Hearing Date and Time: February 13, 2020 at 10:00 a.m.
Objection Deadline: February 6, 2020 at 4:00 p.m.
Reply Deadline: February 10, 2020 at 4:00 p.m.

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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)
Debtors.	(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 TO CONTINUE THE MARCH 30, 2020 TRIAL SETTING FOR COUNTS VI AND VII PENDING A JURY TRIAL ON THE PREDICATE CLAIMS (COUNTS I-V)

Pursuant to the Seventh Amendment to the Constitution, Defendants Charter Communications, Inc. (Charter, Inc.) and Charter Communications Operating, LLC (Charter Operating) respectfully move for an order continuing the March 30, 2020 trial setting for Counts VI and VII of Plaintiffs' Complaint until after the jury trial on Counts I, III, and V (and potentially Counts II and IV) in the United States District Court for the Southern District of New York.

According to Plaintiffs, "Counts I, III and V, [along with Counts II and IV,] constitute the **predicate claims** upon which Counts VI (violation of the automatic stay) and Count VII (equitable subordination) are based." Ex. A at 2 (emphasis added). Defendants have a constitutional right to a jury trial on those predicate claims. *See* U.S. Const. amend. 7. *See also, e.g., Beacon Theatres v. Westover*, 359 U.S. 500, 501 (1959) ("Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."). Where an action "presents both legal and equitable claims that are interrelated," the "legal claims 'must be tried to a jury first and the equitable claims resolved subsequently in the light of the determination of the jury.'" *Sch. for Language & Commc'n Dev. v. N.Y. State Dep't of Educ.*, No. 02-cv-0269, 2005 WL 8161208, at *2 (E.D.N.Y. Mar. 16, 2005) (*quoting* 9 Wright & Miller, *Federal Practice and Procedure*, § 2305). *See Wade v. Orange Cty. Sheriff's Office*, 690 F. Supp. 176, 179 (S.D.N.Y. 1987) (same).

A continuance of the bench trial for Counts VI and VII is mandatory to ensure that that an equitable determination as to damages or injury on Counts VI and VII does not interfere with Defendants' right to a jury trial on the predicate claims in Counts I through V. *See Ross v. Bernhard*, 396 U.S. 531, 537–38 (1970) ("Where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims.").

BACKGROUND

On April 5, 2019, Plaintiffs filed a seven-count complaint asserting 2,870 discrete claims against Charter, Inc. and Charter Operating. This Court conveyed its intent to dismiss the 205 equitable subordination claims against Charter, Inc. and dismiss 169 of the 205 equitable subordination claims against Charter Operating.[1] Adv. Proc. 19-08246, Dkt. No. 200 at 55-56.

Counts VI and VII are equitable claims set for trial on March 30, 2020. Counts I through V are the predicate claims underpinning those equitable claims. Among those predicate claims, Counts I, III, and V are legal claims for damages that must be tried to a jury and Counts II and IV are on appeal. (On January 16, 2020, Plaintiffs argued that Counts II and IV are not appealable because they are actually damage claims. Were that so, those Counts would also have to be tried to a

[1] It also instructed Plaintiffs to provide a proposed order. *See* Adv. Proc. 19-08246, Dkt. No. 200 at 56:9-10. Plaintiffs have not done so.

jury. *Accord Starr Int'l Co. v. Am. Int'l Grp., Inc.*, 623 F. Supp. 2d 497, 504 (S.D.N.Y. 2009) (instructing that "the longstanding federal policy favoring jury trials counsels in favor of finding a right to a jury trial in ambiguous cases") (citation omitted).)

A. Plaintiffs have asserted both jury and non-jury claims in their Complaint.

Defendants assert claims for, e.g., violations of the Lanham Act (Count I), 15 U.S.C. § 1125(a)(1)(B), violations of its North Carolina analog (Count III), N.C. § 75-1.1., *et seq*., and breaches of contract (Count V). Dkt. No. 1. Counts I, III, and V present legal claims triable to a jury. *See, e.g.*, *Classic Liquor Importers, Ltd. v. Spirits Int'l B.V.*, 201 F. Supp. 3d 428, 455 (S.D.N.Y. 2016) (false advertising claim seeking damages is triable to jury); *Citibank USA, Nat'l Assn v. Ragsdale*, No. 4:05-CV-00071-FL, 2009 WL 10705209, at *4 (E.D.N.C. Jan. 30, 2009) (jury decides conduct, damages and proximate cause for North Carolina statute); *Brown v. Sandimo Materials*, 250 F.3d 120, 126–27 (2d Cir. 2001) (breach of contract claims "uniformly treated" as legal claim with right to jury).

Relying on the above-referenced predicate claims, Plaintiffs also asserted equitable claims for (1) a violation of the automatic bankruptcy stay (Count VI)—which this Court has indicated it will treat as a claim for civil contempt, Dkt. No. 200 at 52-53—and (2) equitable subordination (Count VII).

B. Defendants have invoked their constitutional right to a jury trial and none of the parties have consented to a bankruptcy judge presiding over that trial.

Pursuant to Federal Rule of Civil Procedure 38 and Bankruptcy Rule 9015, Defendants demanded a jury in their Answer, which was filed in accordance with Bankruptcy Rule 5005. *See* Dkt No. 41 at ¶ 8 ("Charter demands a trial by jury for all issues so triable, and does not consent [to] the Bankruptcy Court conducting a jury trial."). None of the Defendants or Plaintiffs filed a statement of their consent to a bankruptcy judge presiding over that jury trial pursuant to Bankruptcy Rule 9015(b). To be effective, such a statement of consent would have had to have been submitted no later than May 22, 2019. *See* Local Bankruptcy Rule 9015-1.[2]

C. This Court found that Counts VI and VII depend on the predicate claims for false advertising violations and breaches of contract.

This Court relied on its determination of liability on the predicate claims to find a violation of the automatic bankruptcy stay for the purposes of civil contempt and inequitable conduct for purposes of equitable estoppel (Count VII). Dkt. No. 200 at 147:10-15 ("[T]he 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."); 149:6-14 ("Here, I

[2] Local Bankruptcy Rule 9015-1 reads as follows: "A statement of consent to have a jury trial conducted by a Bankruptcy Judge under 28 U.S.C. § 157(e) must be filed not later than fourteen (14) days after the service of the last pleading directed to the issue for which the demand was made." The last pleading directed to the issue for which the demand was made was Defendants' May 8, 2019 Answer demanding a trial by jury for all issues so triable. Dkt. No. 41 at ¶ 8.

have already found a breach of a separate and independent legal duty, namely, the breach in the Lanham Act and its state law equivalents, which would give rise to, or lead to the conclusion, that the claimant has engaged in some type of inequitable conduct[.]"). It left open the question of damages arising from that liability finding. The jury must determine any damages arising from the predicate claims.

D. Defendants have preserved their right to *de novo* review of this Court's liability findings and have appealed its December 18, 2019 Bench Ruling.

On January 2, 2020, Defendants filed a notice of objections to this Court's December 18, 2019 Bench Ruling pursuant to, e.g., 28 U.S.C. § 157(c) and the District Court's February 1, 2012 Standing Order of Reference, which instructs, "The district court may treat any order of the bankruptcy court as proposed findings of fact and conclusions of law in the event the district court concludes that the bankruptcy judge could not have entered a final order or judgment consistent with Article III of the United States Constitution." On the same day, Defendants filed a Notice of Appeal (Dkt. No. 201) appealing the order on Counts II and IV, and a Notice of Appeal (Dkt. No. 202) with their motion for leave to appeal (Dkt. No. 203) seeking leave from the District Court to appeal the order on Counts I, III, and V-VII. Those appeals have been docketed in the District Court. *See* S.D.N.Y. Case No. 7:20-cv-00121-KMK and S.D.N.Y. Case No. 7:20-cv-00132-UA.

ARGUMENT

I. Proceeding with a bench trial on Counts VI and VII before the jury trial on the predicate claims would violate Defendants' constitutional right of trial by jury.

The Seventh Amendment instructs that "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." U.S. Const. amend 7. Defendants thus have a fundamental constitutional right to a jury as the fact finding body for Counts I, III, and V. *Accord, e.g., Beacon Theatres*, 359 U.S. at 501; *Simler v. Conner*, 372 U.S. 221, 222 (1963) ("The federal policy favoring jury trials is of historic and continuing strength."). It is well established that a contemporaneous bench trial on equitable claims cannot be used as a vehicle to take the fact finding role away from the jury with respect to legal claims with common issues. *See Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479 (1962) (where legal and equitable claims shared common issues, "the legal claims involved in the action must be determined prior to any final court determination of respondents' equitable claims"); *Wade*, 690 F. Supp. at 179 ("the legal claims must be decided by a jury first and the court, sitting in equity, is bound by those jury findings coextensive with the equitable claim"); *Sch. for Language*, 2005 WL 8161208, at *2 (same).

II. A bench trial on Count VII alone would waste judicial resources and the resources of the insolvent Debtors.

In granting something less than a complete liability finding on Count VII, this Court stated "It is not clear to me, however, whether the creditors or the debtors will be injured, too, and which creditors will be injured." Dkt No. 200 at

149. But the Court did not explicitly reject Plaintiffs' theory that false advertising and breach of contract established injury to a creditor. To the extent that theory will be asserted at trial, Count VII cannot be tried before the jury trial on the predicate claims. *See Wade*, 690 F. Supp. at 179. Even if Plaintiffs abandon their novel theory of creditor injury, however, a continuance of the March 30, 2020 trial date for Count VII would still be warranted because separate trials for Counts VI and VII would be needlessly wasteful. *Accord, e.g., In re: FKF 3, LLC*, No. 13-CV-3601 (KMK), 2016 WL 4540842, at *20 (S.D.N.Y. Aug. 30, 2016) ("the most efficient use of judicial resources would be to have only one trial in one court"). Avoiding wasteful expenditures is particularly important here where, e.g, Windstream Holdings, Inc. has been "insolvent, inadequately capitalized, and/or unable to pay its debts as they came due" since at least the end of the third quarter of 2017. *See* Adv. Proc. 19-08279 Dkt. No. 71 (Amended Complaint) at 5.

CONCLUSION

For the reasons stated above, this Court should continue the March 30, 2020 trial pending completion of the jury trial in the United States District Court for Southern District of New York.

Dated: January 23, 2020

Respectfully submitted,

THOMPSON COBURN LLP

By: */s/ John Kingston*

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CERTIFICATE OF SERVICE

I hereby certify that on this 23nd day of January, 2020, I served a true and correct copy of the foregoing ***Defendants' Motion to Continue the March 30, 2020 Trial Setting*** via operation of the Court's Electronic Filing System upon all counsel of record in the adversary proceeding.

Undersigned counsel will send a true and correct copy of ***Defendants' Motion to Continue the March 30, 2020 Trial Setting*** via email to the following:

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Exhibit A

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January 23, 2020

The Honorable Kenneth M. Karas
United States District Judge
U.S. District Court for the Southern District of New York
300 Quarropas Street
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Re: ***Windstream Holdings, Inc., et al. v. Charter Communications, Inc., et al.*, No. 7:20-cv-00121-KMK (S.D.N.Y.) – Request For Leave To File Motion To Dismiss The Notice Of Appeal**

Dear Judge Karas:

This firm is counsel to Windstream Holdings, Inc. and its affiliated debtors and debtors in possession (collectively, "Windstream") in the above-captioned case. This case purports to be an appeal as of right from an adversary proceeding in the Bankruptcy Court. Because there is no final order in that proceeding, we write, pursuant to your Individual Rule II.A., to request leave to file a motion to dismiss the Notice of Appeal.

Windstream filed the adversary proceeding against its competitors, Charter Communications, Inc. and Charter Communications Operating, LLC (together, "Charter"). The Complaint alleges seven interrelated causes of action arising out an advertising campaign launched by Charter in which it told Windstream's customers that, because Windstream had filed for bankruptcy, it was going out of business. In fact, Windstream had filed a Chapter 11 petition for reorganization and was not going out of business. Count I alleges Charter engaged in false advertising in violation of the Lanham Act. Count II alleges Charter engaged in false advertising in violation of Georgia's Uniform Deceptive Trade Practices Act. Count III alleges Charter engaged in false advertising in violation of North Carolina's Uniform Deceptive Trade Practices Act. Count IV alleges Charter engaged in false advertising in violation of Nebraska's Uniform Deceptive Trade Practices Act. Count V alleges that Charter breached a contract with Windstream. Count VI alleges that Charter violated the Bankruptcy Code's automatic stay by engaging in false advertising. Count VII alleges that Charter's false advertising constitutes inequitable conduct requiring subordination of its claims in Windstream's Chapter 11 cases. *See Windstream Holdings, Inc. v. Charter Comms.*, No. 7:19-08246 (Bankr. S.D.N.Y.), ECF No. 1 ("Adv. Dkt.").

Judge Drain entered a TRO against Charter at the outset of the adversary proceeding which was subsequently converted into a preliminary injunction. After the completion of discovery, Windstream filed a motion for partial summary judgment of liability on all causes of action and Charter filed a motion for summary judgment on Counts I-V. Charter also filed a motion for judgment on the pleadings on Count VI and a motion to dismiss Count VII. Judge Drain heard argument on these motions on December 18, 2019.

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During the December 18th hearing, Charter argued that Judge Drain lacked authority, as a non Article III judge, to issue "final orders of judgments" on Counts I through V. (Adv. Dkt. 240-1 at 62:1–6). In response, Judge Drain explained that any ruling he made on the motions was "not a final ruling." (*Id.* at 131:5-6). Rather, any decision he made would be an interlocutory decision because it would only partially resolve the claims in the adversary proceeding. Judge Drain further explained that any decision on the motions may later become part of a final order or proposed findings of fact and conclusions of law when the claims have been fully resolved. (*Id.* at 131:1–11; *see also id.* at 155:25–156:9).

After argument, Judge Drain ruled from the bench on each of the motions. He denied Charter's motion for summary judgment on Counts I-V. He also denied Charter's motion for judgment on the pleadings with respect to Count VI. Judge Drain granted Charter's motion to dismiss Count VII with respect to Charter Communications Inc., but denied it with respect to Charter Communications Operating, LLC. With respect to Windstream's motion for partial summary judgment, Judge Drain granted summary judgment on liability on Counts I through V. He denied summary judgment on liability with respect to Counts VI and VII.

Judge Drain expressly stated that his bench ruling was "not a final ruling." (Adv. Dkt. No. 240-1 at 131:5-6). Indeed, he has not issued an order with respect to any of his rulings on these motions. Nor has he entered any ruling on the docket of the adversary proceeding. Nevertheless, Charter filed a Notice of Appeal asserting that it could appeal Judge Drain's bench ruling on Counts II and IV as of right. Through this Notice, Charter attempts to break off Counts II and IV from the rest of the case despite the fact that they are not discrete claims, but rather are interrelated with other causes of action. Thus, Counts II and IV are only two of the four false advertising claims, each of which proceeds from the same set of operative facts. Moreover, Counts II and IV, along with Counts I, III and V, constitute the predicate claims upon which Count VI (violation of automatic stay) and Count VII (equitable subordination) are based. Charter justifies its piecemeal approach by asserting that Counts II and IV are "non-damage claims." Thus, according to Charter, this Court can treat the bench ruling as effectively a final order fully resolving Counts II and IV.

Because Charter seeks to appeal from a non-final bench ruling, this Court lacks jurisdiction under 28 U.S.C. § 158(a)(1), and the Notice of Appeal must be dismissed. Judge Drain's grant of partial summary judgment was plainly not a final order under 28 U.S.C. § 158(a)(1). Judge Drain's bench ruling lacks the hallmarks of a final order. In order to be satisfied that finality exists, appellate courts look for "some manifestation by" the lower court that "it intends the decision to be its final act." *Somoza v. New York City Dep't of Educ.*, 538 F.3d 106, 112 (2d Cir. 2008) (applying general finality standards under 28 U.S.C. § 1291). Judge Drain's bench ruling lacks any such indicia of finality. In granting partial summary judgment, Judge Drain noted how and why his ruling was "not a final ruling." A month later, Judge Drain reemphasized the point. On January 16, 2020, Judge Drain held a hearing on the parties' *Daubert* motions. At the outset of that hearing, Charter challenged Judge Drain's ability to hear the motions, asserting that the Bankruptcy Court had been divested of jurisdiction by the filing of the Notice of Appeal. Judge Drain rejected Charter's argument. He explained that his bench ruling could not be a final judgment because no order or judgment had been entered on the docket. (Jan. 16, 2020 Hr'g Tr.

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at 111:23–112:22) (citing Rule 9021 of the Federal Rules of Bankruptcy Procedure, which states an order is "effective" when docketed under Rule 5003). Judge Drain also pointed out that Counts II and IV had not yet been resolved in their entirety. For example, the appropriate relief has not yet been determined. At trial, Judge Drain must determine whether Charter's actions exhibited a "willful" intent to deceive, such that certain fees and costs can be included in the relief. (*Id.* at 109:17–111:22).

Even looking beyond Judge Drain's description of his bench ruling, its interlocutory nature is plain. In an adversary proceeding in the Bankruptcy Court, "any order granting *partial* disposition of [that] proceeding is not final." *In re Sterling*, No. 17-cv-248, 2018 WL 1157970, at *2 (S.D.N.Y. Mar. 2, 2018) (emphasis added). Here, Judge Drain granted only *partial* summary judgment on liability as to Counts II and IV. It is well established that a grant of "partial summary judgment is interlocutory," not final. *In re Chateaugay Corp.*, 922 F.2d 86, 90 (2d Cir. 1990).

Indeed, even if Judge Drain had fully adjudicated Counts II and IV, this Court would still lack jurisdiction to hear an appeal because other claims (Counts I, III, V, VI and VII) remain pending before the Bankruptcy Court. Under Rule 54(b) of the Federal Rules of Civil Procedure, "any order or other decision, however designated, that adjudicates fewer than all the claims . . . does not end the action as to any of the claims." Fed. R. Civ. P. 54(b). The only way around that rule is through an order certifying and "direct[ing] entry of final judgment as to one or more of the claims." *Id.* Judge Drain did not enter such an order here. As such, Judge Drain's ruling "remains interlocutory and is therefore not 'final' under § 158(a)(1)." *Sterling*, 2018 WL 1157970, at *2.

Given the foregoing, Windstream requests leave to file a motion to dismiss Charter's Notice of Appeal. A pre-motion conference here would be a waste of judicial resources given the adamant position that Charter took before the Bankruptcy Court at the January 16th hearing in which it insisted that Judge Drain had issued a final order on Counts II and IV, despite Judge Drain repeatedly telling Charter he had not done so and explaining why his bench ruling was not a final order. Therefore, this dispute is ripe and the Court should allow Windstream to move to dismiss Charter's appeal without further delay.

Respectfully submitted,

Terence P. Ross
Counsel to Windstream Holdings, Inc., *et al.*

SO ORDERED

U.S. District Judge