

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

**Hearing Date: July 29, 2021, at 10:00
a.m. (prevailing Eastern Time)**

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**Response Deadline: July 20, 2021, at
4:00 p.m. (prevailing Eastern Time)**

In re: WINDSTREAM FINANCE, CORP., et
al.,

Debtor

Case No.: 19-22397 (RDD)
Chapter 11

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Plaintiff

v

Adversary Proceeding No.: _____

Defendant

-----x

***Motion For Order Determining Claim Has Not Been Discharged Or
Allowing Claim As Administrative Claim***

Claimants, Joe Wray and Stephanie Wray (Wray) move the court for an order determining their claim against Windstream Finance Corp., or all other Windstream entities party to this proceeding and the Plan of Reorganization for Windstream Holdings, Inc., et al. has not been discharged and the Wrays are not enjoined from attempting to collect for their claim against any Windstream entity or to allow their claim as an administrative claim against the responsible Windstream entities, and as grounds states:

1. The Wrays own real property in Oglethorpe County, GA at 2458 Elberton Rd. Carlton, GA 30627.
2. They are and have been customers of Windstream since before this bankruptcy case.
3. The Windstream entities, including Windstream Financial Corp., filed for bankruptcy on or about February 25, 2019. Various notices were sent to creditors during the bankruptcy.



The Wrays received at least one of those notices. Windstream has provided evidence of mailing notices to the Wrays.

4. On or about January 4, 2020, the Windstream entity operating in Georgia trespassed upon the Wrays' property and placed a cable over their property on the surface of the ground to service the adjacent property.
5. On January 6, 2020, Globe Communications, LLC, and/or one of its subcontractors, Cable South Marketing, Inc., for and at the request of Windstream, dug a trench on the Wrays' property and buried the cable. Before the trench was dug, Stephanie Wray confronted the worker with the trenching machine and told him he was on her property and did not have permission to put any cable on her property. The worker responded to Mrs. Wray that he had received permission from the adjacent property owner and that he was going to install the cable as he had been requested. He then dug the trench on the Wrays' property and installed the cable.
6. The cable was and is a continuing trespass on the Wrays' property.
7. Undersigned has contacted Windstream and Globe Communications LLC about the trespass and demanded that the cable be removed, but to date it has not been removed.
8. Although the Wrays were aware that Windstream had filed for bankruptcy, Windstream had not trespassed on their property until almost one year after the bankruptcy was filed. Further, the Wrays were in litigation with the adjoining property owners over the area of the Wrays' property where Windstream laid the cable. A nonjury trial had concluded in August, 2019, but a ruling by the trial court was not issued until March 19, 2021, which ruled that the adjoining property owner who presumably gave Windstream permission to place the cable on the Wrays' property, was determined to have no prescriptive easement for a private

way over the Wrays' property where the cable had been placed. Accordingly, March 19, 2021, is the first time that the Wrays had definitive legal support for Windstream's trespass. See affidavit of Stephanie Wray and Joe Wray attached as Exhibit A.

9. The Wrays have communicated with Windstream through their counsel regarding this claim. Windstream has taken the position that the Wrays' claim for trespass was discharged by the court's order confirming the Plan of Reorganization and the passage of the Bar Date for all claims. Thus, the Wrays and their attorney cannot file suit against any Windstream entity without risking a claim that they have violated the Plan and injunction prohibiting pursuing discharged claims.

10. This court entered its **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER CONFIRMING THE FIRST AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION OF WINDSTREAM HOLDINGS, INC. ET AL., PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE [Docket #2243 filed on 6/26/20]**. The Order contained the following provision:

RR. Retention of Jurisdiction.

55. Except as otherwise provided in any of the Plan Documents, the Court shall retain jurisdiction over the Chapter 11 Cases and all matters arising out of, or related to, the Chapter 11 Cases and the Plan, including, but not limited to, the matters set forth in Article XI of the Plan.

and

UU. Retention of Jurisdiction

135. Notwithstanding the entry of this Confirmation Order, from and after the Effective Date, this Court shall, to the fullest extent legally permissible, retain exclusive jurisdiction over the Chapter 11 Cases and all matters arising under, arising out of, or related to, the Chapter 11 Cases, including all matters listed in Article IX of the Plan, as well as for the purposes set forth in section 1142 of the Bankruptcy Code. To the extent it is not legally permissible for the Court to have exclusive jurisdiction over any of the foregoing matters, the Court shall have non-exclusive jurisdiction over such matters to the fullest extent legally permissible. Notwithstanding anything to the contrary in this Confirmation Order or the Plan, from and after the Effective Date, the Court shall not retain jurisdiction over the

Reorganized Windstream Organizational Documents except to the extent that this Confirmation Order has been vacated or reversed, but instead, such enforcement shall be governed as set forth in the Reorganized Windstream Organizational Documents, as applicable.

11. The Bankruptcy Plan Support Agreement [Doc 1533 Filed 03/02/20] at page 7 defines

“claim” as follows:

“**Claim**” has the meaning ascribed to it in section 101(5) of the Bankruptcy Code.

12. The Bankruptcy Plan defines claim as follows:

27. “*Claim*” means any claim, as defined in section 101(5) of the Bankruptcy Code, against any of the Debtors.

13. Bankruptcy Code Section 101(5) defines claim as follows:

(5) The term “claim” means--

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C.A. § 101.

14. In *In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir. 1995), the court addressed the definition

of a claim and held as follows:

The critical issue before us is the scope of the term “claim” as employed by the Bankruptcy Code. If the Combined Fund's premium assessment is a “claim” against LTV that existed prior to the filing of the petition, then those premiums must now be disallowed. The Code defines a “claim” as a “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” 11 U.S.C. § 101(5)(A). As this court noted in a prior iteration of this case, “Congress unquestionably expected this definition to have wide scope.” *In re Chateaugay*, 944 F.2d at 1003. In *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 558, 110 S.Ct. 2126, 2130–31, 109 L.Ed.2d 588 (1990), the Supreme Court reviewed the legislative history of the Bankruptcy Code and noted Congress's intent to invest the term “claim” with the “broadest possible” scope so that “all legal obligations of the debtor ... will be able to be dealt with in

a bankruptcy case.” See H.R.Rep. No. 95–595, at 310 (1977), U.S.Code Cong. & Admin.News 1978, pp. 5787, 6267. However broadly “claim” is understood, it is clear that the existence of a valid bankruptcy claim depends on (1) whether the claimant possessed a right to payment, and (2) whether that right arose before the filing of the petition. Looking to the plain language of the Bankruptcy Code, we must ascertain whether a “right to payment” existed at the time of LTV's petition. In *Davenport*, the Court stated simply that “a ‘right to payment’ is nothing more nor less than an enforceable obligation....” 495 U.S. at 559, 110 S.Ct. at 2131.

A claim will be deemed pre-petition when it arises out of a relationship recognized in, for example, the law of contracts or torts. “A claim exists only if before the filing of the bankruptcy petition, the relationship between the debtor and the creditor contained all of the elements necessary to give rise to a legal obligation—‘a right to payment’—under the relevant non-bankruptcy law.” In re *National Gypsum Co.*, 139 B.R. 397, 405 (N.D.Tex.1992). (emphasis added) *Id.* at 476-477;

15. Based on *In re Chateaugay Corp.*, the Wrays’ claim against Windstream is not a claim as defined in the Plan, and accordingly should not be discharged and is exempt from the injunction precluding all collection efforts to enforce the claim. See also *In re Duplan Corp.*, 212 F.3d 144, 156-157 (2d Cir. 2000) (common law claims may not be discharged depending on whether they are pre- or post-petition).

16. Alternatively, the Plan [Doc 1631 Filed 04/01/20] defines “Administrative Claim” as follows:

9. “Administrative Claim” means a Claim for the costs and expenses of administration of the Estates pursuant to sections 503(b) (including Claims arising under section 503(b)(9) of the Bankruptcy Code), 507(b), or 1114(e)(2) of the Bankruptcy Code, including: (a) the actual and necessary costs and expenses incurred after the Petition Date until and including the Effective Date of preserving the Estates and operating the Debtors’ businesses; (b) Allowed Professional Fee Claims; and (c) all fees and charges assessed against the Estates pursuant to section 1930 of chapter 123 of title 28 of the United States Code. (Plan, p. 6)

17. Neither the referenced code sections nor the definition itself give notice that a tort claim for trespass to real property occurring after the filing of the petition is or may be an

Administrative Claim although Administrative Claims include tort claims. *Reading Co. v. Brown*, 391 U.S. 471, 485, 88 S.Ct. 1759 (1968) (post-petition tort claims are “actual and necessary costs” of administration under the Act).

18. The Plan further provides as follows regarding Administrative Claims that may not be filed before the Bar Date:

... after the Effective Date, the applicable Reorganized Debtor, agrees to less favorable treatment, each holder of an Allowed Administrative Claim shall be paid in full in Cash: (a) if such Administrative Claim is Allowed as of the Effective Date, not later than the Effective Date; or (b) if such Administrative Claim is not Allowed as of the Effective Date, ***upon entry of an order of the Bankruptcy Court Allowing such Claim***, or as soon as reasonably practicable thereafter; *provided* that if an Allowed Administrative Claim arises from liabilities incurred by the Estates in the ordinary course of business after the Petition Date, such Claim shall be paid in accordance with the terms and conditions of the particular transaction giving rise to such Claim in the ordinary course. (emphasis added)

HOLDERS OF ADMINISTRATIVE CLAIMS THAT ARE REQUIRED TO, BUT DO NOT, FILE AND SERVE A REQUEST FOR PAYMENT OF SUCH ADMINISTRATIVE CLAIMS BY THE ADMINISTRATIVE CLAIMS BAR DATE SHALL BE FOREVER BARRED, ESTOPPED, AND ENJOINED FROM ASSERTING SUCH ADMINISTRATIVE CLAIMS AGAINST THE DEBTORS, THE REORGANIZED DEBTORS, OR THEIR RESPECTIVE PROPERTY AND ASSETS AND SUCH ADMINISTRATIVE CLAIMS SHALL BE DEEMED DISCHARGED AS OF THE EFFECTIVE DATE. (Plan p. 19)

10. “Administrative Claims Bar Date” means the first Business Day that is 30 days following the Effective Date, except as specifically set forth in the Plan. (Plan p. 6)

19. Section § 503 (a) of the Bankruptcy Code provides that “An entity may timely file a request for payment of an administrative expense, or ***may tardily file such request if permitted by the court for cause.***” (emphasis added) According to statute, the Plan and the court’s order confirming the plan, this court has jurisdiction for the “entry of an order ... allowing [the

Wrays’] Claim.” Compare *In re Duplan Corp.*, 212 F.3d 144, 153-155 (2d Cir. 2000) (plan allowance of Administrative Claims).

20. Good cause exists to allow a tardily filed Administrative Claim for the following reasons.

- a. The Wrays were unaware that they had a Claim or Administrative Claim against Windstream.
- b. Nothing in the definition of “Administrative Claim” gives notice to persons such as the Wrays that a claim for trespass to their real property that occurred nearly one year after Windstream filed its petition is either a Claim or an Administrative Claim.
- c. Even the statutes referenced in the definition of Administrative Claim do not reference the kind of claim the Wrays have against Windstream.
- d. The litigation that definitively determined the Wrays’ exact legal rights did not conclude until after the Effective Date and the Bar Date.
- e. The amount of the Wrays’ claim has not been determined. The Wrays’ intend to file suit in the Oglethorpe County Superior Court, in Georgia against Globe Communications, LLC and Cable South Marketing, Inc., both of which will have an indemnity or contribution claim against Windstream which is not affected by Windstream’s bankruptcy because their claim is post-petition and post Effective Date of the confirmation.

Wherefore, Stephanie and Joe Wray request the court enter an order as follows:

- f. Holding that the Wrays’ claim has not been discharged and is not subject to the discharge injunction and the Wrays are free to pursue their claim against Windstream because their claim is a pre-petition claim; or

- g. Authorizing the Wrays claim as an Administrative Claim that may be pursued preferably by separate suit in the Oglethorpe County Superior Court where Windstream would be a party with Globe Communications, LLC and Cable South Marketing, Inc., or by adversary proceeding.

Respectfully submitted, June 29, 2021.

/s/Gary Gerrard
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Attorney for Joe and Setphanie Wray

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CERTIFICATE OF SERVICE

This is to certify that I have this day served upon all parties in the foregoing matter a copy of the foregoing *Motion For Order Determining Claim Has Not Been Discharged Or Allowing Claim As Administrative Claim* by electronic filing with the Court and email as follows:

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This June 29, 2021.

GARY GERRARD
/s/ Gary Gerrard
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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X

In re: Case No.: 19-22312 (RDD)

Chapter 11

Debtor

-----X

Adversary Proceeding No.: _____

Plaintiff

v.

Defendant

-----X

**AFFIDAVIT IN SUPPORT OF MOTION FOR ORDER
DETERMINING CLAIM HAS NOT BEEN DISCHARGED
OR ALLOWING CLAIM AS ADMINISTRATIVE CLAIM**

I, Stephanie Wray, after having been duly sworn upon oath depose and say as follows:

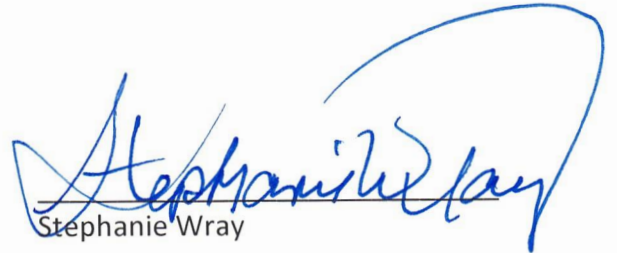
1. I am over the age of 18 and give this affidavit upon personal knowledge or such knowledge is as stated herein.
2. My husband and I reside at 2458 Elberton Rd, Carlton, Georgia 30627.
3. I have been customers of Windstream since before Windstream filed bankruptcy.
4. I received one or more notices about the bankruptcy.
5. On or about January 4, 2020, the Windstream entity operating in Georgia trespassed upon my property and placed a cable over the surface of the ground to provide service to the adjacent property.
6. On January 6, 2020, a Windstream contractor dug a trench on my property and buried the Windstream cable. Before the trench was dug, I confronted the man with the trenching machine and told him he was on my property and did not have permission to put any cable on my property. The man responded that the adjacent property owner had given permission and that he was going to install the cable as he had been requested. He then

dug a trench with his machine and installed the cable and left.

7. The cable remains on the my property.
8. My lawyer has contacted Windstream and it's contractor, Globe Communications LLC, about the trespass and demanded that the cable be removed, but to date it has not been removed.
9. Although I was aware that Windstream had filed for bankruptcy, Windstream had not trespassed on my property until almost one year after the bankruptcy was filed. Further, in January 2019, the adjoining property owners filed a case against me and my husband claiming they had a private way by prescription over the area of my property where Windstream laid the cable. The case was originally in the Probate Court of Oglethorpe County, GA, but was transferred to the Superior Court. A nonjury trial of the case concluded in August, 2019, but the trial court did not issue a final judgment until March 19, 2021, which ruled that the adjoining property owner had no right to a private way over my property where the cable had been placed. Accordingly, March 19, 2021, is the first time that I had definitive legal support for Windstream's trespass.
10. Neither my husband nor I was unaware that we were required to file a claim or any other document with the Bankruptcy Court for the trespass that started almost one year after Windstream filed for bankruptcy. Further, until the final judgment was entered the the case with the adjoining property owners was concluded, we were unsure of our rights regarding the placing of the cable on our property.

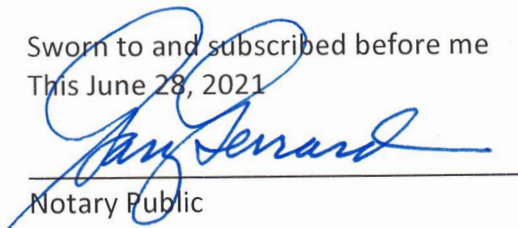
11. I request the court determine that I can still make a claim against Windstream for its continuing trespass upon my property either as not discharged by the bankruptcy or that it be treated as a late filed administrative claim.

Further sayeth affiant not.



Stephanie Wray

Sworn to and subscribed before me
This June 28, 2021



Notary Public