John Kingston (*pro hac vice*)
Michael Nepple (*pro hac vice*)
Brian Hockett (*pro hac vice*)
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis, MO 63101
Telephone: (314) 552-6000
Facsimile: (314) 552-7000

Counsel 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.,	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' OPPOSITION TO PLAINTIFFS' MOTION *IN LIMINE*

Defendants Charter Communications, Inc. and Charter Communications Operating, LLC (collectively, Defendants) state as follows for their Opposition to Plaintiffs' Motion *in Limine* (Dkt. No. 300):

INTRODUCTION

The parties' identified exhibits and designated deposition testimony while Counts I through VII were still slated to be tried as a single unit. *See* Dkt. No. 270, at 61:5-9. The District Court has now withdrawn the automatic reference with respect to Counts I through V of Plaintiffs' Complaint. *See Windstream Holdings, Inc., et al. v. Charter Communications, Inc. et al*, Case No. 7:19-cv-09354-CS, April 24, 2020 Minute Entry re Dkt. No. 38. In light of that development, Plaintiffs' motion is largely moot.

Given this Court's interlocutory partial summary judgment order based on the evidence offered in connection with in the parties' cross motions for summary judgment, the remaining trial issues on Plaintiffs' Civil Contempt claim (Count VI) are (1) whether § 362(a) of Title 11, U.S.C., clearly and an unambiguously forbade, *inter alia*, the subject advertising and, and if so, (2) whether Defendants acted maliciously in not diligently attempting to comply with those unambiguous prohibitions. *See* Dkt. No. 274. *See, e.g., Perez v. Danbury Hosp.*, 347 F.3d 419, 423-24 (2d Cir. 2003); *Drywall Tapers & Pointers of Greater N.Y. v. Local 530 of Operative Plasterers*, 889 F.2d 389, 395 (2d Cir. 1989) (an essential element of civil contempt is that "the party enjoined must be able to ascertain from the **four corners** of the order precisely what acts are forbidden") (emphasis added).[1] *See also In re Markus*, 607 B.R. 379, 395 (Bankr. S.D.N.Y. 2019) (noting a clear and

[1] The necessity that the conduct underpinning a contempt sanction be clearly and unambiguously proscribed by the subject order is a Due Process requirement. *See Erhardt v. Prudential Grp., Inc.*, 629 F.2d 843, 846–47 (2d Cir. 1980).

In *In re Crysen/Montenay Energy Co.*, 902 F.2d 1098, 1105 (2d Cir. 1990), the Second Circuit established the standard for imposing non-contempt sanctions under § 362(k): "any deliberate act taken in violation of a stay, which the violator knows to be in existence." The Second Circuit unequivocally held that the lenient *Crysen/Montenay* standard applies "ONLY" to claims brought by a natural person; it does not apply to corporate claimants like the 205 plaintiffs asserting claims here. *In re Chateaugay Corp.*, 920 F.2d 183, 186–87 (2d Cir. 1990) ("We now hold that a bankruptcy court may impose sanctions pursuant to § 362(h), under the standard set out in *Crysen/Montenay*, **only** for violating a stay as to debtors who are natural persons.") (emphasis added).

unambiguous order "must be such that it enables the enjoined party to ascertain from the four corners of the order precisely what acts are forbidden."); *Zino Davidoff SA v. CVS Corp.*, No. 06-cv-15332, 2008 WL 1775410, at *13 (S.D.N.Y. Apr. 17, 2008).

If the Defendants acted maliciously in failing to be reasonably diligent in their efforts to comply with an unambiguous prohibition of the Automatic Stay, then the Court will need to determine each plaintiff's damages, if any, caused by that noncompliance and the monetary award necessary to remedy the damages,[2] if any, suffered by each plaintiff and whether there is any necessity for coercive sanctions. *See, e.g., Perfect Fit Indus., Inc. v. Acme Quilting Co.*, 646 F.2d 800, 810 (2d Cir. 1981) ("If a fine is imposed for compensatory purposes, the amount of the fine must be based upon the complainant's actual losses sustained as a result of the contumacy."); *Hatahley v. United States*, 351 U.S. 173, 182 (1956) (remand for particularized fact-finding required where trial court made "no attempt to allot any particular sum to any of the 30 plaintiffs");

Drywall, cited above, was one of two Second Circuit decisions the *Chateaugay* court cited for the proposition that civil contempt was available for an Automatic Stay violation. *In re Chateaugay Corp.*, 920 F.2d at 186–87. In the other, *Fid. Mortg. Inv'rs v. Camelia Builders, Inc.*, 550 F.2d 47, 51 (2d Cir. 1976), the court stated "It is, of course, true that, for a person to be held in contempt, the court order violated must 'be specific and definite.'" Given its express holding that the lenient *Crysen/Montenay* standard is not available for corporate debtors and its citation of decisions reiterating, e.g., the "specific and definite" notice requirement and "four corner" rule, the Second Circuit's *Chateaugay* decision does not suggest the civil contempt standard in bankruptcy court is any lower than the civil contempt standard in any other federal court. Indeed, the court suggested a heightened civil contempt standard in context of a claim based on a stay violation where "contempt involves maliciousness." *In re Chateaugay Corp.*, 920 F.2d 183, 187 (2d Cir. 1990) (citing *Crysen/Montenay*)

[2] Plaintiffs' proposed sanction/damage distinction is nonsensical. First, Plaintiffs don't seek "sanctions" in their Complaint. They seek "damages according to proof." Dkt. No. 1 at 29. Second, sanctions are equivalent to legal damages. *See U.S. v. United Mine Workers of Am.*, 330 U.S. 258, 304 (1947) ("Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy."); *New York State Nat. Org. for Women v. Terry*, 886 F.2d 1339, 1353 (2d Cir. 1989) ("Compensatory sanctions should reimburse the injured party for its actual damages.").

Windstream Holdings, Inc., et al. v. Charter Communications, Inc., et al., 7:19-cv-09354-CS, April 21, 2020, Bench Ruling at 15:10-11 ("Each plaintiff will still need to prove its damages at trial.").

The remaining issues for thirty-six plaintiffs' equitable subordination claims (Count VII) are whether creditors have been harmed or their debt collection efforts unfairly impaired by the conduct determined was undisputed in its interlocutory partial summary judgment ruling. *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.").

Given the scope of the remaining issues for trial (and depending on what evidence Plaintiffs are permitted to adduce in their case in chief), many of the exhibits and deposition designations at issue in Plaintiffs' motion may no longer be necessary. Moreover, it will be impossible to rule on most of Plaintiffs' evidentiary objections before the Court is apprised of the purpose for which Defendants are offering it. For example, an out of court statement that is not offered for the truth of the matter asserted is not hearsay, Fed. R. Evid. 801, and can hardly be excluded by Plaintiffs' invocation of the general rule against hearsay, Fed. R. Evid. 802.

ARGUMENT

I. The deposition testimony of Defendants' corporate designees is admissible under Fed. R. Civ. P. 32(a)(6).

Plaintiffs have offered parts of the corporate representative depositions at issue throughout this proceeding. Indeed, those deposition designations were the basis for this Court's interlocutory finding that there was no dispute as to the fact that Defendants' violated the automatic stay by establishing a protocol whereby a disconnection of service would "be robotically or automatically triggered." Dkt No. 237, at 150:13-152:19 (granting plaintiffs' summary judgment motion "insofar as it seeks a determination that the automatic stay was violated by the termination of

service"). Plaintiffs have included corporate representative designations in their pretrial disclosures. Where a party has offered a part of a deposition in evidence—as Plaintiffs already have done and apparently intend to do at trial—"any party may itself introduce any other parts." Fed. R. Civ. P. 32(a)(6). Thus, the subject depositions are admissible at a hearing or trial under Rule 32(a)(1) because Plaintiffs' counsel—having noticed the depositions—was present and the subject depositions will only be used to the extent they would be admissible under the Federal Rule of Evidence if the deponent were testifying live.

Video files of all depositions with both Plaintiffs' and Defendants' designations will be provided to the Court. Given that this is a bench trial conducted via Skype, Plaintiffs' claimed preference for live testimony rings hollow. There is no risk of jury confusion. And the video deposition testimony was taken under circumstances much more akin to an in-person trial than the remote testimony to be presented next week. *Accord, e.g., Forrester Environmental Services, Inc. v. Wheelabrator Technologies, Inc.*, 2012 DNH 68, 2012 WL 1161125, *2 (D.N.H. 2012) ("Where a deposition has been videotaped… any advantage to live testimony is diminished, as the finder of fact will still have the opportunity to observe the witness's body language and to hear the spoken testimony."); *McDaniel v. BSN Medical,Inc*., 2010 WL 2464970, *4 (W.D. Ky. 2010) ("[A]ny concern over the inability for the jury to assess [the witness's] credibility is significantly alleviated because the deposition will be presented to the jury by video rather than being read from a transcript.").

II. <u>This Court did not exclude Mr. Borders' relevant and timely expert report.</u>

Mr. Borders' expert report and trial declaration are admissible because (1) this court never excluded Mr. Borders' October 18, 2019 rebuttal report, (2) Mr. Borders' report is relevant to

whether Defendants acted with maliciousness or failed to be reasonably diligent in their adherence to industry standards; and (3) the disclosure of Mr. Borders' rebuttal report was not untimely.

Contrary to Plaintiffs' assertion, this Court has not entered an order excluding Mr. Borders' October 18, 2019 expert report. Unlike the order preluding Dr. Ostberg, this Court's order with respect to Mr. Borders is expressly limited to the opinions in his October 25, 2019 expert report. *Compare* ECF No. 251 ("Ostberg shall not be permitted to offer expert testimony in the Adversary Proceeding") and 252 (containing no similar language and only addressing "Mr. Borders' October 25, 2019 expert report"). Defendants do not propose to offer testimony addressed in Mr. Border's October 25, 2019 report.

Plaintiffs' contend Mr. Borders' opinion that Defendants followed industry practice is irrelevant because it is not a defense to false advertising. But Mr. Borders's opinions are relevant to rebut Plaintiffs' proof on the question of maliciousness and/or reasonable diligence.

Lastly, Mr. Borders' October 18, 2019 rebuttal report was properly disclosed on the rebuttal expert disclosure deadline. Courts in this Circuit recognize that the definition of "rebuttal" evidence for a defendant is essentially identical to that of "relevant" evidence. *See, e.g., In re Puda Coal*, 30 F. Supp. 3d at 252 ("It is typically the case that evidence presented in defense to a claim would be 'rebuttal' evidence; if it is not, it would be, in effect, irrelevant under Rule 401."); *United States v. Barrow*, 400 F.3d 109, 120 (2d Cir. 2005) (applying a similar "commonly understood meaning" of "rebuttal" in construing a proffer agreement between the parties). Put simply, a rebuttal report can address any evidence Plaintiffs present in support of their claim; it is not limited to rebutting affirmative expert reports.

Moreover, Plaintiffs fail to explain why the alleged untimely disclosure of Mr. Borders' rebuttal report warrants the harsh remedy of excluding Mr. Borders' expert testimony. *See Update*

Art, Inc. v. Modiin Pub., Ltd., 843 F.2d 67, 71-72 (2d Cir. 1988) (expert preclusion is a harsh remedy that "should be imposed only in rare situations"). First, any alleged failure to comply with the rebuttal deadline was the result of Defendants' reading of the term "rebuttal" in exactly the same way as the Southern District and Second Circuit have read the word "rebuttal." *See In re Puda Coal*, 30 F. Supp. 3d at 252; *Barrow*, 400 F.3d at 120. Second, Mr. Borders' opinions rebutting Plaintiffs' contentions on the element of reasonable diligence are "critical" to Defendants' defense. *See Zerega Ave. Realty Corp. v. Hornbeck Offshore Transp., LLC,* 571 F.3d 206, 213 (2d Cir. 2009) (trial court abused its discretion in excluding expert opinion, in part, because "the testimony of [the expert] was critical to Hornbeck's defense"). Third, Plaintiffs suffered no prejudice because they deposed Mr. Borders on October 31, 2019. Plaintiffs marked Mr. Borders' October 18, 2019 rebuttal report as an exhibit in that deposition, but declined to question him about it.

III. To the extent they have not been mooted by the withdrawal of the reference for Counts I through V, Defendants' arguments about exhibits that have not been offered into evidence are premature.

Many of the exhibits Plaintiffs seek to exclude relate to the Counts that have been withdrawn to the District Court. But, depending on what evidence Plaintiffs are permitted to adduce, certain of those exhibits may become relevant for other purposes. *See* Fed. R. Evid. 105 (evidence inadmissible for one purpose may be admitted for another purpose). *See U.S. v. Lombardozzi*, S1 02 CR.273(PKL), 2003 WL 1907969, at *3 (S.D.N.Y. 2003) (while evidence of other acts was not admissible to prove character, "the Second Circuit has found such evidence admissible for a variety of other purposes") (citing *United States v. Pascarella*, 84 F.3d 61, 69 (2d Cir. 1996)); *Olin Corp. v. Ins. Co. of N.A*., 603 F. Supp. 445, 449 (S.D.N.Y. 1985) ("statements

made in compromise negotiations [are] not admissible to prove liability or invalidity of the claim, although it may be admissible on other grounds, including to prove bias or prejudice of a witness").

Similarly, Defendants do not intend to offer the Ostberg expert reports, and attachments thereto, for the truth of the matters asserted therein. Defendants simply list the Ostberg reports to reserve the right to offer them for an admissible purpose during trial. Defendants suggest that this Court should defer ruling on the admissibility of exhibits unless and until they have been offered and the Court has been informed of the basis for which they have been offered.

Dated: April 24, 2020

Respectfully submitted,

/s/ John Kingston

John Kingston (pro hac vice)
Michael Nepple (pro hac vice)
Brian Hockett (pro hac vice)
THOMPSON COBURN LLP
One U.S. Bank Plaza
St. Louis, MO 63101
314-552-6461
314-552-7000 (f)
jkingston@thompsoncoburn.com
mnepple@thompsoncoburn.com
bhockett@thompsoncoburn.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 24th of April, 2020, I served a true and correct copy of the foregoing ***Defendants' Opposition to Plaintiffs' 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' Opposition to Plaintiffs' Motion in Limine*** via email to the following:

Terence P. Ross
Kristin Lockhart
Michael R. Justus
2900 K Street NW
North Tower – Suite 200
Washington, DC 20007-5118
terence.ross@kattenlaw.com
kristin.lockhart@kattenlaw.com
michael.justus@kattenlaw.com

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

United States Trustee
Paul K. Schwartzburg
U.S. Department of Justice
Office of the United States Trustee
201 Varick Street, Rm. 1006
New York, NY 10014
Paul.schwartzberg@usdoj.gov

Official Committee of Unsecured Creditors
Steve Rappoport
Lorenzo Marinuzzi
Morrison & Foerster LLP
250 West 55th Street
New York, NY 10019-9601
srappoport@mofo.com
lmarinuzzi@mofo.com

/s/ John Kingston