UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re: Windstream Holdings, Inc., et al, Debtors.	)	Case No. 7:21-cv-04552-CS
Windstream Holdings, Inc., et al., Plaintiffs-Appellees, v. Charter Communications Inc. and Charter Communications Operating, LLC, Defendants-Appellants	)	

BRIEF OF APPELLANTS CHARTER COMMUNICATIONS INC. AND CHARTER COMMUNICATIONS OPERATING, LLC

CORPORATE DISCLOSURE STATEMENT

Defendant-Appellant Charter Communications Inc. is a publicly-held Delaware corporation. Liberty Broadband Corporation is the only publicly-held corporation with an interest greater than 10% in Charter Communications, Inc.

Defendant-Appellant Charter Communications Operating, LLC is a Delaware limited liability company which is a subsidiary of and managed by Defendant-Appellant Charter Communications, Inc.

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PRELIMINARY STATEMENT

In this adversary proceeding, the bankruptcy court issued what the Debtors' counsel boasts to be the largest ever sanction for a violation of the automatic stay—more than $19 million.[1] This unprecedented sanction was not based on a creditor blatantly violating the automatic stay, or indeed any creditor activity at all. Rather, it was based on a competitor of certain Debtors (collectively, "Windstream") issuing an advertisement that did nothing more than note, as Windstream Holdings, Inc. itself had stated, that Windstream faced "uncertainty" and "risk" from the bankruptcy.

Appellants Charter Communications Inc. and Charter Communications Operating, LLC ("Charter") request reversal of the bankruptcy court's decision on numerous grounds set forth below, but Charter notes here two fundamental errors mandating reversal:

First, the bankruptcy court's ruling rested on the idea that Charter's advertisements interfered with Windstream's contracts with its customers, but there is *no evidence* of any such contracts. Indeed, the only evidence on the issue shows that Windstream has no customer contracts. Windstream's misleading assertion of customer contracts—for the first time in its post-trial brief, citing no evidence to

[1] *See* https://katten.com/katten-wins-record-19-million-award-for-client-windstream-in-false-advertising-case-arising-out-of-windstreams-chapter-11.

support it—led the bankruptcy court to err on this issue. Without a contractual right to keep customers, Windstream has no property interest in the mere hope of keeping customers, and thus there can be no stay violation in urging customers to switch to Charter.

Second, the bankruptcy court's ruling rested on a theory that advertising is an "exercise of control" over property, despite the plain-language and common-sense reading to the contrary. The only case cited by the bankruptcy court addressing this issue held that advertising is not control. And the bankruptcy court distinguished that case based solely on the presence of customer contracts that do not exist. Moreover, if advertising is control, then *all* advertising that encourages customers to go with a debtor's competitor violates the automatic stay. Recognizing the absurdity of this proposition, the bankruptcy court attempted to limit its reading of the stay's prohibition to "improper" advertising, but there is nothing in the text supporting that distinction, much less offering guidance as to what "proper" advertising is permissible to the countless businesses competing with companies seeking bankruptcy protection.

In sum, the bankruptcy court's decision rests on contracts that do not exist and a legal theory that would dramatically expand the scope of the automatic stay to regulate competitors regardless of whether they actually exercise control over the

debtor's property—and punishes Charter with civil sanctions for failing to predict this expansion. This Court should reverse.

JURISDICTIONAL STATEMENT

This appeal is from the final judgment entered by the bankruptcy court in the adversary proceeding on April 15, 2021. Adv. Pro. No. 19•08246 ("Adv.") Dkt. 334. The bankruptcy court had jurisdiction over this adversary proceeding under 28 U.S.C. §§ 157(b) and 1334(b) because Windstream's claims related to the chapter 11 cases of the debtors, *In re Windstream Holdings, Inc.*, No. 19-22310 *et seq.*, pending in the bankruptcy court. This Court has jurisdiction under 28 U.S.C. §§ 158(a)(1) and 1334(b). Charter timely filed its notice of appeal on April 29, 2021. Adv. Dkt. 337.

STATEMENT OF THE ISSUES PRESENTED

1) Did the bankruptcy court err in holding:

(a) there was no fair ground of doubt, and it was clear and unambiguous, that Charter's advertising campaign violated the automatic stay;

(b) Charter violated the automatic stay by committing an "an act to exercise control over property of the estate" under Section 362(a)(3), by encouraging customers to switch telecommunications service away from a company facing the risk and uncertainty of Chapter 11 bankruptcy;

(c) "improper" advertising "exercise[s] control" over property, but "legitimate" advertising does not, and the advertising here was "improper" because it supposedly violated the Lanham Act and state-law equivalents; and

(d) contempt sanctions could be imposed without a finding that Charter failed to act with reasonable diligence?

Standard of Review: The legal questions of whether Charter violated the automatic stay and whether there was a fair ground for doubt are reviewed *de novo*. While a finding of lack of reasonable diligence would be reviewed for clear error, this issue also is reviewed *de novo* because there was no such finding.

2) Did the bankruptcy court err in holding that it had the authority to hold Charter in contempt, and to take away from a jury the question of whether Charter's advertising was unlawful and any damages therefrom?

Standard of Review: This legal issue is reviewed *de novo*.

3) Did the bankruptcy court err in holding that approximately $10 million in damages was properly compensatory and not duplicative, and that over $9 million in attorneys' fees and expenses should be awarded where there was no evidence to support a one-sentence, conclusory finding of willfulness?

Standard of Review: These are legal issues and mixed questions of law and fact that are reviewed *de novo*.

STATEMENT OF THE CASE

A. Factual Background

1. Windstream's Bankruptcy

Debtors operate as a telecommunications company, with certain companies under the Windstream umbrella providing voice and data network communication services to residences and businesses. Record on Appeal (Dkt. 12) Item No. ("Rec.") 1 ¶ 11. Windstream does not require its residential customers to sign long-term contracts; instead, Windstream charges customers for its services on a month-to-month basis and permits its residential customers to cancel their services at any time. *See, e.g.*, Rec. 142 at 92, 1444.

On February 25, 2019, all 205 Debtors filed a Voluntary Petition for Chapter 11 bankruptcy protection. No. 19-22312, Dkt. 1. The automatic stay went into effect on that date. 11 U.S.C. § 362.

The same day, Windstream issued a press release acknowledging the "risks and uncertainties relating to [Windstream's] Chapter 11 cases." Rec. 23, Ex. 3 at 2. As part of its "first day motions" with the bankruptcy court, Windstream requested relief from certain provisions of the Bankruptcy Code so it could continue its operations uninterrupted. Windstream represented to the bankruptcy court that if it

was not granted such relief, there could be "costly disruptions to [Windstream's] operations" and "the Debtors' business operations would be severely disrupted." No. 19-22312, Dkt. 27 ¶¶ 33-36, 49.

On the same day, Windstream moved for approval of "the form and manner of notifying creditors of commencement of these chapter 11 cases." Rec. 262. The notice ("Windstream Stay Notice") that Windstream sought approval for, and the bankruptcy court approved, contained the following description of the automatic stay:

> The filing of the case imposed an automatic stay against most ***collection activities***. This means that ***creditors*** generally may not take action to collect debts from the debtor or the debtor's property. For example, while the stay is in effect, ***creditors*** cannot sue, assert a deficiency, repossess property, or ***otherwise try to collect*** from the debtor. Creditors ***cannot demand repayment*** from the debtor by mail, phone, or otherwise. ***Creditors who violate the stay*** can be required to pay actual and punitive damages and attorney's fees.

Id. at Ex. 1 (emphases added). In March 2019, Windstream sent the Windstream Stay Notice to creditors and to approximately 1,159,952 of its customers. Rec. 23, Ex. 8.

On March 15, 2019, Windstream filed its 2018 Annual Report with the SEC, which informed investors that "risks and uncertainties surrounding the Chapter 11 Cases raise substantial doubt about our ability to continue as a going concern." Rec. 23, Ex. 5 at 17. Windstream warned that its bankruptcy could force a "cessation of operations," and warned of risks to its "ability to generate sufficient cash to fund our

operations during the pendency of the Chapter 11 Cases," and its "ability to develop, confirm and consummate a Chapter 11 plan or alternative restructuring transaction." *Id.* at 3, 5, 8. It further warned that "future results are dependent upon the successful confirmation and implementation of a plan of reorganization," and "[i]f the proceedings related to the Bankruptcy Filings continue for a longer period than anticipated, customers and suppliers may lose confidence in our ability to reorganize our business successfully and will seek to establish alternative commercial relationships." *Id.* at 7.

2. Charter's Direct Mail Advertisement

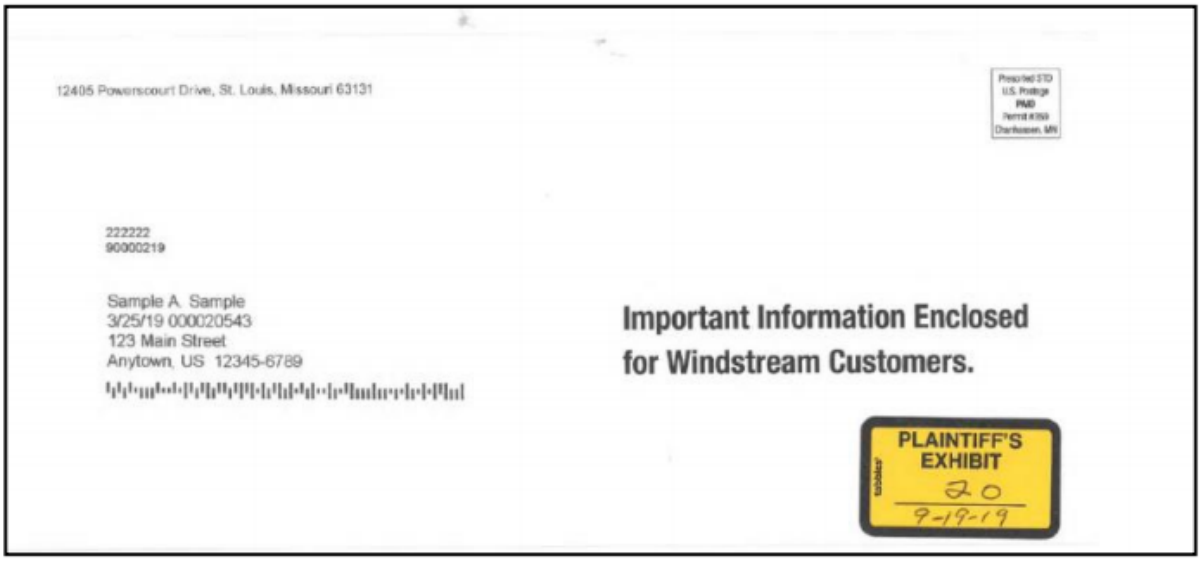
Charter also offers voice and data communication services to residential and business customers. Rec. 1 ¶ 12. Charter, Windstream, and a variety of other internet service providers compete in certain locations within the United States. *Id.* ¶ 13.

In March 2020, Charter engaged advertising agency RAPP Worldwide, Inc. ("RAPP") to develop a marketing campaign to highlight certain benefits of Charter's internet offerings versus those offered by Windstream. Rec. 159. For example, the advertisements highlighted Charter's fast internet speeds, free internet modems (compared to Windstream's $5.99 per month fee for a modem), Charter's large library of On Demand titles, and Charter's "TV App," which permitted streaming of live television on mobile devices. Rec. 121 at 1. The advertisement began by noting

that Windstream's future was "uncertain[]" and "unknown" and asked whether customers would be able to "rely on [Windstream] in the future." *Id.* at 1, 2. Charter diligently instructed RAPP not to assert that Windstream was going away or would not emerge from bankruptcy. Rec. 255 (Atkinson (Charter) Dep. Tr. 175:5-176:3; 176:8-18; 177:2-6); Rec. 155 at 4; Rec. 254 (McGuire (RAPP) Dep. Tr. 50:21-51:22; 126:5-127:9; 127:11-22). The undisputed summary judgment evidence was that the advertisement was consistent with generally accepted practices in the direct mail industry. Rec. 22 ¶ 92.[2]

The full advertisement, on behalf of Charter's residential internet brand Spectrum, is shown below:

[2] Debtors challenged the admissibility of the expert declaration submitted in support of this fact in a meet-and-confer letter (Adv. Dkt. 112) that was treated as a motion to strike, to which Defendants responded (Adv. Dkt. 113). The bankruptcy court never ruled on Debtors' motion.



Rec. 121; Rec. 123.

In March 2019, Charter mass-mailed the advertisements to approximately 800,000 residences in 22 states. Rec. 228. Charter did not use—and did not have

access to—any customer lists of Windstream's to determine where to send the 800,000 brochures. Rec. 259 (Kardos Dep. Tr. 10:4-11:24). Instead, Charter used publicly available information to send advertisements to areas where Windstream may have operated. *Id.* Only a fraction of the approximately 800,000 advertisements were received by Windstream customers. *Id*.

3. The Parties' Prelitigation Communications

On March 20, 2019, representatives of the parties convened a call where Windstream expressed concerns regarding the advertisements. Adv. Dkt. 3 ¶ 26. The next day, Windstream sent Charter a cease-and-desist letter. *Id.*, Ex. 10. On March 26, 2019, Windstream sent a second letter, acknowledging that Charter communicated it was "taking this matter seriously" and that it was actively "investigating" the issue. *Id.*, Ex. 10 at 6.

On March 26—nearly two weeks before the initiation of this lawsuit—Charter responded in writing to Windstream, stating that it would take Windstream's concerns into account before distributing any further advertisements. Adv. Dkt. 3, Ex. 11. In particular, Charter removed the references to "uncertainty" and "risk" in the next batch of advertisements that it had planned to circulate on April 22, 2019. Adv. Dkt. 12 at 5. The revised brochure addressing Windstream's stated concerns is reproduced below:

Spectrum

America's fastest-growing
TV, Internet and Voice provider.

TV + Internet
from $44.99 /mo each for 12 mos*

No Contracts

Name or Current Resident
123 Anystreet
Anytown, ST 12345-6789

Dear (Neighbor):

Windstream has filed for Chapter 11 bankruptcy. To ensure you get the best TV and Internet services, switch to Spectrum. With a network built for the future, Spectrum is here for the long haul—with our best deal from $44.99/mo each for 12 months.*

HD **Spectrum TV***—stream live TV anywhere, plus FREE HD
Watch live TV, your favorite shows, sporting events and more in superior digital picture and sound quality. Plus, download the Spectrum TV App to stream up to 180 live TV channels, including your local channels, and up to 50,000 On Demand titles on your devices at home and on-the-go.

Spectrum Internet*—top performing Internet provider, delivering more speed, more consistently***
Get the most out of your devices with the fastest Internet starting speeds for the price at [FLG] Mbps. Includes no data caps and a **FREE** Internet modem.

Windstream has a 2-year contract.[1] With Spectrum, there are no contracts. Plus, we will buy you out of your current contract up to $500.**

Sincerely,

Geoff Boytos, VP of Marketing

P.S. Ask about adding home phone service for $9.99/month.* Call your friends and family in the U.S., Canada, Mexico and more with no added taxes and fees. Guaranteed to save you money!

Spectrum TV
from $44.99 /mo for 12 mos*

Spectrum Internet
$44.99 /mo for 12 mos*

Goodbye, Windstream.
Hello, Spectrum.

Call 1-XXX-XXX-XXXX
or visit Spectrum.com
Limited-time offer! Expires XX/XX/XX

TV + Internet
from $44.99 /mo each for 12 mos*
NO CONTRACTS

GA-LC-1D-042219-FLG-30

Adv. Dkt. 12, Ex. C.

B. This Lawsuit

On April 5, 2019, Windstream filed a complaint against Charter with the bankruptcy court. Rec. 1. Windstream alleged seven counts against Charter: (I) violation of the Lanham Act; (II) violation of the Georgia Uniform Deceptive Trade Practices Act; (III) violation of the North Carolina Unfair and Deceptive Trade Practices Act; (IV) violation of the Nebraska Uniform and Deceptive Trade Practices Act; (V) breach of contract; (VI) violation of the automatic stay; and (VII) equitable subordination. *Id.* at 21-28. Along with a complaint, Windstream moved for a temporary restraining order ("TRO") and preliminary injunction against Charter. Adv. Dkt. 2. On April 16, 2019, the bankruptcy court issued a TRO, ordering Charter to "cease and desist" from its direct mail campaign. Rec. 2 at 3. Charter complied with the order and permanently suspended its direct mail campaign. Adv. Dkt. 57, Ex. A. On May 16, 2019, the bankruptcy court issued a preliminary injunction, extending the same relief it granted to Windstream in the TRO. Rec. 3.

On October 9, 2020, Charter filed a motion with this Court to withdraw the reference from the bankruptcy court as to Counts I through V. Adv. Dkt. 104.

On November 15, 2019, Windstream and Charter each filed motions for summary judgment. Rec. 14, 20. Windstream moved for summary judgment on liability on all seven counts. Rec. 14. With respect to Count VI (Violation of the Automatic Stay), Windstream argued that Charter violated the stay "in at least three

ways: (1) by willfully harming Windstream's goodwill by sending a false advertisement to Windstream's customers; (2) by disconnecting service to hundreds of Windstream customers in breach of the notice provisions of the VAR Agreement; and (3) by disconnecting service to Windstream customers in an attempt to collect prepetition debts allegedly owed to Charter." Rec. 15 at 32. Notably, Windstream did *not* assert that Charter's advertisements violated the stay by interfering with Charter's customer contracts.

On December 18, 2019, the bankruptcy court held a hearing on the parties' summary judgment motions and issued a bench ruling, denying Charter's summary judgment motion on Counts I through V and granting Windstream's summary judgment motion for liability on all seven counts (but making no determination as to any alleged damages). Rec. 74 at 137. The bankruptcy court held that the burden of proof on falsity had shifted to Charter because, by suggesting Windstream's bankruptcy created risk for customers, "Charter intentionally set out to deceive the public." *Id.* at 138, 144. The court then held that Charter was not able to satisfy its burden to show that customers had not been confused by Charter's advertisement. *Id.* at 144-145.

The bankruptcy court further held that "the violation of the Lanham Act and its state law equivalents is an act to control property of the estate, namely, the debtors' customers or contracts with those customers, which would also constitute a

violation of the automatic stay, given that those rights are protected by the automatic stay." *Id.* at 152.

On April 21, 2020, this Court held a hearing where it ruled on (1) Debtors' motion to dismiss Charter's notice of appeal of the bankruptcy court's summary judgment decisions on the claims asserted in Counts II and IV (non-damage claims); (2) Charter's request for interlocutory review of the bankruptcy court's summary judgment decision on the remaining Counts; and (3) Charter's motion to withdraw the reference as to Counts I through V. This Court dismissed Charter's notice of appeal because the bankruptcy court's summary judgment opinion did not finally adjudicate the adversary proceeding. Case 7:19-cv-09354, Dkt. 39 at 31. This Court also held that the issues decided in the summary judgment motion did not warrant an interlocutory appeal. *Id.* at 19. However, this Court granted Charter's motion to withdraw the reference on Counts I through V because, *inter alia*, "Counts I through V are private rights"; "the proof of claims would not necessarily resolve [any of the counts]"; the parties did not consent to final adjudication by the bankruptcy court; "Counts I, III and V are legal claims as to which there is a right to a jury trial on damages"; and "considerations of efficiency … favors withdrawing the reference as to Counts I through V." *Id.* at 22, 25, 27. This Court also noted that Charter "can seek district-court review of the bankruptcy court's partial summary judgment decision, which would … involve reviewing the bankruptcy court's liability rulings

on Counts I through V because the bankruptcy court's determinations that defendants violated the automatic stay and engaged in inequitable conduct or acts of insubordination were premised on its rulings that defendants violated the Lanham Act and state trade practice statutes and breached their contract with plaintiffs." *Id.* at 33-34.

C. The Bankruptcy Court's Opinion

In May 2020, the bankruptcy court held a four-day trial to determine: (a) if under Count VI (violation of the automatic stay) of the Complaint, Charter is liable for civil contempt and, if so, the proper compensatory sanction to impose; and (b) whether under Count VII, equitable subordination was appropriate given the amount of alleged harm caused by Charter's advertisements. During the trial, the bankruptcy court did not admit any customer contracts into evidence and Windstream made no argument about any such contracts. The only evidence relating to customer contracts was a transcript of Windstream salespeople admitting that Windstream does not have such contracts with its customers. *See, e.g.*, Rec. 142 ("Windstream doesn't do contracts").

The bankruptcy court issued a memorandum decision on April 8, 2021. Rec. 110 (the "Order").[3] The bankruptcy court held that its "inherent contempt power"

[3] Charter is not appealing the bankruptcy court's holdings regarding termination of service and equitable subordination. *See* Order at 3-4.

gave it the authority to grant monetary sanctions to Windstream. *Id.* at 5. The court acknowledged that "civil contempt should not be resorted to where there is a fair ground of doubt as to the wrongfulness of the defendant's conduct," but also held that "it is logical to require those in doubt whether the stay applies to seek clarification from the court or be sanctioned for shooting first and aiming later." *Id.* at 6-8 (internal quotation marks and citations omitted).

The court held that section 362(a)(3) of the Bankruptcy Code "is clear and unambiguous as applied to Charter's conduct" of "interfering with the Plaintiffs' customer contracts and goodwill," *id.* at 10, and applies "to conduct that simply interferes with the debtor's contract rights," *id.* at 13. The court recognized that "every corporation expects legitimate advertising by competitors, and thus advertising" generally would *not* "exercise control" over property of the estate. *Id.* at 19. Nonetheless, the court concluded that "[n]o reasonable person would believe that Defendants' advertising campaign, designed to use false and knowingly misleading information to cause the Debtors' customers to terminate their contracts and switch to Charter, protected a legitimate interest of Charter's and did not harm property interests of the Debtors." *Id.*

After finding Charter in contempt, the court held that it need not find Charter acted "willfully" to "award[] actual damages," *id.* at 22, and that "compensatory sanctions" can "include fees and expenses incurred in trying to enforce the stay," *id.*

at 23-24. The court awarded Windstream $19,179,329.45 in compensatory sanctions (with respect to Charter's advertising campaign), which included $9,183,179.45 in legal fees and expenses, *id.* at 41, $5,100,000 in supposed "lost profits," *id.* at 26, $862,775 in "corrective advertising," *id.* at 36, and $4,033,425 for "the cost of a promotional campaign [undertaken by Windstream] comprising customer upgrades, discounts and other pricing promotions," *id.*

SUMMARY OF THE ARGUMENT

The bankruptcy court's contempt ruling and sanctions should be reversed or vacated on several grounds.

I. The bankruptcy court erred as a matter of law in holding that Charter violated the automatic stay, and in holding that there was not at least a fair ground of doubt that precluded the imposition of sanctions.

A. Contempt sanctions are permissible only if there is no fair ground of doubt as to the violation of a court order. However, even while accepting this point, the bankruptcy court insisted that a company in doubt about the automatic stay must seek guidance or else face contempt, which conflicts with binding precedent.

B. None of the requirements for a violation of the automatic stay was satisfied.

First, Windstream failed to prove the existence of estate property at issue here. The bankruptcy court concluded as a matter of law that there was a property right in

Windstream's contracts with its customers, but Windstream never introduced any evidence of customer contracts. Windstream never even asserted their existence until its post-trial brief, when it still cited nothing about contracts. In fact, the only evidence on the issue is that Windstream does *not* have customer contracts at all and misled the court with a post-trial brief suggesting otherwise. The only other purported property interest here is goodwill, but no evidence of goodwill was adduced and numerous bankruptcy cases have cast doubt on whether goodwill is property apart from identifiable trademarks, customer lists, or other intangible property not present here. Neither Windstream nor the bankruptcy court identified what the supposed goodwill actually consisted of beyond Windstream's general interest in keeping customers, which does not constitute a property right under well-established law.

Second, Windstream failed to show that Charter exercised control over any property. Charter did not control any contractual rights of Windstream (because none exists) or Windstream's goodwill. It simply mailed an advertisement, which encouraged customers to switch to Charter, as competitors routinely do. The only case where a debtor claimed a violation of the automatic stay based on mere advertising expressly rejected this theory. *See In re Golden Distribs., Ltd.*, 122 B.R. 15 (Bankr. S.D.N.Y. 1990). And the bankruptcy court cited no precedent in support

of its wildly expansive interpretation of "control" as any act that might impact decisions made by the Debtors' customers.

Third, the bankruptcy court erred in using the supposed Lanham Act violation as the basis of an automatic stay violation. Seemingly recognizing that not all advertising for a debtor's customers could violate the automatic stay, the bankruptcy court distinguished between "legitimate" and "improper" advertising. But there is nothing in the language of "exercise control" that suggests any such distinction, and it conflicts with the natural definition and purpose of a "stay," which is to temporarily pause otherwise lawful conduct. It also would be a troubling expansion of bankruptcy court power to allow bankruptcy courts to decide innumerable violations of nonbankruptcy law under the rubric of the automatic stay. Indeed, it would turn the automatic stay into an "obey the law" injunction, which courts routinely hold improper.

Moreover, there was no Lanham Act violation in the first place. There was nothing false or misleading about the initial advertisements' reference to the "risk" and "uncertainty" of bankruptcy. Windstream's own public filings made the same point in materially identical terms. Regardless, such statements of opinion about the future are not actionable under the Lanham Act. The bankruptcy court decided these issues incorrectly on summary judgment.

Fourth, Charter acted with reasonable diligence, which also precludes contempt sanctions. The bankruptcy court failed to address this issue, and the undisputed evidence shows that Charter ensured that the advertisements did not say that Windstream was going out of business and that Charter had no belief that the advertisements were misleading, let alone that they might violate the automatic stay. And when Windstream asked Charter to remove the language of "risk" and "uncertainty," Charter did so within days, even before this suit was filed. That is far from the unreasonable conduct that would warrant contempt sanctions.

II. This Court should also reverse because the bankruptcy court lacked authority to issue the contempt sanctions. The bankruptcy court relied on the generic authority of Section 105(a) and inherent authority. However, the Supreme Court has held in other contexts that neither of these sources of authority can override explicit provisions of the Bankruptcy Code. Given that Congress expressly limited the sanction authority for violations of the automatic stay to natural persons, Section 105(a) and inherent authority cannot expand this authority.

III. The damages award is also unsupported and improper. The damages were not tied to any particular property right or traceable to anything Charter did. Damages were based generically on the loss of customers and the cost to retain or replace them, despite that there is no general property right to keep customers for as long as the business wants. Moreover, the $5 million in lost profits damages rested

on obviously wrong expert testimony that conflated customers staying with Windstream for 50 months total (on average) with customers staying for an *additional* 50 months from any measurement date, and failed to show that any increased churn (loss) of customers was statistically significant. The lost profit damages awarded were also patently duplicative of the $4 million awarded to reimburse Windstream the cost of retaining or replacing those profits, which Windstream conceded they did by the end of the year. Finally, under binding precedent, attorneys' fees may be imposed only for a willful violation of a court order, and the bankruptcy court's one conclusory sentence on the willfulness issue is both insufficient to justify the $9 million fee award and clearly erroneous.

STANDARD OF REVIEW

Although a district court reviews a bankruptcy court's order for contempt and sanctions for abuse of discretion, "such review is more exacting than under the ordinary abuse-of-discretion standard because a bankruptcy court's contempt power is narrowly circumscribed." *In re DiBattista*, 615 B.R. 31, 38 (Bankr. S.D.N.Y. 2020) (quotation marks omitted). "A bankruptcy court abuses its discretion if it (1) bases its decision on an error of law or uses the wrong legal standard; (2) bases its decision on a clearly erroneous factual finding; or (3) reaches a conclusion that, though not necessarily the product of a legal error or a clearly erroneous factual finding, cannot be located within the range of permissible decisions." *Id.* (quotation

marks omitted).[4] In examining sanctions for contempt, the reviewing court must "ensure that any such decision is made with restraint and discretion." *Mackler Prods., Inc. v. Cohen*, 225 F.3d 136, 141 (2d Cir. 2000) (internal quotations and citations omitted). As discussed below, the bankruptcy court's decision here rested on errors of law and clear errors of fact, and was not made with restraint and discretion.

ARGUMENT

I. CHARTER DID NOT VIOLATE THE AUTOMATIC STAY, AND, AT A MINIMUM, THERE IS A FAIR GROUND OF DOUBT THAT MAKES CONTEMPT SANCTIONS INAPPROPRIATE

To hold a party in civil contempt, the plaintiff must show that "(1) the order the contemnor failed to comply with [was] clear and unambiguous, (2) the proof of non-compliance is clear and convincing, and (3) the contemnor has not diligently attempted to comply in a reasonable manner." *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 655 (2d Cir. 2004). The burden to prove all elements falls on the party seeking contempt, *i.e.*, Windstream. *See, e.g., In re DiBattista*, 615 B.R. at 39.

While the bankruptcy court cited the three-part standard (Order at 6), it failed to mention—let alone apply—the "clear and convincing evidence" standard in deciding whether there was a violation of the automatic stay. It also failed to

[4] Mixed questions of fact and law are also reviewed *de novo*. *See Man Ferostaal v. M/V Akili*, 704 F.3d 77, 82 (2d Cir. 2012).

mention whether Charter diligently attempted to comply in a reasonable manner. Accordingly, there are no factual findings applying the proper standard on which to defer.[5] Regardless, as discussed below, the bankruptcy court erred both as a legal matter and factual matter in holding that Charter violated the automatic stay and that there was no fair ground of doubt about this supposed violation.

A. Contempt Sanctions Are Permissible Only If There Is No Fair Ground Of Doubt As To A Violation Of A Court Order

A defendant may not be held in civil contempt if there was a "*fair ground of doubt* as to the wrongfulness of the defendant's conduct." *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019). "[C]ivil contempt is a severe remedy," and the sanctioning court must ensure that there is "no objectively reasonable basis for concluding that the … conduct" was lawful. *Id.* at 1799 (quotation marks omitted). While *Taggart* did not concern contempt for violation of the automatic stay, its reasoning applies fully to this situation. *See Suh v. Anderson*, BAP No. CC-19-1244, 2020 WL 1277575, at *4 & n.3 (B.A.P. 9th Cir. March 16, 2020).[6] That is the standard

[5] In any event, as discussed *infra* at I.C.2, no deference is warranted because this Court withdrew the reference on the Lanham Act issue and the Lanham Act ruling was decided on summary judgment as the basis for bankruptcy court's automatic stay ruling.

[6] *Taggart* noted that the standard might be different for violation of an automatic stay because the "willful" standard in § 362(k)(1) "differs from the more general language in section 105(a)." 139 S. Ct. at 1804. However, Section 362(k) is inapplicable to corporations, *see In re Chateaugay Corp.*, 920 F.2d at 186-87, and

Windstream advocated (*see* Rec. 100 at 13-14), and that the bankruptcy court adopted here (*see* Order at 6-7).

Regardless, the general Second Circuit law on sanctions for contempt is consistent with *Taggart*: the "party enjoined must be able to ascertain from the four corners of the order precisely what acts are forbidden." *Drywall Tapers & Pointers v. Local 530*, 889 F.2d 389, 395 (2d Cir. 1989). "The proper measure of clarity … is not whether the decree is clear in some general sense, but whether it *unambiguously proscribes the challenged conduct*." *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 292 (2d Cir. 2008) (emphasis added). Thus, sanctions are improper for "a difficult question of first impression," *id.*, or where there is a dispute between courts on the issue, *see In re Orlandi*, 612 B.R. 372 (6th Cir. B.A.P. 2020). "[C]lose questions of interpretation are resolved in the defendant's favor in order to prevent unfair surprise." *Schering Corp. v. Ill. Antibiotics Co.*, 62 F.3d 903, 906 (7th Cir. 1995).

While the bankruptcy court adopted the "fair ground of doubt" standard, it revealed it was applying a different standard by stating that "it is logical to require those in doubt whether the stay applies to seek clarification from the court or be sanctioned for shooting first and aiming later." Order at 8. The idea that a party can

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thus, if contempt authority exists at all, it comes from Section 105(a)—the same provision at issue in *Taggart*. *See Taggart*, 139 S. Ct. at 1801.

be sanctioned where it is unclear whether the conduct violated a court order is plainly inconsistent with *Taggart*, as well as the more general principles requiring an unambiguous violation for the extreme remedy of contempt sanctions.

B. Charter's Advertisements Did Not Take "Control" Of Windstream's "Property," As Required For A Violation Of The Automatic Stay

The automatic stay applies to several categories of conduct, only one of which is potentially applicable here: "any act … to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). Charter's advertisements did not constitute an act to exercise control over the property of Windstream's estate—and, at a minimum, there is a fair ground of doubt on this issue.

1. Windstream Failed To Identify Any Contractual Right To Its Customers, And The Mere Possibility That Customers Would Remain With Windstream Is Not "Property"

There is no property right here, and thus no violation of the automatic stay. The bankruptcy court identified two supposed bases for a property right in Charter keeping its customers: "customer contracts and goodwill." Order at 3. Both are based on fundamental errors.

First, Windstream has no property rights in contracts with customers because there is no record of ***any*** Windstream contracts with customers. At summary judgment, Windstream did not even assert that Charter exercised control over the Debtors' contract rights. *See* Rec. 15 at 32-34 (as relevant to this appeal, advancing

only "goodwill" as property of the estate).[7] The first mention of customer contracts was the bankruptcy court stating *sua sponte* in its bench ruling on summary judgment that there was an "act to control property of the estate, namely, the debtors' customers or contracts with those customers." Rec. 74 at 152.

During the four-day trial, again Windstream did not mention customer contracts and the bankruptcy court did not admit any customer contracts into evidence. The *only* evidence on this subject was a transcript of recorded phone conversations in which Windstream's customer service associates assured their customers that Windstream does *not* have *any* customer contracts. *See* Rec. 142 at 92, 154, 238, 531 ("ASSOCIATE: No. Windstream does – we don't do contracts period, so that's – that's another thing."; "Windstream doesn't do contracts with phone and internet."; "We don't have contracts. Our service is completely contract free."). Nonetheless, the bankruptcy court remained fixed on this issue and again *sua sponte* raised it after the trial: "I would like you to brief … the existing case law on the application of the automatic stay to actions by parties that harm a Debtor's contractual relationships …." Rec. 107 (Trial Tr. (May 6, 2020)) at 144.

Rather than responsibly correct the court about the absence of customer contracts, and argue the actual evidence, Windstream leaned in and asserted the

[7] *See supra* n.1.

existence of customer contracts for the first time in its post-trial brief. *See* Rec. 100 at 17 ("Windstream had contractual subscriptions in place with its customers"); *id.* ("Charter's false advertising was directed at customers contractually committed to Windstream."). However, the lone piece of evidence Windstream cited for these assertions said literally nothing about contracts, only that the average duration a customer stayed with Windstream was 50 months. *See* Rec. 248 (Jarosz Decl.) ¶ 23. And Windstream's assertions are especially troubling given that its own website disclaims customer contracts.[8] In contrast, Charter's post-trial brief (filed the same day) argued that the case law regarding contractual rights was inapposite because "Defendants have found no case that holds or suggests the mere solicitation of customers ***not contractually bound*** to the debtor violates §362(a)(3)." Rec. 101 at 32 (emphasis added).

Seemingly misled by Windstream's new assertions, the bankruptcy court made customer contracts the linchpin of its contempt decision. The court first noted that "[o]n average a customer's ***relationship*** with the Debtors lasts 50 months."

[8] *See* https://www.windstream.com/Support/My-Account/Webmail/Is-there-a-contract (**"Is there a contract?** Windstream does not require customers to sign a contract for High-Speed Internet service."); https://www.windstream.com/Support/My-Account/Billing-payments/Is-there-an-early-cancellation-fee (**"Is there an early cancellation fee?** No, Windstream does not charge a termination fee in the event you decide to cancel your service."). This Court can take judicial notice of Windstream's own website. *See, e.g.*, *Goplin v. WeConnect, Inc.*, 893 F.3d 488, 491 (7th Cir. 2018).

Order at 16 n.17 (emphasis added) (citing Rec. 107 (Trial Tr. (May 6, 2020) at 39 (testimony of Jeffrey H. Auman))). But it then cited this same testimony for the proposition that "there is uncontroverted evidence that the Debtors' customer ***contracts'*** average duration at the time of the stay violation was 50 months." *Id.* at 19 (emphasis added). However, this leap from "relationship" to "contracts" finds no support in Mr. Auman's testimony, which mentions no contracts at all. *See* Rec. 107 (Trial Tr. (May 6, 2020) at 39). In short, the bankruptcy court's holding of Charter's interference with Windstream's contractual rights and supposed damages therefrom was based on nothing more than an assumption of the bankruptcy court reinforced by a false post-trial brief from Windstream.

Without any evidence of customer contracts, there is clearly no property right for Windstream to keep its customers. All of the case law that the bankruptcy court relied upon in this context concerned express rights in executory contracts. *See* Order at 11. Here, not only was there no evidence of a contract, but there certainly was no evidence that the contracts were executory and created property rights (let alone what those property rights entailed and how they were taken by Charter).

More generally, the law is clear that there is no property right to renew a business relationship absent a contractual right to do so. *See, e.g.*, *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 578 (1972) ("[T]he respondent surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient

to require the University authorities to give him a hearing when they declined to renew his contract of employment."); *Brown v. Indep. Sch. Dist. No. I-06*, 974 F.2d 1237, 1241 (10th Cir. 1992) ("[A]n individual cannot claim a property right in renewal of a contract based only on previous renewals of it …."); *Khan v. Bland*, 630 F.3d 519, 522 (7th Cir. 2010) (holding there is "no property right in the renewal" of contracts).[9] In short, Windstream failed to meet its burden to prove it had an executory right to keep its customers for any period of time, let alone for 50 months.

Second, the bankruptcy court likewise erred in relying on goodwill as supposed property of the estate. Many courts have held in the bankruptcy context that goodwill alone should not be treated as property. *See In re Roco Corp.*, 21 BR 429, 435 (B.A.P. 1st Cir. 1982) ("[G]oodwill is rarely accepted as an asset in bankruptcy cases."); *Jones v. Rowland*, 457 F.2d 44, 46 (10th Cir. 1972) ("Good will is rarely accepted as an asset in bankruptcy cases simply because the mere existence

[9] State law determines the extent of the estate's interest in property for bankruptcy purposes. *Butner v. United States*, 440 U.S. 48, 54 (1979). The states where the advertising took place follow the general rule that there is no property right in renewal absent a contractual right of renewal. *See, e.g., Matthews v. Ala. Agric. & Mech. Univ.*, 716 So. 2d 1272, 1276 (Ala. Civ. App. 1998); *Pennington v. Gwinnett Cty.*, 764 S.E.2d 860, 861 (Ga. Ct. App. 2014); Zuckerman v. Bevin, 565 S.W.3d 580, 603-604 (Ky. 2018); *Johnston v. Panhandle Coop. Ass'n*, 408 N.W.2d 261, 267 (Neb. 1987); *Dep't of Transp. v. Adams Outdoor Advert. of Charlotte Ltd. P'ship*, 804 S.E.2d 486, 496 (N.C. 2017); *Gialluca v. Jackson Loc. Sch. Dist. Bd.of Educ.*, No. 2001CA00176, 2001 WL 1612125, at *3 (Ohio Ct. App. Dec. 10, 2001). *A fortiori*, there is no property right to keep customers when no contract exists at all.

of the condition of bankruptcy precludes the existence of business good will."); *Trask v. Susskind*, 376 F.2d 17, 20 (5th Cir. 1967) (holding that "[o]rdinarily, goodwill cannot be transferred separate and apart from tangible assets" and solicitation of the bankrupt company's customers was not a transfer of goodwill).

To be sure, some cases have recognized a property right in goodwill, *see* Order at 12, but those cases concern the value of goodwill associated with trademarks or customer lists. *See In re Biolitec, Inc.*, No. 13-11157, 2015 WL 351201, at *10 (Bankr. D.N.J. Jan. 22, 2015); *Phillips v. Diecast Mkt. Innovations, L.L.C. (In re Collecting Concepts)*, 2000 WL 1191026, at *4 (Bankr. E.D. Va. Feb. 28, 2000); *Merry Hull & Co. v. Hi•Line Co.*, 243 F. Supp. 45, 50 (S.D.N.Y. 1965). However, there was no evidence here about trademarks or customers lists, let alone that Charter ever exercised control over these property rights. Indeed, neither Windstream nor the bankruptcy court made any attempt to define the nature or extent of the goodwill here, such that it would constitute property—and the naked use of the word "goodwill" does not suffice to make a property right. That is especially true given that goodwill was used as a shorthand for Windstream's hope that customers would not move to Charter, and the case law is clear (*see supra* at I.B.1) that without a contractual right, there is no property right based on the mere hope that customers might choose to remain with the debtor. At a minimum, given the many cases not

treating naked goodwill as property, there is ambiguity on this issue that would preclude a finding of contempt.

2. Charter Did Not "Exercise Control" Over Any Windstream Property

Even if there were property rights here—and there were not—there is no legal support for the idea that advertising for a debtor's customers is an exercise of control over them in violation of the automatic stay. In the only case the parties or court could find where a debtor even attempted to make such an argument, the court flatly rejected it. In *Golden Distributors*, the debtor's former operational supervisor solicited the debtor's customers despite having agreed not to do so for a period of years. 122 B.R. at 17. The court held that "the defendants' solicitation of customers of the debtor whose names were readily obtainable … does not constitute an impermissible obtaining of possession or control by the defendants of property of the debtor's estate, or from the debtor's estate." 122 B.R. at 21. Moreover, the court rejected the debtor's appeal to goodwill as the basis for applying the stay because "[t]here was no evidence that the defendants sought to continue the debtor's business or hold themselves out as related in any way to the debtor's business so as to acquire the good will that was associated with such business." *Id.* at 20. The bankruptcy court distinguished *Golden Distributors* solely on the ground that supposedly there are contracts here. *See* Order at 19. However, given the lack of Windstream customer contracts "which can be translated into assured sales" (*see Golden*

Distributors, 122 B.R. at 20), *Golden Distributors* is directly on point, and especially given the complete absence of any cases to the contrary, provides at least a fair ground of doubt as to the applicability of the automatic stay.

This result also follows from the plain language of the phrase "exercise of control." Even assuming there were customer contracts, Charter did not gain any control over Windstream's contractual rights, and there is no evidence of any breach of any contractual rights. Similarly, even assuming there was a property right in goodwill, there is no evidence to suggest that Charter gained control of any Windstream goodwill simply by gaining Windstream customers who chose Charter as their service provider for any number of reasons. As one treatise simply stated: "[C]ompeting against the debtor is not the same as taking debtors' good will." Epstein, Nickles & White, Bankruptcy, Practitioner Treatise Series, Vol. 1, § 3-14, at 174 (1992). That is especially clear where the competition just takes the form of an advertisement: Charter's advertising certainly was intended to *influence* Windstream's customers, but it in no way *controlled* them. The customers had a choice whether to remain with Windstream or to select a different telecommunications service provider, including Charter. *See In re Trump Ent. Resorts, Inc.*, 534 B.R. 93, 104-05 (Bankr. D. Del. 2015) (holding that encouraging the customers to boycott the Taj Mahal was not an exercise of control in violation of the automatic stay).

Even putting aside the lack of any legal support for treating competition as an exercise of control, courts have recognized the ambiguity of the "exercise of control" phrase and the need to avoid overbroad interpretations. "While each of the words 'exercise' and 'control' is clearly defined by Webster's, the significance of the phrase 'to exercise control' in the Code is, at best, ambiguous." *In re Young*, 193 B.R. 620, 624 (Bankr. D.D.C. 1996) (footnote with dictionary definition of "control" omitted). While the phrase was added to the automatic stay provision in 1984, "there is no legislative history which clarifies Congress' purpose in adding it." *In re Allentown Ambassadors, Inc.*, 361 B.R. 422, 437 (Bankr. E.D. Pa. 2007). "The term has been described as 'elusive' and one which can be defined only in a 'case-by-case' manner because a 'continuum of conduct exists which the Court must evaluate in determining whether [a party] has assumed control of property of the estate.'" *Id.* (citations omitted). And this concept is even more elusive "when intangible property is involved." *Id.* In light of this ambiguity, *Allentown Ambassadors* crafted a three-part balancing test to determine "whether the challenged conduct falls inside or outside of the boundary lines": "(1) the nexus between the conduct at issue and the property interests of the bankruptcy estate, (2) the degree of impact on the bankruptcy estate and (3) the competing legal interests of the non-debtor parties." *Id.* at 440 (footnote omitted). The court readily acknowledged it was engaged in making "essentially, a public policy decision." *Id.* Making a policy decision is not

the correct method of applying a statute; and if it were, it would at least give rise to a fair ground of doubt about whether promoting policy is covered by the automatic stay.

The bankruptcy court erred as a matter of law in holding that "section 362(a)(3) stays acts that impair, interfere with or destroy the estate's interest in contracts or goodwill." Order at 12. There is no plain language or logical interpretation of "exercise control" that covers acts that merely impair or interfere with—but do not "control"—the property at issue. None of the cases that the bankruptcy court cites supports this extra-textual interpretation of "control" as the same as "interfere," let alone suggests that it would cover something as anodyne as advertisements.[10] *See ACandS v. Travelers Cas. & Sur. Co.*, 435 F.3d 252, 260 (3d Cir. 2006) (holding that automatic stay applied to arbitration award that "effectively terminat[ed] ACandS's insurance coverage"); *Licensing by Paolo v. Sinatra (In re Gucci)*, 126 F.3d 380, 392 (2d Cir. 1997) (assuming arguendo that "the Gucci companies'

[10] Within the Bankruptcy Code, Congress employed the phrase "exercise control" in only one other section, when determining whether a customer of a broker dealer should be considered an insider or other control person of the debtor. *See* 11 U.S.C. § 747 (subordinating claims of customers who "had the power to exercise control over the management or policies of the debtor"). When intending to do so, Congress prohibited certain actions that fall short of exercising control. *See id.* § 365(a)(4) (prohibiting the trustee from "interfer[ing]" with rights of a licensee under a contract).

continued pursuit of administrative proceedings and litigation against Paolo Gucci licensees repeatedly violated the stay provision"); *In re 48th Street Steakhouse, Inc.*, 835 F.2d 427, 430-31 (2d Cir. 1987) (explaining reasoning without interpreting "exercise control," but rather holding that terminating a prime lease is an act to "obtain possession" of the premises represented by a sub-lease).[11]

The Supreme Court's interpretation of "exercise control" confirms that the bankruptcy court's attempt to expand this phrase should be rejected. In *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995), the Court held that a bank's freezing of an account to protect its right of setoff did not violate Section 362(a)(3)

[11] The bankruptcy court's other citations are equally inapposite. *See In re Extraction Oil & Gas, Inc.*, No. 20-11548, 2020 WL 7074142, at *3-4 (Bankr. D. Del. Dec. 3, 2020) (holding automatic stay applied to a company that sued and engaged in a settlement agreement with alternative service providers that prevented them from working with oil company debtor); *Biolitec*, 2015 WL 351201, at *10 ("The Defendants violated the automatic stay when they … began using the Debtor's customer information and goodwill …."); *Alert Holdings, Inc. v. Interstate Protective Servs., Inc. (In re Alert Holdings, Inc.)*, 148 B.R. 194, 198-99 (Bankr. S.D.N.Y. 1992) (holding use of the debtor's proprietary customer list and going into customer's homes to transfer the billing to defendant violated the automatic stay); *Corp. Claims Mgmt. v. Shaiper (In re Patriot Nat'l, Inc.)*, 592 B.R. 560, 571 (Bankr. D. Del. 2018) ("CCMI alleges that Defendants violated the automatic stay by obtaining, maintaining and continually using CCMI's Misappropriated Information."); *In re Prithvi Catalytic, Inc.*, No. 13-23855, 2015 WL 1651433, at *13 (Bankr. W.D. Pa. Apr. 8, 2015) (explaining that "using [Debtors'] confidential information" and thereby "us[ing] the Debtor's own resources against itself to deprive the estate of the opportunity to receive value from the employment agreements" was a plausible stay violation); *Collecting Concepts*, 2000 WL 1191026, at *4 (suggesting that use of the debtor's trademarks violates the automatic stay).

because "petitioner's temporary refusal to pay was neither a taking of possession of respondent's property nor an exercising of control over it, but merely a refusal to perform its promise." *Strumpf*, 516 U.S. at 21. Thus, "control" of property has its usual meaning of actual power over that property, and an act that may interfere with property does not fall within Section 362(a)(3).

Finally, the bankruptcy court's application of "exercise control" to the advertising here would conflict with the well-established principle that the Bankruptcy Code should be interpreted to give debtors a "fresh start" but not a "head start." *See, e.g.*, *In re Kokoszka*, 479 F.2d 990, 995 (2d Cir. 1973); *Allentown Ambassadors*, 361 B.R. at 439-40 & n.38 (collecting cases). A non-bankrupt company routinely faces advertising and other solicitation of its customers from competitors. If a bankrupt company were somehow immune from such competition—because any act to solicit customers constituted an "exercise of control"—that would be a substantial, undue advantage that finds no rationale in the Bankruptcy Code.

C. The Bankruptcy Court Erred In Treating A Supposed Lanham Act Violation As A Violation Of The Automatic Stay

The bankruptcy court's holding that the Lanham Act violation is the basis for the automatic stay violation provides yet another ground for reversal because (1) a

separate legal violation cannot be converted into an automatic stay violation, and (2) there was no Lanham Act violation.[12]

1. A Violation Of The Lanham Act Is Not A Violation Of The Automatic Stay

There is no question that the automatic stay cannot ban all advertising directed towards a debtor's customers, as that would pose serious First Amendment concerns in addition to creating a wildly excessive scope for the automatic stay. Recognizing this problem, the bankruptcy court created a dichotomy between "legitimate" advertising, which is not covered by the stay, and "improper" advertising, which supposedly is covered. Order at 19-20. The court did not explain, however, how this limiting principle finds any roots in the statutory text. Indeed, it has none: the question, as discussed above, is whether there is an exercise of control over property. There is nothing about "improper" advertising that creates more "control" over customers than does legitimate advertising; either the solicitation of the debtor's customers is control or it is not. Thus, the dichotomy the bankruptcy court created to save its overbroad interpretation of "control" as applying to advertising is unsound and should be rejected.

[12] The bankruptcy court also mentioned a violation of "state-law equivalents" to the Lanham Act, but performed no separate analysis of state law. *See* Rec. 74 at 154. In any event, all of the arguments below apply equally to the state-law equivalents to the Lanham Act.

Even beyond the total lack of textual support, the bankruptcy court's approach has several fundamental flaws.

First, this approach would improperly expand the adjudicative power of the bankruptcy court and impinge on Charter's right to a jury trial. Rather than properly limiting itself to enforcement of the Bankruptcy Code, the bankruptcy court would have to decide violations of all of the rules of competition in order to apply the automatic stay. The D.C. Circuit has cautioned against this kind of "expansion of the jurisdiction of the bankruptcy court" through an overbroad interpretation of "exercise of control." *U.S. v. Inslaw, Inc.*, 932 F.2d 1467, 1472 (D.C. Cir. 1991) (citations omitted). The instant case is the prototypical example of the problem: this Court withdrew the reference on the Lanham Act claim, but the bankruptcy court still used its summary judgment decision on the Lanham Act to impose damages in the guise of an automatic stay violation. Thus, the bankruptcy court not only increased its power, but did so in a manner that effectively deprived Charter of its right to a jury trial on the Lanham Act claim and any damages that supposedly flowed from it.

There is nothing in the phrase "exercise of control" that suggests bankruptcy courts should become roving arbiters of whether competitors have violated non-bankruptcy law against the debtors. Indeed, if the conduct at issue is unlawful, then there is no need to use the blunt remedy of contempt sanctions rather than simply

enforcing the law that is supposedly being violated. *See In re Krause*, 414 B.R. 243, 264 (Bankr. S.D. Ohio 2009) (holding that contempt sanctions pursuant to § 105 are improper when "there is already a congressionally-created remedy in existence for the alleged wrong") (quotation marks omitted).

Second, a "stay" means a temporary suspension of otherwise *lawful* acts pending further judicial action. The term "stay" commonly refers to a legal rule or judicial order that "simply suspend[s] judicial alteration of the status quo." *Nken v. Holder*, 556 U.S. 418, 429 (2009) (quotation marks omitted); *see Black's Law Dictionary* 1709 (11th ed. 2019) (a "stay" is the "postponement or halting of a proceeding, judgment, or the like"). Thus, "stay" denotes a prohibition that is temporary, pending a further event. And its use in the Bankruptcy Code is no different. The automatic stay temporarily pauses otherwise lawful actions in order to afford a debtor a chance to discharge its debts and treat all creditors fairly. The notion that "illegitimate advertising" is "temporarily" suspended (*i.e.*, stayed) by the Bankruptcy Code until a debtor gets out of bankruptcy is simply a *non sequitur* and far from the natural reading of the words.

Third, the automatic stay as a whole focuses on creditor behavior and should be carefully circumscribed outside this sphere. Subsection (a)(3) is among eight subsections defining the scope of the automatic stay. The other seven sub-sections suspend conduct by creditors. 11 U.S.C. § 362(a)(1)-(2), (4)-(8). Thus, the primary

concern and consistent thread throughout all these provisions is to maintain the status quo in the face of creditors otherwise asserting their lawful rights or remedies. Nothing suggests an intention to regulate behavior by a party not seeking to collect on a debt, but rather to entice customers to switch internet providers due to the bankruptcy or financial condition of the debtor.[13] Thus, the bankruptcy court's gymnastics to expand the word "stay" to cover supposedly improper advertising is inconsistent with the purpose of Section 362 as a whole.

Fourth, the Windstream Stay Notice did not state that it would apply to competitor activity (let alone advertising), as is required for contempt. Nothing in the Windstream Stay Notice (or any other)[14] suggests that competition is being regulated and that competing in the wrong way could expose you to violating the automatic stay, instead referring solely to "creditors" and "collection activities." *See supra* at Statement of the Case at A.1.

In the same vein, during the April 15, 2019 hearing on the Debtors' motion for a temporary restraining order, the bankruptcy court accurately pointed out to the Debtors that "*the stay violation is really quite different than the other Lanham Act*

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[13] When Congress sought to prohibit parties from taking advantage of the fact the debtor filed for bankruptcy, Congress expressly did so with an explicit ban, not a temporary pause like the automatic stay. *See, e.g.*, 11 U.S.C. §§ 365(e), 525(a), 541(c).

[14] Rec. 263.

relief you're seeking." *See* Rec. 6 at 82:15-17 (emphasis added). Indeed, in its April 15, 2019 bench ruling on Windstream's motion for a TRO, the bankruptcy court initially (and properly) separated the legal contentions: "I have before me a motion by the Debtor … for the entry of an order, A, enforcing the automatic stay … ; and B, under Lanham Act … , temporarily restraining actions by Charter/Spectrum" for "false advertising …." Rec. 6 at 98:17-99:1. The bankruptcy court then issued a TRO describing the stay violation as concerning only discontinuation of service to Windstream customers,[15] not the advertisements. Rec. 2 at 3, ¶ E. Thus, nothing in the Windstream Stay Notice or even the TRO suggested regulation of competitive activity.

Finally, treating any violation of competition law as a violation of the automatic stay would convert the stay into an improper "obey the law" injunction. "[A]n injunction must be more specific than a simple command that the defendant obey the law." *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 51 (2d Cir. 1996); *see also e.g.*, *Krause*, 414 B.R. at 264 ("§ 105(a) … cannot be used as a basis to issue an 'obey the law' injunction."). Such an injunction creates "overbreadth and vagueness concerns … rooted in basic principles of due process." *EEOC v. AutoZone, Inc.*, 707 F.3d 824, 841-42 (7th Cir. 2013). Here, the bankruptcy court's

[15] That aspect was not appealed. *See supra* n.1.

ruling would be the most extreme version of an obey-the-law injunction: it would turn an automatic stay into an injunction against the violation of *every* competition law (and possibly any other law where the conduct might affect a debtor's property) without any notice that it is doing so. This is clearly improper and, once again, there is certainly a fair ground of doubt about whether this comports with the law.

2. Charter Did Not Violate The Lanham Act

There was no trial on whether Charter violated the Lanham Act, and instead the bankruptcy court held—as a matter of law—that the Debtors were entitled to summary judgment on the Lanham Act violation. Rec. 74 at 137. That decision is reviewed *de novo*. *In re T.R. Acquisition Corp.*, 309 B.R. 830, 835 (S.D.N.Y. 2003). Indeed, the need for complete *de novo* review is especially clear because this Court withdrew the reference as to the Lanham Act claim.

Looking at the issue *de novo*, there is no basis for a Lanham Act claim because the statements at issue—suggesting a risk to Windstream from the bankruptcy—are statements of *opinion about the future*, which cannot support a Lanham Act claim. As the Second Circuit has held, "statements of opinion are generally not the basis for Lanham Act liability." *Groden v. Random House, Inc.*, 61 F.3d 1045, 1051 (2d Cir. 1995). That is because the Lanham Act expressly prohibits only "false or misleading description ***of fact***, or false or misleading representation ***of fact***." 15 U.S.C. § 1125(a)(1) (emphases added). For instance, assertions that a company is

"going out of business" or is "financially unstable" cannot be considered false or misleading because they are inherently statements of "opinion, which [are] non-actionable under the Lanham Act." *Medison Am. Inc. v. Preferred Med. Sys., LLC*, 548 F. Supp. 2d 567, 579 (W.D. Tenn. 2007). Similarly, a competitor warning suppliers to "be careful" when doing business because the plaintiff "is going out of business" were found to be a "non-verifiable prediction or opinion about the future" and therefore "not actionable as a false or misleading statement of fact under the Lanham Act." *Global Tech Led, LLC v. Hilmuz Int'l Corp.*, 2017 WL 588669 at *6 (M.D. Fla. Feb. 14, 2017). Given that a far more extreme claim that a company is "going out of business" is a non-actionable opinion, *a fortiori* Charter's advertisement that merely *questions* Windstream's future in far more equivocal terms cannot be actionable under the Lanham Act. And again, at the very least, there is a fair ground of doubt on this issue that precludes contempt sanctions.

Even if the statements were actionable (and they are not), the evidence on the summary judgment record shows that there was at least a triable issue of fact on whether Charter's advertisements violated the Lanham Act. To show that Charter's advertisements violated the Lanham Act, Windstream "must establish that the challenged message is … either literally or impliedly false." *Church & Dwight Co., Inc. v. SPD Swiss Precision Diagnostic, GmBH*, 843 F.3d 48, 65 (2d Cir. 2016).

First, Charter's advertisement was not literally false. "To establish literal falsity, a plaintiff must show that the advertisement either makes an express statement that is false or … unambiguously imply a false message." *Church & Dwight*, 843 F.3d at 65 (quotations omitted). Here, there was nothing unambiguously false in the advertisement. The advertisement did not state that Windstream was definitely or even probably going out of business, but rather only *questioned* Windstream's future, stating: "Windstream has filed for Chapter 11 bankruptcy, which means uncertainty. Will they be able to provide the Internet and TV Services you rely on in the future?" Rec. 121. This language mirrored Windstream's own statements in its 10-K that disclosed it was "unclear whether [Windstream] would be able to reorganize [its] business" and there were "risks and uncertainties" about Windstream's "ability to continue as a going concern." Rec. 23, Ex. 5 at 3.[16] Charter's statement about the uncertainty of Windstream's future given the bankruptcy is therefore not unambiguously false—indeed, it is not false at all, as Windstream (like any company in bankruptcy) necessarily faces some risk.

[16] The bankruptcy court held that such disclosures were not relevant because they "were not intended for or sent to Windstream's customers" and "did not indicate any risk of such a liquidation of termination of service being imminent." Rec. 74 at 146. But the intended audience does not determine whether a statement is true or false, and nothing in Charter's advertisement indicated "imminent" termination any more than did Windstream's own 10-K, which used materially equivalent language.

While one can debate the severity of that risk, merely recognizing its existence is not a false statement.

Second, there was likewise no implied falsity, which requires showing that "a substantial portion of the intended audience" was misled. *Johnson & Johnson-Merck Consumer Pharms. Co. v. Rhone-Poulenc Rorer Pharms., Inc.*, 19 F.3d 125, 134 (3d Cir. 1994). The bankruptcy court held that a survey supposedly showed that "more than half of the surveyed customers were mislead [sic] or confused by the mailing." Rec. 74 at 144. But the "more than half" consists largely of respondents who, after reading Charter's advertisement, believed that "Windstream *may* go out of business"; only a small minority (14%) believed Windstream "will" go out of business. Rec. 23, Ex. 20 at 37. This is a critical distinction because, as discussed above and Windstream itself recognized, there *was* a risk that Windstream might go out of business, and so those who believed such a risk existed were not misled by the advertisement.

The other facts that the bankruptcy court relied upon also fail to support any inference—let alone an undisputed fact—that the advertisement was impliedly false. In particular, the bankruptcy court noted that "several hundred [people] called the 1-855 number that was uniquely contained in the mailing" and that "over 20 customers … actually changed service to a clearly established competitor in Charter." Rec. 74 at 145. However, that *several hundred people* called the number and a *few*

dozen changed to Charter (*out of 800,000 total advertisements sent*) shows, if anything, the lackluster impact of the advertisement.[17] But even for that small percentage of customers, there is no evidence to suggest that they switched to Charter because they were misled, rather than because of the undisputedly accurate statements in the advertisements about the benefits of Charter (including, e.g., the lack of a modem fee). *See supra* at 7; *see also* Rec. 107 (Trial Tr. (May 6, 2020)) 38:14-15.

Finally, the bankruptcy court further erred in adopting a presumption of implied falsity. "[W]here a plaintiff adequately demonstrates that a defendant has intentionally set out to deceive the public, and the defendant's deliberate conduct in this regard is of an egregious nature, a presumption arises that consumers are, in fact, being deceived." *Johnson & Johnson * Merck Consumer Pharms. Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 298 (2d Cir. 1992) (quotation marks omitted). "[A] high level of evidence is required to show the kind of 'egregious' misconduct required to meet this standard." *PharmacyChecker.com, LLC v. Nat'l Ass'n of Bds. of Pharmacy*, 2021 WL 1199363, at *31 (S.D.N.Y. Mar. 30, 2021).

[17] At summary judgment, it was undisputed that the subject advertisement was the worst performing Charter advertisement, as compared to subsequent Windstream-related advertisements that did not reference bankruptcy. Rec. 22 ¶ 50.

That "high level of evidence" does not exist here, and certainly there is at least a material dispute of fact on the issue that precludes summary judgment. The bankruptcy court held the colors of the envelope supposedly were similar to Windstream's colors and thereby deceived the public to "believe that the communication was coming from Windstream." Rec. 74 at 144. But there is no evidence that Charter was attempting to deceive customers as to the sender of the flyer, and zero surveyed customers in Windstream's top-performing states identified the subject color as a Windstream color. Rec. 22 ¶¶ 81, 107. Regardless, upon opening the envelope, there obviously should be no confusion that the message itself was an advertisement from Charter.

The bankruptcy court's conclusion about customer confusion also improperly conflates the Lanham Act claim for false advertising at issue here (under Section 1125(a)(1)(B)) with a Lanham Act claim for likelihood of confusion from using a competitor's trademarks or trade dress (under Section 1125(a)(1)(A)), *which was not even alleged here*.[18] And a false advertising claim *cannot* be based on the likelihood of confusion from the advertising supposedly looking like it came from someone else. *See Parks LLC v. Tyson Foods, Inc.*, 863 F.3d 220, 225-229 (3d Cir. 2017)

[18] Such a claim would not be viable because (*inter alia*) Charter's mailer used only two of the four colors that Windstream uses on its logo and was displayed in a completely different format and style. *See* Rec. 130 at 14-17; *see also Hall*, 2010 WL 9490035 at *6.

(explaining that a "false advertising" claim, as distinct from a "false association" claim, may not be based on misleading consumers about "the creator, manufacturer, or any broader conception of the term 'origin'").

The bankruptcy court also erred in relying on Charter's supposed "knowledge that Windstream was not in any imminent danger of terminating service to its customers" as an additional ground to show intent to deceive. Rec. 74 at 144. The advertisement *did not say that there was imminent danger*, the idea that there was some risk was (as stated above) not false at all, and there is no evidence to suggest that Charter knew there was no risk. In any event, a simple intent to mislead does not constitute "high evidence" of "egregious conduct" sufficient to invoke the presumption. *See, e.g.*, *Stokley-Van Camp, Inc. v. Coca-Cola Co.*, 646 F. Supp. 510, 527-528 (S.D.N.Y. 2009).

In sum, there was no basis for a Lanham Act presumption against Charter, and regardless, there was at least a dispute of fact that precluded summary judgment—and a fair ground of doubt that precludes contempt sanctions—as to whether the advertisement was false or misleading.

D. Charter Diligently Attempted To Comply With The Stay

The bankruptcy court further erred in not addressing whether Charter acted with reasonable diligence, and indeed the record shows that Windstream failed to prove this requirement for sanctions. "To determine reasonable diligence, courts

examine the defendant's actions and consider whether they are based on a good faith and reasonable interpretation of the court order." *Schmitz v. St. Regis Paper Co.*, 758 F. Supp. 922, 927 (S.D.N.Y. 1991). "[A] party generally would not have sanctions imposed for its violation of an automatic stay as long as it had acted without maliciousness and had had a good faith argument and belief that its actions did not violate the stay." *Crysen/Montenay Energy Co. v. Esselen Assocs., Inc.*, 902 F.2d 1098, 1104 (2d Cir. 1990).

Here, the undisputed evidence establishes Charter's reasonable diligence. *First*, Charter specifically told its advertising agency *not* to state that Windstream was going away or would not emerge from Chapter 11. Rec. 255 (Atkinson (Charter) Dep. Tr. 175:5-176:3; 176:8-18; 177:2-6); Rec. 155 at 4; Rec. 254 (McGuire (RAPP) Dep. Tr. 50:21-51:22; 126:5-127:9; 127:11-22). The bankruptcy court suggested there was an "obvious contradiction[] between the [advertisement] and … Charter's own analyses of the Debtors' financial condition." Order at 14-15. However, the undisputed evidence shows that the analytical report Charter relied upon stated that "while Chapter 11 will provide some legal shelter while the telco reorganizes its tangled debt structure," there is "uncertainty about the service impacts," and that "[w]hile the move is intended to ensure Windstream survives, it could result in the opposite." Rec. 222 at 1-2. In short, there is no

evidence that Charter failed to act in good faith to accurately convey the risk to Windstream. *See* Rec. 255 (Atkinson (Charter) Dep. Tr. at 218:25-219:5; 219:9-15).

Second, when Windstream complained to Charter about the "risk" language, within a few days Charter pulled the language out of the advertisements that Windstream complained about (*i.e.*, the references to risk and uncertainty). Adv. Dkt. 12 at 5. There is no evidence that Defendants refused to accommodate the single bankruptcy-related concern expressed by Windstream before this lawsuit was filed. Rec. 163 at 18:4-19:23; 20:10-24.

Third, at no point did Charter believe that there was any potential violation of the automatic stay. Indeed, there is no evidence that Charter considered any potential application of the automatic stay on its advertisements, which makes sense because no court had ever so held and nothing on the face of the statute suggested such breadth. Thus, to the extent it is permissible at all to extend the automatic stay to a new outer reach of supposedly improperly advertising to compete with the debtor, the failure to predict this leap in the law plainly does not constitute a lack of reasonable diligence.

II. THE CONTEMPT SANCTIONS EXCEEDED THE AUTHORITY OF THE BANKRUPTCY COURT

The contempt order should also be reversed on the independent ground that the bankruptcy court had no authority to issue sanctions. Section 362(k)(1) of the Bankruptcy Code provides that "***an individual*** injured by any willful violation of a

stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(k)(1) (emphasis added). This section applies only to "human beings" and the Bankruptcy Code provides no similar authority for a bankruptcy court to award damages to corporate debtors. *In re Chateaugay Corp.*, 920 F.2d 183, 185 (2d Cir. 1990) ("Plainly, the statute here is referring only to human beings.").

Instead of relying on any explicit authority in the Bankruptcy Code to sanction Charter, the bankruptcy court relied on dicta from *Chateaugay*, which suggested that where the debtor is a non-individual, the bankruptcy court still has sanction power which "derive[s] from the Court's inherent contempt power … as well as under 11 U.S.C. § 105(a)." Order at 5 (citing *Chateaugay*, 920 F.2d at 187); *see also* Order at 21.

However, after *Chateaugay*, the Supreme Court clarified that a bankruptcy court's "inherent sanctioning powers are … subordinate to valid statutory directives and prohibitions" and "that §105(a) does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code." *Law v. Siegel*, 571 U.S. 415, 421 (2014) (internal citations and quotations omitted). Where Congress "carefully calibrated" certain provisions of the Bankruptcy Code, then the "bankruptcy court's § 105(a) and inherent powers may not be exercised in contravention" of such calibrated provisions. *Id.* at 423. As the Second Circuit made

clear in *Chateaugay*, Congress chose the word "individual" carefully for Section 362(k) and likely had good reasons for limiting such recoveries to "individual" debtors, as they are "particularly vulnerable to violations of the stay." 920 F.2d at 186.

Given that Section 362(k) expressly limited sanctions for violations of the automatic stay to individuals—and that, under *Law v. Siegel*, inherent authority and Section 105(a) cannot substitute for the powers expressly provided for and limited in the Bankruptcy Code—there is no authority for a bankruptcy court to provide contempt sanctions to corporations for violations of the automatic stay. As one court explained, "[s]ince Section 362(k) makes clear that only injured individuals may pursue damages, allowing another entity to pursue damages for a stay violation effectively circumvents the limitation of Section 362(k)." *Gebhardt v. McKeever (In re McKeever)*, 550 B.R. 623, 643 (Bankr. N.D. Ga. 2016). Thus, courts that once had held that "the [bankruptcy] court may use Section 105 as a remedy for a trustee to pursue a stay violation," no longer do so after *Law v. Siegel*. *Id.* Accordingly, the bankruptcy court here lacked authority to issue the sanctions and the award for damages therefore should be reversed.

III. THE DAMAGES AWARD WAS UNSUPPORTED AND IMPROPER

The bankruptcy court awarded Windstream $19,179,329.45 in compensatory sanctions, which included $5,100,000 in actual "lost profits" allegedly suffered by

Windstream (Order at 26), $4,033,425 for "the cost of a promotional campaign" (Order at 36), $862,775 in "corrective advertising" (Order at 36), and $9,183,179.45 in legal fees and expenses (Order at 42). However, these calculations rested on an improper foundation.

First, none of the damages was tied to the supposed property rights of Windstream. As discussed *supra* at 25, there was no evidence of customer contracts, so *a fortiori* none of the damages could have been based on the loss of contractual rights. Similarly, there was no evidence of the value of goodwill or lost goodwill and Windstream made no attempt to define or measure such a loss. Instead, the damages were based entirely on supposed loss of *customers* and the asserted lost profits and costs to retain, regain, or replace them. But since there is no general property right to keep customers, using these supposed damages as compensatory damages for a contempt sanction is improper.

Second, the lost profits damages rested on shockingly defective expert testimony. Windstream's expert, Mr. Jarosz, calculated the lost profits damages by estimating the increased "churn rate"—*i.e.*, the rate at which Windstream customers left Windstream—supposedly caused by allegedly improper advertisements by Charter. This analysis supposedly showed that Windstream lost 1,386 customers from Charter's advertisement. Order at 26. The expert then multiplied this number by 50 (the number of months that the average Windstream customer stays with the

company), multiplied the product by $77.63 (the average monthly revenue that Windstream generates from each customer), and then multiplied that result by 94.5% (the gross profit margin of Windstream), yielding the $5.1 million "lost profits" award. Order at 35-36.

However, this logic has an obvious flaw: while the average Windstream customer may stay at Windstream for 50 months, *see* Order at 16 n.17, the 1,386 customers that allegedly "churned" (*i.e.*, stopped being a customer) had, by definition, already been at Windstream for some portion of their average 50-month relationship, and therefore could not be expected to stay at Windstream for an *additional* 50 months. Assuming the number of months customers stay at Windstream follows a normal distribution, this would reduce the lost profits number by approximately half.

Moreover, and equally flawed, Mr. Jarosz did not test whether his conclusions were statistically significant, a well-established final step in statistical analyses. *See, e.g.*, *Ottaviani v. State Univ. of N.Y.*, 875 F.2d 365, 371 (2d Cir. 1989) ("Before a deviation from a predicted outcome can be considered probative, the deviation must be 'statistically significant.'"). According to Mr. Jarosz, the advertisements caused the churn rate to increase by 0.38%, but he provided no analysis to determine whether this miniscule increase was statistically significant or instead was just a result of noise in the data. *See Ottaviani*, 875 F.2d at 371 ("[B]ecause random

deviations from the norm can always occur, ... statisticians do not consider slight disparities between predicted and actual results to be statistically significant.").

Furthermore, the expert failed to link any supposed injury with any of the particular 205 Debtors. *See, e.g.*, Rec. 109 (Trial Tr. (April 28, 2020)) 70:16-72:6 (Debtors' expert admitting "I can't give you any numbers at the individual legal entity level"). And none of the Debtors introduced any other evidence of its own injury.

Third, the damages calculation adopted by the bankruptcy court involves an impermissible double recovery. In particular, Mr. Auman of Windstream testified that "the $4 million [promotional campaign] was directed towards new customers that we were attempting to acquire to offset the losses [resulting from Charter advertisements]." Rec. 107 (Trial Tr. (May 6, 2020)) at 122:16-19. As a result of its $4 million promotional campaign, Windstream returned to its "plan" for its growth rate by October 2019, *negating all impacts of the Charter advertisements*, and finished the year with *almost the exact same number of customers it had intended*. *See* Order at 33; Rec. 107 (Trial Tr. (May 6, 2020)) 58:5-7 ("once we launched this promotion we got back to growth and we got back, close back to our plan commitment for the year"). But the $5,100,000 of hypothetical lost profits compensated Windstream for 50 prospective months, through 2024, even though Windstream conceded at trial it had fully recovered by year's end through

promotions and incentives. Order at 33. Simply put, Windstream cannot recover *both* 50 months' worth of lost profits *and* the money it spent to successfully stem such losses. Such a double recovery is impermissible. *See, e.g.*, *Balance Dynamics v. Schmitt Indus., Inc.*, 204 F.3d 683, 692 (6th Cir. 2000).

Finally, the award of attorneys' fees was also improper. Under the Lanham Act, attorneys' fees are permitted only in exceptional cases. *See Nike, Inc. v. Already, LLC*, 663 F.3d 89, 99 (2d Cir. 2011), aff'd, 568 U.S. 85 (2013). There was no such ruling here, nor would one be possible given that this Court withdrew the reference on the Lanham Act claim. Even assuming the bankruptcy court could use the Lanham Act as the basis for the automatic stay violation while discarding its limitation on attorneys' fees, there is a clear limitation that applies to attorney's fees in the context of contempt sanctions: there must be a finding of willfulness. *See King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1063 (2d Cir. 1995) ("In order to award fees, the district court had to find that ... contempt was willful."); *see also Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130-31 (2d Cir. 1979).[19] The bankruptcy court found willfulness only in a single, conclusory sentence in its opinion. Order at 41. This lone sentence does not form a legitimate basis to impose

[19] The bankruptcy court asserted it is an open question whether willfulness is required to impose fees. Order at 23 (citing *Jacobs v. Citibank, N.A.*, 318 Fed App'x 3, 5 n.3 (2d Cir. 2008)). But *Jacobs* cannot change the binding precedent requiring willfulness.

a sanction of over $9 million in fees and expenses. Regardless, it is clearly erroneous because for the same reasons that Charter acted with reasonable diligence, *see supra* at 49, at the very least it did not act willfully in violation of the automatic stay given the absence of any precedent treating anything even remotely similar as a violation and the absence of any evidence suggesting the requisite intent.

CONCLUSION

For the foregoing reasons, Charter respectfully requests that the Court reverse or vacate the order of the bankruptcy court.

STATEMENT REGARDING ORAL ARGUMENT

Charter respectfully requests oral argument in this appeal because the case involves numerous, important issues of law, including an unprecedented expansion of the automatic stay in conflict with other courts. Charter believes that oral argument would be beneficial to the Court given the complexity of these issues and the extensive record from the bankruptcy court.

Dated: New York, New York
July 26, 2021

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Bankruptcy Procedure 8015(h), the undersigned certifies that the above brief complies with the applicable type-volume limitation of Federal Rule of Bankruptcy Procedure 8015(a)(7)(B)(i) because, excluding the parts of the brief exempted by Federal Rule of Bankruptcy Procedure 8015(g), this brief contains 12,999 words. The above brief also complies with the typeface requirements of Federal Rule of Bankruptcy Procedure 8015(a)(5) and type-style requirements of Federal Rule of Bankruptcy Procedure 8015(a)(6).

/s/ Susheel Kirpalani
Susheel Kirpalani

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of July 2021, I caused a true and correct copy of the foregoing document 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 proceeding.

Dated: July 26, 2021

By: */s/ Anil Makhijani*
Anil Makhijani