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FIRM NEWS

# Katten Wins Record $19 Million+ Award for Client Windstream In False Advertising Case Arising Out Of Windstream's Chapter 11

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(NEW YORK) Late Thursday, April 8, 2021, the Honorable Robert D. Drain issued a decision awarding Katten's client, communications and software company Windstream Holdings, Inc. and its subsidiaries (“Windstream”), the largest compensatory sanction award ever issued by a bankruptcy court for violation of the Bankruptcy Code's automatic stay.

The U.S. Bankruptcy Court for the Southern District of New York (the “Court”) awarded Windstream over $19 million in compensatory sanctions for multiple violations of the Bankruptcy Code's automatic stay by Charter Communications Inc. and Charter Communications Operating, LLC (together, “Charter”), one of Windstream's main competitors. The Court held that Charter had engaged in a false advertising campaign that was designed to capitalize on Windstream's bankruptcy in an effort to take Windstream customers and damage Windstream's brand, reputation and business.

In April 2019, Windstream filed a seven-count complaint against Charter, which sought, among other things, damages for violating the Lanham Act and contempt sanctions for violating the Bankruptcy Code's automatic stay. At the very outset of the litigation, Katten strategically moved for and obtained a Temporary Restraining Order to promptly stop Charter's advertising campaign. After a further hearing conducted by the Court, Katten obtained a Preliminary Injunction to enjoin Charter's advertising campaign. The Preliminary Injunction included a rare provision requiring Charter to pay for “corrective advertising” to be sent to Windstream customers in an effort to undo some of the damage caused by Charter's false advertising. After extensive discovery, the Court granted partial summary judgment to Windstream on all counts and set Count VI (violation of the automatic stay) and Count VII (equitable subordination) for a bench trial. Trial was held during the last week of April and first week of May 2020, in one of the first virtual trials of the then-new coronavirus pandemic. The Court's 45-page opinion constituted its decision on that trial.

In his decision, Judge Drain found that the evidence introduced at trial proved that Charter's mailings were designed to appear as if they were coming from Windstream and that the mailings were "literally false and intentionally misleading." Specifically, Judge Drain found that Charter's mailings were intended to mislead Windstream customers into thinking that Windstream was going out of business because of its Chapter 11 filing and that Windstream customers needed to switch service to Charter. Judge Drain found that Charter's exercise of control over Windstream's customers and its goodwill violated the automatic stay.

Judge Drain further found that Charter was liable for four separate categories of damages: "(1) lost profits from customers who switched to Charter as a result of the campaign, (2) the cost of corrective advertising to maintain customers, (3) the cost of a promotional campaign to recover market share. . ., and (4) the fees and expenses of outside counsel and [Windstream's] expert witness. . . ." Windstream's expert witness testified that the company lost some 1,400 customers and as much as $5.1 million in profits because of Charter's false advertising. In addition, Windstream expended nearly $900,000 in corrective advertising, as well as more than $4 million in promotional costs to try to redress the harm to Windstream's goodwill caused by the false advertising. The Court also awarded Windstream its attorneys' fees and litigation costs relating to prosecution of the litigation. In total, the Court awarded sanctions of $19,184,658.30, which we understand to be the largest compensatory sanction ever awarded by a bankruptcy court for violation of the automatic stay.

"The automatic stay is one of the most fundamental provisions of the Bankruptcy Code and we are gratified by Judge Drain's willingness to enforce it by stopping Charter's violations and compensating Windstream for the costs caused by those violations," said Katten Intellectual Property Partner Terence Ross.

Katten Insolvency and Restructuring Partner Shaya Rochester added, "We are extremely pleased with the decision and happy that Windstream will be compensated for certain losses it incurred as a result of Charter's stay violation."

In addition, Judge Drain decided that Charter's wrongful conduct was sufficient to justify the equitable subordination of Charter's proofs of claim (in the aggregate amount of $16,974,706) against certain of the Windstream Debtors, meaning that such claims will not be paid unless and until all general unsecured claims in Class 6A of Windstream's Chapter 11 Plan have been paid in full. As a practical matter, this means that Charter will receive no recovery on account of its proofs of claim because general unsecured claims in Class 6A received less than a 1 percent recovery under Windstream's Chapter 11 Plan.

The Katten litigation team representing Windstream was led by Terence P. Ross, Shaya Rochester, Michael R. Justus, Tami Kameda Sims and Eric T. Werlinger. Steven J. Reisman, Chair of Katten's

New York Insolvency and Restructuring Practice, is the principal attorney for Windstream at Katten and represents Windstream in matters unrelated to the litigation against Charter.

A copy of the Court's April 8, 2021 decision and copies of the pleadings filed in Windstream's adversary proceeding against Charter can be accessed free of charge on the case website at kccllc.net.

## CONTACTS

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