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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
v.	
CHARTER COMMUNICATIONS, INC. and CHARTER COMMUNICATIONS OPERATING, LLC,	
Defendants.	

DEBTORS' OBJECTION TO DEFENDANTS' OMNIBUS MOTION *IN LIMINE*

[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.

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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 Objection to the Omnibus Motion *in Limine* (the "Motion") (Adv. Dkt. No. 297), filed by defendants Charter Communications, Inc. and Charter Communications Operating, LLC (together, "Charter").

* * * * *

Charter's Motion essentially seeks to preclude Windstream from submitting any evidence at trial next week. Because, however, there is no basis in the Federal Rules of Evidence to preclude any of Windstream's proposed testimony or evidence, Charter's Motion throws any frivolous argument it can conceive of into its brief in the hope that something might stick. Notwithstanding the sheer quantity of arguments that Charter's Motion lodges, none of them ultimately hits the mark. All of them must be overruled and the Motion denied.

Like many of Charter's filings of late (including two additional motions *in limine* accompanying this one), Charter's Motion proceeds from the false premise that the parties are about to go to trial to calculate "damages" on Counts VI and VII. This is not true and Charter knows it is not true. Windstream seeks *sanctions* against Charter for its breach of the automatic stay. It also seeks to equitably subordinate claims made by Charter in the Chapter 11 cases here. This distinction matters because a number of Charter's arguments seek to prohibit Windstream from putting on "any evidence of damages" due to purported disclosure failures during discovery. Simply put, and as explained previously, evidence submitted at trial to determine sanctions under Count VI or equitable subordination under Count VII is materially different from the evidence used to award "damages" under the Lanham Act.

Moreover, many of Charter's arguments manifest a serious misunderstanding as to how evidentiary remedies under Rule 37 of the Federal Rules of Civil Procedure work. Half of

Charter's arguments seek to preclude Windstream from presenting *any* evidence in support of various issues purportedly at issue at trial. That type of far-reaching sanction is usually available only after a party has violated an order to comply with applicable discovery rules following a successful motion to compel by an adversary. Charter made no such motion to compel in this adversary proceeding, and Windstream certainly has not disobeyed any discovery order issued by this Court. What Charter is attempting to do through the Motion is to use purported disclosure violations (which are typically met with exclusion of specific evidence or testimony) and belatedly asserted discovery problems as an excuse to bypass the procedure laid out in Rule 37(b)(2). This Court should not allow Charter to do so.

Even on Charter's own terms, all of the arguments in the Motion are fatally flawed. They are plagued by legal error and factual misrepresentations. And, even if Charter managed to identify some deficiency in Windstream's disclosures (it has not), Charter cannot possibly show that it has been prejudiced by any such deficiency. Accordingly, exclusion or preclusion is inappropriate and Charter's Motion should be denied *in toto*.

LEGAL STANDARD

Evidence should be excluded on a motion *in limine* "only if it is clearly inadmissible on all potential grounds." *Romanelli v. Long Island R. Co.*, 898 F. Supp. 2d 626, 629 (S.D.N.Y. 2012) (internal quotation marks omitted). Indeed, courts will deny a motion *in limine* if the relief requested is "too sweeping in scope to be considered prior to trial." *United States v. Paredes*, 176 F. Supp. 2d 179, 181 (S.D.N.Y. 2001) (citing *Baxter Diagnostics, Inc. v. Novatek Medical, Inc.*, No. 94-cv-5520, 1998 WL 665138, at *3 (S.D.N.Y. Sept. 25, 1998)). Similarly, courts will deny a motion *in limine* if it does "not specify the writings or potential testimony that the movants believe should be excluded." *Viada v. Osaka Health Spa, Inc.*, No. 04-cv-2744, 2005 WL 3435111, at *1 (S.D.N.Y. Dec. 12, 2005). *See also Jean-Laurent v. Hennessy*, 840 F. Supp. 2d

529, 556 (E.D.N.Y. 2011). Unless a movant points to specific documents or testimony it seeks to exclude, "the Court is unable to determine, with any degree of certainty, whether the writings and testimony sought to be excluded from the trial would be inadmissible under any of the provisions of the Federal Rules of Evidence." *Viada*, 2005 WL 3435111, at *1

ARGUMENT

I. TRIAL IN THIS MATTER CONCERNS SANCTIONS AND EQUITABLE SUBORDINATION, NOT "DAMAGES."[2]

Half of Charter's arguments (Parts II-V) seek preclusionary sanctions because Windstream purportedly did not make adequate disclosures or produce adequate discovery on "damages." (Motion, 13-20). These arguments hinge upon the false premise that Windstream is looking to prove legal damages or damages under the Lanham Act at trial on Counts VI-VII. It is not. Windstream seeks sanctions for violation of the automatic stay as to Count VI and equitable subordination of Charter's claims in the Chapter 11 cases on Count VII. As this Court has already concluded, (*see* Adv. Dkt No. 281, 10-11), both are equitable remedies that are distinct from legal damages. *See In re Chateaugay Corp.*, 920 F.2d 18, 187 (2d Cir. 1990) (sanctions for the automatic stay); *In re LightSquared Inc.*, 511 B.R. 253, 349 (Bankr. S.D.N.Y. 2014).

The distinction between legal damages and equitable remedies (*e.g.*, sanctions) matters because they differ both in terms of the type of evidence Windstream will submit and the findings this Court will ultimately make. Under well-settled law, the appropriate sanction for Charter's violation of the automatic stay is a matter of this Court's sound discretion. *See In re TS Employment, Inc.*, 597 B.R. 494, 536 (Bankr. S.D.N.Y. 2019). It may consider the losses caused by Charter's conduct—*e.g.*, lost customers, harm to Windstream's goodwill, the cost of corrective advertising, attorneys' fees, litigation costs and the like. *See In re Hooker Investments*, 116 B.R.

[2] Part I of this objection addresses Parts II-V of the Motion and is dispositive thereof.

375, 383 (Bankr. S.D.N.Y. 1990) (there was "sufficient evidence of [defendant's] lack of good faith to impose sanctions" for actual harm suffered), *In re Ionosphere Clubs, Inc.*, 171 B.R. 18, 21 (S.D.N.Y. 1994) (awarding sanctions for trustee's expenses and fees incurred in bringing creditor into compliance with automatic stay). *See also In re AM Intern., LLC*, 46 B.R. 566, 578 (Bankr. M.D. Tenn. 1985) ("[I]t is appropriate to award costs and attorney's fees where an entity has knowingly taken action in violation of the stay.").

Conversely, the Lanham Act provides that "the plaintiff *shall* be entitled . . . to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action." 15 U.S.C. § 1117(a) (emphasis added). Section 1117(a) then states: "The court *shall* assess such profits or damages or cause the same to be assessed under its direction." *Id.* (emphasis added). Under this statutory framework, there is no discretionary weighing of various factors as is the case in determining a sanction for violation of the automatic stay.

Charter conflates these two distinct remedies in an apparent attempt to multiply the number of *in limine* arguments it could launch at Windstream. Viewed properly, Charter has no basis for bringing a motion *in limine* complaining of Windstream's purported failure "to provide a *damage* computation or identify supporting documents," (Part II, Motion, 13-17), for its supposed efforts to "block[ ] . . . *damages-related* discovery," (Parts III-IV, *id.* at 17-20), or for its claimed "failure to disclose any expert *damages opinion* relating to Counts VI and VII, (Part V, *id.* at 21) (emphasis added). Accordingly, Parts II-V of Charter's Motion are meritless and should be denied.

II. CHARTER IMPROPERLY SEEKS DRASTIC PRECLUSIONARY RELIEF UNDER RULE 37(b) WITHOUT HAVING EVEN FOLLOWED THE REQUIRED PROCEDURES.[3]

Charter's Motion also suffers from a fatal misunderstanding and misapplication of Rule 37 of the Federal Rules of Civil Procedure. Rule 37 contains five distinct subsections, two of which are relevant here—(b) and (c). *See* Fed. R. Civ. P. 37. Subsection (b) applies when a "party fails to obey an order to provide or permit discovery." *Abbas v. Goord*, No. 06-cv-06489, 2008 WL 2705360, at * 2 (N.D.N.Y. July 1, 2008). *See also Daval Steel Prods., a Div. of Francosteel Corp. v. M/V Fakredine*, 951 F.2d 1357 (2d Cir. 1991) ("there must be a valid court order in force before sanctions may be imposed pursuant to Rule 37(b)(2)"). Conversely, Subsection (c) provides, in relevant part, that a party that "fails to provide information or identify a witness as required by Rule 26(a) . . . is not allowed to use *that information or witness* . . . at a trial, unless the failure was substantially justified or is harmless."[4] *Caruso v. Bon Secours Charity Health Sys., Inc.*, 703 F. App'x 31, 33 (2d Cir. 2017) (emphasis added) (quoting Fed. R. Civ. P. 37(c)(1). In other words, whereas courts apply Subsection (c) to exclude specific witnesses and testimony, *see Caruso*, 703 F. App'x at 34 (excluding testimony from two experts under Rule 37(c)), courts have used Subsection (b) to impose broad sanctions for "noncompliance with" court orders. *See M/V Fakredine*, 951 F.2d 1357 at 1363 (affirming district court's sanction under Rule 37(b)(2) of "an order granting a claim and precluding a party from presenting evidence in opposition to it").

This distinction is critical here because Charter has conflated the two subsections. Charter's first four arguments are broad requests for the preclusion of categories of testimony. (*See* Motion, 1). Specifically, Charter requests that Plaintiffs be prohibited from

[3] Part II of this objection addresses Parts I-IV of the Motion and is dispositive thereof.

[4] Charter has only sought relief under the self-executing provision of Rule 37(c)(1).

presenting: (1) "*any* evidence of alleged creditor injury;" (2) "*any* evidence of damages under Counts VI and VII;" (3) *any* "damage evidence;" and (4) "*any* non-expert damage testimony evidence." (*See id.*) (emphasis added). Subsection (c) applies to specific undisclosed information or witnesses, not the broad categorical requests Charter seeks. *Caruso*, 703 F. App'x at 34 (explaining that Subsection (c)(1) is triggered by the failure to properly disclose "information or a witness"). To obtain that broad relief, Charter must proceed under Subsection (b)(2), which it cannot do here because Windstream has complied with all potentially applicable court orders. *See M/V Fakredine*, 951 F.2d 1357 at 1363 (noting that Subsection (b)(2) first requires the violation of a court order because it has not). Notably, Charter's Motion never mentions that Windstream violated a court order. Even if Charter was applying Rule 37 correctly (which it is not), it fails to acknowledge that "preclusion is not generally ordered." *Atkins v. County of Orange*, 372 F.Supp.2d 377, 396 (S.D.N.Y. 2005). *See also* *Engler v. Prods., Inc.*, 304 F.R.D. 349, 355 (N.D.N.Y. 2015) ("Indeed, courts in this Circuit have held that preclusion of evidence is a harsh remedy, it should be imposed only in rare situations.").

III. EVEN UNDER CHARTER'S MISTAKEN UNDERSTANDING OF RULE 37(b), ALL OF ITS ARGUMENTS FAIL.

Properly understood, Charter's Motion is infected by the two overarching defects just discussed, which doom over half of the arguments it makes. In addition to these categorical defects, all eight of Charter's points fail on Charter's terms because they lack any colorable basis in the law or are predicated upon demonstrable misrepresentations of fact.

A. Charter's Motion Part I: Preclusion Of Evidence Of Creditor Injury

Charter asks the Court to "prohibit[ ]" Windstream "from presenting any testimony or documents in support of their claim that any of their creditors were harmed or disadvantaged" by Charter's inequitable conduct because Windstream purportedly failed to identify documents to

support this claim in its initial disclosures pursuant to Rule 26(a)(1)(A)(ii). (Motion, 12-13). Charter claims it is entitled to this remedy "under Rule 37." (*Id.* at 12). Charter does not say which provision of Rule 37 it relies upon for its argument, but only Rule 37(b)(2) could offer the sweeping relief Charter seeks.

Charter's argument should be rejected because it has not complied and cannot comply with Rule 37(b)(2), and it has not otherwise established a breach of the disclosure obligations of Rule 26(a)(1)(A)(ii). Tellingly, Charter does not specify a single document from Windstream's exhibit list for which Windstream purportedly failed to provide "a description by category and location" in its initial disclosures.[5] Charter has had Windstream's exhibit list since March 17, 2020, so this should have been a relatively simple argument to make. If Charter actually believed that Windstream intended to offer evidence that it did not properly disclose under Rule 26(a)(1)(A)(ii), it should have had no trouble pointing this Court to the specific exhibits and explaining in detail how those exhibits were not properly disclosed in Windstream's disclosures.[6] But Charter does not do so. Instead, it asks the Court to categorically prevent Windstream from submitting *any* evidence related to harm suffered by creditors from Charter's misconduct. Only Rule 37(b)(2) offers that kind of far-reaching (and punitive) prohibition and it is inapplicable here because Windstream has not violated any court order.

[5] Throughout its Motion, Charter purposefully elides key language from Rule 26(a)(1)(A)(ii), resulting in grossly misleading quotations. Parties do not have to disclose "a copy of all documents" in their custody and control as part of their initial disclosures. They must disclose "a copy**—or a description by category and location—**of all documents" in its custody and control. Fed. R. Civ. P. 26(a)(1)(A)(ii) (omitted language bolded).

[6] Presuming that Charter is referring to Plaintiffs' Exhibits 96, 97, 101, and 102—all of which are plans of reorganization for the Debtors—these documents were not finalized and filed until March 2020.

Charter's argument fails for the reasons discussed in Part II, *supra*. It is trying to cloak a request for a drastic Rule 37(b)(2) sanction in the garb of a purported breach of Rule 26(a)(1)(A)(ii), which would normally be met with a remedy under Rule 37(c)(1). And, even under Rule 37(c)(1), Charter is not entitled to relief because it has made no effort whatsoever to explain any specific breach of Rule 26(a)(1)(A)(ii)'s disclosure requirement by Windstream. Charter's first argument should therefore be denied.

B. Charter's Motion Part II-IV: Preclusion Of Evidence Of "Damages"

Next, Charter tries in three different ways to stop Windstream from introducing evidence on "damages." It argues that Windstream: (1) violated Rule 26(a)(1)(A)(iii) by failing to disclose a computation of damages with supporting documentation, (Motion, 13-17); (2) "refused to answer" discovery requests and "blocked other avenues of damage-related discovery," (*id.* at 17-20); and (3) "refused to respond to non-expert discovery." (*Id.* at 20). Once again, Charter does not identify specific pieces of evidence or testimony that it thinks should be excluded—which is reason enough to reject the argument. *Viada*, 2005 WL 3435111, at *1. Instead, Charter wants to prevent Windstream from putting on any kind of case on "damages"—a much broader sanction only available under Rule 37(b)(2), which is inapplicable here because Windstream has not violated any court order.

All three of Charter's argument fail for the reasons identified in Parts I and II, *supra*. They are predicated upon the fallacious premise that Windstream seeks to introduce evidence of "damages." And, they seek a preclusionary sanction under Rule 37(b)(2) despite completely failing to meet the requirements under that rule. On top of that, each of Charter's arguments in Parts II-IV of the Motion suffer from individualized defects that also compel their rejection.

In Part II of the Motion, Charter argues that Windstream did not comply with Rule 26(a)(1)(A)(iii) because it purportedly failed to disclose "a computation of each category of

damages claimed" or make available the material "upon which each computation is based." (Motion, 13-14). But once again, the forthcoming trial does not concern "damages," as that term is used in Rule 26(a)(1). *See SEC v. Razmilovic*, No. 04-cv-2276, 2010 WL 2540762, at *2 (E.D.N.Y. June 14, 2010) (concluding that Rule 26(a)(1)(A)(iii) does not require a computation for equitable claims such as disgorgement "because such remedies [are] not 'damages' within the meaning of" the Rule). Apart from that, Charter's accusation simply is not true. It is a repeat of a failed attack from Charter's Motion for Summary Judgment, (Adv. Dkt. Nos. 130, 176), which this Court denied. (Adv. Dkt. No. 275). Windstream identified John Jarosz as its damages expert in its initial disclosures. (Adv. Dkt. No. 297-14, 5). Mr. Jarosz produced a report laying out his opinion in detail. (Adv. Dkt. No. 297-18). Likewise, Windstream's disclosures provided a range of loss suffered as a result of Charter's breach of the VAR and what caused that loss. (Adv. Dkt. No. 297-14, 11). It also provided an explanation of the harm to its goodwill. (*Id.*). It supported both with a declaration from Jeffrey Auman. (Adv. Dkt. No. 147). Windstream's conduct satisfied its disclosure obligations under Rule 26—which is what this Court concluded by rejecting at summary judgment the very same Rule 37 argument that Charter repeats here. (Adv. Dkt. No. 275).

In Parts III and IV, Charter alleges that Windstream did not respond to Charter's discovery requests related to damages, (Motion, 17-20), or otherwise produce non-expert testimony on damages. (*Id.* at 20). But if Charter thought Windstream's discovery responses were deficient, it was obligated to file a motion to compel before the close of discovery.[7] *Owen v. No Parking*

[7] Charter claims that it raised some of these issues in a letter brief to the Court, but the Court "found no need for a teleconference" on these issues "[b]ased on" Windstream's representations "that their damage evidence or calculations would be set forth in their damage expert's report." (Motion, 4). That is a misrepresentation of what this Court actually said in its September 3, 2019 email. The Court's views on the necessity of a phone conference hinged on a different issue: "Is Katten

Today, Inc., 280 F.R.D. 106, 112 (S.D.N.Y. 2011) ("A party ordinarily must file a motion to compel *before* the close of discovery and if it fails to do so, the motion will be deemed untimely."). Charter cannot circumvent this rule by attempting to shoehorn its belated discovery complaints into a motion *in limine*. All the more important, Charter is trying to jump from a complaint about allegedly deficient discovery to a sweeping preclusive sanction without the intermediate steps of securing an order to compel production and brining a motion under Rule 37(b)(2) for non-compliance therewith. *See supra* Part II. Yet again, Charter is attempting to fundamentally misapply Rule 37.

Finally, and in any event, Charter's argument is riddled with falsehoods and gross mischaracterizations. For example, Charter claims that Windstream "failed to produce any supporting documents or any substantive analysis" related to the opinion expressed by Mr. Jarosz. (Motion, 18). In reality, Mr. Jarosz's report is highly detailed and has dozens of pages of attachments containing the data he relied upon to reach his opinions. (Adv. Dkt. No. 297-18). Moreover, Windstream provided additional data related to Mr. Jarosz's testimony upon Charter's request. It is thus completely untrue that "Plaintiffs refused to produce any of the documents supporting [Mr. Jarosz's] computation." (Motion, 19 n.8). It is likewise false for Charter to claim that Mr. Auman's trial declaration contains "*new* damages calculations." (Motion, 18). Mr. Auman has testified that Windstream suffered over $5,000 as a result of Charter's service disconnections under the VAR Agreement, and just over $4 million in losses as a result of a promotional campaign to mitigate the effects of Charter's false advertising. (Adv. Dkt. No. 299-1). The former is within the range of the $5,000 to $16,000 in potential losses from Charter's

representing the two employees? If so, and it agrees to accept Rule 45 service on them, I see no need for a conference." (Adv. Dkt. No. 297-6, 3). Following the Court's message ***Charter waived*** its request for a teleconference. (*Id.* at 1).

breach of contract identified in Mr. Auman's declaration accompanying Windstream's opposition to Charter's motion for summary judgment. (Adv. Dkt. No. 147). The latter figure relates to Windstream's budgeted $8 million to mitigate Charter's false advertising, which Mr. Auman testified to in his deposition. Indeed, both of these figures represent significant steps down from the original losses anticipated by Mr. Auman during earlier phases of the litigation—a benefit to Charter.

In summary, Charter's attempt to preclude Windstream from putting on evidence of "damages" fails for many reasons. It mischaracterizes the objective of the trial and the evidence that Windstream will submit. It seeks preclusive sanctions under Rule 37(b)(2) without even attempting to comply with the procedural strictures of the rule. And, it is predicated upon numerous misrepresentations.

C. Charter's Motion Part V-VI: Exclusion Of John Jarosz's Expert Testimony

In Parts V and VI of its Motion, Charter tries once again to prevent Mr. Jarosz from testifying at trial. Charter first argues in Part V that Windstream should generally be prevented from offering expert testimony at trial because Windstream has disclosed no expert that "relat[es] to Counts VI and VII." (Motion, 21). This argument misconstrues both the applicable rules and the content of Mr. Jarosz's testimony. Rule 26(a)(2)(B)(i) requires experts to disclose "all opinion the witness will express and the basis and reason for them." Nothing in the Rule requires an expert to designate himself as opining to specific *counts* in a complaint or a party to disclose which specific *counts* in a complaint he will opine on. *See, e.g.*, *Bartlett v. Mut. Pharm. Co.*, 678 F.3d 30, 40 (1st Cir. 2012) (affirming district court's ruling that expert disclosure was adequate where it revealed "main thrust" of testimony, *rev'd on other grounds*, 570 U.S. 472 (2013)). Here, Mr. Jarosz's expert report offered opinions on lost customers as a result of Charter's unlawful action. (Adv. Dkt. No. 297-13, 27-40). He has been called to testify as to the same at trial of Counts VI

and VII. (Jarosz Trial Decl., ¶¶ 2, 11). His trial declaration merely tracks his expert report tendered under Rule 26 (a)(2)(B), which means Windstream has fully complied with its disclosure obligations. *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 762 (7th Cir. 2010) (purpose of expert report is to "convey the substance of the expert's opinion" (quoting *Walsh v. Chez*, 583 F.3d 990, 994 (7th Cir. 2009)).

Charter also argues in Part VI that Mr. Jarosz should be excluded because Windstream purportedly "opposed Defendants' Motion to Continue by representing that . . . John Jarosz would not be testifying on" Counts VI and VII. (Motion, 21). That statement is a lie. Charter's argument in Part VI is nothing more than an abbreviated version of the deeply flawed position it took in its Motion to Reconsider. (Adv. Dkt. No. 289). Charter's argument here fails for the same reasons pointed out in Windstream's Objection to Charter's Motion to Reconsider. (Adv. Dkt. No. 294). Without repeating all of those arguments, Windstream restates the two key points from that objection: (1) the forthcoming bench trial should have no collateral-estoppel effect on a future jury trial on damages for Counts I-V; and (2) Windstream did not misrepresent its position to the Court, but rather moved expeditiously and transparently to rectify an apparent misunderstanding by the Court of Windstream's intended use of Mr. Jarosz at trial.[8] (*Id.* at 6-7, 10-12).

[8] Charter's argument on pages 21-22 of its Motion betray its tenuous relationship with the truth. Charter again insinuates that Windstream intended to mislead the Court as to Mr. Jarosz's status by not objecting to the Court's observation that trial might take less than a full day. (Motion, 22). That is preposterous. As Charter well knows, all witnesses have provided direct testimony via declaration, and any reasonable cross examination of Mr. Jarosz should last at most an hour. All the more galling, Charter misattributes a phrase from Mr. Jarosz's expert report to his trial declaration. (*Id.*). Nowhere in his trial declaration does Mr. Jarosz use the words "damages calculations"—once again, he will not testify to "damages" under any count at this trial.

D. Charter's Motion Part VII: Exclusion Of Documents Purportedly Not Made Available For Copying or Inspection

In Part VII of the Motion, Charter asks the Court to prohibit Windstream from using "any documents that were not made available for copying or inspection during discovery." (Motion at 22). Charter does not go to the trouble to identify which documents from Windstream's exhibit list are implicated by this point, which is reason enough to deny Charter's argument. *Viada*, 2005 WL 3435111, at *1.

On page 7 of its Motion, Charter identifies 15 exhibits from Windstream's exhibit list that were "generated before September 6, 2019," but supposedly "not supplied to Defendants or identified in [Windstream's] Rule 26(a) disclosures before September 6, 2019." (Motion, 7). To the extent Charter intended to predicate its argument on these exhibits, its argument fails. These 15 documents are fee statements and applications from Windstream's conflicts counsel and from counsel for the committee of unsecured creditors. They are matters of public record filed on Windstream's main bankruptcy docket. Counsel for Charter receives electronic notice of these filings. So, Charter did receive these documents at the time of filing. Indeed, it is clear that Charter retrieves and reviews these documents. For example, Charter cited Katten's Seventh Monthly Fee Statement, (Plaintiffs' Exhibit 74 and Bankr. Dkt. No. 1157) in its reply in support of its Motion to Withdraw the Reference, which it filed in the District Court in November 2018. (*Windstream Holdings, Inc. v. Charter Communications, Inc.*, No. 19-cv-09354, Dkt. No. 29, at 2 n.2 (S.D.N.Y. Nov. 7, 2019)). Finally, Windstream has stated since its first initial disclosure that it intended to rely upon "Windstream's Chapter 11 filings" in this case. (Adv. Dkt. No. 297-14, 9).

Put simply, Charter has not identified a single exhibit that should be excluded because it was not made available to Charter. Its argument should be denied.

E. Charter's Motion Part VIII: Exclusion Of Exhibit 104

Finally, Charter argues Windstream's Trial Exhibit 104 (*i.e.*, Katten Muchin Rosenman LLP's Third Interim Fee Application (the "Fee Application")) is inadmissible because: (1) the Declaration filed in support of the Fee Application was submitted by Katten partner Steven Reisman, who has withdrawn and been walled off from this adversary proceeding due to an alleged conflict of interest and "thus cannot have sufficient personal knowledge under Federal Rule of Evidence 602" to support the Fee Application; and (2) the Fee Application constitutes inadmissible hearsay. (Motion, 23). Both arguments are frivolous.

The first argument is a red herring. As Charter itself concedes, Mr. Reisman withdrew only from "matters ***unrelated*** to the Adversary Proceeding." (*Id.*) (emphasis added). Mr. Reisman still acts as the supervising partner at Katten for the overall Windstream engagement, which is more than just this adversary proceeding, and includes all billing responsibility. Indeed, Mr. Reisman has worked and continues to work on matters for the Debtors in these Chapter 11 cases that are unrelated to this adversary proceeding. It is through this work "unrelated to the Adversary Proceeding" and his billing responsibilities that that Mr. Reisman has personal knowledge of the fees and expenses requested in the Fee Application. Moreover, the Fee Application itself consists only of documents that are matters of public record which Mr. Reisman may review consistent with the ethical screen in place.

Charter's second argument fares no better. The Fee Application and its exhibits fall under at least two hearsay exceptions: (1) the business-records exception, Rule 803(6) of the Federal Rules of Evidence, and (2) the residual exception, Rule 807.

The Business-Records Exception. The business-records exception in "Rule 803(6) favor(s) the admission of evidence rather than its exclusion if it has any probative value at all." *Matter of Ollag Const. Equip. Corp.*, 665 F.2d 43, 46 (2d Cir. 1981) (internal quotation marks

omitted). Unsurprisingly, courts have uniformly allowed relevant billing statements under the business-records exception. *E.g.*, *Gucci Am., Inc. v. Rebecca Gold Enterprises, Inc.*, 798 F. Supp. 177, 180 (S.D.N.Y. 1992) ("unredacted legal bills were properly authenticated as business records" and so "there was no hearsay error"); *see also In re Frazin*, No. 02-32351-BJH-13, 2017 WL 7050632, at *10 (Bankr. N.D. Tex. Dec. 22, 2017) (finding, based on a declaration, that time records of law firm Haynes and Boone fell under Rule 803(6)). This Court should reach the same result here. The Fee Application and its exhibits meet all the requirements of Rule 803(6) and thus are not excludable as hearsay:

First, the invoices attached to the Fee Application reflect attorneys' time entries and records "made at or near the time by—or from information transmitted by—someone with knowledge." Fed. R. Evid. 803(6)(A). The invoices in the exhibit were generated approximately once a month reflecting attorneys' fees incurred in the prior month. (*E.g.*, Windstream Trial Ex. 104, pp. 102-04).

Second, the "record[s] w[ere] kept in the course of a regularly conducted activity of" Katten, and "making the record[s] was a regular practice of that activity." Fed. R. Evid. 803(6)(B)-(C). As explained in the Fee Application, Katten "maintains computerized records of the time expended to render the professional services required by its client" and "maintains a record of expenses incurred in the rendition of the professional services required by the Debtors and for which reimbursement is sought" in "the ordinary course of Katten's practice." (Windstream Trial Ex. 104, pp. 13-14).

Third, "all these conditions" listed above were "shown . . . by a certification that complies with Rule 902(11)." Fed. R. Evid. 803(6)(D). This requirement was met by the affidavit of Mr. Reisman, who stated that "the fees and disbursements sought in the Fee Application are

permissible under the relevant rules, court orders, and Bankruptcy Code provisions"; and that "the fees and disbursements sought in the Fee Application are billed at rates customarily employed by Katten and generally accepted by Katten's clients." (Windstream Trial Ex. 104, 26). His affidavit complied with Rule 902(11) because it contained a "certification" of a "qualified person."

Fourth and finally, Charter has not shown that "the source of information" or "the method or circumstances of preparation indicate a lack of trustworthiness." Fed. R. Evid. 803(6)(E). Nor could it. Law firms everywhere prepare time entries and invoices like those attached to the Fee Application in the regular course of their business. Charter has no reason to call Katten's, or any other law firm's, routinely generated invoices into question.

The Residual Exception. The Fee Application also falls under the residual exception in Rule 807. Under this rule, a hearsay statement is not excludable if it "is supported by sufficient guarantees of trustworthiness--after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement"; and "it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts." Fed. R. Evid. 807(a)(1)-(2). Here, the Fee Application and its exhibits are trustworthy: they reflect information from the kind of invoices that are routinely generated by law firms around the country, and the accuracy of the information was attested to by Mr. Reisman under penalty of perjury. *See Fed. Trade Comm'n v. Amy Travel Serv., Inc.*, 875 F.2d 564, 576 (7th Cir. 1989) ("The affidavits possess sufficient guarantees of trustworthiness; each was made under oath subject to perjury penalties and the affiants describe facts about which they have personal knowledge—their contacts with defendants."), *overruled on other grounds by Fed. Trade Comm'n v. Credit Bureau Ctr., LLC*, 937 F.3d 764 (7th Cir. 2019). The Fee Application and exhibits are

also more probative of Katten's fees and expenses than any other evidence. These documents reflect Katten's official monthly invoices that track each attorney's fees and each expense item.

Charter's attempt to keep out the Fee Application should fail. Its attack on Mr. Reisman's personal knowledge is a red herring, and the document is admissible under exceptions to the hearsay rule. Attorneys' fees are a key piece of evidence classically considered by a court in determining sanctions for violation of the automatic stay.

IV. CHARTER HAS SUFFERED NO PREJUDICE.

Charter's motion has yet another fatal flaw. It cannot show any prejudice from Windstream's alleged disclosure failures. Courts do not strike evidence under Rule 37(c) if the failure to disclose "was substantially justified or harmless." *N.Y. v. United Parcel Serv., Inc.*, 942 F.3d 554, 591 (2d Cir. 2019) (quoting Fed. R. Civ. P. 37(c)(1)). A party's "[f]ailure to comply with the mandate of the Rule is harmless when there is no prejudice to the party entitled to the disclosure." *Jockey Int'l, Inc. v. M/V "Leverkusen Express"*, 217 F.Supp. 2d 447, (S.D.N.Y. 2002). For example, in *United Parcel Serv., Inc.*, UPS argued that the district court should have precluded all of the plaintiffs' evidence on damages because the evidence was not disclosed adequately. 942 F.3d at 591. The Second Circuit affirmed the district court's denial of that request, reasoning that the plaintiffs disclosed "their damages *theory* from the beginning," informed UPS of the "key *documents* used to prove total damages," "notified UPS that [they] would rely on direct and circumstantial *evidence*," and produced "a *computation* of damages for a subset of the claimed damages." *Id.* at 592 ("Here, the judge who oversaw the discovery process and trial acted well within her discretion in concluding that UPS did not suffer[] any real prejudice from the lack of a more robust disclosure." (alteration in original) (citation and internal quotation marks omitted)).

Here, Charter has not, and cannot, show it was prejudiced. First, Charter has possessed the evidence Windstream intends to use at trial for many months. Second, Charter deposed both of the witnesses at issue—Mr. Jarosz and Mr. Auman. Third, when the parties exchanged proposed witness lists on January 30, 2020, Charter identified four witnesses to rebut Mr. Jarosz. Fourth, in its pretrial disclosure, Charter included those same four rebuttal witnesses and exhibits to rebut Mr. Jarosz's testimony. (Adv. Dkt. No. 272, 2). Fifth, to the extent Charter suggests it incurred prejudice, this Court has already addressed, and rejected, that argument when responding to Charter's Motion for Summary Judgment. (Adv. Dkt. No. 144, 43–44 & Adv. Dkt. No. 275, 2). The evidence thus belies any suggestion that Charter was prejudiced. Because Charter was not prejudiced, any potential failure by Windstream to disclose evidence is harmless and fails to trigger Rule 37(c). *See Barcroft Media, Ltd. v. Coed Media Group, LLC*, No. 16-cv-7634, 2017 WL 4334138 at *2 (S.D.N.Y. Sept. 28, 2017) (defendant's "technical violation of Rule 26(a) and (e) . . . was plainly harmless" when "Plaintiffs have indisputably known about" the witness and his testimony "for months").

CONCLUSION

For the foregoing reasons, Windstream respectfully requests that the Court deny Charter's Omnibus Motion *in Limine*.

Date: April 24, 2020

/s/ Terence P. Ross

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Conflicts Counsel to the Debtors and Debtors in Possession

CERTIFICATE OF SERVICE

I hereby certify that, on April 24, 2020, I caused a true and correct copy of the foregoing Debtors' Objection to Defendants' Omnibus Motion *In Limine* 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