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of Windstream Holdings, Inc., et al.*

**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)
WINDSTREAM HOLDINGS, INC., <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	Adv. Pro. No. 19-08246
	)	
v.	)	
	)	
CHARTER COMMUNICATIONS, INC. and	)	
CHARTER COMMUNICATIONS OPERATING, LLC,	)	
	)	
Defendants.	)	

**THE COMMITTEE'S POST-TRIAL BRIEF**

<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.



## **I. INTRODUCTION**

The Official Committee of Unsecured Creditors (the “Committee”) of Windstream Holdings, Inc., *et al.* and its debtor affiliates, as debtors and debtors in possession in the above-captioned Chapter 11 cases (collectively, “Windstream” or the “Debtors”), as intervenor in the above-captioned adversary proceeding commenced by the Debtors against Charter Communications, Inc. and Charter Communications, LLC (collectively, “Charter”) (the “Adversary Proceeding”), respectfully submits that the Court should award the relief requested by Debtors in Counts VI and VII of the Complaint. Specifically, the Committee asks the Court to sanction Charter in the amount of \$19.9 million for Count VI, Charter’s violations of the automatic stay, and to equitably subordinate Charter’s claims under Count VII.

The Court has already found that Charter violated the automatic stay and engaged in inequitable conduct. (Adv. Dkt. No. 274.) Over the course of a four-day trial, Windstream proved the losses it suffered as a result of Charter’s injurious advertisements and other violative conduct. In addition, throughout this lawsuit, Charter’s lawyers have acted to frivolously delay this litigation. This, too, has caused the Debtors to rack up additional legal fees and costs. Unsecured creditors were also injured as a result of Charter’s unlawful actions. Because the Debtors’ Plan of Reorganization provides for virtually no recovery to unsecured creditors and Charter’s misconduct has directly harmed the value of the Debtors’ estates, the awarding of significant sanctions to the Debtors for Charter’s misdeeds has become all the more imperative for the Committee. Thus, the Committee respectfully requests that the Court enter a judgment awarding the full amount of sanctions that the Debtors seek and equitably subordinating Charter’s claims.

## **II. ARGUMENT**

On March 3, 2020, this Court entered an Order finding Charter liable for violations of Section 43(a) of the Lanham Act and related state deceptive trade practices laws, as well as in breach of the VAR Agreement between the parties for disconnecting hundreds of Windstream customers. (Adv. Dkt. No. 274.) As the evidence presented by the Debtors showed, Charter's false advertising campaign cost Windstream substantial sums of money in the form of departing customers, lost profits, expensive ameliorative efforts and, of course, legal fees and costs. Adding insult to injury, Charter's lawyers have tacked on even more fees and costs by engaging in frivolous litigation tactics at nearly every turn. Charter conducted a scorched earth discovery campaign, serving dozens of discovery requests on the Debtors seeking irrelevant information. Charter also filed a motion to dismiss raising arguments that had no basis in fact or law. (Adv. Dkt. No. 109.) More recently, Charter refused to stipulate to the admissibility of dozens of noncontroversial documents the Debtors sought to enter into evidence. (4/27/20 Hr. Tr. 49:12-51:16.) Then, on the eve of trial, Charter filed a motion styled as a request for judicial notice of facts but which was actually a blatant attempt to draw the Court's attention for the first time to new legal arguments and precedents Charter believed favored its case. (Adv. Dkt. No. 308.) The Court also has sanctioned Charter, or warned that it may do so, on several occasions. (*E.g.*, Adv. Dkt. No. 258). And these are just a few examples of Charter's numerous nonsensical acts that imposed further, needless costs on the Debtors and their estates, resulting in harm to unsecured creditors.

Charter's tactics, before and during the litigation, have had a significantly negative impact on Windstream's business and, in turn, the Debtors' estates. This directly impacts the

recoveries the unsecured creditors can expect to obtain.<sup>2</sup> Because of this, the Committee has taken an active role from the outset of this litigation. In May 2019, the Committee intervened and became a party to this Adversary Proceeding. (Adv. Dkt. No. 56.) The Committee has participated in depositions and submitted papers where it has believed doing so would be helpful to the Court and, overall, has supported, and continues to support, the Debtors' efforts to prosecute this litigation and to be made whole by Charter. Because it has now become apparent that, under the proposed Plan before the Court, unsecured creditors are not expected to receive a meaningful recovery, every dollar counts. Charter has effectively taken value out the pockets of unsecured creditors by imposing millions of dollars of costs and fees and misleading Windstream customers into switching to Charter. Charter should not be able to profit from its intentionally unlawful conduct at the expense of unsecured creditors.

The Debtors have now demonstrated at trial a conservative measure of the extent of the harm that Charter's actions have caused to the Debtors' estates. The fees and costs incurred in connection with this Adversary Proceeding alone have amounted to over \$9 million and continue to rise. *See Auman Dec.* ¶¶ 20-21. Further, according to the testimony of the Debtors' expert, John Jarosz, the Debtors have lost \$3.2 to \$5.1 million in profits from lost customers and were forced to spend an additional nearly \$5 million in promotional and corrective advertising expenses to attract new customers for those lost to Charter's falsities and to keep customers who intended to disconnect their service in light of Charter's false and misleading advertising. *See Jarosz Dec.* ¶ 6. All told, the Debtors have proven Windstream's losses as a result of Charter's misconduct are approximately \$19.9 million.

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<sup>2</sup> As will be clear in the Committee's Confirmation Objection, the Committee believes that the claims against Charter are unencumbered by pre-petition liens, and any value recovered should be available for unsecured creditors.

### III. CONCLUSION

For all the foregoing reasons, the Committee respectfully requests that the Court issue sanctions in the full amount requested by the Debtors as to Count VI and equitably subordinate Charter's claims under Count VII.

Dated: June 9, 2020

/s/ Lorenzo Marinuzzi  
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