

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 98-2651-CIV-DIMITROULEAS/SELTZER

CBS BROADCASTING INC., et al.,

Plaintiffs,

vs.

ECHOSTAR COMMUNICATIONS
CORPORATION, et al.,

Defendants.

_____ /

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on the Emergency¹ Motion of All Plaintiffs for Issuance of An Order to Show Cause Why EchoStar and Two Parties Acting in Concert with EchoStar Should Not be Held in Contempt (DE 1071) and was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636 and the Magistrate Rules of the Local Rules of the United States District Court for the Southern District of Florida (DE 1092). For the reasons set forth below, the undersigned RECOMMENDS that the Motion be DENIED.

I. MAGISTRATE JUDGE'S CIVIL CONTEMPT AUTHORITY

A federal magistrate judge's contempt authority is derived from 28 U.S.C. § 636(e). Where the parties have not consented to trial before a magistrate judge and the alleged contemnor's act constitutes a civil contempt, section 636(e)(6)(B)(iii) provides:

¹ In its November 30, 2006 Order Referring Motion to Magistrate Judge, the District Court stated that it "does not view this [Motion] as an emergency." Order, n.1 (DE 1092).

[T]he magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question . . . an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

28 U.S.C. § 636(e)(6)(B)(iii); see also F.T.C. v. Cleverlink Trading Ltd., No. 05 C 2889, 2006 WL 3106448, at *14-16 (N.D. Ill. Oct. 26, 2006) (In non-consent, civil cases, where a magistrate judge believes that an act constitutes a civil contempt, the magistrate judge shall proceed under § 636(e)(6)(B)(iii)).

“The certification of facts under section 636(e) serves to determine whether the moving party can adduce sufficient evidence to establish a prima facie case of contempt.” Church v. Steller, 35 F. Supp. 2d 215, 217 (N.D.N.Y 1999). In determining whether to certify facts, a magistrate judge may conduct a hearing to determine whether such certification is proper. Id.; Gomez v. Scoma’s, Inc., No. C-94-4452-VRW (JSB), 1996 WL 723082, at *3 (N.D. Cal. Dec. 2, 1996). “The duty of the magistrate [judge] under this subsection is simply to investigate whether further contempt proceedings are warranted, not to issue a contempt order.” Gomez, 1996 WL 723082, at *3. “Whether the conduct of a party [actually] constitutes contempt and any sanctions therefor are committed to the discretion of the district court.” Church, 35 F. Supp. 2d at 217. “However, upon a certification a magistrate judge may recommend that certain sanctions be imposed by the district court upon a finding of contempt.” Id. Where no factual basis for an order of

contempt is found, the magistrate judge “may choose not to certify the matter to the district court for further proceedings.” Id.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs in this copyright infringement action are the owners of the broadcast networks CBS Broadcasting, Inc. and Fox Broadcasting Co., together with four affiliate trade associations (collectively, “Plaintiffs”). They sought a permanent injunction against EchoStar Communications Corp., a satellite carrier, and its subsidiaries (collectively, “EchoStar”). Plaintiffs alleged that EchoStar’s retransmission via satellite of copyrighted programming owned by Plaintiffs violated their copyright in their network television broadcasts.² The central issue before the District Court was whether EchoStar had violated the Satellite Home Viewer Act (“SHVA”), as amended by the Satellite Home Viewer Improvement Act (“SHVIA”), which grants a limited statutory license to satellite carriers transmitting distant network signals³ to private homes if subscribers are “unserved households” as defined by the Act.

Following a bench trial, the District Court issued its Findings of Fact and Conclusions of Law (DE 864) and entered Final Judgment for Plaintiffs (DE 865). On appeal, the Eleventh Circuit affirmed, in part, the District Court’s decision. But the appellate court further held that a district court must impose a permanent injunction where

² EchoStar operates “DISH Network,” which offers satellite television programming to subscribers who receive programming using small satellite dishes.

³ “Distant network programming” is network programming received by a subscriber from outside that subscriber’s local market. By way of example, a Fort Lauderdale subscriber may receive programming from a New York CBS station.

a satellite carrier has willfully engaged in a “pattern or practice” of statutory violations (as did EchoStar). Accordingly, the Eleventh Circuit remanded the case to the District Court to enter a nationwide permanent injunction against EchoStar. See CBS Broad., Inc. v. EchoStar Communications Corp., 450 F.3d 505, 526-27 (11th Cir. 2006).

In accordance with the Eleventh Circuit’s mandate, on October 20, 2006, the District Court entered an Order of Permanent Injunction (DE 1020), which permanently enjoined EchoStar and “those persons acting in concert or participation with EchoStar” from the “secondary transmission . . . of a performance or display of a wor[k] embodied in a primary transmission of any network station affiliated with ABC, Inc., CBS Broadcasting, Inc., Fox Broadcasting, Inc. or National Broadcasting Co.” Pursuant to this Order, EchoStar was required to shut down its delivery of distant network stations by December 1, 2006.⁴

In May 2006, National Programming Service LLC,⁵ through its Chief Executive Officer, Michael Mountford⁶ (collectively, “NPS”), approached EchoStar about the prospect of providing distant network channels to eligible EchoStar subscribers who might lose service as a result of a permanent injunction against EchoStar. Mountford Decl. at ¶ 4;⁷

⁴ On November 20, 2006, the District Court denied EchoStar’s motion to postpone the December 1 deadline (DE 1069), and on November 30, 2006, the Eleventh Circuit denied EchoStar’s motion for a stay of the permanent injunction. See Eleventh Circuit decision attached to Notice of Filing (DE 1074).

⁵ NPS is also known as All American Direct.

⁶ Mountford avers that at all times he was acting on behalf of NPS in his capacity as Chief Executive Officer and that he does not and has never had a personal interest in the Agreement entered into with EchoStar. Mountford Decl. at ¶ 35 (DE 1086).

⁷ The Declaration of Michael Mountford is attached as Ex. 1 to Non-Parties National Programming Service, LLC’s and Michael Mountford’s Opposition to Emergency Motion

Povenmire Decl. at ¶ 5.⁸ NPS is a C-Band programming provider; NPS and its predecessor have provided programming, including distant network channels, to eligible subscribers for more than ten years.⁹ Although NPS recognized an opportunity to expand its consumer base to EchoStar's subscribers as a result of the permanent injunction, it lacked the necessary transponder to provide such services.¹⁰ NPS Opposition Memorandum at 3 (DE 1086); Mountford Decl. at ¶ 6. Therefore, for approximately six months, NPS negotiated at arms length with EchoStar to lease a transponder owned by EchoStar or leased by EchoStar from another satellite carrier or owner. Mountford Decl. at ¶ 5; Povenmire Decl. at ¶ 7. Both NPS and EchoStar were represented by counsel

of All Plaintiffs for Issuance of Order to Show Cause why EchoStar and Two Parties Should Not be Held in Contempt (DE 1086). As part of NPS's "Reply" to Plaintiffs' "Response" to NPS's Request for Hearing and Supplemental Brief, Ex. 1 (DE 1106), NPS submitted a second affidavit of Mountford. The undersigned will refer to the second declaration as "Mountford Decl. II."

⁸ Rex Povenmire is a former EchoStar employee; he currently is an independent consultant who EchoStar has employed to assist with its efforts to disconnect distant network programming to its subscribers. The Declaration of Rex Povenmire is attached to EchoStar's Opposition to Emergency Motion of All Plaintiffs for Issuance of Order to Show Cause why EchoStar and Two Parties Should Not be Held in Contempt (DE 1073). As part of EchoStar's Supplemental Opposition (DE 1094), EchoStar submitted a second declaration of Povenmire. The undersigned will refer to the second declaration as "Povenmire Decl. II."

⁹ At various times in the past, NPS has both competed with EchoStar and done business with it. Mountford Decl. at ¶ 10.

¹⁰ NPS contends that its "business decision is fundamentally no different than DirecTV's attempt to capitalize on the effects of the Permanent Injunction through a blitzkrieg advertising campaign directed at consumers affected by the Permanent Injunction. However, unlike DirecTV, NPS did not have its own satellite capacity to provide distant network channels; thus NPS approached EchoStar regarding leasing transponder space from EchoStar to provide the distant network programming." NPS's Opposition at 4 n.1 (DE 1086)

throughout the negotiations. Mountford Decl. at ¶ 5.

On November 29, 2006, NPS and EchoStar entered into a Satellite Transponder Service Agreement (“Agreement.”).¹¹ See Agreement attached as Ex. 3 to Plaintiffs’ Motion (DE 1071) and attached as Ex. A to Mountford Decl. (DE 1086). Under the Agreement, EchoStar will lease one of its transponders to NPS for \$150,000 per month.¹² Agreement at ¶¶ 1.A, 3.A; Mountford Decl. at ¶ 12; Povenmire Decl. at ¶ 12. The Agreement does not restrict or place requirements on what NPS can do with the leased transponder; NPS may use the transponder for whatever purpose it desires. NPS does acknowledge that it intends to use some of the leased satellite capacity to uplink distant network channels. Mountford Decl. at ¶ 14.¹³ The Agreement obligates NPS to pay EchoStar for a period of two years, whether or not NPS actually provides distant network

¹¹ According to Mountford, such lease agreements are common in the industry. In the past, NPS has entered into similar leases for satellite capacity with companies other than EchoStar, including Intelsat and SES Americom. Mountford Decl. at ¶ 15. Indeed, SHVA includes a lessee of satellite capacity in its definition of a “satellite carrier” entitled to the statutory copyright license. See 17 U.S.C. § 119(d)(6). EchoStar states that it leases transponders in the ordinary course of its business. Povenmire Decl. at ¶ 5. See also EchoStar’s Opposition Memorandum at 4 n.2 and attached Ex 2 (discussing leases by satellite carriers other than EchoStar) (DE 1073). Plaintiffs counter that in none of these other transponder leases was there an existing court order barring the satellite company from providing programming and the purposes of these leases was not to evade a court order. Plaintiffs’ Supplemental Memorandum at 11 (DE 1081).

¹² Mountford represents that after contacting a consultant who has been involved in similar leasing agreements, he believes that the \$150,000 lease amount reflects the fair market value. Mountford Decl. at ¶ 16; e-mail from consultant, Ex. B to Mountford Decl. EchoStar states that the lease amount is consistent with the rate at which it leases satellite capacity to others. Povenmire Decl. at ¶ 12.

¹³ NPS is also exploring the possibility of using some of the transponder capacity to provide continuing education programming - a purpose unrelated to distant networks.

services. Agreement at ¶ 11(c); Mountford Decl. at ¶ 13. Beyond the monthly transponder lease payment, the only revenue EchoStar will receive from NPS is a \$5,000 monthly fee for the lease of an uplink antenna until such time that NPS is able to install its own permanent antenna.¹⁴ Agreement at ¶ 4.B; Mountford Decl. at ¶ 22; Povenmire Decl. at ¶ 28.

On the same date that EchoStar and NPS executed the Agreement (November 29, 2006), they furnished Plaintiffs' counsel with a copy. See letter and e-mail to Plaintiffs' counsel, Ex. 1, 2 to Plaintiffs' Motion (DE 1071). The next day, Plaintiffs filed the instant Motion for an Order to Show Cause Why EchoStar and Two Parties Acting in Concert with EchoStar Should Not be Held in Contempt (DE 1071); on December 1, 2006, they filed a Supplemental Memorandum (DE 1081).¹⁵ On November 30, 2006, EchoStar filed its

¹⁴ The Agreement provides for a period not to exceed three months. Agreement at ¶¶ 4.A, 4.B.

¹⁵ Plaintiffs have additionally filed an Alternative Motion for Clarification of the Permanent Injunction (DE 1080) and supporting memorandum at 14-15 (DE 1081) (citing cases discussing law on modification of injunctions) and a Notice by All Plaintiffs Concerning Referral of Pending Motions to Magistrate Judge and Request for Expedited Treatment at 4-5 (DE 1097) (requesting clarification of Permanent Injunction). Plaintiffs have also requested that the Court enter a temporary restraining order prohibiting NPS from signing up customers to receive distant network programming until such time as the Court rules on the pending motions. See Plaintiffs' Supplemental Memorandum at 5 n.3 (DE 1081), Notice by All Plaintiffs Concerning Referral of Pending Motions to Magistrate Judge and Request for Expedited Treatment at 5-6 (DE 1097) (discussing the entry of a temporary restraining order), and Notice of Filing of Proposed Temporary Restraining Order (DE 1085). NPS has objected both to Plaintiffs' clarification motion and to their temporary restraining order request. Additionally, NPS has moved to intervene herein in order that it may respond to Plaintiffs' Alternative Motion for Clarification (DE 1111). The District Court has not referred any of these motions to the undersigned. However, the undersigned notes that were the District Court to adopt this Report and Recommendation, all these motions would be rendered moot.

Opposition to Plaintiffs' Motion, together with the Declaration of Rex Provenmire (DE 1073); on December 4, 2006, EchoStar filed a Supplemental Opposition to Plaintiffs' Motion (DE 1094). And on December 1, 2006, NPS filed its Opposition to Plaintiffs' Motion, together with the Declaration of Michael Mountford (DE 1086).

III. LAW OF CIVIL CONTEMPT

"There can be no question that courts have inherent power to enforce compliance with their legal orders through civil contempt." Shillitani v. United States, 384 U.S. 364, 370 (1966). Civil contempt sanctions serve two purposes - coercive and compensatory - and the United States Supreme Court has spoken to both:

Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the [contemnor] into compliance with the court's order, and to compensate the complainant for losses sustained. Where compensation is intended, a fine is imposed, payable to the complainant. Such a fine must of course be based upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy.

But where the purpose is to make the defendant comply, the court's discretion is otherwise exercised. It must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.

United States v. United Mine Workers of America, 330 U.S. 258, 303-04 (1947). When fashioning an equitable remedy for civil contempt, district courts enjoy "wide discretion." McGregor v. Chierico, 206 F.3d 1378, 1385 n.5 (11th Cir. 2000); United States v. City of Miami, 195 F.3d 1292, 1298 (11th Cir. 1999). Nonetheless, sanctions imposed to coerce compliance cannot be any greater than necessary to ensure compliance. Jove Eng'g, Inc.

v. Internal Revenue Service, 92 F.3d 1539, 1558 (11th Cir. 1996). And civil contempt sanctions must always give to the contemnor the opportunity to bring himself into compliance by “satisfy[ing] the trial court that he [is] no longer in violation of the . . . order and that he would in good faith thereafter comply with the terms of the order.” Lance v. Plummer, 353 F.2d 585, 592 (5th Cir. 1965).

The Eleventh Circuit, however, has made clear that any finding of civil contempt – willful disregard of the authority of the Court – must be predicated upon “clear and convincing evidence” that the underlying order was violated. Howard Johnson Co. v. Khimani, 892 F.2d 1512, 1516 (11th Cir. 1990). Such “clear and convincing evidence must establish that: (1) the allegedly violated order was valid and lawful; (2) the order was clear and unambiguous; and (3) the alleged violator had the ability to comply with the order.” Riccard v. Prudential Ins. Co., 307 F.3d 1277, 1296 (11th Cir. 2002). Once the moving party shows that the order was violated, the burden shifts to the alleged contemnor to explain his noncompliance. U.S. v. Roberts, 858 F.2d 698, 701 (11th Cir. 1988). Intent to disobey is not a prerequisite to a finding of civil contempt. Piambino v. Bestline Prods., Inc., 645 F. Supp. 1210, 1212 (S.D. Fla. 1986). Although inability to comply with the underlying order is a defense in a contempt proceeding, such inability is established only by a showing that one has, in good faith, made “all reasonable efforts to comply.” Roberts, 858 F.2d at 701 (quoting U.S. v. Rizzo, 539 F.2d 458, 465 (5th Cir. 1976)). However, “[c]onduct that evinces substantial, but not complete compliance with the court order may be excused if it was made as part of a good faith effort at compliance.” Howard Johnson, 892 F.2d at 1516.

IV. THE PARTIES' ARGUMENTS AND THE COURT'S ANALYSIS

The Permanent Injunction entered by the District Court against EchoStar provides in pertinent part:

[I]t is

ORDERED, ADJUDGED AND DECREED that, effective December 1, 2006, Defendants EchoStar Communications Corporation (d/b/a DISH Network), EchoStar Satellite Corporation, Satellite Communications Operating Corporation and DirectSat Corporation (collectively "EchoStar"), their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with EchoStar are hereby PERMANENTLY ENJOINED AND RESTRAINED from the secondary transmission, pursuant to the statutory license set forth in Section 119, Title 17, United States Code, of a performance or display of a wor[k] embodied in a primary transmission of any network station affiliated with ABC, Inc., CBS Broadcasting, Inc., Fox Broadcasting Company, or National Broadcasting Co.

October 20, 2006 Order of Permanent Injunction (DE 1020). The Permanent Injunction bars EchoStar from providing any distant programming services – even wholly legitimate services.

_____ It is undisputed that as of December 1, 2006 (the effective date of the Permanent Injunction), EchoStar had terminated all distant network programming to its approximately 900,000 subscribers. Povenmire Decl. II at ¶¶ 2, 3, Ex. to EchoStar's Supplemental Opposition (DE 1094).¹⁶ Plaintiffs do not contend that EchoStar itself is continuing to provide distant network programming to its subscribers. Rather, Plaintiffs argue that "[i]nstead of doing so directly . . . EchoStar is engaging in the transparent sham of

¹⁶ EchoStar legitimately continues to provide Showtime, ESPN, Discovery Channel, and "hundreds of other core programming channels to over 12 million subscribers," as well as foreign language programming. EchoStar Supplemental Opposition at 12 (DE 1094).

arranging for a third party – National Programming Service LLC (NPS), and its CEO, Michael Mountford – to do, with enormous technical and other assistance from EchoStar, precisely what the Permanent Injunction prohibits.” Plaintiffs’ Motion at 1 (DE 1071). In other words, Plaintiffs contend that the Permanent Injunction prohibits “EchoStar from leasing or otherwise making available its satellite facilities for retransmission of distant network stations by third parties to EchoStar customers.” Plaintiffs’ Supplemental Memorandum at 5 (DE 1081).

Under Federal Rule of Civil Procedure 65(d), an injunction “is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.” Thus, “an injunction binds not only parties subject thereto, but also non-parties who act with the enjoined party.” TravelHost, Inc. v. Blandford, 68 F.3d 958, 961 (5th Cir. 1995). As the Supreme Court has explained:

[Rule 65(d)] is derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them, represented by them or subject to their control. In essence . . . defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.

Regal Knitwear Co. v. Nat’l Labor Relations Bd., 324 U.S. 9, 14 (1945); accord Roe v. Operation Rescue, 54 F.3d 133, 139 (3rd Cir. 1995) (“an instigator of contemptuous conduct may not ‘absolve himself of contempt liability by leaving the physical performance of the forbidden conduct to others.’”) (citation omitted); Mainstream Mktg. Servs., Inc. v. FTC, 284 F. Supp. 2d 1266, 1277 (D. Colo. 2003) (stating that there is a “substantial body

of case law to the effect that a person enjoined cannot do indirectly through another what it is prohibited from doing directly”); Hexacomb Corp v. GTW Enters, Inc., No. 93 C 3107, 1994 WL 171533, at *4 (N.D. Ill. May 2, 1994) (defendant violated injunction when it did “through the back-door that which it could not do itself as a result of the injunction”).

Plaintiffs urge the Court to hold NPS and Mountford in contempt on the basis that they are persons acting in concert with EchoStar. Plaintiffs’ Motion at 2, 3 (DE 1071); Plaintiffs’ Supplemental Memorandum at 1, 11 (DE 1081). “The courts have interpreted the language [‘active concert or participation with’] as requiring that a person either be ‘legally identified with’ a party in the case or ‘aid and abet’ the party to violate the decree.” Project B.A.S.I.C. v. Kemp, 947 F.2d 11, 20 (1st Cir. 1991) (quoting NBA Props, Inc., v. Gold, 895 F.2d 30, 33 (1st Cir. 1990) (citations omitted)); accord Goya Foods, Inc. v. Wallack Mgmt. Co., 290 F.3d 63, 75 (1st Cir. 2002) (“[I]t has long been recognized that a non-party may be held in civil contempt if, and to the extent that, he knowingly aids or abets an enjoined party in transgressing a court order . . . ; the challenged action must be taken for the benefit of, or to assist, a party subject to the decree.”); Indep. Fed’n of Flight Attendants v. Cooper, 134 F.3d 917, 920 (8th Cir. 1997) (“The essence of [Rule 65(d)] is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors”); Alemite Mfg. Co. v. Staff, 42 F.2d 832, 833 (2d Cir. 1930) (L. Hand, J.) (“[the non-party] respondent must either abet the defendant or must be legally identified with him”).

In their effort to demonstrate that EchoStar and NPS are in contempt, Plaintiffs point to the following:

1. EchoStar and NPS have repeatedly represented to the public that the purpose of the Agreement is to provide distant network signals to EchoStar subscribers who have lost distant network signals pursuant to the Permanent Injunction¹⁷ and have actively encouraged such EchoStar subscribers to obtain distant network programming from NPS. On November 30, 2006, EchoStar aired for its subscribers a “Charlie Chat” presentation, advising them to contact All American Direct (NPS) to see if they qualified for distant network channels. During this presentation EchoStar’s CEO, Charlie Ergen, stated:

There is a new company, that’s not associated with DISH Network . . . They are currently, starting tomorrow, uplinking Atlanta and San Francisco to qualified DBS customers. Now, one of the advantages to All-American Direct is that [you] do not need new equipment for the most part to receive signals from your DISH Network system. . . . The only possible negative is that broadcasters . . . are challenging the right of All-American Direct to actually broadcast that signal to you. . . . What I would do is have you go to their web site, and contact All-American Direct, its www.mydistantnetworks.com, and go to their website, and that’s where the most current information will be about qualifying for distant networks there.

Plaintiffs’ Supplemental Memorandum at 3 (DE 1081) (quoting audio clip posted at

¹⁷ In addition to representing the purpose of the Agreement to the public, NPS also represented the purpose of the Agreement – to provide distant network programming to former EchoStar subscribers – in correspondence to Plaintiffs’ counsel: “[NPS] approached EchoStar regarding the possibility of offering distant network channels to DISH Network customers who will lose those services December 1.” November 29, 2006 e-mail from Mountford to Plaintiffs’ counsel, Ex. 2 to Plaintiffs’ Motion (DE 1071). Moreover, Plaintiffs contend that the true purpose is reflected by the Agreement itself; it repeatedly references distant network signals. For example, the provision concerning “Use of Service” employs the term no fewer than 16 times.

www.satelliteguys.us/showthread.php?p=737315#poststop),¹⁸ see printout from web site showing links to audio recordings from the Charlie Chat video, Plaintiffs' Supplemental Memorandum, Ex. 6A (DE 1081). In response to viewer questions, Ergen responded: "Your only alternative today really would be to contact the new company [NPS], contact them and see if you do qualify, in fact for that signal"; "You can reach out to All-American Direct and it's possible you would qualify there. . . ."; "The only alternative company who may be able to accept that waiver, again, is All-American Direct. . . ."; and "[Y]our choices are an off-air antenna, lifeline cable, or All-American Direct, to contact them to get your channels." Id. In a separate running loop on an EchoStar channel, EchoStar executive, James DeFranco, advised EchoStar subscribers how to get distant network signals: "Just give [NPS] your name and address, and they will check to see if you are eligible to receive distant network channels from them. To see if you qualify, you will need to contact [NPS], by visiting their web site, at www.mydistantnetworks.com." Plaintiffs Supplemental Memorandum at 4 (quoting James DeFranco audio clip posted at website, www.satelliteguys.us/showthread.php?p=737315#poststop).¹⁹

¹⁸ The Court can hear the audio recording by signing up (without cost) to the www.satelliteguys.us website, or Plaintiffs will provide it to the Court upon request.

¹⁹ NPS responds that Plaintiffs' claim that EchoStar is "directing' or otherwise assisting customers to move to NPS [is] simply irrelevant – the issue is not whether EchoStar may be assisting NPS in **NPS's** provision of legal services, but whether **NPS** is 'aiding and abetting' **EchoStar**." NPS's Response to Plaintiffs' Motion to "Clarify" the Court's Injunction against EchoStar at 6 (DE 1112). Additionally, EchoStar contends that Plaintiffs have quoted only portions of the Ergen communications with EchoStar's customers, omitting that EchoStar actually informed its customers of all their options, including switching to DirecTV and considering lifeline cable and off-air antennas. EchoStar's Supplemental Opposition at 13-14 (DE 1094); NPS's Response to Plaintiffs' Motion to "Clarify" the Court's Injunction against EchoStar at 6 (DE 1112). Plaintiffs have

In an interview published by *Satellite Business News* on December 1, 2006, Mountford stated that the DeFranco loop was slated to run; it would direct EchoStar subscribers who had lost their distant network programming to contact NPS. Plaintiffs' Supplemental Memorandum, Ex. 6B (DE 1081). And in an e-mail to members of Congress, Mountford stated: "We wish to inform you of an alternative that will allow legitimate consumers who are presently slated to be turned off by DISH Network pursuant to the court ordered injunction, to retain their distant network signals." November 29, 2006 e-mail from Mountford, Ex. 7 to Plaintiffs' Supplemental Memorandum (DE 1081).

2. The frequencies that NPS is leasing from EchoStars satellites to provide distant network programming are licensed by the FCC to EchoStar.

3. EchoStar's customers who subscribe to NPS's distant network programming will continue to use satellite antennas (or dishes) and set-top boxes that they had purchased or otherwise obtained from EchoStar – the same equipment that the customers use to process all other programming from EchoStar. During the Charlie Chat presentation, EchoStar's CEO Ergen encouraged EchoStar subscribers to obtain distant network signals, using the identical equipment they use to receive EchoStar programming: "Now, one of the advantages to All-American Direct [NPS] is that [you] do not need new equipment for the most part to receive the signals from your DISH Network system. . . ." Plaintiffs' Supplemental Memorandum at 3 (DE 1081) (quoting audio clip posted at

replied to this argument by submitting a complete transcript of the November 30 Charlie Chat presentation and a chart comparing the number of references to NPS/All American Direct with references to DirecTV during the presentation. See Reply Memorandum by All Plaintiffs in Support of Alternative Motion for Clarification of the Permanent Injunction at 2-3 and Ex. 14 thereto (DE 1103).

www.satelliteguys.us/showthread.php?p=737315#poststop). And EchoStar executive DeFranco assured EchoStar customers that NPS “may be able to provide you distant ABC, CBS, NBC, or Fox network channels, from Atlanta or San Francisco, using your existing DISH Network satellite system.” Plaintiffs’ Supplemental Memorandum at 4 (quoting audio clip posted at www.satelliteguys.us/showthread.php?p=737315#poststop).

4. EchoStar and NPS finalized their Agreement just two days before the cutoff date set by the District Court. According to Plaintiffs, the timing of the deal confirms the “transparent purpose of the deal” and was designed to try to “outfox plaintiffs and the Court.”²⁰ Plaintiffs’ Supplemental Memorandum at 7, 7 n.4 (DE 1081).

5. EchoStar provided NPS with a confidential and proprietary list of those EchoStar subscribers in markets in which EchoStar does not offer local-to-local service or in which EchoStar’s local-to-local service does not include all four major networks; the list includes detailed information (names, addresses, and telephone numbers) about the subscribers most likely to request distant signals from NPS. NPS then requested that Decisionmark analyze the list. According to Plaintiffs, “NPS uses the Decisionmark analysis of the EchoStar subscriber list to determine, in advance, whether to offer distant

²⁰ EchoStar responds that the timing of the Agreement was not sinister. It explains that during most of the six months it was negotiating with NPS, EchoStar’s primary focus was on negotiating and attempting to implement a settlement agreement with Plaintiffs. When a settlement did not come to fruition, EchoStar explored other options to minimize customer disruption, including the proposal from NPS. According to EchoStar, “the fact that 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.” EchoStar’s Supplemental Opposition (DE 1094).

signals to particular EchoStar subscribers who contact NPS.” Plaintiffs’ Reply to NPS’s Response to Plaintiff’s Alternative Motion for Clarification of the Permanent Injunction at 1-2 (DE 1113).²¹

EchoStar and NPS argue that they have not violated the Permanent Injunction and are not in contempt thereof based on the following facts:

1. NPS is an independent third party and a separate legal entity from that of EchoStar; EchoStar has no direct or indirect ownership interest in NPS. Mountford Decl. at ¶ 7; Povenmire Decl. at ¶ 8. NPS has been providing programming, including distant network channels, to consumers for more than ten years. Mountford Decl. at ¶¶ 3,7; Povenmire Decl. at ¶ 8, 14;

2. NPS does and will continue to maintain a separate corporate and business address from EchoStar. NPS’s corporate offices are located in Indianapolis, Indiana;

²¹ NPS explains that it “requested that EchoStar provide it with limited customer data to allow NPS to judge the potential market for such services.” NPS’s “Reply” to Plaintiffs’ “Response” to NPS’s Request for Hearing and Supplemental Brief at 9 (DE 1106). As described in a Non Disclosure Agreement between NPS and EchoStar, the list was provided to NPS for the “limited purpose of testing and building the Company’s [NPS’s] internal systems.” Non-Disclosure Agreement at ¶ 1, Ex. A to Mountford Decl. II (DE 1106). According to Mountford, NPS needed this data “to determine whether it made economic and business sense to enter the marketplace and to compete for the right to provide distant network (and other) programming to eligible former customers of EchoStar. . . .” Mountford Decl. II at ¶ 4. The list did not provide any information about subscriber eligibility. Mountford Decl. II at ¶ 5. NPS then provided the list to Decisionmark for processing to determine the eligibility of these subscriber’s to receive distant network signals. Only after it received Decisionmark’s analysis, did NPS enter into the transponder Lease Agreement with EchoStar. Mountford Decl. II at ¶ 8. NPS has not used Decisionmark’s eligibility analysis to directly or indirectly contact EchoStar’s former subscribers; however, if a former EchoStar subscriber contacts NPS, it may access the data provided by Decisionmark to determine that subscriber’s eligibility. Mountford Decl. II at ¶ 11.

EchoStar's corporate offices are located in Denver, Colorado. Mountford Decl. at ¶ 11; Povenmire Decl. at ¶ 10.

3. NPS and EchoStar have no officers, directors, employees, agents, or servants in common. NPS does not share management with EchoStar, and EchoStar does not direct NPS's activities. Mountford Decl. at ¶¶ 8,9; Povenmire Decl. at ¶ 9.

4. As of December 1, 2006, EchoStar has not and will not provide any distant network programming to any current or future subscribers. Povenmire Decl. at ¶¶ 6, 11.

5. The Agreement places no restrictions or requirements on what NPS can do with the satellite capacity it is leasing; NPS may use the leased satellite capacity for whatever purpose it desires. Agreement at ¶ 1.A; Mountford Decl. at ¶ 14; Povenmire Decl. at ¶ 13. Although NPS intends to use some of the capacity of the leased satellite to uplink distant network channels, it is not obligated to do so. Mountford Decl. at ¶ 14. Under the Agreement, NPS is obligated to pay EchoStar for at least two years, even if NPS does not provide distant network programming. Agreement at ¶ 11; Mountford Decl. at ¶ 13.

6. NPS, independent of EchoStar, is arranging for the backhaul of distant network channels for facilities in San Francisco and Atlanta where network channels will be collected; these premises are leased by NPS. Mountford Decl. at ¶ 32; Povenmire Decl. at ¶ 29. NPS, independent of EchoStar, "has also arranged for equipment to process the broadcast signal to improve it to acceptable levels, compress the video signals in preparation for satellite transmission, and encrypt the signals to protect the content from improper and unauthorized viewing by ineligible parties." Mountford Decl. at ¶ 33; Povenmire Decl. at ¶ 29. And NPS, independent of EchoStar, has "arranged for satellite

backhaul capacity on Commercial C-Band satellites, to convey the San Francisco and Atlanta signals back to the facility where they will be uplinked to the transponder leased from EchoStar.” Mountford Decl. at ¶ 34; Povenmire Decl. at ¶ 29.

7. NPS will transmit channels from San Francisco and Atlanta. By contrast, EchoStar transmitted channels from New York, Los Angeles, and Denver. EchoStar’s Supplemental Opposition at 2 (DE 1094).

8. Consumers are not required to subscribe to DISH Network (EchoStar) programming as a condition of receiving distant network channels or other NPS programming. An eligible subscriber can subscribe solely to NPS services. Agreement at ¶ 3.A; Mountford Decl. at ¶ 24; Povenmire Decl. at ¶ 16.

9. EchoStar subscribers will not be automatically activated for NPS programming. Agreement at ¶ 3.A; Mountford Decl. at ¶ 25. Only those eligible subscribers who contact NPS directly will be activated for distant network programming. Agreement at ¶ 3.A. NPS has and will continue to maintain a call center (independently from EchoStar) to address any questions related to distant network programming (and other NPS services). Agreement at ¶ 27; Mountford Decl. at ¶ 27; Povenmire Decl. at ¶ 21. A consumer purchasing distant network programming from NPS may choose not to receive any programming from EchoStar. Agreement at ¶ 3.A; Mountford Decl. ¶ at 24; Povenmire Decl. at ¶ 18.

10. NPS will independently qualify and determine each subscriber’s eligibility (under SHVIA) to receive distant network programming. It has developed and maintains its own Subscriber Management system to authorize and de-authorize consumers to

receive distant network programming. Mountford Decl. at ¶ 26; Povenmire Decl. at ¶ 19. And NPS will employ (at significant cost) Decisionmark Corporation to determine subscriber eligibility.²² Mountford Decl. at ¶ 18. EchoStar will have no part in the process. Agreement at ¶ 3.A; Mounford Decl. at ¶ 23. Indeed, EchoStar's customer service representatives will not have the ability to determine or check the eligibility of any customer to receive distant network programming. Povenmire Decl. at ¶ 22. And EchoStar will not have the ability to authorize consumer set top boxes for NPS provided programming. Agreement at ¶ 3.A; Mountford Decl. at ¶ 26; Povenmire Decl. at ¶ 19. NPS alone will be responsible for ensuring compliance with SHVIA. Agreement at ¶ 3.A; Mountford Decl. at ¶ 23; Povenmire Decl. at ¶¶ 15, 17.

11. NPS will use new pricing and new programming packages developed without

²² In a subsequent filing, NPS states that Plaintiffs "have threatened Decisionmark with separate contempt proceedings if it continues to perform under its contract with NPS." NPS's "Reply" to Plaintiffs' "Response" to NPS's Request for Hearing and Supplemental Brief at 2 (DE 1106). According to Mountford, on December 5, 2006, "NPS's ability to access the Decisionmark licensed products for eligibility determinations was terminated by Decisionmark." Mountford Decl. II at ¶ 12. Mountford avers: "I am informed and believe that Decisionmark stopped providing services to NPS, despite the contract between Decisionmark and NPS, because Plaintiffs told Decisionmark that the services it was providing violated this Court's injunction against EchoStar and threatened Decisionmark with contempt proceedings if it continued to provide services to NPS." Mountford Decl. II at ¶ 12. On December 12, 2006, the United States District Court for the Southern District of Indiana issued a temporary restraining order ("TRO") requiring Decisionmark to provide services to NPS under the contract between the parties. The TRO is effective for ten days, with a possible renewal for ten more days. It would be dissolved were the District Court herein to enter an order preventing EchoStar from leasing its transponder to NPS for the delivery of distant network stations to EchoStar customers. See Memorandum Entry on Temporary Restraining Order and Temporary Restraining Order in National Programming Serv. LLC v. Decisonmark Corp., No. 1:06-cv-1754-DFH-TAB (S.D. Ind. Dec. 12, 2006) attached to NPS's Notice of Issuance of Temporary Restraining Order in Related Case (DE 1117).

any input from EchoStar. Mountford Decl. at ¶ 25. NPS has and will continue to have its own billing system. Mountford Decl. at ¶ 28; Povenmire Decl. at ¶ 23. NPS alone will determine the retail price for the services it provides, including that of distant network programming. Mountford Decl. at ¶ 20; Povenmire Decl. at ¶ 20. NPS subscribers will receive a separate bill directly from NPS, and NPS will collect payment from its subscribers. Agreement at ¶ 3.A; Mountford Decl. at ¶ 28; Povenmire Decl. at ¶ 23. EchoStar will neither bill nor collect payment from NPS subscribers. Mountford Decl. at 28; Povenmire Decl. at ¶ 23. Upon a subscriber's non-payment of NPS programming, only NPS (and not EchoStar) will be able to de-authorize any programming NPS provides. Agreement at ¶ 3.A; Mountford Decl. at ¶ 29; Povenmire Decl. at ¶ 24.

12. NPS will be responsible for paying royalty fees associated with providing distant network programming to the copyright owners pursuant to SHVIA. Agreement at ¶ 3.A; Mountford Decl. at ¶ 30; Povenmire Decl. at ¶ 25. And NPS will be solely responsible for calculating, collecting, and paying all taxes and other governmental fees that may be assessed in connection with providing distant network programming. Mountford Decl. at ¶ 31; Povenmire Decl. at ¶ 26.

13. No costs associated with NPS's provision of distant network programming will be paid by EchoStar. Mountford Decl. at ¶ 21.

14. EchoStar will not receive or share in any revenues or profits derived from NPS's provision of distant network programming. Mountford Decl. at ¶ 22; Povenmire Decl. at ¶ 28. Aside from the interim \$5,000 monthly antenna fee, the only revenue that EchoStar will receive is the \$150,000 monthly amount for the lease of a transponder.

Agreement at ¶ 1.A, 3.A; Mountford Decl. at ¶ 12; Povenmire Decl. at ¶ 28. Hence, the total **annual** revenue that EchoStar will receive under the Agreement will be less than \$2 million; before December 1, 2006, EchoStar's **monthly** revenue from distant network programming was more than \$2 million. Povenmire Decl. at ¶ 28.

EchoStar argues that the Agreement between it and NPS "upholds and affirmatively assures fulfillment" of the "the purposes of the statutory remedy, and the Permanent Injunction embodied by it." EchoStar Supplemental Opposition at 4 (DE 1094). These purposes 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 network channels to its consumers."²³ EchoStar Supplemental

²³ Plaintiffs interpret the purpose of SHVIA and the Permanent Injunction more broadly. They contend that the injunction mandated by the Act and imposed herein has two purposes or effects:

[The Act and the Permanent Injunction require that EchoStar lose not only direct revenue from the sale of distant signals, but also] *lose **all** of its revenues from many customers who cancel their overall subscriptions because they are unable to obtain distant signals from the satellite carrier.* And the impact of losing a *customer* [for all services] is much larger [than losing a customer for distant network services] With 900,000 subscribers in play, the revenue impact on EchoStar is enormous.

* * *

It is *this* effect of the Permanent Injunction – the larger effect – that EchoStar has schemed to neutralize through its collaboration with NPS. By being able (through its work with NPS) to offer distant network signals to its customers seamlessly, using exactly the same equipment, EchoStar will – if this Court does not act – effectively nullify the "severe"

Opposition at 4 (DE 1094). According to EchoStar, SHVIA “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 license to a lessee of satellite capacity. . . . Thus, in the case of a lessee of satellite capacity, **only the lessee** holds the compulsory statutory license and is responsible for compliance.” EchoStar Supplemental Opposition at 4 (DE 1094).²⁴

Additionally, EchoStar contends that as a lessor under SHVIA, it is merely a passive carrier of the secondary transmission. See 17 U.S.C. § 111(a)(3).²⁵ It also argues that

injunction mandated by Congress.

Reply Memorandum by All Plaintiffs in Support of Alternative Motion for Clarification of the Permanent Injunction at 7-8 (DE 1103). The undersigned, however, does not agree.

The Permanent Injunction is directed only to the prohibited activity of providing distant network programming; it is not directed to nor intended to penalize EchoStar’s other, permissible activities. Neither SHVIA nor the Permanent Injunction require that EchoStar suffer harm to its legitimate activities. Were it otherwise, the Injunction (as mandated by the Act) would have required that EchoStar cease all business. The fact that the Agreement may assist EchoStar in retaining customers of its permissible activities – which are not the targets of the Injunction – does not undermine the purpose of the Act or otherwise violate the Permanent Injunction.

²⁴ SHVIA provides:

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 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).

²⁵ Section 111(a)(3) provides:

“[t]he 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.” EchoStar Supplemental Opposition at 8 (DE 1094).

In support of its argument that it is not transmitting distant network signals, EchoStar discusses the court’s holding in National Cable Television Ass’n, Inc. v. F.C.C., 33 F.3d 66 (D.C. Cir. 1994).

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

(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 transmissions, and whose activities consist solely of providing wires, cables, or other communication 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.

17 U.S.C. § 111(a)(3) (emphasis added).

participation” in transmission entails “at least choosing the signal, or originating it.” *Id.* at 71-71. 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 signals, whereas the party that permits the use of its equipment for such transmission is merely conducting, and not transmitting the signal. *Id.*

EchoStar’s Supplemental Opposition at 8-9 (DE 1094). According to EchoStar, SHVIA also recognizes this distinction by granting the compulsory copyright license to the lessee (not the lessor) of satellite capacity. See 17 U.S.C. § 119(d)(6). EchoStar maintains that it is not participating in the origination of the signals, the uplinking of the signals, or the delivery of the signals and, therefore, is not transmitting distant network programming in violation of the Permanent Injunction.

On its behalf, NPS contends that because it was not a party to the underlying litigation, its rights and interests have not been adjudicated; it has not had its day in court. Therefore, NPS contends that it can only be found to have violated the Permanent Injunction and, thus, be held in contempt if it acted “in active concert or participation” with EchoStar to assist it (EchoStar) in providing distant network programming. According to NPS, “[e]ntering into a lease with EchoStar so that NPS can provide **NPS’s** own services does not transmute NPS into one acting in ‘active concert or participation’ with EchoStar. Trying to serve EchoStar’s eligible customers, who are allowed to receive distant network programming under the law and barred from receiving it from EchoStar, is also not improper.” NPS Opposition at 7.

NPS additionally argues that Plaintiffs, in bringing their contempt (and other motions), are seeking “to bar an innocent competitor (NPS) from the marketplace and to transmute the Court’s injunction against EchoStar into a monopoly for DirecTV – NPS’s only real competitor in this market. [Significantly, DirecTV] is owned by News Corporation (also the owner of Plaintiff Fox Broadcasting Company).” NPS’s “Reply” to Plaintiffs’ “Response” to NPS’s Request for Hearing and Supplemental Brief at 2-3 (DE 1106).

According to NPS:

If EchoStar’s former distant network programming customers wish to receive distant network programming services via satellite, they now have essentially two alternatives: they may purchase those services from NPS or they may purchase those services from DirecTV. DirecTV, however, requires that these former customers also cancel the remainder of their contracts with EchoStar as a condition of receiving distant network programming from it. DirecTV further requires these former customers to purchase or lease brand new DirecTV equipment, as well as to pay whatever costs or fees may be associated with beginning service. NPS, on the other hand, provides former EchoStar distant network programming customers with the option of simply paying to receive distant network programming from NPS – and to continue to receive from EchoStar other programming that, if they choose, EchoStar is still allowed to provide.

NPS’s Response to Plaintiffs’ Motion to “Clarify” the Court’s Injunction against EchoStar at 2-3 (DE 1112).

In sum, NPS argues:

[It] is not assisting EchoStar in any EchoStar endeavor. Rather, NPS is leasing a transponder from EchoStar so that NPS can provide services to individuals who will become NPS’s customers. EchoStar is not sharing in NPS’s venture, receiving in any revenues or profits from the distant network programming NPS lawfully provides, or assuming any costs.

NPS has no interest in seeing EchoStar violate the Permanent Injunction. The Permanent Injunction essentially prohibits EchoStar from providing distant network programming to its subscribers. If NPS were to take action to assist EchoStar in violating the Permanent Injunction, NPS would essentially be foreclosing itself from the profits it stands to make as a result of the Lease Agreement.

NPS's Opposition at 11 (DE 1086).

Before a party may be held in civil contempt of a court order, the court order at issue must be clear and unambiguous. Riccard, 307 F.3d at 1296. Discussing the requisite clarity, the court in Project B.A.S.I.C. explained:

A court order . . . must not only be specific about what is to be done or avoided, but can only compel action from those who have adequate notice that they are within the order's ambit. For a party to be held in contempt, it must have violated a clear and unambiguous order that left no reasonable doubt as to what behavior was expected and who was expected to behave in the indicated fashion. In determining specificity, the party enjoined must be able to ascertain from the four corners of the order precisely what acts are forbidden.

947 F.2d at 17 (internal quotations and citations omitted). Here, the District Court's Order of Permanent Injunction clearly bars EchoStar from providing any distant programming services – even wholly legitimate distant programming services. The Order, however, does not by its terms prohibit EchoStar from leasing equipment – hardware – to an independent non-party, which (non-party) may then provide distant network programming.

The arguments of EchoStar and NPS are well-taken. At bottom, the transaction between the two is nothing more than an equipment lease. EchoStar is not only out of the prohibited business, but it has no part of NPS's distant network programming. It therefore is not doing indirectly what it formerly did directly. Aside from the equipment lease

revenue – which EchoStar receives whether NPS signs up 1 million subscribers or none at all – the only benefits that EchoStar derives are the incidental accrual of goodwill (for alerting its subscribers to a substitute provider) and the potential preservation of its permissible activities (which lie outside the scope of the Injunction). Plaintiffs, therefore, have failed to meet their burden of demonstrating that EchoStar and NPS are “acting in concert” to violate the Permanent Injunction. There being no factual basis for an order of contempt, the undersigned declines to certify the matter to the District Judge for further contempt proceedings.

V. RECOMMENDATION

Based on the foregoing, the undersigned RECOMMENDS that the District Court DENY the Emergency Motion of All Plaintiffs for Issuance of An Order to Show Cause Why EchoStar and Two Parties Acting in Concert with EchoStar Should Not be Held in Contempt (DE 1071).

The parties will have **five (5)**²⁶ days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with the Honorable William P. Dimitrouleas, United States District Judge. Failure to file objections timely shall bar the parties from a *de novo* determination by the District Court of an issue

²⁶ Generally, parties are afforded ten days after service of a magistrate judge’s report and recommendation to file written objections. 28 U.S.C. § 636(b)(1)(C). However, where exigencies exist, a court may shorten the time for filing objections. See United States v. Barney, 568 F.2d 134, 136 (9th Cir. 1978) (holding that trial court did not err in providing parties less than the full ten-day period to file objections to the magistrate’s report and recommendation where exigencies existed, stating “[t]en days is a maximum, not a minimum”); Hispanic Counseling Center, Inc. v. Incorporated Village of Hempstead, 237 F. Supp. 2d 284, 290 (E.D.N.Y. 2002) (court may shorten time period for filing objections where exigencies exist).

covered in the report and shall bar the parties from attacking on appeal factual findings accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. See 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140, 149 (1985); Henley v. Johnson, 885 F.2d 790, 794 (1989).

DONE AND SUBMITTED at Fort Lauderdale, Florida, this 15th day of December 2006.


BARRY S. SELTZER
United States Magistrate Judge

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