

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FT. LAUDERDALE DIVISION**

Case No. 98-2651-CIV (Dimitrouleas/Seltzer)

CBS BROADCASTING INC., et al.,

Plaintiffs,

v.

**ECHOSTAR COMMUNICATIONS
CORPORATION, et al.,**

Defendants.

**ECHOSTAR'S SUPPLEMENTAL OPPOSITION TO ALL PLAINTIFFS'
EMERGENCY MOTION FOR ISSUANCE OF AN ORDER
TO SHOW CAUSE, AND ALTERNATIVE MOTION
FOR CLARIFICATION OF THE PERMANENT INJUNCTION**

EchoStar accepts the decision of this Court. It has complied, and will continue to comply, with the Permanent Injunction. EchoStar shut off distant network channels to all of its approximately 900,000 subscribers. It is out of the distant network signal business. *See* Declaration of Rex Povenmire at ¶¶ 2, 3, attached hereto as Exhibit 1 ["Povenmire Decl."]. Plaintiffs do not and cannot contest these facts.

EchoStar's lease agreement with National Programming Service LLC ("NPS") does not alter these facts. That Agreement is consistent with both the letter and the spirit of the Permanent Injunction and the statutory remedy embodied in the injunction. Under the Agreement's terms, EchoStar will not qualify consumers for access to distant network programming, will not activate or de-activate subscribers, and will not earn any revenue from that business. NPS has the right to use the leased transponder to transmit any video programming it desires. While use of a portion of the transponder to transmit distant network

channels was not unexpected, the fact remains that that decision was made by NPS, which may use all or a portion of the transponder capacity for other purposes in its discretion. Further, NPS decided to transmit distant channels from San Francisco and Atlanta. In contrast, EchoStar had selected channels from New York, Los Angeles, and Denver to deliver to substantially all of its eligible subscribers. EchoStar was not, and will not in the future be, involved in the selection or distribution of distant network channels or any other video programming by NPS. Under the statute and applicable case law, EchoStar thus is **not** engaged in the transmission of distant network channels via satellite. *See, e.g., National Cable Television Ass'n v. FCC*, 33 F.3d 66, 73 (DC Cir. 1994) (court defined "transmission" in the video programming context as requiring "*active participation* in the selection and distribution of video programming.") (emphasis supplied).

While the statute was intended to protect the broadcasters' copyrights, it also limited those rights, allowing consumers to watch distant network channels in areas where broadcasters fail to invest in the facilities necessary to provide local network channels off air. Plaintiffs ask this Court to expand their exclusivity rights beyond those the statute establishes. The Court should deny plaintiffs' requested relief and refuse to expand the scope of the Permanent Injunction and the scope of the statutory remedy the Permanent Injunction embodies. Plaintiffs also are not entitled to a Temporary Restraining Order ("TRO"); plaintiffs have not identified any harm they will suffer if NPS – instead of DirecTV, which is the only other distant network provider – provides distant network programming to eligible subscribers. If plaintiffs' requests are granted, only consumers and NPS will be harmed – as consumers will be left with fewer

choices and NPS will be denied the opportunity to grow its business as result of the opportunity created by the injunction.¹ There is no basis to find either EchoStar or NPS in contempt.

ARGUMENT

I. PLAINTIFFS HAVE NOT MET THEIR BURDEN OF SHOWING ANY EVIDENCE, LET ALONE CLEAR AND CONVINCING EVIDENCE, THAT ECHOSTAR OR NPS ARE IN CONTEMPT OF THE INJUNCTION.

To prevail, plaintiffs must meet the heavy burden of showing “clear and convincing” proof of EchoStar’s (and NPS’s) alleged contempt. *See Jordan v. Wilson*, 851 F.2d 1290, 1292 (11th Cir. 1988) (appellants not in contempt because “a civil contempt order may be upheld only if the proof of the defendant’s contempt is clear and convincing”); *United States v. Rizzo*, 539 F.2d 458, 465 (5th Cir. 1976) (finding this burden to be more exacting than the preponderance of the evidence standard and appellee failed to meet the burden of establishing clear and convincing proof of contempt). To meet this burden, plaintiffs must establish with clear and convincing evidence, and the Court must unequivocally conclude, that: the Permanent Injunction was clear and unambiguous; the Permanent Injunction was violated; and EchoStar (and NPS) had the ability to comply with the injunction. *See generally Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1296 (11th Cir. 2002); *United States v. Koblitz*, 803 F.2d 1523, 1527 (11th Cir. 1986) (citing *Smith v. Sullivan*, 611 F.2d 1050, 1052-54 (5th Cir.1980)). Plaintiffs have not satisfied their burden.²

¹ Whether consumers contact DirecTV or NPS, the process is *exactly* the same: (1) the consumer is qualified through Decisionmark; (2) if the consumer is eligible, then distant network channels are activated; (3) the consumer is billed by the satellite carrier (*i.e.*, NPS or DirecTV); (4) the satellite carrier collects the money; (5) the satellite carrier pays a royalty fee for each consumer. Enlarging the scope of the injunction and granting the requested TRO to restrict consumer choice (and create a *de facto* monopoly for DirecTV and FOX) contravenes both the intent and spirit of the statute.

² Plaintiffs have further failed to adequately request a TRO. Plaintiffs request a TRO in footnote 3 of the Supplemental Memorandum. This request does not comply with Local Rule 7.1(A) as it was improperly filed as a motion and does not contain a corresponding memorandum of law citing supporting authority. Accordingly, plaintiffs’ TRO request must be denied. Even if plaintiffs had properly made a request for a TRO, plaintiffs’ request must be denied. Plaintiffs have not established each of the necessary elements. Plaintiffs have not established, and cannot establish, a likelihood of success on the merits, or, for instance, that they will suffer irreparable harm if the

A. EchoStar's Lease Of A Transponder To NPS Does Not Violate Either The Spirit Or Intent Of The Statute Or The Permanent Injunction; EchoStar Is Not Transmitting Distant Channels.

It is undisputed that EchoStar permanently disconnected distant network channels to all of its approximately 900,000 subscribers and has otherwise complied with the Permanent Injunction. *See Povenmire Decl.*, Ex A. It is also clear that the lease between EchoStar and NPS does not on its face violate the Permanent Injunction. Consequently, in order to attempt to expand their exclusivity, plaintiffs in essence argue that the Agreement between EchoStar and NPS violates the spirit and intent of the statute and the Permanent Injunction. Because it does not in fact do so, they attempt to expand the scope of the statute, and thus the Permanent Injunction, to accomplish their goal.

The purposes of the statutory remedy, and the Permanent Injunction embodied by it, may reasonably be construed to include: (1) assuring that EchoStar does not qualify consumers for access to distant network programming; (2) assuring that EchoStar does not activate or deactivate consumers for distant network programming; and (3) denying EchoStar the revenue that would result from providing distant network channels to its consumers. The Agreement upholds, and affirmatively assures fulfillment of, each of these purposes. The Agreement:

- Establishes NPS, not EchoStar, as the owner of distant network subscriber information and other related rights (Agreement, ¶ 12.M.);
- Requires NPS to be solely responsible for the collection, transport, delivery, reception, monitoring, and uplinking of all signals to be transmitted using the leased transponder (Agreement, ¶ 1.A);
- Permits NPS to offer distant network channels to all eligible consumers, not just EchoStar subscribers (Agreement, ¶ 3.A.);

requested TRO is not entered. *See Freeman v. Cavazos*, 923 F.2d 1434 (11th Cir. 1991) (denying temporary restraining order when petitioner failed to demonstrate irreparable harm). Irreparable harm will not be presumed simply because this Court has entered a permanent injunction. *See Filtration Dev. Co., LLC v. United States*, 63 Fed. Cl. 418, 423-424 (Ct. Cl. 2004).

- Prevents EchoStar from determining subscriber eligibility, or from activating or de-activating distant network subscribers; and prevents NPS from using EchoStar call center, subscriber management, and other systems to determine subscriber eligibility, activate, and deactivate subscribers (Agreement, ¶ 3.A.);
- Requires NPS to independently contract with Decisionmark to determine subscriber eligibility (Agreement, ¶ 3.A.);
- Requires consumers to contact NPS directly in order to subscribe to distant network channels (Agreement, ¶ 3.A.);
- Prohibits EchoStar from disconnecting distant network programming to NPS customers, even if those customers are also EchoStar customers and fail to pay EchoStar for the programming they receive from EchoStar (Agreement, ¶ 3.A.);
- Prevents EchoStar from billing or collecting payments from distant network subscribers and requires that NPS use its own systems for billing and collection; customers receive and pay two separate bills (Agreement, ¶ 3.A.);
- Permits NPS to charge whatever price it desires for the services it delivers (Agreement, ¶ 3.A.);
- Requires NPS to pay all taxes related to distant network subscribers (Agreement, ¶ 3.A.); and
- Requires NPS to provide Copyright Office and other reports required under Section 119 (Agreement, ¶ 3.C.).

The statute does not prevent independent companies, such as NPS, from leasing transponders to provide distant network channels. In fact, the statute specifically permits this practice. SHVIA expressly grants a compulsory copyright license to a lessee of satellite capacity:

The term "satellite carrier" means **an entity that uses the facilities of a satellite or satellite service** licensed by the Federal Communications Commission . . . to establish and operate a channel of communications for point-to-multipoint distribution of television station signals, **and that owns or leases a capacity or service on a satellite in order to provide such point-to-multipoint distribution . . .**

17 U.S.C. § 119(d)(6) (emphasis added). Thus, in the case of a lessee of satellite capacity, *only the lessee* holds the compulsory statutory license and is responsible for compliance. Moreover, as a lessor, EchoStar is a passive carrier of the secondary transmission under § 111(a)(3):

(a) **Certain Secondary Transmissions Exempted.** The secondary transmission of a performance or display of a work embodied in a primary transmission *is not an infringement* of copyright if—

*

*

*

(3) the secondary transmission is *made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others*: Provided, that the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions;

In an analogous case, the court considered whether a drug store, which had been enjoined from participating in the practice of optometry, could lease its premises to an independent optician or optometrist. *Rowe v. Standard Drug Co.*, 9 N.E.2d 609 (Ohio 1937). The court rejected the notion of contempt and found that, despite the injunction:

There can be **no question** of The Standard Drug Company's right to lease its premises or a part thereof to either an optician or optometrist so long as it receives no part of the fees arising from the practice of optometry and in no way participates in the practice of that profession. (emphasis added.)

Id. at 612; *see also Rowe v. Burt's, Inc.*, 31 N.E.2d 725 (Ohio App. 1939) (“[a] corporation does not engage in the practice of optometry by the mere act of leasing a portion of its premises for optical purposes.”). The court made this finding after looking behind the lease agreement and scrutinizing the parties' conduct and manner in which the parties did business. After such scrutiny, the court concluded:

There is nothing in the record to show want of good faith on the part of The Standard Drug Company – nothing to show that the writing was a mere ruse to cover up an illegal arrangement whereby The Standard Drug Company aided or abetted Adeleson and Kudysch or either of them in the performance of an act that constituted the illegal practice of optometry in violation of the injunction.

The Standard Drug Co., 9 N.E.2d at 613.

The Court in *Burt's*, following the *Standard Drug Company* decision, similarly found that “[a] corporation does not engage in the practice of optometry by the mere act of leasing a portion of its premises for optical purposes.” *Burt's*, 31 N.E.2d at 725 (quoting *Rowe v. Standard Drug Co.*, 9 N.E.2d 609 (Ohio 1937)). The court reached this conclusion even though the department store advertised the optical business and retained the right to keep a percentage of the optician’s income and review the optician’s financial records. *Id.* The court also made its finding even though “to the average member of the public [the opticians] undoubtedly appear to be still a part of defendant’s business organization.” *Id.*

EchoStar leases space and only space. In all other respects, NPS is completely independent of EchoStar. *See* Agreement; *see generally* Mountford Decl.; November 29, 2006 Declaration of Rex Povenmire, Exhibit 1 to EchoStar’s Opposition. Like The Standard Drug Company, EchoStar receives no fees or revenue from the enjoined business – here the transmission of distant channels. *See* Agreement, ¶ 3.A. In *Burt's*, the court reached its conclusion even though “to the average member of the public [the opticians] undoubtedly appear to be still a part of defendant’s business organization.” *Id.* The department store advertised the optical business and retained the right to set optical rates and review the opticians’ financial records. In contrast, NPS sets its rates for distant network and other programming entirely independent from EchoStar. *See* Agreement, ¶ 3.A. NPS has been in the business for over 20 years, and maintains offices completely separate from EchoStar. EchoStar has no authority to

review NPS's financial records or otherwise be involved in NPS's business. The plaintiffs here have not, and could not, assert that the public would perceive NPS's business to be a part of EchoStar's business operation as was the case in *Burt's*. Moreover, unlike the courts in both *The Standard Drug Company* and *Burt's*, there is no concern here of protecting the health and safety of the public.

The fact that EchoStar leases a transponder to NPS, a portion of which NPS uses to deliver distant network programming, does not make EchoStar liable for any subsequent violation of SHVIA because EchoStar is not transmitting distant channels and is not the "satellite carrier" under SHVIA. This is true under general case law such as *The Standard Drug Co.* decision. It is also true under the United States Copyright laws, which specifically contemplate and permit agreements allowing the lease of transponder capacity to provide distant network channels. See 17 U.S.C. §§ 119(d)(6) and 111(a)(3).

The conclusion that EchoStar is not transmitting distant network programming as a result of its lease with NPS is further supported by the court's holding in *National Cable*, 33 F.3d at 73. In *National Cable*, the court defined "transmission" in the video programming context as requiring "*active participation* in the selection and distribution of video programming." *Id.* (emphasis supplied). According to the court, "active participation" in transmission entails "at least choosing the signal, or originating it." *Id.* at 71-72. When determining what constitutes transmission, the court specifically rejected the argument that "conducting [the signal] personally to its destination" was a transmission. *Id.* at 72. To the contrary, the court found that the party whose equipment is used to conduct a signal "is merely a conduit for those signals." *Id.* Thus, the entity that chooses or originates the signal is transmitting the signal, whereas the party that permits the use of its equipment for such transmission is merely conducting, and not

transmitting, the signal. *Id.* Again, this is a distinction SHVIA itself recognizes by granting the compulsory copyright license to the lessee (not the lessor) of satellite capacity. *See* 17 U.S.C. § 119 (d)(6) *discussed infra*.

EchoStar is merely a conduit for NPS's signal – having no involvement in the selection, uplinking, or transmission of distant network channels that NPS delivers. *See* Povenmire Decl., ¶ 17; Agreement, ¶¶ 1.A, 3.A. It has only leased equipment to NPS for NPS to use in providing a variety of programming, including, to the extent NPS chooses, the transmission of distant network programming. *See* Agreement, ¶ 3.A. NPS retains the right to determine which programming to uplink and how to apportion the transponder's capacity between uplinking distant network channels and other programming. *See* Agreement, ¶ 3.A. NPS also chooses and originates the signals. *Id.* EchoStar has no right to, and does not, control the selection of the signals. *Id.* Highlighting that it is NPS, not EchoStar, that chooses the programming, NPS chose to offer distant network channels from San Francisco and Atlanta, while substantially all EchoStar subscribers received distant network channels from Los Angeles, New York, or Denver.

EchoStar does not receive any revenue from NPS's delivery of distant network programming (Agreement, ¶3.A.) – effective December 1, EchoStar's distant network revenue of over \$3 million per month was reduced to zero. While NPS will pay EchoStar a market rate of \$150,000 per month for the lease of the transponder, this lease payment is not tied in any way to the delivery of distant network programming. If NPS generates \$1 million a month in revenue, the lease price is still \$150,000. *See* Agreement, ¶ 2.A; *see also* NPS's Opposition at p. 4; Mountford Decl., ¶ 22.

In short, EchoStar is not participating in the origination of the signals, the uplinking of the signals, or the delivery of the signals. Under the *National Cable* standard, EchoStar is not transmitting distant network programming. There is no basis for a finding that EchoStar and NPS are in active concert and participation to violate the injunction or that NPS is aiding and abetting EchoStar to violate the injunction. *See* Fed. R. Civ. P. 65(d) (Rule 65(d) is clear that only persons “in active concert or participation” with an enjoined party are bound by an injunction).³

B. The Permanent Injunction Does Not Preclude EchoStar’s Customers From Using Equipment They Purchased To Receive Distant Network Programming From NPS.

Because EchoStar has complied with the Permanent Injunction and because the Agreement between EchoStar and NPS does not alter that compliance, plaintiffs attempt to expand the scope of their exclusivity by expanding the statute and the Permanent Injunction. They argue in essence that the statute was intended to punish not just EchoStar, but also EchoStar’s subscribers. They erroneously assert that if an EchoStar subscriber uses a set top box, which can receive EchoStar programming, to also receive distant network channels, then that customer is participating in an “evasion scheme”⁴ and should be forced to switch to a different provider for their core programming (to continue to receive distant network

³In addition, when a party has reasonably interpreted a court’s order and acted in good faith, it will not be held in contempt for violating that order. *See South Beach SunCare, Inc. v. Sea & Ski Corp.*, 1999 U.S. Dist. LEXIS 7902 (S.D. Fla. 1999) (refusing to find contempt because the party did not technically, or deliberately, violate the injunction); *Filtration Dev. Co., LLC v. United States*, 63 Fed. Cl. 418, 421 (Ct. Cl. 2004) (refusing to find a party in contempt because the party did not violate the terms of the injunction). When the court’s order does not bar the action complained of, the court will refuse to find contempt. *See id.* (refusing to find the Army in contempt because “[n]othing in the court’s opinion stated that the Army was perpetually barred from taking the action complained of.”). In addition, when the statutory scheme under which a permanent injunction is entered specifically contemplates that the parties are free to engage in certain activities, a party will not be found in contempt if it engages in those activities – even when the party is permanently enjoined because it violated the statute in other ways in the past. *See id.* (refusing to find a party in contempt because “an order imposing such a blanket prohibition would conflict with the court’s obligations under 28 U.S.C. § 1491(b)(3).”). EchoStar’s and NPS’s interpretation of the Permanent Injunction and the statute are patently reasonable. Even if the Court ultimately disagrees, there is no basis to find either EchoStar or NPS in contempt.

⁴ If the customers are indeed part of the purported “evasion” scheme, as plaintiffs allege, then plaintiffs must give all such customers an opportunity to be heard and defend against plaintiffs’ contempt claim.

programming).⁵ See Supplemental Memorandum Of All Plaintiffs In Support Of Emergency Motion For Issuance Of An Order To Show Cause, And In Support Of Alternative Motion For Clarification Of The Permanent Injunction (“Supplemental Memorandum”) at p. 8. However, there is no evidence the statute was intended to punish consumers; instead, consumers are the statute’s primary beneficiaries.

Distant networks were, of course, only a very small part of the programming EchoStar provided to consumers. As one of the largest providers in the United States, EchoStar provides Showtime, ESPN, Discovery Channel, and hundreds of other core programming channels to over 12 million customers. EchoStar also offers more foreign language programming than any other provider in the United States. The statute clearly was not intended to force consumers legitimately entitled to receive distant network channels to stop obtaining core programming, or foreign language programming not available from other providers, as a condition to the receipt of distant network channels. The statute also clearly was not intended to force consumers legitimately entitled to receive distant network channels to give up the set top box they purchased from EchoStar, JVC, RCA, or others as a condition to the receipt of distant network channels. The statute also clearly was not intended to force consumers to accept an inferior provider for its core programming as a condition to the receipt of distant network channels.⁶ But this is in essence what plaintiffs demand.

⁵ FOX, which has most actively opposed EchoStar’s actions, is the controlling shareholder of DirecTV, the only company other than NPS that currently offers distant network channels to consumers in the United States. The statute was not intended to be used in this manner to achieve monopoly status on the distribution of distant network channels for DirecTV.

⁶ Other providers are likely inferior to the consumer who chooses EchoStar because, among other things, such alternative provider will likely charge higher prices (EchoStar is positioned as the low cost provider of core programming in the pay TV market); offer inferior customer service (EchoStar consistently scores at the top of industry surveys for quality customer service); offer inferior equipment (EchoStar offers more technologically advanced high definition receiver equipment and digital video recorder equipment than virtually any of its competitors); and might not even offer the programming the consumer wants to watch (EchoStar offers more foreign

Expansion of the law beyond the scope of both the Permanent Injunction and the statute embodied in that injunction, and into the homes of EchoStar customers, is inappropriate and contrary to the law. *See supra* discussion, Section II. Expanding the statute and the Permanent Injunction will only mean that consumers have fewer choices and NPS will be deprived of the business opportunity created by the Permanent Injunction. Indeed, the *sole* benefactor of plaintiffs' requested expansion is DirecTV; DirecTV would achieve monopoly status for the transmission of distant network programming.

C. Neither EchoStar Nor NPS Is Scheming To Violate The Terms Of The Permanent Injunction; There Is No Sinister Intent To Violate the Injunction.

Since EchoStar has complied with the Permanent Injunction, and since the Agreement between EchoStar and NPS does not alter that compliance, plaintiffs attempt to cast a shadow of impropriety rather than focusing on the facts. Plaintiffs' attempt to characterize the arm's-length agreement between EchoStar and NPS as a scheme to violate the Permanent Injunction has no basis in fact.

Significantly, while at times arguing to the contrary, plaintiffs themselves admit, as they must, that NPS would clearly be free to lease a transponder from any entity other than EchoStar and transmit distant programming to EchoStar subscribers. *See* Supplemental Memorandum at p. 8; *see also* 17 U.S.C. § 119(d)(6). Thus, as an example, if NPS (or some other third party) leased transponder space on a satellite operated by Intelsat to offer distant network channels to consumers generally, and purchased set top boxes and other reception equipment from EchoStar, that would not violate the Permanent Injunction. Moreover, if NPS (or some other third party) leased transponder space on a satellite operated by Intelsat to offer distant network channels to EchoStar customers, and purchased set top boxes and other reception equipment from RCA (one

language programming than any other company in the United States, most of which channels are not distributed by other pay TV providers).

of several large companies that have manufactured and sold set top boxes to consumers which are capable of receiving programming carried by EchoStar), that would not violate the Permanent Injunction. The fact that NPS chose instead to lease capacity from EchoStar, an act specifically contemplated under Copyright law, 17 U.S.C. § 119(d)(6), does not change the legality or legitimacy of the agreement.

Nonetheless, as part of the effort to cast a shadow of impropriety on this legitimate agreement, in the Supplemental Memorandum filed Friday, the plaintiffs attack the message that EchoStar's Chairman, Charlie Ergen, recorded to communicate with the 900,000 customers whose distant network programming has been disconnected. Supplemental Memorandum at 3-4. Plaintiffs extract a partial statement from that message to argue EchoStar is encouraging customers to obtain distant network channels from NPS, and is not mentioning other alternatives. *Id.* Even if the picture presented by plaintiffs was accurate, the action would not be inappropriate. It is telling, however, that in making their point the plaintiffs deleted the second half of Mr. Ergen's statement. The plaintiffs' extract reads:

You really have two choices [the first is] All-American Direct. . . .

The entire statement reads: “

You really have two choices. . . . [the first is] All-American Direct. . . . **And certainly DirecTV, our competitor DirecTV, is another alternative for you . . .**

See Transcript of November 30, 2006 Special Edition Charlie Chat at <http://www.satelliteguys.us> beginning at minute 24:40 (emphasis added). That is, in the second half of the statement – which plaintiffs deliberately exclude – Mr. Ergen, in an attempt to minimize disruption to consumers, recommends consumers consider EchoStar's satellite competitor, DirecTV.

In other portions of the message, and related PowerPoint presentation, plaintiffs also omit Mr. Ergen's recommendations for consumers to consider lifeline cable, off-air antennas, and DirecTV, in addition to NPS. The entire presentation demonstrates that EchoStar is giving "equal billing" to every available alternative. *Id.* at minute 9:13 ("off air antenna is a possibility...all American is also a possibility for you...and a third possibility is that, that you may want to look at what is called life-line cable... and I would be remiss if I didn't say that another possibility is DirecTV").

Even had Mr. Ergen not made those additional recommendations, his actions would have been entirely appropriate. All of EchoStar's 900,000 distant network subscribers were disconnected. Many remain without access to any network channels today. A majority will choose to receive local network channels from EchoStar. Some have had off-air antennas installed. Others have migrated to cable. Some have undoubtedly called NPS and been qualified for distant network channels by it. Yet others have undoubtedly signed up for service from DirecTV. EchoStar has suggested all of these alternatives to customers. Plaintiffs cannot argue that these facts show EchoStar is acting in concert with NPS unless it would also take the position EchoStar is acting in concert with cable companies and DirecTV.

But none of these actions, alternatives, or results is relevant to plaintiffs' contempt motion, unless plaintiffs would somehow argue that the Permanent Injunction should be construed to prohibit EchoStar from mentioning NPS as one of many third party alternatives available to consumers. If that is plaintiffs' suggestion, we urge the Court to reject it as entirely without legal precedent. The fact that EchoStar has identified and will continue to identify NPS (*i.e.*, All-American Direct) as **one** of the options available to eligible consumers to receive distant network programming does not demonstrate a sinister intent to violate the Permanent

Injunction; instead, it demonstrates EchoStar's commitment to customer service. EchoStar has no ability to force consumers to subscribe to NPS's service, nor is there any requirement that subscribers receiving NPS programming also subscribe to DISH Network. Agreement, ¶ 3.A. EchoStar instead is identifying all the alternatives available to consumers adversely impacted by the Permanent Injunction.

In a further attempt to draw the Court away from the facts and the law, plaintiffs twist EchoStar's words in footnote eight in their Supplemental Memorandum. Contrary to plaintiffs' assertion, the quoted statement does not in any way stand for the proposition that it is "EchoStar's view that law is a sport." It is true that Mr. Ergen made the statement: "Let's get down in the mud and let's go and let's have a brawl. We win our fair share of these battles and if not, we have our fun no matter what." *See DirecTV, EchoStar Fight for Subscribers*, Satellite Business News Fax Update, Dec. 1, 2006, at 1-2, attached as Exhibit 6B to the Supplemental Memorandum. Importantly, however, contrary to plaintiffs' mischaracterization, Mr. Ergen was not talking about this case or the Court when he made that statement. Rather, as shown in the article, Mr. Ergen was explaining to retailers that for every customer who migrates to DirecTV as a result of the Permanent Injunction, EchoStar will go out and persuade two DirecTV subscribers to switch to EchoStar. *Id.* Competition is not, of course, in any way prohibited by the Permanent Injunction.

Plaintiffs then make the peculiar assertion that inclusion of the term "Distant Network Signals" 16 times in the Agreement is evidence of some inappropriate purpose or sinister intent to violate the injunction. *See* Supplemental Memorandum at 7-8. Instead, this reflects that both NPS and EchoStar took seriously the Permanent Injunction and adopted explicit procedures to

assure that EchoStar would have (and has) no role whatsoever in any distribution of distant network programming by NPS. *See* Agreement, ¶¶ 1.A; 3.A.

Plaintiffs further erroneously argue the fact that the Agreement was executed days before the Permanent Injunction's effective date is somehow indicative of a "transparent purpose of the deal". *See* Supplemental Memorandum at 7. In fact, the Agreement was negotiated over a six-month period and, at times, the negotiations were contentious. *See* Mountford Decl., ¶¶ 3-6. During most of this period, EchoStar's primary focus was on negotiating, and then attempting to implement, the settlement agreement reached with plaintiffs. When plaintiffs at the last minute demanded more money for reduced customer protection, EchoStar insisted that plaintiffs honor the agreement. Plaintiffs then refused to support Court approval of the settlement, and EchoStar moved forward on a number of options to attempt to minimize consumer disruption, including the proposal from NPS. Importantly, the fact the Agreement was not finalized until two days before the injunction's December 1 effective date, more than likely hurt both EchoStar and NPS because there was insufficient time for a smooth transition; if the Agreement had been finalized earlier there would have been more time for NPS and EchoStar to put systems in place. More time would have caused less disruption to subscribers. Plaintiffs would have then argued that the time to allow for a smoother transition was somehow indicative of a scheme between EchoStar and NPS to evade the injunction. Indeed, had the Agreement been signed three or six months prior to December 1st, plaintiffs would no doubt have found reason why either such date was inappropriate.⁷ Regardless of the date, it is irrelevant to the facts and law in this matter.

⁷ The fact is plaintiffs are upset because although they have succeeded in preventing EchoStar from providing distant network programming, they have not eliminated all competition – which has been FOX's desire. The statute clearly was not intended to be used by FOX, the controlling shareholder of EchoStar's only satellite TV competitor DirecTV, to establish monopoly status for the distribution of distant network channels. Moreover, as a result of their own greedy actions, plaintiffs lost the \$100 million dollars they would have been paid under the terms of the Settlement Agreement.

Finally, the fact that NPS approached EchoStar to take advantage of a business opportunity made possible by the Permanent Injunction does not indicate a desire to evade the Permanent Injunction or evade the law. *See* Supplemental Memorandum at 9. Under the statute, NPS is entitled to deliver distant network channels to eligible subscribers. 17 U.S.C. § 119(d)(6). NPS should not be attacked and held in contempt and its reputation smeared because it sought to take advantage of a business opportunity and seek a lease with an entity – EchoStar – known to have satellite capacity and a ready market of eligible subscribers, which would almost immediately increase NPS’s own subscriber base.⁸

II. THE COURT HAS NO DISCRETION TO MODIFY THE PERMANENT INJUNCTION, TO DEVIATE FROM THE STATUTE, AND/OR TO EXPAND THE STATUTORY REMEDY.

A court should not expand the coverage of a statutory remedy when legislation, as here, provides for a particular remedy or remedies. *See Northwest Airlines, Inc. v. Transport. Workers Union*, 451 U.S. 77 (1981); *McKinnon v. Blue Cross & Blue Shield*, 935 F.2d 1187 (11th Cir. 1991) (each stating that “a frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the Statute to subsume other remedies.”). Indeed, when Congress has set out a detailed scheme of remedies for a statutory cause of action, courts may not expand those remedies on the basis of general equitable principles. *See Erkins v. Bryan*, 785 F.2d 1538 (11th Cir. 1986).

Here, Congress clearly established the statutory remedy for a finding of a pattern and practice of violations. *See generally* 17 U.S.C. § 119. Prohibiting EchoStar customers from

⁸ As indicated in NPS’s Opposition, NPS intends to use the satellite capacity for purposes other than the delivery of distant network programming. *See* NPS’s Opposition at 3. In fact, NPS is already working on using the satellite capacity for on-line education programming. *See id.* With an almost immediate increase in its subscriber base, NPS has an immediate increase in its market and audience for its other programming, who will not have to invest in additional equipment in order to view NPS’s other programming.

receiving distant network programming from equipment they purchased and limiting EchoStar's use of its satellite facilities was not intended by Congress and would expand the statute's express statutory remedies. *See* 17 U.S.C. § 119. The Court should not expand the statute and modify the injunction to enjoin EchoStar from leasing or otherwise making its satellite facilities available to third parties for retransmission of distant network stations and preclude EchoStar subscribers from receiving distant network channels from their set top boxes, as plaintiffs request.

CONCLUSION

EchoStar is out of the business of transmitting distant network channels. The Agreement between EchoStar and NPS does not violate the Permanent Injunction and preserves the spirit and intent of both the Permanent Injunction and the statutory remedy embodied in the injunction. Plaintiffs will not be harmed if NPS, rather than DirecTV, provides distant network channels to eligible subscribers. The only resulting harm if plaintiffs' requested relief is granted will be to consumers, as they will have fewer choices, and to NPS, who will be denied the opportunity to grow its business as a result of the business opportunity created by the injunction. EchoStar thus requests that the Court deny plaintiffs' order to show cause and request for a temporary restraining order.⁹ EchoStar further requests that the Court deny plaintiffs' request to modify (clarify) the Permanent Injunction to preclude EchoStar from leasing its equipment and satellites and EchoStar subscribers from receiving distant network programming on their purchased set top boxes, and thereby legislate by rewriting SHVIA.

⁹ Due process requires that, to the extent there are disputed material facts, EchoStar (and NPS) be afforded an opportunity to be heard and defend plaintiffs' contempt claim. *See Mercer v. Mitchell*, 908 F.2d 763, n.11 (11th Cir. 1990) (in a civil contempt proceeding if the court is faced with a material issue of fact, then due process requires the court conduct a hearing). The Court should recognize this right and hold an evidentiary hearing to the extent that it is inclined to find that either EchoStar or NPS is in contempt.

Dated this 4 day of December, 2006.



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CERTIFICATE OF SERVICE

On this 4 day of December, 2006, a copy of the foregoing Opposition To The Supplemental Memorandum By All Plaintiffs In Support Of Emergency Motion For Issuance Of An Order To Show Cause, And In Support Of Alternative Motion For Clarification Of The Permanent Injunction Preliminary Statement was served upon plaintiffs by e-mail, facsimile, and depositing one copy of same in the U.S. Postal Service, first class postage prepaid, and addressed to their attorneys:

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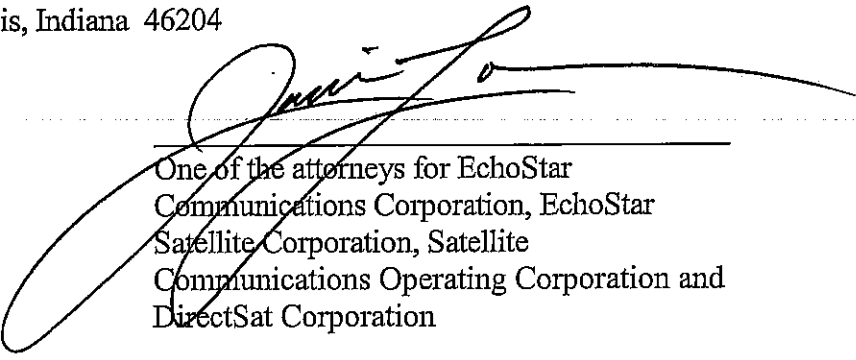
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DECLARATION OF REX POVENMIRE

I, Rex Povenmire, declare, under penalty of perjury, as follows

1. My name is Rex Povenmire and I am currently an independent consultant for EchoStar Communications Corporation ("EchoStar"), and have been an independent consultant for EchoStar since August 1, 2006. The matters stated herein are based upon my personal knowledge and, if called as a witness, I could and would competently testify to the matters stated herein.

2. In compliance with the Permanent Injunction, effective December 1, 2006, EchoStar has sent disconnect commands for distant network programming to all of its Distant Network subscribers.

3. Thus, in compliance with the Permanent Injunction, effective December 1, 2006, EchoStar is no longer authorizing any distant network programming service to any of its subscribers and is out of the business of providing distant network programming.

Executed this 3rd day of December, 2006, at Englewood, Colorado.

A handwritten signature in black ink, appearing to read "Rex Povenmire", is written over a horizontal line.

REX POVENMIRE