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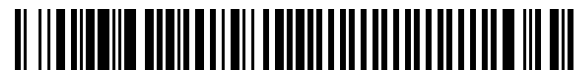
*Conflicts Counsel to the Debtors and Debtors in Possession*

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

In re:	)	
	)	Chapter 11
WINDSTREAM HOLDINGS, INC., <i>et al.</i> , <sup>1</sup>	)	
	)	Case No. 19-22312 (RDD)
Debtors.	)	
	)	(Jointly Administered)
<hr/>		
WINDSTREAM HOLDINGS, INC., <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	Adv. Pro. No. 19-08246
	)	
v.	)	
	)	
CHARTER COMMUNICATIONS, INC. and	)	
CHARTER COMMUNICATIONS OPERATING, LLC,	)	
	)	
Defendants.	)	
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**DEBTORS' MOTION *IN LIMINE* TO STRIKE DEFENDANTS'  
USE AT TRIAL OF CERTAIN DEPOSITION TESTIMONY,  
EXHIBITS, AND PROPOSED TRIAL TESTIMONY**

<sup>1</sup> The last four digits of Debtor Windstream Holdings, Inc.'s tax identification number are 7717. Due to the large number of debtor entities in these Chapter 11 cases, for which joint administration has been granted, a complete list of the debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors' claims and noticing agent at <http://www.kccllc.net/windstream>. The location of the Debtors' service address for purposes of these Chapter 11 cases is: 4001 North Rodney Parham Road, Little Rock, Arkansas 72212.



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Windstream Holdings, Inc. and its debtor affiliates, as debtors and debtors in possession in the above-captioned Chapter 11 cases (collectively, “Debtors” or “Windstream”), and as plaintiffs in the above-captioned adversary proceeding, respectfully submit this Motion *In Limine* to Strike Defendants’ Use at Trial of Certain Deposition Testimony, Exhibits, and Proposed Trial Testimony.

### **FACTUAL BACKGROUND**

On March 2, 2020, Defendants Charter Communications, Inc. and Charter Communications Operating, LLC (collectively, “Charter”) disclosed designations of deposition testimony and exhibits that they intend to use at trial. (Adv. Dkt. No. 272). Charter designated portions of testimony from depositions taken pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, including the depositions of the following Charter corporate designees: Kelly Atkinson (taken on May 1, 2019 and September 19, 2019); Keith Dardis (taken on May 1, 2019); and Frederick Gunzel (taken on September 19, 2019). (*Id.*). All three of these witnesses are executives employed by Charter and work at Charter’s headquarters in Stamford, Connecticut, which is within 100 miles of this courthouse. All three of these witnesses gave deposition testimony in this adversary proceeding as Rule 30(b)(6) witnesses for Charter.

Charter also designated certain trial exhibits that it intends to rely on at trial. Among these exhibits were expert reports and related documents that were already excluded by the Court. Charter designated trial exhibits relating to the already-excluded expert testimony of Henry Ostberg, namely: the October 18, 2019 Expert Report of Henry Ostberg (the “Ostberg Affirmative Report”) (Charter Trial Ex. 20) and documents attached thereto (Charter Trial Exs. 99, 100, 152); and the attachments to the October 25, 2019 Rebuttal Report of Henry Ostberg offered as a rebuttal to the Expert Report of John C. Jarosz (the “Ostberg Rebuttal Report”) (Charter Trial Exs. 101,

156). Charter has designated the Ostberg Affirmative Report and its attachments, and the attachments to the Ostberg Rebuttal Report, as proposed trial exhibits, despite the Court's order prohibiting any expert testimony from Mr. Ostberg in this adversary proceeding and the Court's exclusion of the Ostberg Affirmative Report and the Ostberg Rebuttal Report. (Adv. Dkt. Nos. 112, 251).

Similarly, Charter designated as trial exhibits certain portions of the October 18, 2019 Expert Report of Robert Borders (the "Borders Affirmative Report") (Charter Trial Ex. 157),<sup>2</sup> and documents attached to the Borders Affirmative Report (Charter Trial Exs. 90, 91, 92, 153), despite the Court's exclusion of the Borders Affirmative Report. (See Adv. Dkt. No. 112).<sup>3</sup>

Charter also designated certain trial exhibits that only relate to liability issues already decided by the Court at summary judgment. (Charter Trial Exs. 1-3, 5-6, 8-9, 12-20, 22-25, 29-30, 32-36, 47-51, 53-71, 77, 81-87, 90-92, 96-97, 99-101, 105-108, 110-139, 141-143, 145-364). Those are irrelevant to this trial.

Finally, on April 20, 2020, Charter submitted the Trial Declaration of Robert Borders ("Borders Trial Declaration") that it intends to use as Mr. Borders' direct testimony at trial. The Borders Trial Declaration recasts the already-excluded Borders Affirmative Report into the form of a declaration, despite the Court's exclusion of the Borders Affirmative Report.

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<sup>2</sup> The Borders Affirmative Report and its attachments are available at Adv. Dkt. No. 113, Ex. C.

<sup>3</sup> As it did with Mr. Ostberg, Charter disclosed two putative expert reports of Robert Borders: (i) the October 18, 2019 Borders Affirmative Report discussed herein; and (ii) a second report served on October 25, 2019 (the "Borders Rebuttal Report") offered as a rebuttal to the Expert Report of John C. Jarosz. The Borders Rebuttal Report is not a subject of this Motion. This Court already excluded *in part* the Borders Rebuttal Report and Mr. Borders' testimony relating thereto in its January 28, 2020 Order ruling on Windstream's *Daubert* motion. (Adv. Dkt. No. 252). As provided in the Court's Order, Windstream reserves the right to renew its *Daubert* motion at trial based on the actual testimony of Mr. Borders.

## ARGUMENT

### I. CHARTER'S DESIGNATION OF DEPOSITION TESTIMONY OF ITS CORPORATE DESIGNEES MUST BE STRICKEN.

Debtors move to strike Charter's use at trial of the Rule 30(b)(6) deposition testimony of its corporate designees. As discussed in detail below, Rule 32(a) of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by Rule 7032 of the Federal Rules of Bankruptcy Procedure, prohibits the use of such testimony here.

"[A] witness's live in-court testimony is the preferred method of presenting his or her testimony." *Strategic Value Master Fund, Ltd. v. Cargill Fin. Servs. Corp.*, 421 F. Supp. 2d 741, 769 (S.D.N.Y. 2006). *Accord Aristocrat Leisure Ltd. v. Deutsche Bank Tr. Co. Americas*, No. 04-cv-10014, 2009 WL 3111766, at \*19 (S.D.N.Y. Sept. 28, 2009); *Banks v. Yokemick*, 144 F. Supp. 2d 272, 288 (S.D.N.Y. 2001) ("deposition testimony is only a substitute, not to be resorted to if the witness can appear in person."). This preference for live testimony in federal courts is reflected in Rule 32(a) of the Federal Rules of Civil Procedure. Rule 32(a) limits the use of deposition testimony to seven narrow situations. Fed. R. Civ. P. 32(a)(1)(C) (use of a deposition at trial is only permitted if "the use is allowed by Rule 32(a)(2)-(8)"). None of these seven provisions allow Charter's proposed use of the deposition testimony of its own corporate designees.<sup>4</sup> Indeed, Rule 32(a)(3) specifically address the use of deposition testimony of corporate designees. Rule 32(a)(3) expressly limits the use of deposition testimony of corporate designees to an *adverse* party. Fed.

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<sup>4</sup> Charter may rely on such deposition testimony for impeachment purposes under Rule 32(a)(2), but it is incomprehensible why Charter would impeach its own corporate executives. Charter, however, cannot rely on Rule 32(a)(6) because its designation of these depositions were not made in *response* to Windstream's own designation depositions. In fact, Charter did not even know of Windstream's deposition designations at the time Charter made its disclosures.

R. Civ. P. 32(a)(3) (“An *adverse* party may use for any purpose the deposition of a party or anyone who, when deposed, was the . . . designee under Rule 30(b)(6)[.]”) (emphasis added).

Charter identified Kelly Atkinson, Keith Dardis, and Frederick Gunzel as its corporate designees for Rule 30(b)(6) depositions. Now, Charter seeks to use their Rule 30(b)(6) deposition testimony at trial. Although Rule 32(a)(3) allows an “adverse party”—like Windstream—to “use for any purpose the deposition of . . . anyone, who when deposed, was the party’s . . . designee under Rule 30(b)(6),” it does not similarly permit Charter to do so. Thus, Charter cannot use the deposition testimony of Kelly Atkinson, Keith Dardis, and Frederick Gunzel at trial. Accordingly, Charter’s designations of their own corporate designees’ deposition testimony must be stricken. To the extent that Charter wishes to have its corporate designees testify at trial, Charter must have them appear live subject to cross-examination.<sup>5</sup>

## **II. CHARTER’S DESIGNATION OF THE OSTBERG AFFIRMATIVE REPORT, ITS ATTACHMENTS, AND ATTACHMENTS FROM THE OSTBERG REBUTTAL REPORT AS TRIAL EXHIBITS MUST BE STRICKEN.**

Charter designated the Ostberg Affirmative Report, the attachments thereto, and the attachments to the Ostberg Rebuttal Report, as exhibits that it intends to use at trial. (Charter Trial Exs. 20, 99, 100, 101, 152, 156). The Court, however, has excluded Mr. Ostberg from this adversary proceeding. (Adv. Dkt. No. 251). Specifically, the Court entered an Order on January 28, 2020, directing in pertinent part:

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<sup>5</sup> Charter cannot avail itself of Rule 32(a)(4) here. Rule 32(a)(4) permits deposition testimony to be used for any purpose at trial if the witness is “unavailable.” Fed. R. Civ. P. 32(a)(4). A witness is unavailable if he or she is “more than 100 miles from the place of hearing or trial[.]” Fed. R. Civ. P. 32(a)(4)(B). Kelly Atkinson, Keith Dardis, and Frederick Gunzel have each testified during deposition or at previous hearings that they are located at and work out of Charter’s headquarters in Stamford, Connecticut, which is approximately 20 miles from the courthouse. Thus, these witnesses do not qualify as “unavailable,” and Charter may not rely on this exception to the general rule in order to use their deposition testimony at trial.

“Henry D. Ostberg shall not be permitted to offer expert testimony in the Adversary Proceeding or any matters related thereto.”

(*Id.*). In addition, the Court excluded the Ostberg Affirmative Report and the Ostberg Rebuttal Report from this adversary proceeding. (*Id.*; Adv. Dkt. No. 112). Accordingly, the Ostberg Affirmative Report and its attachments, Charter Trial Exs. 20, 99, 100, 152, and the attachments to the Ostberg Rebuttal Report, Charter Trial Exs. 101 and 156, cannot be used by Charter at trial and must be stricken.

### **III. CHARTER’S DESIGNATION OF THE OSTBERG AFFIRMATIVE REPORT AND ITS ATTACHMENTS ALSO CONSTITUTE IMPERMISSIBLE HEARSAY.**

In addition to being excluded by the Court, the Ostberg Affirmative Report and its attachments, and the attachments to the Ostberg Rebuttal Report, also constitute inadmissible hearsay under Rules 801 and 802 of the Federal Rules of Evidence, made applicable in this adversary proceeding by Rule 9017 of the Federal Rules of Bankruptcy Procedure. This Court has noted that: “As a rule, expert reports are hearsay.” *Sec. Inv’r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 610 B.R. 197, 224 (Bankr. S.D.N.Y. 2019) (citing *In re Quigley Co., Inc.*, 437 B.R. 102, 151 (Bankr. S.D.N.Y. 2010) (granting defendant’s motion to exclude expert report submitted by trustee)). Accordingly, Charter’s designation of the Ostberg Affirmative Report and the attachments thereto, and the attachments to the Ostberg Rebuttal Report, must be stricken for the additional reason that they constitute hearsay.

### **IV. CHARTER’S DESIGNATION OF PORTIONS OF THE BORDERS AFFIRMATIVE REPORT AND ITS ATTACHMENTS AS TRIAL EXHIBITS MUST BE STRICKEN.**

Charter designated portions of the Borders Affirmative Report and the attachments thereto as exhibits that it intends to use at trial. (Charter Exs. 90, 91, 92, 153, 157). The Court, however, has excluded the Borders Affirmative Report from this adversary proceeding. Specifically, the Court held a teleconference hearing on November 8, 2019, in response to Windstream’s October



22, 2019 letter-motion requesting exclusion of the Borders Affirmative Report. (*See* Adv. Dkt. No. 112). Windstream’s letter-motion sought exclusion of the Borders Affirmative Report on grounds that it was untimely, improper rebuttal under Rules 26 and 37 of the Federal Rules of Civil Procedure and pursuant to *Softel, Inc. v. Dragon Med. & Scientific Commc’ns, Inc.*, 118 F.3d 955, 961 (2d Cir. 1997). In addition, Windstream argued it was irrelevant under Rule 702 of the Federal Rules of Evidence.<sup>6</sup> (*Id.*). Specifically, Charter improperly filed the Borders Affirmative Report as a “rebuttal” report on October 18, 2019—rebuttal report deadline—despite the fact that Windstream had not disclosed an affirmative expert report relating to the subject matter of the Borders Affirmative Report (*i.e.*, generally accepted practices in direct-mail marketing). In other words, the Borders Affirmative Report could not be a rebuttal report because there was no corresponding affirmative expert report to rebut. Instead, the Borders Affirmative Report was an untimely affirmative expert report that should have been disclosed on October 4, 2019, not on October 18, 2019. Further, the Borders Affirmative Report was irrelevant because, even if Charter followed industry practice in designing its false mailer, that is not a defense to false advertising.<sup>7</sup> The Court advised counsel for both parties on the November 8, 2019 teleconference hearing that the Borders Affirmative Report was stricken under *Softel*.<sup>8</sup> Accordingly, the portions of the

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<sup>6</sup> Windstream’s letter-motion also sought exclusion of the Ostberg Affirmative Report on the same grounds, which the Court also granted on the teleconference hearing.

<sup>7</sup> Indeed, the Court has now held that Charter is liable for false advertising as a matter of law. (Adv. Dkt. No. 274).

<sup>8</sup> Because the Court excluded the Borders Affirmative Report and Ostberg Affirmative Report, Windstream did not seek to depose Mr. Borders or Mr. Ostberg regarding those stricken reports, nor did Windstream file *Daubert* motions relating to those stricken reports. Thus, to allow them into evidence now would unfairly prejudice Windstream.

Borders Affirmative Report, Charter Trial Ex. 157, and the attachments to the Borders Affirmative Report, Charter Trial Exs. 90, 91, 92, 153, cannot be used by Charter at trial and must be stricken.<sup>9</sup>

**V. CHARTER'S DESIGNATION OF TRIAL EXHIBITS RELATING TO ALREADY-DECIDED LIABILITY ISSUES ARE IRRELEVANT AND MUST BE STRICKEN.**

The Court has already held that Charter breached the VAR and engaged in false and intentionally deceptive advertising in violation of the Lanham Act and various state laws. (Adv. Dkt. No. 274). The Court has also already held that Charter's breach of the VAR and false advertising constitute a violation of the automatic stay under Count VI of the Complaint and inequitable conduct under Count VII of the Complaint. (*Id.*). Notwithstanding this, Charter has disclosed numerous proposed trial exhibits that are clearly related to these liability findings. This includes at least the following exhibits: Charter Exs. 1-3, 5-6, 8-9, 12-20, 22-25, 29-30, 32-36, 47-51, 53-71, 77, 81-87, 90-92, 96-97, 99-101, 105-108, 110-139, 141-143, 145-364. Because the Court has already decided that Charter breached the VAR, that Charter engaged in intentional false advertising, that Charter violated the automatic stay and that Charter engaged in inequitable conduct, all of Charter's proposed trial exhibits that seek to relitigate these holdings are irrelevant to the issues at trial and must be stricken. *See* Fed. R. Civ. P. 401, 402.

**VI. THE BORDERS TRIAL DECLARATION MUST BE STRICKEN.**

On April 20, 2020, Charter submitted the Borders Trial Declaration that it intends to use as Mr. Borders' direct testimony at trial. The Borders Trial Declaration recasts the already-excluded Borders Affirmative Report into the form of a testimonial declaration, despite the Court's

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<sup>9</sup> For the reasons discussed in Section III above, the portions of the Borders Affirmative Report, Charter Trial Ex. 157, and the attachments to the Borders Affirmative Report, Charter Trial Exs. 90, 91, 92, 153, also must be stricken as inadmissible hearsay.

exclusion of the Borders Affirmative Report. For the same reasons discussed in Section IV above, the Borders Trial Declaration must be stricken.<sup>10</sup>

### CONCLUSION

For the foregoing reasons, Windstream respectfully requests that the Court grant its Motion *In Limine* and strike Charter's designation of deposition testimony by its corporate designees, the Ostberg Report and its attachments, the attachments to the Ostberg Rebuttal Report, the portions of the Borders Report and its attachments, the documents relating to already-decided liability issues, and the Borders Trial Declaration.

Dated: April 22, 2020  
New York, NY

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*Conflicts Counsel to the Debtors and Debtors in Possession*

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<sup>10</sup> If the Borders Trial Declaration contained testimony relating solely to the portions of the Borders Rebuttal Report that the Court did not strike in its *Daubert* ruling (Adv. Dkt. No. 252), Windstream would not move *in limine* to exclude such testimony, if timely submitted. But Charter chose to put forth Mr. Borders to testify only regarding the already-stricken Borders Affirmative Report, and such testimony must be stricken.

**CERTIFICATE OF SERVICE**

I hereby certify that, on April 22, 2020, I caused a true and correct copy of the Debtors' Motion *In Limine* To Strike Defendants' Use At Trial Of Certain Deposition Testimony, Exhibits, And Proposed Trial Testimony to be filed electronically using the CM/ECF system, which will then send a notification of such filing (NEF) to all counsel of record in this lawsuit.

/s/ Terence P. Ross

Terence P. Ross