talking to me and Nino today. My notes are below. Please let me know if you think I goofed or missed anything.

1. Charter's First Interrogatory: You confirmed that the list of 4,843 customers included all "last mile customers" as defined. You will provide a verified interrogatory confirming this fact. We didn't discuss dates, but I'd appreciate that verified interrogatory response by September 5. Please let me know if that doesn't work.
2. You recently learned that Mr. Langston is no longer employed by Windstream. You will provide an updated FRCP 26(a) disclosure that includes his address and telephone number.
3. Windstream is standing on its position that it need not produce Jerry Wayne Parrish or Shonne Bandy and that Charter must subpoena those witnesses. We reiterated our willingness to work with you on dates and locations for the convenience of the witnesses.
4. Windstream is standing on its position that it need not produce a damage computation under FRCP 26(a) before submitting a damage expert report.
5. In light of Mr. Langston's departure, you would like to reschedule the corporate representative deposition of Windstream for a different date in Little Rock, Arkansas. You will provide available dates when you have them.
6. To resolve the dispute regarding Interrogatory No. 2, Charter proposed that Windstream provide the "spreadsheet" or "spreadsheets" of customers for the three KCC mailings (316,106, 880,610, and 843,847 customers). You will consider that proposal. Please let me know your decision by 8/28.

Thanks again for your time.

Regards,

John

John S. Kingston

jkingston@thompsoncoburn.com

P: 314.552.6464

F: 314.552.7000

M: 314.602.6464

Thompson Coburn LLP

One US Bank Plaza

St. Louis, Missouri 63101

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NOTIFICATION: Katten Muchin Rosenman LLP is an Illinois limited liability partnership that has elected to be governed by the Illinois Uniform Partnership Act (1997).

=====

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2900 K Street NW
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Washington, DC 20007-5118
202.625.3500 tel
www.katten.com

TERENCE P. ROSS
terence.ross@katten.com
202.625.3676 direct
202.298.7570 fax

August 29, 2019

VIA ELECTRONIC MAIL

The Honorable Robert D. Drain
United States Bankruptcy Judge
U.S. Bankruptcy Court
for the Southern District of New York
300 Quarropas Street
White Plains, NY 10601-4140

**Re: Charter's Request for Telephonic Discovery Dispute Conference -
*Windstream Holdings, Inc., et al., v. Charter Communications, Inc. and Charter
Communications Operating, LLC*, Adv. Pro. No. 19-08246**

Dear Judge Drain:

On behalf of Plaintiff Windstream Holdings, Inc. and its affiliated debtors and debtors in possession (collectively, the "Debtors" or "Windstream") in the above-referenced adversary proceeding, we respectfully submit this response to the letter submitted on August 28, 2019 by Defendant Charter Communications, Inc., and its affiliates (collectively, "Charter"), regarding certain discovery issues and Charter's request for a telephonic discovery conference. (*See* Adv. Docket No. 94).

Windstream believes that no such discovery conference is necessary. Windstream's conduct in discovery has strictly adhered to and is in full compliance with the Federal Rules of Civil Procedure, as described in detail below.

FACTUAL BACKGROUND

This is a straight-forward false advertising case. Shortly after Windstream filed its Chapter 11 petition with this Court, Charter launched a marketing campaign to persuade Windstream customers to switch their service to Charter by telling them that Windstream was going out of business and would soon stop providing service. (*See* Adv. Docket No. 1). This campaign included mass mailings, door-to-door solicitation and emails all directed at convincing Windstream customers that Windstream was going out of business. (*Id.*). Of course, the entire Charter marketing campaign was based on a falsehood – that Windstream was going out of business. This Court issued a temporary restraining order to stop Charter's campaign of false advertising and subsequently converted that temporary restraining order into a preliminary injunction. (Adv. Docket Nos. 25 and 61). During the hearings on this interim relief, the Court made it crystal clear to Charter that it should resolve this dispute rather than continue the litigation.

Katten

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Charter, however, has refused to take that sage advice and instead has engaged in a “scorched-earth” discovery campaign. Thus, Charter has propounded to Windstream three requests for document production totaling 210 separate requests. Charter has also propounded to Windstream three sets of admissions totaling 92 separate requests for admission. And, Charter has propounded to Windstream five sets of interrogatories totaling 13 separate interrogatories, each containing multiple parts and subparts.

This specific dispute arises out of this “scorched-earth” discovery campaign Charter has undertaken. Charter has noticed for deposition two Windstream employees – Shonne Bandy and Jerry Wayne Parrish. Both are fact witnesses with limited involvement in the lawsuit. Ms. Bandy was the Windstream employee who received reports of Charter disconnecting Windstream customers. Mr. Parrish was a Windstream employee who received a solicitation from a Charter employee to switch service because Windstream was going out of business. Windstream has not told Charter that these employees cannot be deposed. Windstream has simply insisted that they be deposed through the proper procedural mechanism – a subpoena issued pursuant to Rule 45. This is necessary so that any testimony is not binding against Windstream as it would be if they are deposed pursuant to mere notice under Rule 30(b)(6), as discussed in detail below.

The second specific dispute relates to Windstream’s Rule 26(a) Initial Disclosures. Charter asserts that Windstream has failed to provide a damages calculation. In fact, in its Rule 26(a) Initial Disclosures, Windstream did address damages stating:

“At this time, due to the need for discovery relating to Charter’s profits and the continuing investigation regarding Windstream’s lost profits and the potential need for expert discovery on the topic, Windstream is unable to estimate the range of provable damages.”

Charter asserts that “Windstream should have provided its damages calculation in its Initial Disclosures and, if not then available, it should have supplemented in a timely manner.” (Adv. Docket No. 94). And yet, this is precisely what Windstream has advised Charter it will do. Windstream has retained a damages expert who will provide a report setting out Windstream’s damages. At that time, Windstream will amend its Rule 26(a) Initial Disclosures to adopt that report as to its damages calculations. Indeed, Charter does not dispute Windstream’s right to proceed in this manner. (*Id.*) (“Windstream can obviously supplement and update its damage computation with an expert opinion.”). Apparently, however, Charter wants Windstream to make up a damages calculation that it does not currently have and then amend it with an expert report. As discussed in detail below, Rule 26(a) does not require such an action by Windstream.

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ARGUMENT

A. Ms. Bandy And Mr. Parrish Can Only Be Deposed By Subpoena Pursuant To Rule 45.

As the Southern District of New York has repeatedly made clear, “only a party to litigation may be compelled to give testimony pursuant to a notice of deposition.” *United States v. Afram Lines (USA), Ltd.*, 159 F.R.D. 408, 413 (S.D.N.Y. 1994). When a party to a lawsuit is a corporation, as here, it may be noticed for deposition pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, in which case it must designate “one or more officers, directors, or managing agents” to be deposed. Fed. R. Civ. P. 30(b)(6). “The testimony of such [an officer, director or managing agent] will be binding on the [corporate] party.” *Afram Lines*, 159 F.R.D. at 413. “However, a corporate employee or agent who does not qualify as an officer, director, or managing agent is not subject to deposition by notice.” *Id.* “Such an employee is treated as any other non-party witness, and must be subpoenaed pursuant to Rule 45 of the Federal Rules of Civil Procedure” *Schindler Elevator Corp. v. Otis Elevator Co.*, No. 1:06-cv-05377 (CM)(THK), 2007 WL 1771509, at *2 (S.D.N.Y. June 18, 2007).

The distinction drawn by this case law on whether a corporate employee can be noticed for deposition or must be served with a subpoena is not trivial. The testimony of an employee that is produced for deposition by a corporate party pursuant to a notice of deposition is binding on the corporate party. *Afram Lines*, 159 F.R.D. at 413. The testimony of an employee that is obtained by a subpoena is not binding on the corporate party. *Id.* Thus, the manner in which Charter obtains deposition testimony here is significant and the Federal Rules of Civil Procedure should be strictly followed in that regard.

The two Windstream employees at issue here – Shonne Bandy and Jerry Wayne Parrish – are not “officers, directors or managing agents” of Windstream. Indeed, Charter does not even attempt to argue that either are “officers” or “directors” of Windstream. Rather, Charter argues that “low-level employees may qualify as managing agents” and then ambiguously asserts that Ms. Bandy – but not Mr. Parrish – is somehow “linked . . . with the events giving rise to this lawsuit.” This assertion is insufficient to meet Charter’s burden to establish the status of an employee as a “managing agent.” *Afram Lines*, 159 F.R.D. at 413.¹ In fact, Ms. Bandy is a “Trouble Resolution Specialist II” – one of many employed by Windstream. (Adv. Docket No. 51). Her duties involve responding to customer service and repair issues. (*Id.*). The only reason she is listed on Windstream’s Rule 26(a) Initial Disclosures is that she is the employee who received several

¹ Charter provides no facts or argument as to why Mr. Parrish should be considered a “managing agent.”

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customer calls regarding Charter's May 2nd through May 8th disconnect of Windstream customers. (*Id.*). Her position and duties at Windstream are not such that she can speak on behalf of and bind Windstream on matters at issue in this lawsuit. Rather, she is a classic fact witness subject to deposition only by subpoena.

Moreover, Windstream has already agreed to produce a corporate representative to testify on behalf of Windstream on the exact topics on which Charter seeks to depose Ms. Bandy and Mr. Parrish. Windstream has agreed to produce, pursuant to notice under Rule 30(b)(6), Mr. Jeffrey Auman who is Windstream's Executive Vice President, Sales and Marketing. In this position, Mr. Auman functions as both the chief marketing officer and chief sales officer for Windstream and does qualify as a "managing agent" of Windstream whose testimony can bind Windstream in this litigation. Mr. Auman's deposition should be more than sufficient for Charter's purposes in this lawsuit. However, to the extent Charter believes it must also depose Ms. Bandy and Mr. Parrish, it is free to do so pursuant to subpoena under Rule 45. And, to facilitate this process, Windstream earlier today served upon Charter an Amended Rule 26(a) Initial Disclosures setting out addresses for Ms. Bandy and Mr. Parrish.

B. Rule 26(a) Does Not Require Windstream To Provide A Damages Calculation It Does Not Have.

Rule 26(a) only requires Windstream to disclose information "then reasonably available to it." Fed. R. Civ. P. 26(a)(1)(E). There is no requirement to make up a damages calculation that it does not actually have. The Southern District of New York has approved of Windstream's approach to disclosure of damages information. It has held: "where . . . the plaintiff's damages are not the product of a simple mathematical calculation and require expert testimony, the damages calculations need not be produced as part of the party's Rule 26(a)(1) disclosures and may be produced as part of the party's Rule 26(a)(2) [expert testimony] disclosures." *Kingsway Fin. Servs., Inc. v. PriceWaterhouseCoopers LLP*, 2006 WL 1520227, at *1 (S.D.N.Y. June 1, 2006). See also 6 J. Moore, *Moore's Federal Practice* § 26.22[4][c][ii], at 26-90 – 26-91 (3d ed 2018) (when damages calculations are "appropriately the subject of expert evidence," a plaintiff's damages disclosure obligation "would be controlled by the expert disclosure rules."). In light of this treatment of damage disclosure obligations, Charter's demand for an immediate damages calculation is misplaced and should be rejected.

Katten

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CONCLUSION

In light of the above, Windstream respectfully requests that the Court deny Charter's request for a telephonic conference, or, in the alternative, deny Charter's demands to: (1) take deposition testimony of Jerry Wayne Parrish and Shonne Bandy by mere notice, and (2) provide it with an immediate computation of damages.

Respectfully submitted,



Terence P. Ross
Conflicts Counsel to the
Debtors and Debtors in Possession

EXHIBIT A

Terence P. Ross
Tami Kameda Sims (*admitted pro hac vice*)
Shaya Rochester
KATTEN MUCHIN ROSENMAN LLP
575 Madison Avenue
New York, NY 10022
Telephone: (212) 940-8800
Facsimile: (212) 940-8776

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
)	
vs.)	
)	
CHARTER COMMUNICATIONS, INC. and)	
CHARTER COMMUNICATIONS OPERATING, LLC,)	
)	
Defendants.)	
)	

**DECLARATION OF SHONNE BANDY IN SUPPORT OF DEBTORS' REPLY IN
SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND OTHER
EQUITABLE RELIEF AGAINST CHARTER COMMUNICATIONS, INC. AND
CHARTER COMMUNICATIONS OPERATING, LLC**

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 the Debtors have requested joint administration, 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' proposed 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.



I, Shonne Bandy, declare as follows:

1. I currently hold the position of Trouble Resolution Specialist II with Windstream Holdings, Inc. (“Windstream”). My duties include managing customer inquiries on service and repair related issues, managing trouble tickets in Windstream’s ticketing system and following up with internal and external teams until such tickets are resolved.

2. I submit this declaration in support of the Debtors’ Reply In Support Of Motion for a Preliminary Injunction, and Other Equitable Relief against Charter Communications, Inc. and Charter Communications Operating, LLC (collectively, “Charter”). By virtue of my position as Trouble Resolution Specialist II, I am generally familiar with [REDACTED]

[REDACTED]

[REDACTED].

3. Except as otherwise indicated, all facts set forth in this declaration are based upon my personal knowledge, my discussions with other members of Windstream’s management team and advisors, my review of relevant documents and information concerning Windstream’s operations, financial affairs, and restructuring initiatives, or my opinions based upon my experience and knowledge. If called as a witness, I could and would testify competently to the facts set forth in this declaration. I am authorized to submit this declaration on behalf of the Debtors.

4. From May 2, 2019 through May 8, 2019, Charter disconnected and shut down a cable broadband circuit that provides services to a [REDACTED] store located in San Antonio, Texas [REDACTED]. The [REDACTED] uses this circuit to process credit card transactions and for voice-related services.

5. [REDACTED] is one of Windstream’s largest customers.

6. On May 2, 2019, following the disconnection of service, Windstream immediately contacted Charter to determine why it had disconnected the [REDACTED] services. In response, a Charter representative stated that the circuit was down due to “a soft disconnect for non-payment.”

7. This disconnection significantly disrupted operations. It prevented the [REDACTED] from using their phones or processing credit card transactions. In addition, the [REDACTED] could not use their wireless tablets, which allows it to assist customers by checking them out without needing to go to a point of sale register. The [REDACTED] was forced to revert to a wireless backup system in order to continue its business. The issue was not corrected by Charter until May 6, 2019 and only after Windstream reached out to a representative of the Spectrum National Division. And a result of this delay this delay, the [REDACTED] was not able to get its equipment working until the morning of May 7, 2019.

8. After being assured that service would be restored, Charter again disconnected the same cable broadband circuit to the [REDACTED] later in the morning of May 7, 2019. In the meantime, the backup LTE device for the [REDACTED] also went down. Windstream contacted Charter later that morning and was told that the service had been suspended due to non-payment. Subsequently, I was advised by Windstream personnel that the non-payment was on account of certain prepetition debt allegedly owed by Windstream stemming from a service charge for a technician visit on February 23, 2019. Service was then restored later in the day on May 7, 2019.

9. On May 8, 2019, Charter disconnected and shut down the same cable broadband circuit to the [REDACTED] for a third time. When Windstream inquired again about this disconnection, a Charter representative advised that the “account [was] coded incorrectly,” and that it was apparently still coded for suspension due to non-payment. The Charter representative stated that she had reconnected the circuit. However, service was not restored to the [REDACTED]

until two minutes before store closing on May 8, 2019. Charter, however, has not provided confirmation that the [REDACTED] will not be disconnected again. Attached hereto as **Exhibit A** is a true and correct copy of my notes documenting the disconnections on May 7, 2019 and May 8, 2019. Attached hereto as **Exhibit B** is a true and correct copy of the Windstream trouble ticket summaries relating to the disconnections that occurred on May 2, 2019 through May 8, 2019.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on May 10, 2019

/s/ Shonne Bandy
Shonne Bandy

EXHIBIT A

[REDACTED]

From: Kinney, Diane <[REDACTED]>
Sent: Wednesday, May 8, 2019 11:34 AM
To: Manzano, Stacey R
Subject: FW: notes from [REDACTED] Spectrum disconnect 3 times in error

--

Diane Kinney
Manager – Repair

[REDACTED] office
[REDACTED]

WINDSTREAM ENTERPRISE

3000 Columbia House Blvd. #106
Vancouver, WA 98661
windstreamenterprise.com

From: Bandy, Shonne K
Sent: Wednesday, May 8, 2019 11:20 AM
To: Kinney, Diane <[REDACTED]>
Subject: notes from [REDACTED] Spectrum disconnect 3 times in error

from 5/7

Account: [REDACTED]

Spectrum: [REDACTED]
[REDACTED]

SW: Jen

She told me the service is suspended due to non-payment

Explained this should be resolved, we just got this restored today for the same issue

She found the account was coded incorrectly, and removed the disconnect for non-payment

She advised there is still a balance on the local account which she applied the credit.

She said the credit should go through before the system tried to disconnect it.

Once the credit goes through the issue should be resolved.

5/8 spoke with Willette; she said reseller accounts need to be addressed to different phone number and contact; notations on case from 4/16 showing she may be able to resolve without transferring me; she is reaching out to credit services department to put in the credits to cover; she has reconnected line-continued conversation with Willette at Spectrum; yesterday an escalation was put into their credit department, but system keeps putting in nonpayer code; she coded an extended credit code to give the escalation team time to credit the account 5-7 days, by 14th is when the credits should go

through and extension covers the days up to the 17th; she recommends calling again on the 16th to ensure the credits have posted by then; she coded this as critical; filing info was put on the account on March 19th and should have therefore auto credited the account but was missed; call this same contact number, and reference escalation number [REDACTED]

Cheers!

Shonne K. Bandy, MN CM GWCWC

Trouble Resolution Spec II - ES Care and Repair

Office: [REDACTED]

Public Callback: [REDACTED]

WINDSTREAM ENTERPRISE

3000 Columbia House Blvd. 106
Vancouver, Wa 98661
windstreamenterprise.com

EXHIBIT B

PUBLIC	5/2/19	10:18:23 am	auto	NETCOOL	Automated Update: Alert is currently in a DOWN condition in Fault Management System
PUBLIC		10:18:54 am		REMEDY	Alarm: down - CPE Down - [REDACTED]
PRIVATE		10:18:54 am		REMEDY	A SFDC Task Not Created. A Base Rep was not found.
PRIVATE		10:52:29 am	WS	CHETAN BHATIA	OSS: WAVE Account ID: [REDACTED] Install Order: [REDACTED] Status: In Service Circuit LATA: [REDACTED] CLLI: [REDACTED] ILEC: Time Warner Cable ILEC Circuit: [REDACTED] Circuit ID: [REDACTED] Transport: Cable Monitored IP: [REDACTED] Migration Status: Future Migration
PUBLIC	5/2/19	10:53:39 am	WS	CHETAN BHATIA	CURRENTLY: > Unable to reach Management IP. > Transport: Cable > Please perform layer 1 troubleshooting and update this trouble ticket > Need to verify power at the location and check cables NEXT STEP: > Awaiting power verification and layer 1 troubleshooting PROBLEM: > Customer equipment is down. PREVIOUS TROUBLESHOOTING: > Netcool reporting customer equipment down Please contact Windstream with any questions or concerns. https://mylink.earthlink.com/account/register [REDACTED]
	5/2/19	10:53:39 am	WS	CHETAN BHATIA	Enter "<ctrl> + C" to stop ping of [REDACTED]... PING [REDACTED] ([REDACTED]) 56(84) bytes of data. From [REDACTED] icmp_seq=1 Destination Net Unreachable From [REDACTED] icmp_seq=2 Destination Net Unreachable From [REDACTED] icmp_seq=3 Destination Net Unreachable ^C --- [REDACTED] ping statistics --- 3 packets transmitted, 0 received, +3 errors, 100% packet loss, time 2002ms From: Devin Arvin Sent: Thursday, May 2, 2019 1:51 PM To: [REDACTED] Subject: DOWN COMMUNICATIONS STORE [REDACTED] INSTRUCTIONS FOR USING THIS TEPMPLATE: OF THE YELLOW HIGHLIGHTED CHOICES, YOU ARE TO DELETE THE INCORRECT ANSWER. ONLY THE VALID YELLOW RESPONSE SHOULD REMAIN. Are there and situations regarding this outage that the supervisor should be sware of; such as: Phone line issues, power outage, etc? Cirucit type: MPLS IPsec Cable 1 Store Type: CORP 2 Does the store have VOIP?:
PUBLIC	5/2/19	10:55:08 am	[REDACTED] pc	DEVIN ARVIN	

NO- provide an alternate contact phone number :

Ensure that the CPE is plugged into the battery side

3 of a working APC:

4 Power cycle the modem

Power Light ON

US/DS ON

Internet RED

Power cycle the router. Wait approximately 5 minutes. Report the light status of the following

5 lights:

OK Light is the light ON

FE4 WAN is the light ON.

VPN light is the light OFF

6 The registers will plug into either LAN 0, 1, 2, 3

I had to open a HOT NEN trouble ticket as one did

7 not automatically generate: YES

Refer to Guidelines for Down NEN Communications

Stores document for further instructions on how to

8 handle a store that has no communications.

Devin Arvin | IT Service Desk Analyst

| Pittsburgh, PA 15222

PUBLIC 5/2/19 12:14:12 pm WS SHONNE BANDY

CURRENTLY:

- [REDACTED] is providing light status of both modem and router after power cycle, Inet red,WAN red
- filed LEC ticket, they said disconnect is soft due to account status
- referred to WS lead/manager for resolution

NEXT STEPS:

- pending escalation updates

PREVIOUS:

5/2 -netcool alarmed cpe down

> Awaiting power verification and layer 1 troubleshooting

PRIVAT 5/2/19 12:14:12 pm WS SHONNE BANDY

called [REDACTED] spk with Spectrum rep spk with Ben; he states it is configured with modem and

they have not paid the bill, in soft disconnect
Hello, [REDACTED],

I have another one that is down due to financial reasons: [REDACTED]

called Time Warner cable [REDACTED] Spectrum spoke with [REDACTED]; he states the down circuit is configured with modem and router separately; gave him light status; he said the circuit is in SOFT DISCONNECT due to nonpayment. Line will not be reconnected until bill is paid.

Cheers!

Shonne K. Bandy, MNCM GWCWC

Trouble Resolution Spec II - ES Care and Repair

Office:

PRIVAT 5/2/19 1:13:01 pm WS LEABRIAN DUKES

PUBLIC 5/3/19 9:00:24 am WS RYAN CARPENTER

TT# [https://\[REDACTED\].windstream.com/browse/CCDP-](https://[REDACTED].windstream.com/browse/CCDP-)

5/3

- Moving ticket out pending update on [REDACTED] ticket

PUBLIC	5/4/19	12:27:51 pm		ASHLEY BAKOUBOUL	Can we please have an update on this ticket? Are there and situations regarding this outage that the supervisor should be sware of; such as: Phone line issues, power outage, etc? Circuit type: MPLS IPsec Cable 1. 2. 3. 4. Power Light ON; light is GREEN US/DS: ON ; light is GREEN Internet: On ; light is RED 5. OK Light; ON is the light GREEN FE4 WAN ; ON is the light GREEN VPN light is the light OFF 6. 7. I had to open a HOT NEN trouble ticket as one did not automatically generate: YES 8.	Store Type: CORP Does the store have VOIP?: NO- Store phone line is working. Ensure that the CPE is plugged into the battery side of a working APC: YES Power cycle the modem Power cycle the router. Wait approximately 5 minutes. Report the light status of the following lights: The registers will plug into either LAN 0, 1, 2, 3 Refer to Guidelines for Down NEN Communications Stores document for further instructions on how to handle a store that has no communications.
PUBLIC	5/4/19	12:34:31 pm		ASHLEY BAKOUBOUL		
PUBLIC	5/4/19	4:17:42 pm	WS	RYAN FAHEY	CURRENTLY: -5/4 - ticket is still pending an update - We will need to review on Monday when the team is in the office NEXT ACTION: - Pending ticket update PREVIOUSLY: 5/3 - Moving ticket out pending update on ticket CURRENTLY:-5/6 - ticket has been closed stating that the bill is paid. - Contacted internal billing contact to look into this soft disco issue. NEXT ACTION: - Pending response from billing PREVIOUSLY: 5/3 - Moving ticket out pending update on ticket -5/4 - ticket is still pending an update - We will need to review on Monday when the team is in the office	
PUBLIC	5/6/19	11:17:13 am	WS	BRIAN DUKES	Email to Billing Contact From: Dukes, Brian L Sent: Monday, May 6, 2019 10:26 AM To: Subject: OMS# , Case# , ACC# Hello ,	
PRIVAT	5/6/19	11:17:13 am	WS	BRIAN DUKES		

I found an old email where you helped figure out a non-payment issue from Spectrum/TimeWarner and I am wondering if you can point me in the right direction or take a look to get this issue resolved.

This circuit went down on 5/2 and when we call into Spectrum they are stating that the circuit is down due to a soft disconnect for non-payment. I have told them that the payment is most likely in error since this is a big account and all of their sites would be down if we didn't make a payment.

Spectrum/Tim Warner account# [REDACTED]

Thank You

--

Brian Dukes
Lead – Repair

[REDACTED]
[REDACTED]

[REDACTED]

Vancouver, WA 98661
windstreamenterprise.com

CURRENTLY: 5/6
- Billing worked with the LEC and got the billing issue taken care of
- I am now able to ping the cable modem but not usable IP
- [REDACTED] please have the customer check cables and powercycle the Cisco.

NEXT ACTION:
- Pending update from customer

PREVIOUSLY:
5/3
- Moving ticket out pending update on [REDACTED] ticket
5/4
- [REDACTED] ticket is still pending an update
- We will need to review on Monday when the team is in the office
5/6
- [REDACTED] ticket has been closed stating that the [REDACTED] bill is paid.
- Contacted internal billing contact to look into this soft disco issue.

From: Bradford, Michelle
Sent: Monday, May 6, 2019 12:23 PM
To: Miller, James D
<[REDACTED]>
Cc: Roughton, Karla
<[REDACTED]>; Dukes, Brian L
<[REDACTED]>
Subject: RE: OMS# [REDACTED], Case# [REDACTED] ACC# [REDACTED]
[REDACTED], [REDACTED] - [REDACTED]

Hello All,
I just spoke to Trey with the Spectrum/Time Warner National Division ([REDACTED]) and he recognized the issue immediately.

PUBLIC 5/6/19 1:53:35 pm WS BRIAN DUKES

PRIVAT 5/6/19 1:53:35 pm WS BRIAN DUKES

He was going to correct the issue with the past due balance of \$172.39, due to it not being done correctly.
Trey said the customer should be back up and running in about 15 minutes.

ACCT# [REDACTED]
[REDACTED]
[REDACTED]
San Antonio, TX 78224

If you need anything else just let me know.
Thank you,
Michelle

Michelle Bradford

Analyst I – Access Cost Management | Windstream
[REDACTED] |
windstreambusiness.com
[REDACTED]

From: Miller, James D
Sent: Monday, May 6, 2019 1:21 PM
To: Bradford, Michelle
<[REDACTED]>
Cc: Roughton, Karla
<[REDACTED]>; Dukes, Brian L
<[REDACTED]>
Subject: RE: OMS# [REDACTED], Case# [REDACTED], ACC# [REDACTED], [REDACTED], [REDACTED]

Always helps if I include the recipient...

Hey Michelle,

Can you please look into this ASAP for us??

Jimmy Miller
Staff Manager – Access Cost Management
[REDACTED] |
windstreambusiness.com
[REDACTED]

From: Miller, James D
Sent: Monday, May 6, 2019 2:21 PM
To: Roughton, Karla
<[REDACTED]>; Dukes, Brian L
<[REDACTED]>
Subject: RE: OMS# [REDACTED], Case# [REDACTED], ACC# [REDACTED], [REDACTED], [REDACTED]

Hey Michelle,

Can you please look into this ASAP for us??

Jimmy Miller
Staff Manager – Access Cost Management
[REDACTED] |
windstreambusiness.com
[REDACTED]

From: Roughton, Karla
Sent: Monday, May 6, 2019 2:18 PM
To: Dukes, Brian L <[REDACTED]>

19-08246-rrd Doc 207-5 Filed 04/22/20 Entered 04/22/20 18:39:09 Exhibit 5 19-08246-rrd Doc 207-5 Filed 04/22/20 Entered 04/22/20 18:39:09 Exhibit 5 Pg. 22 of 42					5/7 - SW Cindy from store - She is trying to reach Ryan and requesting call back - Call back cell at 2 [REDACTED] Next step: - Pending tech review SYMPTOM: - Intermittent PREVIOUS TROUBLESHOOTING: - Automated Update: Alert is currently in an UP condition in Fault Management System CURRENTLY: 5/7 - Called store and had them power cycle the Cisco router, service restored - We are monitoring the service with the LEC to make sure the issue is resolved NEXT ACTION: - Monitoring 2 days PREVIOUSLY: 5/3 - Moving ticket out pending update on [REDACTED] ticket 5/4 - [REDACTED] ticket is still pending an update - We will need to review on Monday when the team is in the office 5/6 - [REDACTED] ticket has been closed stating that the [REDACTED] bill is paid. - Contacted internal billing contact to look into this soft disco issue. - Billing worked with the LEC and got the billing issue taken care of - I am now able to ping the cable modem but not usable IP - [REDACTED] please have the customer check cables and powercycle the Cisco. 5/7 - Called store and had MOD reconnect the Cisco [REDACTED], service restored - Store has 2 TEMP LTE routers on site, advised store they can return those - They also have an Adtran 1531 but no other LAN devices - Had store remove Adtran switch - [REDACTED] please review, we see this cleared 5/7 - Called LEC again and found there was still an issue with the records. - Tech made another correction and we can now reach the LEC modem, but not the CPE - Called store, line is busy - [REDACTED] please have store power cycle the Cisco [REDACTED] once more
PUBLIC	5/7/19	11:47:17 am	AUTO	NETCOOL	
PUBLIC	5/7/19	12:27:29 pm	WS	RYAN FAHEY	
PRIVAT	5/7/19	12:27:29 pm	WS	RYAN FAHEY	Montoring Automated Update: Alert is currently in a DOWN condition in Fault Management System
PUBLIC	5/8/19	8:48:08 am	AUTO	NETCOOL	
PUBLIC	5/8/19	10:13:53 am		JONATHAN FISCHER	WS, SW Cindy at the store. Store is back down. We powercycled the router and modem. Please review and store is still down.

Przulj, Nino

From: Rochester, Shaya <shaya.rochester@katten.com>
Sent: Wednesday, September 4, 2019 2:47 PM
To: Kingston, John S.; Robert Drain; NYSBml_Drain's_Chambers
Cc: Ross, Terence P.; Justus, Michael R.
Subject: RE: In re Windstream Holdings, Inc., et al, Case No. 19-22312; Adversary Proceeding No. 19-08246

Judge Drain,

This email confirms that Windstream concurs that a teleconference is not necessary unless the Court directs otherwise.

Thank you for your assistance with this matter.

Respectfully submitted,
Shaya Rochester
Conflicts Counsel for the Debtors

Shaya Rochester

Partner

Katten

Katten Muchin Rosenman LLP
575 Madison Avenue | New York, NY 10022-2585
direct +1.212.940.8529
shaya.rochester@katten.com | katten.com

From: Kingston, John S. <jkingston@thompsoncoburn.com>
Sent: Tuesday, September 3, 2019 5:18 PM
To: Rochester, Shaya <shaya.rochester@katten.com>; Robert Drain <judge_drain@nysb.uscourts.gov>; NYSBml_Drain's_Chambers <rdd.chambers@nysb.uscourts.gov>
Cc: Ross, Terence P. <terence.ross@katten.com>; Justus, Michael R. <michael.justus@katten.com>
Subject: RE: In re Windstream Holdings, Inc., et al, Case No. 19-22312; Adversary Proceeding No. 19-08246

EXTERNAL EMAIL – EXERCISE CAUTION

Judge Drain,

If I correctly understand the letter submitted Debtor's counsel to confirm that Debtors are not seeking damages in this Adversary Proceeding other than those to be described in an expert witness report, then I agree that there is no need for a teleconference.

Thank you for your time.

Best regards,

John

John S. Kingston

jkingston@thompsoncoburn.com

P: 314.552.6464
F: 314.552.7000
M: 314.602.6464

Thompson Coburn LLP
One US Bank Plaza
St. Louis, Missouri 63101
www.thompsoncoburn.com

From: Rochester, Shaya <shaya.rochester@katten.com>
Sent: Tuesday, September 3, 2019 3:11 PM
To: Robert Drain <judge_drain@nysb.uscourts.gov>; NYSBml_Drain's_Chamb
<rdd.chambers@nysb.uscourts.gov>
Cc: Ross, Terence P. <terence.ross@katten.com>; Justus, Michael R. <michael.justus@katten.com>; Kingston, John S. <jkingston@thompsoncoburn.com>
Subject: RE: In re Windstream Holdings, Inc., et al, Case No. 19-22312; Adversary Proceeding No. 19-08246

Judge Drain,

Thank you for the email and your assistance with this matter. Katten is authorized to accept service of a proper subpoena issued pursuant to Rule 45 to Shonne Bandy and Jerry Wayne Parrish.

With this agreement by Windstream, we respectfully submit that a Telephonic Discovery Dispute Conference is not necessary.

If you have any further questions or instructions regarding the foregoing, please let us know. Thank you.

Respectfully submitted,
Shaya Rochester
Conflicts Counsel for the Debtors

Shaya Rochester
Partner

Katten
Katten Muchin Rosenman LLP
575 Madison Avenue | New York, NY 10022-2585
direct +1.212.940.8529
shaya.rochester@katten.com | katten.com

From: Robert Drain <judge_drain@nysb.uscourts.gov>
Sent: Tuesday, September 3, 2019 8:57 AM
To: Rochester, Shaya <shaya.rochester@katten.com>; NYSBml_Drain's_Chamb
<rdd.chambers@nysb.uscourts.gov>
Cc: Ross, Terence P. <terence.ross@katten.com>; Justus, Michael R. <michael.justus@katten.com>; jkingston_thompsoncoburn.com <jkingston@thompsoncoburn.com>
Subject: Re: In re Windstream Holdings, Inc., et al, Case No. 19-22312; Adversary Proceeding No. 19-08246

EXTERNAL EMAIL – EXERCISE CAUTION

Is Katten representing the two employees? If so, and it agrees to accept Rule 45 service on them, I see no need for a conference.

From: Rochester, Shaya <shaya.rochester@katten.com>
Sent: Thursday, August 29, 2019 4:15:51 PM
To: NYSBml_Drain's_Chambers <rdd.chambers@nysb.uscourts.gov>

Cc: Ross, Terence P. <terence.ross@katten.com>; Justus, Michael R. <michael.justus@katten.com>;
jkingston_thompsoncoburn.com <jkingston@thompsoncoburn.com>

Subject: In re Windstream Holdings, Inc., et al, Case No. 19-22312; Adversary Proceeding No. 19-08246

Dear Ms. Li,

Attached is the Debtors' response letter to *Charter's Request for Telephonic Discovery Dispute Conference* [Adv. Docket No. 94] filed in the above-referenced adversary proceeding.

In accordance with Judge Drain's Chambers Rules, the Debtors filed the response letter on the ECF system [Adv. Docket No. 95] and have attached a copy to this email.

If you have any questions, please let us know. Thank you for your assistance with this matter.

Respectfully submitted,
Shaya Rochester
Conflicts Counsel for the Debtors

Shaya Rochester

Partner

Katten

Katten Muchin Rosenman LLP
575 Madison Avenue | New York, NY 10022-2585
direct +1.212.940.8529
shaya.rochester@katten.com | katten.com

=====
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=====
NOTIFICATION: Katten Muchin Rosenman LLP is an Illinois limited liability partnership that has elected to be governed by the Illinois Uniform Partnership Act (1997).
=====

Terence P. Ross
Michael R. Justus (*pro hac vice pending*)
Shaya Rochester
KATTEN MUCHIN ROSENMAN LLP
575 Madison Avenue
New York, NY 10022
Telephone: (212) 940-8529
Facsimile: (212) 940-8776

Conflicts Counsel to the Debtors and Debtors in Possession

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE 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
)	
vs.)	
)	
CHARTER COMMUNICATIONS, INC. and)	
CHARTER COMMUNICATIONS OPERATING, LLC,)	
)	
Defendants.)	
)	

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 the Debtors have requested joint administration, 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' proposed claims and noticing agent at <http://www.kcellc.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.

**WINDSTREAM HOLDINGS, INC.'S OBJECTIONS AND RESPONSES TO
DEFENDANTS' AMENDED NOTICE OF VIDEO DEPOSITION PURSUANT TO RULE
30(b)(6)**

Pursuant to Rules 26 and 30 of the Federal Rules of Civil Procedure, the Local Rules of this District, and any other applicable rules (collectively, the “Applicable Rules”), Windstream Holdings, Inc. and its affiliated debtors (collectively, “Windstream”), by and through its undersigned counsel, hereby object to Defendants Charter Communications, Inc. and Charter Communications Operating, LLC’s (collectively, “Charter”) Amended Notice of Video Deposition pursuant to Fed. R. Civ. P. 30(b)(6) of Windstream as follows.

GENERAL OBJECTIONS

Windstream makes the following General Objections (“General Objections”) to each Topic propounded in Charter’s Amended Notice of Video Deposition Pursuant to Rule 30(b)(6) (the “Amended Notice”). These General Objections are hereby incorporated into each specific response. The assertion of the same, similar or additional objections or partial responses to individual Topics does not waive any of Windstream’s General Objections.

1. Windstream objects to the location of the deposition.
2. Windstream objects to the date and time of the deposition.
3. Windstream objects to each Topic to the extent it is vague, ambiguous, overbroad, or unduly burdensome, or purports to impose on Windstream any duty or obligation that is inconsistent with or in excess of those obligations that are imposed by the Applicable Rules.
4. Windstream objects to each Topic to the extent that it seeks information that is protected from disclosure by the attorney-client privilege, the attorney work product doctrine or any other applicable privilege, doctrine or discovery immunity.

5. Windstream objects to each Topic to the extent it seeks information that is not related to the parties' claims and defenses, is not proportional to the needs of the case, and/or the burden or expense outweighs the likely benefit.

6. Windstream objects to each Topic to the extent it does not contain any temporal limitations or seeks information for periods of time that are arbitrary and/or irrelevant to the parties' claims and defenses.

7. Windstream objects to each Topic to the extent it seeks information that is not known or reasonably available to Windstream; already known to Charter; and/or is publicly available.

8. Windstream objects to each Topic to the extent that it seeks information that is unreasonably cumulative or duplicative, or is obtainable through document requests, interrogatories, or another source that is more convenient, less burdensome or less expensive than a deposition.

SPECIFIC OBJECTIONS AND RESPONSES

Subject to the foregoing General Objections, Windstream objects and responds to the Amended Notice as follows.

TOPIC NO. 1:

Windstream's responses to Charter's discovery requests in this adversary proceeding.

RESPONSE TO TOPIC NO. 1:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Subject to and without waiver of the General Objections, Windstream will produce a witness to testify on Windstream's responses to Charter's unobjectionable discovery requests in this adversary proceeding.

TOPIC NO. 2:

All communications with Physicians Weight Loss in Newark, Ohio from May 1, 2019 through the present.

RESPONSE TO TOPIC NO. 2:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to this Topic as vague, lacking reasonable particularity, overly broad, seeking irrelevant information, and unduly burdensome to the extent it seeks *all* communications with Physician Weight Loss from May 1, 2019 through the present. Windstream further objects to this Topic to the extent it seeks discovery of information that is protected from disclosure by the attorney-client privilege, the work product doctrine, the common interest doctrine, or other applicable privilege.

Subject to and without waiver of the previously asserted objections, Windstream will produce a witness to testify on relevant, non-privileged communications with Physicians Weight Loss in Newark, Ohio from May 1, 2019.

TOPIC NO. 3:

All communications with Judy Spencer in Newark, Ohio from May 1, 2019 through the present.

RESPONSE TO TOPIC NO. 3:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to this Topic as vague, lacking reasonable particularity, overly broad, seeking irrelevant information, and unduly burdensome to the extent it seeks *all* communications with Judy Spencer from May 1, 2019 through the present. Windstream further objects to this Topic to the extent it seeks discovery of information that is protected from disclosure by the attorney-client privilege, the work product doctrine, the common interest doctrine, or other applicable privilege.

Subject to and without waiver of the previously asserted objections, Windstream will produce a witness to testify on relevant, non-privileged communications with Judy Spencer in Newark, Ohio from May 1, 2019.

TOPIC NO. 4:

The interruption or disconnection of service to Windstream customers since January 1, 2019.

RESPONSE TO TOPIC NO. 4:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to this Topic as overly broad, seeking irrelevant information, and unduly burdensome to the extent it seeks information prior to February 25, 2019. Windstream further objects to this Topic to the extent it seeks discovery of information that is protected from disclosure by the attorney-client privilege, the work product doctrine, the common interest doctrine, or other applicable privilege. Windstream further objects to this Topic as vague and ambiguous and as lacking specificity sufficient to identify a witness because “interruption or disconnection of service” is undefined and it is unclear whether Charter seeks

testimony as to only those alleged violations by Charter or by others, if any, the latter of which are irrelevant to the claims and defenses in this proceeding. Windstream further objects to this Topic to the extent that it is cumulative and duplicative of Topic No. 7.

Subject to and without waiver of the previously asserted objections, Windstream will produce a witness to testify on the interruption or disconnection of service to Windstream customers by Charter since February 25, 2019.

TOPIC NO. 5:

Windstream customers that have expressed concern regarding Windstream's bankruptcy.

RESPONSE TO TOPIC NO. 5:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to the phrase "expressed concern regarding Windstream's bankruptcy" as vague and ambiguous. Windstream further objects to this Topic to the extent it seeks discovery of information that is protected from disclosure by the attorney-client privilege, the work product doctrine, the common interest doctrine, or other applicable privilege.

Subject to and without waiver of the previously asserted objections, Windstream will produce a witness to testify on those Windstream customers that it knows have expressed concern regarding Windstream's Chapter 11 bankruptcy filing.

TOPIC NO. 6:

Windstream customers that have terminated service since January 1, 2019.

RESPONSE TO TOPIC NO. 6:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to this Topic as overly broad, seeking irrelevant

information, and unduly burdensome to the extent it seeks information prior to February 25, 2019. Windstream further objects to this Topic to the extent it seeks discovery of information that is protected from disclosure by the attorney-client privilege, the work product doctrine, the common interest doctrine, or other applicable privilege.

Subject to and without waiver of the previously asserted objections, Windstream will produce a witness to testify on Windstream customers who have terminated service since February 25, 2019.

TOPIC NO. 7:

The interruption or disconnection of service to Windstream customers under the Spectrum Business Value Added Reseller Agreement from February 2019 through the present.

RESPONSE TO TOPIC NO. 7:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to this Topic as overly broad, seeking irrelevant information, and unduly burdensome to the extent it seeks information prior to February 25, 2019. Windstream further objects to this Topic to the extent it seeks discovery of information that is protected from disclosure by the attorney-client privilege, the work product doctrine, the common interest doctrine, or other applicable privilege. Windstream further objects to this Topic as vague and ambiguous because “interruption or disconnection of service” is undefined and it is unclear whether Charter seeks testimony as to only those alleged violations by Charter or by others, if any, the latter of which are irrelevant to the claims and defenses in this proceeding. Windstream further objects to this Topic to the extent that it is cumulative or duplicative of Topic No. 4.

Subject to and without waiver of the previously asserted objections, Windstream will produce a witness to testify on the interruption or disconnection of service to Windstream customers by Charter under the Spectrum Business Value Added Reseller Agreement since February 25, 2019.

TOPIC NO. 8:

The interruption or disconnection of service to General Nutrition Center in San Antonio, Texas between May 2, 2019 and May 6, 2019.

RESPONSE TO TOPIC NO. 8:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to this Topic as vague and ambiguous because “interruption or disconnection of service” is undefined and it is unclear whether Charter seeks testimony as to only those alleged violations by Charter or by others, if any, the latter of which are irrelevant to the claims and defenses in this proceeding. Windstream further objects to this Topic to the extent it seeks discovery of information that is protected from disclosure by the attorney-client privilege, the work product doctrine, the common interest doctrine, or other applicable privilege.

Subject to and without waiver of the previously asserted objections, Windstream will produce a witness to testify on the interruption or disconnection of service to General Nutrition Center in San Antonio, Texas by Charter between May 2, 2019 and May 6, 2019.

TOPIC NO. 9:

The factual allegations in Shaya Rochester’s June 14, 2019 correspondence to John Kingston.

RESPONSE TO TOPIC NO. 9:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to this Topic as seeking information irrelevant to the claims and defenses in this proceeding. Subject to and without waiver of the previously asserted objections, Windstream will produce a witness to testify on the factual allegations in Shaya Rochester's June 14, 2019 correspondence to John Kingston.

TOPIC NO. 10:

Windstream customers that have switched their service to Charter/Spectrum from February 2019 through the present, including Windstream's understanding, if any, of why such customers switched.

RESPONSE TO TOPIC NO. 10:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to this Topic because it is premature—Windstream has not completed its factual investigation or discovery in this proceeding and is not yet aware of all Windstream customers that have switched service to Charter/Spectrum. Windstream further objects to this Topic as overly broad, seeking irrelevant information, and unduly burdensome to the extent it seeks information prior to February 25, 2019. Windstream further objects to this Topic to the extent it seeks discovery of information that is protected from disclosure by the attorney-client privilege, the work product doctrine, the common interest doctrine, or other applicable privilege.

Subject to and without waiver of the previously asserted objections, Windstream will produce a witness to testify on those Windstream customers that it knows have switched their

service to Charter/Spectrum from February 25, 2019, including Windstream's understanding, if any, of why such customers switched.

TOPIC NO. 11:

The factual allegations in Windstream's Complaint in this adversary proceeding.

RESPONSE TO TOPIC NO. 11:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Subject to and without waiver of the General Objections, Windstream will produce a witness to testify on the factual allegations in Windstream's Complaint.

TOPIC NO. 12:

The circumstances surrounding Windstream's collection and production of documents in this adversary proceeding.

RESPONSE TO TOPIC NO. 12:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Subject to and without waiver of the General Objections, Windstream will produce a witness to testify on the circumstances surrounding Windstream's collection and production of documents in this adversary proceeding.

TOPIC NO. 13:

Windstream's communications with any third party regarding the allegations asserted in Windstream's Complaint and/or the evidentiary record in this adversary proceeding.

RESPONSE TO TOPIC NO. 13:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to this Topic as vague, overly broad, seeking irrelevant information, and unduly burdensome to the extent it seeks Windstream's communications with *any third party* and as lacking specificity sufficient to identify a witness. Windstream further objects to this Topic to the extent it seeks discovery of information that is protected from disclosure by the attorney-client privilege, the work product doctrine, the common interest doctrine, or other applicable privilege.

Subject to and without waiver of the General Objections, Windstream will produce a witness to testify on Windstream's communications with any third party regarding the allegations asserted in Windstream's Complaint and/or the evidentiary record in this adversary proceeding.

TOPIC NO. 14:

Identification of witnesses to the claims asserted in this adversary proceeding, including Windstream's understanding of the witnesses' knowledge relevant to the claims.

RESPONSE TO TOPIC NO. 14:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to this Topic because it is premature—Windstream has not completed its factual investigation or discovery in this proceeding. Windstream further objects to this Topic to the extent it seeks discovery of information that is protected from disclosure by the attorney-client privilege, the work product doctrine, the common interest doctrine, or other applicable privilege. Accordingly, Windstream will not produce a witness to testify on this Topic.

TOPIC NO. 15:

Windstream's alleged irreparable harm allegedly resulting from Charter's alleged actions in this adversary proceeding.

RESPONSE TO TOPIC NO. 15:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to this Topic to the extent it seeks discovery of information that is protected from disclosure by the attorney-client privilege, the work product doctrine, the common interest doctrine, or other applicable privilege.

Subject to and without waiver of the previously asserted objections, Windstream will produce a witness to testify on Windstream's irreparable harm resulting from Charter's alleged actions in this adversary proceeding.

TOPIC NO. 16:

Windstream's claimed damages in this adversary proceeding.

RESPONSE TO TOPIC NO. 16:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to this Topic because it is premature—Windstream has not completed its factual investigation or discovery in this proceeding. Windstream further objects to this Topic as impermissibly seeking unqualified expert testimony. Pursuant to the scheduling order entered in this proceeding, Windstream will produce an expert to testify on this Topic at the appropriate time.

TOPIC NO. 17:

From January 1, 2017 to the present, Windstream's marketing and advertising campaigns that contain no outward indicia the communication is from Windstream and/or that contain outward indicia that the communication is from an entity other than Windstream.

RESPONSE TO TOPIC NO. 17:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to this Topic as vague and unintelligible because "outward indicia" is undefined, ambiguous, and lacking specificity sufficient to designate a witness. Windstream further objects to this Topic as beyond the permissible scope of discovery in that the testimony sought is not relevant to any claim or defense. Accordingly, Windstream will not produce a witness to testify on this Topic.

TOPIC NO. 18:

From January 1, 2017 to the present, Windstream's marketing and advertising campaigns that involve the use of color palettes similar to those of its competitors, including Charter.

RESPONSE TO TOPIC NO. 18:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to this topic as beyond the permissible scope of discovery in that the testimony sought is not relevant to any claim or defense. Accordingly, Windstream will not produce a witness to testify on this Topic.

TOPIC NO. 19:

Windstream's communications with actual and potential customers regarding its bankruptcy and/or Charter's at-issue advertising.

RESPONSE TO TOPIC NO. 19:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to the phrases "regarding its bankruptcy" as vague and ambiguous.

Subject to and without waiver of the previously asserted objections, Windstream will produce a witness to testify on Windstream's communications with actual and potential customers regarding its Chapter 11 bankruptcy filing and the advertisements disseminated by Charter that are at issue in this proceeding.

TOPIC NO. 20:

The factual basis for your contention that Charter has engaged in an unwarranted refusal to fully resolve the matter that constitutes the basis of this adversary proceeding.

RESPONSE TO TOPIC NO. 20:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to this Topic as vague, overly broad, and lacking specificity sufficient to designate a witness. Windstream further objects to this Topic as seeking information irrelevant to the claims and defenses in this proceeding. Windstream further objects to this Topic to the extent it seeks discovery of information that is protected from disclosure by the attorney-client privilege, the work product doctrine, the common interest doctrine, or other applicable privilege. Accordingly, Windstream will not produce a witness to testify on this Topic.

TOPIC NO. 21:

Windstream's understanding and interpretation of the documents, communications, events, decision, and actions identified in Paragraphs 1-20, above.

RESPONSE TO TOPIC NO. 21:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to this Topic as vague, overly broad, unduly burdensome, and lacking specificity sufficient to designate a witness. Windstream further objects to this Topic as seeking information irrelevant to the claims and defenses in this proceeding. Accordingly, Windstream will not produce a witness to testify on this Topic.

TOPIC NO. 22:

Windstream's Chapter 11 cases.

RESPONSE TO TOPIC NO. 22:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to this Topic as vague, ambiguous, and lacking specificity sufficient to designate a witness. Accordingly, Windstream will not produce a witness to testify on this Topic.

TOPIC NO. 23:

Windstream's operations and business prior to the Chapter 11 filing.

RESPONSE TO TOPIC NO. 23:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to this Topic as vague, ambiguous, and lacking specificity sufficient to designate a witness. Accordingly, Windstream will not produce a witness to testify on this Topic.

TOPIC NO. 24:

Windstream's Kinetic internet campaign.

RESPONSE TO TOPIC NO. 24:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to this Topic as vague, ambiguous, and lacking specificity sufficient to designate a witness. Windstream further objects to this Topic as seeking information irrelevant to the claims and defenses in this proceeding. Accordingly, Windstream will not produce a witness to testify on this Topic.

TOPIC NO. 25:

Windstream's cease and desist letters to Charter.

RESPONSE TO TOPIC NO. 25:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to this Topic to the extent it seeks discovery of information that is protected from disclosure by the attorney-client privilege, the work product doctrine, the common interest doctrine, or other applicable privilege.

Subject to and without waiver of the previously asserted objections, Windstream will produce a witness to testify on Windstream's cease and desist letters to Charter.

TOPIC NO. 26:

Alleged customer confusion caused by Charter's advertisements.

RESPONSE TO TOPIC NO. 26:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to the Topic as vague and ambiguous.

Windstream further objects to this Topic to the extent that it is cumulative or duplicative of Topic No. 19.

Subject to and without waiver of the previously asserted objections, Windstream will produce a witness to testify on customer confusion caused by Charter's advertisements.

TOPIC NO. 27:

Windstream's corrective advertising efforts in response to Charter's advertisement.

RESPONSE TO TOPIC NO. 27:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to this Topic as vague and ambiguous. Windstream further objects to this Topic to the extent that it is cumulative or duplicative of Topic No. 19.

Subject to and without waiver of the previously asserted objections, Windstream will produce a witness to testify on Windstream's corrective advertising efforts in response to Charter's advertisements.

[signature on following page]

Dated: September 23, 2019
New York, NY

/s/ Terence P. Ross
Terence P. Ross
Michael R. Justus
Shaya Rochester
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575 Madison Avenue
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*Conflicts Counsel to the Debtors and Debtors in
Possession*

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of September 2019, a true and correct copy of Windstream Holdings, Inc.'s Objections And Responses To Defendants' Amended Notice Of Video Deposition was served by email on all counsel of record in this adversary proceeding.

Dated: September 23, 2019

/s/ Kristin Lockhart

Kristin Lockhart

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

3 IN RE

4 WINDSTREAM HOLDINGS, INC., et al.,
Debtors,

5 -----
Chapter 11

6 Case No. 19-22312 (RDD)

7 -----
WINDSTREAM HOLDINGS, INC., et al.,
Plaintiffs,

8 vs.

Adv. Proc. No. 19-08246
9 (RDD)

10 CHARTER COMMUNICATIONS, INC.
and CHARTER COMMUNICATIONS
OPERATING, LLC
11 Defendants.

12
13
14
15
16 VIDEO DEPOSITION OF JEFFREY AUMAN
17 Taken on behalf of the Defendants
18 September 24, 2019
19
20
21
22
23
24
25

1 distributed by Mr. Brannon's group you don't have
2 any personal knowledge related to Windstream
3 customers that have terminated service in 2019?

4 MR. ROSS: Didn't he just answer that
5 question?

6 I'm objecting as asked and answered.
7 You're asking the same question two or three times
8 and just changing the wording a little bit.

9 Q. (BY MR. KINGSTON) Do you recall the
10 question, sir? It's okay if you don't, she can
11 read it back.

12 A. If you don't mind reading it back.

13 MR. KINGSTON: Ms. Benoist, do you
14 mind reading it back please?

15 (Whereupon, the reporter read from the record)

16 A. Not offhand I do not, no. Nothing
17 comes to mind.

18 Q. (BY MR. KINGSTON) Direct your
19 attention to item 7. Do you see that, sir?

20 A. Yes.

21 Q. Mr. Auman, do you have any
22 responsibility related to the Spectrum Business
23 Value Added Reseller Agreement?

24 A. No.

25 Q. Do you have any personal knowledge

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1 related to the Spectrum Business Value Added
2 Reseller Agreement?

3 A. No.

4 Q. Take a look if you would, sir, at
5 number 12. Mr. Auman, do you have any personal
6 knowledge related to Windstream's collection and
7 production of documents in this proceeding?

8 A. Not that I'm aware of. Nothing comes
9 to mind as far as personal knowledge is concerned.

10 Q. Take a look at 13. Do you see that,
11 sir?

12 A. Yes.

13 Q. Sir, do you have any personal
14 knowledge related to Windstream's communication
15 with third parties regarding its claims in this
16 adversary proceeding?

17 A. I don't understand what third party
18 means in this question.

19 Q. Sure. Do you know about -- so at
20 some point Windstream folks might talk amongst
21 themselves about their claims in this proceeding.
22 Do you understand that, sir?

23 A. Yes.

24 Q. And sometimes they might talk to
25 their lawyers, do you understand that?

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1 you can remember today that you talked to, you
2 relied on the two Wal-Mart related audio recordings
3 and you relied on the documents that we've
4 discussed, is that right?

5 A. Yes. Also transcripts.

6 Q. Anything else?

7 A. I believe that's primarily it. There
8 may be other inputs.

9 Q. You've described for me what you can
10 think of today.

11 A. Yes, sir.

12 Q. Take a look at Exhibit 2, category
13 16. Do you see that, sir?

14 A. I do.

15 Q. Beyond what you've already described
16 for me related to the harm that you believe
17 Windstream has suffered do you have any personal
18 knowledge related to Windstream's claimed damages
19 in this proceeding?

20 MR. ROSS: We've objected to this and
21 said we're not producing a witness on this except
22 for the expert, so he's not here to testify about
23 that.

24 Q. (BY MR. KINGSTON) You can answer,
25 sir.

1 MR. ROSS: No, you can't. You're
2 instructed not to answer that question.

3 MR. KINGSTON: You're instructing --
4 just so I'm clear as to counsel's instruction,
5 you're instructing the witness not to answer the
6 question asking whether he has personal knowledge
7 related to Windstream's damages in this adversary
8 proceeding.

9 MR. ROSS: Yes, he's not here to
10 testify personally and you know that. I would
11 object to that.

12 Q. (BY MR. KINGSTON) I guess what I'd
13 like to do is see if, whether we really have
14 anything to fuss about and to that end if you have
15 personal knowledge great, if you don't, you don't.

16 If you don't have personal knowledge
17 on this topic I don't see a need to fuss with my
18 friend across the table about whether or not I'm
19 allowed to ask you questions about it. So I'll
20 take another run at sort of the threshold question.

21 MR. ROSS: Let's just stop. He's not
22 here to testify personally, I've let you have
23 enormous leeway and we're not going to do any more.
24 If you want to adjourn the deposition and file a
25 motion, we'll do that.

1 Q. (BY MR. KINGSTON) You don't have
2 personal knowledge, sir --

3 MR. ROSS: I've instructed the
4 witness not to answer questions about his personal
5 knowledge, he's not here to testify in a personal
6 capacity.

7 Q. (BY MR. KINGSTON) Mr. Auman, are you
8 going to follow your counsel's advice not to answer
9 my question of whether or not you have personal
10 knowledge related to Windstream's claimed damage in
11 this proceeding?

12 A. Yes, sir, I am.

13 Q. Take a look at 17, sir.

14 MR. ROSS: 17 we've also said we're
15 not producing a witness on this.

16 Q. (BY MR. KINGSTON) Do you see that,
17 sir? Do you see 17?

18 A. Yes, I do.

19 Q. Mr. Auman, do you have personal
20 knowledge related to Windstream's marketing and
21 advertising campaigns that contain no outward
22 indicia that the communication is from
23 Windstream?

24 MR. ROSS: So that's a hard question
25 to answer the way you phrased it. If it's a null

1 A. Yes, sir.

2 Q. Thank you.

3 (MARKED DEFENDANT'S EXHIBIT NO. 4)

4 Q. (BY MR. KINGSTON) Mr. Auman, on
5 Exhibit 4 is a single page document Bates labeled
6 WIN2742. The top left indicates it's a customer
7 letter containing important news about Windstream,
8 it appears to include the signature of Tony Thomas,
9 president and CEO.

10 Take a moment to review Exhibit 4 and
11 let me know when you're ready, sir.

12 A. Thank you. (Reviewing document).

13 Okay. I'm ready.

14 Q. And so is Exhibit 4 a letter from
15 Windstream informing its customers about the
16 Chapter 11 bankruptcy?

17 A. Yes, that's what it appears to be to
18 me.

19 Q. And what's the date of that letter?

20 A. February 25th, 2019.

21 Q. And does the letter refer customers
22 to a press release in the first paragraph?

23 A. Yes.

24 Q. And is that a press release that can
25 be found online?

1 A. I don't know if it exists today or
2 not. It appears to be a url link. That's what it
3 looks like to me, yes, sir.

4 Q. I read the last sentence of the first
5 paragraph of the customer letter dated February 25,
6 2019 to direct customers to a press release we
7 issued that can be found at news.windstream.com.

8 Do you read it the same way, sir?

9 A. Yes, sir.

10 Q. And it looks like there's a reference
11 to FAQs at the first sentence of the second to last
12 paragraph.

13 A. Yes, sir.

14 Q. I read that as follows: A set of
15 FAQs that should help address some of your initial
16 questions can be accessed by visiting Windstream's
17 restructuring website at
18 www.windstreamrestructuring.com.

19 Have I read that correctly?

20 A. Yes, sir.

21 Q. And is that restructuring website a
22 website run by Kurtzman Carson Consultants, LLC?

23 A. I'm not aware.

24 Q. You don't know one way or the other?

25 A. I don't know one way or the other.

1 And I assume when you say run by, hosted.

2 Q. Yes, sir.

3 A. I don't know.

4 Q. You have no idea one way or another
5 what the website www.windstreamrestructuring.com is
6 affiliated with?

7 MR. ROSS: That's a different
8 question.

9 MR. KINGSTON: It got away from me,
10 I'll take another run at it.

11 Q. (BY MR. KINGSTON) You don't know one
12 way or another, sir, whether the website
13 www.windstreamrestructuring.com is operated or
14 maintained by Kurtzman Carson?

15 A. I'm not aware.

16 Q. Did the following spelling of
17 Kurtzman Carson Consultants sound right to you,
18 sir: K-U-R-T-Z-M-A-N, C-A-R-S-O-N,
19 C-O-N-S-U-L-T-A-N-T-S?

20 A. Sounds like it would be a good
21 spelling, yes, sir.

22 (MARKED DEFENDANT'S EXHIBIT NO. 5)

23 Q. (BY MR. KINGSTON) Mr. Auman, as soon
24 as your lawyer's had a chance to glance at the
25 piece of paper I've put in front of him I'm going

1 to hand you Exhibit 5. For the record Exhibit 5 is
2 a --

3 MR. ROSS: Three.

4 Q. (BY MR. KINGSTON) Three page
5 document that looks to be a printout of the
6 news.windstream.com website that includes an
7 article, or excuse me, it includes a press release
8 dated February 25, 2019.

9 Take a moment to review Exhibit 5 and
10 let me know when you're ready, sir.

11 A. Thank you. (Reviewing document).
12 I've read it.

13 Q. And is that the press release at
14 news.windstream.com referenced in the first
15 paragraph of the February 25, 2019 customer letter?

16 A. It certainly appears to be, yes. It
17 appears to be but I don't know for certain.

18 Q. That to you appears to be the press
19 release at www, excuse me, at news.windstream.com?

20 A. Yes. And that's because I'm looking
21 at the url down at the bottom, it appears to be
22 that's where this was sourced.

23 Q. And that's something we could verify
24 just by going to the news.windstream.com website
25 and clicking back to February 25 of 2019?

1 A. I would think so.

2 Q. Directing your attention to the third
3 paragraph from the top on the first page, I see
4 sort of an extended quotation of some remarks given
5 by Tony Thomas. Do you see that, sir?

6 A. Can you just read the first four or
7 five words?

8 Q. Sure. Do you see the third paragraph
9 that starts with the words I want to express?

10 A. Yes.

11 Q. I read the second sentence in that
12 paragraph as follows: With approval from the court
13 we will continue paying our employees, maintaining
14 our relationships with our vendors and business
15 partners and serving our customers as usual.

16 Have I read that correctly?

17 A. Yes, sir.

18 Q. And has the bankruptcy court approved
19 Windstream's reorganization plan as we sit here
20 today, sir?

21 A. That's my understanding. Yes, sir.
22 That's my understanding.

23 Q. Your understanding is that the --

24 A. I'm not a lawyer but that's my basis
25 of, that's my understanding.

1 that, sir?

2 A. Yes.

3 Q. And do you see where the press
4 release refers the reader to Windstream's annual
5 report?

6 A. I see where it references the
7 Securities and Exchange Commission website for the
8 company annual report, yes. And subsequent
9 filings.

10 Q. I read the press release in that part
11 as follows: Factors that could cause actual
12 results to differ materially from those
13 contemplated in our forward looking statements
14 include among others factors under risk factors in
15 item (a) of the company annual report and in
16 subsequent filings with the Securities Exchange
17 Commission at www.sec.gov.

18 Have I read that correctly?

19 A. Yes, sir. That's what it appears to
20 me to be.

21 Q. And so in its press release
22 Windstream refers the reader to the company annual
23 report and the SEC's website at www.sec.gov.

24 A. Yes, sir.

25 My stomach's telling me it's about

1 that time.

2 MR. ROSS: It's actually not.

3 (MARKED DEFENDANT'S EXHIBIT NO. 6)

4 Q. (BY MR. KINGSTON) Mr. Auman, I'm
5 handing you Exhibit 6 which is a multi-page
6 document Bates labeled WIN2749 through 2769. Take
7 a moment to review Exhibit 6 and let me know when
8 you're ready, sir.

9 A. Yes. (Reviewing document).

10 Okay.

11 Q. What is Exhibit 6?

12 A. What's the question, sir?

13 Q. Do you recognize Exhibit 6?

14 A. Yes.

15 Q. And what is it?

16 A. It's a consumer sales and care call
17 document from April 1st, 2019.

18 Q. And have you seen it before, have you
19 seen Exhibit 6 before?

20 A. I don't recall seeing this exhibit
21 previously.

22 Q. I forgot to ask you a bunch of
23 typical beginning of deposition questions Mr.
24 Auman.

25 Did you review documents in preparing

1 seen us use on our mailings.

2 Q. Does Windstream keep a database of
3 its past mailings?

4 A. Not that I'm aware of.

5 Q. If I wanted to get my hands on
6 exemplars of direct mail pieces that Windstream has
7 sent 2017, '18 and '19 is that something that you
8 have on file somewhere back at the office?

9 A. You know, I don't know.

10 Q. It may be, it may not be something
11 that Windstream has back on file at the office.

12 A. That's correct. May or may not.

13 Q. What I'd like to do, sir, is I want
14 to go through Exhibit 6 and circle all the color
15 scheme portions that in your view look like the
16 color scheme on the back of that envelope. What
17 I'd like to you do is circle and put your initials
18 by it.

19 A. (Indicating). Is one of the bars
20 sufficient or you want the same --

21 Q. One is fine.

22 A. Okay.

23 Q. Would you mind if I took a look at
24 your copy of Exhibit 6 whenever you're finished?

25 A. Sure.

1 (Indicating).

2 Q. Thank you, sir.

3 And saw you circled the portions of
4 Exhibit 6 that in your view, where in your view the
5 Windstream color scheme is similar to the color
6 scheme on the back of the mailer on Page 5, is that
7 right, sir?

8 A. Yes, sir.

9 Q. And it looks like you circled a
10 portion of the logo on the first page and a portion
11 of the bar at the bottom of the fifth page. Isn't
12 that right, sir?

13 A. Yes.

14 Q. And that logo and that bar are
15 reproduced kind of throughout Exhibit 6, is that
16 right?

17 A. Yes.

18 Q. And so, and is that logo that's sort
19 of a knot of different letters, is that the Kinetic
20 logo?

21 A. Yes, it is. The, what I'm not sure
22 of is if this PowerPoint is an exact replica of the
23 color palette that we use to print direct material
24 on. This is an internal business document so it's
25 not necessarily customer facing, so there's a,

1 could be some slight variance, but.

2 Q. That knot of colors next to the word
3 Kinetic, does that look similar in your view to the
4 logo that goes out on Windstream direct mails?

5 A. That's a typical, it's a typical logo
6 that we use.

7 Q. And it looks like the knot of colors
8 includes kind of a green strand, a purple strand, a
9 blue strand and then that purple to pink strand, is
10 that right, sir?

11 A. Yes. There's a, the palette has a
12 bunch of different colors to it, not all are used
13 in our mailings. So I would recommend if we could
14 is that we get the actual direct mailer piece as a,
15 actual comparison and not an internal business
16 document.

17 Q. In your view a direct mailer piece
18 from Windstream, or a sampling of the direct mailer
19 piece from Windstream would be a better comparison
20 than this PowerPoint, is that fair?

21 A. Yes.

22 Q. It looks like there are portions of
23 Exhibit 6 that have been blocked out. Do you see
24 that?

25 A. I definitely saw that. A lot of ink.

1 A. Yes, I do. Embarrassingly as it is
2 it's a little small print, but I think I could make
3 that out, yes.

4 Q. And it looks like there's -- so the
5 letter looks like it's signed by Tony Thomas, the
6 president and CEO of Windstream, is that right?

7 A. Yes, sir.

8 Q. And then it looks like there's a list
9 of companies on the notice attachment. Do you see
10 that?

11 A. I do. Yes, sir. They look like a
12 list, representative sample of companies. It's a
13 little hard for me to see that.

14 Q. I read the first sentence of Page 8
15 of Exhibit 6 as follows: We started sending the
16 below communication to customers on March 15th and
17 were done in waves.

18 Have I read that correctly?

19 A. Yes. Yes, that I can see, yes.

20 Q. Is that a true statement, that
21 Windstream started sending out that notice on March
22 15th and it was done in waves?

23 A. I can't say if it started on March
24 15th definitively or not. I will take this as
25 certainly what we communicated internally. I think

1 to my recollection, the best recollection I have is
2 customers would have started to receive it around
3 the March 22nd or so, so that seems to be accurate.

4 Q. So you have no reason to disbelieve
5 the representation in the Windstream PowerPoint
6 that it started sending the below communication to
7 customers on March 15th and were done in waves?

8 A. Yes, sir. On or around March 15th.

9 Q. And below that I read the Windstream
10 PowerPoint to say that customers should have
11 received them the week of March 18 and March 25th.

12 Do you have any reason to disbelieve
13 that, sir?

14 A. No, sir. I do know that -- it says
15 customer should have. I do know surprisingly as it
16 is with the U.S. Mail sometimes things show up a
17 lot longer out than you'd expect it. So I would
18 say I wouldn't think that everybody received these
19 communications by the 25th. Some of the markets
20 are very rural.

21 Q. Has Windstream done anything on its
22 own to determine when in fact its customers did
23 receive the communications represented on Page 8 of
24 Exhibit 6?

25 A. Not that I'm aware of.

1 Q. And is Exhibit 7 the communication we
2 were just talking about on Page 8 of the Windstream
3 PowerPoint?

4 A. Yes, sir, it appears to be. It's
5 much easier for me to read.

6 Q. Yeah. I read the third paragraph of
7 the letter on the first page of Exhibit 7 as
8 follows: If you have any questions you should
9 visit [http colon www.kcciloc.net/windstream](http://www.kcciloc.net/windstream) or call
10 877-709-4757 toll free.

11 Have I read that correctly?

12 A. Yes, sir.

13 Q. Has Windstream made any effort to
14 determine how many customers visited that website?

15 A. I'm not aware of any effort.

16 Q. As far as you are aware Windstream
17 has made no effort to determine the number of
18 customers that visited the website referenced in
19 the third paragraph of Mr. Thomas's letter to
20 Windstream's customers?

21 MR. ROSS: Didn't he just answer that
22 question?

23 MR. KINGSTON: I think he answered a
24 slightly different question.

25 MR. ROSS: Read the new question back

1 then.

2 (Whereupon, the reporter read from the record)

3 A. I'm not aware of if there was effort
4 or no effort or if there was any collection or not.
5 I'm not aware.

6 Q. (BY MR. KINGSTON) Did Windstream
7 make any effort to identify -- strike that. Do you
8 mind if I start over?

9 A. Yes.

10 Q. Did Windstream make any effort to
11 determine the number of customers that called that
12 phone number in the middle paragraph of Mr.
13 Thomas's letter?

14 A. Again, I'm not aware of any effort to
15 determine the number of customers that called.

16 Q. And Exhibit 7 is the letter and
17 notice that went out on March 15th and would have
18 started arriving in homes the week of March 18th
19 and 25th extending out for some time thereafter
20 depending on the efficiency of the United States
21 Postal Service, is that right?

22 A. Yes, sir. As far as I can tell, yes.

23 Q. Do you know Katherine Webb?

24 A. Yes.

25 Q. And who is Ms. Webb?

Steven J. Reisman
Terence P. Ross
Tami Kameda Sims (*pro hac vice*)
Shaya Rochester
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Conflicts Counsel to the Debtors and Debtors in Possession

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE 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
)	
vs.)	
)	
CHARTER COMMUNICATIONS, INC. and)	
CHARTER COMMUNICATIONS OPERATING, LLC,)	
)	
Defendants.)	

**PLAINTIFF WINDSTREAM HOLDINGS, INC.'S RESPONSES AND OBJECTIONS TO
DEFENDANTS' REQUESTS FOR PRODUCTION OF DOCUMENTS**

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 the Debtors have requested joint administration, 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' proposed claims and noticing agent at <http://www.kcellc.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.

custody, or control that it is able to locate after a reasonably diligent search and reasonable inquiry.

REQUEST FOR PRODUCTION NO. 24

All documents concerning your allegation that Windstream has been damaged as a result of the alleged disconnection of service to approximately 300 Windstream customers as alleged in Paragraphs 75 and 77 of Windstream's Complaint.

RESPONSE TO REQUEST FOR PRODUCTION NO. 24

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to this Request on the grounds that it seeks the disclosure of confidential, proprietary, or sensitive information regarding Windstream's business and/or business operations. Windstream further objects to the Request to the extent it calls for the disclosure of confidential information protected by the privacy rights of non-parties. Windstream further objects to this Request to the extent that it seeks the production of information and documents that are subject to protection by the attorney-client privilege or work product doctrine.

Subject to and without waiver of the previously asserted objections, Windstream responds that it has already produced non-privileged documents responsive to this Request in connection with its Motion for a Temporary Restraining Order. Windstream further responds that it will produce additional responsive, non-privileged documents, if any, within its possession, custody, or control that it is able to locate after a reasonably diligent search and reasonable inquiry.

information and documents that are subject to protection by the attorney-client privilege or work product doctrine.

REQUEST FOR PRODUCTION NO. 28

Any other document you intend on introducing at the preliminary injunction hearing scheduled in this adversary proceeding.

RESPONSE TO REQUEST FOR PRODUCTION NO. 28

Windstream incorporates by reference its General Objections stated above as though set forth fully herein.

Subject to and without waiver of the previously asserted objections, Windstream responds that it will produce responsive, non-privileged documents, if any, that it intends to introduce at the preliminary injunction hearing in this adversary proceeding.

Dated: April 26, 2019
New York, NY

/s/ Steven J. Reisman
Steven J. Reisman
Terence P. Ross
Tami Kameda Sims (*pro hac vice* application pending)
Shaya Rochester
KATTEN MUCHIN ROSENMAN LLP
575 Madison Avenue
New York, NY 10022
Telephone: (212) 940-8800
Facsimile: (212) 940-8876
Email: sreisman@kattenlaw.com
terence.ross@kattenlaw.com
tami.sims@kattenlaw.com
srochester@kattenlaw.com

*Proposed Conflicts Counsel to the Debtors and
Debtors in Possession*

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April 2019, a true and correct copy of PLAINTIFF WINDSTREAM HOLDINGS, INC.'S RESPONSES AND OBJECTIONS TO DEFENDANTS' REQUESTS FOR PRODUCTION OF DOCUMENTS was served by email on all counsel of record in this adversary proceeding.

Dated: April 26, 2019

/s/ Tami Kameda Sims

Tami Kameda Sims

Terence P. Ross
Michael R. Justus (*pro hac vice pending*)
Shaya Rochester
KATTEN MUCHIN ROSENMAN LLP
575 Madison Avenue
New York, NY 10022
Telephone: (212) 940-8800
Facsimile: (212) 940-8776

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
)	
vs.)	
)	
CHARTER COMMUNICATIONS, INC. and)	
CHARTER COMMUNICATIONS OPERATING, LLC,)	
)	
Defendants.)	
)	

**DEBTORS' OBJECTIONS AND RESPONSES TO DEFENDANTS' THIRD SET OF
REQUESTS FOR PRODUCTION TO WINDSTREAM HOLDINGS, INC.**

Pursuant to Rules 7026 and 7034 of the Federal Rules of Bankruptcy Procedure, Rules 26
and 34 of the Federal Rules of Civil Procedure, the Local Rules of this District, and any other

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 the Debtors have requested joint administration, 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' proposed 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.

aware of and/or are not in its possession, custody, or control. Windstream further objects to the extent this Request is cumulative and duplicative of at least Request No. 50.

REQUEST FOR PRODUCTION NO. 24:

All documents, in native format, evidencing the monthly total number of Windstream customers from January 1, 2014 to present, including by relevant market.

RESPONSE:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to the phrase “relevant market” as vague, ambiguous, and undefined. Windstream further objects to this Request to the extent it seeks *all* documents as unduly burdensome, overbroad, and disproportionate to the needs of the case as the burden and cost associated with obtaining such documents outweigh any purported benefit, if any. Windstream further objects on the basis that this Request contains an arbitrary time frame that is broader than and/or not relevant to the time in which Charter utilized a false and misleading advertising campaign directed at Windstream customers. Windstream further objects to this Request on the grounds that it seeks the disclosure of confidential, proprietary, or sensitive information regarding Windstream’s business and/or business operations. Windstream further objects to this Request to the extent it calls for the disclosure of confidential information protected by the privacy rights of non-parties. Windstream further objects to this Request to the extent that it seeks the production of information and documents that are subject to the protection by the attorney-client privilege or work product doctrine.

REQUEST FOR PRODUCTION NO. 25:

All documents, in native format, evidencing Windstream’s calculation or basis for estimating the Average Customer Life in months for a Windstream customer.

RESPONSE:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to this Request to the extent it seeks *all* documents as unduly burdensome, overbroad, and disproportionate to the needs of the case as the burden and cost associated with obtaining such documents outweigh any purported benefit, if any. Windstream further objects to this Request on the basis that this Request is beyond the permissible scope of discovery in that the broad categories of documents sought go beyond the documents that are relevant to any claim or defense in this action. Windstream further objects to this Request on the grounds that it seeks the disclosure of confidential, proprietary, or sensitive information regarding Windstream's business and/or business operations. Windstream further objects to the extent this Request is prematurely seeking documents or information that are more appropriately addressed through expert discovery.

Subject to and without waiver of the previously asserted objections, Windstream responds that it will produce responsive, non-privilege documents, if any, within its possession, custody, or control, that show the Average Customer Life for a Windstream customer.

REQUEST FOR PRODUCTION NO. 26:

All documents, in native format, supporting Windstream's contention that Average Customer Life is 49 months.

RESPONSE:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to this Request to the extent it seeks *all* documents as unduly burdensome, overbroad, and disproportionate to the needs of the case as the burden and cost associated with obtaining such documents outweigh any purported benefit, if

of information and documents that are subject to the protection by the attorney-client privilege or work product doctrine.

REQUEST FOR PRODUCTION NO. 39:

Documents evidencing the weekly total number of Windstream customers from January 1, 2014 to present.

RESPONSE:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects on the basis that this Request contains an arbitrary time frame that is broader than and/or not relevant to the time in which Charter utilized a false and misleading advertising campaign directed at Windstream customers. Windstream further objects that this Request is unduly burdensome, overbroad, and disproportionate to the needs of the case as the burden and cost associated with obtaining such documents outweigh any purported benefit, if any. Windstream further objects to this Request on the basis that this Request is beyond the permissible scope of discovery in that the broad categories of documents sought go beyond the documents that are relevant to any claim or defense in this action. Windstream further objects to this Request on the grounds that it seeks the disclosure of confidential, proprietary, or sensitive information regarding Windstream's business and/or business operations.

REQUEST FOR PRODUCTION NO. 40:

Documents evidencing the monthly total number of Windstream customer requested disconnections from January 1, 2014 to present, including by relevant market.

RESPONSE:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to the phrase “relevant market” as vague, ambiguous, and undefined. Windstream further objects on the basis that this Request contains an arbitrary time frame that is broader than and/or not relevant to the time in which Charter utilized a false and misleading advertising campaign directed at Windstream customers. Windstream further objects that this Request is unduly burdensome, overbroad, and disproportionate to the needs of the case as the burden and cost associated with obtaining such documents outweigh any purported benefit, if any. Windstream further objects to this Request on the basis that this Request is beyond the permissible scope of discovery in that the broad categories of documents sought go beyond the documents that are relevant to any claim or defense in this action. Windstream further objects to this Request on the grounds that it seeks the disclosure of confidential, proprietary, or sensitive information regarding Windstream’s business and/or business operations.

REQUEST FOR PRODUCTION NO. 41:

Documents evidencing the weekly total number of Windstream customer requested disconnections from January 1, 2014 to present, including by relevant market.

RESPONSE:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to the phrase “relevant market” as vague, ambiguous, and undefined. Windstream further objects on the basis that this Request contains an arbitrary time frame that is broader than and/or not relevant to the time in which Charter utilized a false and misleading advertising campaign directed at Windstream customers. Windstream

further objects that this Request is unduly burdensome, overbroad, and disproportionate to the needs of the case as the burden and cost associated with obtaining such documents outweigh any purported benefit, if any. Windstream further objects to this Request on the basis that this Request is beyond the permissible scope of discovery in that the broad categories of documents sought go beyond the documents that are relevant to any claim or defense in this action. Windstream further objects to this Request on the grounds that it seeks the disclosure of confidential, proprietary, or sensitive information regarding Windstream's business and/or business operations.

REQUEST FOR PRODUCTION NO. 42:

Documents evidencing the monthly total number of Windstream involuntary disconnections, other than those disconnections requested by customers, from January 1, 2014 to present, including by relevant market.

RESPONSE:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to the phrases "relevant market" and "involuntary disconnections" as vague, ambiguous, and undefined. Windstream further objects on the basis that this Request contains an arbitrary time frame that is broader than and/or not relevant to the time in which Charter utilized a false and misleading advertising campaign directed at Windstream customers. Windstream further objects that this Request is unduly burdensome, overbroad, and disproportionate to the needs of the case as the burden and cost associated with obtaining such documents outweigh any purported benefit, if any. Windstream further objects to this Request on the basis that this Request is beyond the permissible scope of discovery in that the broad categories of documents sought go beyond the documents that are relevant to any

claim or defense in this action. Windstream further objects to this Request on the grounds that it seeks the disclosure of confidential, proprietary, or sensitive information regarding Windstream's business and/or business operations.

REQUEST FOR PRODUCTION NO. 43:

Documents evidencing the weekly total number of Windstream involuntary disconnections, other than those disconnections requested by customers, from January 1, 2014 to present, including by relevant market.

RESPONSE:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to the phrases "relevant market" and "involuntary disconnections" as vague, ambiguous, and undefined. Windstream further objects on the basis that this Request contains an arbitrary time frame that is broader than and/or not relevant to the time in which Charter utilized a false and misleading advertising campaign directed at Windstream customers. Windstream further objects that this Request is unduly burdensome, overbroad, and disproportionate to the needs of the case as the burden and cost associated with obtaining such documents outweigh any purported benefit, if any. Windstream further objects to this Request on the basis that this Request is beyond the permissible scope of discovery in that the broad categories of documents sought go beyond the documents that are relevant to any claim or defense in this action. Windstream further objects to this Request on the grounds that it seeks the disclosure of confidential, proprietary, or sensitive information regarding Windstream's business and/or business operations.

REQUEST FOR PRODUCTION NO. 44:

Documents evidencing the monthly total number of new customers Windstream added from January 1, 2014 to present, including by relevant market.

RESPONSE:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to the phrase “relevant market” as vague, ambiguous, and undefined. Windstream further objects on the basis that this Request contains an arbitrary time frame that is broader than and/or not relevant to the time in which Charter utilized a false and misleading advertising campaign directed at Windstream customers. Windstream further objects that this Request is unduly burdensome, overbroad, and disproportionate to the needs of the case as the burden and cost associated with obtaining such documents outweigh any purported benefit, if any. Windstream further objects to this Request on the basis that this Request is beyond the permissible scope of discovery in that the broad categories of documents sought go beyond the documents that are relevant to any claim or defense in this action. Windstream further objects to this Request on the grounds that it seeks the disclosure of confidential, proprietary, or sensitive information regarding Windstream’s business and/or business operations.

REQUEST FOR PRODUCTION NO. 45:

Documents evidencing the weekly total number of new customers Windstream added from January 1, 2014 to present, including by relevant market.

RESPONSE:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to the phrase “relevant market” as vague,

ambiguous, and undefined. Windstream further objects on the basis that this Request contains an arbitrary time frame that is broader than and/or not relevant to the time in which Charter utilized a false and misleading advertising campaign directed at Windstream customers. Windstream further objects that this Request is unduly burdensome, overbroad, and disproportionate to the needs of the case as the burden and cost associated with obtaining such documents outweigh any purported benefit, if any. Windstream further objects to this Request on the basis that this Request is beyond the permissible scope of discovery in that the broad categories of documents sought go beyond the documents that are relevant to any claim or defense in this action. Windstream further objects to this Request on the grounds that it seeks the disclosure of confidential, proprietary, or sensitive information regarding Windstream's business and/or business operations.

REQUEST FOR PRODUCTION NO. 46:

Documents sufficient to identify each Windstream customer that voluntarily disconnected Windstream's service for each month of 2019.

RESPONSE:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to the phrases "voluntary disconnected" as vague, ambiguous, and undefined. Windstream further objects on the basis that this Request contains an arbitrary time frame that is broader than and/or not relevant to the time in which Charter utilized a false and misleading advertising campaign directed at Windstream customers. Windstream further objects that this Request is unduly burdensome, overbroad, and disproportionate to the needs of the case as the burden and cost associated with obtaining such documents outweigh any purported benefit, if any. Windstream further objects to this Request on the basis that this

RESPONSE:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to this Request to the extent it seeks *all* documents as unduly burdensome, overbroad, and disproportionate to the needs of the case as the burden and cost associated with obtaining such documents outweigh any purported benefit, if any. Windstream further objects to this Request on the grounds that it seeks the disclosure of confidential, proprietary, or sensitive information regarding Windstream's business and/or business operations. Windstream further objects to the extent this Request is prematurely seeking documents or information that are more appropriately addressed through expert discovery. Windstream further objects to this Request to the extent that it seeks the production of information and documents that are subject to the protection by the attorney-client privilege or work product doctrine.

Subject to and without waiver of the previously asserted objections, Windstream responds that no such surveys or documents exist.

REQUEST FOR PRODUCTION NO. 56:

For the period January 1, 2009 to present, all documents evidencing any financial analysis regarding the lifetime and/or annual loss of losing a subscriber, including impacts on goodwill, if any.

RESPONSE:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to the phrase "financial analysis" as vague and ambiguous. Windstream further objects to this Request to the extent it seeks *all* documents as unduly burdensome, overbroad, and disproportionate to the needs of the case as the burden and

cost associated with obtaining such documents outweigh any purported benefit, if any. Windstream further objects on the basis that this Request contains an arbitrary time frame that is broader than and/or not relevant to the time in which Charter utilized a false and misleading advertising campaign directed at Windstream customers. Windstream further objects to this Request on the grounds that it seeks the disclosure of confidential, proprietary, or sensitive information regarding Windstream's business and/or business operations. Windstream further objects to this Request because it seeks documents or things or information that is readily obtainable by Charter as it is by Windstream.

Subject to and without waiver of the previously asserted objections, Windstream responds that it will produce responsive, non-privilege documents, if any, within its possession, custody, or control.

REQUEST FOR PRODUCTION NO. 57:

All documents evidencing any public statements Windstream has made regarding the economic value of securing a new subscriber and/or losing a subscriber, including impacts on goodwill, if any.

RESPONSE:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to the phrase "economic value" as vague and ambiguous. Windstream further objects to this Request to the extent it seeks *all* documents as unduly burdensome, overbroad, and disproportionate to the needs of the case as the burden and cost associated with obtaining such documents outweigh any purported benefit, if any. Windstream further objects to this Request on the grounds that it seeks the disclosure of confidential, proprietary, or sensitive information regarding Windstream's business and/or

business operations. Windstream further objects to this Request because it seeks documents or things or information that is readily obtainable by Charter as it is by Windstream.

Subject to and without waiver of the previously asserted objections, Windstream responds that it will produce responsive, non-privilege documents, if any, within its possession, custody, or control.

REQUEST FOR PRODUCTION NO. 58:

For the period January 1, 2009 to present, all documents evidencing Windstream's projections for new subscribers generally, and by market, whether on a monthly, quarterly, annual, or other basis.

RESPONSE:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to the phrases "projections" and "new subscribers" as vague, ambiguous, and undefined. Windstream further objects to this Request to the extent it seeks *all* documents as unduly burdensome, overbroad, and disproportionate to the needs of the case as the burden and cost associated with obtaining such information outweigh any purported benefit, if any. Windstream further objects on the basis that this Request contains an arbitrary time frame that is broader than and/or not relevant to the time in which Charter utilized a false and misleading advertising campaign directed at Windstream customers. Windstream further objects to this Request on the basis that this Request is beyond the permissible scope of discovery in that the broad categories of documents or information sought go beyond the documents and information that are relevant to any claim or defense in this action. Windstream further objects to this Request on the grounds that it seeks the disclosure of confidential, proprietary, or sensitive information regarding Windstream's business and/or

business operations. Windstream further objects to the extent this Request is prematurely seeking documents or information that are more appropriately addressed through expert discovery. Windstream further objects to this Request to the extent that it seeks the production of information and documents that are subject to the protection by the attorney-client privilege or work product doctrine.

REQUEST FOR PRODUCTION NO. 59:

For the period January 1, 2009 to present, all documents evidencing Windstream's projections for subscriber loss generally, and by market, whether on a monthly, quarterly, annual, or other basis.

RESPONSE:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to the term "projections" as vague, ambiguous, and undefined. Windstream further objects to this Request to the extent it seeks *all* documents as unduly burdensome, overbroad, and disproportionate to the needs of the case as the burden and cost associated with obtaining such information outweigh any purported benefit, if any. Windstream further objects on the basis that this Request contains an arbitrary time frame that is broader than and/or not relevant to the time in which Charter utilized a false and misleading advertising campaign directed at Windstream customers. Windstream further objects to this Request on the basis that this Request is beyond the permissible scope of discovery in that the broad categories of documents or information sought go beyond the documents and information that are relevant to any claim or defense in this action. Windstream further objects to this Request on the grounds that it seeks the disclosure of confidential, proprietary, or sensitive information regarding Windstream's business and/or business operations. Windstream further

objects to the extent this Request is prematurely seeking documents or information that are more appropriately addressed through expert discovery. Windstream further objects to this Request to the extent that it seeks the production of information and documents that are subject to the protection by the attorney-client privilege or work product doctrine.

REQUEST FOR PRODUCTION NO. 60:

For the period January 1, 2014 to present, all documents evidencing projected marketing and/or advertising budgets generally, and by market.

RESPONSE:

Windstream incorporates by reference its General Objections stated above as though set forth fully herein. Windstream further objects to the term “projected” as vague, ambiguous, and undefined. Windstream further objects to this Request to the extent it seeks *all* documents as unduly burdensome, overbroad, and disproportionate to the needs of the case as the burden and cost associated with obtaining such information outweigh any purported benefit, if any. Windstream further objects on the basis that this Request contains an arbitrary time frame that is broader than and/or not relevant to the time in which Charter utilized a false and misleading advertising campaign directed at Windstream customers. Windstream further objects to this Request on the basis that this Request is beyond the permissible scope of discovery in that the broad categories of documents or information sought go beyond the documents and information that are relevant to any claim or defense in this action. Windstream further objects to this Request on the grounds that it seeks the disclosure of confidential, proprietary, or sensitive information regarding Windstream’s business and/or business operations. Windstream further objects to the extent this Request is prematurely seeking documents or information that are more appropriately addressed through expert discovery.

Dated: September 18, 2019
New York, NY

/s/ Terence P. Ross
Terence P. Ross
Michael R. Justus (*pro hac vice pending*)
Shaya Rochester
KATTEN MUCHIN ROSENMAN LLP
575 Madison Avenue
New York, NY 10022
Telephone: (212) 940-8800
Facsimile: (212) 940-8876
Email: terence.ross@katten.com
michael.justus@katten.com
srochester@katten.com

Conflicts Counsel to the Debtors and Debtors in Possession

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, a true and correct copy of the Debtors' Objections And Responses To Defendants' Third Set Of Requests For Production To Windstream Holdings, Inc. was served by email on all counsel of record in this adversary proceeding.

Dated: September 18, 2019

/s/ Kristin Lockhart

Kristin Lockhart



One US Bank Plaza
St. Louis, MO 63101

314 552 6000 main
314 552 7000 fax
thompsoncoburn.com

Nino Przulj
314 552 6559 direct
nprzulj@thompsoncoburn.com

September 3, 2019

Kristin Lockhart
Katten Muchin Rosenman LLP
2900 K Street NW, North Tower – Ste. 200
Washington, DC 20007-5118
kristin.lockhart@kattenlaw.com

Re: Copying Documents referenced in Windstream's Supplemental Initial Disclosures
*Windstream Holdings, Inc., et al., v. Charter Communications, Inc. and Charter
Communications Operating, LLC*, Adv. Pro. No. 19-08246-RDD (Bankr. S.D.N.Y.)

Dear Ms. Lockhart:

On August 29, 2019, Windstream served its Supplemental Initial Disclosures. Beginning on page eight of its Supplemental Disclosures, Windstream identified 15 distinct categories of documents that are in its possession, custody, or control and that Windstream may use to support its claims or defenses.

Charter respectfully requests to copy the documents identified by Windstream in the Supplemental Disclosures by Friday, September 6, 2019. Please let me know the location where Charter can inspect and copy the documents.

If you have any questions, please do not hesitate to contact me at (314) 552-6559.

Sincerely,

Thompson Coburn LLP

A handwritten signature in black ink, appearing to read "N. Przulj", written over a horizontal line.

By

Nino Przulj

From: Przulj, Nino
Sent: Monday, September 9, 2019 10:21 AM
To: Lockhart, Kristin
Subject: RE: Windstream v. Charter - Second Supplemental Initial Disclosures

Kristin,

That's all we wanted to know.

Thanks,

Nino

Nino Przulj
nprzulj@thompsoncoburn.com
P: 314.552.6559
F: 314.552.7000
M: 314.602.6559

Thompson Coburn LLP
One US Bank Plaza
St. Louis, Missouri 63101
www.thompsoncoburn.com

-----Original Message-----

From: Lockhart, Kristin <kristin.lockhart@katten.com>
Sent: Friday, September 6, 2019 4:57 PM
To: Przulj, Nino <nprzulj@thompsoncoburn.com>
Subject: Re: Windstream v. Charter - Second Supplemental Initial Disclosures

Nino,

The documents we intend to rely on for Rule 26(a) purposes have all been supplied to Charter's counsel electronically and are in it's counsel's possession. I believe our disclosures are compliant with the Rules.

Thus, I'm unclear as to what else is at issue here. However, in an effort to avoid further unnecessary disputes over discovery, I'm happy to get on a call with you to discuss on Monday so you may clarify your position.

Please let me know if that works.

Thanks,

Kristin Lockhart
Associate
Katten Muchin Rosenman LLP

2900 K Street NW, North Tower<x-apple-data-detectors://0/1> - Suite 200 / Washington, DC 20007-5118<x-apple-data-detectors://1/0>

p / 202.625.3558<tel:202.625.3558> f / 202.298.7570<tel:202.298.7570>

kristin.lockhart@kattenlaw.com<mailto:kristin.lockhart@kattenlaw.com> /

www.kattenlaw.com<http://www.kattenlaw.com/>

On Sep 6, 2019, at 5:46 PM, Przulj, Nino <nprzulj@thompsoncoburn.com<mailto:nprzulj@thompsoncoburn.com>> wrote:

EXTERNAL EMAIL – EXERCISE CAUTION

Kristin,

Is this intended as a response to our request to inspect?

Thanks,

Nino

Sent from my iPhone

On Sep 6, 2019, at 4:35 PM, Lockhart, Kristin <kristin.lockhart@katten.com<mailto:kristin.lockhart@katten.com>> wrote:

Dear counsel,

Attached please find Windstream's Second Supplemental Initial Disclosures.

Regards,

Kristin Lockhart

Associate

Katten

Katten Muchin Rosenman LLP

2900 K Street NW, North Tower - Suite 200 | Washington, DC 20007-5118

direct +1.202.625.3558

kristin.lockhart@katten.com<mailto:kristin.lockhart@katten.com> | katten.com<https://www.katten.com/>

=====

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=====

NOTIFICATION: Katten Muchin Rosenman LLP is an Illinois limited liability partnership that has elected to be governed by the Illinois Uniform Partnership Act (1997).

=====

<2019.09.06 - Windstream's Second Supplemental Initial Disclosures.pdf>

CONFIDENTIALITY NOTE: This message and any attachments are from a law firm. They are solely for the use of the intended recipient and may contain privileged, confidential or other legally protected information. If you are not the intended recipient, please destroy all copies without reading or disclosing their contents and notify the sender of the error by reply e-mail.

Terence P. Ross
Michael R. Justus (admitted *pro hac vice*)
Shaya Rochester
Katten Muchin Rosenman LLP
575 Madison Avenue
New York, NY 10022
Telephone: (212) 940-8800
Facsimile: (212) 940-8776

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., <i>et al.</i> , ¹	)	Case No. 19-22312 (RDD)
)	
Debtors.	)	(Jointly Administered)
)	
WINDSTREAM HOLDINGS, INC., <i>et al.</i> ,)	
)	
Plaintiffs,	)	Adv. Pro. No. 19-08246
)	
v.)	
)	
CHARTER COMMUNICATIONS, INC. and)	
CHARTER COMMUNICATIONS OPERATING,)	
LLC,)	
)	
Defendants.)	
)	

**DECLARATION OF JEFFREY H. AUMAN
IN LIEU OF DIRECT TESTIMONY AT TRIAL**

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.

I, Jeffrey H. Auman declare as follows:

1. I am Executive Vice President of Sales and Marketing with Windstream Holdings, Inc. I submit this declaration in lieu of direct testimony at the trial of this adversary proceeding on behalf of Windstream Holdings, Inc. and its debtor affiliates and debtors in possession in the above-captioned Chapter 11 cases, and as plaintiffs in the above-captioned adversary proceeding (collectively, the “Debtors” or “Windstream”).

2. As Executive Vice President of Sales and Marketing, I am generally familiar with Windstream’s day-to-day operations, business and financial affairs, and books and records. I am also familiar with the false advertising campaign launched by Defendants Charter Communications, Inc. and Charter Communications Operating, LLC (collectively, “Charter”) that is a subject of this adversary proceeding. I make this declaration as the corporate representative of Windstream at trial. Except as otherwise indicated, all facts set forth in this declaration are based upon my personal knowledge, discussion with other members of Windstream’s management team, advisors and staff, and review of relevant documents, records and information regarding Windstream’s operations, financial affairs, and restructuring initiatives. If called as a witness, I could and would testify competently to the facts set forth in this declaration.

3. The Debtors are all affiliates within the same Windstream corporate family. The Debtors operate under and/or use the Windstream name in the marketplace.

4. Windstream provides telecommunication services to consumers in eighteen U.S. states. Windstream competes with Charter in twelve of those eighteen states. Those twelve states are the only states in which Charter competes directly with Windstream for consumer business.

5. Windstream and Charter entered into an executory agreement (the “VAR Agreement”) pursuant to which Charter provides “last mile” connectivity service to Windstream.

Joint Trial Exhibit 1 is a true and correct copy of the VAR Agreement. This connectivity service is largely provided outside of the twelve states in which Windstream and Charter compete directly for consumer business.

6. Pursuant to the VAR Agreement, Windstream has the right to utilize Charter's business Internet access, via coax cable, to distribute Windstream's services to customers in certain designated areas. This is commonly referred to as "last mile" connectivity.

7. Under the VAR Agreement, and in exchange for Charter's "last mile" connectivity services, Windstream agreed to pay Charter for its services, among other things. Windstream has adequately performed all of its obligations under the VAR Agreement.

8. After Debtors filed their Chapter 11 petitions in the Bankruptcy Court, they provided to Charter a comprehensive list of Windstream customers receiving "last mile" connectivity through Charter pursuant to the VAR Agreement. This list was provided at the request of Charter, despite the fact that Charter already knew the identities of all such customers.

9. On or around March 15, 2019, Charter disconnected service under the VAR Agreement to approximately 289 Windstream customers. Prior to these disconnects, Charter failed to provide thirty-days written notice of its discontinuation of services, as required under the VAR Agreement.

10. Some Windstream customers disconnected by Charter on or around March 15, 2019, contacted Charter to have their services reinstated and were told by Charter that service was not being restored because of Windstream's failure to pay certain prepetition amounts allegedly owed to Charter by Windstream.

11. Trouble tickets were created and kept by Windstream customer service representatives in the regular course of its business at or about the time they received calls from

Windstream customers who had been disconnected by Charter on or around March 15, 2019. Plaintiffs' Trial Exhibit 34 is a true and correct copy of an internal Windstream record of the trouble tickets relating to those disconnections.

12. Windstream took action to address Charter's disconnection of service to its customers, including tasking Windstream employees to investigate and attempt to rectify the disconnects. As a result of that investigation, Windstream learned that the disconnection of service by Charter to approximately 289 Windstream customers who receive "last mile" connectivity service under the VAR Agreement was an attempt by Charter to collect prepetition debt. Charter's representatives informed Windstream that the customer accounts that were disconnected were coded incorrectly by Charter and thus were improperly disconnected to collect prepetition debt.

13. Notwithstanding the fact that the Bankruptcy Court entered a Temporary Restraining Order prohibiting Charter from disconnecting any further Windstream customers under the VAR Agreement, Charter disconnected service to Windstream's customers on at least four separate occasions in April and May. Prior to these disconnections, Charter failed to provide thirty-days written notice of its discontinuation, as required under the VAR Agreement. Windstream took action to address Charter's unexpected disconnection of service to its customers, including tasking Windstream employees to investigate and attempt to rectify the disconnects. Again, Windstream learned that these disconnections were due to Charter's failure to take appropriate measures to identify Windstream accounts that were not to be disconnected. Charter's representatives informed Windstream that such accounts were coded incorrectly by Charter and thus were improperly disconnected to collect prepetition debt. One of the customers disconnected was GNC, which is one of Windstream's largest and most important corporate accounts.

Windstream management and employees spent numerous hours investigating and attempting to rectify these disconnects.

14. Windstream suffered harm from the service disconnections by Charter under the VAR Agreement. For example, Windstream provided at least \$5,278.85 in customer “out of service” credits in connection with certain customers who opened trouble tickets in connection with the disconnection of service by Charter. In addition, Windstream suffered a loss of customer goodwill, as well as damage to its brand.

15. Windstream also suffered harm from Charter’s false advertising. For example, in order to mitigate the effects of Charter’s false advertising, Windstream was forced to offer customer upgrades, discounts, and pricing promotions to convince customers to maintain their service with Windstream. The total approximate cost of this was \$4,033,425.

16. In addition, in April 2019, Windstream sent out multiple direct mail pieces and e-mails to its customers in an effort to correct the false impressions created by Charter’s false advertising. This corrective advertising cost Windstream approximately \$862,775. Joint Trial Exhibit 11 is a true and correct copy of an invoice reflecting certain costs relating to these direct mail pieces which was received and kept by Windstream in the regular course of its business. The first page of Plaintiffs’ Trial Exhibit 62 is a true and correct copy of a redacted internal Windstream record prepared and kept in the regular course of its business listing expenses incurred by Kurtzman Carson Consultants LLC in connection with services provided to Windstream. Plaintiffs’ Trial Exhibit 62 lists the postage and printing costs relating to the direct mail pieces used in Windstream’s corrective advertising. Plaintiffs’ Trial Exhibit 64 is a true and correct copy of an internal Windstream record prepared and kept in the regular course of its business setting out Windstream’s costs relating to the corrective advertising as expended over time. Notwithstanding

their efforts to mitigate the damage caused by Charter's false advertising, Windstream suffered a loss of customer goodwill, as well as damage to its brand.

17. After Charter launched its false advertising campaign in late-March 2019, Windstream began to experience a significant spike in customers discontinuing service in those exchanges in which Windstream competes with Charter for consumer and small to medium-sized business customers. This continued until at least the late-Summer of 2019.

18. Plaintiffs' Trial Exhibit 60 is a true and correct copy of an internal Windstream record prepared and kept in the regular course of its business listing "churn" for Windstream customers in all Windstream consumer broadband exchanges and in Windstream consumer broadband exchanges in which Windstream competes with Charter.

19. Windstream has the ability to track customers who switch telephone service from Windstream to Charter to the extent such customers request to "port" their telephone numbers to Charter, *i.e.*, keep the same telephone number that they had used with Windstream. At least 4,500 residential and business Windstream customers have ported their telephone numbers to Charter since Charter's false advertising campaign was launched. All of these residential Windstream customers who ported their telephone numbers from Windstream to Charter would have been sent Charter's direct-mail advertisement containing the false statements. Plaintiffs' Trial Exhibit 14 is a true and correct copy of an internal Windstream record prepared and kept in the regular course of its business listing customers who, during the period February 4, 2019 – July 9, 2019, requested that their telephone numbers be "ported" to Charter.

20. In order to stop Charter's false advertising campaign and to stop Charter from disconnecting Windstream customers under the VAR Agreement, as well as to recover the losses and costs that Charter's wrongful conduct caused, Windstream filed an adversary proceeding in

the Bankruptcy Court. Plaintiffs' Trial Exhibit 1 is a true and correct copy of the Complaint filed with the Bankruptcy Court initiating that adversary proceeding. Plaintiffs' Trial Exhibits 67-93, 100, 104-105 are true and correct copies of the monthly attorney fee statements and the interim attorney fee applications filed with the Bankruptcy Court which reflect the attorneys' fees and costs incurred by Windstream to date in this adversary proceeding. These are kept by Windstream in the regular course of its business. Plaintiffs' Trial Exhibits 94-95 are true and correct copies of invoices from experts retained by Windstream in connection with this adversary proceeding. These are kept by Windstream in the regular course of its business. Based on the foregoing, the total amount of fees and costs incurred by the Debtors' estates through March 31, 2020, solely in connection with this adversary proceeding is approximately \$7,740,328.20. Outside counsel and the experts continue to work on this adversary proceeding and, thus, Windstream continues to incur attorneys' fees and costs relating to this adversary proceeding. Accordingly, the total amount will be revised upward at the time of trial.

21. Windstream's management has spent numerous hours addressing the problems caused by Charter's false advertising. For example, Windstream's Legal Department alone has spent approximately 1,911 hours investigating and responding to Charter's false advertising and assisting with this adversary proceeding. This represents an internal cost to Windstream of approximately \$408,000.

22. Plaintiffs' Trial Exhibit 6 is a true and correct copy of Windstream Holdings, Inc.'s 2Q 2018 Earnings Presentation which was prepared and is kept in the regular course of its business.

23. Plaintiffs' Trial Exhibit 7 is a true and correct copy of Windstream Holdings, Inc.'s 2Q 2019 Earnings Presentation which was prepared and is kept in the regular course of its business.

24. Plaintiffs' Trial Exhibit 17 is a true and correct copy of an internal Windstream record of customer contacts relating to Charter's false advertising which was prepared and kept in the regular course of its business.

25. Plaintiffs' Trial Exhibit 18 is a true and correct copy of certified transcripts of calls by Windstream customers relating to Charter's false advertising recorded and kept by Windstream in the regular course of its business.

26. Plaintiffs' Trial Exhibit 19 is a true and correct copy of certified transcripts of calls by Windstream customers relating to Charter's false advertising recorded and kept by Windstream in the regular course of its business.

27. Plaintiffs' Trial Exhibit 61 is a true and correct copy of an internal Windstream record prepared and kept in the regular course of its business listing consumer revenue for the period January 2019 through August 2019.

28. Plaintiffs' Trial Exhibit 65 is a true and correct copy of a transcript of a voice mail message from a Windstream customer relating to Charter's false advertising recorded and kept by Windstream in the regular course of its business.

29. Plaintiffs' Trial Exhibit 66 is a true and correct copy of certified transcripts of calls by Windstream customers relating to Charter's false advertising recorded and kept by Windstream in the regular course of its business.

30. Plaintiffs' Trial Exhibit 35 is a true and correct copy of the Third Supplemental Initial Disclosures of Plaintiff Windstream Holdings, Inc. and Affiliated Debtors served in this adversary proceeding upon Charter.

31. Plaintiffs' Trial Exhibit 46 is a true and correct copy of certain advertising copy distributed door-to-door in Ohio by Mr. Emmitt Walker, an employee of Charter.

32. The Debtors have filed with the Bankruptcy Court a joint Chapter 11 plan of reorganization (the “Plan”) and corresponding disclosure statement (the “Disclosure Statement”). The Plan sets forth, among other things, the treatment of claims against the Debtors’ estates. Under the Plan, holders of Obligor General Unsecured Claims will not receive a 100% recovery. Certain claims filed by Charter are Obligor General Unsecured Claims. Plaintiffs’ Trial Exhibits 101 and 102 are true and correct copies of the Plan and Disclosure Agreement, filed with the Bankruptcy Court.

33. Plaintiffs’ Trial Exhibit 3 is a true and correct copy of the Complaint filed with the U.S. District Court for the Eastern District of Missouri by the plaintiffs in the lawsuit *Charter Communications Holding Co., et al. v. DirecTV, Inc.*, No. 4:09-cv-00730, Dkt. No. 1 (E.D. Mo. May 11, 2009).

34. Plaintiffs’ Trial Exhibit 5 is a true and correct copy of Windstream’s Consumer Broadband Exchanges Summary for the period January 2016 – August 2019, which was prepared and kept by Windstream in the regular course of its business.

35. Plaintiffs’ Trial Exhibit 8 is a true and correct copy of an email(s) produced by Charter from its records during discovery in this adversary proceeding.

36. Plaintiffs’ Trial Exhibit 9 is a true and correct copy of an email(s) produced by Charter from its records during discovery in this adversary proceeding.

37. Plaintiffs’ Trial Exhibit 10 is a true and correct copy of an email(s) produced by Charter from its records during discovery in this adversary proceeding.

38. Plaintiffs’ Trial Exhibit 11 is a true and correct copy of an email(s) produced by Charter from its records during discovery in this adversary proceeding.

39. Plaintiffs' Trial Exhibit 12 is a true and correct copy of an email(s) produced by Charter from its records during discovery in this adversary proceeding.

40. Plaintiffs' Trial Exhibit 15 is a true and correct copy of Windstream customer contracts bought out by Charter and was produced by Charter from its records during discovery in this adversary proceeding.

41. Plaintiffs' Trial Exhibit 20 is a true and correct copy of a brief filed by the plaintiffs in the lawsuit, *Charter Communications Holding Co., et al. v. DirecTV, Inc.*, No. 4:09-cv-00730, Dkt. No. 9-2 (E.D. Mo. May 11, 2009).

42. Plaintiffs' Trial Exhibit 25 is a true and correct copy of an email(s) produced by Charter from its records during discovery in this adversary proceeding.

43. Plaintiffs' Trial Exhibit 26 is a true and correct copy of an email(s) produced by Charter from its records during discovery in this adversary proceeding.

44. Plaintiffs' Trial Exhibit 27 is a true and correct copy of an email(s) produced by Charter from its records during discovery in this adversary proceeding.

45. Plaintiffs' Trial Exhibit 28 is a true and correct copy of an email(s) produced by Charter from its records during discovery in this adversary proceeding.

46. Plaintiffs' Trial Exhibit 29 is a true and correct copy of an email(s) produced by Charter from its records during discovery in this adversary proceeding.

47. Plaintiffs' Trial Exhibit 30 is a true and correct copy of an email(s) produced by Charter from its records during discovery in this adversary proceeding.

48. Plaintiffs' Trial Exhibit 33 is a true and correct copy of an email(s) produced by Charter from its records during discovery in this adversary proceeding.

49. Plaintiffs' Trial Exhibit 39 is a true and correct copy of an email(s) produced by Charter's advertising agency, RAPP, from its records, pursuant to a subpoena issued during discovery in this adversary proceeding.

50. Plaintiffs' Trial Exhibit 40 is a true and correct copy of an email(s) produced by Charter from its records during discovery in this adversary proceeding.

51. Plaintiffs' Trial Exhibit 41 is a true and correct copy of an email(s) produced by Charter from its records during discovery in this adversary proceeding.

52. Plaintiffs' Trial Exhibit 42 is a true and correct copy of an email(s) produced by Charter from its records during discovery in this adversary proceeding.

53. Plaintiffs' Trial Exhibit 43 is a true and correct copy of an email(s) produced by Charter from its records during discovery in this adversary proceeding.

54. Plaintiffs' Trial Exhibit 44 is a true and correct copy of an email(s) produced by Charter's advertising agency, RAPP, from its records, pursuant to a subpoena issued during discovery in this adversary proceeding.

55. Plaintiffs' Trial Exhibit 45 is a true and correct copy of an email(s) produced by Charter's advertising agency, RAPP, from its records, pursuant to a subpoena issued during discovery in this adversary proceeding.

56. Plaintiffs' Trial Exhibit 47 is a true and correct copy of an email(s) produced by Charter from its records during discovery in this adversary proceeding.

57. Plaintiffs' Trial Exhibit 48 is a true and correct copy of a certified transcript of a hearing held in this adversary proceeding on April 15, 2019.

58. Plaintiffs' Trial Exhibit 50 is a true and correct copy of an email(s) produced by Charter from its records during discovery in this adversary proceeding.

59. Plaintiffs' Trial Exhibit 51 is a true and correct copy of instant messages produced by Charter from its records during discovery in this adversary proceeding.

60. Plaintiffs' Trial Exhibit 52 is a true and correct copy of an email(s) produced by Charter from its records during discovery in this adversary proceeding.

61. Plaintiffs' Trial Exhibit 53 is a true and correct copy of instant messages produced by Charter from its records during discovery in this adversary proceeding.

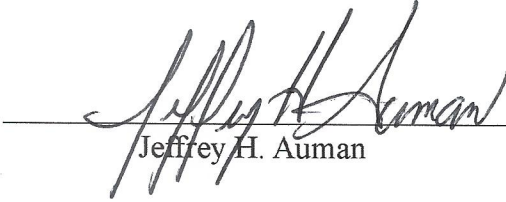
62. Plaintiffs' Trial Exhibit 55 is a true and correct copy of an email(s) produced by Charter from its records during discovery in this adversary proceeding.

63. Plaintiffs' Trial Exhibit 58 is a true and correct copy of a document produced by Charter from its records during discovery in this adversary proceeding.

64. Plaintiffs' Trial Exhibit 59 is a true and correct copy of the verified Defendants' Responses and Objections to Debtors' Interrogatories to Defendants, dated September 23, 2019, and served on Debtors in this adversary proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: April 20, 2020



Jeffrey H. Auman

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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)
<hr/>	
WINDSTREAM HOLDINGS, INC., et al.,	§
	§ Adv. Pro. No. 19-08246 (RDD)
Plaintiffs,	§
	§
vs.	§
	§
CHARTER COMMUNICATIONS, INC. and	§
CHARTER COMMUNICATIONS	§
OPERATING, LLC,	§
	§
Defendants.	§
	§

**EXPERT REPORT
OF
JOHN C. JAROSZ**

October 11, 2019

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EXPERT REPORT OF JOHN C. JAROSZ

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I. INTRODUCTION

A. Assignment

1. I submit this expert report on behalf of Windstream Holdings, Inc. and its affiliated debtors as debtors in possession (collectively, “Plaintiffs” or “Windstream”) in the adversary proceeding in the above-captioned Chapter 11 cases. I have been retained by Windstream to provide expert analysis and testimony, if necessary, related to the damages incurred by Windstream due to Charter Communications, Inc. and Charter Communications Operating, LLC’s (collectively, “Defendants” or “Charter”) alleged false advertising campaign resulting in violations of the Lanham Act and other similar state statutes, breach of contract, violation of the Bankruptcy Code’s automatic stay, and equitable subordination.¹ Specifically, I was asked to calculate Windstream’s lost profits damages due to Charter’s false advertising campaign, and the increased costs, including corrective advertising costs, incurred by Windstream due to Charter’s alleged false advertising campaign.

2. This report summarizes the opinions that I have formed to date. I may modify or supplement my opinions, if necessary and allowed, based on the review and analysis of information provided to me subsequent to the filing of this report.

B. Qualifications

3. I am a Managing Principal of Analysis Group, Inc. (“Analysis Group”) and Director of the firm’s Washington, DC office. Analysis Group is an economic, financial,

¹ *In re: Windstream Holdings, Inc., et al.; Windstream Holdings, Inc., et al., vs. Charter Communications, Inc. and Charter Communications Operating, LLC*, Complaint, April 5, 2019 (“Complaint”), ¶¶ 39-86.

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health care, and strategy consulting firm with offices in Boston, MA; Chicago, IL; Dallas, TX; Denver, CO; Los Angeles, CA; Menlo Park, CA; New York, NY; San Francisco, CA; Washington, DC; Brussels, Belgium; Montreal, Canada; Beijing, China; Paris, France; and London, U.K. We provide research and analysis in a variety of business, litigation, and regulatory settings, and have particular expertise in intellectual property (“IP”) matters, having been engaged in numerous tort and contract cases involving patents, trademarks, copyrights, false advertising, trade secrets, and unfair competition.

4. I am an economist whose specialty is IP valuation and monetary relief (including damages) assessment. I have been involved in more than 350 such engagements. My resume is attached as Tab 1. It describes all of my testimony (either in deposition or at trial) and all of my publications.

C. Evidence Considered

5. In preparing this report, I have considered information from a variety of sources, each of which is a type that is reasonably relied upon by experts in my field. Those sources are identified in Tab 2. I also have relied upon my professional judgment and expertise, gathered in many years of estimating damages. In addition, I and/or people working under my direction have spoken with several Windstream employees, including:

- Jeffrey Auman, Executive Vice President of Sales and Marketing;
- Brad Brannon, Vice President of Consumer and Small and Medium Business Intelligence for Windstream; and
- Aaron Pierce, Vice President of Marketing and Operations.

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D. Compensation

6. My firm has billed Windstream on a time-and-materials basis for my work and that of my colleagues. My hourly billing rate for the time spent consulting and calculating damages, which includes my study of pertinent issues and materials, and any testimony I may give, is \$800. I also have directed the efforts of other staff members of Analysis Group, whose hourly billing rates range from \$280 to \$535. My compensation is not, in any way, dependent on the outcome of this proceeding or on the substance of my opinion.

E. Summary of Conclusions

7. Windstream’s lost profits damages correspond to the amount of profits that Windstream would have made on sales from customers that were lost due to Charter’s alleged actions. If lost profits damages are awarded, these damages are between \$3.2 and \$5.1 million for customers that were lost from April 2019 through August 2019.²

8. Additionally, Windstream’s damages also include increased costs caused by Charter’s alleged actions, including the costs of Windstream’s corrective advertising campaign in April 2019 and the costs of Windstream’s promotional campaign in September 2019 to recover its subscriber base. If damages associated with Windstream’s costs of corrective advertising are awarded, these damages are \$809,876.³ If damages associated with

² Tab 3.

³ Tab 3.

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Windstream’s costs of its September promotional campaign are awarded, these damages are estimated to be approximately \$8.0 million.⁴

II. BACKGROUND

A. Parties-in-Suit

1. Windstream

9. Founded on May 23, 2013, Windstream is a publicly-traded holding company with its principal place of business in Little Rock, AR.⁵ Windstream describes itself as “a leading provider of advanced network communications and technology solutions for consumers, small businesses, enterprise organizations and carrier partners across the U.S.”⁶ In 2018, Windstream generated revenues of approximately \$5.7 billion, and operating income of approximately \$296.6 million.⁷

⁴ Tab 3. The \$8.0 million estimate reflects Windstream’s forecast of the costs associated with offering free service to certain new customers for 90 days. *See* 90 Days Free Cost.xlsx; Rule 30(b)(6) Deposition Windstream, September 24, 2019, at 95-97; Conversation with Brad Brannon. I may modify or supplement my opinions, if necessary and allowed, based on the review and analysis of information provided to me subsequent to the filing of this report.

⁵ <https://www.bloomberg.com/profile/company/WIN:US> (viewed 10/8/2019); <https://news.windstream.com/history/default.aspx> (viewed 10/8/2019).

⁶ <https://www.windstream.com/about/windstream-information/company-overview> (viewed 9/16/2019).

⁷ https://s22.q4cdn.com/358319107/files/doc_financials/quarterly_results/2018/q4/4Q18-Financial-Highlights.pdf (viewed 10/8/2019).

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10. Windstream offers broadband internet, voice, video and/or security in bundled solutions to residential consumers and small businesses primarily in 18 states.⁸ Windstream markets its premium services, including its highest speed internet products and video offerings, under the brand name “Kinetic” in several areas.⁹ In 2018, Windstream’s Consumer & Small Business segment served approximately 1.4 million residential and small business customers, and generated \$1.9 billion in revenue and \$1.1 billion in contribution margin.¹⁰

11. On February 25, 2019, Windstream filed its Chapter 11 cases.¹¹ I understand that the Chapter 11 filings were not the result of failures of operations or concerns with the overall financial health of Windstream’s business, but rather were “precipitated by an adverse decision issued by the United States District Court for the Southern District of New York, holding that Windstream had defaulted on an indenture with certain of Windstream’s

⁸ <https://www.windstream.com/about/windstream-information/coverage-map> (viewed 9/25/2019). The 18 states that Windstream serves are Alabama, Arkansas, Florida, Georgia, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, and Texas. *See also* <https://www.windstream.com/about/windstream-information/company-overview> (viewed 9/16/2019).

⁹ Windstream introduced the “Kinetic” brand across its consumer, and small and medium business product portfolio in 2017. <https://www.telecompetitor.com/windstream-rebrand-introduces-kinetic-across-consumer-smb-product-portfolio/> (viewed 10/8/2019).

¹⁰ https://s22.q4cdn.com/358319107/files/doc_financials/quarterly_results/2018/q4/4Q18-Financial-Highlights.pdf (viewed 10/8/2019).

¹¹ Complaint, ¶ 14. *See also* <https://investor.windstream.com/news/news-details/2019/Windstream-Holdings-Inc-Files-for-Voluntary-Reorganization-Under-Chapter-11-of-the-US-Bankruptcy-Code-Following-Judge-Furmans-Decision/default.aspx> (viewed 9/25/2019).

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unsecured notes” (the “District Court Decision”).¹² As described in its public statements, Windstream announced that it is “confident that, upon completion of the reorganization process, we will be even better positioned to invest in our business, expand our speed and capabilities for our customers and compete for the long term.”¹³ Windstream emphasized that it would continue “serving our customers as usual” and “remain[ed] committed to providing critical voice and data services.”¹⁴

2. Charter

12. Incorporated in Missouri in 1993, Charter is a publicly-traded holding company with its principal place of business in Stamford, Connecticut.¹⁵ Charter is a cable provider and a broadband communications services company.¹⁶ Across the U.S., Charter offers “subscription-based video services, including video on demand (“VOD”), high definition (“HD”) television, and digital video recorder (“DVR”) service, Internet services, voice and mobile services” marketed under its “Spectrum” brand.¹⁷ Charter’s “[b]undled

¹² Complaint, ¶ 14.

¹³ <https://investor.windstream.com/news/news-details/2019/Windstream-Holdings-Inc-Files-for-Voluntary-Reorganization-Under-Chapter-11-of-the-US-Bankruptcy-Code-Following-Judge-Furmans-Decision/default.aspx> (viewed 9/25/2019). *See also*, Complaint, ¶ 14.

¹⁴ <https://investor.windstream.com/news/news-details/2019/Windstream-Holdings-Inc-Files-for-Voluntary-Reorganization-Under-Chapter-11-of-the-US-Bankruptcy-Code-Following-Judge-Furmans-Decision/default.aspx> (viewed 9/25/2019).

¹⁵ Charter Communications, Inc., Form 10-K for fiscal year ended December 31, 2018 (“Charter 2018 10-K”), p. 1; <http://www.fundinguniverse.com/company-histories/charter-communications-inc-history/> (viewed 9/25/2019).

¹⁶ Charter 2018 10-K, p. 1.

¹⁷ Charter 2018 10-K, pp. 4, 9.

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services are available to substantially all of [its] [consumers], and approximately 58% of [its] customers subscribe to a bundle of services.”¹⁸ In 2018, Charter generated approximately \$43.6 billion in revenues, and \$5.2 billion in operating income.¹⁹

13. In 2018, Charter and its affiliates and subsidiaries provided cable and internet services to residential and commercial customers in 41 states.²⁰ Charter competes against Windstream in 12 of the 18 states in which Windstream provides services.²¹

B. Overview of Allegations

14. On April 5, 2019, Windstream commenced this adversary proceeding against Charter.²² In its complaint, Windstream alleges that, among other things, the Charter advertisements mailed shortly after Windstream filed for bankruptcy made false and/or misleading statements in violation of the Lanham Act and other similar state statutes.²³ Windstream also alleges that Charter breached its reseller agreement with Windstream by disconnecting service to certain Windstream customers without providing the requisite 30

¹⁸ Charter 2018 10-K, p. 4.

¹⁹ Tab 8.

²⁰ Complaint, ¶ 12.

²¹ Windstream competes in the following 18 states: Alabama, Arkansas, Florida, Georgia, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, and Texas. Windstream competes with Charter in the following 12 states: Alabama, Georgia, Kentucky, Minnesota, Missouri, Nebraska, New York, North Carolina, Ohio, Pennsylvania, South Carolina, and Texas. *See* 190917 Charter Litigation Information -damages.xlsx.

²² *See* Complaint.

²³ Complaint, ¶ 5.

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days’ notice to Windstream.²⁴ Windstream also alleges that Charter violated the automatic stay and other provisions of the Bankruptcy Code by, among other things, disconnecting service to certain Windstream customers.²⁵

15. Windstream has alleged several specific counts against Charter:

- Count I: Violation of the Lanham Act, 15 U.S.C. § 1125(a);
- Count II: Violation of Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. §§ 10-1-370, *et. seq.*;
- Count III: Violation of North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen Stat. § 75-1.1, *et. seq.*;
- Count IV: Violation of Nebraska Uniform and Deceptive Trade Practices Act, Neb. Rev. Stat. § 87-302, *et. seq.*;
- Count V: Breach of Written Contract;
- Count VI: Violation of Automatic Stay, 11 U.S.C. § 362; and
- Count VII: Equitable Subordination, 11 U.S.C. § 510(c).²⁶

²⁴ Complaint, ¶¶ 5-6, 31.

²⁵ Complaint, ¶¶ 81-83.

²⁶ Complaint, ¶¶ 39-86.

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1. Lanham Act and Other Similar State Statutes

16. On February 25, 2019, Windstream filed for Chapter 11 primarily to restructure its balance sheet following the District Court Decision.²⁷ As noted above, these Chapter 11 cases were not caused by failures in Windstream’s operations or uncertainty about the financial health of its business.²⁸ Windstream publicly announced and fully expects that it will continue its operations in all 18 states in which it provides service.²⁹

17. I understand that, from March 15, 2019 through March 26, 2019,³⁰ Charter undertook a direct mail advertising campaign in which it sent over 800,000 mailers to Windstream’s customers in those areas in which Charter and Windstream compete.³¹ The mailers contained a Charter advertisement stating and/or implying that Windstream’s Chapter

²⁷ Complaint, ¶ 14; <https://investor.windstream.com/news/news-details/2019/Windstream-Holdings-Inc-Files-for-Voluntary-Reorganization-Under-Chapter-11-of-the-US-Bankruptcy-Code-Following-Judge-Furmans-Decision/default.aspx> (viewed 9/25/2019).

²⁸ Complaint, ¶ 14. *See also* Debtors’ Motion for a Temporary Restraining Order, Preliminary Injunction and Other Equitable Relief against Charter Communications, Inc. and Charter Communications Operating, LLC, April 2019 (“Motion for TRO and PI”), ¶¶ 8-13.

²⁹ Complaint, ¶¶ 1, 14; <https://investor.windstream.com/news/news-details/2019/Windstream-Holdings-Inc-Files-for-Voluntary-Reorganization-Under-Chapter-11-of-the-US-Bankruptcy-Code-Following-Judge-Furmans-Decision/default.aspx> (viewed 9/25/2019); Rule 30(b)(6) Deposition Windstream, September 24, 2019, at 73 and Exhibit 4.

³⁰ Charter Communications, Inc. and Charter Communications Operating, LLC’s Opposition to Debtor’s Motion for Temporary Restraining Order, April 11, 2019, Exhibit B, at p. 5.

³¹ Complaint, ¶¶ 18-20; *In re: Windstream Holdings, Inc., et al. v. Charter Communications, Inc. et al.*, Hearing Transcript, April 15, 2019 (“TRO Hearing Transcript”), at 101.

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11 cases mean that Windstream will not be able to continue providing services.³² One advertisement read,

Windstream Customers,

Don’t Risk Losing Your Internet and TV Services.

Windstream has filed for Chapter 11 bankruptcy, which means uncertainty. Will they be able to provide the Internet and TV services you rely on in the future? To ensure you are not left without vital Internet and TV services, switch to Spectrum. With a network built for the future, Spectrum is here for the long haul...

Goodbye, Windstream.
Hello, Spectrum.³³

³² Complaint, ¶¶ 19-22.

³³ Complaint, ¶ 22.

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18. Another is shown below.

The flyer is for Spectrum, featuring the Spectrum logo in the top right. It shows a laptop displaying '200 Mbps', a TV screen showing the movie 'Boomerang', and a tablet showing 'Black Panther'. Below these images, it says 'Tuesdays @ 10pm on BET' and 'Wednesdays @ 9pm on VH1'. The main headline reads 'Windstream Customers, Don't Risk Losing Your Internet and TV Services.' The body text explains that Windstream has filed for Chapter 11 bankruptcy and encourages switching to Spectrum for a better deal. It lists several benefits: fast speeds up to 200 Mbps, top performing internet provider, free modem, free HD with instant access to on-demand titles, and the Spectrum TV app. It also mentions that Windstream has a 2-year contract, while Spectrum has no contracts, and offers to buy out the current contract for up to \$500. A green circular badge says 'BEST DEAL EVER!'. The bottom left says 'Goodbye, Windstream. Hello, Spectrum.' and provides the phone number 1-855-280-7152 and website Spectrum.com/lifestyle. The bottom right shows the price '\$59.98 /mo. for 12 mos.' with 'NO CONTRACT' below it. At the very bottom, there is a small line of text: '0528-ALD-69 22117001-AD1-0005121-001552'.

Spectrum

200 Mbps

Boomerang

Tuesdays @ 10pm on BET

Wednesdays @ 9pm on VH1

**Windstream Customers,
Don't Risk Losing Your Internet and TV Services.**

Windstream has filed for Chapter 11 bankruptcy, which means uncertainty. Will they be able to provide the Internet and TV services you rely on in the future? To ensure you are not left without vital Internet and TV services, switch to Spectrum. With a network built for the future, Spectrum is here for the long haul—with our best deal for Internet and TV services from **\$59.99/month for 12 months***

- **Fast speeds up to 200 Mbps.**™ Everyone at home can stream, game and download at the same time with no data caps.
- **Spectrum is the top performing internet provider,** delivering more speed, more consistently.¹¹
- **FREE** modem; Windstream charges \$5.99/month for an Internet modem.¹
- **FREE** HD¹ with instant access to a huge selection of On Demand titles.
- Download the **Spectrum TV® App**[®] to stream up to 50+ LIVE channels² including BET, OWN and VH1 on your devices, anywhere in your home and everywhere on-the-go.

Windstream has a 2-year contract. With Spectrum there are no contracts.
Plus, we will buy you out of your current contract up to \$500.**

BEST DEAL EVER!

Goodbye, Windstream.
Hello, Spectrum.

Call 1-855-280-7152
or visit Spectrum.com/lifestyle
Limited-time offer! Expires 04/25/19

**SPECTRUM INTERNET 200 Mbps
+ SPECTRUM LIFESTYLE TV**

\$59.98 /mo. for 12 mos.*

NO CONTRACT

0528-ALD-69 22117001-AD1-0005121-001552

19. Around the same time, I understand that Charter’s direct sales representatives handed out flyers similar to the direct mail advertisements described above.³⁴ I understand

³⁴ Declaration of Timothy Wyatt in Support of Debtors’ Reply in Support of Motion for Preliminary Injunction and Other Equitable Relief against Charter Communications, Inc. and Charter Communications Operating, LLC, May 10, 2019 (“Wyatt Declaration”), ¶ 5.

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that Charter’s sales representatives also made claims that Windstream would be going out of business.³⁵

20. On April 15, 2019, this Court issued a temporary restraining order (the “TRO”) against Charter, finding that “the statements in the mailers [] were literally false in suggesting that Windstream is in any material way at risk of not delivering services or going out of business” and were “misleading to the consumers who constitute Windstream’s customers.”³⁶ On May 16, 2019, the Court issued a preliminary injunction enjoining Charter from making any further claims about Windstream’s bankruptcy.³⁷ Windstream alleges that, despite these orders, Charter’s sales and service representatives continued to make false and/or misleading statements claiming and/or implying that Windstream is “going out of business” in violation of the TRO.³⁸

21. Windstream alleges that Charter’s advertising “has caused consumer confusion and consumer deception among Windstream’s customers.”³⁹ According to Windstream, Windstream customers were “misled into opening the envelopes because they

See also, Supplemental Declaration of Lewis Langston in Support of Debtors’ Motion for a Temporary Restraining Order, Preliminary Injunction and Other Equitable Relief against Charter Communications, Inc. and Charter Communications Operating, LLC, April 11, 2019 (“Langston Supplemental Declaration”), ¶¶ 4-5. *See also*, Complaint, at Exhibit B.

³⁵ Wyatt Declaration, ¶¶ 4-8, Exhibits A and B.

³⁶ TRO Hearing Transcript, at 112.

³⁷ Preliminary Injunction Against Charter Communications, Inc. and Charter Communications Operating, LLC, May 16, 2019 (“Preliminary Injunction Order”), ¶ 1.

³⁸ *See, e.g.*, WIN002488-511 and WIN002772-789.

³⁹ Complaint, ¶ 24.

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believed the communications came from Windstream,” and were then “confused and misled by the false statements contained in the advertisements.”⁴⁰ Since March 2019, Windstream has received hundreds of calls from customers expressing concern or confusion due to Charter’s false advertisements.⁴¹ Windstream contends that Charter’s actions are “likely to influence the purchasing decision of Windstream’s current or prospective customers,” and that “Charter’s false and misleading statements have and are likely to continue to injure Windstream by causing Windstream to lose subscribers and sales.”⁴² I understand that Windstream seeks to recover Charter’s profits and monetary damages sustained by Windstream, among other fees and costs.⁴³

22. In addition, I understand that Windstream has “expend[ed] substantial time, money, and resources to combat [Charter’s] false claims.”⁴⁴ For example, according to Windstream, it has offered upgrades to distressed customers and has incurred costs to educate its customer service representatives on how to respond to Charter’s false and/or misleading claims.⁴⁵ Windstream also undertook an extensive corrective advertising campaign in April and May 2019 to mitigate the effects of Charter’s false and/or misleading statements by mailing correspondence to customers. For example, in April 2019, Windstream sent over 1.5

⁴⁰ Complaint, ¶ 24. *See also*, TRO Hearing Transcript, April 15, 2019, at 101-102.

⁴¹ *See, e.g.*, Complaint, ¶¶ 27-28.

⁴² Complaint, ¶¶ 39-54.

⁴³ *See* Complaint, ¶ 54.

⁴⁴ Complaint, ¶ 30.

⁴⁵ Complaint, ¶ 30.

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million emails and direct mailers to its affected customers.⁴⁶ I also understand that in September 2019, Windstream launched a campaign to recapture (or replace) the customers that Windstream had lost to Charter by offering 90 days of service without charge.⁴⁷

2. Breach of Contract

23. In April 2018, Charter and Windstream entered into a Value Added Reseller Agreement (“VAR Agreement”) under which Charter agreed to provide “last mile” connectivity for certain Windstream customers through Charter’s network in exchange for certain payments from Windstream, among other things.⁴⁸ Specifically, the contract grants Windstream rights to use Spectrum’s (*i.e.*, Charter’s) business internet access services, business WiFi, and voice services to distribute Windstream’s services in certain areas.⁴⁹

24. On or around March 14, 2019, Charter disconnected service to approximately 350 Windstream customers without giving 30 days notice to Windstream, and informed customers that their service could not be reinstated because Windstream had failed to make

⁴⁶ Tab 9. *See also*, WIN002771; Complaint, ¶ 30.

⁴⁷ *See, e.g.*, 90 Days Free Cost.xlsx; Conversation with Jeffrey Auman and Brad Brannon. According to Windstream’s projections, Windstream expects to lose \$8.0 million from the 90-day free campaign. 90 Days Free Cost.xlsx; Conversation with Brad Brannon.

⁴⁸ Complaint, ¶ 31; Complaint, at Exhibit A (“VAR Agreement”). “Last mile” connectivity refers to a network’s acquisition of a competitor’s service in order to connect from their network to the actual physical customer premise.

⁴⁹ VAR Agreement, at 1-2, 13. *See also*, Complaint, ¶ 71.

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payments owed to Charter.⁵⁰ Charter continued to disconnect service to certain Windstream customers after the issuance of the TRO.⁵¹

25. Windstream alleges that Charter’s decision to discontinue service without notifying Windstream breached Sections 2.3, 8.1, and 11.2 of the VAR Agreement.⁵² In addition, Windstream contends that Charter’s actions violated the automatic stay and section 362(a)(3) of the Bankruptcy Code because Charter was attempting to “collect [Windstream’s] prepetition debts.”⁵³

3. Automatic Stay

26. I understand that the Bankruptcy Code’s automatic stay prohibits “acts to exercise control over the property of a debtor’s estate and any act to collect, assess, or recover a claim against a debtor that arose before the petition date.”⁵⁴ Windstream alleges that Charter violated the automatic stay of the Bankruptcy Code by “interfer[ing] with Windstream’s contractual rights in the [VAR Agreement] by ceasing to provide service to Windstream’s customers, without permission of the Court,” sending “false and deceptive advertisements to

⁵⁰ Complaint, ¶ 32.

⁵¹ Preliminary Injunction Order, ¶ 4.

⁵² Complaint, ¶ 32. Section 2.3 of the VAR Agreement states that “Spectrum shall give Windstream thirty (30) days’ notice prior to [] discontinuance;” Section 8.1 provides that “Spectrum will use commercially reasonable efforts to provide the Spectrum Services...24 hours per day, seven (7) days per week;” and Section 11.2 sets forth certain reasons for which the agreement “may be terminated immediately by either party through written notice.” VAR Agreement, at 2, 6, 8.

⁵³ Complaint, ¶ 83. I understand that Windstream is not authorized to make payments for pre-petition debt as a result of its Chapter 11 filing. Complaint, ¶ 32.

⁵⁴ Complaint, ¶ 80.

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Windstream’s customers, thereby impairing Windstream’s goodwill,” and “disconnect[ing] customers’ service in an attempt to collect its prepetition debts.”⁵⁵

4. Equitable Subordination

27. I understand that Windstream also seeks “equitable subordination of all the claims of Charter Communications, Inc. and its subsidiaries and affiliates...against the Debtors to the claims of all other creditors pursuant to 11 U.S.C. § 510(c),” such that the “Charter Claimants should not be permitted to receive any distributions on any claims asserted or to be asserted by the Charter Claimants in these Chapter 11 cases until payment in full with interest is made to all non-defendant creditors of Windstream.”⁵⁶

C. Marketplace Overview

28. Cable providers typically distribute TV content from cable networks to consumers over wired telecommunications networks.⁵⁷ Cable providers also typically offer broadband internet access and voice services, which are often bundled together with a cable TV subscription into a single offering.⁵⁸ The largest U.S. cable providers in 2019 are Comcast Corporation, Charter Communications, Inc., and Verizon Communications, Inc.⁵⁹ Cable

⁵⁵ Complaint, ¶¶ 81-83.

⁵⁶ Complaint, ¶ 86.

⁵⁷ <https://www.ibisworld.com/united-states/market-research-reports/cable-providers-industry/> (viewed 9/29/2019).

⁵⁸ <https://www.ibisworld.com/united-states/market-research-reports/cable-providers-industry/> (viewed 9/29/2019).

⁵⁹ <https://www.ibisworld.com/united-states/market-research-reports/cable-providers-industry/> (viewed 9/29/2019).

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providers are expected to generate approximately \$90 billion in revenues in the U.S. in 2019.⁶⁰ Many cable providers that provide internet services also compete with internet service providers (“ISPs”), which are companies that use wired infrastructure to enable consumers to access the internet.⁶¹ In 2018, ISPs generated approximately \$115 billion in revenues in the U.S.⁶² The largest ISPs are AT&T Inc., Comcast Corporation, Charter Communications Inc., Verizon Communications, Inc., and CenturyLink Inc.⁶³ In addition, cable providers face competition for cable TV subscribers from online streaming services, such as Netflix, though the rise of these services may help drive demand for their broadband internet offerings.⁶⁴

29. Generally, consumers of cable and internet services can be divided into two primary segments: residential consumers and business (or commercial) consumers. Residential consumers account for approximately 60 percent of the U.S. marketplace, with business/commercial customers accounting for the remaining 40 percent.⁶⁵ Among residential consumers, purchase decisions are commonly influenced by availability and geographic

⁶⁰ <https://www.ibisworld.com/united-states/market-research-reports/cable-providers-industry/> (viewed 9/29/2019).

⁶¹ <https://www.ibisworld.com/united-states/market-research-reports/internet-service-providers-industry/> (viewed 9/29/2019).

⁶² <https://www.ibisworld.com/united-states/market-research-reports/internet-service-providers-industry/> (viewed 9/29/2019).

⁶³ <https://www.ibisworld.com/united-states/market-research-reports/internet-service-providers-industry/> (viewed 9/29/2019).

⁶⁴ <https://fortune.com/2019/04/22/cord-cutting-ott-netflix-directv/> (viewed 9/30/2019).

⁶⁵ IBISWorld, “Cable Providers in the U.S.,” May 2016, at 18; IBISWorld, “Internet Service Providers in the U.S.,” October 2014, at 17.

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coverage, price, speed of internet access, service contract terms and flexibility, and equipment fees, among other attributes.⁶⁶

30. The U.S. marketplace for cable and internet services is highly saturated. As of 2019, approximately 90 percent of U.S. adults use the internet,⁶⁷ and roughly 80 percent of U.S. households have broadband internet access at home.⁶⁸

31. While many providers offer cable and/or internet services in the U.S., not all providers compete for the same customers. Each provider typically has a well-defined geographic footprint, which may or may not overlap with other providers. In 2019, approximately 88 percent of Americans have had access to at least two wired broadband internet service providers.⁶⁹ In areas served by multiple cable and internet service providers, competition for customers is fierce.⁷⁰ Given the widespread adoption of cable and internet services, most new customers for one provider are typically gained from the existing subscriber base of a competing provider, rather than customers who are new to the marketplace.⁷¹ Industry observers recently commented on the fierce competition in the

⁶⁶ <https://www.toptenreviews.com/best-internet-providers> (viewed 10/4/2019).

⁶⁷ <https://www.pewinternet.org/fact-sheet/internet-broadband/> (viewed 9/30/2019).
Approximately 97 percent of Americans between the ages of 18 and 49 use the internet.
<https://www.pewresearch.org/fact-tank/2018/09/28/internet-social-media-use-and-device-ownership-in-u-s-have-plateaued-after-years-of-growth/> (viewed 9/30/2019).

⁶⁸ <https://www.ncta.com/broadband-by-the-numbers> (viewed 9/30/2019).

⁶⁹ <https://www.ncta.com/broadband-by-the-numbers> (viewed 9/30/2019).

⁷⁰ *See, e.g.*, Charter 2018 10-K, at 10.

⁷¹ <https://www.pewinternet.org/fact-sheet/internet-broadband/> (viewed 10/10/2019);
<https://www.pcmag.com/news/366986/39-million-americans-switched-digital-home-services-in-2018> (viewed 10/11/2019).

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industry, noting that “[t]elecommunications companies are struggling to retain their subscribers in a saturated US wireless market.”⁷²

III. DAMAGES ANALYSIS

A. Damages Framework

1. Lanham Act and Other Similar State Statutes

32. Windstream has alleged that Charter undertook a false advertising campaign to mischaracterize Windstream’s Chapter 11 bankruptcy in violation of the Lanham Act (15 U.S.C. §1125(a)), among other violations.⁷³ I understand that damages for violation of the Lanham Act are governed by Section 35(a) of the Lanham Act (15 U.S.C. §1117(a)):

When ... a violation under section 1125(a) ... shall have been established..., the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and subject to the principles of equity, to recover (1) defendant’s profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. ... In assessing profits the plaintiff shall be required to prove defendant’s sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award reasonable attorney fees to the prevailing party.⁷⁴

⁷² <https://articles2.marketrealist.com/2019/05/why-did-frontiers-customer-churn-rate-increase-in-q1/> (viewed 9/26/2019).

⁷³ Complaint, ¶¶ 39-86.

⁷⁴ 15 U.S.C. Code §1117(a).

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33. Windstream has alleged that Charter engaged in deceptive trade practices in violation of the Georgia Uniform Deceptive Trade Practices Act (O.C.G.A. §§ 10-1-372(a)(4), 10-1-372(a)(5), 10-1-372(a)(8), and 10-1-372(a)(12)).⁷⁵ I understand that damages for violation of the Georgia Uniform Deceptive Trade Practices Act are governed by Section 10-1-373 of the Georgia Uniform Deceptive Trade Practices Act (O.C.G.A. § 10-1-373(b)), entitling Windstream to its costs.⁷⁶

34. Windstream has alleged that Charter engaged in unfair or deceptive acts or practices in violation of the North Carolina Unfair and Deceptive Trade Practices Act (N.C. Gen. Stat. § 75-1.1(b)).⁷⁷ I understand that damages for violation of the North Carolina Unfair and Deceptive Trade Practices Act are governed by Section 75-16 of the North Carolina Unfair and Deceptive Trade Practices Act (N.C. Gen. Stat. § 75-16):

If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.⁷⁸

⁷⁵ Complaint, ¶¶ 55-59.

⁷⁶ O.C.G.A. § 10-1-373(b).

⁷⁷ Complaint, ¶¶ 60-64.

⁷⁸ N.C. Gen. Stat. § 75-16.

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35. Windstream has alleged that Charter engaged in deceptive trade practices in violation of the Nebraska Uniform and Deceptive Trade Practices Act (Neb. Rev. Stat. §§ 87-302(a)(4), 87-302(a)(5), and 87-302(a)(9)).⁷⁹ I understand that damages for violation of the Nebraska Uniform and Deceptive Trade Practices Act are governed by Section 87-303(b) of the Nebraska Uniform and Deceptive Trade Practices Act (Neb. Rev. Stat. § 87-303(b)) entitling Windstream to its costs.⁸⁰

36. I currently have data and evidence, as shown below, allowing me to estimate some of the damages flowing from alleged violations of the Lanham Act and other similar state statutes.

2. Breach of Contract

37. As I understand it, the goal of damages related to breach of contract is to put the injured party in as good a position as it would have been in had the contract been performed.⁸¹ I understand that in the event of a breach, it is the expectation of the parties *at the time of breach* that determine the value of the conditional rights lost by the injured party.⁸²

⁷⁹ Complaint, ¶¶ 65-68.

⁸⁰ Neb. Rev. Stat. § 87-303(b).

⁸¹ Restatement (Second) of Contracts § 344, 347 (1981).

⁸² Restatement (Second) of Contracts § 348 (1981). Additionally, I understand that “traditional expectancy damage rules permit [] recover[y] without regard to action taken after breach.” Vernon, David H., “Expectancy Damages for Breach of Contract: a Primer and Critique,” *Washington University Law Quarterly* Vol. 1976 No. 2 (1976): 179-256, p. 190.

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38. I currently do not have sufficient data and evidence allowing me to estimate with a reasonable degree of certainty damages flowing from only the alleged breach of contract.

3. Automatic Stay

39. Windstream has alleged that Charter violated the automatic stay and Section 362(a)(6) of the Bankruptcy Code when it: (1) unilaterally and unlawfully interfered with Windstream’s contractual rights in the VAR Contract by ceasing to provide service to Windstream’s customers, without permission of the Court; (2) sent false and deceptive advertisements to Windstream’s customers, thereby impairing Windstream’s goodwill; and (3) disconnected customers’ service in an attempt to collect its prepetition debts. I understand that damages for violation of the automatic stay are sanctions in the form of monetary damages.

40. I currently do not have sufficient data and evidence allowing me to estimate with a reasonable degree of certainty damages flowing from only the alleged violation of the automatic stay.

4. Equitable Subordination

41. Windstream seeks the equitable subordination of all of Charter’s claims against the Debtors to the claims of all other creditors for the purposes of distributions pursuant to Section 510(c) of the Bankruptcy Code (11 U.S.C. 510(c)). Windstream argues that any Charter claimants should not be permitted to receive any distributions on any claims asserted or to be asserted by the Charter claimants in these chapter 11 cases until payment in full with interest is made to all non-defendant creditors of Windstream. I understand that under Section 510(c):

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“the court may...subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest...”

B. Causation

42. Evidence from customer service calls to Windstream indicates that Charter’s false and/or misleading statements described above (collectively, “Charter’s False Advertising Campaign”) caused confusion and led customers to believe that they were losing their Windstream service, which drove customers to disconnect from Windstream and switch to Charter when they otherwise would have remained with Windstream.⁸³

43. Windstream’s customer service call notes demonstrate that Charter’s False Advertising Campaign caused many customers to be confused about the future availability of Windstream’s services. For example, one customer called to “get info on what’s going on with his [service] if going out of business.”⁸⁴ Another customer “wanted to be reassured [Windstream] is in bus[iness] since Spect[rum] sent [a] flyer stating we are going out of business and they are potentially losing the [services] with us.”⁸⁵ Similarly, a customer wanted to know “about [the] letter she received from Spectrum. Wanted to know if she was still going to have our services.”⁸⁶ Another customer indicated that she got a “letter from Spectrum requiring her to switch to them [because] we were going bankrupt.”⁸⁷

⁸³ TRO Hearing Transcript, at 101-106.

⁸⁴ Langston Deposition Exhibit 24, at WIN000321.

⁸⁵ Langston Deposition Exhibit 24, at WIN000323.

⁸⁶ Langston Deposition Exhibit 24, at WIN000317.

⁸⁷ Langston Deposition Exhibit 24, at WIN000316.

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44. Evidence from Windstream’s customer service call notes also reveals that Charter’s False Advertising Campaign led customers to switch to Charter as a result of this confusion. For example, one customer “cancel[ed] [and] went with Spectrum because of the bankruptcy and received a flyers [*sic*] from Spectrum that future...with us was uncertain.”⁸⁸ Another customer noted, “I’m sorry. I’ve been with you for 45 years. I had no idea this was false, and now the only thing I can do is cancel this now, and if I’m unhappy with the new one, then I’ll come back to you, but right now I need to cancel.”⁸⁹ Similarly, other customers reported that they were “already with Spectrum because of [the] letter”⁹⁰ and “went to Spectrum due to [the] letter.”⁹¹

45. Further, evidence from Windstream’s customer service interactions suggests that, but for the confusion generated by Charter’s actions, many customers would have remained with Windstream as opposed to switching to Charter. For example, one customer left a voicemail expressing his or her confusion and desire to continue service with Windstream, if available:

I got those letters about Windstream saying they’re in bankruptcy. Well, today this Spectrum guy comes knocking on the door telling me in two months, I wont have no service... are they just going to cut everybody off and we just ain’t going to have no service? I don’t want to switch unless I have to.⁹²

⁸⁸ Langston Deposition Exhibit 24, at WIN000279.

⁸⁹ Langston Deposition Exhibit 26, at WIN000418.

⁹⁰ Langston Deposition Exhibit 24, at WIN000304.

⁹¹ Langston Deposition Exhibit 24, at WIN000274. *See also*, Langston Deposition Exhibit 26, at WIN001928.

⁹² Langston Deposition Exhibit 20, at WIN00070.

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Similarly, a customer reported that he received a communication from Spectrum stating that “Windstream is to be shut down and they want me to come over to Spectrum,” but noted, “I don’t want to go to Spectrum. I want to stay with Windstream...Windstream is better than sliced bread, I’ll tell ya.”⁹³ Other customers expressed similar preferences for Windstream, commenting that “as long as you guys are in business, I’ll just stay with Windstream,”⁹⁴ and “I’ve been with [Windstream] all these years, and I didn’t want to lose Windstream.”⁹⁵

46. This evidence demonstrates that Charter’s False Advertising Campaign generated substantial confusion among Windstream customers regarding the future availability of Windstream services. The evidence further indicates that numerous customers switched their service from Windstream to Charter as a direct result of Charter’s actions. And this evidence suggests that, absent the confusion and uncertainty generated by Charter’s False Advertising Campaign, many customers would have a preference for Windstream and/or would prefer to continue with their existing service rather than switching to Charter’s Spectrum service.

⁹³ Langston Deposition Exhibit 26, at WIN001401-404. Similarly, another customer indicated that she did not want to cancel her Windstream service, but had already switched to Spectrum due to the false and/or misleading letter she received. Langston Deposition Exhibit 26, at WIN000419 (“ASSOCIATE: First thing’s first here. Obviously you -- you did not want to cancel the service, but with the -- CUSTOMER: Correct. ASSOCIATE: -- with the misleading information, you went through with it. CUSTOMER: Right.”).

⁹⁴ Langston Deposition Exhibit 26, at WIN000755.

⁹⁵ Langston Deposition Exhibit 26, at WIN001011.

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47. In fact, by Charter’s own estimation, at least 663 customers signed up for Charter’s services as a result of Charter’s False Advertising Campaign. According to Charter, 3,721 customers called Charter using the unique phone number provided in Charter’s False Advertising Campaign, and 663 of those customers ultimately signed up for Charter’s services.⁹⁶

C. Quantification

48. Windstream’s lost profits damages arise from Windstream customers who disconnected their Windstream services due to Charter’s False Advertising Campaign (“Lost Customers”) who otherwise would not have disconnected.⁹⁷

⁹⁶ Charter_046353.

⁹⁷ As noted above, I do not currently have sufficient data and evidence allowing me to estimate with a reasonable degree of certainty damages flowing from only the alleged breach of contract or the violation of the automatic stay. I also do not have sufficient data and evidence to adequately quantify the harm to Windstream’s reputation and certain costs incurred by Windstream to respond to Charter’s false and/or misleading statements and temporary disconnection of service to certain Windstream customers. For example, according to Windstream, it has offered free upgrades to customers who called in to express concerns or to ask questions as a direct result of Charter’s false and/or misleading statements. Windstream also incurred costs to educate its customer service representatives on how to respond to Charter’s false and/or misleading statements. Complaint, ¶¶ 28, 30; Langston Deposition Exhibit 5, at WIN000033, WIN000035; Langston Deposition Exhibit 24, at WIN000225, WIN000230, WIN000237, WIN000279, WIN000337, WIN000341, WIN000347; Langston Deposition Exhibit 24, at WIN000427, WIN001135. I also understand that Windstream’s management incurred opportunity costs as they were focused on addressing Charter’s alleged actions rather than on improving customer experience. *See, e.g.*, Rule 30(b)(6) Deposition Windstream, September 24, 2019, at 112, Exhibit 6. Therefore, my damages analysis likely understates the actual damages caused by Charter’s alleged actions. If additional data become available to me subsequent to the filing of this report, I may update my calculations accordingly, if necessary and allowed.

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49. I calculated lost profits damages in three steps. First, I determined the number of Lost Customers by examining Windstream’s “churn rate”⁹⁸ before and after Charter’s False Advertising Campaign. For my second step, I determined the lost revenues associated with the Lost Customers (“Lost Revenues”). For my third step, I applied Windstream’s profit margins on the Lost Revenues associated with the Lost Customers (“Lost Profits”).

1. Lost Profits

a. Lost Customers

50. I estimated the number of Lost Customers based on Windstream’s internal data covering its subscriber base in marketplaces (or “exchanges”) in which it provides services. As shown in Tab 5, the Windstream data report monthly customer adds, disconnects, and subscriber base for “All Exchanges” (*i.e.*, all Windstream exchanges) and “Charter Exchanges” (*i.e.*, exchanges in which Windstream and Charter compete) from January 2016 through August 2019.⁹⁹ These data can be used to calculate the “churn rate” over time for each of these groups.

⁹⁸ As described in more detail below, “churn rate” is frequently used by telecommunications companies, including Windstream, to assess their business. *See, e.g.*, Rule 30(b)(6) Deposition Windstream, September 24, 2019, at 157-159. It is calculated as the number of disconnected customers divided by the number of total customers.

⁹⁹ The data also report other information such as customer adds and disconnects for each state in Charter Exchanges. 190917 Charter Litigation Information -damages.xlsx; Conversation with Brad Brannon.

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51. Churn rate refers to the percentage of a firm’s customers that discontinue services in a given time period.¹⁰⁰ It is calculated as the number of disconnected customers in a given period divided by the total number of customers at the beginning of that period.¹⁰¹ Churn rate is an important metric that telecommunications companies, including Windstream, use in the normal course of business to assess their performance.¹⁰² Researchers have found that in order to be successful in a maturing industry, such as telecommunications, “the strategic focus of a company ought to shift from acquiring customers to retaining customers by reducing customer churn.”¹⁰³

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- ¹⁰⁰ Blattberg, Robert C., Byung-Do Kim, and Scott A. Neslin, “Multichannel Customer Management,” in *Database Marketing*, Springer, 2008, pp. 607-633, at 607. *See also*, Baker, Michael, and Susan Hart, *The Marketing Book*, 6th Edition, Elsevier, 2008, at 510.
- ¹⁰¹ Blattberg, Robert C., Byung-Do Kim, and Scott A. Neslin, “Multichannel Customer Management,” in *Database Marketing*, Springer, 2008, pp. 607-633, at 607. *See also*, Baker, Michael, and Susan Hart, *The Marketing Book*, 6th Edition, Elsevier, 2008, at 510.
- ¹⁰² Rule 30(b)(6) Deposition Windstream, September 24, 2019, at 157-159; Kotler, Philip, and Kevin Lane Keller, *Marketing Management*, 14th edition, Prentice Hall, 2012, at 139. *See also*, Amin, Adnan, Sajid Anwar, Awais Adnan, Muhammad Nawaz, Khalid Alawfi, Amir Hussain, and Kaizhu Huang, “Customer Churn Prediction in the Telecommunication Sector Using a Rough Set Approach,” *Neurocomputing*, Vol. 237 (2017): 242-254, at 242; Ascarza, Eva, Peter Ebbes, Oded Netzer, and Matthew Danielson, “Beyond the Target Customer: Social Effects of Customer Relationship Management Campaigns,” *Journal of Marketing Research*, Vol. 54, No. 3 (2017): 347-363, at 351.
- ¹⁰³ Ahn, Jae-Hyeon, Sang-Pil Han, and Yung-Seop Lee, “Customer Churn Analysis: Churn Determinants and Mediation Effects of Partial Defection in the Korean Mobile Telecommunications Service Industry,” *Telecommunications Policy*, Vol. 30, No. 10-11 (2006): 552-568, at 553.

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52. Using Windstream’s subscriber data, I compared the churn rates before and after Charter’s False Advertising Campaign for the Windstream customers in exchanges in which Windstream competes with Charter (*i.e.*, “Charter Exchanges”)¹⁰⁴ versus the Windstream customers in exchanges in which Windstream does not compete with Charter (*i.e.*, “Non-Charter Exchanges”).¹⁰⁵

53. As described above, Charter’s False Advertising Campaign was sent to Windstream customers in all exchanges in which Windstream and Charter compete. The campaign was not used to attract Windstream customers in the exchanges in which Charter does not compete. This presents a natural experiment that allows for the estimation of the incremental impact of Charter’s False Advertising Campaign on Windstream’s churn rate. Customers in Charter Exchanges (the “treatment group”) were exposed to the campaign in the second period (after the campaign), but not in the first period (before the campaign). Customers in Non-Charter Exchanges (the “control group”) were not exposed to the campaign in the first or second period.¹⁰⁶ Both groups, however, have been exposed to systemic factors unrelated to Charter’s campaign that may affect Windstream’s churn rate. For example, Windstream’s corporate strategy or truthful and accurate news surrounding Windstream’s

¹⁰⁴ For this group, the churn rate corresponds to the number of Windstream customers who disconnected divided by the number of Windstream customers in the Charter Exchanges.

¹⁰⁵ For this group, the churn rate corresponds to the number of customers who disconnected divided by the number of Windstream customers in the Non-Charter Exchanges.

¹⁰⁶ Windstream’s Consumer Exchange Data report aggregates for all Exchanges served by Windstream and, separately, the Charter Exchanges. Therefore, I calculated the customer numbers for the Non-Charter Exchanges by taking the difference between the aggregate measures for all Exchanges and Charter Exchanges. *See* Tab 5.

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bankruptcy could affect customer churn in both the Charter Exchanges and Non-Charter Exchanges.

54. Given the two distinct groups described above, the impact of Charter’s False Advertising Campaign on Windstream’s churn rate can be estimated by subtracting (i) the *change* in the churn rate in the Non-Charter Exchanges (the control group) across the two periods from (ii) the *change* in the churn rate in the Charter Exchanges (the treatment group) across the two periods.¹⁰⁷ The “differencing” of the trends across time and groups controls for the effects of factors unrelated to Charter’s alleged actions to isolate the impact of Charter’s False Advertising Campaign.¹⁰⁸

55. For both Exchange groups, I examined April 2018 through August 2018 versus April 2019 through August 2019. Comparing the churn rates in the same months (year over year) controls for seasonality effects.¹⁰⁹

¹⁰⁷ See, e.g., Card, David, and Alan B. Krueger, “Minimum Wages and Employment: A Case Study of the Fast Food Industry in New Jersey and Pennsylvania,” *The American Economic Review*, Vol. 84, No. 4 (1994): 772-793, at 778-780. Angrist, Joshua D., and Jörn-Steffen Pischke, *Mostly Harmless Econometrics: An Empiricist’s Companion*, Princeton University Press, 2008, at 169-182.

¹⁰⁸ See, e.g., Card, David, and Alan B. Krueger, “Minimum Wages and Employment: A Case Study of the Fast Food Industry in New Jersey and Pennsylvania,” *The American Economic Review*, Vol. 84, No. 4 (1994): 772-793, at 778-780. Angrist, Joshua D., and Jörn-Steffen Pischke, *Mostly Harmless Econometrics: An Empiricist’s Companion*, Princeton University Press, 2008, at 169-182.

¹⁰⁹ I use April to August 2018 churn rates because it is closest in time (year over year) to the period of interest. Furthermore, I understand that Windstream implemented a change in its business and marketing strategies and that the results of those changes have been noticeable since Q2 2018. See, e.g., “2Q18 Earnings Presentation,” Windstream, August 9, 2018, at 6-8, 16; Conversation with Jeffrey Auman.

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56. To calculate the churn rates period-over-period, I used the number of Windstream customers in March of the same year as the baseline because Charter’s False Advertising Campaign was initiated in mid-to-late March 2019; the effects of that campaign can be expected to start in April 2019.¹¹⁰ Accordingly, customer churn from April 2019 through August 2019 is calculated as the number of disconnects in these 5 months divided by the total number of customers in March 2019.¹¹¹ That is, the churn rate in 2019 is measured based on the number of existing customers in March 2019 (*i.e.*, the customer base targeted by Charter’s False Advertising Campaign).

57. As shown in Tab 4, in March 2018, there were 355,135 customers in the Charter Exchanges.¹¹² From April 2018 through August 2018, 42,182 customers disconnected from Windstream.¹¹³ Thus, the churn rate was 11.88 percent for this period.¹¹⁴ A similar calculation shows that the churn rate from April 2019 through August 2019 in the Charter

¹¹⁰ Researchers have found that advertising mailers can affect consumer behavior for approximately one year. Van Diepen, Merel, Bas Donkers, and Philip Hans Franses, “Dynamic and Competitive Effects of Direct Mailings: A Charitable Giving Application,” *Journal of Marketing Research*, Vol. 46, No. 1 (2009): 120-133, at 127. Furthermore, because the total number of customers is affected by the number of adds and disconnects in prior months, Charter’s False Advertising Campaign would be expected to affect Windstream’s subscriber base (*i.e.*, total number of customers) after the launch of the campaign.

¹¹¹ Similarly, customer churn for April through August 2018 is calculated as the number of disconnects in these five months divided by the total number of customers in March 2018.

¹¹² Tab 4.

¹¹³ Tab 4.

¹¹⁴ Calculated as 11.88 percent = 42,182 / 355,135. Tab 4.

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Exchanges was 12.58 percent.¹¹⁵ That is, 12.58 percent of the number of Windstream customers in March 2019 disconnected from April 2019 through August 2019. Accordingly, Windstream’s churn rate in the Charter Exchanges increased by 0.70 percentage points.¹¹⁶

58. As shown in Tab 4, in March 2018, there were 649,686 customers in the Non-Charter Exchanges.¹¹⁷ Between April 2018 and August 2018, 65,265 customers disconnected from Windstream.¹¹⁸ Thus, the churn rate was 10.05 percent.¹¹⁹ A similar calculation shows that the churn rate from April 2019 through August 2019 was 10.36 percent.¹²⁰ Accordingly, Windstream’s churn rate in the Non-Charter Exchanges increased by 0.32 percentage points.¹²¹

¹¹⁵ Tab 4.

¹¹⁶ Calculated as 0.70 percent = 12.58 percent – 11.88 percent. Tab 4. When discussing the *change* or *difference* in churn rates, I use the phrase “percentage points.” When discussing the value of churn rates or applying churn rates and differences or changes in churn rates to customer bases, I use the word “percent.”

¹¹⁷ Tab 4.

¹¹⁸ Tab 4.

¹¹⁹ Calculated as 10.05 percent = 65,265 / 649,686. Tab 4.

¹²⁰ Tab 4.

¹²¹ Calculated as 0.32 percent = 10.36 percent – 10.05 percent (differences due to rounding). Tab 4.

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59. The calculations above are summarized in Table 1 below.

Table 1: Windstream Customer Churn Rates¹²²

	Before	After	Change
	April – August	April – August	Over
	2018	2019	Time
Charter Exchanges	11.88 percent	12.58 percent	0.70 percent
Non-Charter Exchanges	10.05 percent	10.36 percent	0.32 percent
Difference	1.83 percent	2.22 percent	0.38 percent

60. As shown in Table 1 (and Tab 4), after Charter’s False Advertising Campaign was launched in March 2019, Windstream’s churn rate in the Charter Exchanges increased by 0.38 percentage points more than its churn rate in the Non-Charter Exchanges.¹²³ Therefore, the incremental impact of Charter’s False Advertising Campaign on Windstream’s churn rate was 0.38 percentage points. Applying this 0.38 percent to the number of Windstream customers in the Charter Exchanges in March 2019 results in the number of Lost Customers that are attributable to Charter’s False Advertising Campaign. My calculations are shown in Tab 4.

¹²² Tab 4.

¹²³ Tab 4.

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61. As reported in Tab 4, my analysis shows that Charter’s False Advertising Campaign caused Windstream to lose 1,386 customers from April 2019 through August 2019.¹²⁴

62. I understand that Charter produced its own calculation of Windstream’s Lost Customers for the purposes of this litigation. According to Charter, through September 12, 2019, 3,721 customers called the unique number in the mailers of Charter’s False Advertising Campaign,¹²⁵ and 663 of them ultimately purchased one or more services from Charter.¹²⁶

¹²⁴ Calculated as $360,865 \times 0.38$ percent = 1,386. See Tab 4. This calculation is conservative because I only considered customers who have been directly influenced by Charter’s False Advertising Campaign. However, customers may have been indirectly influenced by the campaign as a result of communications with friends and family and / or on social media, etc. In fact, researchers studying the spillover effects of a marketing campaign reported that for every 100 customers targeted by the campaign, 28 additional customers (friends and families of the targeted customers) would be influenced in the same way by the campaign. Ascarza, Eva, Peter Ebbes, Oded Netzer, and Matthew Danielson, “Beyond the Target Customer: Social Effects of Customer Relationship Management Campaigns,” *Journal of Marketing Research*, Vol. 54, No. 3 (2017): 347-363, at 347. Other researchers have found that churning behavior is quite contagious. According to a 2011 article published in the *Journal of Marketing*, researchers reported that exposure to a neighbor who churned is associated with an 80 percent increase in the probability of churning. Nitzan, Irit, and Barak Libai, “Social Effects on Customer Retention,” *Journal of Marketing*, Vol. 75, No. 6 (2011): 24-38, at 35.

¹²⁵ As described above, I understand that Charter’s False Advertising Campaign began in mid-to-late March.

¹²⁶ Charter_046353. Charter’s analysis includes data on the mailers containing the false and/or misleading statements at issue here (the “3/26/2019 Incremental” mailers), as well as data on three other Charter mailers in May (“5/6/2019 NDM,” “5/13/2019 NDM,” and “5/20/2019 NDM”). According to Charter, 0.081 percent of the March 2019 mailers containing the false and/or misleading statements generated sales, while 0.104 to 0.169 percent of the May mailers generated sales. The variance in the rates of returns reported by Charter also is at odds with research suggesting that advertisements distributed by the same channel (e.g., direct mail) generally have similar impact on customer behavior. See e.g., Blattberg, Robert C., Byung-Do Kim, and Scott A. Neslin,

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However, the 663 customers that Charter reported likely understates the actual number of Lost Customers because there are multiple ways in which Windstream customers can switch to Charter. For example, customers can subscribe to Charter services in stores, by calling Charter’s general sales number, or on Charter’s website.¹²⁷ In fact, customers who were influenced by Charter’s March 2019 mailers may have called the unique numbers in Charter’s May 2019 mailers instead. According to Charter’s calculations, however, those customers would apparently be credited to the May 2019 mailers. In addition, Charter’s analysis does not appear to count the door-to-door sales that it generated through its representatives. Furthermore, to the extent that Charter’s False Advertising Campaign led certain Windstream customers to switch to another competitor or discontinue their subscriptions all together, those customers would not be captured in Charter’s calculation.¹²⁸

b. Lost Revenues

63. To calculate Windstream’s Lost Revenues associated with the Lost Customers, I first calculated the average revenues per customer based on Windstream’s 2019 Consumer Revenues and Profits Data, which report monthly revenues and gross margins from January

“Multichannel Customer Management,” in *Database Marketing*, Springer, 2008, pp. 635-674, at 657.

¹²⁷ <https://www.spectrum.com/contact-us.html> (viewed 10/1/2019).

¹²⁸ As described above, I did not have sufficient data to quantify all the extraordinary costs that Windstream incurred as a result of Charter’s False Advertising Campaign. *See, e.g.*, Rule 30(b)(6) Deposition Windstream, September 24, 2019, at 44-45, 112, Exhibit 6. *See also*, Langston Deposition Exhibit 5, at WIN000033, WIN000035; Langston Deposition Exhibit 24, at WIN000225, WIN000230, WIN000237, WIN000279, WIN000337, WIN000341, WIN000347; Langston Deposition Exhibit 24, at WIN000427, WIN001135.

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2019 through August 2019.¹²⁹ As shown in Tab 6, the average monthly revenues per customer was \$77.63 in March 2019.¹³⁰

64. I then estimated the expected number of months that the Lost Customers would have remained with Windstream in the absence of Charter’s False Advertising Campaign based on Windstream’s churn rate in March 2019 in the Charter Exchanges. As shown in Tab 5, the 2.0 percent churn rate in March 2019 corresponds to an expected tenure of 50 months.¹³¹

65. Taken together, as shown in Tab 4, Windstream’s Lost Revenues on the Lost Customers amount to \$5.4 million.

c. Lost Profits

66. I calculated Windstream’s lost profits associated with the Lost Customers using two different measures of profit.

67. First, I used the average gross profit per customer based on Windstream’s 2019 Consumer Revenues and Profits Data.¹³² As shown in Tab 6, the average monthly gross profit per customer in March 2019 was \$73.35, which corresponds to a gross margin of 94.5 percent.¹³³ Here, I understand that gross margin accounts for variable costs associated with

¹²⁹ Tab 6; Consumer ARPU_GM.pdf.

¹³⁰ The average monthly revenue per customer ranged from \$77.12 to \$78.10. *See* Tab 6.

¹³¹ Calculated as $1 / 0.02 = 50$. *See also*, Blattberg, Robert C., Byung-Do Kim, and Scott A. Neslin, “Multichannel Customer Management,” in *Database Marketing*, Springer, 2008, pp. 607-633, at 608.

¹³² Consumer ARPU_GM.pdf.

¹³³ The average monthly gross profit per customer ranged from \$72.76 to \$73.55 and the gross margins ranged from 93.5 percent to 94.5 percent. *See* Tab 6.

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Windstream’s provision of services to customers.¹³⁴ I applied this gross margin to the Lost Revenues that I calculated above. As shown in Tab 4, based on this measure of profits, Windstream’s Lost Profits on the Lost Revenues amount to \$5.1 million.

68. Second, I used the average contribution profit per customer based on Windstream’s 2018 – Q2 2019 Kinetic Segment Financial Information. Here, I understand that contribution margin accounts for segment direct costs and operating costs, as well as allocated company-wide operating costs.¹³⁵ As shown in Tab 7, the data report quarterly revenues, costs and expenses, and contribution margins from Q1 2018 through Q2 2019.

69. As shown in Tab 7, the contribution margin of Windstream’s Kinetic Segment¹³⁶ in Q1 2019 was 59.2 percent, which corresponds to an average monthly contribution profit per customer of \$45.96.¹³⁷ As shown in Tab 4, based on this measure of profits, Windstream’s Lost Profits on the Lost Revenues amount to \$3.2 million. This measure of profits is likely to be too low given the small incremental volume at issue here (an estimated

¹³⁴ Conversation with Brad Brannon.

¹³⁵ Conversation with Brad Brannon and Aaron Pierce. It is unlikely that company-wide operating costs would be affected by the small incremental volume at issue here (an estimated 1,386 Lost Customers) relative to Windstream’s customer base (over 350,000 customers). As such, Windstream’s contribution margin would understate the incremental profits associated with serving the Lost Customers, therefore understating the magnitude of Windstream’s lost profits associated with these customers.

¹³⁶ I understand that the Kinetic business unit serves consumers and small businesses and that these customers were the targets of Charter’s False Advertising Campaign *See* Windstream’s 2Q19 Earnings Presentation, August 8, 2019, available at https://s22.q4cdn.com/358319107/files/doc_financials/quarterly_results/2019/q2/2Q19-Investor-Presentation.pdf (viewed 10/10/2019), pp. 12 and 20.

¹³⁷ Tab 4. The contribution margin of Windstream’s Kinetic Segment ranged from 57.8 percent to 59.9 percent. *See* Tab 7.

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1,386 Lost Customers).¹³⁸ Volumes in that range are unlikely to have a measurable effect on costs such as network and facilities expenses.

70. Based on my analysis above, Charter’s False Advertising Campaign caused Windstream to lose 1,386 customers from April 2019 through August 2019. These customer losses correspond to Lost Profits of \$3.2 to \$5.1 million.¹³⁹

71. Based on Charter’s analysis, Charter’s False Advertising Campaign caused Windstream to lose at least 663 customers from April 2019 through September 12, 2019.¹⁴⁰ These customer losses correspond to lost profits of \$1.5 to \$2.4 million.¹⁴¹

2. Increased Costs

a. Costs of Corrective Advertising

72. As discussed above, Windstream has spent substantial time, money, and resources to combat Charter’s false claims.¹⁴² Among other things, Windstream has undertaken a corrective marketing campaign to mitigate the effects of Charter’s False Advertising Campaign by sending approximately 1.2 million direct mail advertisements to its affected customers in April 2019.¹⁴³

¹³⁸ Tab 3.

¹³⁹ Tab 4.

¹⁴⁰ Charter_046353. As described above, Charter’s analysis likely understates the number of actual customers that Windstream lost due to Charter’s False Advertising Campaign.

¹⁴¹ Tab 10. As described above, Charter’s analysis likely understates the number of actual customers that Windstream lost due to Charter’s False Advertising Campaign.

¹⁴² Complaint, ¶ 30.

¹⁴³ Email titled “Re: Charter Corrective Mailings,” July 31, 2019, at 1; KCC Invoices.

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73. In the Preliminary Injunction Order issued on May 16, 2019, the Court ordered Charter to “pay the reasonable cost incurred by Windstream in connection with preparing and mailing” the corrective advertisements.¹⁴⁴ I understand that Charter has agreed to pay the cost of the Windstream’s corrective advertisements incurred in May 2019, but Charter has not agreed to pay the cost of the corrective advertisements incurred in April 2019.¹⁴⁵

74. In April 2019, Windstream incurred costs to design and mail/e-mail the corrective advertisements.¹⁴⁶ As shown in Tab 9, the total cost incurred by Windstream in connection with those corrective advertisements in April 2019 was \$809,876.¹⁴⁷

b. Promotional Offer

75. As described above, in September 2019, Windstream launched a promotion to provide 90 days of free service to new customers.¹⁴⁸ According to Mr. Auman, this promotion was launched because Windstream “had a spike in disconnects during the April to July timeframe in Spectrum markets and we wanted to maintain our commitment to achieving our growth plan. So we took action as a management team to introduce new pricing promotions

¹⁴⁴ Preliminary Injunction Order, ¶ 6.

¹⁴⁵ Email titled “Re: Charter Corrective Mailings,” July 31, 2019, at 3.

¹⁴⁶ Email titled “Re: Charter Corrective Mailings,” July 31, 2019, at 1; KCC Invoices.

¹⁴⁷ See Email titled “Re: Charter Corrective Mailings,” July 31, 2019, at 1; KCC Invoices, pp. 124-125, 128; WIN002771; Conversation with Aaron Pierce. I understand from Mr. Pierce that these costs relate to design, printing, and mailing costs.

¹⁴⁸ 90 Days Free Cost.xlsx; Rule 30(b)(6) Deposition Windstream, September 24, 2019, at 95-97; Conversation with Brad Brannon.

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into the marketplace as a result.”¹⁴⁹ According to Windstream’s calculations, the total cost that will be incurred by Windstream in connection with the promotion from September 19, 2019 through February 20, 2020 is estimated to be \$7,966,371.¹⁵⁰

IV. CONCLUSION

76. Windstream’s lost profits damages correspond to the amount of profits that Windstream would have made on sales from customers that were lost due to Charter’s alleged actions. If lost profits damages are awarded, these damages are between \$3.2 and \$5.1 million for customers that were lost from April 2019 through August 2019.¹⁵¹

77. Additionally, Windstream’s damages also include increased costs caused by Charter’s alleged actions, including the costs of Windstream’s corrective advertising campaign in April 2019 and the costs of Windstream’s promotional campaign in September 2019 to recover its subscriber base. If damages associated with Windstream’s costs of corrective advertising are awarded, these damages are \$809,876.¹⁵² If damages associated with Windstream’s costs of its September promotional campaign are awarded, these damages are estimated to be approximately \$8.0 million.¹⁵³

¹⁴⁹ Rule 30(b)(6) Deposition Windstream, September 24, 2019, at 95. In his role as Senior VP of Sales, Mr. Auman is responsible for achieving revenue targets and meeting growth plans. Rule 30(b)(6) Deposition Windstream, September 24, 2019, at 14-15.

¹⁵⁰ 90 Days Free Cost.xlsx; Rule 30(b)(6) Deposition Windstream, September 24, 2019, at 95-97; Conversation with Brad Brannon.

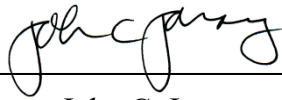
¹⁵¹ Tab 3.

¹⁵² Tab 3.

¹⁵³ Tab 3. The \$8.0 million estimate reflects Windstream’s forecast of the costs associated with offering free service to certain new customers for 90 days. *See* 90 Days Free

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78. This report summarizes the opinions that I have formed to date. I may modify or supplement my opinions, if necessary and allowed, based on the review and analysis of information provided to me subsequent to the filing of this report.

A handwritten signature in black ink, appearing to read "John C. Jarosz", is written over a horizontal line.

John C. Jarosz
October 11, 2019

Cost.xlsx; Rule 30(b)(6) Deposition Windstream, September 24, 2019, at 95-97;
Conversation with Brad Brannon. I may modify or supplement my opinions, if necessary and allowed, based on the review and analysis of information provided to me subsequent to the filing of this report.

Terence P. Ross
Michael R. Justus (*pro hac vice pending*)
Shaya Rochester
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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., <i>et al.</i> , ¹	)	Case No. 19-22312 (RDD)
)	
Debtors.	)	(Jointly Administered)
)	
WINDSTREAM HOLDINGS, INC., <i>et al.</i> ,)	
)	
Plaintiffs,	)	Adv. Pro. No. 19-08246
)	
v.)	
)	
CHARTER COMMUNICATIONS, INC. and CHARTER)	
COMMUNICATIONS OPERATING, LLC,)	
)	
Defendants.)	
)	

**THIRD SUPPLEMENTAL INITIAL DISCLOSURES OF PLAINTIFF
WINDSTREAM HOLDINGS, INC. AND AFFILIATED DEBTORS**

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.

Pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure and Rule 7026 of the Federal Rules of Bankruptcy Procedure, the debtors and debtors in possession in the above-captioned Chapter 11 cases (collectively, the “Debtors” or “Windstream”) provide the following third supplemental initial disclosures to Defendants Charter Communications, Inc. and Charter Communications Operating, LLC (collectively, “Charter”).

The disclosures contained herein are based solely on information and documents as presently available and known to Windstream as of the date of these disclosures. Windstream reserves the right to clarify, supplement, and/or amend these disclosures at a later date. In making its disclosures, Windstream does not waive any objections based upon relevance, materiality, competence, privilege, immunity from disclosure or other grounds.

A. INDIVIDUALS

Pursuant to Fed. R. Civ. Pro. 26(a)(1)(A)(i) of the Federal Rules of Civil Procedure, Windstream discloses the following individuals that may have information that Windstream may use to support its claims and/or defenses in this lawsuit. By indicating the general subject matter of information that witnesses possess, Windstream is not representing that this is the only relevant information that these witnesses possess.

At least the following individuals are believed to have discoverable information on the indicated subject(s) that may be used to support Windstream's claims and defenses.

Name and Contact Information	Subject(s)
Jeffrey Auman <i>Executive Vice President, Sales and Marketing</i> Windstream Holdings, Inc. 11329 W. 160th Street Overland Park, KS 66221	<ul style="list-style-type: none">• Windstream's Chapter 11 Cases;• Windstream's operations and business prior to the Chapter 11 filing;• Windstream's Kinetic internet campaign;• Charter's false advertising campaign regarding Windstream's Chapter 11 filing;• Windstream's cease and desist letters to Charter;• Customer confusion caused by Charter's false advertising campaign;• The harm and damage to Windstream caused by Charter's unlawful actions;• Charter's disconnection of Windstream customers in or around March 2019;• Charter's disconnection of Windstream customers after the Court's Temporary Restraining Order and Preliminary Injunction Order;• Windstream's corrective advertising efforts in response to Charter's false advertising campaign;• Windstream's responses to Charter's discovery requests in this proceeding; and• Windstream's document production in the above-captioned adversary proceeding.

<p>Lewis Langston <i>Retired</i> Windstream Holdings, Inc.</p> <p>Address Unknown</p>	<ul style="list-style-type: none"> • Windstream's Chapter 11 Cases; • Windstream's operations and business prior to the Chapter 11 filing; • Windstream's Kinetic internet campaign; • Charter's false advertising campaign regarding Windstream's Chapter 11 filing; • Windstream's cease and desist letters to Charter; • Customer confusion caused by Charter's false advertising campaign; • The harm to Windstream caused by Charter's false advertising campaign; • Charter's disconnection of Windstream customers in or around March 2019; and • Charter's disconnection of Windstream customers after the Court's Temporary Restraining Order and Preliminary Injunction Order.
<p>Jerry Wayne Parrish <i>Vice President of Kinetic National Sales</i> Windstream Holdings, Inc.</p> <p>2208 Customs House Court Raleigh, NC 27615</p>	<ul style="list-style-type: none"> • Statements made by Charter direct sales representative Emmitt Walker on or around April 8, 2019.
<p>Shonne Bandy <i>Trouble Resolution Specialist II</i> Windstream Holdings, Inc.</p> <p>3000 Columbia House Blvd Suite 106 Vancouver, WA 98661</p>	<ul style="list-style-type: none"> • Disconnection of Windstream customer by Charter in May 2019.
<p>Timothy Wyatt <i>Customer Service Technician</i> Windstream Holdings, Inc.</p> <p>776 Hopewell Drive Heath, OH 43056</p>	<ul style="list-style-type: none"> • Windstream customer's complaint of false statements made by Charter employee, Latisha Truong, regarding Windstream's bankruptcy on or around May 9, 2019.

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<p>Paul Strickland <i>Vice President of Customer Care</i> Windstream Holdings, Inc.</p> <p>Three Morrocroft Centre 6801 Morrison Boulevard Charlotte, NC 28211</p>	<ul style="list-style-type: none"> • Windstream's customer care call centers; • Calls, notes, and logs taken by customer call center agents at Windstream's customer care call centers regarding Charter's false advertising campaign; and • Record keeping at Windstream's customer call centers.
<p>John Jarosz <i>Managing Principal</i> Analysis Group, Inc.</p> <p>800 17th Street, NW Washington, DC 20006</p>	<ul style="list-style-type: none"> • Damages to Windstream resulting Charter's unlawful actions; and • Costs of corrective advertising and promotional campaigns incurred by Windstream as a result of Charter's unlawful actions.
<p>Kelly Atkinson <i>Head of Consumer Marketing of Small and Medium Businesses</i> Charter Communications, Inc.</p> <p>Address Unknown</p>	<ul style="list-style-type: none"> • Charter's false advertising campaign, including the decision to launch the campaign, the design of the advertisements, the recipients and geographic scope of the campaign, and the use of the advertisements; • Communications with present or potential customers referring to Windstream; and • Windstream customers that switched to Charter.
<p>Keith Dardis <i>Vice President of Small and Medium Business and Residential Direct Sales</i> Charter Communications, Inc.</p> <p>Address Unknown</p>	<ul style="list-style-type: none"> • The role of Charter direct sales representatives; authorized or unauthorized advertising campaigns conducted by Charter direct sales representatives; • Disconnection of Windstream customers by Charter; and • Communications to Charter employees regarding the Court's Temporary Restraining Order and Preliminary Injunction.
<p>Jennifer Smith Charter Communications, Inc.</p> <p>Address Unknown</p>	<ul style="list-style-type: none"> • The design of Charter's advertisements relating to Windstream's Chapter 11 cases, including the design of the outer envelope; and • Internal communications relating to Charter's false advertising campaign regarding Windstream's Chapter 11 cases.

<p>Chris Czekaj Charter Communications, Inc.</p> <p>Address Unknown</p>	<ul style="list-style-type: none"> • Charter's false advertising campaign, including the decision to launch the campaign, the design of the advertisements, the recipients and geographic scope of the campaign, and the use of the advertisements; and • Internal communications relating to Charter's false advertising campaign regarding Windstream's Chapter 11 cases.
<p>Emmitt Walker Charter Communications, Inc.</p> <p>1801 Elyria Avenue Lorain, OH 44055</p>	<ul style="list-style-type: none"> • The distribution of false advertisement by Charter employees; • Charter's false advertising campaign; • Statements made by Charter employees that Windstream would no longer provide its services in the future; and • Charter's communications to employees regarding the Court's Temporary Restraining Order and Preliminary Injunction.
<p>Andrew Sites Charter Communications, Inc.</p> <p>3100 Elida Road Lima, OH 45805</p>	<ul style="list-style-type: none"> • The distribution of false advertisement by Charter employees; • Charter's false advertising campaign; • Statements made by Charter employees that Windstream would no longer provide its services in the future; and • Charter's communications to employees regarding the Court's Temporary Restraining Order and Preliminary Injunction.
<p>R2 Creative</p> <p>Address Unknown</p>	<ul style="list-style-type: none"> • The design of Charter's advertisements relating to Windstream's Chapter 11 cases, including the design of the outer envelope; and • Internal communications relating to Charter's false advertising campaign regarding Windstream's Chapter 11 cases.
<p>RAPP Worldwide, Inc.</p> <p>220 East 42nd Street New York, NY 10017</p>	<ul style="list-style-type: none"> • The design of Charter's advertisements relating to Windstream's Chapter 11 cases; and • Internal communications relating to Charter's false advertising campaign regarding Windstream's Chapter 11 cases.

Latisha Truong Address Unknown	<ul style="list-style-type: none">• Statements made on or around May 2019 to Windstream customers regarding Windstream's Chapter 11 filing.
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Additional Charter employees, agents, and/or representatives	<ul style="list-style-type: none">• The design of Charter’s advertisements relating to Windstream’s Chapter 11 cases, including the design of the outer envelope;• Internal communications relating to Charter’s false advertising campaign regarding Windstream’s Chapter 11 cases;• The training of Charter’s representatives and agents relating to Windstream’s Chapter 11 cases;• Windstream customers that have switched their service to Charter from February 2019 through the present;• Customer responses and customer confusion arising from Charter’s false advertising campaign relating to Windstream’s Chapter 11 cases;• Charter’s profits relating to its false advertising campaign concerning Windstream’s Chapter 11 cases;• Customer calls or communications from Windstream customers whose services were disconnected or terminated under the Spectrum Business Value Added Reseller Agreement from February 2019 through the present;• The interruption or disconnection of service to Windstream customers between February 2019 through the present, including but not limited to, the disconnection of Windstream customer in San Antonio, Texas;• Charter’s efforts to comply with the Bankruptcy Court’s April 16, 2019 Temporary Restraining Order, including any violations thereof;• Charter’s efforts to comply with the Bankruptcy Court’s May 16, 2019 Preliminary Injunction, including any violations thereof; and• Charter’s efforts to comply with the Bankruptcy Court’s automatic stay, including any violations thereof.
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Windstream reserves the right to disclose additional witnesses to further supplement its initial disclosures as additional information becomes known or available to it.

B. DOCUMENTS

Pursuant to Rule 26(a)(1)(A)(ii) of the Federal Rules of Civil Procedure, Windstream identifies the following categories of documents and tangible things that, unless otherwise noted, are in the possession, custody, or control of Windstream, and that Windstream may use to support its claims or defenses:

- Documents relating to the products and services provided by Windstream;
- Documents relating to the targeted customers and geographic regions for which Windstream offers its products and services;
- Documents filed with the United States Patent and Trademark Office in connection with Windstream's registrations for its WINDSTREAM trademarks (publicly available);
- Windstream's Chapter 11 filings (publicly available);
- Documents relating to Windstream's operations throughout its Chapter 11 cases;
- Documents relating Windstream's Kinetic internet advertising campaign;
- Documents relating to Charter's false advertising campaign concerning Windstream's Chapter 11 cases;
- Documents relating to Windstream's customer responses to Charter's false advertising campaign;
- Documents relating to customer confusion caused by Charter's false advertising campaign;

- Documents relating to the harm to Windstream caused by Charter's false advertising campaign;
- Documents relating to damage control efforts that Windstream has had to undertake in response to Charter's false advertising campaign;
- Documents relating to Charter's violations of the Court's Temporary Restraining Order;
- Documents relating to Charter's violation of the Bankruptcy Court's automatic stay;
- Documents relating to agreements between Windstream and Charter for the provision of "last mile" services; and
- Communications between Windstream and Charter.

Windstream may also rely on documents that are in the possession, custody or control of Charter and/or third parties, as well as documents that Windstream may later learn of, find, or determine are significant. Windstream states that the documents above, including those documents in the possession, custody or control of Charter, that it may rely upon are: WIN000001 - WIN002771; Charter_000001 - Charter_047064; and Charter_Marketing_000001 - Charter_Marketing_005316. Windstream reserves the right to supplement its initial disclosures as such documents become known and available to it, and once additional information regarding its claims can be adequately ascertained through discovery, including by third-party subpoenas.

C. DAMAGES

Pursuant to Rule 26(a)(1)(A)(iii) of the Federal Rules of Civil Procedure, Windstream discloses that it is seeking an award of monetary damages caused by Charter as a result of its false and misleading advertising, in addition to treble and punitive damages, attorneys' fees, costs, and

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any pre-judgment and post-judgment interest. On October 11, 2019, Windstream disclosed John Jarosz as an expert witness and provided a report pursuant to Rule 26(a)(2)(B) that addressed the damages resulting from the wrongful acts by Charter alleged in Windstream's Complaint (*See generally* Adv. Dkt. No. 1). As further detailed in Mr. Jarosz's report, Windstream discloses that it has suffered monetary damages in the form of lost profits and lost customers in the range of \$3.2 to \$5.1 million. Such amount is exclusive of damages in the form of costs that Windstream spent to correct the harm caused by Charter's false advertising, which include \$809,976 spent on corrective advertising in April 2019 and approximately \$8 million spent on promotional campaigns beginning in September 2019. Windstream also incurred damages as a result of Charter's breach of contract, namely, at least as much as \$5,000 to \$16,000 in damages in the form of customer credits associated with Charter's sudden disconnection of service to Windstream customers.

Windstream also discloses that it has suffered harm to its goodwill and reputation resulting from the wrongful acts by Charter. As a result of these acts, Windstream has received numerous customer complaints. Windstream has spent significant time, effort, and money to correct Windstream customers' perception of Windstream and its business, which has been undermined through the acts of Charter.

Windstream also seeks equitable subordination and/or equitable disallowance of any and all claims asserted by Charter against the Debtors, and any other equitable relief as the Court may deem just and proper.

D. INSURANCE

Pursuant to Rule 26(a)(1)(A)(iv) of the Federal Rules of Civil Procedure, Windstream discloses that it is presently unaware of any insurance agreement applicable to the claims asserted in the Complaint.

CONFIDENTIAL – ATTORNEYS EYES ONLY

Dated: December 6, 2019

/s/ Terence P. Ross

Terence P. Ross

Michael R. Justus (*pro hac vice pending*)

Shaya Rochester

KATTEN MUCHIN ROSENMAN LLP

575 Madison Avenue

New York, NY 10022

Telephone: (212) 940-8800

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Email: terence.ross@katten.com

michael.justus@katten.com

srochester@katten.com

*Conflicts Counsel to the Debtors and Debtors in
Possession*

CONFIDENTIAL – ATTORNEYS EYES ONLY

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December 2019, a true and correct copy of the Third Supplemental Initial Disclosures of Debtors and Plaintiff Windstream Holdings, Inc. was served by email on all counsel of record in the adversary proceeding.

Dated: December 6, 2019

/s/ Kristin Lockhart

Kristin Lockhart

CONFIDENTIAL – ATTORNEYS EYES ONLY

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 19-22312-rdd

4 Adv. Case No. 19-08246-rdd

5 - - - - - x

6 In the Matter of:

7
8 WINDSTREAM HOLDINGS, INC.,

9
10 Debtor.

11 - - - - - x
12 WINDSTREAM HOLDINGS, INC.,

13 Plaintiff,

14 v.

15 CHARTER COMMUNICATIONS, INC. ET AL,

16 Defendants.

17 - - - - - x

18
19
20 United States Bankruptcy Court

21 300 Quarropas Street, Room 248

22 White Plains, NY 10601

23
24 February 13, 2020

25 10:15 AM

1 B E F O R E :

2 HON ROBERT D. DRAIN

3 U.S. BANKRUPTCY JUDGE

4

5 ECRO: NAROTAM RAI

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1 HEARING re Adversary proceeding: 19-08246-rdd Windstream
2 Holdings, Inc., et al. v. Charter Communications, Inc. et al
3 Motion to Allow Defendant's Motion to Continue the March 30,
4 2020 Trial Setting for Counts VI and VII Pending a Jury
5 Trial on the Predicate Claims (Counts I-V)

6
7 Adversary proceeding: 19-08246-rdd Windstream Holdings,
8 Inc., et al. v. Charter Communications, Inc. et al
9 Final Pre-Trial Conference

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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

2

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4 Attorney for Windstream

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6 North Tower - Suite 200

7 Washington, DC 2007

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9 BY: TERENCE P. ROSS

10 MICHAEL R. JUSTUS

11 SHAYA ROCHESTER

12

13 MORRISON & FOERSTER LLP

14 Proposed Counsel for the Official Committee of

15 Unsecured Creditors

16 250 West 55th Street

17 New York, NY 10019

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19 BY: STEVEN T. RAPPOPORT

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1 THOMAS COBURN LLP

2 Attorney for Charter Communications

3 One US Bank Plaza

4 St. Louis, MO 63101

5
6 BY: JOHN S. KINGSTON

7 BRIAN HOCKETT

8
9 ALSO PRESENT TELEPHONICALLY:

10
11 PATRICK GEORGE

12 TAYLOR B. HARRISON

13 MICHAEL G. LINN

14 KAT RICHARDSON

15 SHAYA ROCHESTER

16 JESSICA STEINHAGEN

1 puzzling to suggest that CBI recognized that Katchen stood
2 for the proposition that Dairy Queen and Beacon Theaters
3 didn't apply in adversary proceedings regardless of whether
4 they had a proof of claim filed when CBI mentions neither
5 Beacon Theaters nor Dairy Queen.

6 THE COURT: This isn't helpful to me. Let me move
7 to the second point, which is as far as the argument based
8 on collateral estoppel, where would the collateral estoppel
9 be here if I went ahead with Counts 6 and 7? Where would
10 the collateral estoppel be?

11 MR. KINGSTON: I don't know. The collateral
12 estoppel would depend on what happened in the case. I mean,
13 it's the risk of collateral estoppel --

14 THE COURT: But you haven't -- you haven't
15 identified where there would be collateral estoppel.

16 MR. KINGSTON: Again, with collateral estoppel you
17 can't tell. I think we've identified the overlapping
18 issues, of course, which are the issues of damage of injury.
19 And we've identified the basis for our contention that it's
20 overlapping, which are the complaint, the summary judgement
21 pleadings, and the --

22 THE COURT: But isn't the concern here ultimately
23 based on collateral estoppel?

24 MR. KINGSTON: Yeah. I mean, if the court is
25 saying could I go ahead with 6 and 7 if I found that those

1 cases, that they didn't -- that those counts -- the issues
2 presented in those counts didn't overlap at all with the
3 issues --

4 THE COURT: No, I'm saying something different,
5 which is the jury trial concern here with going ahead with
6 Counts 6 and 7 is solely based on collateral estoppel.
7 There's nothing else. So where's the collateral estoppel?
8 I think the burden is on you to show it, not for the other
9 side to show that it wouldn't be collateral estoppel.

10 MR. KINGSTON: I think that the recognition that
11 there is a risk of collateral estoppel is because the issues
12 are the same.

13 THE COURT: But are they? I mean --

14 MR. KINGSTON: They are according to, again,
15 Plaintiff's complaint, their summary judgement papers, and
16 the Rule 26(a) disclosures. Yes, Your Honor.

17 THE COURT: The damages issues are the same?

18 MR. KINGSTON: They articulate the same damages
19 for each count.

20 THE COURT: And you're relying on --

21 MR. KINGSTON: I would take a look at the
22 complaint, which incorporates everything above it. And then
23 I would also refer the Court -- maybe the place where it's
24 collective would be on the docket at Page 123. If you go
25 all the way to the equitable subordination claim, they say

1 as set forth above, referring to their discussion of the
2 previous six counts, Charter's conduct caused Windstream to
3 lose customers, revenue, market share, while also damaging
4 Windstream's good will and reputation, which is the exact
5 same injury alleged for counts 1 through 5. So it seems
6 that they are the same issue, Your Honor.

7 THE COURT: You all have identified -- you all
8 have your expert reports at this point, right? Do the
9 expert reports treat the damages issues for purposes of the
10 Lanham Act claims differently than equitable subordination
11 of breach of the automatic stay?

12 MR. ROSS: Yes, Your Honor. We're the only one to
13 put in an actual damage report on damages.

14 THE COURT: Okay.

15 MR. ROSS: And it was quite clear that his report
16 went to the Counts 1 through 4.

17 THE COURT: So how would you establish the damages
18 element of 510 simply by saying there are damages? How
19 would you do the 510 damages then if the expert report is
20 just 1 through 4?

21 MR. ROSS: So for the equitable subordination we
22 simply have to show -- and the law doesn't require to show
23 anything other than we were damaged and harmed. And then we
24 can make an argument as to how you remedy that. I do not
25 think it would encompass really all of the -- so again, we

1 come back to a big chunk of the claim on the Lanham Act is
2 for corrective advertising. I'm not sure where that would
3 come in on that. But the expert was crystal clear that he
4 was opining as to 1 through 4.

5 THE COURT: So how are you going to -- how do you
6 propose to establish the remedy for equitable subordination
7 or the contempt sanction for breach of the automatic stay?

8 MR. ROSS: Well, the injury to the creditors --

9 THE COURT: Yeah.

10 MR. ROSS: -- is going to be very significant
11 here. We saw yesterday a --

12 THE COURT: So -- I'm sorry. No, but I'm just
13 talking about -- I'm trying to figure out whether there's
14 collateral estoppel here or not. You will be presenting
15 some form of proof to establish the remedy, and also some
16 form of proof to establish sanctions for breach of the
17 automatic stay. If it's not the expert report which
18 quantifies Lanham Act damages, where is it coming from?

19 MR. ROSS: Well, that's a good question. It might
20 -- that's a very good question. I'd have to think about
21 that one, Your Honor. The question presented was does he --
22 what the expert report does is to explain why there are lost
23 profits, why there are lost customers, how many lost
24 customers and how do you quantify that.

25 THE COURT: Right.

1 MR. ROSS: Not sure that that does or does not --
2 I'm not able to tell you right now.

3 THE COURT: Okay.

4 MR. ROSS: Whether or not that goes to --

5 THE COURT: Well, no, I appreciate that, that
6 equitable subordination does not require the same type of
7 analysis of damages that a Lanham Act claim would for
8 example or a breach of contract claim would. It's a
9 different type of analysis. Same for sanctions.

10 MR. ROSS: The reality is with respect to contempt
11 cases more broadly, but I also think not bankruptcy work,
12 like Mr. Rochester, but when the court has found violations
13 of the automatic stay and they've gone through the contempt
14 process, the damages assessed, the sanctions assessed have
15 often been focused on attorney's fees and some minor slap on
16 the wrist.

17 THE COURT: Well, although there are plenty of
18 times when you -- I mean, but they come under the rubric of
19 actual damages. Not the slap on the wrist, but actual
20 damages. Because you had to hire an attorney to fix the
21 problem.

22 MR. ROSS: But again, that's an attorney's fee
23 issue.

24 THE COURT: I understand that.

25 MR. ROSS: And that we could put in --

1 estoppel effect for all seven.

2 Knowing that that's a possibility, does either
3 party -- do either parties or both -- do either of the
4 parties or both parties want to consider that and decide
5 whether I should at least put off the trial for a brief
6 period to see whether Judge Seibel will cut through the
7 whole thing on the motion to withdraw the reference? I'm
8 not asking for your views now. You have a few days because
9 I'm going to write something on this. So I'll give you an
10 oral ruling. But I'd like to leave that with you, because
11 that is a possibility.

12 MR. ROSS: I'll certainly take it to my client.
13 And I agree, we have to have a ruling. Because if it's a
14 trial on all seven counts before you, then that would be
15 something that I think we'd have to take seriously. But if
16 it's just on some lump portion of the inequitable conduct, I
17 don't see what that accomplishes.

18 THE COURT: Okay. Because in your view -- and I
19 tend to agree with you -- it's not necessarily collateral
20 estoppel.

21 MR. ROSS: Yes, Your Honor.

22 THE COURT: Right. Okay. Okay. Thank you.

23 MR. KINGSTON: Thank you, Judge.

24 (Whereupon these proceedings were concluded at 12:27
25 PM)

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya

Ledanski Hyde

Digitally signed by Sonya Ledanski
Hyde
DN: cn=Sonya Ledanski Hyde, o, ou,
email=digital@veritext.com, c=US
Date: 2020.02.18 15:26:53 -05'00'

Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

Date: February 17, 2020

From: Robert Drain <judge_drain@nysb.uscourts.gov>
Sent: Monday, February 24, 2020 4:18 PM
To: shaya.rochester_katten.com; NYSBml_Drain's_Chambers; Dorothy Li
Cc: Katrina Pape; Ross, Terence P.; Justus, Michael R.; Kingston, John S.; Hockett, Brian W.
Subject: RE: Windstream/Charter

Thank you for this briefing.

As the parties know, my partial summary judgment ruling determined liability on the various causes of action and the right to injunctive relief under the Lanham Act (there also was sufficient commonality for collateral estoppel purposes for me to determine those issues under the bankruptcy-specific rule of In re CBI Holding Co., Inc., 529 F.3d 432 (2d Cir. 2008)), but did not determine Windstream's requests for monetary relief or fix the extent of equitable subordination of Charter's claims. I therefore believe that the remaining issues for trial are (a) the proper remedial extent of equitable subordination of Charter's claims for Charter's violation of the Lanham Act and the automatic stay, (b) sanctions, including actual damages, for Charter's breach of the automatic stay resulting from termination of service for unpaid bills, (c) Lanham Act damages, and (d) damages and other remedies under the state law equivalents of the Lanham Act.

At the February 13 hearing on Charter's motion to postpone the March 30 trial, the parties disagreed whether a jury trial was required to resolve remaining issues (c) – (d), above, or whether, as Windstream argued, the fact that the liability and injunction issues on all claims could be decided together in my partial summary judgment ruling required the remaining issues *also* to be decided by me instead of a jury. (Of course, the parties also disagreed whether trial of issues (a) – (b) must be postponed pending determination of any issues triable by a jury, but under CBI Holding such postponement clearly is not required although it may be warranted in an exercise of discretion.)

After the February 13 hearing and the briefing below, I have concluded, as I will be setting out in a written decision that I hope to issue next week, that (a) while the remaining, remedial elements of the equitable subordination and stay violation causes of action (i) cannot be tried by a jury and (ii) may be tried by me before the other causes of action, starting on March 30, (b) the outcome of that trial would in all likelihood not serve as collateral estoppel for the remaining element (damages) of the Lanham Act claim, and certain elements of the related state law claims where Windstream seeks a monetary recovery, which must be tried by a jury because the remaining damages issues, unlike the issues I've already decided, are not bound up in the determination of the remaining bankruptcy issues. Moreover, any remaining monetary aspects of the state law claims that in isolation might not be triable by a jury are not governed by the bankruptcy-unique considerations articulated by CBI Holding, and therefore under Ross v. Bernhard, 396 U.S. 531 (1970), and similar non-bankruptcy cases should be tried, if necessary, after the jury's determination of the Lanham Act damages.

I am informing you of this conclusion now because I don't believe that the parties should be preparing for a March 30 bench trial before me regarding the parties' damages calculations under the Lanham Act and related state statutes. Also, while you are free to seek a trial starting March 30 on the extent of the equitable subordination remedy and proper sanctions for Charter's already-decided breach of the automatic stay, it appeared from comments at the February 13 hearing that both sides may prefer delaying that trial until after the jury trial on the extent of damages for breach of the Lanham Act and comparable state law breaches triable by a jury (as was the case in Sharp v. Hawkins, 2004 WL 2792121 (N.D. Cal. 2004), with the exception that the common issues among the bankruptcy and non-bankruptcy claims regarding liability/wrongful conduct there had not already been decided whereas here they have, leaving only non-common issues between the bankruptcy claims and the other claims) and you may, therefore, want to communicate that view to District Judge Seibel in connection with Charter's pending motion to withdraw the reference.

I therefore would like the parties to let me know promptly by email whether they want to proceed with trial on March 30 on the remaining elements of the equitable subordination and breach of the automatic stay causes of action or, instead want to delay that trial pending Judge Seibel's ruling on the motion to withdraw the reference.

Sincerely,

Judge Drain

From: Rochester, Shaya <shaya.rochester@katten.com>

Sent: Monday, February 24, 2020 1:29 PM

To: NYSBml_Drain's_Chambbers <rdd.chambers@nysb.uscourts.gov>; Dorothy Li <Dorothy_Li@nysb.uscourts.gov>

Cc: Katrina Pape <Katrina_Pape@nysb.uscourts.gov>; Ross, Terence P. <terence.ross@katten.com>; Justus, Michael R. <michael.justus@katten.com>; jkingston_thompsoncoburn.com <jkingston@thompsoncoburn.com>; bhockett_thompsoncoburn.com <bhockett@thompsoncoburn.com>

Subject: Windstream -- election of remedies

Your Honor,

As you are aware, Katten Muchin Rosenman LLP ("Katten") represents Windstream Holdings, Inc. and its debtor affiliates (collectively, "Windstream") in connection with their adversary proceeding against Charter Communications, Inc. and Charter Communications Operating, LLC (collectively, "Charter"), which is pending under Adversary Case No. 19-08246 (the "Adversary Proceeding"). We write to provide authority regarding an issue the Court raised at the hearing in the Adversary Proceeding on February 13, 2020 (the "Hearing").

At the Hearing, the Court asked whether Windstream may pursue an equitable subordination claim based on the same facts underlying its legal claims for monetary damages. (See Transcript at 69-71). We advised the Court that Windstream is generally in agreement with Charter that Windstream may not ultimately obtain a "double recovery" in the form of monetary damages and equitable subordination based on the same underlying facts. (*Id.* at 69). Windstream, however, need not elect its remedy at this stage in the proceedings. The Court asked for cases to support that proposition, noting that because Charter had raised the issue in its reply brief, Windstream had not had any opportunity to address it. We indicated that cases supporting that proposition would be provided to the Court. (*Id.* at 71). This email provides those cases.

In *Matter of Century Glove, Inc.*, 151 B.R. 327, 332 (Bankr. D. Del. 1993), the Court was presented with the question as to whether "[a] debtor may not obtain both equitable subordination and an award of money damages which would compensate it for the damages resulting from the same conduct." *Id.* The court held that the debtor could plead "alternate and inconsistent forms of relief" and that, because the debtor did "not presently know that it will prevail on its legal claims . . . [defendant] cannot force [the debtor] to elect its remedy at the pleading stage." *Id.*

Other courts have agreed. For instance, in *In re Bernard L. Madoff Inv. Securities LLC*, 515 B.R. 117 (Bankr. S.D.N.Y. 2014), the trustee brought claims seeking avoidance of a fraudulent transfer and equitable subordination of the defendant's claim based on its role in the fraudulent transfer. The court found that the trustee could maintain both claims despite that the estate ultimately could not "recover damages and equitable subordination for the same wrong[.]" *Id.* at 161. Similarly, in *In re Granite Partners, L.P.*, 210 B.R. 508 (Bankr. S.D.N.Y. 1997), the court found that the plaintiff could plead both claims for damages and equitable subordination and that "a court should not dismiss an equitable subordination claim . . . merely because the plaintiff has also asserted a claim for damages based upon the same conduct." *Id.* at 517.

Indeed, as the cases make clear, Windstream may maintain an equitable subordination claim up to the time it receives payment on an award of monetary damages for the same conduct. *In re First Alliance Mortgage Co.*, 298 B.R. 652, 666 n.2 (C.D. Cal. 2003) ("once a party has obtained money damages, that same party may not also obtain equitable subordination based on the same conduct.") (emphasis added); *In re Granite Partners, LP*, 210 B.R. 508, 517 (Bankr.

S.D.N.Y. 1997)(“If they prevail, **and collect a judgment . . .** they will be made whole, and will not be entitled to any further legal or equitable relief.”)(emphasis added).

We hope the foregoing responds to the Court’s request. For your convenience, we have also attached copies of the cases cited above.

Regards,
Shaya Rochester
Conflicts Counsel for the Debtors

Shaya Rochester
Partner

Katten

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=====
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=====

NOTIFICATION: Katten Muchin Rosenman LLP is an Illinois limited liability partnership that has elected to be governed by the Illinois Uniform Partnership Act (1997).
=====

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 19-22312-rdd

4 Adv. Case No. 19-08246-rdd

5 - - - - - x

6 In the Matter of:

7
8 WINDSTREAM HOLDINGS, INC.,

9
10 Debtor.

11 - - - - - x

12 WINDSTREAM HOLDINGS, INC., et al.,

13 Plaintiffs,

14 v.

15 CHARTER COMMUNICATIONS, INC., et al.,

16 Defendants.

17 - - - - - x

Page 2

United States Bankruptcy Court
300 Quarropas Street, Room 248
White Plains, NY 10601

March 9, 2020

3:01 PM

B E F O R E :

HON ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

ECRO: SHEA

1 HEARING re Adversary proceeding: 19-08246-rdd Windstream
2 Holdings, Inc., et al. v. Charter Communications, Inc. et al
3 Final Pre-Trial Conference via Phone
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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

2

3 KATTEN MUCHIN ROSENMAN LLP

4 Attorneys for Debtors

5 575 Madison Avenue

6 New York, Ny 10022

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8 BY: TERRENCE ROSS (TELEPHONICALLY)

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13 St. Louis, MO 63101

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15 BY: JOHN KINGSTON (TELEPHONICALLY)

16 BRIAN HOCKETT (TELEPHONICALLY)

17

18 MORRISON & FOERSTER LLP

19 Attorneys for the Committee

20 250 West 55th Street

21 New York, NY 10019

22

23 BY: JOCELYN GREER (TELEPHONICALLY)

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25

1 ALSO PRESENT TELEPHONICALLY:

2

3 JEFFREY H. DAVIDSON

4 GABRIEL I. GLAZER

5 TAYLOR B. HARRISON

6 SEAN DALY

7 MICHAEL HOCKETT

8 MICHAEL R. JUSTUS

9 MICHAEL G. LINN

10 STEVEN RAPPOPORT

11 SHAYA ROCHESTER

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P R O C E E D I N G S

CLERK: All rise.

THE COURT: Okay. Good afternoon. This is Judge Drain. And we're here on the final pretrial conference in the Windstream Holdings, Inc., et al v. Charter Communications, Inc. and Charter Communications Operating, LLC. Who do I have on the phone?

MR. ROSS: Your Honor.

THE COURT: I just heard the last two words.

MR. ROSS: It's Terrence Ross, with the law firm of Katten, appearing for the Debtors, Debtors in Possession, and Plaintiffs in the adversary proceeding.

THE COURT: Okay. Good afternoon.

MR. KINGSTON: And John Kingston, on behalf of the Defendants, Your Honor.

THE COURT: Afternoon.

MS. GREER: Good afternoon, Your Honor.

MAN 1: (indiscernible) of Katten.

MR. HOCKETT: Brian Hockett is also on, on behalf of Charter Communications.

THE COURT: Okay.

MS. GREER: And Jocelyn Greer, of Morrison & Forester, on behalf of the Committee is also on.

THE COURT: Okay. Afternoon. The Committee hasn't really been involved in this adversary proceeding but

1 had asked for a live line. There's no one in the courtroom,
2 so we'll just go ahead with those folks who are on the
3 phone.

4 As currently scheduled, I have a trial set to
5 begin March 31, and if necessary, going through April 1 on
6 Counts 6 and 7, the breach of the automatic stay and
7 equitable subordination counts. Obviously, there were
8 emails exchanged the week before last on whether the parties
9 wanted to go ahead with that trial or not.

10 I'll be issuing my written opinion that I already
11 summarized for you in my February 26 email shortly, denying
12 Charter's motion for a continuance of the trial, which was
13 based solely on the constitutional jury trial argument. It
14 did not seek a stay under the bankruptcy rules specifically.

15 But I have the email from Windstream stating that
16 it would like to proceed with the trial. And I don't know
17 if there's been any further thought on that point,
18 particularly in light of the proposed -- the restructuring
19 support agreement entered into last week, but as things
20 currently stand, I am planning on going forward with the
21 trial on those two counts.

22 Does anyone have anything further to say on that
23 point?

24 MR. ROSS: This is Mr. Ross, Your Honor. No.

25 THE COURT: Okay.

1 MR. KINGSTON: Your Honor, this is John Kingston.
2 Is the Court anticipating going forward on Count 6 as to
3 both creditor and non-creditor Defendants?

4 THE COURT: Yes. Yes, to the extent that there
5 are allegations that the non-creditor Defendants violated
6 the automatic stay.

7 MR. KINGSTON: I have nothing beyond that inquiry,
8 Your Honor.

9 THE COURT: Okay. All right. So you have the
10 pretrial order on this. So again, I just want to remind you
11 all that I'll be expecting the witness declarations or
12 affidavits and the joint exhibit book a week before the
13 trial is set.

14 I'm not sure whether it will take a full day,
15 given that we're just going ahead on Counts 6 and 7, and
16 given, as I understand it, the limited extent of damages
17 and/or sanctions that Windstream is seeking to show or
18 establish here.

19 Does anyone have any more questions before we
20 close the conference?

21 MR. ROSS: Your Honor, this is Mr. Ross again. I
22 have just a couple of housekeeping questions and then one
23 substantive question. What is your preference as far as
24 start time and how long do you usually like to go with a
25 trial, Your Honor? Just so we make sure that we have

1 everything teed up and --

2 THE COURT: Sure. Well, given that, again, we
3 just had the two causes of action - I'm assuming we'll start
4 at 10:00 -- and I don't like to break with a witness in
5 midstream, or even after he or she has finished their
6 direct, so I'm fairly flexible about breaking for lunch, and
7 similarly, whether we go until 6:00-6:30 or so, or
8 alternatively close when we're done with one witness but
9 don't contemplate being able to finish with another one at
10 the end of the day.

11 You all should discuss between yourselves how long
12 you expect each witness to go, so you can have a better idea
13 of whether you want to forge ahead in the evening, because
14 otherwise, we wouldn't finish on April 1st, or will you want
15 to carry over on April 1st.

16 MR. ROSS: And then, Your Honor, two follow-on
17 questions. First, I am correct that you don't want any
18 direct testimony? You just want a declaration?

19 THE COURT: Correct.

20 MR. ROSS: And then the witness appears live for
21 cross-examination.

22 THE COURT: That's right.

23 MR. ROSS: And then the second part, Your Honor,
24 is I take it you generally prefer not to have any sort of
25 opening statement, but you do allow a closing argument?

1 THE COURT: That's right. I don't like opening
2 statement, but I do expect the parties to have prepared,
3 obviously subject to what they hear during the trial, for
4 closing argument, and to be ready to make closing argument
5 at the end of the trial. Again, I think that will be well
6 within the two days that are budgeted. If for some reason
7 that doesn't happen, then I'll put it over to hear closing
8 argument another day. But I'm assuming that it will happen
9 during the time that's been allotted.

10 MR. ROSS: And then, Your Honor, Mr. Ross again.
11 The one substantive question I want to raise is, the parties
12 have exchanged witness lists. The Defendant Charter's
13 witness list includes Dr. Rossberg, who was excluded by the
14 Court in Daubert -- one of the Daubert motions. I really
15 don't want to have to file a limine motion on this. I think
16 it's a waste of the Debtors' estate to have to be
17 relitigating things over and over again.

18 THE COURT: Okay. Well --

19 MR. ROSS: We would just like an understanding
20 that he's not going to show up, so we don't have to prepare
21 for him.

22 THE COURT: Okay. And I don't know when those
23 lists were exchanged, but obviously on issues of where I've
24 ruled, you should assume that that ruling still stands.

25 MR. KINGSTON: This is John Kingston. Understood,

1 Your Honor.

2 THE COURT: Okay. All right. Very well.

3 Anything else?

4 MR. KINGSTON: Nothing, Your Honor.

5 THE COURT: Okay. Thanks a lot.

6 MR. HOCKETT: Nothing from the Defendants, Your
7 Honor.

8 THE COURT: Okay. Bye-bye.

9 MR. KINGSTON: Thank you.

10 (Whereupon these proceedings were concluded at
11 3:10 PM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

Date: April 10, 2020

[& - evening]

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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., <i>et al.</i> , ¹	)	Case No. 19-22312 (RDD)
)	
Debtors.	)	(Jointly Administered)
)	
WINDSTREAM HOLDINGS, INC., <i>et al.</i> ,)	
)	
Plaintiffs,	)	Adv. Pro. No. 19-08246
)	
v.)	
)	
CHARTER COMMUNICATIONS, INC. and)	
CHARTER COMMUNICATIONS OPERATING, LLC,)	
)	
Defendants.)	
)	

**DECLARATION OF JOHN C. JAROSZ
IN LIEU OF DIRECT TESTIMONY AT TRIAL**

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.

I, John C. Jarosz, declare as follows:

1. I am a Managing Principal at Analysis Group, Inc. (“Analysis Group”) and Director of its Washington, DC office. Analysis Group is an economic, financial, health care, and strategy consulting firm with offices across the nation. It provides research and analysis in a variety of business, litigation, and regulatory settings, and has particular expertise in intellectual property (“IP”) matters. It has been engaged in numerous lawsuits involving IP issues, including patents, trademarks, copyrights, false advertising, trade secrets, and unfair competition.

2. I am an economist whose specialty is IP valuation and monetary relief (including damages) assessment. Among my responsibilities at Analysis Group, I provide clients with my analysis and assessment on IP valuation and monetary relief in a variety of contexts, including litigation. I have been involved in more than 500 such engagements over almost 35 years. I have provided expert testimony at trial or in arbitration hearings on approximately 100 occasions. A true and correct copy of my current CV is attached hereto at Tab 1 and is incorporated herein by reference. It is also Plaintiffs’ Trial Exhibit 103.

3. I was engaged by Windstream Holdings, Inc. and its debtor affiliates, and debtors-in-possession in the above-captioned Chapter 11 cases, and as plaintiffs in the above-captioned adversary proceeding. As I did in my expert report in this adversary proceeding, I will refer herein to Plaintiffs collectively as either “Windstream” or “Debtors.” I was specifically engaged to provide an economic analysis of the losses incurred by Windstream as a result of the unlawful acts by Charter Communications, Inc. and Charter Communications Operating, LLC (collectively, “Charter”) alleged in Windstream’s Complaint in the above-captioned adversary proceeding. Economic analyses that I undertake, such as this one, typically involve the application of statistical

methods/models to data in order to draw observations about those data and/or to determine whether empirical support exists for hypothesized economic relationships.

4. I am generally familiar with the factual allegations and the causes of action asserted by Windstream in this adversary proceeding. I have reviewed the Declaration Of Jeffrey H. Auman In Lieu Of Direct Testimony At Trial, as well as the exhibits identified therein.

5. Except as otherwise indicated, all facts and opinions set forth in this declaration are based upon my personal knowledge, my expertise in damages computation, the Expert Report of John C. Jarosz and the relied-upon documents cited therein, and my discussions with employees of Windstream. Moreover, my opinions herein are based on application of a commonly used empirical methodology that I have used in the past and which is widely accepted for use in this type of economic analysis. If called as a witness, I could and would testify competently to the facts and opinions set forth in this declaration.

6. As a result of my engagement by Windstream in this adversary proceeding, I have formed an opinion which I hold with a reasonable degree of certainty appropriate in the field of economics that, during the period April 2019 through August 2019, Windstream lost approximately 1,386 customers as a result of the unlawful conduct of Charter, and that this represents lost profits to Windstream in the range of approximately \$3.2 million to \$5.1 million.

7. I arrived at the foregoing opinion through a three-step process. First, I determined the number of customers lost by Windstream due to Charter's unlawful actions by examining whether there were any changes in Windstream's "churn rate." Second, I determined the lost revenue associated with those lost customers. Third, I applied Windstream's profit margins to the lost revenue associated with the lost customers.

8. With respect to the first step, I relied on internal Windstream data relating to its customer base in marketplaces (“exchanges”) in which it provides broadband services. As shown in Plaintiffs’ Trial Exhibit 5, this data reports on monthly customer adds, disconnects, and customer base for “All Exchanges” and “Charter Exchanges” (exchanges in which Charter and Windstream compete) from January 2016 through August 2019. I understand that Windstream kept that data in the regular course of its business. This is the type of data that experts in my field reasonably rely upon. This data can be used to calculate the “churn rate” over time. “Churn rate” refers to the percentage of customers that discontinue services in a given time period. It is calculated as the number of disconnected customers in a given period divided by the total number of customers at the beginning of that period. Churn rate is an important metric that telecommunications companies, including Windstream, use in the regular course of business to assess their performance.

9. I understand that Charter’s false advertising campaign was launched in late-March 2019, and was sent to Windstream customers in all exchanges in which Windstream and Charter compete (the “Charter Exchanges”). The false advertisement was not sent to Windstream customers in the exchanges in which Charter does not compete with Windstream (the “Non-Charter Exchanges”). This situation presents a natural experiment that allows for the estimation of the impact of Charter’s false advertising campaign on Windstream’s churn rate. Customers in Charter Exchanges were exposed to the false advertising in the second period (after the campaign), but not in the first period (before the campaign), and, therefore, serve as the “treatment group.” Customers in Non-Charter Exchanges were not exposed to the false advertising in the first or second period and, therefore, serve as the “control group.” Both groups, however, were exposed to systemic factors unrelated to Charter’s false advertising campaign that may affect Windstream’s

churn rate. For example, Windstream's corporate strategy or truthful and accurate news surrounding Windstream's bankruptcy could affect customer churn in both the Charter Exchanges and Non-Charter Exchanges.

10. Given the two distinct groups described above (the treatment group and the control group), I was able to analyze the impact of Charter's false advertising campaign upon Windstream through an analysis of the differences in "churn rate" in the period before versus the period after dissemination of Charter's false advertising in two distinct groups – the Charter Exchanges (the treatment group) and the Non-Charter Exchanges (the control group). The impact of Charter's false advertising campaign on Windstream's churn rate can be estimated by subtracting (i) the *change* in the churn rate in the Non-Charter Exchanges across the two periods from (ii) the *change* in the churn rate in the Charter Exchanges across the two periods. The "differencing" of the trends across time and groups controls for the effects of factors unrelated to Charter's false advertising to isolate the impact of Charter's false advertising campaign.

11. The above-described analysis is referred to as a "difference-in-differences" analysis. In my field, we typically refer to it as a "diff-in-diff" analysis. It is a common technique used in economics to measure the impact of a change in one variable upon another variable. I have used it many times in prior assignments and have substantial experience in doing so. I ensured that a diff-in-diff was an appropriate technique for my analysis here by first conducting a parallel trend review on the period before the start of Charter's false advertising campaign. As discussed below, my parallel trend analysis showed that the data sets were appropriate for application of a diff-in-diff analysis.

12. The "trends" I compared here were the monthly churn rates for the Charter Exchanges versus the monthly churn rates for the Non-Charter Exchanges. I compared the trends

by running a trend analysis on the monthly churn rates from January 2018 through March 2019 for each exchange group. I chose those dates partly because they were close in time to Charter's false advertising campaign launched in late-March 2019, in order to ensure that the marketplace dynamics were closest to those seen during the time of the campaign.

13. The results of the trend analysis were two lines: one line depicting the trend in monthly churn rate for the Charter Exchanges and one line depicting the trend in monthly churn rate for the Non-Charter Exchanges. This is shown in the demonstrative exhibit attached hereto at Tab 2. Prior to the start of Charter's false advertising campaign, the slopes of those two lines were sufficiently close – that is “parallel” – to one another for me to conclude that the data sets were proper for a diff-in-diff analysis. In other words, the separate exchange groups were trending quite closely to one another such that they exhibited “parallel trends,” and there were no indications of other variables causing those parallel trends to deviate during the time period I reviewed. Thus, I was able to move forward with the diff-in-diff analysis described in Paragraph 10 above with a high degree of confidence that it would yield a reasonably reliable conclusion.

14. Given the parallel trends discussed above, if a variable, such as Charter's false advertising, was introduced into one of the exchange groups and, if it had an impact on churn rate, I would expect the trend lines for the two groups to deviate from the relationship they had before the variable was introduced. And, in fact, that is what my analysis here revealed. In this regard, my analysis is confirmed by other evidence of record, such as Plaintiffs' Trial Exhibits 18 and 65-66, as well as Joint Trial Exhibits 2 and 8.

15. Using Windstream's customer data, I compared the churn rates before and after Charter's false advertising for the Windstream customers in the Charter Exchanges versus the Windstream customers in the Non-Charter Exchanges. For both groups, I examined churn rate

from April 2018 through August 2018 versus April 2019 through August 2019. Comparing the churn rates in the same months (year over year) controls for seasonality effects. I used April to August 2018 churn rates because it was closest in time (year over year) to the period of interest. Furthermore, I understand that Windstream implemented significant changes in its business and marketing strategies and that the results of those changes began to appear in Q2 2018, rendering the use of earlier periods inappropriate.

16. To calculate the churn rates period-over-period, I used the number of Windstream customers in March of the same year as the baseline because Charter's false advertising campaign was initiated in late-March 2019. Because the total number of customers is affected by the number of adds and disconnects in prior months, Charter's false advertising campaign would be expected to affect Windstream's customer base after the launch of the campaign. Thus, the effects of that false advertising campaign can be expected to start in April 2019. Evidence indicated that the effects of Charter's false advertising campaign lasted into at least August 2019. Thus, August 2019 was used as an end date for the analysis. This is a conservative choice given that researchers have found that advertising mailers can affect consumer behavior for approximately one year. Customer churn from April 2019 through August 2019 is calculated as the number of disconnects in these five months divided by the total number of customers in March 2019. That is, the churn rate for the period under consideration is measured based on the number of existing customers in March 2019 (*i.e.*, the customer base targeted by Charter's false advertising campaign).

17. In March 2018, there were 355,135 customers in the Charter Exchanges. From April 2018 through August 2018, 42,182 customers in the Charter Exchanges disconnected from Windstream. Thus, the churn rate in the Charter Exchanges was 11.88 percent for this period. In

March 2019, there were 360,865 customers in the Charter Exchanges. From April 2019 through August 2019, 45,396 customers in the Charter Exchanges disconnected from Windstream. Thus, the churn rate from April 2019 through August 2019 in the Charter Exchanges was 12.58 percent. Accordingly, Windstream's churn rate in the Charter Exchanges increased by 0.70 percentage points

18. In March 2018, there were 649,686 customers in the Non-Charter Exchanges. Between April 2018 and August 2018, 65,265 customers in the Non-Charter Exchanges disconnected from Windstream. Thus, the churn rate in the Non-Charter Exchanges was 10.05 percent in this period. In March 2019, there were 671,617 customers in the Non-Charter Exchanges. Between April 2019 and August 2019, 69,604 customers in the Non-Charter Exchanges disconnected from Windstream. Thus, the churn rate in the Non-Charter Exchanges for the period April 2019 through August 2019 was 10.36 percent. Accordingly, Windstream's churn rate in the Non-Charter Exchanges increased by 0.32 percentage points.

19. The calculations described above are summarized in the Table below and shown in the demonstrative exhibit attached hereto at Tab 3.

	Before	After	Change
	April – August	April – August	Over
	2018	2019	Time
Charter Exchanges	11.88 percent	12.58 percent	0.70 percent
Non-Charter Exchanges	10.05 percent	10.36 percent	0.32 percent
Difference	1.83 percent	2.22 percent	0.38 percent

20. As shown in the above Table, after Charter's false advertising campaign was launched in late-March 2019, Windstream's churn rate in the Charter Exchanges increased by 0.38 percentage points more than its churn rate in the Non-Charter Exchanges. Therefore, the impact of Charter's false advertising campaign on Windstream's churn rate was 0.38 percentage points. Applying this 0.38 percent to the number of Windstream customers in the Charter Exchanges in March 2019 results in the number of lost customers that are attributable to Charter's false advertising campaign. This analysis shows that Charter's false advertising campaign caused Windstream to lose approximately 1,386 customers from April 2019 through August 2019. This is shown in the demonstrative exhibit attached hereto at Tab 4. This calculation is conservative because I only considered customers in Charter Exchanges through August 2019. However, customers in the Charter Exchanges may have been influenced by Charter's false advertising beyond August 2019. Moreover, customers in the Non-Charter Exchanges may have been influenced by Charter's false advertising campaign as a result of communications with friends and family and/or on social media, *etc.* In fact, researchers studying the spillover effects of a marketing campaign reported that for every 100 customers targeted by such a campaign, 28 additional customers (friends and families of the targeted customers) would be influenced in the same way by such a campaign.

21. Charter produced its own internal calculation of Windstream's lost customers for the purposes of this litigation. This information is found in Joint Trial Exhibits 2 and 8. According to Charter, through June 24, 2019, there were 3,721 customers who called the unique telephone number in the false advertisement mailed by Charter, and 663 of them ultimately purchased one or more services from Charter. However, the 663 customers that Charter reported likely understates the actual number of lost customers. First, it likely understates the customer loss because there are

multiple ways in which Windstream customers can switch to Charter. The 663 customers, at best, reflect customers who switched services during the tracking period (which Charter stopped recording in late-June 2019, months earlier than it should have stopped) by calling the unique telephone number in Charter's false advertisement. Customers can also subscribe to Charter services in stores, by calling Charter's general sales number, or on Charter's website. None of these lost customers would be reflected in Charter's report of customers calling the unique telephone number in the false advertisement. In fact, customers who were influenced by Charter's false advertisement may have called the other unique telephone numbers used in Charter's May 2019 mailers instead. According to Charter's calculations, however, those customers would apparently be credited to the May 2019 mailers. In addition, Charter's analysis does not appear to include the door-to-door sales that it generated through its representatives. Furthermore, to the extent that Charter's false advertising campaign led certain Windstream customers to switch to another competitor or discontinue their subscriptions all together, those customers would not be captured in Charter's calculation. Second, this number appears to represent an undercounting of sales generated by the March 2019 mailer because the return rate (*i.e.*, sales divided by number of mailers) reported by Charter for the March 2019 mailer is substantially lower than the return rates reported by Charter in other direct mail campaigns launched by Charter in May 2019 into the same markets. Moreover, this disparity in return rates is at odds with research suggesting that advertisements distributed by the same channel (*e.g.*, direct mail) generally have a similar impact on customer behavior. So, this reported rate of return on the Charter false advertisement is inherently suspect as underreporting actual results.

22. In the second step of this process, I determined the lost revenue associated with the loss of these customers. To calculate Windstream's lost revenues, I first calculated the average

revenues per customer based on Windstream's 2019 Consumer Revenues and Profits Data, which is Plaintiffs' Trial Exhibit 61. This reports monthly revenues and gross margins from January 2019 through August 2019. I understand that Windstream kept that data in the regular course of its business. This is the type of data that experts in my field reasonably rely upon. The average monthly revenues per customer was \$77.63 in March 2019.

23. I then estimated the expected number of months that the lost customers would have remained with Windstream in the absence of Charter's false advertising based on Windstream's churn rate in March 2019 in the Charter Exchanges. The 2.0 percent churn rate in March 2019 corresponds to an expected tenure of 50 months. Windstream's lost revenues on those lost customers then amounts to approximately \$5.4 million. This is shown in the demonstrative exhibit attached hereto at Tab 4.

24. In the third step of this process, I determined the profits lost by Windstream as a result of the customers lost to Charter's false advertising. I calculated Windstream's lost profits using two different measures of profit. As a first measure of profit, I used the average gross profit per customer based on Windstream's 2019 Consumer Revenues and Profits Data, which is Plaintiffs' Trial Exhibit 61. This reports monthly revenues and gross margins from January 2019 through August 2019. I understand that Windstream kept that data in the regular course of its business. This is the type of data that experts in my field reasonably rely upon. The average monthly gross profit per customer in March 2019 was \$73.35, which corresponds to a gross margin of 94.5 percent. The gross margin accounts for direct expenses associated with Windstream's provision of services to customers. I applied this gross margin to the lost revenues that I calculated above. Based on this measure of profits, Windstream's lost profits on the lost revenues amount to approximately \$5.1 million. This is shown in the demonstrative exhibit attached hereto at Tab 4.

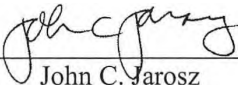
25. As a second measure of profit, I used the average contribution profit per customer based on Windstream's 2018 – Q2 2019 Kinetic Segment Financial Information. This is Plaintiffs' Trial Exhibit 7. I understand that Windstream kept that data in the regular course of its business. This is the type of data that experts in my field reasonably rely upon. Contribution margin represents gross margin minus allocated company-wide operating expenses, such as Selling, General and Administrative expenses.

26. The contribution margin of Windstream's Kinetic Segment in Q1 2019 was 59.2 percent, which corresponds to an average monthly contribution profit per customer of \$45.96. Based on this measure of profits, Windstream's lost profits on the lost revenues amount to approximately \$3.2 million. This is shown in the demonstrative exhibit attached hereto at Tab 4. This measure of profits is likely to be too low given the small incremental volume at issue here (an estimated 1,386 lost customers). Volumes in that range are unlikely to have a measurable effect on company-wide operating costs, such as network and facilities expenses.

27. Based on my analysis above, it is my opinion that Charter's false advertising campaign caused Windstream to lose approximately 1,386 customers from April 2019 through August 2019. These customer losses represent lost profits in the range of \$3.2 to \$5.1 million. This is shown in the demonstrative exhibit attached hereto at Tab 4. This range should be regarded as conservative and likely underestimates Windstream's actual losses.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: April 17, 2020



John C. Jarosz

TAB 1

JOHN C. JAROSZ
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John Jarosz, a Managing Principal of Analysis Group, Inc., specializes in applied microeconomics and industrial organization. He has performed research, given economic testimony, and provided strategy consultation in intellectual property, licensing, and commercial damages matters, including:

- evaluation of damages in patent, copyright, trade secret, trademark, and unfair competition cases (including lost profits, reasonable royalties, price erosion, unjust enrichment, accelerated market entry, and prejudgment interest);
- evaluation of injunctive relief and commercial success in a variety of intellectual property cases;
- strategy consultation regarding the nature and value of technology, methods to share technology, and reasonable compensation terms;
- analysis of compliance with FRAND/RAND commitments; and
- general commercial damages testimony in a variety of cases and across numerous industries.

Prior to joining Analysis Group, Mr. Jarosz was a Director with Putnam, Hayes & Bartlett, Inc. Before that, he was a Senior Analyst with Richard J. Barber Associates, a Section Supervisor with Mutual of Omaha Insurance, and a Research Analyst with the Center for the Study of American Business.

EDUCATION

J.D.	University of Wisconsin
M.A. & Ph.D. candidate	Economics, Washington University, St. Louis
B.A., <i>Summa Cum Laude</i>	Economics and Organizational Communication, Creighton University

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PROFESSIONAL ASSOCIATIONS/MEMBERSHIPS

- American Economic Association
- American Law and Economics Association
- American Bar Association (Sections: Intellectual Property, Antitrust and Litigation)
- State Bar of Wisconsin (Section: Intellectual Property)
- American Intellectual Property Law Association (Sections: Federal Litigation, Licensing, Trade Secrets and Antitrust)
- Licensing Executives Society
 - Former Chair, Valuation and Taxation Committee
 - Former Member, Certified Licensing Professional Exam Writing Team
- Former Advisory Board - *The IP Litigator*
- Former Columnist (Damage Awards) - *The IP Litigator*
- Omicron Delta Epsilon (International Honor Society in Economics)
- Association of University Technology Managers
- Certified Licensing Professional
- Intellectual Property Owners Association (Committee: Damages and Injunctions)
- 2011 Presidential Rank Review Board
- Referee, Journal of Forensic Economics
- The Sedona Conference (Sections: Best Practices in Patent Litigation, Patent Damages and Remedies)
- IAM Patent 1000 (2014, 2015, 2016): The World's Leading Patent Practitioners - Economic Experts
- IP Law360: Voices of the Bar

TESTIMONIAL EXPERIENCE

Patent Cases – Damages

- **BASF Plant Science, LP v. Commonwealth Scientific and Industrial Research Organisation; and Commonwealth Scientific and Industrial Research Organisation, Grains Research and Development, Corp., and Nuseed Pty Ltd. v. BASF Plant Science, LP and Cargill, Inc.**
United States District Court, Eastern District of Virginia (Case No. 17-cv-503-HCM)
Trial and deposition testimony and expert report: reasonable royalty damages and injunctive relief covering patents directed to the production of plant-derived omega-3 oils.
- **Riddell, Inc. v. Kranos Corporation, d/b/a Schutt Sports**
United States District Court, Northern District of Illinois (Case No. 1:16-cv-04496)
Trial testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving patents covering football helmet technology.

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- **Cedars-Sinai Medical Center v. Quest Diagnostics Inc. and Quest Diagnostics Nichols Institute**
United States District Court, Central District of California, Western Division (Case No. 17-cv-5169-GW-FFM)
Deposition testimony and expert report: damages associated with alleged misappropriation of trade secrets, breach of contract, and patent infringement involving diagnostic testing for irritable bowel syndrome (IBS).
- **Roche Diagnostics Corporation v. Meso Scale Diagnostics, LLC and Meso Scale Diagnostics, LLC v. Roche Diagnostics Corporation and BioVeris Corporation**
United States District Court, District of Delaware (Case No. 17-189 (LPS)(CJB))
Trial and deposition testimony and expert report: reasonable royalty damages related to alleged patent infringement involving electrochemiluminescent detection technology used in immunoassay kits.
- **Kranos IP Corporation, Kranos IP II Corporation, and Kranos Corporation d/b/a Schutt Sports v. Riddell, Inc.**
United States District Court, Northern District of Illinois (Case No. 1:17-cv-06802)
Deposition testimony and expert report: reasonable royalty damages and prejudgment interest involving patents covering football helmet technology.
- **Nichia Corporation v. Vizio, Inc.**
United States District Court, Central District of California (Case No. 8:16-cv-00545)
Deposition testimony and expert report: reasonable royalty damages and commercial success involving patents directed to light emitting diodes (LEDs).
- **Syngenta Crop Protection, LLC v. Willowood, LLC, Willowood USA, LLC, Willowood Azoxystrobin, LLC, and Willowood Limited**
US District Court, Middle District of North Carolina (Case No. 1:15-cv-274)
Trial and deposition testimony and expert report: damages and prejudgment interest related to alleged patent and copyright infringement involving crop fungicide.
- **Integra Lifesciences Corporation, Integra Lifesciences Sales, LLC, Confluent Surgical, Inc., and Incept, LLC v. Hyperbranch Medical Technology, Inc.**
United States District Court, District of Delaware (Case No. 15-cv-00819)
Trial and deposition testimony and expert reports: lost profits, price erosion, reasonable royalty, prejudgment interest, preliminary relief, and commercial success involving patents directed to cranial and spinal dural repair sealants.
- **Blue Spike, LLC v. Toshiba America, Inc., and Toshiba Corporation**
US District Court, Eastern District of Texas (Tyler Division) (Case No. 6:16-CV-430-RWS-JDL)
Damages hearing and early expert report: damages related to alleged patent infringement involving address space layout randomization ("ASLR") technology.
- **Audio MPEG, Inc., U.S. Philips Corporation, TDF SAS, and Institut Für Rundfunktechnik GmbH v. Dell, Inc.**
United States District Court, Eastern District of Virginia, Norfolk Division (Case No. 1:15-CV-1674 AJT/TCB)
Deposition testimony and expert report: analysis of patent pool compliance with FRAND commitments and determination of FRAND-compliant royalties involving patents directed to the transmission and storage of digital audio files.
- **Koninklijke Philips Electronics N.V. and Philips Electronics North America Corporation v. ZOLL Medical Corporation**
United States District Court, District of Massachusetts (Case No. 1:10-cv-11041)
Trial and deposition testimony and expert report: lost profits, reasonable royalty damages, and prejudgment interest related to alleged patent infringement involving external defibrillators.

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- **Erfindergemeinschaft UroPep GbR v. Eli Lilly and Company and Brookshire Brothers, Inc.**
US District Court, Eastern District of Texas, Marshall Division (Case No. 2:15-cv-1202-WCB)
Trial and deposition testimony and expert report: reasonable royalty damages related to alleged patent infringement directed to phosphodiesterase (PDE) V inhibitor(s) indicated for the treatment of benign prostatic hyperplasia.
- **Koninklijke Philips Electronics N.V. and Philips Electronics North America Corporation v. ZOLL Lifecor Corporation**
United States District Court, Western District of Pennsylvania (Case No. 2:2012-cv-01369)
Deposition testimony and expert report: damages related to alleged patent infringement involving wearable defibrillators.
- **Luminara Worldwide, LLC v. Shenzhen Liown Electronics Co., Ltd, Central Garden and Pet Co., et al.; Shenzhen Liown Electronics Co., Ltd, Central Garden and Pet Co. v. Luminara Worldwide, LLC, et al. ; and Luminara Worldwide, LLC v. Shenzhen Liown Electronics Co., Ltd and Central Garden and Pet Co., et al.**
United States District Court, District of Minnesota (Case Nos. 14-cv-03103 (SRN/FLN) and 15-cv-03028 (SRN/FLN))
Deposition testimony and expert reports: damages associated with alleged patent infringement and breach of contract, and unjust enrichment associated with breach of non-disclosure agreement and use of trade secrets, related to flameless candle technology and distribution.
- **MobileMedia Ideas LLC v. Apple, Inc.**
United States District Court, District of Delaware (Case No. 10-258-SLR)
Trial and deposition testimony and expert report: reasonable royalty involving patents directed to incoming call, playlist, and location detection features used in smartphones, tablets, and portable media players.
- **MAZ Encryption Technologies LLC v. Blackberry Corporation**
United States District Court, District of Delaware (Case No. 1:13-cv-00304-LPS)
Deposition testimony and expert report: reasonable royalty involving a patent directed to encryption/decryption methods used in smartphone and tablet operating systems.
- **BroadSoft, Inc. v. Callwave Communications, LLC**
United States District Court, District of Delaware (Case No. 13-cv-0711-RGA)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving patents directed to telecommunications call processing.
- **Advanced Video Technologies, LLC v. Blackberry, LTD. and Blackberry Corporation**
United States District Court, Southern District of New York (Case No. 1:11-cv-06604-CM-RLE)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving a patent directed to video compression and decompression.
- **Drone Technologies, Inc. v. Parrot S.A. and Parrot, Inc.**
United States District Court, Western District of Pennsylvania (Case No. 2:14-cv-0111)
Trial and deposition testimony and expert report: reasonable royalty and prejudgment interest involving a patent directed to drone technology.
- **Bayer CropScience AG and Bayer CropScience NV v. Dow AgroSciences LLC, Mycogen Plant Science Inc., Agrigenetics, Inc. d/b/a Mycogen Seeds LLC, and Phytogen Seed Company, LLC**
International Chamber of Commerce (Case No. 18892/VRO /AGF)
Arbitration hearing testimony and expert report: damages associated with alleged breach of contract and patent infringement involving genetically modified seed.

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- **CertusView Technologies, LLC v. S &N Locating Services LLC and S & N Communications, Inc.**
United States District Court, Eastern District of Virginia, Norfolk Division (Case No. 2:13-cv-346 (MSD/LRL))
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving patents directed to creation of electronic sketches for utility location purposes.
- **Ecolab USA Inc. and Kleancheck Systems, LLC v. Diversey, Inc.**
United States District Court for the District of Minnesota (Civil Action No. 12-cv-1984 (SRN/JJG))
Deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving products covering the monitoring of hospital cleaning.
- **Everlight Electronics Co. Ltd., and Emcore Corporation v. Nichia Corporation and Nichia America Corporation v. Everlight Americas, Inc.**
United States District Court, Eastern District of Michigan, Southern Division (Case No. 4:12-cv-11758 GAD-MKM)
Trial and deposition testimony, expert report and declaration: commercial success, lost profits, reasonable royalty, and prejudgment interest involving patents directed to LEDs.
- **Source Search Technologies, LLC v. Kayak.com, Inc.**
United States District Court, District of New Jersey (Case No. 2:11-cv-03388-FSH-MAH)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving a patent directed to online exchanges.
- **Universal Electronics, Inc. v. Universal Remote Control, Inc.**
United States District Court, Central District of California, Southern Division (Case No. SACV12-329AG (JPRx))
Trial and deposition testimony and expert report: reasonable royalty and prejudgment interest involving patents directed to universal remotes.
- **Prowess, Inc. v. RaySearch Laboratories AB, et al.**
United States District Court, District of Maryland (Case No. 11 CV 1357 (WDQ))
Deposition testimony and expert report: lost profits, reasonable royalty and prejudgment interest involving patents directed to treatment planning software for radiation therapy.
- **JDS Therapeutics, LLC and Nutrition 21, LLC v. Pfizer Inc., Wyeth LLC, Wyeth Consumer Healthcare Ltd., and Wyeth Consumer Healthcare LLC**
United States District Court, Southern District of New York (Case No. 1:12-cv-09002-JSR)
Deposition testimony and expert report: commercial success, reasonable royalty, and unjust enrichment involving patents and trade secrets directed to the use of chromium picolinate in multi-vitamins.
- **comScore, Inc. v. Moat, Inc.**
United States District Court, Eastern District of Virginia, Norfolk Division (Case No. 2:12CV695-HCM/DEM, Lead Case 2:12CV351-HCM/DEM)
Deposition testimony and expert report: lost profits, reasonable royalty and prejudgment interest involving patents directed to online analytics.
- **Impulse Technology Ltd. v. Microsoft Corporation, Electronic Arts, Inc., Ubisoft Holdings, Inc., and Konami Digital Entertainment Inc.**
United States District Court, District of Delaware (Case No. 11-586-RGA-CJB)
Deposition testimony and expert report: reasonable royalty involving patents directed to video game motion detection functionalities.

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- **LendingTree, LLC v. Zillow, Inc., NexTag, Inc., and Adchemy, Inc.**
United States District Court, Western District of North Carolina, Charlotte Division (Case No. 3:10-cv-439-FDW-DCK)
Trial and deposition testimony and expert report: lost profits, reasonable royalty and prejudgment interest involving patents directed to internet loan matching systems.
- **Network Protection Sciences, LLC v. Fortinet, Inc.**
United States District Court, Northern District of California (Case No. 3:12-cv-01106-WHA)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving patents directed to network security systems.
- **Shurtape Technologies, LLC and Shurtech Brands, LLC v. 3M Company**
United States District Court, Western District of North Carolina (Case No. 5:11-cv-00017)
Deposition testimony and expert report: lost profits, reasonable royalty and prejudgment interest involving patents directed to painter's tape.
- **Abbott Biotechnology Ltd. and AbbVie, Inc. v. Centocor Ortho Biotech, Inc.**
United States District Court, District of Massachusetts (Case No. 09-40089-FDS)
Deposition testimony and expert report: lost profits, reasonable royalty and prejudgment interest involving patents directed to the treatment of rheumatoid arthritis.
- **Wi-LAN Inc. v. Alcatel-Lucent USA Inc.; Telefonaktiebolaget LM Ericsson; Ericsson Inc.; Sony Mobile Communications AB; Sony Mobile Communications (USA) Inc.; HTC Corporation; HTC America, Inc.; Exede Inc.; LG Electronics, Inc.; LG Electronics Mobilecomm U.S.A., Inc.; and LG Electronics U.S.A., Inc.**
United States District Court, Eastern District of Texas (Case No. 6:10-CV-521-LED)
Trial and deposition testimony, affidavit, and expert report: reasonable royalty and prejudgment interest involving patents directed to wireless telecommunication systems.
- **Epos Technologies Ltd.; Dane-Elec S.A.; Dane-Elec Memory S.A.; and Dane-Elec Corporation USA v. Pegasus Technologies Ltd. and Luidia, Inc.**
United States District Court, District of Columbia (Case No. 07-cv-00416-WMN)
Deposition testimony and expert report: lost profits, reasonable royalty and prejudgment interest involving patents directed to digital pen products.
- **Life Technologies Corporation; Applied Biosystems, LLC; Institute for Protein Research; Alexander Chetverin; Helena Chetverina; and William Hone v. Illumina, Inc. and Solexa, Inc.**
United States District Court, Southern District of California (Case No. 3:11-cv-00703)
Deposition testimony and expert report: lost profits, reasonable royalty and prejudgment interest involving patents directed to DNA amplification and sequencing technology.
- **TomTom, Inc. v. Michael Adolph**
United States District Court, Eastern District of Virginia (Case No. 1:12-cv-528)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving patents directed to automotive navigation systems.
- **Carl B. Collins and Farzin Davanloo v. Nissan North America, Inc. and Nissan Motor Co., Ltd.**
United States District Court, Eastern District of Texas, Marshall Division (Case No. 2:11-cv-00428-JRG)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving patents directed to automotive engines.
- **I.E.E. International Electronics & Engineering, S.A. and IEE Sensing, Inc. v. TK Holdings, Inc.**
United States District Court, Eastern District of Michigan (Case No. 2:10-cv-13487)
Deposition testimony and expert report: lost profits, reasonable royalty and prejudgment interest involving patents directed to capacitive sensing used in automotive seats.

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- **St. Clair Intellectual Property Consultants, Inc. v. Acer, Inc., et al.; Microsoft Corporation v. St. Clair Intellectual Property Consultants, Inc.**
United States District Court, District of Delaware (Case No. 09-354-JJF, 09-704-JJF and 10-282-LPS)
Trial and deposition testimony and expert report: reasonable royalty and prejudgment interest involving patents directed to power management, bus configuration and card slot technology in laptops and desktops.
- **CardioFocus, Inc. v. Xintec Corporation (d/b/a Convergent Laser Technologies); Trimedyn, Inc.; and Cardiogenesis Corporation**
United States District Court, District of Massachusetts (Case No. 1:08-cv-10285 NMG)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving a patent directed to laser devices used for the treatment of advanced coronary artery disease.
- **Avocent Redmond Corp. v. Raritan Americas, Inc.**
United States District Court, Southern District of New York (Case No. 10-cv-6100 (PKC)(JLC))
Deposition testimony and expert report: lost profits, lost royalties, reasonable royalty and prejudgment interest involving a patent and contract directed to software and hardware products and technologies that provide connectivity and centralized management of IT infrastructure through KVM switches.
- **Frontline Placement Technologies, Inc. v. CRS, Inc.**
United States District Court, Eastern District of Pennsylvania (Case No. 2:07-CV-2457)
Deposition testimony and expert report: lost profits, lost royalties, reasonable royalty and prejudgment interest involving a patent and contract directed to automated substitute fulfillment software.
- **Novozymes A/S and Novozymes North America, Inc. v. Danisco A/S; Genecor International Wisconsin, Inc.; Danisco US Inc.; and Danisco USA Inc.**
United States District Court, Western District of Wisconsin (Case No. 10-CV-251)
Trial and deposition testimony and expert report and expert declaration: lost profits, reasonable royalty, prejudgment interest and irreparable harm involving a patent directed to alpha-amylases used for fuel ethanol.
- **Triangle Software, LLC v. Garmin International, Inc.; Garmin USA, Inc.; TomTom, Inc.; and Volkswagen Group of America, Inc.**
United States District Court, Eastern District of Virginia, Alexandria Division (Case No. 1:10-CV-01457-CMH-TCB)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving a patent directed to providing personal navigation device functionality.
- **Northeastern University and JARG Corporation v. Google, Inc.**
United States District Court, Eastern District of Texas, Marshall Division (Case No. 2:07-cv-486(CE))
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving a patent directed to internet index and search technology.
- **Bissell Homecare, Inc. v. Dyson, Inc.**
United States District Court, Western District of Michigan (Case No. 1:08-cv-724)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving patents directed to vacuum cleaner collection and discharge.

John C. Jarosz, page 8

- **Toshiba Corporation v. Imation Corp.; Moser Baer India Ltd; Glyphics Media, Inc.; Ritek Corp.; Advanced Media, Inc.; CMC Magnetics Corp.; Hotan Corp.; and Khypermedia Corp.**
United States District Court, Western District of Wisconsin (Case No. 3:09-cv-00305-slc)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving patents directed to DVDs.
- **Affinity Labs of Texas, LLC. v. BMW North America, LLC, et al.**
United States District Court, Eastern District of Texas, Lufkin Division (Case No. 9:08-CV-00164-RC)
Trial and deposition testimony and expert report: reasonable royalty and prejudgment interest involving patents directed to connecting a portable audio player to an automobile sound system.
- **Regents of the University of Minnesota v. AGA Medical Corp.**
United States District Court, District of Minnesota (Case No. 0:07-cv-04732 (PJS/RLE))
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving patents directed to septal occlusion devices.
- **Ethicon Endo-Surgery, Inc. v. Hologic Inc. and Suros Surgical Systems, Inc.**
United States District Court, Southern District of Ohio, Western Division (Case No. 07-cv-00834)
Trial and deposition testimony and expert report: lost profits and reasonable royalty involving patents directed to biopsy equipment and methods, and the biopsy of soft tissue.
- **Humanscale Corp. v. CompX International, Inc. and CompX Waterloo**
United States District Court, Eastern District of Virginia, Richmond Division (Case No. 3:09-CV-86-JRS)
Trial and deposition testimony and expert report: reasonable royalty and prejudgment interest involving patents directed to keyboard support mechanisms.
- **Carl Zeiss Vision GMBH and Carl Zeiss Vision International GMBH v. Signet Armorlite, Inc.**
United States District Court, Southern District of California (Case No. 09-CV-0657-DMS (POR))
Trial testimony and deposition testimony and expert report: lost profits, reasonable royalty, and lost licensing fees involving a patent directed to progressive eyeglass lenses.
- **ShopNTown LLC v. Landmark Media Enterprises, LLC**
United States District Court, Eastern District of Virginia, Norfolk Division (Case No. 2:08CV564)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving a patent directed to rental matching systems over the internet.
- **Cerner Corp. v. Visicu, Inc.**
United States District Court, Western District of Missouri, Western Division (Case No. 04-1033-CV-W-GAF)
Trial and deposition testimony and expert report: lost profits and reasonable royalty involving patents directed to electronic ICU monitoring systems.
- **Sanofi-Aventis Canada Inc.; Schering Corp.; and Sanofi-Aventis Deutschland GmbH v. Apotex/Novopharm Limited**
Federal Court of Canada (Case No. T-1161-07/T-161-07)
Trial testimony and expert report: lost profits and reasonable royalty involving a patent directed to hypertension treatment.
- **C2 Communications Technologies, Inc. v. Qwest Communications Corp; Global Crossing Telecommunications, Inc.; and Level 3 Communications, LLC**
United States District Court, Eastern District of Texas, Marshall Division (Case No. 2-06CV-241 TJW)
Trial and deposition testimony and expert report: reasonable royalty and prejudgment interest involving a patent directed to carrying PSTN calls via Voice over Internet Protocol.

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- **Siemens AG v. Seagate Technology**
United States District Court, Central District of California, Southern Division (Case No. SA CV 06-788 JVS (ANx))
Trial and deposition testimony and expert report: reasonable royalty and prejudgment interest involving a patent directed to hard disk drive technology.
- **Siemens Medical Solutions USA, Inc. v. Saint-Gobain Ceramics & Plastics, Inc.**
United States District Court, District of Delaware (Case No. 07-190-SLR)
Trial and deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving patents directed to medical scanner technology.
- **Aventis Pharma, S.A. v. Baxter Healthcare Corp.**
Arbitration
Arbitration hearing and deposition testimony and expert report: reasonable royalty and prejudgment interest involving a patent directed to hemophilia treatment.
- **Every Penny Counts, Inc. v. Bank of America Corp. and Bank of America, N.A.**
United States District Court, Middle District of Florida, Fort Myers Division (Case No. 2:07-CV-42-FTM-29SPC)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving a patent directed to the Keep the Change debit card program.
- **DEKALB Genetics Corp. v. Syngenta Seeds, Inc.; Golden Harvest Seeds, Inc.; Sommer Bros. Seed Co.; JR Robinson Seeds, Inc.; and Garst Seed Co.**
United States District Court, Eastern District of Missouri (Case No. 4:06CV01191MLM)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving a patent directed to genetically modified corn.
- **International Flora Technologies, Ltd. v. Clarins U.S.A.**
United States District Court, District of Arizona (Case No. 2:06-CV-01371-ROS)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving patents directed to skin care products.
- **Howmedica Osteonics Corp. v. Zimmer, Inc.; Centerpulse Orthopedics, Inc. (formerly known as Sulzer Orthopedics, Inc.); and Smith & Nephew, Inc.**
United States District Court, District of New Jersey (Case No. 05-0897 (WHW))
Deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving a patent directed to hip implant technology.
- **Elan Pharma International, Ltd. v. Abraxis Bioscience, Inc.**
United States District Court, District of Delaware (Case No. 06-438-GMS)
Trial and deposition testimony and expert report: reasonable royalty and prejudgment interest involving patents directed to nanotechnology drug delivery.
- **Mobile Micromedia Solutions LLC v. Nissan North America, Inc.**
United States District Court, Eastern District of Texas, Texarkana Division (Case No. 505-CV-230)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving a patent directed to automotive entertainment systems.
- **Nichia Corp. v. Seoul Semiconductor, Ltd. and Seoul Semiconductor, Inc.**
United States District Court, Northern District of California (Case No. 3:06-CV-00162-MMC (JCS))
Trial and deposition testimony and expert report: reasonable royalty, unjust enrichment, and prejudgment interest involving patents directed to light emitting diodes.

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- **NetRatings, Inc. v. WebSideStory, Inc.**
United States District Court, Southern District of New York (Case No. 06-CV-878(LTS)(AJP))
Deposition testimony and expert report: reasonable royalty involving technology directed to internet audience measurement and analysis.
- **Ernest K. Manders, M.D. v. McGhan Medical Corp.**
United States District Court, Western District of Pennsylvania (Case No. 02-CV-1341)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving a patent directed to implantable tissue expanders.
- **Source Search Technologies, LLC v. LendingTree, Inc.; IAC/InterActiveCorp; and ServiceMagic, Inc.**
United States District Court, District of New Jersey (Case No. 2:04-CV-4420)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving a patent directed to online exchanges.
- **The Boeing Co. v. The United States**
United States Court of Federal Claims (Case No. 00-705 C)
Trial and deposition testimony and expert report: reasonable royalty and prejudgment interest involving a patent directed to a process for aging aluminum lithium alloys used for space shuttle external tanks.
- **Bridgestone Sports Co., Ltd. and Bridgestone Golf, Inc. v. Acushnet Co.**
United States District Court, District of Delaware (Case No. 05-132-(JJF))
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving patents directed to cores, intermediate layers and covers of golf balls.
- **Dyson Technology Ltd. and Dyson, Inc. v. Maytag Corp.**
United States District Court, District of Delaware (Case No. 05-434-GMS)
Trial and deposition testimony and expert report: reasonable royalty and prejudgment interest involving patents directed to upright cyclonic vacuum cleaners.
- **Verizon Services Corp. and Verizon Laboratories, Inc. v. Vonage Holdings Corp. and Vonage America, Inc.**
United States District Court, Eastern District of Virginia (Case No. 1:06CV682)
Trial and deposition testimony and expert report: permanent injunction, lost profits, and reasonable royalty involving patents directed to a voice over internet protocol (“VoIP”) platforms.
- **Hitachi, LTD v. BorgWarner, Inc.**
United States District Court, District of Delaware (Case No. 05-048-SLR)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving a patent directed to automotive cam shaft technology.
- **Innogenetics N.V. v. Abbott Laboratories**
United States District Court, Western District of Wisconsin (Case No. 05-C-0575-C)
Trial and deposition testimony and expert report: reasonable royalty involving a patent directed to HCV genotyping.
- **O2 Micro International v. Monolithic Power Systems, Inc.**
United States District Court, Northern District of California (Case No. 04-02000 CW; 06-02929 CW)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving patents directed to AC to DC power converter circuits used for backlights.
- **Solvay Solexis, Inc. v. 3M Co.; 3M Innovative Properties Co.; and Dyneon LLC**
United States District Court, District of New Jersey (Case No. 04-06162 (FSH/PS))
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving a patent directed to low temperature fluoroelastomers.

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- **Target Technology Co., LLC v. Williams Advanced Materials, Inc., et al.**
United States District Court, Central District of California (Case No. SACV04-1083 DOC (MLGx))
Deposition testimony and expert report: reasonable royalty and design-around alternatives involving a patent directed to silver alloy sputtering targets for DVDs.
- **Metrologic Instruments, Inc. v. Symbol Technologies, Inc.**
United States District Court, District of New Jersey (Case No. 03cv2912 (HAA))
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving patents directed to bar code scanners.
- **Eaton Corp. v. ZF Meritor, LLC**
United States District Court, Eastern District of Michigan (Case No. 03-74844)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving patents directed to truck clutches and transmissions.
- **Meritor Transmission Corp. v. Eaton Corp.**
United States District Court, Western District of North Carolina (Case No. 1:04-CV-178)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving a patent directed to truck transmissions.
- **Monsanto Co. v. Syngenta Seeds, Inc.**
United States District Court, District of Delaware (Case No. 04-305-SLR)
Deposition testimony and expert report: reasonable royalty involving patents directed to genetically modified corn seed.
- **Indiana Mills & Manufacturing, Inc. v. Dorel Industries, Inc.**
United States District Court, Southern District of Indiana (Case No. 1:04-CV-1102)
Deposition testimony and expert report: damages and profits associated with alleged contract breach and patent infringement involving technology directed to automobile child restraint systems.
- **Paice LLC v. Toyota Motor Corp.**
United States District Court, Eastern District of Texas, Marshall Division (Case No. 2-04CV-211) (DF)
Deposition testimony and expert report: reasonable royalty involving patents directed to hybrid-electric powertrain systems.
- **GTECH Corp. v. Scientific Games International**
United States District Court, District of Delaware (Case No. 04-0138)
Deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving patents directed to a system and method for distributing lottery tickets.
- **WEDECO UV Technologies, Inc. v. Calgon Carbon Corp.**
United States District Court, District of New Jersey (Case No. 01-924)
Deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving patents directed to treatment of potable water with UV light.
- **Khyber Technologies Corp. v. Casio, Inc; Everex Systems, Inc.; Hewlett-Packard Co.; and Hewlett-Packard Singapore PTE. LTD.**
United States District Court, District of Massachusetts (Case No. 99-CV-12468-GAO)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving a patent directed to audio playback for portable electronic devices.
- **Air Liquide America, L.P. v. P.H. Glatfelter Co.**
United States District Court, Middle District of Pennsylvania (Case No. 1:CV-04-0646)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving patents directed to the use of ozone bleaching of pulp.

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- **Gary J. Colassi v. Cybex International, Inc.**
United States District Court, District of Massachusetts (Case No. 02-668-JEL/JGL)
Trial and deposition testimony and expert report: reasonable royalty and prejudgment interest involving a patent directed to treadmill support decks.
- **Medinol Ltd. v. Guidant Corp. and Advanced Cardiovascular Systems, Inc.**
United States District Court, Southern District of New York (Case No. 03 Civ. 2604 (SAS))
Deposition testimony and expert report: reasonable royalty analysis and prejudgment interest involving patents directed to connectors for coronary and peripheral stents.
- **Donner, Inc. v. American Honda Motor Co.; McDavid Plano-Acura, L.P.; and The Beaumont Co.**
United States District Court, Eastern District of Texas, Texarkana Division (Case No. F:03-CV-253)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving a patent directed to automobile entertainment systems.
- **Nonin Medical, Inc. v. BCI, Inc.**
United States District Court, Fourth Division of Minnesota (Case No. 02-668-JEL/JGL)
Deposition testimony and expert report: reasonable royalty, lost profits, and prejudgment interest involving patents directed to finger clip pulse oximeters.
- **Stryker Trauma S.A. and Howmedica Osteonics Corp. v. Synthes (USA)**
United States District Court, District of New Jersey (Case No. 01-CV 3879 (DMC))
Deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving a patent directed to snap-fit external fixation systems.
- **Michael Foods, Inc. and North Carolina State University v. Rose Acre Farms, Inc.**
United States District Court, Eastern District of North Carolina Western Division (Case No. 5:02-CV-477-H(3))
Deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving patents directed to extended shelf life eggs.
- **Waters Technologies Corp.; Waters Investments, Ltd.; Micromass UK Ltd.; and Micromass, Inc. v. Applera Corp.**
United States District Court, District of Delaware (Case No. 02-1285-GMS)
Deposition testimony and expert report: lost profits, price erosion, reasonable royalty, and prejudgment interest involving a patent directed to mass spectrometer ionization sources.
- **Medtronic Sofamor Danek, Inc. v. Gary K. Michelson, M.D. and Karlin Technology, Inc.**
United States District Court, Western District of Tennessee (Case No. 01-2373 GV)
Trial and deposition testimony and expert report: damages and profits associated with alleged contractual breaches, tortious interference and intentional negligent representations involving spinal implants.
- **Matsushita Electric Industrial Co. Ltd. v. Cinram International, Inc.**
United States District Court, District of Delaware (Case No. 01-882-SLR)
Deposition testimony and expert report: reasonable royalty and prejudgment interest covering patents directed to aspects of bonding substrates together to form optical discs, such as DVDs.
- **Boehringer Ingelheim Vetmedica, Inc. v. Schering-Plough Corp. and Schering Corp.**
United States District Court, District of New Jersey (Case No. 96-CV-04047)
Trial and deposition testimony and expert report: lost profits, reasonable royalty, price erosion, and prejudgment interest involving a patent directed to porcine vaccine (PRRS) products.

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- **Arris International and Randall A. Holliday v. John Mezzalingua and Associates, Inc. d/b/a PPC**
United States District Court, District of Colorado (Case No. 01-WM-2061)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving patents directed to coaxial cable connectors.
- **Promega Corp. v. Applera Corp.; and Lifecodes Corp., and its Subsidiaries Cellmark Diagnostics, Inc.; and Genomics International Corp.**
United States District Court, Western District of Wisconsin (Case No. 01-C-0244-C)
Deposition testimony and expert report: lost profit rate, reasonable royalty, and prejudgment interest involving a patent directed to DNA sequencing technology.
- **Alcon Laboratories, Inc. and Alcon Manufacturing, Ltd. v. Pharmacia Corp.; Pharmacia & Upjohn Co.; and The Trustees of Columbia University in the City of New York**
United States District Court, Southern District of New York (Case No. 01-Civ.2989 (WHP))
Deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving a patent directed to compositions for treatment of glaucoma.
- **Pharmacia Corp.; Pharmacia AB; Pharmacia Enterprises S.A.; and Pharmacia & Upjohn Co. v. Alcon Laboratories, Inc.**
United States District Court, Southern District of New York (Case No. 01-070-SLR)
Deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving a patent directed to compositions for treatment of glaucoma.
- **Takata Corp. v. AlliedSignal, Inc. and Breed Technologies, Inc.**
United States District Court, District of Delaware (Case No. 98-94-MMS)
Deposition testimony and expert report: reasonable royalty and prejudgment interest covering patents and trade secrets directed to seatbelt retractors.
- **Chiron Corp. v. Genentech, Inc.**
United States District Court, Eastern District of California (Case No. S-00-1252 WBS GGH)
Deposition testimony and expert report: reasonable royalty and prejudgment interest covering a patent directed to the active ingredient in an anti-cancer drug.
- **Greene, Tweed of Delaware, Inc. v. DuPont Dow Elastomers, LLC**
United States District Court, Eastern District of Pennsylvania (Case No. 00-CV-3058)
Trial and deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving a patent covering perfluorelastomeric seals used in semiconductor fabrication applications.
- **Streck Laboratories v. Beckman Coulter, Inc.**
United States District Court, District of Nebraska (Case No. 8:99CV473)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving patents covering hematology testing equipment.
- **Adobe Systems Inc. v. Macromedia, Inc.**
United States District Court, District of Delaware (Case No. 00-743-JJF)
Trial and deposition testimony and expert report: reasonable royalty involving patents covering computer video and audio software.
- **Dictaphone Corp. v. Nice Systems, Ltd.**
United States District Court, District of Connecticut (Case No. 3:00-CV-1143)
Deposition testimony and expert report: lost profits, price/margin erosion, reasonable royalty, and prejudgment interest involving patents covering digital logger systems.

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- **Metrologic Instruments, Inc. v. PSC, Inc.**
United States District Court, District of New Jersey (Case No. 99-CV-04876)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving patents covering bar code scanning equipment.
- **Genzyme Corp. v. Atrium Medical Corp.**
United States District Court, District of Delaware (Case No. 00-958-RRM)
Trial testimony and expert report: lost profits and price/margin erosion involving patents covering chest drainage systems.
- **Norian Corp. v. Stryker Corp.**
United States District Court, Northern District of California (Case No. C-01-0016 (WHA))
Trial and deposition testimony and expert report: reasonable royalty and prejudgment interest involving a patent covering bone cement.
- **John Mezzalingua Associates, Inc., d/b/a PPC v. Antec Corp.**
United States District Court, Middle District of Florida (Case No. 3:01-CV-482-J-25 HTS)
Deposition testimony and expert report: disgorgement of profits involving a design patent covering a coaxial cable connection.
- **Rockwell Automation Technologies, LLC v. Spectra-Physics Lasers, Inc. and Opto Power Corp.**
United States District Court, District of Delaware (Case No. 00-589-GMS)
Deposition testimony and expert report: reasonable royalty involving a patent covering a process for producing semiconductor epitaxial films.
- **Tanashin Denk Co., Ltd. v. Thomson Consumer Electronics, Inc.**
United States District Court, Southern Division of Indiana (Case No. IP 99-836-C Y/G)
Trial and deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving patents covering cassette tape drives.
- **Medtronic Sofamor Danek, Inc. et al. v. Osteotech**
United States District Court, Western Division of Tennessee (Case No. 99-2656-GV)
Deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving patents covering the instruments and method of inserting a spinal inter-body fusion device.
- **Heimann Systems GmbH v. American Science and Engineering, Inc.**
United States District Court, District of Connecticut (Case No. 00 CV 10276 (WGY))
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving a patent directed to mobile X-ray examining apparatus.
- **Omega Engineering, Inc. v. Cole-Parmer Instrument Co.; Davis Instrument Manufacturing Co., Inc.; Dwyer Instruments, Inc.; and Raytek Corp.**
United States District Court, District of Connecticut (Case Nos. 3:98 CV 00733 (JCH), 3:98 CV 02052 (JCH) and 3:98 CV 02276 (JCH))
Trial and deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving patents and alleged unfair competitive practices directed to portable infrared thermometers.
- **Particle Measuring Systems, Inc. v. Rion Co., Ltd.**
United States District Court, District of Colorado (Case No. 99-WM-1433)
Deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving a patent directed to a device and method for optically detecting particles in fluid.
- **The University of Colorado Foundation Inc., et al. v. American Cyanamid Co.**
United States District Court, District of Colorado (Case No. 93-K-1657)
Trial and deposition testimony and expert report: measure and amount of prejudgment interest in a patent infringement, fraud and unjust enrichment case covering prenatal vitamin formulations.

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- **Gleason Works v. Oerlikon Geartec AG and Liebherr-America, Inc.**
United States District Court, Western District of New York (Case No. 98-CV-6275 L)
Deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving a patent directed to bevel gear-cutting machines.
- **Amersham Pharmacia v. PE Corp.**
United States District Court, Northern District of California (Case No. C 97-04203-TEH)
Deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving a patent directed to a method of using energy transfer reagents in a DNA sequencing system.
- **Ziarno v. The American Red Cross, et al.**
United States District Court, Northern District of Illinois (Case No. 99 CIV 3430)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving a patent directed to online/internet fundraising.
- **Applied Medical Resources Corp. v. Core Dynamics, Inc.**
United States District Court, Central District of California (Case No. SACV 99-748-DOC (ANx))
Trial and deposition testimony and expert report: reasonable royalty and prejudgment interest involving patents directed to surgical trocars.
- **Bell Communications Research, Inc. v. Fore Systems, Inc.**
United States District Court, District of Delaware (Case No. 98-586 JJF)
Deposition testimony and expert report: reasonable royalty and prejudgment interest covering patents directed to telecommunications technology (ATM over SONET networks).
- **Newell Operating Co. (EZ Painter Co.) v. Linzer Products Corp.**
United States District Court, Eastern District of Wisconsin (Case No. 98-C-0864)
Deposition testimony and expert report: reasonable royalty and prejudgment interest covering a patent directed to a method for manufacturing polypropylene paint roller covers.
- **Dow Chemical Co. v. Sumitomo Chemical Co., Ltd. and Sumitomo Chemical America, Inc.**
United States District Court, Eastern District of Michigan (Case No. 96-10330-BC)
Deposition testimony and expert report: reasonable royalty and prejudgment interest covering a patent directed to a method for manufacturing cresol epoxy novalac resins used in integrated circuit encapsulation.
- **Insight Development Corp. v. Hewlett-Packard Co.**
United States District Court, Northern District of California (Case No. C 98 3349 CW)
Deposition testimony and expert report: damages and profits associated with alleged contract breaches, patent, copyright and trade secret misappropriation/infringement and unfair competition involving digital image processing and transmission, including that over the internet.
- **Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer Inc. and Centre National De La Recherche Scientifique**
United States District Court, Southern District of New York (Case No. 95 Civ. 8833)
Deposition testimony and expert report: reasonable royalty covering a patent directed to semi-synthetic processes for manufacturing an anti-cancer drug.
- **Pactiv Corp. v. S.C. Johnson & Son, Inc.**
United States District Court, Northern District of Illinois (Case No. 98 C 2679)
Deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving a patent directed to zipper closure mechanisms for home storage bags.

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- **Dr. Harry Gaus v. Conair Corp.**
United States District Court, Southern District of New York (Case No. 94-5693 (KTD) (FM))
Trial and deposition testimony and expert report: reasonable royalty and prejudgment interest covering a patent directed to hazard prevention devices used with electrical hair dryers.
- **Neogen Corp. v. Vicam, L.P., et al.**
United States District Court, Middle District of Florida (Case No. 97-405-CIV-T-23B)
Deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest covering a patent and a variety of tort claims directed to aflatoxin testing equipment.
- **Surety v. Entrust**
United States District Court, Eastern District of Virginia (Case No. 99-203-A)
Deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest covering a patent directed to digital time stamping.
- **Sofamor Danek Holdings, Inc., et al. v. United States Surgical Corp., et al.**
United States District Court, Western District of Tennessee (Case No. 98-2369 GA)
Trial and deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving a patent covering the method of inserting a spinal inter-body fusion device.
- **Molten Metal Equipment Innovation, Inc. v. Metaullics**
United States District Court, Northern District of Ohio (1:97-CV2244)
Trial testimony and expert report: lost profits, reasonable royalty, and prejudgment interest covering a patent directed to submersible molten metal pumps.
- **AcroMed Corp. v. Sofamor Danek Group, Inc.**
United States District Court, Northern District of Ohio (Case No. 1:93-CV01184)
Trial and deposition testimony and expert report: lost profits and prejudgment interest involving patents directed to spinal implant devices.
- **BIC Corp. v. Thai Merry Co., Ltd.**
United States District Court, Central District of California (Case No. 98 CIV. 2113 (DLC))
Deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving a patent directed to disposable cigarette lighters.
- **Synsort Inc. v. Michael Wagner; Cambridge Algorithm; ICF Kaiser Intl. Inc., et al.**
United States District Court, Northern District of Georgia (Case No. 1:93-CV-2247-JEC)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving a patent directed to data sorting software.
- **Shell Oil Co. v. ICI Americas, Inc. and P.E.T Processors, LLC**
United States District Court, Eastern District of Louisiana (Case No. 97-3526 Section "K")
Deposition testimony and expert report: lost profits and reasonable royalty involving a patent directed to a process to manufacture solid stated polyethylene naphthalene.
- **Pall Corp. v. Hemasure Inc. and Lydall, Inc.**
United States District Court, Eastern District of New York (Case No. CV-96-436 (TCP/ETB), Case No. 96-5620 (LDW/VVP))
Deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving patents directed to prestorage leukodepletion devices.
- **Mentor H/S, Inc. v. Medical Device Alliance, Inc.; Lysonix, Inc.; and Misonix, Inc.**
United States District Court, Central District of California (Case No. CV97-2431 WDK (BQRx))
Trial and deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving a patent directed to ultrasonic liposuction.

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- **Hyundai Electronics Industries Co., Ltd. v. NEC Corp. and NEC Electronics, Inc.**
United States District Court, Eastern District of Virginia (Case No. 97-2030A, Case No. 97-2031A, Case No. 98-118-A)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving patents directed to semiconductor technology.
- **Hitachi, LTD. v. Samsung Display Devices Co., LTD.; Samsung Display Devices, Inc.; Samsung Electronics Co., LTD.; Samsung Electronics America, Inc.; and Office Depot, Inc.**
United States District Court, Eastern District of Virginia (Case No. 97-1988-A)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving patents directed to various aspects of cathode ray tubes.
- **Stairmaster Sports/Medical Products, a Limited Partnership v. Groupe Procycle, Inc. and Procycle USA, Inc.**
United States District Court, District of Delaware (Case No. 97-396 MMS)
Deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving a patent directed to stair climbing fitness equipment.
- **Angelo Mongiello's Children, LLC v. Pizza Hut, Inc.**
United States District Court, Eastern District of New York (Case No. 95 CV 4601)
Deposition testimony and expert report: reasonable royalty and prejudgment interest involving a patent directed to a method for forming pizza shells.
- **BTG v. Magellan Corp.; BTG v. Trimble Navigation**
United States District Court, Eastern District of Pennsylvania (Case No. 96-CV-7551/Case No. 96-CV-5084 (HB))
Deposition testimony and expert reports: reasonable royalty, prejudgment interest, value of inventory on hand, preparation and investments made and business commenced (as of patent reissuance) involving a patent directed to secret or secure communications technology employed in global positioning system products.
- **Micro Chemical, Inc. v. Lextron, Inc.**
United States District Court, District of Colorado (Case No. 88-Z-499)
Trial and deposition testimony and expert report: lost profits, price erosion, reasonable royalty, and prejudgment interest involving a patent directed to feed additive weigh/mix dispensing machines.
- **Thai Merry Co., Ltd.; Honson Marketing Group, Inc.; and Calico Brands, Inc. v. BIC Corp.**
United States District Court, Central District of California (Case No. 96-5256 WJR (BQRx))
Deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving patents directed to child-resistant disposable cigarette lighters.
- **Radco, Inc. v. Shell Oil Co.; Foster Wheeler USA Corp.; Lyondell-Citgo Refining Co., LLC; Petro-Chem Development Co. Inc.; and Marathon Oil Co.**
United States District Court, Northern District of Oklahoma (Case No. 93-C 1102)
Deposition testimony and expert report: reasonable royalty involving a patent directed to coker heater refinery equipment.
- **Beloit Corp. v. Valmet Corp., et al.**
United States District Court, Western District of Wisconsin (Case No. 96-C-0087-C)
Trial testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving patents directed to the dryer section of paper making machines.
- **Burke, Inc. v. Everest & Jennings, Inc. et al./Burke, Inc. v. Invacare Corp.**
United States District Court, California Central District (Case No. 89-2613 (KMW)/Case No. 90-787 (KMW))
Trial and deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest over a patent directed to three wheel motorized scooter technology.

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- **Bauer Inc. v. Rollerblade, Inc.**
United States District Court, Eastern District of Virginia (Case No. 96-952-A)
Deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving a patent directed to a hybrid stitched and molded skate boot design.
- **Mettler - Toledo A.G. v. Denver Instrument Co., et al.**
United States District Court, Eastern District of Virginia (Case No. 95-1055-A)
Deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving patents directed to analytical and precision balances.
- **Bristol-Myers Squibb Co. v. Abbott Laboratories**
United States District Court, Southern District of Indiana (Case No. EV 94-56-C)
Trial and deposition testimony and expert report: reasonable royalty involving a patent directed to a guiding device used in enteral delivery set assemblies.
- **Crown Equipment Corp. v. The Raymond Corp.**
United States District Court, Northern District of Ohio (Case No. 3:93CV7356)
Trial and deposition testimony and expert report: lost profits, reasonable royalty, and prejudgment interest involving a patent directed to lift truck technology.
- **Mitsubishi Kasei Corp.; and Mitsubishi Kasei America, Inc. v. Virgle Hedgcoth; and Mertec Licensing Technology**
United States District Court, Northern District of California (Case No. 94-1971 SAW (JSB))
Deposition testimony and expert report: reasonable royalty involving a patent directed to sputtered rigid disks used in personal computers.
- **Travelers Express Co. Inc. v. The Standard Register Co.**
United States District Court, District of Minnesota (Case No. 4-93-436)
Deposition testimony and expert report: lost profits, reasonable royalty, patent misuse, and prejudgment interest involving patents directed to money order dispensers.
- **Dow Chemical Co. v. The United States**
Court of Federal Claims (Case No. 19-83C)
Trial and deposition testimony: measure and amount of delay compensation in an eminent domain case over the taking of a patent directed to the back - filling of abandoned coal mines.

Patent Cases – Injunctive Relief

- **Biogen International GmbH and Biogen MA, Inc. v. Amneal Pharmaceuticals LLC**
United States District Court, District of Delaware (Cases 17-cv-823-LPS (Consolidated); 17-cv-00875-UNA (Sawai USA, Inc. and Sawai Pharmaceutical Co., Ltd.); 17-cv-00847 (Shilpa Medicare Limited); 17-cv-00954-UNA and 19-cv-00333-UNA (Zydus Pharmaceuticals USA, Inc.); 17-cv-00824-UNA (Aurobindo Pharma USA, Inc. and Aurobindo Pharma USA LLC); 17-cv-00825-UNA and 19-cv-00211-UNA (Hetero USA, Inc., Hetero Labs Limited Unit-III, and Hetero Labs Limited); 17-cv-00845-UNA (MSN Laboratories Private Ltd. and MSN Pharmaceuticals, Inc.); and 17-cv-00827-UNA and 17-cv-00874-UNA (Prinston Pharmaceutical, Inc. and Sandoz, Inc.))
Trial and deposition testimony and expert report: commercial success and injunctive relief covering patents directed to oral medication for the treatment of multiple sclerosis.
- **Biogen International GmbH and Biogen MA, Inc. v. Mylan Pharmaceuticals, Inc.**
United States District Court, Northern District of West Virginia (Case No. 17-cv-00116-IMK)
Deposition testimony and expert report: commercial success and injunctive relief covering patents directed to oral medication for the treatment of multiple sclerosis.

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- **BASF Plant Science, LP v. Commonwealth Scientific and Industrial Research Organisation; and Commonwealth Scientific and Industrial Research Organisation, Grains Research and Development, Corp., and Nuseed Pty Ltd. v. BASF Plant Science, LP and Cargill, Inc.**
United States District Court, Eastern District of Virginia (Case No. 17-cv-503-HCM)
Trial and deposition testimony and expert report: reasonable royalty damages and injunctive relief covering patents directed to the production of plant-derived omega-3 oils.
- **Fresenius Kabi USA, LLC v. Fera Pharmaceuticals, LLC and Oakwood Laboratories, LLC**
United States District Court, District of New Jersey (Case No. 15-03654-KM-MAH)
Deposition testimony and expert declarations: antitrust liability and damages; commercial success and preliminary injunctive relief involving patents directed to injectable drug treatment of myxedema coma.
- **Dominion Resources, Inc., and Virginia Electric and Power Company v. Alstom Grid, Inc.**
United States District Court, Eastern District of Pennsylvania
Trial and deposition testimony and expert report: permanent injunction involving patents directed to a system and process that dynamically samples smart meters in order to achieve voltage optimization.
- **Integra Lifesciences Corporation, Integra Lifesciences Sales, LLC, Confluent Surgical, Inc., and Incept, LLC v. Hyperbranch Medical Technology, Inc.**
United States District Court, District of Delaware (Case No. 15-cv-00819)
Trial and deposition testimony and expert reports: lost profits, price erosion, reasonable royalty, prejudgment interest, preliminary relief, and commercial success involving patents directed to cranial and spinal dural repair sealants.
- **Antares Pharma, Inc. v. Medac Pharma, Inc., Medac GmbH, Becton Dickinson France S.A.S., and Becton, Dickinson and Company**
United States District Court, District of Delaware (C.A. No. 14-270-SLR)
Deposition testimony and expert report: irreparable harm, balance of hardships, and public interest involving patents directed to methotrexate autoinjector products.
- **Delavau, LLC v. J.M. Huber Corporation and J.M. Huber Micropowders Inc.**
United States District Court, District of New Jersey (Case No. 12-05378 (ES)(SCM))
Deposition testimony and expert declaration: preliminary injunctive relief involving patents directed to dietary calcium supplements.
- **Dyson Technology Limited and Dyson, Inc. v. Cornucopia Products, LLC**
United States District Court, District of Arizona (Case No. 2:12-cv-00924-ROS)
Hearing testimony and expert declaration: irreparable harm involving patents directed to bladeless fans.
- **Novozymes A/S and Novozymes North America, Inc. v. Danisco A/S; Genecor International Wisconsin, Inc.; Danisco US Inc.; and Danisco USA Inc.**
United States District Court, Western District of Wisconsin (Case No. 10-CV-251)
Trial and deposition testimony and expert report and expert declaration: lost profits, reasonable royalty, prejudgment interest and irreparable harm involving a patent directed to alpha-amylases used for fuel ethanol.
- **LifeWatch Services, Inc. and Card Guard Scientific Survival, LTD. v. Medicomp, Inc. and United Therapeutics Corp.**
United States District Court, Middle District of Florida, Orlando Division (Case No. 6:09-cv-1909-Orl-31DAB)
Hearing and deposition testimony and expert declaration: preliminary injunctive relief involving patents directed to ambulatory arrhythmia monitoring solutions.

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- **Verizon Services Corp. and Verizon Laboratories, Inc. v. Vonage Holdings Corp. and Vonage America, Inc.**
United States District Court, Eastern District of Virginia (Case No. 1:06CV682)
Trial and deposition testimony and expert report: permanent injunction, lost profits and reasonable royalty involving patents directed to a voice over internet protocol (“VoIP”) platforms.
- **Riverwood International Corp. v. MeadWestvaco Corp.**
United States District Court, Northern District of Georgia (Case No. 1:03-CV-1672 (TWT))
Deposition testimony and expert report: irreparable harm involving a patent directed to 2x6 beverage cartons.

Patent Cases – Commercial Success

- **Biogen International GmbH and Biogen MA, Inc. v. Amneal Pharmaceuticals LLC**
United States District Court, District of Delaware (Cases 17-cv-823-LPS (Consolidated); 17-cv-00875-UNA (Sawai USA, Inc. and Sawai Pharmaceutical Co., Ltd.); 17-cv-00847 (Shilpa Medicare Limited); 17-cv-00954-UNA and 19-cv-00333-UNA (Zydus Pharmaceuticals USA, Inc.); 17-cv-00824-UNA (Aurobindo Pharma USA, Inc. and Aurobindo Pharma USA LLC); 17-cv-00825-UNA and 19-cv-00211-UNA (Hetero USA, Inc., Hetero Labs Limited Unit-III, and Hetero Labs Limited); 17-cv-00845-UNA (MSN Laboratories Private Ltd. and MSN Pharmaceuticals, Inc.); and 17-cv-00827-UNA and 17-cv-00874-UNA (Prinston Pharmaceutical, Inc. and Sandoz, Inc.))
Trial and deposition testimony and expert report: commercial success and injunctive relief covering patents directed to oral medication for the treatment of multiple sclerosis.
- **Biogen International GmbH and Biogen MA, Inc. v. Mylan Pharmaceuticals, Inc.**
United States District Court, Northern District of West Virginia (Case No. 17-cv-00116-IMK)
Deposition testimony and expert report: commercial success and injunctive relief covering patents directed to oral medication for the treatment of multiple sclerosis.
- **Mylan Pharmaceuticals, Inc. v. Biogen MA, Inc.**
The United States Patent and Trademark Office (Case No. IPR2018-01403)
Deposition testimony and expert report: commercial success covering patents directed to oral medication for the treatment of multiple sclerosis.
- **Teva Pharmaceuticals International GmbH, Cephalon, Inc., and Eagle Pharmaceuticals, Inc. v. Apotex, Inc., Apotex Corp., Fresenius Kabi USA, LLC, Mylan Laboratories Ltd., and Slayback Pharma Limited Liability Company**
United States District Court, District of Delaware (Case No. 17-cv-1154-CFC)
Trial and deposition testimony and expert report: commercial success covering patents directed to an injectable chemotherapy drug for the treatment of blood cancer.
- **Astellas Pharma, Inc., Astellas US LLC, Astellas Pharma US, Inc., Medivation LLC, Medivation Prostate Therapeutics LLC, Pfizer, Inc., and The Regents of the University of California v. Actavis Laboratories FL, Inc., Actavis LLC, Apotex, Inc., Apotex Corp., Zydus Pharmaceuticals (USA), Inc., Cadila Healthcare Limited, Roxane Laboratories, Inc., West-Ward Pharmaceuticals Corp., and West-Ward Pharmaceuticals International Limited**
United States District Court, District of Delaware (Case No. 16-cv-1120)
Deposition testimony and expert report: commercial success involving patents directed to the treatment of prostate cancer.
- **Valeant Pharmaceuticals International, Inc., Salix Pharmaceuticals, Inc., Progenics Pharmaceuticals, Inc., and Wyeth LLC v. Actavis Laboratories FL, Inc.**
United States District Court, District of New Jersey (Case No. 2:16-cv-09038 (SRC)(CLW))
Deposition testimony and expert report: commercial success covering patents directed to an oral treatment of opioid induced constipation (“OIC”) indications.

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- **Nichia Corporation v. Vizio, Inc.**
United States District Court, Central District of California (Case No. 8:16-cv-00545)
Deposition testimony and expert report: reasonable royalty damages and commercial success involving patents directed to light emitting diodes (LEDs).
- **Valeant Pharmaceuticals International, Inc., Salix Pharmaceuticals, Inc., Progenics Pharmaceuticals, Inc., and Wyeth LLC v. Mylan Pharmaceuticals, Inc., Mylan Laboratories Ltd., Mylan, Inc., and Actavis LLC**
United States District Court, District of New Jersey (Case No. 2:15-08180 (SRC)(CLW))
Deposition testimony and expert report: commercial success covering patents directed to an intravenous treatment of opioid induced constipation (“OIC”) indications.
- **Eli Lilly and Company v. Teva Pharmaceuticals USA, Inc.**
United States District Court, Southern District of Indiana, Indianapolis Division (Case No. 16-cv-596)
Deposition testimony and expert report: commercial success covering a patent directed to treatment of postmenopausal osteoporosis.
- **Integra Lifesciences Corporation, Integra Lifesciences Sales, LLC, Confluent Surgical, Inc., and Incept, LLC v. Hyperbranch Medical Technology, Inc.**
United States District Court, District of Delaware (Case No. 15-cv-00819)
Trial and deposition testimony and expert reports: lost profits, price erosion, reasonable royalty, prejudgment interest, preliminary relief, and commercial success involving patents directed to cranial and spinal dural repair sealants.
- **VIVUS, Inc. v. Actavis Laboratories FL, Inc.**
United States District Court, District of New Jersey (Case No. 14-cv-3786-SRC-CLW; 15-cv-1636-SRC-CLW; and 15-CV-02693-SRC-CLW)
Deposition testimony and expert reports: commercial success involving patents directed to an immediate release/extended release combination drug used for chronic weight management.
- **Fresenius Kabi USA, LLC v. Fera Pharmaceuticals, LLC and Oakwood Laboratories, LLC**
United States District Court, District of New Jersey (Case No. 15-03654-KM-MAH)
Deposition testimony and expert declarations: antitrust liability and damages; commercial success and preliminary injunctive relief involving patents directed to injectable drug treatment of myxedema coma.
- **In the Matter of Certain Magnetic Data Storage Tapes and Cartridges Containing the Same (Sony Corporation, Sony Corporation of America, and Sony Electronics, Inc. (Respondents))**
United States International Trade Commission (Inv. No. 337-TA-1012)
Trial and deposition testimony and expert report: economic evaluation of FRAND, commercial success, bond, remedy, domestic industry, and public interest issues involving patents directed to certain magnetic data storage tapes and cartridges.
- **Noven Pharmaceuticals, Inc. v. Actavis Laboratories UT, Inc.**
United States District Court, District of Delaware (Case No. 15-249 (LPS))
Trial and deposition testimony and expert report: commercial success involving patents directed to an estrogen therapy patch.
- **Sebela International, Ltd. v. Actavis Laboratories FL, Inc., Actavis Pharma, Inc., Andrx Corp., and Actavis, Inc.; Sebela International Ltd. v. Princeton Pharmaceutical, Inc., Solco Healthcare U.S., LLC, and Huahai US, Inc.**
United States District Court, District of New Jersey (Case No. 14-cv-06414 (CCC-JBC) and 14-cv-07400 (CCC-JBC); consolidated with Case No. 15-cv-05308)
Trial and deposition testimony and expert report: commercial success involving patents directed to a non-hormonal product indicated for the treatment of moderate to severe vasomotor symptoms (“VMS”) associated with menopause.

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- **Meda Pharmaceuticals, Inc. and Cipla, Ltd. v. Apotex, Inc. and Apotex Corp.**
United States District Court, District of Delaware (Case No. 14-1453-LPS)
Trial and deposition testimony and expert declaration: commercial success involving patents directed to a combination formulation drug used to treat seasonal allergic rhinitis.
- **Arctic Cat, Inc., v. Polaris Industries, Inc.**
The United States Patent and Trademark Office (Cases IPR2015-01781; IPR2015-01783)
Deposition testimony and expert declaration: commercial success involving patents directed to side-by-side all-terrain vehicles.
- **Innopharma Inc., Mylan Pharmaceuticals, Inc., et al. v. Senju Pharmaceutical Co., Ltd., Bausch & Lomb, Inc., and Bausch & Lomb Pharma Holdings Corp.**
The United States Patent and Trademark Office (Case Nos. IPR2015-00902 and IPR2015-00903)
Deposition testimony and expert declaration: commercial success involving patents directed to nonsteroidal anti-inflammatory drugs (“NSAIDs”) used to treat post-cataract surgery inflammation and pain.
- **Lupin Ltd. and Lupin Pharmaceuticals, Inc. v. Senju Pharmaceutical Co., Ltd.**
The United States Patent and Trademark Office (Case Nos. IPR2015-01097; IPR2015-01105; IPR2015-01099; and IPR2015-01100)
Deposition testimony and expert declaration: commercial success involving patents directed to nonsteroidal anti-inflammatory drugs (“NSAIDs”) used to treat post-cataract surgery inflammation and pain.
- **Senju Pharmaceutical Co., Ltd., Bausch & Lomb, Inc., and Bausch & Lomb Pharma Holdings Corp. v. Innopharma Inc., Lupin Pharmaceuticals, Inc., et al.**
United States District Court, District of New Jersey (Case Nos. 14-cv-00667-JBS-KMW; 14-cv-04149-JBS-KMW; 14-cv-05144-JBS-KMW; 15-cv-00335-JBS-KMW; 14-cv-06893-JBS-KMW; and 15-cv-03240-JBS-KMW)
Deposition testimony and expert declaration: commercial success involving patents directed to nonsteroidal anti-inflammatory drugs (“NSAIDs”) used to treat post-cataract surgery inflammation and pain.
- **Arctic Cat, Inc., v. Polaris Industries, Inc.**
The United States Patent and Trademark Office (Case IPR2014-01427)
Deposition testimony and expert declaration: commercial success involving patents directed to side-by-side all-terrain vehicles.
- **Intendis GmbH, Intraser GmbH & Co. KG and Bayer Healthcare Pharmaceuticals Inc., v. Glenmark Generics Ltd. and Glenmark Generics Inc., USA.**
United States District Court, District of Delaware (Case No. 13-cv-421-SLR)
Trial and deposition testimony and expert report: commercial success involving a patent directed to the treatment of certain skin diseases.
- **Everlight Electronics Co. Ltd., and Emcore Corporation v. Nichia Corporation and Nichia America Corporation v. Everlight Americas, Inc.**
United States District Court, Eastern District of Michigan, Southern Division (Case No. 4:12-cv-11758 GAD-MKM)
Trial and deposition testimony, expert report and declaration: commercial success, lost profits, reasonable royalty, and prejudgment interest involving patents directed to LEDs.

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- **Bayer Healthcare Pharmaceuticals, Inc. and Dow Pharmaceutical Sciences, Inc. v. River's Edge Pharmaceuticals, LLC, Teresina Holdings, LLC, Medical Products Laboratories, Inc. and Stayma Consulting Services, LLC**
United States District Court, Northern District of Georgia, Atlanta Division (Case No. 11-cv-01634-RLV)
Deposition testimony and expert report: commercial success involving a patent directed to the treatment of certain skin diseases.
- **JDS Therapeutics, LLC and Nutrition 21, LLC v. Pfizer Inc., Wyeth LLC, Wyeth Consumer Healthcare Ltd., and Wyeth Consumer Healthcare LLC**
United States District Court, Southern District of New York (Case No. 1:12-cv-09002-JSR)
Deposition testimony and expert report: commercial success, reasonable royalty, and unjust enrichment involving patents and trade secrets directed to the use of chromium picolinate in multi-vitamins.
- **Ferring, B.V. v. Watson Laboratories, Inc. – Florida, Apotex Inc., and Apotex Corp.**
United States District Court, District of Nevada (Case Nos. 3:11-cv-00481-RCJ-VPC, 3:11-cv-00485-RCJ-VPC, 3:11-cv-00853-RCJ-VPC, 3:11-cv-00854-RCJ-VPC, 2:12-cv-01935-RCJ-VPC, and 2:12-cv-01941-RCJ-VPC)
Deposition testimony and expert report: commercial success involving patents directed to the treatment of menorrhagia.
- **Medicis Pharmaceutical Corporation; Dow Pharmaceutical Sciences, Inc.; and Alyzan, Inc. v. Actavis Mid Atlantic LLC**
United States District Court, District of Delaware (Case No. 11-CV-409)
Deposition testimony and expert report: commercial success involving a patent directed to delivery vehicles for treatment of dermatological disorders.
- **Galderma Laboratories, L.P.; Galderma S.A.; and Galderma Research & Development, S.N.C. v. Tolmar Inc.; and Actavia Mid Atlantic LLC**
United States District Court, District of Delaware (Case No. 10-cv-45 (LPS))
Trial and deposition testimony and expert report: commercial success involving a patent directed to treatment of dermatological disorders.
- **Pronova Biopharma Norge AS v. Teva Pharmaceuticals USA, Inc.; Apotex Corp. and Apotex Inc.; Par Pharmaceutical, Inc.; and Par Pharmaceutical Companies, Inc.**
United States District Court, District of Delaware (Case Nos. 09-286-SLR/09-304-SLR/09-305-SLR-MPT)
Trial and deposition testimony and expert report: commercial success covering patents directed to treatment of HDL cholesterol and hypertriglyceridemia.
- **Eli Lilly and Company v. Wockhardt Limited and Wockhardt USA, Inc.**
United States District Court, District of Indiana, Indianapolis Division (Case No. 1:08-cv-1547-WTL-TAB)
Deposition testimony and expert report: commercial success covering a patent directed to treatment of depression, anxiety and pain.
- **Acorda Therapeutics, Inc. v. Apotex Inc. and Apotex Corp.**
United States District Court, District of New Jersey (Case No. 2:07-cv-04937-JAG-MCA)
Trial and deposition testimony and expert report: commercial success covering a patent directed to treatment of spasticity.

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- **Medeva Pharma Suisse A.G. and Proctor & Gamble Pharmaceuticals, Inc. v. Roxane Laboratories, Inc.**
United States District Court, District of New Jersey (Case No. 3:07-CV-05165-FLW-TJB)
Deposition testimony and expert report: commercial success involving a patent directed to treatment of ulcerative colitis.
- **Otsuka Pharmaceutical Co., Ltd., Inc., et al. v. Sandoz, Inc., et al.**
United States District Court, District of New Jersey (Case No. 07-cv-01000)
Trial and deposition testimony and expert report: commercial success covering a patent directed to the active ingredient of an atypical antipsychotic drug.
- **Janssen-Ortho Inc. and Daiichi Pharmaceutical Co., Ltd v. Novopharm Ltd.**
Canadian Federal Court (Case No. T-2175-04)
Trial testimony (written) and affidavit: commercial success covering a patent directed to the active ingredient of an anti-infective drug.
- **Janssen-Ortho Inc. and Daiichi Pharmaceutical Co., Ltd v. The Minister of Health; and Apotex Inc.**
Federal Court of Canada (Case No. T-1508-05)
Deposition testimony and expert report: commercial success interest involving a patent directed to an anti-infective drug.
- **Ortho-McNeil Pharmaceutical, Inc., et al. v. Mylan Laboratories**
United States District Court, Northern District of West Virginia (Case No. 1:02CV32)
Trial and deposition testimony and expert report: commercial success covering a patent directed to the active ingredient of an anti-infective drug.
- **Elan Corp., PLC v. Andrx Pharmaceuticals, Inc.**
United States District Court, Southern District of Florida (Case No. 98-7164)
Trial and deposition testimony and expert report: commercial success covering a patent directed to controlled release dosing of a nonsteroid anti-inflammatory drug.

Patent Cases – Other

- **MPEG LA, LLC v. Toshiba American Information Systems, Inc.**
Supreme Court of the State of New York, County of New York (Index No. 162716/2015)
Deposition testimony and expert report: contract transfer and patent misuse involving patents directed to digital television standards.
- **Fresenius Kabi USA, LLC v. Fera Pharmaceuticals, LLC and Oakwood Laboratories, LLC**
United States District Court, District of New Jersey (Case No. 15-03654-KM-MAH)
Deposition testimony and expert declarations: antitrust liability and damages; commercial success and preliminary injunctive relief involving patents directed to injectable drug treatment of myxedema coma.
- **Travelers Express Co. Inc. v. The Standard Register Co.**
United States District Court, District of Minnesota (Case No. 4-93-436)
Deposition testimony and expert report: lost profits, reasonable royalty, patent misuse and prejudgment interest involving patents directed to money order dispensers.

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Trade Secret Cases

- **JELD-WEN, Inc. v. John Ambruz and Global Strategic Partners LLC**
American Arbitration Association (Case No. 01-17-0007-0838)
Hearing and deposition testimony and expert report: damages and reasonable royalty associated with alleged misappropriation of trade secrets and breach of contract involving the production of molded door skins.
- **NCR Corporation v. Pendum LLC and Burroughs, Inc.**
United States District Court, Northern District of Georgia (Case No. 16-cv-04114-SCJ)
Deposition testimony and expert report: damages associated with lost profits, price erosion, unjust enrichment, and economic effects and harm associated with alleged misappropriation of trade secrets, copyright infringement, trademark infringement, breach of contract, and tortious interference with current and prospective business relations in case involving the servicing of automatic teller machines (ATMs).
- **Cedars-Sinai Medical Center v. Quest Diagnostics Inc. and Quest Diagnostics Nichols Institute**
United States District Court, Central District of California, Western Division (Case No. 17-cv-5169-GW-FFM)
Deposition testimony and expert report: damages associated with alleged misappropriation of trade secrets, breach of contract, and patent infringement involving diagnostic testing for irritable bowel syndrome (IBS).
- **Steves and Sons, Inc. v. JELD-WEN, Inc.**
United States District Court, Eastern District of Virginia, Richmond Division (Case No. 16-cv-00545-REP)
Trial and deposition testimony and expert report: damages, profits, and reasonable royalty associated with alleged misappropriation of trade secrets and tortious interference with employment contracts and severance agreements involving the production of molded door skins.
- **Luminara Worldwide, LLC v. Shenzhen Liown Electronics Co., Ltd, Central Garden and Pet Co., et al.; Shenzhen Liown Electronics Co., Ltd, Central Garden and Pet Co. v. Luminara Worldwide, LLC, et al. ; and Luminara Worldwide, LLC v. Shenzhen Liown Electronics Co., Ltd and Central Garden and Pet Co., et al.**
United States District Court, District of Minnesota (Case Nos. 14-cv-03103 (SRN/FLN) and 15-cv-03028 (SRN/FLN))
Deposition testimony and expert reports: damages associated with alleged patent infringement and breach of contract, and unjust enrichment associated with breach of non-disclosure agreement and use of trade secrets, related to flameless candle technology and distribution.
- **Red Online Marketing Group LP, d/b/a 50onRED v. Revizer Ltd., d/b/a Ad Force Technologies, Ltd., and Revizer Technologies, Ltd.**
United States District Court, Eastern District of Pennsylvania (Case No. 14-1353)
Deposition testimony and expert report: damages associated with alleged misappropriation of trade secrets, breach of contract, and unfair competition (Lanham Act violations) involving internet monetization products.
- **Thomas C. Sisoian v. International Business Machines Corporation (IBM)**
United States District Court, Western District of Texas, Austin Division (Case No. A-14-CA-565-SS)
Deposition testimony and expert report: unjust revenues and profits involving misappropriation of trade secrets over developing, implementing, and integrating complex telecommunication information systems.

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- **In the Matter of Certain Sulfentrazone, Sulfentrazone Compositions, and Processes for Making Sulfentrazone (FMC (Complainant))**
United States International Trade Commission (Investigation No. 337-TA-914)
Trial and deposition testimony and expert report: irreparable harm, balance of hardships, and public interest involving a patent directed to a crop herbicide.
- **In the Matter of Certain Opaque Polymers (Organik Kimya (Respondent))**
United States International Trade Commission (Investigation No.337-TA-883)
Deposition testimony and expert report: injury, independent economic valuation, and bond involving trade secrets used in the production of opaque polymers.
- **MacDermid, Inc. v. Cookson Group, plc, Cookson Electronics, Enthone, Inc., and David North**
United States Superior Court, Judicial District of Waterbury (Case No.x10-cv-09-5014518-d)
Deposition testimony and expert report: royalty and prejudgment interest involving the misappropriation of trade secrets directed to chemicals, materials, and technical services used in a possible corporate acquisition.
- **JDS Therapeutics, LLC and Nutrition 21, LLC v. Pfizer Inc., Wyeth LLC, Wyeth Consumer Healthcare Ltd., and Wyeth Consumer Healthcare LLC**
United States District Court, Southern District of New York (Case No.1:12-cv-09002-JSR)
Deposition testimony and expert report: commercial success, reasonable royalty, and unjust enrichment involving patents and trade secrets directed to the use of chromium picolinate in multi-vitamins.
- **E. I. du Pont de Nemours and Company v. Kolon Industries, Inc. and Kolon USA, Inc.**
United States District Court, Eastern District of Virginia, Richmond Division (Case No. 3:09CV58)
Trial and deposition testimony and expert report: unjust enrichment involving misappropriation of trade secrets directed to aramid fiber production.
- **CA, Inc.; Computer Associates Think, Inc.; Platinum Technology International, Inc.; and Platinum Technology IP, Inc., v. Rocket Software, Inc.**
United States District Court, Eastern District of New York (Case No. 07-CV-1476 (ADS)(MLO)
Deposition testimony and expert report: lost profits, unjust enrichment, price erosion and prejudgment interest involving copyrights and trade secrets related to DB2 software tools.
- **Sensormatic Electronics Corp. v. The TAG Co. US LLC; Phenix Label Co.; Dennis Gadonniex**
United States District Court, Southern District of Florida (Case No.06-81105-Civ-Hurley/Hopkins)
Trial and deposition testimony and expert report: unjust enrichment involving misappropriation of trade secrets directed to loss prevention systems.
- **Cogent Systems, Inc. v. Northrop Grumman Corp.**
California Superior Court, County of Los Angeles, Central District (Case No.BC332199)
Deposition testimony and expert report: reasonable royalty involving misappropriation of trade secrets directed to fingerprint identification technology.
- **Geomatrix, LLC and David A. Potts v. Infiltration Systems, Inc.**
Connecticut Superior Court, District of Middlesex at Middleton (Case No.MMX-CV-05-4004477 S)
Deposition testimony and expert disclosure: reasonable royalty involving misappropriation of trade secrets directed to leach field and septic tank technology.
- **McMahon Marketing v. Toyota Motor Sales**
California Superior Court, County of Los Angeles (Case No. BC317277)
Deposition testimony: damages and profits associated with trade secrets directed to a luxury hotel and automotive partnership.

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- **Christopher Karol and Karol Designs, LLC v. Burton Corp.**
United States District Court, District of Vermont (Case No. 1:01-CV-178)
Deposition testimony and expert report: reasonable royalty and disgorgement of profits involving trade secrets and an NDA directed to snowboard boot and binding technology.
- **Takata Corp. v. AlliedSignal, Inc. and Breed Technologies, Inc.**
United States District Court, District of Delaware (Case No. 98-94-MMS)
Deposition testimony and expert report: reasonable royalty and prejudgment interest covering patents and trade secrets directed to seatbelt retractors.
- **Trimless-Flashless Design, Inc. v. Augat, Inc.; Thomas & Betts Corp.; and Tyco International, Ltd.**
United States District Court, Eastern District of Virginia (Case No. CA00-245-A)
Trial and deposition testimony and expert report: damages and profits associated with alleged breach of contract and misappropriation of trade secrets involving metallized particle interconnects used to connect microprocessors with mother boards.
- **Insight Development Corp. v. Hewlett-Packard Co.**
United States District Court, Northern District of California (Case No. C 98 3349 CW)
Deposition testimony and expert report: damages and profits associated with alleged contract breaches, patent, copyright and trade secret misappropriation/infringement and unfair competition involving digital image processing and transmission, including that over the internet.
- **DSC Communications Corp. v. DGI Technologies, Inc.**
United States District Court, Northern District of Texas (Case No. 3:94-CV-1047)
Trial testimony and expert report: reasonable royalty involving copyrights, trade secrets and unfair competition over telecommunications switching equipment.
- **Wayne State University; Lumigen Inc.; and A. Paul Schapp v. Irena Bronstein and Tropix Inc.**
State of Michigan Circuit Court, County of Wayne and Court of Claims (Case No. 88-804-627 CK/Case No. 88-11871CM)
Deposition testimony and expert report: unjust enrichment and lost profits involving trade secrets directed to chemiluminescence (medical detection) technology.

Trademark Cases

- **NCR Corporation v. Pendum LLC and Burroughs, Inc.**
United States District Court, Northern District of Georgia (Case No. 16-cv-04114-SCJ)
Deposition testimony and expert report: damages associated with lost profits, price erosion, unjust enrichment, and economic effects and harm associated with alleged misappropriation of trade secrets, copyright infringement, trademark infringement, breach of contract, and tortious interference with current and prospective business relations in case involving the servicing of automatic teller machines (ATMs).
- **Katherine Dines v. Toys “R” Us-Delaware, Inc.**
United States District Court, District of Colorado (Case No. 12-cv-2279-PAB-KMT)
Deposition testimony and expert report: profits and prejudgment interest associated with trademark infringement involving a line of stuffed animal toys.
- **The Corvyn Group II, LLC v. O.C. Seacrets, Inc.**
United States District Court, District of Maryland, Northern Division (Case No. 08-cv-02764-WDQ)
Trial testimony and expert report: profits and damages involving the use of “Secrets” trademark in the leisure resort business.

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- **YSL Beauté v. Oscar de la Renta, Ltd.**
American Arbitration Association (Case No. 13 133 01389 08)
Arbitration hearing testimony and expert report: damages associated with alleged breach of contract and trademark infringement involving cosmetics, fragrances and beauty products.
- **Fishman Transducers, Inc. v. Stephen Paul d/b/a “Esteban” Daystar Productions and HSN Interactive LLC**
United States District Court, District of Massachusetts (Case No. 07-CA-10071 RCL)
Trial and deposition testimony and expert report: damages and profits associated with a trademark directed to guitar transducers.
- **ISP.NET, LLC d/b/a IQuest Internet v. Qwest Communications International, Inc.**
United States District Court, Southern District of Indiana, Indianapolis Division (Case No. IP01-0480 C B/S)
Deposition testimony and expert report: reasonable royalty, disgorgement of profits and prejudgment interest involving a trademark directed to internet service provision.
- **Fuel Clothing Co., Inc. v. Safari Shirt Co. d/b/a Fuel Clothing Co., Inc.**
United States District Court, Western District of Washington at Tacoma (Case No. CO5 5366 KJB)
Deposition testimony and expert report: economic harm involving a trademark directed to sports apparel logos.
- **Alpha International, Inc. v. General Foam Plastics Corp.**
United States District Court, Eastern District of North Carolina (Case No. 4:01-CV-142-H(3))
Deposition testimony and expert report: copyright infringement, trademark infringement, conversion and unjust enrichment involving bowling pin sets and ride-on toys.
- **Fuel TV, Inc. v. Fuel Clothing Co., Inc.**
United States District Court, Central District of California, Western Division (Case No. CV03-8248-ABC-VBKx)
Deposition testimony and expert report: economic harm involving infringement of trademark used in extreme sports applications.
- **AutoNation, Inc. v. Acme Commercial Corp., et al. (CarMax)**
United States District Court, Southern District of Florida (Case No. 96-6141)
Trial and deposition testimony and expert report: reasonable royalty associated with trademark infringement and unfair competition in the auto superstore business.

Copyright Cases

- **NCR Corporation v. Pendum LLC and Burroughs, Inc.**
United States District Court, Northern District of Georgia (Case No. 16-cv-04114-SCJ)
Deposition testimony and expert report: damages associated with lost profits, price erosion, unjust enrichment, and economic effects and harm associated with alleged misappropriation of trade secrets, copyright infringement, trademark infringement, breach of contract, and tortious interference with current and prospective business relations in case involving the servicing of automatic teller machines (ATMs).
- **Syngenta Crop Protection, LLC v. Willowood, LLC, Willowood USA, LLC, Willowood Azoxystrobin, LLC, and Willowood Limited**
US District Court, Middle District of North Carolina (Case No. 1:15-cv-274)
Trial and deposition testimony and expert report: damages and prejudgment interest related to alleged patent and copyright infringement involving crop fungicide.

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- **American Society for Testing and Materials d/b/a ASTM International; National Fire Protection Association, Inc.; and American Society of Heating, Refrigerating, and Air Conditioning Engineers, Inc. v. Public.Resource.org, Inc.**
United States District Court for the District of Columbia (Case No. 13-cv-01215-TSC)
Deposition testimony and expert report: harm and public interest involving copyrights and trademarks covering standards incorporated by reference into law.
- **Complex Systems, Inc. v. ABN AMRO Bank N.V.**
United States District Court, Southern District of New York (Case No. 08-cv-7497)
Deposition testimony and expert report: revenues and profits involving copyrighted trade finance software.
- **Shepard Fairey and Obey Giant Art, Inc. v. The Associated Press v. Shepard Fairey; Obey Giant Art, Inc.; Obey Giant LLC; Studio Number One, Inc.; and One 3 Two, Inc.**
United States District Court, Southern District of New York (Case No. 09-01123(AKH))
Deposition testimony and expert report: fair use, damages and profits involving copyrighted photograph of President Obama.
- **CA, Inc.; Computer Associates Think, Inc.; Platinum Technology International, Inc.; and Platinum Technology IP, Inc., v. Rocket Software, Inc.**
United States District Court, Eastern District of New York (Case No. 07-CV-1476 (ADS)(MLO))
Deposition testimony and expert report: lost profits, unjust enrichment, price erosion and prejudgment interest involving copyrights and trade secrets related to DB2 software tools.
- **Alpha International, Inc. v. General Foam Plastics Corp.**
United States District Court, Eastern District of North Carolina (Case No. 4:01-CV-142-H(3))
Deposition testimony and expert report: copyright infringement, trademark infringement, conversion and unjust enrichment involving bowling pin sets and ride-on toys.
- **Insight Development Corp. v. Hewlett-Packard Co.**
United States District Court, Northern District of California (Case No. C 98 3349 CW)
Deposition testimony and expert report: damages and profits associated with alleged contract breaches, patent, copyright and trade secret misappropriation/infringement and unfair competition involving digital image processing and transmission, including that over the internet.
- **First National Bank of Omaha v. Three Dimensions Systems Products, Inc.**
United States District Court, District of Nebraska (Case No. 8:98CV569)
Trial and deposition testimony and expert report: damages and profits associated with an alleged contract breach and copyright infringement involving financial services software.
- **Leslie Atkins v. Benson J. Fischer, et al.**
United States District Court, District of Columbia (Case No. 1:98CV00800)
Deposition testimony and expert report: damages and profits associated with copyright infringement covering beer label and packaging designs.
- **Wrench LLC v. Taco Bell Corp.**
United States District Court, Southern District of Michigan (Case No. 1:98-CV-45)
Trial and deposition testimony and expert report: unjust enrichment and actual damages involving chihuahua promotional campaign.
- **DSC Communications Corp. v. DGI Technologies, Inc.**
United States District Court, Northern District of Texas (Case No. 3:94-CV-1047)
Trial testimony and expert report: reasonable royalty involving copyrights, trade secrets and unfair competition over telecommunications switching equipment.

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Breach of Contract Cases

- **In re: Windstream Holdings, Inc., et al. (Debtors); Windstream Holdings, Inc., et al. v. Charter Communications, Inc. and Charter Communications Operating, LLC**
United States Bankruptcy Court, Southern District of New York (Chapter 11, Case No. 19-22312 (RDD); Adv. Pro. No. 19-08246 (RDD))
Deposition testimony and expert report: lost profits and increased costs associated with alleged violations of the Lanham Act and other similar state statutes, breach of contract, violation of the Bankruptcy Code's automatic stay, and equitable subordination involving alleged false advertising campaign.
- **JELD-WEN, Inc. v. John Ambruz and Global Strategic Partners LLC**
American Arbitration Association (Case No. 01-17-0007-0838)
Hearing and deposition testimony and expert report: damages and reasonable royalty associated with alleged misappropriation of trade secrets and breach of contract involving the production of molded door skins.
- **NCR Corporation v. Pendum LLC and Burroughs, Inc.**
United States District Court, Northern District of Georgia (Case No. 16-cv-04114-SCJ)
Deposition testimony and expert report: damages associated with lost profits, price erosion, unjust enrichment, and economic effects and harm associated with alleged misappropriation of trade secrets, copyright infringement, trademark infringement, breach of contract, and tortious interference with current and prospective business relations in case involving the servicing of automatic teller machines (ATMs).
- **MPEG LA, LLC v. Toshiba American Information Systems, Inc.**
Supreme Court of the State of New York, County of New York (Index No. 162716/2015)
Deposition testimony and expert report: contract transfer and patent misuse involving patents directed to digital television standards.
- **Cedars-Sinai Medical Center v. Quest Diagnostics Inc. and Quest Diagnostics Nichols Institute**
United States District Court, Central District of California, Western Division (Case No. 17-cv-5169-GW-FFM)
Deposition testimony and expert report: damages associated with alleged misappropriation of trade secrets, breach of contract, and patent infringement involving diagnostic testing for irritable bowel syndrome (IBS).
- **Western Enterprises, Inc. v. Buckeye Rubber & Packaging Co.; Freudenberg-NOK General Partnership, a/k/a Freudenberg-NOK Sealing Technologies, Inc.; and International Seal Company, Inc.** *Court of Common Pleas, Cuyahoga County, Ohio (Case No. 16-869179)*
Deposition testimony and expert report: damages associated with alleged breaches of contract, duty to indemnify, and negligence related to portable oxygen systems.
- **Luminara Worldwide, LLC v. Shenzhen Liown Electronics Co., Ltd, Central Garden and Pet Co., et al.; Shenzhen Liown Electronics Co., Ltd, Central Garden and Pet Co. v. Luminara Worldwide, LLC, et al. ; and Luminara Worldwide, LLC v. Shenzhen Liown Electronics Co., Ltd and Central Garden and Pet Co., et al.**
United States District Court, District of Minnesota (Case Nos. 14-cv-03103 (SRN/FLN) and 15-cv-03028 (SRN/FLN))
Deposition testimony and expert reports: damages associated with alleged patent infringement and breach of contract, and unjust enrichment associated with breach of non-disclosure agreement and use of trade secrets, related to flameless candle technology and distribution.

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- **Red Online Marketing Group LP, d/b/a 50onRED v. Revizer Ltd., d/b/a Ad Force Technologies, Ltd., and Revizer Technologies, Ltd.**
United States District Court, Eastern District of Pennsylvania (Case No. 14-1353)
Deposition testimony and expert report: damages associated with alleged misappropriation of trade secrets, breach of contract, and unfair competition (Lanham Act violations) involving internet monetization products.
- **Luminara Worldwide, LLC v. Shenzhen Liown Electronics Co., Ltd.**
State of Minnesota District Court, County of Hennepin Fourth Judicial District (Case No. 27-CV-14-16085)
Deposition testimony and expert report: damages associated with alleged breaches of contract and duty of good faith and fair dealing related to agreements to manufacture flameless candles.
- **ABS Holdings, Ltd. and ABS Global, Ltd. v. KT Corporation and KTSAT Corporation**
International Court of Arbitration of the International Chamber of Commerce
Arbitration hearing testimony and expert declaration: damages associated with alleged breaches of contract involving the sale and on-going operations of a satellite.
- **Bayer CropScience AG and Bayer CropScience NV v. Dow AgroSciences LLC, Mycogen Plant Science Inc., Agrigenetics, Inc. d/b/a Mycogen Seeds LLC, and Phytogen Seed Company, LLC**
International Chamber of Commerce (Case No. 18892/VRO /AGF)
Arbitration hearing testimony and expert report: damages associated with alleged breach of contract and patent infringement involving genetically modified seed.
- **Immunomedics Inc. v. Nycomed GmnH (n/k/a Takeda GmbH), Takeda Pharmaceutical Company Limited, and Takeda Pharmaceuticals International, Inc.**
International Center for Dispute Resolution
Arbitration hearing testimony and expert report: diminution of value associated with the delayed/failed development of a monoclonal antibody drug to treat various autoimmune diseases.
- **Avocent Redmond Corp. v. Raritan Americas, Inc.**
United States District Court, Southern District of New York (Case No. 10-cv-6100 (PKC)(JLC))
Deposition testimony and expert report: lost profits, lost royalties, reasonable royalty and prejudgment interest involving a patent and contract directed to software and hardware products and technologies that provide connectivity and centralized management of IT infrastructure through KVM switches.
- **General Assurance of America, Inc. v. Overby-Seawell Company**
United States District Court, Eastern District of Virginia, Alexandria Division (Case No. 1:11CV483)
Deposition testimony and expert report: damages and profits associated with obligations arising from a contract involving specialized insurance products.
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United States District Court, Eastern District of Pennsylvania (Case No. 2:07-CV-2457)
Deposition testimony and expert report: lost profits, lost royalties, reasonable royalty and prejudgment interest involving a patent and contract directed to automated substitute fulfillment software.
- **Amkor Technology, Inc. v. Tessera, Inc.**
International Chamber of Commerce, International Court of Arbitration (Case No.166531/VRO)
Arbitration hearing and deposition testimony and expert report: royalty payments due under a contract directed to semiconductor packaging technology.

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- **Max-Planck-Gesellschaft zur Förderung der Wissenschaften E. V.; Max-Planck-Innovation GmbH; and Alnylam Pharmaceuticals, Inc. v. Whitehead Institute for Biomedical Research; Massachusetts Institute of Technology; and the Board of Trustees of the University of Massachusetts**
United States District Court, District of Massachusetts (Case No. 2009-11116-PBS)
Deposition testimony and expert report: damages and profits associated with contracts covering the transfer and sharing of RNAi technology.
- **YSL Beauté v. Oscar de la Renta, Ltd.**
American Arbitration Association (Case No. 13 133 01389 08)
Arbitration hearing testimony and expert report: damages associated with alleged breach of contract and trademark infringement involving cosmetics, fragrances and beauty products.
- **IMTEC Imaging LLC v. CyberMed, Inc.**
JAMS Arbitration (Reference No.1410005418)
Arbitration hearing and deposition testimony and expert report: lost profits and development costs associated with the alleged breach of a contract involving a software license agreement directed to cone beam computed tomography machines used in dental applications.
- **Biosvnxus, Inc. v. Glaxo Group Limited and MedImmune, Inc.**
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Deposition testimony and expert report: diminution of value associated with the delayed/failed development of a pediatric anti-infective drug.
- **Indiana Mills & Manufacturing, Inc. v. Dorel Industries, Inc.**
United States District Court, Southern District of Indiana (Case No. 1:04-CV-1102)
Deposition testimony and expert report: damages and profits associated with alleged contract breach and patent infringement involving technology directed to automobile child restraint systems.
- **ETEX Corp. v. Medtronic, Inc.; Medtronic International Limited; and Medtronic Sofamor Danek, Inc.**
CPR Institute for Dispute Resolution
Arbitration hearing and deposition testimony and expert report: lost revenues and profits associated with alleged contractual breaches and antitrust violations involving spinal implant materials.
- **Audiotext International, Ltd. and New Media Group, Inc. v. Sprint Communications Co., L.P.**
United States District Court, Eastern District of Pennsylvania (Case No.03-CV-2110)
Deposition testimony and expert report: non-delivery damages involving contracts covering resale of telecommunications services.
- **Medtronic Sofamor Danek, Inc. v. Gary K. Michelson, M.D. and Karlin Technology, Inc.**
United States District Court, Western District of Tennessee (Case No. 01-2373 GV)
Trial and deposition testimony and expert report: damages and profits associated with alleged contractual breaches, tortious interference and intentional negligent representations involving spinal implants.
- **Honeywell International, Inc. and GEM Microelectronic Materials LLC v. Air Products and Chemicals, Inc. and Ashland, Inc.**
Delaware Chancery Court, County of New Castle (Case No.20434-NC)
Trial and deposition testimony and expert report: lost profits associated with alleged contractual breach and tortious interference as well as irreparable harm inquiry involving a strategic alliance to provide electronic chemicals, gases and services to the semiconductor industry.
- **Christopher Karol; and Karol Designs, LLC v. Burton Corp.**
United States District Court, District of Vermont (Case No. 1:01-CV-178)
Deposition testimony and expert report: reasonable royalty and disgorgement of profits involving trade secrets and an NDA directed to snowboard boot and binding technology.

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- **Interactive Return Service, Inc. v. Virginia Polytechnic Institute and State University, et al.**
Circuit Court for the City of Richmond (Case No. LM-870-3)
Deposition testimony: lost profits and lost licensing fees involving contracts to develop interactive/return path communications.
- **City of Hope National Medical Center v. Genentech, Inc.**
Superior Court, State of California, County of Los Angeles (Case No. BC215152)
Deposition testimony and expert report: damages associated with alleged breach of contract involving license fees for use of recombinant DNA technology.
- **Igen International, Inc. v. Roche Diagnostics GmbH**
United States District Court, Southern Division of Maryland (Case No. PJM 97-3461)
Trial and deposition testimony and expert report: damages and profits associated with an alleged breach of contract involving electrochemiluminescent detection technology used in DNA probe and immunoassay kits.
- **Trimless-Flashless Design, Inc. v. Augat, Inc.; Thomas & Betts Corp.; Tyco International, Ltd.**
United States District Court, Eastern District of Virginia (Case No. CA00-245-A)
Trial and deposition testimony and expert report: damages and profits associated with alleged breach of contract and misappropriation of trade secrets involving metallized particle interconnects used to connect microprocessors with mother boards.
- **New Industries Co. (Sudan) Ltd. v. PepsiCo, Inc.**
American Arbitration Association (Case No. 50 T 114 00001 95)
Arbitration hearing testimony and expert report: damages and profits associated with breaches of PepsiCo franchise agreement.
- **Insight Development Corp. v. Hewlett-Packard Co.**
United States District Court, Northern District of California (Case No. C 98 3349 CW)
Deposition testimony and expert report: damages and profits associated with alleged contract breaches, patent, copyright and trade secret misappropriation/infringement and unfair competition involving digital image processing and transmission, including that over the internet.
- **First National Bank of Omaha v. Three Dimensions Systems Products, Inc.**
United States District Court, District of Nebraska (Case No. 8:98CV569)
Trial and deposition testimony and expert report: damages and profits associated with an alleged contract breach and copyright infringement involving financial services software.
- **Computer Aid v. Hewlett-Packard**
United States District Court, Eastern District of Pennsylvania (Case No. (C-96-3085 (MHP))
Deposition testimony and expert report: appropriate discount rate and prejudgment interest rate involving a failed software development contract.
- **Wrench LLC v. Taco Bell Corp.**
United States District Court, Southern District of Michigan (Case No. 1:98-CV-45)
Trial and deposition testimony and expert report: unjust enrichment and actual damages involving chihuahua promotional campaign.
- **Kabushiki Kaisha Izumi Seiko Seiskusho v. Windmere Corp. et al.**
United States District Court, Southern District of Florida (Case No. 94-0803-CIV-MOORE)
Deposition testimony and expert declaration: lost revenues and lost profits in a breach of contract, fraud and antitrust case involving rotary shavers.

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Antitrust Cases

- **Rambus Inc., v. Micron Technology, Inc.**
California Superior Court, County of San Francisco (Case No. 04-431105)
Deposition testimony and expert report: lost revenues and profits associated with alleged antitrust violations related to DRAM technology.
- **ETEX Corp. v. Medtronic, Inc.; Medtronic International Limited; and Medtronic Sofamor Danek, Inc.**
CPR Institute for Dispute Resolution
Arbitration hearing and deposition testimony and expert report: lost revenues and profits associated with alleged contractual breaches and antitrust violations involving spinal implant materials.
- **Kabushiki Kaisha Izumi Seiko Seiskusho v. Windmere Corp. et al.**
United States District Court, Southern District of Florida (Case No. 94-0803-CIV-MOORE)
Deposition testimony and expert declaration: lost revenues and lost profits in a breach of contract, fraud and antitrust case involving rotary shavers.
- **DSC Communications Corp. v. DGI Technologies, Inc.**
United States District Court, Northern District of Texas (Case No. 3:94-CV-1047)
Trial testimony and expert report: reasonable royalty involving copyrights, trade secrets and unfair competition over telecommunications switching equipment.
- **Travelers Express Co. Inc. v. The Standard Register Co.**
United States District Court, District of Minnesota (Case No. 4-93-436)
Deposition testimony and expert report: lost profits, reasonable royalty, patent misuse and prejudgment interest involving patents directed to money order dispensers.

General Tort Cases

- **In re: Windstream Holdings, Inc., et al. (Debtors); Windstream Holdings, Inc., et al. v. Charter Communications, Inc. and Charter Communications Operating, LLC**
United States Bankruptcy Court, Southern District of New York (Chapter 11, Case No. 19-22312 (RDD); Adv. Pro. No. 19-08246 (RDD))
Deposition testimony and expert report: lost profits and increased costs associated with alleged violations of the Lanham Act and other similar state statutes, breach of contract, violation of the Bankruptcy Code's automatic stay, and equitable subordination involving alleged false advertising campaign.
- **NCR Corporation v. Pendum LLC and Burroughs, Inc.**
United States District Court, Northern District of Georgia (Case No. 16-cv-04114-SCJ)
Deposition testimony and expert report: damages associated with lost profits, price erosion, unjust enrichment, and economic effects and harm associated with alleged misappropriation of trade secrets, copyright infringement, trademark infringement, breach of contract, and tortious interference with current and prospective business relations in case involving the servicing of automatic teller machines (ATMs).
- **Western Enterprises, Inc. v. Buckeye Rubber & Packaging Co.; Freudenberg-NOK General Partnership, a/k/a Freudenberg-NOK Sealing Technologies, Inc.; and International Seal Company, Inc.**
Court of Common Pleas, Cuyahoga County, Ohio (Case No. 16-869179)
Deposition testimony and expert report: damages associated with alleged breaches of contract, duty to indemnify, and negligence related to portable oxygen systems.

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- **General Assurance of America, Inc. v. Overby-Seawell Company**
United States District Court, Eastern District of Virginia, Alexandria Division (Case No. 1:11CV483)
Deposition testimony and expert report: damages and profits associated with obligations arising from a contract involving specialized insurance products.
- **The Osage Tribe of Indians of Oklahoma v. The United States of America**
United States Court of Federal Claims (Case No. 99-550 L (into which is consolidated No. 00-169L))
Deposition testimony and expert declaration: present value interest from unpaid oil royalties.
- **Biosynexus, Inc. v. Glaxo Group Limited; and MedImmune, Inc.**
New York Supreme Court, County of New York (Case No. 604485/05)
Deposition testimony and expert report: diminution of value associated with the delayed/failed development of a pediatric anti-infective drug.
- **Bavarian Nordic A/S and Anton Mavr v. Acambis, Inc.**
United States District Court, District of Delaware (Case No. 05-614-SLR)
Deposition testimony and expert report: unjust enrichment and value of property associated with tortious conversion, unfair trade practices and unfair competition involving proprietary technology directed to vaccines.
- **Alpha International, Inc. v. General Foam Plastics Corp.**
United States District Court, Eastern District of North Carolina (Case No. 4:01-CV-142-H(3))
Deposition testimony and expert report: copyright infringement, trademark infringement, conversion and unjust enrichment involving bowling pin sets and ride-on toys.
- **Medtronic Sofamor Danek, Inc. v. Gary K. Michelson, M.D. and Karlin Technology, Inc.**
United States District Court, Western District of Tennessee (Case No. 01-2373 GV)
Trial and deposition testimony and expert report: damages and profits associated with alleged contractual breaches, tortious interference and intentional negligent representations involving spinal implants.
- **Honeywell International, Inc. and GEM Microelectronic Materials LLC v. Air Products and Chemicals, Inc. and Ashland, Inc.**
Delaware Chancery Court, County of New Castle (Case No. 20434-NC)
Trial and deposition testimony and expert report: lost profits associated with alleged contractual breach and tortious interference as well as irreparable harm inquiry involving a strategic alliance to provide electronic chemicals, gases and services to the semiconductor industry.
- **Interactive Return Service, Inc. v. Virginia Polytechnic Institute and State University, et al.**
Circuit Court for the City of Richmond (Case No. LM-870-3)
Deposition testimony: lost profits and lost licensing fees involving contracts to develop interactive/return path communications.
- **Omega Engineering, Inc. v. Cole-Parmer Instrument Co.; Davis Instrument Manufacturing Co., Inc.; Dwyer Instruments, Inc.; and Raytek Corp.**
United States District Court, District of Connecticut (Case Nos. 3:98 CV 00733 (JCH), 3:98 CV 02052 (JCH) and 3:98 CV 02276 (JCH))
Trial and deposition testimony and expert report: lost profits, reasonable royalty and prejudgment interest involving patents and alleged unfair competitive practices directed to portable infrared thermometers.
- **The University of Colorado Foundation Inc., et al. v. American Cyanamid Co.**
United States District Court, District of Colorado (Case No. 93-K-1657)
Trial and deposition testimony and expert report: measure and amount of prejudgment interest in a patent infringement, fraud and unjust enrichment case covering prenatal vitamin formulations.

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- **Hunter Group, Incorporated v. Susan Smith, et al.**
United States District Court, District of Maryland (Case No. 97-2218)
Trial and deposition testimony and expert report: lost enterprise value and lost profits associated with improper solicitation of enterprise resource planning software trainers.
- **William Aramony v. United Way of America et al.**
United States District Court, Southern District of New York (Case No. 96 Civ. 3962 (SAS))
Trial testimony and expert report: lost contributions and out-of-pocket losses surrounding the departure of United Way of America president.
- **Fox v. Fox**
State of Virginia, Circuit Court, Arlington County (Chancery No. 96-80)
Trial testimony (proffered) and expert report: prospective valuation of a patent portfolio involving lasers used for lithotripsy and angioplasty.
- **AutoNation, Inc. v. Acme Commercial Corp., et al. (CarMax)**
United States District Court, Southern District of Florida (Case No. 96-6141)
Trial and deposition testimony and expert report: reasonable royalty associated with trademark infringement and unfair competition in the auto superstore business.

International Trade Cases

- **In the Matter of Certain Magnetic Data Storage Tapes and Cartridges Containing the Same (Sony Corporation, Sony Corporation of America, and Sony Electronics, Inc. (Respondents))**
(International Trade Commission Inv. No. 337-TA-1012E)
Deposition testimony and expert report: civil penalty associated with compliance with CDOs involving patents directed to certain magnetic data storage tapes and cartridges.
- **In the Matter of Certain Magnetic Data Storage Tapes and Cartridges Containing the Same (II) (Sony Corporation, Sony Storage Media Solutions Corporation, Sony Storage Media Manufacturing Corporation, Sony DADC US, Inc., and Sony Latin America (Respondents))**
United States International Trade Commission (Inv. No. 337-TA-1076)
Trial and deposition testimony and expert report: domestic industry, bond, and public interest issues involving patents directed to certain magnetic data storage tapes and cartridges.
- **In the Matter of Certain Magnetic Data Storage Tapes and Cartridges Containing the Same (Sony Corporation, Sony Corporation of America, and Sony Electronics, Inc. (Respondents))**
United States International Trade Commission (Inv. No. 337-TA-1012)
Trial and deposition testimony and expert report: economic evaluation of FRAND, commercial success, bond, remedy, domestic industry, and public interest issues involving patents directed to certain magnetic data storage tapes and cartridges.
- **In the Matter of Certain 3G Mobile Handsets and Components Thereof (Nokia (Respondent))**
United States International Trade Commission (Inv. No. 337-TA-613)
Trial and deposition testimony and expert report: economic evaluation of whether proposed license terms for certain wireless devices are discriminatory under a FRAND obligation and economic evaluation of hold-up and reverse hold-up.
- **In the Matter of Certain Sulfentrazone, Sulfentrazone Compositions, and Processes for Making Sulfentrazone (FMC (Complainant))**
United States International Trade Commission (Investigation No. 337-TA-914)
Trial and deposition testimony and expert report: irreparable harm, balance of hardships, and public interest involving a patent directed to a crop herbicide.

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- **In the Matter of Certain Opaque Polymers (Organik Kimva (Respondent))**
United States International Trade Commission (Investigation No.337-TA-883)
Deposition testimony and expert report: injury, independent economic valuation, and bond involving trade secrets used in the production of opaque polymers.
- **In the Matter of Certain Wireless Devices with 3G and/or 4G Capabilities and Components Thereof (Nokia (Respondent))**
United States International Trade Commission (Investigation No.337-TA-868)
Trial and deposition testimony and expert report: economic evaluation of whether proposed license terms for certain wireless devices are discriminatory under a FRAND obligation, and economic evaluation of hold-up and reverse hold-up.
- **In the Matter of Certain Wireless Devices with 3G Capabilities and Components Thereof (Nokia (Respondent))**
United States International Trade Commission (Investigation No.337-TA-800)
Trial and deposition testimony and expert report: economic evaluation of whether proposed license terms for certain wireless devices are discriminatory under a FRAND obligation.
- **In the Matter of Certain Computing Devices with Associated Instruction Sets and Software (VIA Technologies, Inc., Centaur Technology, IP-First LLC (Complainants))**
United States International Trade Commission (Investigation No.337-TA-812)
Trial and deposition testimony and expert report: economic evaluation of domestic industry issues associated with importation of certain computing devices.
- **In the Matter of Certain Modified Vaccinia Ankara (“MVA”) Viruses and Vaccines and Pharmaceutical Compositions Based Thereon (Bavarian Nordic A/S (Complainant))**
United States International Trade Commission (Investigation No. 337-TA-550)
Deposition testimony and expert report: domestic industry and injury involving patents and proprietary technology directed to vaccines.

Malpractice Cases

- **TattleTale Portable Alarm Systems, Inc. v. Calfee, Halter & Griswold LLP, et al.**
United States District Court, Southern District of Ohio, Eastern Division (Case No. 2:10-CV-226)
Deposition testimony and expert report: lost royalties associated with a law firm’s negligence in handling a patent directed to portable alarm systems.
- **Timothy Robinson and Whorl, LLC v. Cohen Mohr, LLP; Dan Duval; Perkins Coie, LLP; Perkins Coie, L.P.C.; Perkins Coie, D.C.P.C.; and Perkins Coie, California, P.C.**
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Deposition testimony and expert report: lost value and prejudgment interest involving allegations of law firm’s negligence in securing an interest in intellectual property directed to biometric payment technology.
- **Frank Robertson and Cayvon, Inc. v. Nexsen Pruet Jacobs & Pollard, LLP**
South Carolina Common Pleas Court, Fifth Judicial Circuit, Richland (Case No. 2004-CP-40-5531)
Deposition testimony: lost profits associated with a law firm’s negligence in handling a patent directed to commercial nut-cracking machines.
- **Anodyne Corp. v. Klaas, Law, O’Meara & Malkin**
State of Colorado District Court, City and County of Denver (Case No. 97-CV-7129)
Trial testimony and expert report: lost licensing income and prejudgment interest associated with a law firm’s negligence in filing a patent application directed to wrappable flashlights.

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FRAND Cases

- **Audio MPEG, Inc., U.S. Philips Corporation, TDF SAS, and Institut Für Rundfunktechnik GmbH v. Dell, Inc.**
United States District Court, Eastern District of Virginia, Norfolk Division (Case No. 1:15-CV-1674 AJT/TCB)
Deposition testimony and expert report: analysis of patent pool compliance with FRAND commitments and determination of FRAND-compliant royalties involving patents directed to the transmission and storage of digital audio files.
- **In the Matter of Certain Magnetic Data Storage Tapes and Cartridges Containing the Same (Sony Corporation, Sony Corporation of America, and Sony Electronics, Inc. (Respondents))**
United States International Trade Commission (Inv. No. 337-TA-1012)
Trial and deposition testimony and expert report: economic evaluation of FRAND, commercial success, bond, remedy, domestic industry, and public interest issues involving patents directed to certain magnetic data storage tapes and cartridges.
- **In the Matter of Certain 3G Mobile Handsets and Components Thereof (Nokia (Respondent))**
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Trial and deposition testimony and expert report: economic evaluation of whether proposed license terms for certain wireless devices are discriminatory under a FRAND obligation and economic evaluation of hold-up and reverse hold-up.
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Trial and deposition testimony and expert report: economic evaluation of whether proposed license terms for certain wireless devices are discriminatory under a FRAND obligation, and economic evaluation of hold-up and reverse hold-up.
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- “Remedies,” Guest Lecturer, Georgetown University Law Center, April 2012, April 2013, April 2014, April 2015, April 2016, April 2017, April 2018, and April 2019 (with John Taurman).
- “Patents, Innovation and Value,” Guest Lecturer, University of Pennsylvania Law School, February 2019 (with David Abrams).
- “*Sprint v. Time Warner Cable*: Admissibility of Past Jury Verdicts in Damages Estimation,” Intellectual Property Owners Association Damages and Injunctions Committee Monthly Call, December 2018 (with Mark Finkelstein).
- “Entire Market Value Rule: *Finjan v. Exmark v. Power Integrations*,” 2018 Patent Damages Symposium, The Licensing Executive Society (Washington DC Chapter), September 2018 (with Stephen Crenshaw, Jennifer Vanderhart, Jeff Stec, and Stephen Holzen).
- “2018 Daubert Guideposts in Reasonable Royalty Estimation,” Daubert Motion and Patent Challenges in the 2018 Landscape: Significant Trends and Updates, The Knowledge Group, September 2018 (with James Donohue).
- “TCL v. Ericsson: Non-Discrimination,” TCL v. Ericsson FRAND Decision: Legal Implications, The Knowledge Group, September 2018 (with Alan Cox, Stephen Korniczky, and Mario Lopez).
- “Apportionment in Reasonable Royalty Cases,” Reasonable Royalty Damages, Apportionment and Expert Opinions in Light of *Exmark* Case, The Knowledge Group, May 2018 (with Matthew Lynde, Russell Mangum III, and Joel Wacek).
- “Apportionment in Reasonable Royalty Cases,” Apportionment in Patent Damages: What you Need to Know and Do, The Knowledge Group, March 2018 (with Daniel McGavock and John Scalf).
- “Post-Trial Remedies,” What Is My Intellectual Property Worth: Issues That Make a Difference Inside and Outside the Courtroom, Inaugural IP Conference on Issues that Make A Difference, University of Arizona James E. Rogers College of Law, March 2018 (with Timothy Sendek).
- “Design Patent Damages Before *Apple v. Samsung*,” Design Patent Damages: Hot Buttons in 2017 and Beyond, The Knowledge Group, July 2017 (with Barry Bell and Jeffery Stec).
- “Early Consideration of Patent Damages,” The Sedona Conference Webinar, June 2017 (with Hon. John Love, Melissa Finocchio, and Andrea Weiss Jeffries).
- “Permanent Injunctive Relief,” Recent Developments in Damages and Injunctions Law, IPO Damages & Injunctions Committee Conference, June 2017 (with Sarah Burstein, Mark Halligan, David Nelson, and Jenna Pellicchia).
- “U.S. Patent Landscape,” The European Patent Market – The Next Wave for Business? International In-House Counsel Journal 5th Annual Conference, March 2017 (with Anders Arvidsson, Mark Houghton, and Bruce Girvan).
- “The Conference on Patent Damages,” University of Texas School of Law, February 2017 (with David Abrams, Elizabeth Bailey, James Kearn, Shirley Webster, and Michael Risch).

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- “2016 Patent Damages Daubert Opinions,” The Evolving Landscape in the Calculation of Patent Damages – Reasonable Royalties, The Knowledge Group, February 2017 (with Barry Bell, James McGovern, and Jeffery Stec).
- “Commercial Success at the PTAB: 2016 Update,” Strafford Publications CLE Webinar, September 2016 (with Michael Flibbert and Maureen Queler).
- “Economic Perspectives on Recent Patent Damages Rulings,” Silicon Valley Intellectual Property Law Association, May 2016 (with Michael Chapman).
- “Recent Developments in Reasonable Royalty Damages,” Intellectual Property Owners Association Patent Damages Summit, May 2016 (with Charles Barquist, Douglas Melamed, Joseph Shear, and Karen Vogel Weil).
- “The Rise of the ‘Footprint’ Approach in Reasonable Royalty Damages: What’s New in 2016,” The Knowledge Group, February 2016 (with Lisa Cameron, Thomas Dunlap, Kevin Goldman, and Michael Padden).
- “Patent Infringement Reasonable Royalty Damages: Apportion the Increment?” Asian Pacific American Bar Association of Silicon Valley, November 2015 (with William Rooklidge, Michael Chapman, and Richard Eichmann).
- “Patent Enforcement,” Guest Lecturer, George Washington University Law School, September 2015 (with Chuck Donohoe), September 2016.
- “Commercial Success at the PTAB,” Strafford Publications CLE Webinar, August 2015 (with Michael Flibbert and Maureen Queler).
- “Patent Damages Developments in the US,” International Intellectual Property Law Association Global IP Summit, July 2015 (with Iain Connor and Ronald Courtney).
- “WG9 Panel: Development of a Preliminary Compensatory Damages Contentions (PCDCs) Process, Including the Drafting of Local Patent Damages Rules,” The Sedona Conference WG9 and WG10 Joint Midyear Meeting, May 2015 (with Marta Beckwith, Cathy Bissoon, Melissa Finocchio, Andrea Weiss Jeffries, and James Morando).
- “Commercial Success at the PTAB,” IPO Chat Channel Webinar, March 2015 (with Michael Flibbert and Pradeep Chintagunta).
- “WG9 Panel: Commentary on Development of Local Patent Rules for the Exchange of Preliminary Compensatory Damages Contentions (PCDCs),” The Sedona Conference All-Voices Meeting, November 2014 (with Marta Beckwith, Cathy Ann Bencivengo, John Desmarais, and Melissa Finocchio).
- “Patent Damages: How to Build a Case Now,” IPO Chat Channel Webinar, October 2014 (with Paul Grewal and Gary Hoffman).
- “WG9 Commentary on Patent Damages and Remedies,” The Sedona Conference Webinar, October 2014 (with Gary Hoffman, Michael Brody, Rachel Krevans, and William Rooklidge).
- “Economic Testimony in IP Litigation,” Inside Counsel Spotlight, August 2014.

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- “The Evolution of License Comparability in the Estimation of Reasonable Royalty Damages,” West Legal Education Center Webinar, July 2013 (with Carla Mulhern).
- “Georgia-Pacific and the Hypothetical Negotiation: Is the Tail Wagging the Dog?” Licensing Executives Society Washington DC Chapter Meeting, May 2012 (with Michael Chapman).
- “Early Evaluation of Damages in Patent Trials,” IPO Chat Channel Webinar, February 2012 (with Peter Armenio and Rachel Krevans).
- “Evolving IP Value: Recent Developments in Damages and Licensing,” Top IP Retreat 2011, September 2011 (with Michael Wagner).
- “Intellectual Property Valuation,” WIPO Summer School on Intellectual Property, USPTO, August 2011 (with Daria Killebrew).
- “Patent Infringement: Calculating Royalty Damages in a Post-Uniloc World,” Strafford Publications Webinar, March 2011 (with Paul Michel, George Pappas, and Carla Mulhern).
- “Uniloc v. Microsoft: The Decision and Its Impact on IP Valuation,” Licensing Executives Society Hot Topic Webinar, January 2011 (with Michael Lasinski, Justin Nelson, and Mohan Rao).
- “Patent Reform Update,” The District of Columbia Bar, January 2011 (with Paul Michel, Cheryl Miller, and Jason Everett).
- “Reasonable Royalties and Apportionment of Value,” CalCPA Education Foundation, IP Damages Institute 2010, November 2010 (with Michael Wagner, Karen Vogel Weil, and William Rooklidge).
- “What is a Trademark Worth?,” Stifel Retail Summer School at Columbia Business School, August 2010.
- “Economics of False Patent Marking,” BNA Webinar and Audioconferences, Recent Developments in the Law and Economics of False Patent Marking, July 2010 (with Anthony Roth and John Browning).
- “Economic Implications of Patent Reform,” Georgetown University McDonough School of Business, Center for Business and Public Policy; McKool Smith; and Analysis Group, Patent Reform 2010: What Shape Will it Finally Take?, June 2010 (with Paul Michel, Bernard Cassidy and Brian Riopelle).
- “Patent Auctions: How Far Have We Come?,” Licensing Executives Society Annual Meeting (Workshop 3-U), October 2009 (with Robin Heider).
- “Creating a Bullet-Proof Damages Case from Day One,” Minnesota’s CLE’s First Litigation Advocacy Institute: Winning Before Trial, June 2009.
- “Permanent Injunction: An Economist’s Perspective,” Strategies for Managing Intellectual Property Litigation Summit, February 2007.
- “Providing Effective Royalty Testimony,” Licensing Executives Society / Association of University Technology Managers Spring Meeting, May 2006 (with Carla Mulhern and Lisa Pirozzolo).
- “Intellectual Property Damages From An Economist’s Perspective,” The District of Columbia Bar, Trade Secrets Section, November 2005 (with Carla Mulhern, Abram Hoffman and Michael Morin).

John C. Jarosz, page 43

- “Valuation and Taxation Roundtable Discussion -- Hands on Application of Valuation Tools,” Licensing Executives Society Winter Meeting, February 2005 (with Serge-Alain Wandji).
- “Valuation and Pricing of IP,” Association of University Technology Managers Annual Meeting (Educational Track ED1), February 2005 (with Ashley Stevens, Jennifer Hartt and Andrew Maslow); Licensing Executives Society DC Chapter Meeting, February 2005.
- “Ingredients of a Damages Study,” Law Seminars International, Calculating and Proving Patent Damages, October 2004.
- “Current Topics in Technology Valuation,” Association of University Technology Managers Annual Meeting (Educational Track ED1), March 2004.
- “Creative Thinking on Remedies,” Law Seminars International, Trademarks Transactions and Litigation Workshop, July 2003.
- “Industry Royalty Rates and Profitability: An Empirical Test of the 25% Rule,” Licensing Executives Society Annual Meeting (Workshop 3-L), October 2001 (with Carla Mulhern and Robert Vigil).
- “Patent vs. Trade Secret Protection after 18-Month Publication and Festo--Monetary Relief,” Licensing Executives Society Annual Meeting (Workshop 2-M), October 2001 (with Griffith Price, Jr., John Williamson and Robert Payne).
- “The Design-Around Defense in Lost Profits Litigation,” Patent Lawyers Club of Washington, May 2000.
- “Use of the 25% Rule in Valuing Intellectual Property,” Center for Continuing Education, Santa Clara, California, December 1999.
- “Extracting Value from Intellectual Assets: Valuation,” INTX Seminar -- On the Frontier of Intellectual Asset Management: The Strategic Management of Intellectual Assets, November 1999.
- “Internet Patents – Monetary Remedies,” American Intellectual Property Law Association Mid-winter Meeting – IP Law in Cyberspace, February 1999 (with R. Jeffrey Malinak).
- “Industry Royalty Rates and Profitability: An Empirical Test of the 25% Rule,” Licensing Executives Society Annual Meeting (Workshop 3-11), October 1998 (with Carla Mulhern).
- “Royalty Rates and Awards with Patent Infringement Cases: 1916-1996,” Licensing Executives Society Annual Meeting (Workshop G3), November 1997.
- “Valuation of Technology,” Technology Transfer Society Annual Meeting, July 1997.
- “The Valuation and Licensing of Intellectual Property,” Launchspace, December 1996 (with Robert Goldscheider).
- “Quantifying and Valuing Royalties for Intellectual Property,” The 5th Intellectual Property Institute for Corporate Counsel, May 1996.
- “Taxes and Damages,” CPA/Lawyer Relations Committee, DC Institute of CPAs -Legal and Financial Implications of Damages in Litigation, October 1995.

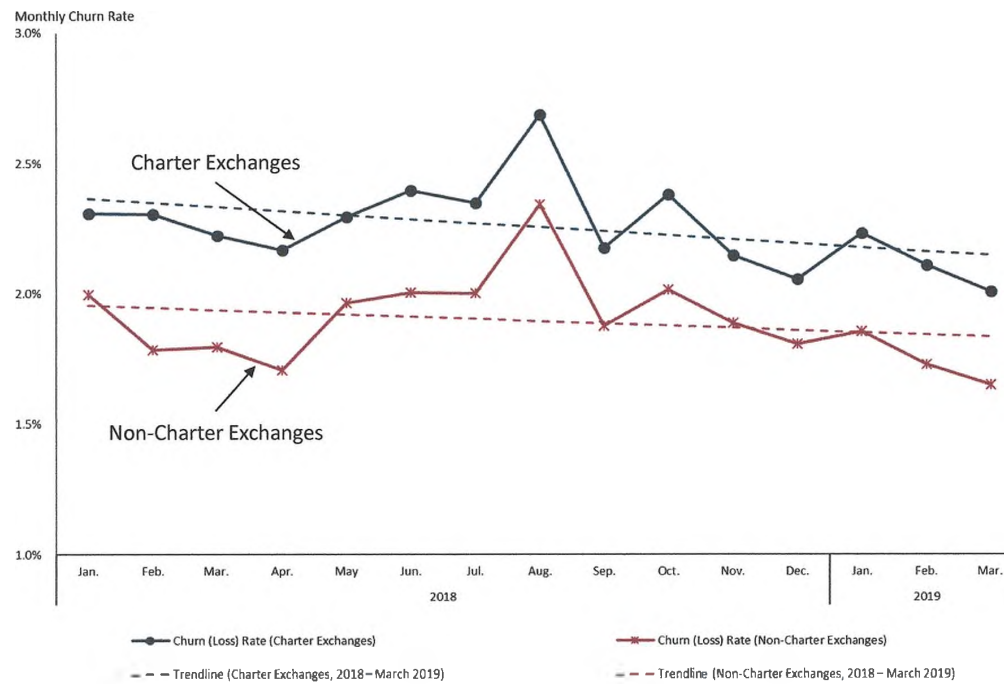
John C. Jarosz, page 44

- “Estimating Lost Profits in Commercial Litigation,” Maryland Association of Certified Public Accountants, Litigation Support Service Conferences, May 1995.
- “Damages in Patent and Trademark Infringement,” Joint American Society of Appraisers and Canadian Institute of Chartered Business Valuators meeting, November 1994.

TAB 2

Tab 2

Parallel Trend Analysis



TAB 3

Tab 3

Windstream's Churn Rates

	Before Charter Campaign	After Charter Campaign	Difference
Charter Exchanges	11.88%	12.58%	0.70%
Non-Charter Exchanges	10.05%	10.36%	0.32%
Difference	1.83%	2.22%	0.38%

TAB 4

Tab 4

Windstream Lost Profits

Increased Churn (Turnover)		0.38 %
Windstream Customers	×	360,865
Lost Customers		1,386
Monthly Revenues / Customer	×	\$77.63
Months of Loss	×	50
Lost Revenues		\$5.4 Million
Profit Margin	×	59.2% – 94.5%

Lost Profits

\$3.2 – \$5.1 Million

From: Ross, Terence P. <terence.ross@kattenlaw.com>
Sent: Thursday, May 2, 2019 3:03 PM
To: Kingston, John S.; Hockett, Brian W.
Cc: Rochester, Shaya; Sims, Tami Kameda
Subject: RE: Windstream Matter

Follow Up Flag: Follow up
Flag Status: Completed

You are correct about Ms. Foudy.

From: Kingston, John S. <jkingston@thompsoncoburn.com>
Sent: Thursday, May 2, 2019 3:20 PM
To: Ross, Terence P. <terence.ross@kattenlaw.com>; Hockett, Brian W. <bhockett@thompsoncoburn.com>
Cc: Rochester, Shaya <shaya.rochester@kattenlaw.com>; Sims, Tami Kameda <tami.sims@kattenlaw.com>
Subject: RE: Windstream Matter

Terry,

This email will confirm that the actions described below resolve the conflict issue we raised with respect to Mr. Reisman for the purposes of Windstream bankruptcy and the related adversary proceeding.

I believe that you've already confirmed that Ms. Foudy has not disclosed any confidences related to the Charter v. DirecTV matter. If I'm mistaken, please advise.

Regards,

John

John S. Kingston
jkingston@thompsoncoburn.com
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From: Ross, Terence P. <terence.ross@kattenlaw.com>
Sent: Wednesday, May 1, 2019 3:26 PM
To: Kingston, John S. <jkingston@thompsoncoburn.com>; Hockett, Brian W. <bhockett@thompsoncoburn.com>
Cc: Rochester, Shaya <shaya.rochester@kattenlaw.com>; Sims, Tami Kameda <tami.sims@kattenlaw.com>
Subject: Windstream Matter

John:

Pursuant to our phone call on Monday, I am writing to inform you that we have taken the following steps relating to the alleged conflict you have raised about Steven Reisman. First, Mr. Reisman has formally withdrawn from the adversary proceeding captioned, *Windstream*

Holdings, Inc., et al, v Charter Communications, Inc., et al., Case No. 19-22312 (RDD) (Bankr. SDNY) (the "Litigation"). A Notice of Withdrawal has been filed with the Court. Second, effective as of April 29, 2019, our Firm has put in a place an ethical screen that "walls off" Mr. Reisman from the Litigation. Third, I have confirmed that Mr. Reisman has not disclosed any confidential information he may have received regarding Charter in the DirecTV matter from ten years ago to anyone at our Firm.

As you are aware, we do not believe that Mr. Reisman has any conflict of interest with respect to the Litigation. We have undertaken the foregoing steps solely for the purpose of resolving a dispute between the parties and to avoid any litigation over the matter. In exchange for taking the above-described steps, you have agreed on behalf of your clients, the Defendants in the above-captioned adversary proceeding, to accept that our actions resolve the alleged conflict and that the Defendants will not seek to disqualify our Firm or any of its lawyers in the Litigation. Please confirm the foregoing through an email replying to this email.

Thanks
Terry Ross

Terence P. Ross

Partner, National Co-Chair Intellectual Property Litigation

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NOTIFICATION: Katten Muchin Rosenman LLP is an Illinois limited liability partnership that has elected to be governed by the Illinois Uniform Partnership Act (1997).

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