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	)	

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

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PRELIMINARY STATEMENT

Windstream's opposition ("Opp.") rests on four assumptions, all of which are necessary to uphold sanctions here: (1) Charter was required to seek guidance if there was doubt about whether the automatic stay applied; (2) the Terms & Conditions on Windstream's website created contractual property rights to keep its customers; (3) so-called "improper" advertising is an exercise of control over property; and (4) the advertising here was false or misleading because there was no risk to Windstream from the bankruptcy. Each assumption is wrong.

First, the Supreme Court unequivocally held that civil contempt sanctions are allowed only if there is no fair ground of doubt about the violation. The Second Circuit repeatedly has held the same. Windstream cites no precedent or rationale for defying this precedent when it argues that Charter had the burden to dispel any doubt or be held strictly liable.

Second, until now, Windstream never pointed to the Terms & Conditions on its website as evidencing contracts and therefore it is improper to rely on them for the first time on appeal. Regardless, Windstream's Terms & Conditions allowed customers to cancel at any time, so they created no continuing property rights.

Third, the only case and treatise to squarely consider the issue instruct that competition is *not* control under Section 362(a)(3). This authority accords with the plain meaning of "control" and Supreme Court precedent. There is nothing in the statute that gives courts license to convert competition into control based on whether advertising is fair or not.

Fourth, the advertising here is materially *identical* to Windstream's own Form 10-K disclosure that there was risk to operations from the bankruptcy. Windstream misrepresents Charter's advertisement as stating that "Windstream was going out of business" (Opp. 2), *which it never said*, to distract from this simple point: Charter's advertising cannot be deemed false or misleading merely for raising the same risk Windstream itself disclosed to its investors.

Far from a sanctionable stay violation, there was at least a fair ground of doubt as to whether Charter saying that bankruptcy brought uncertainty exercised "control" over Windstream's "property." Windstream's assertion—for the first time on appeal—that its website Terms & Conditions created valuable property rights fails on inspection. And Windstream must invent novel definitions of "control" to suggest Charter took its goodwill when Charter never held itself out as anything but a superior provider of internet service. This Court should reverse.

ARGUMENT

Windstream does not dispute that it has the burden to prove "(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) (quoting *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1058 (2d Cir. 1995)). *See* Br. 22; Opp. 48. As noted in a case Windstream cites, "review of a contempt order is more exacting than under the ordinary abuse-of-discretion standard." *PHH Mortg. Corp. v. Sensenich (In re Gravel)*, 6 F.4th 503, 511 (2d Cir. 2021) (quotation marks and citations omitted); *see also Mackler Prods. v. Cohen*, 225 F.3d 136, 141 (2d Cir. 2000) (reviewing court must "ensure that any such decision is made with restraint and discretion") (quotation marks and citations omitted). Applying that standard here, reversal is required.

To begin with, the bankruptcy court erred in failing to apply the "clear and convincing evidence" standard. Windstream contends this argument was waived because Charter did not "develop" it in its opening brief (Opp. 49 n.9), but Charter explicitly made the point (Br. 22) that the standard is "clear and convincing evidence" and that the bankruptcy court did not apply this standard. Nothing more was required to preserve this straight-forward argument.[1] The bankruptcy court's use of the wrong standard alone requires reversal and, at a minimum, precludes any deference to factual findings made under the wrong legal standard. *See* Br. 23.

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[1] Windstream also suggests that "Charter's noncompliance was *undisputed*." (Opp. 49 n.9.) Not so: Charter has always insisted that it complied with the automatic stay.

I. WINDSTREAM ADVANCES THE WRONG STANDARD FOR SANCTIONS, EXPANDS THE "FOUR CORNERS" OF THE STAY BEYOND ITS PLAIN MEANING, AND ABANDONS THE LOWER COURT'S BASIS FOR SANCTIONS

A. Windstream Cannot Undermine The "Fair Ground Of Doubt" Standard It Concedes Is Correct

As Windstream concedes (Opp. 50-51), 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) (citations and quotation marks omitted). Nevertheless, Windstream advocates (Opp. 51-53) for a test in direct conflict with *Taggart*, by placing a burden on Charter to remove any doubt. This attempt to elude *Taggart* is legally baseless and *Taggart* precludes the bankruptcy court's burden-shifting rule for stay violations, *see* Order at 8.

First, Windstream misrepresents (Opp. 52) a quote from *Taggart* as supposedly suggesting that Charter had the burden to resolve any uncertainty in the automatic stay. The full quote states that "a party's 'record of continuing and persistent violations' and 'persistent contumacy' justified placing 'the burden of any uncertainty in the decree ... on [the] shoulders' of the party who violated the court order." 139 S. Ct. at 1802 (quoting *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192-193 (1949)). Windstream deleted the first part of this quote—the "'record of continuing and persistent violations' and 'persistent contumacy'"—which plainly distinguishes the instant case, where there was no previously-adjudicated record of prior violations or contumacy. Windstream's approach also ignores that "civil contempt is a severe remedy, and that principles of basic fairness require that those enjoined receive explicit notice of what conduct is outlawed before being held in civil contempt." *Id.* (internal citations and quotations marks omitted). To the extent Windstream contends (Opp. 18) that contempt authority comes from Section 105(a), that is the same source of authority considered in *Taggart*, 139 S. Ct. at 1801, which carries the "fair ground of doubt" restriction.

Second, Windstream ignores controlling law on sanctions that Charter cited (Br. 24), holding that 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), and the subject order must "unambiguously proscribe[] the challenged conduct," *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 292 (2d Cir. 2008). Contrary to Windstream's suggestion (Opp. 56-57) that this "four corners" rule does not apply in the bankruptcy context, "a bankruptcy court cannot hold a party in contempt for violating an order that is subject to varying interpretations." *In re Gravel*, 6 F.4th at 513; *see also id.* ("[T]o imply a restraint where none is stated would violate the principle that a party must have 'explicit notice' of what is forbidden or required.") (quoting *Taggart*, 139 S. Ct. at 1802).

Third, the cases Windstream cites (Opp. 51-52) are inapposite. Windstream relies principally on *In re Crysen/Montenay Energy Co.*, 902 F.2d 1098, 1105 (2d Cir. 1990), but ignores that the Second Circuit subsequently held that *Crysen/Montenay* did *not* apply outside the context of an individual debtor, where Section 362(h) (now (k)) governs violations of the automatic stay. *See In re Chateaugay Corp.*, 920 F.2d 183 (2d Cir. 1990). As *Chateaugay* explained: "[A] bankruptcy court may impose sanctions pursuant to § 362([k]), under the standard set out in *Crysen/Montenay*, only for violating a stay as to debtors who are natural persons." *Id.* at 186-187. Windstream's theory erroneously conflates a violation of the automatic stay with contempt sanctions for such a violation—the latter requires that there is no fair ground of doubt as to whether there was a violation.

Finally, whether there was an objectively reasonable basis to believe that Charter did not violate the automatic stay is a *legal* question reviewed *de novo*, as this is not a question of fact but rather a question of law (or, at most, a mixed question of fact and law). *See* Br. 21-22 & n.4; *accord Latino Off. Ass'n v. City of N.Y.*, 558 F.3d 159, 164 (2d Cir. 2009) (interpretation of order reviewed *de novo*). Windstream cites (Opp. 16) *In re DiBattista*, 615 B.R. 31 (S.D.N.Y. 2020), which provides clear-error review only to particular factual issues—specifically, whether "calls were impermissibly made to collect the debt," *id.* at 41—not to the ultimate question of objective reasonableness.

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

Windstream fails to show that Charter's advertisements constitute an "act … to exercise control over property of the estate," 11 U.S.C. § 362(a)(3), and that there was not a fair ground of doubt on this issue. *See* Br. 25-36.

1. Windstream Failed To Identify Any Contracts With Customers, And The Mere Expectation That Business Would Remain With Windstream Is Not "Property"

Windstream asserts (Opp. 19-20) that "every conceivable interest" is covered by the automatic stay, but the interest still must be an interest *in property*. Property rights are defined by state law, not the Bankruptcy Code. *See Butner v. United States*, 440 U.S. 48, 55 (1979); *Rodgers v. Cty. of Monroe (In re Rodgers)*, 333 F.3d 64, 66 (2d Cir. 2003). Windstream's argument rests on supposed contractual rights or goodwill, but neither constitutes an interest in property here.

(a) *Contract Rights*

First, Windstream failed to identify any customer contracts. The only record evidence on the issue is Windstream customer service calls stating that there are no contracts. Windstream simply ignores (Opp. 25 n.4) what its employees said: "Windstream doesn't do contracts" and "We don't have contracts." Rec. 142 at 92, 154, 238, 531.

All of the supposed evidence Windstream now points to does not actually evidence a contract, let alone what, if any, property rights were protected.

Windstream misrepresents (Opp. 25) the contents of a spreadsheet, which does not even mention any contracts. *See* Rec. 38 ¶ 65; Rec. 33 Ex. 54. Windstream also relies (Opp. 25) on its counsel coining the phrase "contract concessions" in the summary judgment hearing, Rec. 74 at 67:24-25, but this stray remark does not prove the existence of property. Windstream further relies (Opp. 25) on the reference in Charter's advertisements to two-year contracts, but Windstream did not argue below and does not argue now that it actually had any two-year contracts with customers, let alone introduce evidence of such contracts.[2]

Contrary to Windstream's suggestion (Opp. 26), Charter never conceded the existence of Windstream contracts with customers. Windstream cites (but does not quote) two paragraphs in its statement of undisputed facts below. The first paragraph says only that "Charter's Advertisement offered to 'buy [new customers] out of [their] current contract up to $500,'" and thus merely quotes the advertisement. Rec. 24 ¶ 62. The second says only that Charter "'bought out' at least twenty Windstream customers," and neither the paragraph nor the document it cites mentions any contracts at all. *Id.* ¶ 63. And to the extent Windstream criticizes (Opp. 26) *Charter* for not raising this issue at trial, Windstream does not dispute that it (the party with

[2] Although the record is bare on this point, the advertisements may have been referencing a 24-month bundle then offered with DirecTV. *See* https://web.archive.org/web/20190215005324/*https://windstream.com/digital-tv*.

the burden) did not argue at trial that there even were contracts. There was no reason for Charter to rebut an argument not made (until the post-trial briefs, when Charter *did* make the point after the bankruptcy court raised it). *See* Br. 26-27.

Second, regardless of what the parties said about a contract, the only thing that Windstream now identifies that supposedly evidences one is the Terms & Conditions on its website. However, Windstream never presented this evidence in the bankruptcy court and it is improper to do so now. Whether terms and conditions are valid contracts is a fact-intensive inquiry that requires assessing how conspicuously the terms are displayed to the user. *See Soliman v. Subway Franchisee Advertising Fund Trust, Ltd.*, 999 F.3d 828, 835-37 (2d Cir. 2021); *see also id.* at 837 ("[W]e have emphasized the importance of clearly signaling to the consumer in some fashion that, by continuing with the transaction or by using a website, she will be agreeing to the terms contained in an accompanying hyperlink."). The bankruptcy court never reviewed this new-found evidence, let alone assessed how clearly it signaled the creation of a contract.

Third, even assuming the Terms & Conditions were properly in evidence (and they are not), they do not give rise to any property right to keep customers. Windstream recognizes (Opp. 22) that only executory contracts create property rights, and that executory means "performance remains due to some extent on both sides." *COR Route 5 Co., LLC v. Penn Traffic Co. (In re Penn Traffic Co.)*, 524

F.3d 373, 379 (2d Cir. 2008) (internal citations and quotation marks omitted). However, performance was *not* due for the customers because, according to the Terms & Conditions, payment for a given month of service must be made in advance. *See https://web.archive.org/web/20190227030335/https://www.windstream.com/about/legal/Terms-and-Conditions* § 4 ("All recurring charges are billed one month in advance."). Thus, the contract was not executory and there was no property right. *See Rubenstein v. Cosmos Holdings, Inc.*, No. 19 CIV. 6976 (KPF), 2020 WL 3893347, at *8 (S.D.N.Y. July 10, 2020) (contract was not executory where party had paid in full).

Fourth, even if the contract were executory, the Terms & Conditions state that customers could decline to renew at any time. *See* Br. 27 n.8. An agreement terminable at will does not create a property right. *See White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1062 (2d Cir. 1993) ("An interest that state law permits to be terminated at the whim of another person is not a property right that is protected by the Due Process Clause."); *see also, e.g.*, *Bishop v. Wood*, 426 U.S. 341, 345 n.8 (1976).

Windstream argues (Opp. 21-24) that automatically renewing contracts create property rights, but many cases are to the contrary. *See Verizon New England, Inc. v. Transcom Enhanced Servs., Inc.*, 21 N.Y.3d 66, 72 (2013) ("Verizon argues that the agreement is automatic and [the parties] expect continuation," but "the expectation of any continued or future business is too contingent in nature and speculative to create a present or future property interest" where there is "payment before the receipt of service and the ability to terminate the relationship at any time without penalty"); *see also* Br. 29 & n.9 (citing cases).[3] Windstream's argument (Opp. 19-20, 24) rests on the idea that the mere expectation of business continuing suffices to create a property right, but an expectation is not a property right. *See Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) ("To have a property interest in a benefit, … [h]e must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."). Windstream also argues (Opp. 24) that due process cases are inapposite, but they interpret property rights using the same state law that governs in bankruptcy cases. *See Roth*, 408 U.S. at 577.

(b) *Goodwill*

Windstream's argument for property rights based on goodwill fares no better. As Charter explained (Br. 29), courts have held in the bankruptcy context that goodwill alone should not be treated as property. Windstream asserts (Opp. 28) that

[3] Windstream asserts (Opp. 23) that the cases Charter cites do not concern contracts that would renew absent any action by the parties, but many do. *See Khan v. Bland*, 630 F.3d 519, 530 (7th Cir. 2010); *Johnston v. Panhandle Coop. Ass'n*, 408 N.W.2d 261, 267 (Neb. 1987); *DOT v. Adams Outdoor Advert. of Charlotte Ltd. P'ship*, 804 S.E.2d 486, 496 (N.C. 2017). The cases Windstream cites (Opp. 20-24) are inapposite, as they concern contract rights *in addition* to the mere possibility of renewal where the counter-party can cancel at any time. *See, e.g.*, *In re Sheppard's Dental Ctrs., Inc.*, 65 B.R. 274, 278 (Bankr. S.D. Fla. 1986) (focusing on property right in customer lists).

these courts are wrong, but their reasoning correctly rests on the principle that any protected interest in goodwill (an accounting concept) must be associated with an asset that is itself protected by laws, like trademarks or customer lists. At a minimum, these cases establish a fair ground of doubt on the issue. The cases Windstream cites (Opp. 27-29) are inapposite, as none states that there is a property interest in naked goodwill.

Indeed, Windstream does not dispute that goodwill must be associated with other property rights. Windstream instead urges (Opp. 29-30) that its goodwill constitutes "[b]rand loyalty and customer relationships." But Windstream does not translate these buzz words into cognizable interests in property, and without a cognizable asset (such as a trademark or customer list), there is no legal concept of property in goodwill.

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

At bottom, the lower court held that competing with a debtor for customers—without misappropriating any customer lists or holding oneself out as the debtor itself—is the same as exercising control over a debtor's property. This cannot be squared with the text or purpose of the automatic stay, and the only case and treatise to have considered that reading squarely rejected it.

The first step in interpreting the operative words is to determine whether the type of conduct at issue (advertising) jibes with the meaning and context of the stay.

It does not. Br. 39; *see generally City of Chicago v. Fulton*, 141 S. Ct. 585, 589-590 (2021) (limiting breadth of "exercise control" by "taking the … operative words in turn"). But even if a "stay" regulates competition (it does not), Windstream must resort to mental gymnastics to articulate how competition equals an exercise of control. Windstream posits nothing short of an absurd thesis: mind games are an exercise of control. *See* Opp. 31 ("[Charter's] attempt to trick Windstream's subscribers"); *id.* at 32 ("*improper* attempts to manipulate decision-making are 'act[s] to … exercise control.'"); *id.* at 35 ("false and misleading advertising subverts the customer's decision-making, allowing the liar to exercise control by manipulating the consumer").

Windstream's attempts to back up this novel definition of control fall flat. Br. at 32-36. In its primary case—*In re Alert Holdings, Inc.*, 148 B.R. 194 (Bankr. S.D.N.Y. 1992)—the defendant had previously sold customer accounts to the debtor. After the debtor commenced bankruptcy, the defendants contacted customers *using the debtor's customer list* "through targeted mailings and phone calls." *Id.* at 198. The defendant also notified these customers that it "would now be servicing their alarm systems" because it had been "'authorized' … to assume [the debtor's] accounts." *Id.* The defendant thereafter went "into [customers'] homes to disconnect [the debtor's] monitoring equipment and 'chip-change' these accounts" so as to transfer the billing to defendant. *Id.* at 199.

Unlike the pivotal facts of *Alert Holdings*, here (i) there is no evidence of exclusive customer contracts, and (ii) Charter did not (a) convert any accounts receivable of the debtors, (b) utilize any customer list of the debtors, (c) hold itself out as Windstream's authorized successor service provider, or (d) misappropriate any accounts receivable by physically replacing the debtors' billing equipment with its own.

The fact pattern here more closely resembles that of *Golden Distributors, Ltd. v. Reiss (In re Golden Distributors, Ltd.)*, 122 B.R. 15 (Bankr. S.D.N.Y. 1990). The court below incorrectly distinguished this case by quoting dicta that "[u]nder certain circumstances where a debtor has contractual arrangements with its customer which can be translated into assured sales or income, such intangible property rights or good will can be protected from interference by others within the context of 11 U.S.C. § 362(a)(3)." *Id.* at 20 (cited in Order at 19). The bankruptcy court provided emphasis in the quoted text to the word "*has*" as if the passage turned on the existence of a contract alone. The remainder of the clause, *i.e.*, "which can be translated into assured sales or income," is equally if not more important, and there are no contracts providing "assured sales or income" here.

Renowned Professors Epstein, Nickles, and White said it succinctly: "In essence, competing against the debtor is not [the] same as taking debtor's good will."

Bankruptcy, Practitioner Treatise Series, Vol. 1, § 3-14, at 174 (1992). Addressing *Golden Distributors*, this treatise explains why Windstream's theory must fail here:

> The debtor in *Golden Distributors* could have argued further that (a)(3) was violated by the net effect, overall, of the [defendants'] conduct: soliciting the debtor's customers and taking their business from the debtor reduced the size of the debtor's bankruptcy estate. The causal link is too speculative and tenuous. The stay of (a)(3) requires a more direct [e]ffect on the estate.

Id.

Windstream errs in attempting to rewrite "control" as any "interference" with property of the estate. Windstream cites (Opp. 37-38) a few stray cases using the word "interfere," but none explains how this fits with the plain meaning of "control" and none applies it to anything remotely like the mass mailer here. Moreover, while Windstream attempts (Opp. 38 n.7) to limit *Citizens Bank v. Strumpf*, 516 U.S. 16 (1995), to its facts, the reasoning supports the principle that "control" should not be expanded to interference. *See id.* at 21; *see also Fulton*, 141 S. Ct. at 589. Indeed, if "control" includes "interference," then "refusal to pay" on a right to be paid would be control, but *Strumpf* held it is not.

At a minimum, the words "exercise control" are ambiguous and thus sanctions were improper here. Indeed, Windstream advocates (Opp. 35) for public policy balancing as in *Allentown Ambassadors*, 361 B.R. 422 (Bankr. E.D. Pa. 2007), but fails to recognize that even if judicial balancing were appropriate, statutes that must be interpreted through *ad hoc* balancing are inappropriate for sanctions under the *Taggart* standard.

C. Windstream Abandons The Lanham Act As Underlying The Stay Violation, And Urges A New, Vague "Improper" Advertising Standard To Uphold Sanctions

Yet another basis for reversal is that there was no Lanham Act violation and any other form of "improper" advertising is too vague to support sanctions.

1. The Order Was Based On The Lanham Act, Yet Windstream Abandons The Lanham Act On Appeal

To begin with, Windstream abandons and therefore waives any argument in response to Charter's showing that there was no Lanham Act violation (Br. 42-48) and that the finding on the Lanham Act was improper given that this Court withdrew the reference on that claim (Br. 38). Rather than contest this issue, Windstream attempts (Opp. 44) to reframe the contempt decision as not resting on any Lanham Act violation. But that is completely at odds with history, including when this Court noted: "[T]he bankruptcy court's determinations that defendants violated the automatic stay … were premised on its rulings that defendants violated the Lanham Act." Case 7:19-cv-09354-CS (Dkt. 39) at 34:4-8.

The sanctions were unquestionably based on the Lanham Act summary judgment decision. The Order stated that Charter could not challenge the premise of the Lanham Act decision, Order at 14 n.8, 15 n.14, even though the Lanham Act decision did not apply the clear-and-convincing evidence standard for contempt and applied a Lanham Act presumption of falsity, *see* Rec. 74. And almost all of the cases the bankruptcy court cited in the Order regarding appropriate damages (Order at 31-38) are Lanham Act cases. In short, the bankruptcy court applied its prior Lanham Act decision, Lanham Act legal standards, and Lanham Act case law. Windstream incredulously argues now that "the Lanham Act is not at issue" (Opp. 15) when it was the premise of the damages trial and the Order below.

2. Vague Concept Of "Improper" Advertising Cannot Support Sanctions

Windstream's abandonment of the Lanham Act makes its argument for sanctions even more untenable. Windstream is now left to argue that Charter violated the automatic stay not based on a concrete statutory violation but because Charter engaged in "*improper* attempts to manipulate decision-making." Opp. 32. But one cannot even find the "four corners" of such an edict, let alone assess fair ground of doubt about its application.

Moreover, bankruptcy courts have no authority to make policy-based determinations about what advertising is "improper" under the guise of determining control. *See* Br. 38-39 (citing *U.S. v. Inslaw, Inc.*, 932 F.2d 1467, 1472 (D.C. Cir. 1991)). That is especially problematic here because the Windstream Stay Notice (Rec. 262 Ex. 1) did not state that the stay would apply to competitor activity (let alone advertising). Windstream's argument (Opp. 46-47) that its court-approved notice cannot point out every conceivable violation is a red herring: it can and did identify broad categories of violations, consistent with the "four corners" of the statute. But there was no hint that the activity here would be barred by the stay.

Windstream's argument (Opp. 44) that this was a "quintessential violation of a provision of the *Bankruptcy Code*" is ludicrous given that no court has ever found "improper" advertising—without more—to be such a violation.[4]

Finally, Windstream has virtually no response (Opp. 47) to the point that its theory would turn the automatic stay into an impermissible "obey the law" injunction. Indeed, after scrapping the Lanham Act basis, the injunction is even more facially defective, as there is no question that an injunction to "not advertise improperly" would be too vague to satisfy due process. And it is especially inappropriate to substitute this language for "exercise control" given that regulating competition appears nowhere in the Bankruptcy Code.

3. There Was No False Or Otherwise "Improper" Advertising

Even assuming improper advertising does suffice for an automatic stay violation (it does not), Windstream fails to show that Charter's advertisement was improper. This issue should be reviewed *de novo* because, as discussed *supra* at 2-3, 6, the bankruptcy court decided it in the context of the Lanham Act claim—where it invoked an inapplicable presumption of falsity, did not apply the clear-and-

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[4] As Charter explained (Br. 39-40), Windstream's approach also conflicts with the focus of Section 362 on creditor behavior, which suggests Section 362 should be carefully circumscribed outside that sphere. Windstream's desperate argument (Opp. 46) that Charter Operating is a creditor (of 36 of the 205 plaintiffs) ignores that Charter Communications is not (and that, with respect to the matters on appeal, Charter was not sanctioned for any conduct as a creditor).

convincing evidence standard, and ruled on a claim where the reference was withdrawn (and regardless, summary judgment decisions are reviewed *de novo*).

The actual content of Charter's advertising was neither false nor misleading. Contrary to Windstream's repeated mischaracterizations (Opp. 1-2, 39, 41), the advertisement stated only that there was "uncertainty" to Windstream from the bankruptcy, not that Windstream would or even was likely to go out of business. Rec. 121. Windstream abandons the bankruptcy court's purported reliance on a survey that actually showed that the vast majority were not misled at all and that only a few hundred people (out of 800,000) called the 1-855 number in the mailing. And while Windstream now asserts (Opp. 6-7) that the envelope was deceptive, Windstream made no argument below as to how the envelope supported a stay violation, and had no response to the evidence Charter set forth (Br. 47) showing that there was no deception.[5]

Thus, Windstream's entire argument of "improper advertising" rests on the assertion (Opp. 39) that there was "no credible risk" to Windstream from the bankruptcy. However, the bankruptcy court made no such finding, there is no

[5] It was undisputed that zero surveyed customers (in the states identified by Plaintiffs as among their top performing states) associated Windstream's supposed "distinctive color scheme" (purple to pink color gradient) with Windstream. Rec. 22 at 18.

evidence to support it,[6] and it is inconsistent with Windstream's own Form 10-K, which said there was such a risk. *See* Rec. 23[7], Ex. 5 at 3, 7 (stating 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"). Windstream attempts (Opp. 40 n.8) to dismiss the Form 10-K because Charter did not see it and it was for investors, not customers, but both points are irrelevant to the truth of the matter. Windstream also notes (Opp. 40 n.8) that the 10-K did not say definitively that Windstream would go out of business, but neither did Charter's advertisements. It cannot be unlawful for Charter to tell Windstream's customers exactly what Windstream was telling its own investors.

Moreover, the advertisement was a non-actionable statement of opinion. Windstream argues (Opp. 41) that whether it would provide services in the future is a fact, not opinion, but numerous cases hold the contrary. *See* Br. 43 (collecting cases). Windstream's attempt (Opp. 42) to distinguish those cases because they did not involve bankruptcies is irrelevant to their holding—directly on point here—that

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[6] The supposed evidence Windstream discusses (Opp. 39-40) was not raised at trial and cannot be raised now. Regardless, this supposed evidence suggests, at most, that Windstream likely would be able to continue service, not that the risk from the bankruptcy was non-existent.

[7] Full Form 10-K available at https://www.sec.gov/Archives/edgar/data/1282266/000128226619000019/a201810k.htm.

statements about whether a competitor might go out of business are statements of opinion that are not actionable.[8] And, once again, there is at least a fair ground of doubt on this issue that precludes contempt sanctions.

D. Charter Diligently Attempted To Comply With The Stay

As Charter explained (Br. 48-50), the bankruptcy court failed to address whether Charter diligently attempted to comply with the stay, and this error also requires reversal. Windstream argues that the "diligent attempt" requirement does not apply to the automatic stay, but it is a requirement for any contempt sanctions. *See, e.g.*, *Next Invs., LLC v. Bank of China*, 12 F.4th 119, 128 (2d Cir. 2021). The bankruptcy court itself recognized this requirement, *see* Order at 6, but just failed to apply it. Windstream cites (Br. 58) one case supposedly to the contrary, but it merely held that a party could not assert diligent compliance when it filed a lawsuit in

[8] None of the cases Windstream cites (Opp. 41-42) is relevant here. In one, the court found the advertisement was a non-actionable opinion. *Groden v. Random House, Inc.*, 61 F.3d 1045, 1051-52 (2d Cir. 1995). In another, the court was applying Nevada defamation law and found a jury question as to whether the statement was one of fact or opinion. *See Incorp Servs., Inc. v. Nev. Corp. Servs., Inc.*, No. 09-cv-01300, 2010 WL 11579416, at *5 (D. Nev. Mar. 15, 2010). And in the others, there were specific, false, factual claims about the competitor's situation at the present time. *See Checker Cab Phila., Inc. v. Uber Techs., Inc.*, No. 15-cv-7265, 2016 WL 950934, at *7-8 (E.D. Pa. Mar. 7, 2016) ("Uber's statements expressly suggesting that the insurance policies had been terminated or cancelled as of 5:00 p.m. on October 24, 2014, were literally false."); *EndoSurg Med., Inc. v. EndoMaster Med., Inc.*, 71 F. Supp. 3d 525, 554-55 (D. Md. 2014) (statement that competitors were presently "unstable" survived motion to dismiss).

violation of an unambiguous anti-suit injunction. *In re Lehman Bros. Holdings Inc.*, 526 B.R. 481, 496 (S.D.N.Y. 2014), *aff'd*, 645 F. App'x 6 (2d Cir. 2016).

The required diligence is only 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), or "act[ing] without maliciousness and [with] a good faith argument and belief that its actions did not violate the stay," *Crysen/Montenay*, 902 F.2d at 1104. Charter acted with good faith and without maliciousness, as there is no evidence Charter believed it might be violating the automatic stay and immediately changed the language of its advertisement when Windstream complained. *See* Br. 10. Windstream argues (Opp. 59) that it did not suffice that Charter specifically told its advertising agency *not* to state that Windstream was going away, but Windstream's argument again rests on the erroneous premise that there was no risk in bankruptcy at all. Windstream also errs in asserting (Opp. 40, 59) that Charter knew there was no risk in bankruptcy, ignoring the undisputed evidence that Charter relied upon an analyst report stating there is "uncertainty about the service impacts," and "[w]hile the move is intended to ensure Windstream survives, it could result in the opposite." Rec. 222 at 1-2.

Finally, the prior lawsuit that Windstream relies upon (Opp. 59) is totally inapposite. The bankruptcy court did not rely on this prior lawsuit, and for good reason: In that case, Charter never even asserted a violation of Section 362(a) when it sued DirecTV for false advertising. *Charter Comms. Holdings Co., LLC et al., v. DirecTV, Inc.*, Case No. 4:09-cv-00730-RWS (E.D. Mo.), Dkt. No. 1 at 28-36. And while the district court there enjoined one of seven DirecTV advertisements, it did so on Lanham Act and state law grounds, not for any violation of the automatic stay. *Id*., Dkt. No. 9-2 at 2-3; *id.*, Dkt. 16 at 1-2.

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. Windstream agrees that Section 362(k) authorizes bankruptcy courts to grant only "individual[s]" damages for violations of the stay. However, Windstream argues (Opp. 18) that "Section 105(a) of the Bankruptcy Code imbues bankruptcy courts with inherent authority to impose contempt [sanctions]."

As Charter explained (Br. 51-52), under *Law v. Siegel*, 571 U.S. 415, 421 (2014), Section 105(a) and inherent authority cannot end-run Section 362(k)'s limitation to individual debtors. Windstream argues (Opp. 18) that *Siegel* is irrelevant because the Bankruptcy Code does not specifically prohibit corporations from receiving contempt damages for violations of the automatic stay. But *Siegel* held that this authority cannot override "carefully calibrated" provisions. 571 U.S. at 424. Section 362(k)(1) is just such a provision, as it deliberately limited sanctions to individuals, and expanding sanctions to corporations would subvert this limitation.

Courts have recognized this application of *Siegel*. *See, e.g.*, *Gebhardt v. McKeever (In re McKeever)*, 550 B.R. 623, 643 (Bankr. N.D. Ga. 2016); *cf. In re Taylor*, No. 15-31208 (AMN), 2019 WL 4281896, at *11 (Bankr. D. Conn. Sept. 10, 2019). The only case Windstream cites (Opp. 18) in opposition dealt with a damages award to an individual, not a corporate entity. *See In re Theokary*, 592 F. App'x 102, 107-08 (3d Cir. 2015). The bankruptcy court here overstepped its powers in awarding damages to Windstream, a non-individual.

III. THE DAMAGES AWARD WAS UNSUPPORTED AND IMPROPER

The damages award rests on several fundamental errors that Windstream fails to confront.

First, Windstream ignores the key point that none of the damages was tied to its supposed property rights. Its only response (Opp. 60 n.11) is that contracts and goodwill are property, but even if that were true, the particular contract rights or particular goodwill would have to be linked to the damages. They are not, as the 50-month timeframe for damages has nothing to do with any month-to-month at-will contract rights or goodwill untethered to other rights.

Second, Windstream's expert analysis rests on clear errors. As Charter explained (Br. 54), Windstream's expert confused the average customer relationship of 50 months with the *additional* number of months customers would stay at Windstream at a given moment in time. Windstream asserts (Opp. 62) that Charter is "inaccurately branding the 50 month multiplier as an 'average.'" But Windstream's own trial witness testified that the 50-month *was* the "average tenure of a customer." *See* Rec. 107 at 39:13 (Auman). The bankruptcy court credited this testimony. *See* Order at 16 n.17 ("On *average* a customer's relationship with the Debtors lasts 50 months.") (emphasis added). And Windstream's expert, Mr. Jarosz, misapplied this average and said nothing to show that customers would stay with Windstream for an additional 50 months after the advertisement.

Charter explained (Br. 54) that Mr. Jarosz's analysis was further deficient because he did not test whether his conclusions were statistically significant. Windstream responds (Opp. 62) that because Mr. Jarosz uses a "difference-in-difference," it ensures "no random fluctuation" in the data, but Mr. Jarosz's own testimony states that "difference-in-difference" eliminates only seasonal and other *non-random* fluctuations in data. Rec. 248 at 4-6. Random fluctuations exist in virtually all data, which is why any proper statistical analysis evaluates conclusions for statistical significance. *See, e.g., Ideker Farms, Inc. v. United States,* 151 Fed. Cl. 560, 604 (2020) (checking conclusions from "difference-in-difference" analysis for statistical significance).[9]

[9] Windstream errs in arguing (Opp. 61) that Charter waived these arguments. Prior to trial, Charter moved to exclude Mr. Jarosz testimony as "unreliable" and "inconsistent with generally accepted practices," Rec. 11 at 17, 25, and argued that "churn" rate was an inappropriate way to calculate damages, *id.* at 4. Moreover,

Windstream also fails to show any link to the injury of the particular 205 plaintiff Debtors. Windstream's assertion (Opp. 62 n.12) that Charter "attacked the shared 'Kinetic by Windstream' services" ignores the point that regardless of the supposed attack, there must be a showing of actual damages to the particular Debtors. There is none.

Third, as Charter explained (Br. 55-56), there was obvious double-counting that also requires reversal. According to Windstream's expert, Windstream did not ultimately suffer lost profits precisely because it spent $4 million in promotional costs. *See* Order at 33; Rec. 107 (Trial Tr. (May 6, 2020)) 58, 110. Windstream does not dispute this factual point, and instead argues (Opp. 64) that an award of corrective advertising and lost profits is permissible under *Merck Eprova AG v. Gnosis S.p.A.*, 760 F.3d 247 (2d Cir. 2014).[10] However, in *Merck*, "no damages were awarded by the district court for corrective advertising," 760 F.3d at 264-65, and the "lost profits" were actually a disgorgement of the *defendant's* profits earned from the false advertising, *id.* at 261-262. Windstream also invents (Opp. 64) that the promotional advertising compensated Windstream for "lost goodwill," but as

"appeals courts may entertain additional support that a party provides for a proposition presented below." *Eastman Kodak Co. v. STWB, Inc.*, 452 F.3d 215, 221 (2d Cir. 2006); *see also Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

[10] Despite claiming this appeal is not about the Lanham Act (Opp. 43), Windstream relies on Lanham Act cases to support its damages theory.

Charter explained (Br. 28), no evidence of goodwill (or its lost value) was ever adduced at trial. Thus, any alleged impact on goodwill cannot support this manifest double recovery.

Finally, the award of attorneys' fees was improper. Windstream does not dispute that willfulness is required for an award of attorneys' fees. The bankruptcy court failed to address the willfulness issue other than one conclusory sentence, and Windstream's assumption (Opp. 65) that the bankruptcy court addressed it implicitly does not suffice.

CONCLUSION

Charter respectfully requests that the Court reverse or vacate the order of the bankruptcy court.

Dated: New York, New York
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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 6498 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 22nd day of October 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: October 22, 2021

By: */s/ Anil Makhijani*
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