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

DEBTORS' OBJECTION TO DEFENDANTS' MOTION FOR JUDICIAL NOTICE

[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 Memorandum in Opposition to the Defendants' Motion for Judicial Notice (the "Motion") (Adv. Dkt. No. 308), filed by defendants Charter Communications, Inc. and Charter Communications Operating, LLC (together, "Charter").

* * * * *

On the literal eve of trial, Charter filed a Motion for Judicial Notice, on an emergency basis of its own making. The Motion asked this Court to take notice of more than 30 purported "factual" contentions and weighed in at over 400 pages inclusive of exhibits. As the Court itself observed at the start of trial, Charter's Motion is a frivolous attempt to abuse Rule 201 of the Federal Rules of Evidence by smuggling in new legal arguments under the guise of judicially noticeable facts.

Pursuant to the Court's instruction, Windstream sent Charter a safe-harbor letter demanding that it withdraw its Motion with prejudice, or else Windstream would seek sanctions for forcing to respond to Charter's baseless Motion with zero notice. (Ex. A). What Charter provided in response to Windstream's safe-harbor letter was more gamesmanship. Although Charter claims that it "will not be taking up its motion," (*id.*), its argumentative response belies any suggestion that it has fully withdrawn its Motion with prejudice. Indeed, Charter expressly reserves the right to raise certain issues within the Motion "on a piecemeal basis" during trial. (Ex. A). The only purported "facts" that Charter has completely withdrawn are paragraphs 3-8, 10, 15-21, 28 of its Motion—all which sought judicial notice of "matter[s] of law" (Ex. A)—not the proper

subject of a motion for judicial notice.[2] Charter also claims that paragraphs 22-25 and 30 are "mooted" by the Court's admission of Plaintiffs' Trial Exhibits 1 and 48 into the record. Windstream does not quarrel with Charter's decision to withdraw its Motion for judicial notice as to paragraphs 22-25 and 30. But for the avoidance of confusion, Windstream does not agree that the Court's admission of these documents is equivalent to granting judicial notice of the contentions contained in paragraphs 22-25 and 30 of Charter's Motion, (Ex. A), which would have the effect of deeming these facts uncontroverted. *E.g., Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfer U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir. 1998) (explaining that, because Rule 201(b) has the effect of deeming a fact established without an opportunity for "rebuttal evidence, cross-examination, and argument," "caution must be used in determining that a fact is beyond controversy" and subject to judicial notice under Rule 201).[3]

That leaves paragraphs 11-14 of Charter's Motion, all of which seek to judicially notice purported "facts" gleaned from filings in Charter's 2009 false advertising litigation against the *DirecTV*. Charter states it "will withdraw its motion as to those facts but may seek judicial notice of the contents of those pleadings on a piecemeal basis if and when the need arises." (Ex. A). That is ***not*** a withdrawal with prejudice of Charter's request for judicial notice; it is just a withdrawal of the piece of paper on which the request is written.

Charter's Motion should be denied as to paragraphs 11-14 for two reasons. *First*, Charter does not establish that any of its contentions related to the *DirecTV* litigation are relevant to the

[2] The Second Circuit has explicitly stated that "Rule 201 has no application" to judicial notice of law. *E.g., Siderius v. M.V. Amilla*, 880 F.2d 662, 666 (2d Cir. 1989) ("The Agreement is arguably more like law—to which Rule 201 has no application—than it is to an adjudicative fact. It is axiomatic that Rule 201 of the Federal Rules of Evidence deals only with judicial notice of adjudicative facts.") (Internal quotation marks omitted).

[3] Windstream also reserves its rights with respect to paragraphs 1, 2, 9, and 29 of the Motion.

question of contempt sanctions for breach of the automatic stay under the controlling standard announced in *In re Chateaugay Corp.*, 920 F.2d 183 (2d Cir. 1990), as modified by *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019). *Second*, and in any event, Charter cannot use judicial notice to establish the truth of the contents of the documents from the *DirecTV* litigation, but rather only the fact that the documents exist.

ARGUMENT

I. CHARTER HAS NOT ESTABLISHED THE RELEVANCE OF PARAGRAPHS 11-14 TO THE TRIAL OF COUNT VI.

It is widely accepted that courts may only take judicial notice of relevant facts under Rule 201. *Cabrera v. Dream Team Tavern Corp.*, No. 12-cv-6323, 2016 WL 1627621, at *3 (E.D.N.Y. Apr. 22, 2016). *See also United States v. Emmons*, 524 F. App'x. 995, 997 (6th Cir. 2013) (*per curiam*) ("Federal courts may take judicial notice of proceedings that are relevant to the matter at hand."); *Whiting v. AARP*, 637 F.3d 355, 364 (D.C. Cir. 2011) (explaining that although "the district court may take judicial notice in ruling on a motion to dismiss, . . . the matters to be noticed must be relevant"); *Kowalski v. Gagne*, 914 F.2d 299, 305 (1st Cir. 1990) ("It is well-accepted that federal courts may take judicial notice of proceedings in other courts if those proceedings have relevance to the matters at hand."). An irrelevant fact cannot be an "adjudicative fact." *Physicians Healthsource, Inc. v. Allscripts Health Sols.*, Inc., 244 F. Supp. 3d 716, 718 (N.D. Ill. 2017) ("[A]ll evidence"—including evidence "governed by Rule 201"—"must bear a relationship to some consequential fact in the case."). Indeed, if there is even a question as to the relevance of a proposed fact, that is enough to defeat a motion for judicial notice: a dispute as to relevance calls into "question the evidentiary value" of the documents and the facts contained therein, and it is thus impossible to say that the fact is "not subject to reasonable dispute." *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1082 (7th Cir. 1997).

Here, Charter claims that the purported facts contained in paragraphs 11-14 of its Motion are probative of "whether a prohibition on bankruptcy-related advertising is unambiguously stated within the 'four corners' of 11 U.S.C. § 362(a)(3) and to the question of reasonable diligence." (Motion, 1). It asserts these questions bear on whether it should be held in contempt, citing the general civil contempt standard. (*Id.*). But that is not even the correct standard. Rather, as this Court pointed out during the summary judgment hearing, the standard "most recently articulated by the Supreme Court in the *Taggart* case" is the applicable standard for sanctions under Count VI.[4] (SJ Hr'g Tran. at 136:6-8). Pursuant to *Taggart*, the determinative question is whether there was "no objectively reasonable basis for concluding that the creditor's conduct might be lawful." *Taggart*, 139 S. Ct. at 1801.

Charter does not even attempt to explain how any of the purported facts contained in paragraphs 11-14 of its Motion—the thrust of which is that the court in the *DirecTV* litigation gave Charter a narrower temporary restraining order than it requested—is relevant under the *Taggart* standard. Nor is the relevance plainly apparent. And, Windstream certainly does not agree that these "facts" are relevant. Mere uncertainty as to the relevance of paragraphs 11-14 is reason

[4] Even before *Taggart*, courts in the Second Circuit did not apply the general civil contempt standard to violations of the automatic stay. Rather, the main inquiry was whether breach of the automatic stay involved "maliciousness or lack of a good faith argument and belief that the party's actions were not in violation of a bankruptcy stay." *In re Chateaugay Corp.*, 920 F.2d at 187; *see In re Congregation Birchos Yosef*, 535 B.R. 629, 635 n.5 (Bankr. S.D.N.Y. 2015) (Drain, J.) (same). Charter completely ignores this case law. Out of all the cases cited in its Motion, as well as its Objection to Windstream's Motion *in Limine*, (Adv. Dkt. No. 306), to support its assertion of the general civil contempt standard, not one of them involves sanctions for breach of the automatic stay. In fact, only two of Charter's cases even involve bankruptcy, and both of those cases involve violation of a discrete order from the court. *In re Markus*, 607 B.R. 379, 384 (Bankr. S.D.N.Y. 2019), *aff'd in part, vacated in part, remanded sub nom. Markus v. Rozhkov*, 2020 WL 1659862 (S.D.N.Y. Apr. 3, 2020) ("The Foreign Representative also requests that the Court hold Worms in contempt for failure to comply with the subpoena."); *In re Masterwear Corp.*, 229 B.R. 301, 310 (Bankr. S.D.N.Y. 1999) ("The debtors also claim that the administrative freezes violated the Financing Order, and seek to hold BNY in contempt.").

enough to deny Charter's Motion. *See Gen. Elec. Capital Corp.*, 128 F.3d at 1082. Moreover, it is clear that there is no relevance to an issue remaining in dispute at trial. In that lawsuit, Charter did not bring suit against DirecTV for a violation of the automatic stay. Thus, there was no issue of civil contempt and, therefore, whatever injunctive relief issued in that case is irrelevant here.

II. CHARTER CANNOT USE JUDICIAL NOTICE TO ESTABLISH THE TRUTH OF THE CONTENTS OF THE DIRECTV LITIGATION DOCUMENTS.

In addition, "[a] court may take judicial notice of a document filed in another court 'not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.'" *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992) (quoting *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991)); *see also Elliott v. Nestle Waters N. Am. Inc.*, No. 13-cv-6331, 2014 WL 1795297, at *8 (S.D.N.Y. May 6, 2014) ("[T]he Court may properly take judicial notice of the decisions to the extent that they establish that such decisions were rendered, though not to establish the truth of any matter asserted in the decisions."). Charter's Motion violates this rule.

Charter is not requesting that the Court take judicial notice of the *fact* of Charter's prior litigation against DirecTV. Rather, it is requesting "judicial notice of the *contents*" of certain pleadings in that litigation. (Ex. A) (emphasis added). Charter is doing so to suggest that it did not willfully violate the automatic stay in this adversary proceeding. Thus, Charter is relying on the *contents* of pleadings "to provide the reasoned basis for the" conclusion it wishes this Court to draw. *Global Network Commc'ns v. City of N.Y.*, 458 F.3d 150, 157 (2d Cir. 2006). This is not a proper use of judicial notice. *See id.*

As the Second Circuit has warned, "caution must be used in determining that a fact is" subject to judicial notice under Rule 201. *Tommy Hilfger*, 146 F.3d at 70. That is "[b]ecause the effect of judicial notice is to deprive a party of the opportunity to use rebuttal evidence, cross-

examination, and argument to attack contrary evidence." *Id.* *See also* Fed. R. Evid. 201(b). Here, if Charter wants to prove up the lessons that it allegedly took away from its litigation with DirecTV, it needs to proffer witnesses who are then subject to rebuttal evidence, cross-examination, and argument. It has refused to do so. It cannot use judicial notice to circumvent the rules and to deprive Windstream of these truth-finding tools.

CONCLUSION

For the foregoing reasons, Windstream respectfully requests that the Court deny Charter's Motion for Judicial Notice and award Windstream its attorneys' fees for this objection as a sanction for Charter's frivolous motion\.

Date: April 28, 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 28, 2020, I caused a true and correct copy of the foregoing 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

EXHIBIT A

[redacted]

From: Kingston, John S. <jkingston@thompsoncoburn.com>
Sent: Monday, April 27, 2020 4:46 PM
To: Rochester, Shaya; Hockett, Brian W.; Nepple, Michael L.; Shredl, Steven A.; Przulj, Nino
Cc: rdd.chambers@nysb.uscourts.gov; Dorothy Li; Ross, Terence P.; Justus, Michael R.; Lockhart, Kristin; Thompson, Grace A.; Werlinger, Eric T.
Subject: RE: Windstream Holdings, Inc., et al., vs. Charter Communications, Inc., et al., Adv. Proc. 19-08246: Defendants' Motion for Judicial Notice

EXTERNAL EMAIL – EXERCISE CAUTION

All,

I stated below that Charter's request for notice of fact 30 was mooted by the admission of Plaintiff's trial exhibit 30. I was mistaken. Fact 30 is not included in Plaintiff's trial exhibit 30. Instead Charter's request for notice of fact 30 was mooted by the admission of Plaintiffs' Exhibit 1. Pages 48 through 54 of Plaintiffs' Trial Exhibit 1 are the same documents as are included in Defendants' Trial Exhibit 30. I apologize for my confusion.

Regards,

John

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Subject: RE: Windstream Holdings, Inc., et al., vs. Charter Communications, Inc., et al., Adv. Proc. 19-08246: Defendants' Motion for Judicial Notice

Mr. Rochester,

Thank you for your note. Charter will not be taking up its motion when it presents its case.

A request for judicial notice at trial is pretty routine and can be made at any time. FRE 201(c). The judicial notice motion that Charter intended to take up during its rebuttal case articulated 30 facts that Charter believes are proper for judicial notice because they are not subject to reasonable dispute and can readily be ascertained from sources whose accuracy cannot reasonably be questioned. Rather than slow down the proceeding with an

oral request at the outset of its case, Charter made a written request so that plaintiffs and the court would have time to confirm that the accuracy of Charter's cited sources could not be reasonably questioned.

Of those 30, facts 22 through 25 relate to the April 15, 2019 hearing on Plaintiffs' TRO and Charter's request for judicial notice has been mooted by the fact that the Court has admitted the transcript into evidence as Plaintiffs' Exhibit 48. Likewise Charter's request for judicial notice of the contents of a document in fact 30 has been mooted by the fact that the Court admitted the subject document into evidence as Plaintiffs' Exhibit 30.

This morning the Court took judicial notice of the contents of a number of pleadings from the lawsuit captioned *Charter Communications Holding Co., et al. v. DirecTV, Inc.*, Case No. 4:09-cv- 00730. Facts 11-14 ask the Court to take judicial notice of the contents of other pleadings from that very same lawsuit—specifically Charter's Proposed TRO and the significantly more narrow TRO that the United States District Court actually entered. This morning the Court also took judicial notice of the contents of pleadings in this adversary proceeding and the Chapter 11 cases. Facts 1, 2, 9, and 29 likewise request the Court to take judicial notice of pleadings in this adversary proceeding and the Chapter 11 cases. Such requests are common. *In re MSR Hotels & Resorts, Inc.*, No. 13-11512 (SHL), 2013 WL 5716897, at *1 (Bankr. S.D.N.Y. Oct. 1, 2013) ("A court is empowered to take judicial notice of public filings, including, in an adversary proceeding, those filed on its own dockets in the underlying bankruptcy case."); *Faulkner v. Verizon Commc'ns, Inc.*, 156 F.Supp. 2d. 384, 391 (S.D.N.Y. 2001) ("Pursuant to Fed. R. Evid 201(b), we may take judicial notice of pleadings in other lawsuits … as a matter of public record."); *Guzman v. U.S.*, No. 11 CIV. 5834 JPO, 2013 WL 543343, at *3 (S.D.N.Y. Feb. 14, 2013) ("It is common and entirely proper for courts to take judicial notice of other court proceedings.") (collecting cases). Charter will withdraw its motion as to those facts but may seek judicial notice of the contents of those pleadings on a piecemeal basis if and when the need arises.

The remaining items, Facts 3-8, 10, 15-21, 28 seek judicial notice of the contents of statutes, judicial decisions, and treatises, which Charter believes is properly taken under *City of Wichita, Kan. v. U.S. Gypsum Co.*, 72 F.3d 1491, 1496 (10th Cir. 1996) ("A matter of law can be judicially noticed as a matter of fact; i.e., the court can look to the law not as a rule governing the case before it but as a social fact with evidential consequences."). Given the Court's suggestion that it is inclined to take a contrary view, Charter withdraws its request for judicial notice as to those facts and will not be reasserting a request for judicial notice of those facts in this proceeding.

Regards,

John

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Subject: RE: Windstream Holdings, Inc., et al., vs. Charter Communications, Inc., et al., Adv. Proc. 19-08246: Defendants' Motion for Judicial Notice

Counsel,

Reference is made to *Defendants' Motion For Judicial Notice Of Facts That Can Be Accurately And Readily Determined From Publicly Available Legal Databases And Electronic Filing Systems* [Adv. Dkt. No. 308] (the "Motion").

At the conclusion of today's trial, Judge Drain instructed Windstream to notify Charter that Windstream will request that the Court sanction Charter if the Motion is not withdrawn. The Court has ample basis to sanction Charter's counsel under 28 U.S.C. § 1927, which provides that sanctions are proper for "an attorney who…multiplies the proceedings in any case unreasonably and vexatiously." *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 96 n.6 (2d Cir. 1997) (citation and internal quotation marks omitted). Sanctioned attorneys may be required to pay "the excess costs, expenses, and attorneys' fees reasonably incurred because of" the improper conduct. *Id.* Here, by filing the Motion, which is completely meritless, Charter has yet again needlessly multiplied the proceedings in this adversary proceeding.

In addition, bankruptcy courts "possess inherent authority to impose sanctions against attorneys and their clients." *In re Plumeri*, 434 B.R. 315, 327 (S.D.N.Y. 2010) (quoting *Ginsberg v. Evergreen Sec., Ltd.*, 570 F.3d 1257, 1263 (11th Cir. 2009)). Courts apply the same standard when applying sanctions under Section 1927 and their inherent authority. *Enmon v. Prospect Capital Corp.*, 675 F.3d 138, 143–44 (2d Cir. 2012) ("In practice, the only meaningful difference between an award made under § 1927 and one made pursuant to the court's inherent power is . . . that awards under § 1927 are made only against attorneys . . . while an award made under the court's inherent power may be made against an attorney, a party, or both."). Courts in the Second Circuit have sanctioned parties for filing baseless pleadings (as Charter has done here). *See, e.g., Emmon*, 675 F.3d at 144–45 (affirming sanctions under Section 1927 and the court's inherent authority when the party sought a temporary restraining order under false pretenses and filed a pleading that "made frivolous arguments that misrepresented the record").

Finally, Charter filed the Motion in bad faith. Specifically, on literally the eve of trial, Charter filed a motion, on an emergency basis of its own making, requesting that the Court take judicial notice of 37 purported "facts" gleaned from 23 different sources. The Motion, including the exhibits attached thereto, consists of over 400 pages. Setting aside that none of the purported facts are actual facts, as opposed to legal argument, Charter could have filed this Motion many months ago; indeed, it should have filed it prior to the Court's ruling on summary judgement. Instead, Charter chose to file the Motion on the evening before the trial. Moreover, there is no basis in law for this Motion. Charter's decision to file the Motion on the eve of trial is just another sharp litigation tactic employed by Charter that was no doubt intended to divert the Debtors' attention and ability to prepare for trial.

Based on the foregoing authorities, Charter's behavior clearly warrants sanctions under Section 1927 and this Court's inherent authority. **Accordingly, if Charter does not withdraw the Motion with prejudice by 5:30PM (et) today, April 27, 2020, Windstream will request that the Bankruptcy Court sanction Charter accordingly**.

We do not make this request lightly. Please do the right thing and withdraw the Motion.

Regards,
Shaya Rochester
Conflicts Counsel for the Debtors

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Partner

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Cc: Kingston, John S. <jkingston@thompsoncoburn.com>; Hockett, Brian W. <bhockett@thompsoncoburn.com>; Przulj, Nino <nprzulj@thompsoncoburn.com>; Nepple, Michael L. <MNepple@thompsoncoburn.com>; Ross, Terence P. <terence.ross@katten.com>; Lockhart, Kristin <kristin.lockhart@katten.com>; Justus, Michael R. <michael.justus@katten.com>; Thompson, Grace A. <grace.thompson@katten.com>; Werlinger, Eric T. <eric.werlinger@katten.com>
Subject: RE: Windstream Holdings, Inc., et al., vs. Charter Communications, Inc., et al., Adv. Proc. 19-08246: Defendants' Motion for Judicial Notice

Your Honor,

As you know, we are Conflicts Counsel for the Debtors in the above-referenced Chapter 11 cases and plaintiffs in the above-referenced adversary proceeding.

On the literal eve of trial, Charter filed a 415-page motion, on an emergency basis of its own making, requesting that this Court take judicial notice of multiple so-called “facts”. The Debtors respectfully request that the Court deny the relief requested without the filing of an Objection by the Debtors or a hearing.

If the Court is inclined to conduct a hearing, the Debtors are entitled to be heard and file an objection, under Federal Rule of Evidence 201(e), on the propriety of taking judicial notice, and they respectfully request that they be given such an opportunity. Indeed, under the Case Management Order, Charter should have contacted Chambers to obtain a hearing date before filing the Motion.

The relief requested is wholly meritless and should be denied.

We thank the Court for its assistance in this matter.

Respectfully submitted,

Shaya Rochester

Conflicts Counsel for the Debtors

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Subject: Windstream Holdings, Inc., et al., vs. Charter Communications, Inc., et al., Adv. Proc. 19-08246: Defendants' Motion for Judicial Notice

EXTERNAL EMAIL – EXERCISE CAUTION

Your Honor,

As you know, my firm represents Defendants Charter Communications, Inc. and Charter Communications Operating, LLC in the above-referenced Adversary Proceeding.

Attached please find a courtesy copy of Defendants' Motion for Judicial Notice, which was filed on April 26, 2020, at 3:49 p.m. EST. Defendants do not intend to present their motion for judicial notice until their rebuttal case, but wanted to provide the Court with a courtesy copy as soon as possible.

Respectfully,
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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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