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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
WINDSTREAM HOLDINGS, INC., et al.,	Case No. 19-22312 (RDD)
Plaintiffs.	(Jointly Administered)
WINDSTREAM HOLDINGS, INC., et al.,	
Plaintiffs,	Adv. Pro. No. 19-08246
vs.	
CHARTER COMMUNICATIONS, INC. and CHARTER COMMUNICATIONS OPERATING, LLC,	
Defendants.	

DEFENDANTS' MOTION FOR JUDICIAL NOTICE OF FACTS THAT CAN BE ACCURATELY AND READILY DETERMINED FROM PUBLICLY AVAILABLE LEGAL DATABASES AND ELECTRONIC FILING SYSTEMS

Pursuant to Federal Rule of Evidence 201(c)(2), Defendants Charter Communications, Inc. and Charter Communications Operating, LLC (Defendants) respectfully request that this Court take judicial notice of the facts set forth in numbered paragraphs 1 through 30 below.

Defendants submit that the following facts are relevant to whether a prohibition on bankruptcy-related advertising is unambiguously stated within the "four corners" of 11 U.S.C. § 362(a)(3) and to the question of reasonable diligence.

To establish civil contempt in the Second Circuit, a plaintiff must establish, *inter alia*, "that the order not complied with is clear and unambiguous." *In re Masterwear Corp*., 229 B.R. 301, 310 (Bankr. S.D.N.Y. 1999) (Bernstein, J.) ("[M]ovant must show (1) that the order not complied with is clear and unambiguous, (2) the proof of the noncompliance is clear and convincing, and (3) the contemnor has not diligently attempted to comply in a reasonable manner.") (citing *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1058 (2d Cir. 1995)).

"To be clear and unambiguous, the order must leave '**no uncertainty** in the minds of those to whom it is addressed, **who must be able to ascertain from the four corners of the order precisely what acts are forbidden**.'" *In re Treco*, No. 00-8137, 2001 WL 1566709, at *6 (Bankr. S.D.N.Y. Dec. 10, 2001) (Bernstein, J) (emphasis added) (quoting *King*, 65 F.3d at 1058). *See also Drywall Tapers & Pointers of Greater N.Y. v. Local 530 of Operative Plasterers*, 889 F.2d 389, 395 (2d Cir. 1989) (an essential element of civil contempt is that "the party enjoined must be able to ascertain from the **four corners** of the order precisely what acts are forbidden") (emphasis added);[1] *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1802 (2019)

[1] The necessity that the conduct underpinning a contempt sanction be clearly and unambiguously proscribed by the subject order is a Due Process requirement. *See Erhardt v. Prudential Grp., Inc.*, 629 F.2d 843, 846–47 (2d Cir. 1980).

In *In re Crysen/Montenay Energy Co.*, 902 F.2d 1098, 1105 (2d Cir. 1990), the Second Circuit established the standard for imposing non-contempt sanctions under § 362(k): "any deliberate act taken in violation of a stay, which the violator knows to be in existence." The Second Circuit unequivocally held that the lenient *Crysen/Montenay* standard applies "**ONLY**" to claims brought by natural persons: that standard does not apply to corporate claimants like the 205 plaintiffs asserting claims here. *See In re Chateaugay Corp.*, 920 F.2d 183, 186–87 (2d Cir. 1990) ("We now hold that a bankruptcy court may impose sanctions pursuant to § 362(h), under the standard set out in *Crysen/Montenay*, **only** for violating a stay as to debtors who are natural persons.") (emphasis added).

(instructing that "civil contempt is a severe remedy" and that basic principles of fairness require "that those enjoined receive **explicit notice** of what conduct is outlawed before being held in civil contempt") (emphasis added, internal punctuation omitted); *U.S. on behalf of I.R.S. v. Norton*, 717 F.2d 767, 774 (3d Cir. 1983) (reversing contempt order based on § 362(a) violation and instructing that "[a] party should not be held in contempt unless a court first gives fair warning that certain acts are forbidden; any ambiguity in the law should be resolved in favor of the party charged with contempt").

For the reasons set forth below, Defendants respectfully submit that judicial notice of the following facts is proper because they can accurately and readily be determined from sources whose accuracy cannot reasonably be questioned. *See* FED. R. EVID. 201.

1. On February 25, 2019, the United States Bankruptcy Court for the Southern District of New York (Hon. Robert Drain) approved the following language for notifying creditors of the commencement of Plaintiffs' Chapter 11 cases:

> **This notice has important information about the case for creditors, debtors, and trustees, including information about the meeting of creditors and deadlines. Read both pages carefully.**
>
> 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.

Drywall was one of two Second Circuit decisions the *Chateaugay* court cited for the proposition that civil contempt was available for a stay violation. *Chateaugay*, 920 F.2d at 186–87. In the other, *Fid. Mortg. Inv'rs v. Camelia Builders, Inc.*, 550 F.2d 47, 51 (2d Cir. 1976), the court stated "It is, of course, true that, for a person to be held in contempt, the court order violated must 'be specific and definite.'" (quoting *In Re Rubin*, 378 F.2d 104, 108 (3d Cir. 1967)). Given its express holding that the lenient *Crysen/Montenay* standard is not available for corporate debtors and its reliance on decisions reiterating the "specific and definite" notice requirement and "four corner" rule, the Second Circuit's *Chateaugay* decision does not suggest that the civil contempt standard in bankruptcy court is any less demanding than the civil contempt standard in any other federal court.

> Confirmation of a chapter 11 plan may result in a discharge of debt. A creditor who wants to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadline specified in this notice. (See line 11 below for more information.)

See Exhibit 1, Case No. 19-22312-rdd, ECF 90 at 5, Order…Approving the Form and Manner of Notifying Creditors of Commencement of these Chapter 11 Cases (Mar. 3, 2019) (emphasis in original).

2. The word "advertising" does not appear in the language the United States Bankruptcy Court for the Southern District of New York approved for notifying creditors of the commencement of Plaintiffs' Chapter 11 cases. *See* Exhibit 1.

3. Section 362(a)(3), of Title 11, U.S.C., states that a petition filed under certain section of Title 11 "operates as a stay, applicable to all entities, of … any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362.

4. The word "advertising" does not appear in 11 U.S.C. § 362(a).

5. Section 362(a), of Title 11, U.S.C., does not include the phrases "deceptive trade practices," "unfair competition," or "false advertising."

6. There is no reference to competitive advertising (false or otherwise) in 2 A.L.R. Fed. 2d 459 "What Constitutes 'Willful Violation' of Automatic Stay Provisions of Bankruptcy Code (11 U.S.C.A. § 362(h)) Sufficient To Award Damages—Chapter 11 and 12 Cases" (West 2020) (originally published 2005, updated weekly). *See* Exhibit 2.

7. There is no reference to competitive advertising (false or otherwise) in 23 A.L.R. Fed. 2d 339 "What Constitutes 'Willful Violation' of Automatic Stay Provisions of Bankruptcy

Code (11 U.S.C.A. § 362(k)) Sufficient to Award Damages—Chapter 7 Cases" (West 2020) (Originally published in 2007, updated weekly). *See* Exhibit 3.

8. In *In re Golden Distributors, Ltd.*, 122 B.R. 15, 21–22 (Bankr. S.D.N.Y. 1990) a Bankruptcy Court in the Southern District of New York addressed a situation where a party was accused of wrongfully soliciting a debtor's customers and stated as follows: "The debtor's customers cannot be regarded as property of the debtor's estate within the meaning of 11 U.S.C. § 541 and the defendants' solicitation of business from such customers does not constitute an act to obtain possession of property of the estate or the exercise of control over property of the estate within the context of the automatic stay as imposed under 11 U.S.C. § 362(a)(3)."

9. On April 16, 2019, the United States Bankruptcy Court for the Southern District of New York (Hon. Robert Drain) entered a temporary restraining order that instructed Defendants to "Cease and desist from expressly or impliedly stating in commerce, publishing, or otherwise disseminating in any and all media (including, without limitation, Internet, television, radio, newspaper and other print, billboards, direct mail, telephone and as part of any door-to-door campaign) that Windstream is in bankruptcy or Chapter 11 as part of an effort to persuade Windstream customers to switch their service to Spectrum." Dkt. No. 25 at 5-6, ¶1(k).

10. Section 362(a), of Title 11, U.S.C., does not include the phrases "cease and desist from expressly or impliedly stating in commerce, publishing, or otherwise disseminating in any and all media (including, without limitation, Internet, television, radio, newspaper and other print, billboards, direct mail, telephone and as part of any door-to-door campaign) that debtor is in bankruptcy or Chapter 11 as part of an effort to persuade debtor's customers to switch their service to a competing entity." 11 U.S.C. § 362.

11. In a 2009 lawsuit involving a false advertising claim brought by Charter against DirecTV after the commencement of Charter's prepackaged Chapter 11 bankruptcy (the 2009 Lawsuit), Charter did not assert a claim for a violation of 11 U.S.C. § 362(a).[2] *See Charter Communications Holding Co., et al. v. DirecTV, Inc.*, No. 4:09-cv-00730, Dkt. No. 1 (E.D. Mo. May 11, 2009).

12. In the 2009 Lawsuit, the court did not enter an injunction prohibiting the defendant from "expressly or impliedly stating in commerce, publishing, or otherwise disseminating in any and all media (including, without limitation, Internet, television, radio, newspaper and other print, billboards, direct mail, telephone and as part of any door-to-door campaign) that Charter is in bankruptcy or Chapter 11 as part of an effort to persuade Charter customers to switch their service to DirectTV." *Compare generally Charter Communications Holding Co., et al. v. DirecTV, Inc.*, No. 4:09-cv-00730 *to* Dkt. No. 25.

13. In the 2009 DirectTV lawsuit, the court did not enter an injunction prohibiting the defendant from asserting that bankruptcy entails uncertainty. *See Charter Communications Holding Co., et al. v. DirecTV, Inc.*, No. 4:09-cv-0073 Dkt. Nos. 16, 20, 28, 37, 55, 63, 65. Instead, the Court concluded that DirecTV could refer to the uncertainty of Charter's prepackaged bankruptcy, but could not publish statements suggesting the outcome of the uncertainty: "***there's no way*** [Charter will] be able to bring you the latest technology, more channels in HD, and new exclusive programming," "do you really think [Charter will] be able to

[2] Defendants recognize that they cannot seek judicial notice of the truth of the matters asserted by a claim or within an order and do not attempt to do so here. They merely request judicial notice of whether a claim was made or an order entered. Taking such notice is permissible. *See, e.g.*, *AQ Consulting WLL v. Branca*, No. 10 CIV 7496 AKH, 2011 WL 240812, at *1 (S.D.N.Y. Jan. 19, 2011 ("A court may take judicial notice of a document filed in another court; however, judicial notice may be taken, not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.") (internal quotations omitted); *Am. Home Assur. Co. v. Altman Specialty Plants, Inc.*, No. 08 CIV 7504(PGG), 2009 WL 222158, at *4 (S.D.N.Y. Jan. 26, 2009) ("Because this Court cannot reasonably question the accuracy of the docket in the California *Altman* action, it treats the existence and content of the Amended Complaint as judicially noticed facts.").

bring you the latest technology, more channels in HD or new exclusive programming? ***Probably not***" and "do you really think [Charter will] have the time to bring you the latest technology, more channels in HD or new exclusive programming? ***Probably not***." Exhibit 4, *Charter Communications Holding Co., et al. v. DirecTV, Inc.*, No. 4:09-cv-00730, Dkt. No. 16, Temporary Restraining Order, at 1-2 (emphasis added).

14. In the 2009 DirecTV lawsuit, the court did not enjoin DirecTV from making the following statements for which Charter sought an injunction:

a. From using in commerce, publishing, or otherwise disseminating in any and all media (including, without limitation, Internet, television, radio, newspaper and other print, billboards, and direct mail) the "life-preserver" print advertisements referencing Charter's bankruptcy filing and telling the public "now's the time to save yourself" or "we'll save the day" and "Get Help while you can," (Exhibit 5, *Charter Communications Holding Co., et al. v. DirecTV, Inc.*, Case No. 4:09-cv-00730, Dkt. No. 9-23 at 2, ¶ 2);

b. From using in commerce, publishing, or otherwise disseminating in any and all media (including, without limitation, Internet, television, radio, newspaper and other print, billboards, and direct mail) the "fire extinguisher" print advertisements directing the public to "Get Help while you can" and "instead of waiting to see how Charter's bankruptcy might affect you, just switch to DirecTV (*id*. at 2-3, ¶ 3);

c. From using in commerce, publishing, or otherwise disseminating in any and all media (including, without limitation, Internet, television, radio, newspaper and other print, billboards, and direct mail) the "life-preserver" billboard

advertisements referencing Charter's bankruptcy filing and telling the public to "SAVE YOURSELF" (*id*. at 3, ¶ 4);

d. From using in commerce, publishing, or otherwise disseminating in any and all media (including, without limitation, Internet, television, and radio) the radio advertisement which states that because of Charter's bankruptcy, its customers are "probably thinking what does this mean for me? Will I miss my favorite shows? Lose my TV service? What about my HD channels." (*id*. at 3, ¶ 5);

e. From using in commerce, publishing, or otherwise disseminating in any and all media (including, without limitation, Internet, television, and radio) the radio advertisement which states that Charter's operations are in a "mess" because they filed for bankruptcy (*id*. at 3, ¶ 6);

f. From using in commerce, publishing, or otherwise disseminating in any and all media (including, without limitation, Internet, television, and radio) the radio advertisement which states that Charter's bankruptcy filing is "not going to help [Charter's] customer service one bit." (*id*. at 3, ¶ 7);

g. From using in commerce, publishing, or otherwise disseminating in any and all media (including, without limitation, Internet, television, radio, newspaper and other print, billboard, and direct mail) any advertisements, or other such messages, claiming or implying that Charter, as a result of its Chapter 11 bankruptcy filing: (1) is going out of business, (2) is not able to continue to provide services to customers, (3) is not able to provide new services or content or

the latest technology, (4) is going to provide inferior customer service, or (5) that Charter's customers will be adversely impacted. (*id*. at 4, ¶ 8).[3]

15. Section 362(a), Title 11, U.S.C. does not include the phrase "uses deceptive representations or designations of geographic origin in connection with goods or services," which can be found in the Georgia Deceptive Trade Practices Act, O.C.G.A. § 10-1-372, et seq.

16. Section 362(a), Title 11, U.S.C. does not include the phrase "Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have," which can be found in the Georgia Deceptive Trade Practices Act, O.C.G.A. § 10-1-372, et seq.

17. Section 362(a), Title 11, U.S.C. does not include the phrase "Disparages the goods, services, or business of another by false or misleading representation of fact," which can be found in the Georgia Deceptive Trade Practices Act, O.C.G.A. § 10-1-372, et seq.

18. Section 362(a), Title 11, U.S.C. does not include the phrase "Engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.," which can be found in the Georgia Deceptive Trade Practices Act, O.C.G.A. § 10-1-372, et seq.

19. Section 362(a), Title 11, U.S.C. does not include the phrase "uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact" which can be found in the Lanham Act, 15 U.S.C. § 1125, et seq.

[3] The Temporary Restraining Order (TRO) entered by the Court and Charter's proposed TRO are attached as Exhibits 4 and 5, respectively. The statement enjoined in the first paragraph of the TRO entered by the Court is identical to the statement Charter sought to be enjoined in the first paragraph of its proposed TRO. The remaining statements which the Court enjoined (¶¶ 2-3) were enjoined without a specific request from Charter and are highlighted in Exhibit 4. Similarly, the statements for which Charter sought an injunction in its proposed TRO but which the Court did not enjoin (¶¶ 2-7) are highlighted in Exhibit 5.

20. Section 362(a), Title 11, U.S.C. does not include the phrase "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce" which can be found in the North Carolina Unfair and Deceptive Trade Practices Act, N.C. GEN. STAT. § 75-1.1, et seq.

21. Section 362(a), Title 11, U.S.C. does not include the phrase "Uses deceptive representations or designations of geographic origin in connection with goods or services" which can be found in the Nebraska Uniform and Deceptive Trade Practices Act, NEB REV. STAT. § 87-302, et seq.

22. During an April 15, 2019 hearing on a motion for temporary restraining order, the United States Bankruptcy Court for the Southern District of New York (Hon. Robert Drain) informed counsel for Plaintiffs that "the stay violation is really quite different than the other Lanham Act relief you're seeking." Dkt. No. 84, April 15, 2019 Hearing Tr. at 82:15-17.

23. In its April 15, 2019 bench ruling on Plaintiffs' motion for temporary restraining order, the United States Bankruptcy Court for the Southern District of New York stated "I have before me a motion by the Debtor in these Chapter 11 cases, Windstream, for the entry of an order, A, enforcing the automatic stay in this case under Section 362(a) of the bankruptcy code; and B, under Lanham Act, 15 U.S.C. 1051 through 1127, temporarily restraining actions by Charter/Spectrum that under Section 1125 of that act either constitute in the vernacular false advertising or misrepresenting the nature, characteristics, qualities, or origin of Windstar's goods or, in this case, services and commercial activities." Dkt. No. 84, April 15, 2019 Hearing Tr. at 98:17-99:1.

24. In its April 15, 2019 bench ruling on Plaintiffs' motion for temporary restraining order, after stating that it had before it a motion for an order enforcing the automatic stay under §

362(a) and temporarily restraining actions by Charter/Spectrum under § 1125 of the Lanham Act, the United States Bankruptcy Court for the Southern District of New York described the basis for the standard for injunctive relief under the Lanham Act. Dkt. No. 84, April 15, 2019 Hearing Tr. at 99:2-100:5.

25. In its April 15, 2019 bench ruling on Plaintiffs' motion for temporary restraining order, after describing the standard for injunctive relief under the Lanham Act, the United States Bankruptcy Court for the Southern District of New York stated as follows: "Before turning to the facts and whether they support the issuance of an injunction under the Lanham Act, let me first deal with the first aspect of the relief sought which is simply to enforce the automatic stay which it is alleged in the complaint as well as Mr. Langston's affidavit in support of the Debtors' motion, Charter/Spectrum violated by, on or around March 14, 2019, disconnecting service to approximately 350 Windstream customers, based on allegedly Windstream's failure to pay certain prepetition amounts allegedly owing to Charter. It is clear to me that that allegation which was not refuted with any evidence does describe a violation of the automatic stay under Section 362(a), namely the attempt to enforce payment of a prepetition debt and/or to cease performance under a prepetition executory contract without relief from the automatic stay." Dkt. No. 84, April 15, 2019 Hearing Tr. at 100:6-15.

26. In its April 15, 2019 bench ruling on Plaintiffs' motion for temporary restraining order, the United States Bankruptcy Court for the Southern District of New York did not state that Plaintiffs' allegations and evidence regarding alleged false advertising supported a finding that Defendants had violated § 363(a)(3). Dkt. No. 84, April 15, 2019 Hearing Tr. *passim*.

27. On April 16, 2019, the United States Bankruptcy Court for the Southern District of New York (Hon. Robert Drain) entered a temporary restraining order that described a

violation of the Automatic Stay by Defendants as follows: "The legal and factual bases set forth in the Motion and at the hearing establish good and sufficient cause for granting the relief sought related to the Debtors' claim that Charter violated the automatic stay under Section 362(a) of the Bankruptcy Code because the Debtors have demonstrated that Charter violated the automatic stay of Section 362(a) of the Bankruptcy Code when Charter discontinued service to Windstream customers on or about March 14, 2019 as alleged in Paragraph 32 of the Complaint." Dkt. No. 25 at 3, ¶ E.

28. It is a violation of the Securities Act of 1933 and the Securities Exchange Act of 1934 for a telecommunications provider to inflate publicly reported subscriber accounts upon which stock analysists and public investors rely in making investment decisions. *See* Exhibit 6, *In re Kern*, Securities Act Release No. 8653, Exchange Act Release No. 53100, Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934 (Jan. 11, 2006).

29. Dkt. No. 12-3 in this adversary proceeding (Exhibit C to Defendants' Opposition to Debtors' Motion for Temporary Restraining Order) does not include the word "risk" or the word "uncertainty."

30. Plaintiffs' Trial Exhibit 30 does not include the phrase "Goodbye Windstream. **Hello, Spectrum**."

Argument

Judicial notice of legal matters is proper in these circumstances. *See City of Wichita, Kan. v. U.S. Gypsum Co.*, 72 F.3d 1491, 1496 (10th Cir. 1996) ("A matter of law can be

judicially noticed as a matter of fact; i.e., the court can look to the law not as a rule governing the case before it but as a social fact with evidential consequences.").

In adversary cases, courts routinely take notice of public filings in the parent bankruptcy case. *In re MSR Hotels & Resorts, Inc.*, No. 13-11512 (SHL), 2013 WL 5716897, at *1 (Bankr. S.D.N.Y. Oct. 1, 2013) ("A court is empowered to take judicial notice of public filings, including, in an adversary proceeding, those filed on its own dockets in the underlying bankruptcy case."). Further, courts routinely take judicial notice of public filings in other cases although such notice does not encompass the truth of the matters asserted in the extraneous litigation. *See, e.g.*, *Faulkner v. Verizon Commc'ns, Inc.*, 156 F.Supp. 2d. 384, 391 (S.D.N.Y. 2001) ("Pursuant to Fed. R. Evid 201(b), we may take judicial notice of pleadings in other lawsuits … as a matter of public record."); *Guzman v. U.S.*, No. 11 CIV. 5834 JPO, 2013 WL 543343, at *3 (S.D.N.Y. Feb. 14, 2013) ("It is common and entirely proper for courts to take judicial notice of other court proceedings.") (collecting cases).

Judicial notice is properly taken of "a fact that is not subject to reasonable dispute because it … can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201(b)(2). Judicial notice is mandatory when a party requests it and supplies the necessary information. FED. R. EVID. 201(c)(2) ("The court … must take judicial notice if a party requests it and the court is supplied with the necessary information."). The foregoing facts are not subject to reasonable dispute. Moreover, they can accurately and readily be determined from the electronic filing systems of the United States Bankruptcy Court for the Southern District of New York and the United States District Court for the Eastern District of Missouri and Westlaw's legal research database. Therefore, judicial notice is required under Rule 201.

For the foregoing reasons Defendants' respectfully request that this Court take judicial notice of the facts set forth in the numbered paragraphs 1 through 30 above.

Dated: April 26, 2020

Respectfully submitted,

/s/John Kingston

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April 2020, I served a true and correct copy of the foregoing via operation of the Court's Electronic Filing System upon all counsel of record in the adversary proceeding.

/s/John Kingston