SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

VOOM HD HOLDINGS LLC, Plaintiff, -against- ECHOSTAR SATELLITE L.L.C., Defendant.	Index No. 600292/08 I.A.S. Part 56 Hon. Richard B. Lowe III

DEFENDANT DISH NETWORK L.L.C.'S MEMORANDUM OF LAW IN OPPOSITION TO VOOM HD HOLDINGS LLC'S MOTION FOR SUMMARY JUDGMENT AS TO LIABILITY

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Defendant DISH Network L.L.C. f/k/a EchoStar Satellite L.L.C. ("EchoStar") submits this Memorandum of Law in Opposition to the Motion for Summary Judgment of VOOM HD Holdings LLC f/k/a Rainbow HD Holdings LLC ("Network"), dated April 29, 2010.

PRELIMINARY STATEMENT

The issue in this case is simple and straightforward: if Network did not spend $100 million on the "Service" during 2006, EchoStar had an unqualified right to terminate the Affiliation Agreement and summary judgment should be entered in EchoStar's favor. Network's strategy in making this motion is thus transparent. By submitting lengthy papers and offering up hundreds of exhibits, Network seeks to muddy the waters in the hopes that the Court will throw up its hands and deny EchoStar's summary judgment motion. Network's strategy is two-pronged.

First, recognizing that the Court has already rejected its construction of the operative provision of the Affiliation Agreement in its April 2008 Decision and Order, Network has come up with a new argument, one that it did not find sufficiently compelling to raise when it asked the Court to interpret this same provision in 2008. Network now claims that, to understand the unambiguous language of Section 10 of the Affiliation Agreement, the Court must look outside the four corners of that Agreement and, instead, turn to annexes attached to a separate Delaware Limited Liability Company Agreement (the "LLC Agreement"), which was entered into by different corporate entities for a different purpose. The Affiliation Agreement, however, makes absolutely no reference to the LLC Agreement. Instead, in support of its argument that the Annexes to the LLC Agreement control, Network relies solely on the post hoc, self-serving statements of its witnesses made during discovery in this matter.

Second, Network submits a fifty page, single spaced, small type, Rule 19-a Statement, comprising 227 individual paragraphs of purported material, undisputed facts. In contravention

of the Commercial Division Rules, however, Network fills its Rule 19-a Statement with argumentative, misleading, and completely immaterial statements. Network also submits a three-volume appendix of exhibits with over 180 individual exhibits. As a result, under Rule 19-a(b), EchoStar has had no choice but to respond step-by-step to Network's Rule 19-a Statement demonstrating where the statements are inaccurate or unsupported.

Notwithstanding Network's kitchen sink approach, this case involves a simple contract question, i.e., did Network "spend $100 million US Dollars on the Service" during calendar year 2006, as set forth in Section 10 of the Affiliation Agreement (the "Service Spending Requirement"). The Affiliation Agreement was negotiated by sophisticated parties working with highly skilled outside counsel. The language of the Affiliation Agreement is clear and unambiguous, and the undisputed facts show that Network did not meet this spending obligation. Thus, EchoStar properly exercised its right to terminate the Agreement. Not only should Network's motion for summary judgment be denied, Network's attempt to create confusion around this simple issue to thwart EchoStar's summary judgment motion should be rejected.

BACKGROUND

For a description of the undisputed underlying facts, EchoStar refers to its Memorandum of Law in Support of Motion for Summary Judgment, dated April 29, 2010. To the extent there are additional facts that address issues raised by Network's motion, they are referred to below.[1]

ARGUMENT

A. INTRODUCTION

Although Network argues in its motion papers that Section 10 of the Affiliation Agreement is unambiguous (Pl. Br. at 16), it inundates the Court with all manner of extrinsic

[1] In addition, to the materials submitted by EchoStar in support of its motion for summary judgment, see also EchoStar's Rule 19-a Counter-Statement, dated May 28, 2010, the Affidavit of Robert Rehg, sworn to May 26, 2010, and EchoStar's Supplemental Appendices of Exhibits and Deposition Testimony.

evidence, purportedly supporting its witnesses' post hoc views as to what they now claim they intended the Affiliation Agreement to mean. Under Delaware's "objective theory of contract," however, the meaning of an unambiguous contract is found solely in its written terms. "The true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant." Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co., 616 A.2d 1192, 1196 (Del. 1992) (citations omitted). Network's arguments ignore that "[u]nder the objective theory of contract [as applied under Delaware law], 'intent does not invite a tour through [a party's] cranium, with [the party] as the guide." West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC, 2007 Del. Ch. LEXIS 154, at *32 n.81 (Del. Ch. Nov. 2, 2007) (quoting Progressive Int'l Corp. v. E.I. du Pont de Nemours & Co., 2002 Del. Ch. LEXIS 91, at * 22 (Del. Ch. July 9, 2002)).

More importantly, because the Affiliation Agreement is unambiguous, the Court cannot consider extrinsic evidence to interpret its terms. "The Delaware Supreme Court has declared that if a contract 'is *clear and unambiguous* on its face,' a court may not consult extrinsic evidence in interpreting its provisions." West Willow-Bay Court, 2007 Del. Ch. LEXIS 154, at *32 n.83 (quoting Pellaton v. Bank of N.Y., 592 A.2d 473, 478 (Del. 1991) (emphasis in original)); accord Sussex Equip. Co. v. Burke Equip. Co., 2004 Del. LEXIS 492, at *3-4 (Del. Oct. 26, 2004); Energy Partners, Ltd. v. Stone Energy Corp., 2006 Del. Ch. LEXIS 182, at *53 (Del. Ch. Oct. 11, 2006).[2]

[2] Network cites to substantive New York law, rather than Delaware law, when identifying the standards that govern contract interpretation. (Pl. Br. at 15, 23.) Although the rules of contract interpretation are often similar in many respects, Delaware law applies to the construction of the Affiliation Agreement. (Def. Ex. 7 at 28, § 14(c).) Nevertheless, New York law also bars the use of extrinsic evidence to interpret a contract when the contract is unambiguous. See, e.g., Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P., 13 N.Y.3d 398, 404 (2009) ("Whether an agreement is ambiguous is a question of law for the courts . . . Ambiguity is determined by looking within the four corners of the document, not to outside sources.") (citations omitted); Innophos, Inc. v. Rhodia, S.A., 10 N.Y.3d 25, 30 (2008) (summary judgment affirmed where "no ambiguity exists in this comprehensive agreement, and, as such, it is unnecessary . . . to resort to extrinsic evidence to determine the agreement's meaning").

Network's argument that the Court should consider extrinsic evidence in support of its motion is particularly misplaced given that the Affiliation Agreement was negotiated by sophisticated parties working with highly skilled outside counsel – Sullivan & Cromwell LLP, representing Network, and White & Case LLP, representing EchoStar – and the Affiliation Agreement included an express merger/integration clause. (See Def. Ex. 7 at 29, § 14(1).)

> If this Court were to consult extrinsic evidence when interpreting an unambiguous contract, it would disincentivize careful, precise contract drafting. Particularly in contracts containing integration or merger clauses that affirmatively represent that the written instrument is the exclusive and entire agreement between the parties, use of extrinsic evidence absent ambiguity would be manifestly inefficient and unfair.

Rossi v. Ricks, 2008 Del. Ch. LEXIS 99, at *7-8 (Del. Ch. Aug. 1, 2008) (emphasis added); accord West Willow-Bay Court, 2007 Del. Ch. LEXIS 154, at *32.

The parties and their counsel carefully drafted the Affiliation Agreement over a lengthy period. The meaning of the Agreement is clear, unambiguous, and found entirely within its four corners. Having failed to live up to its bargain, Network seeks to obscure the record – and the Court's decision-making – with immaterial extrinsic evidence, all with the hope of staving off summary judgment.

B. THE AFFILIATION AGREEMENT IS CLEAR AND DOES NOT SUPPORT NETWORK'S INTERPRETATION.

Network's proffered interpretation of the operative provision in Section 10 – "to spend $100 million US Dollars on the Service" – lacks any fidelity to the language of the Affiliation Agreement when read as a whole. Ignoring the definition of "Service" that the parties negotiated and used throughout the Affiliation Agreement, Network argues that the phrase "spend on the Service" essentially has no bounds and refers to any spending on Network's business operations as a whole (including by extension corporate overhead, political contributions, charitable donations, executive bonuses, executive jets, and other perks). (Pl. Br. at 3.) This is the same

argument, albeit repackaged, that this Court rejected in its April 23, 2008 Decision and Order. (See Def. Ex. 2 at 10-11.)

The Court must look no further than the Affiliation Agreement's definition of the term "Service" to determine how that term is used in Section 10. The Affiliation Agreement unambiguously provides that Network had an obligation to spend $100 million in calendar year 2006 "on the Service" that was delivered to EchoStar for distribution to its Subscribers, i.e., the programming content and the other visual and data elements that are included in and make up the television programming service licensed to EchoStar. (Def. Ex. 7 at 3, § 3(a) (referring to "the programming content that makes up the Service." (emphasis added).)[3] Network's arguments designed to escape this clear and unambiguous language are unavailing.

First, Network argues that the definition of the term "Service" is so expansive that it would include Network's business as a whole, essentially asking the Court to replace the term "Service" with the term "Network" as it is used in the Affiliation Agreement. Network's proffered construction finds no support in the actual definition of "Service" or in how that term is actually used throughout the Agreement. Under the Affiliation Agreement, EchoStar agreed to distribute "the television programming service known as 'VOOM' (the 'Service')" on its DISH Network using EchoStar's satellite "Distribution System." (Def. Ex. 7 at 1.) The parties specifically defined the term "Service" as follows:

> "Service" shall mean the Service as more specifically described below in Section 4 and shall, for the avoidance of doubt, include, in the aggregate, all components and/or parts thereof including, without limitation, all interactive components, graphic scrolls or other visual graphics and all portions of the VBI (or its digital

[3] Section 3 of the Affiliation Agreement provides that "Network hereby grants to EchoStar the non-exclusive right and license (including without limitation the requisite license to all copyright, trademark and other intellectual property rights appurtenant to the programming content that makes up the Service) . . . ." (Def. Ex. 7 at 3, § 3(a) (emphasis added).)

equivalent) and any commercial advertising that airs on the Service and shall for clarity refer to, in the aggregate, all constituent channels that make up the Service.

(Id. at 3, § 1.) Referring for the avoidance of doubt to "all components and/or parts" of the Service, the definition includes: "interactive components, graphic scrolls or other visual graphics and all portions of the VBI (or its digital equivalent), and any commercial advertising that airs on the Service" – all elements that are actually delivered to EchoStar's subscribers. (Id.)[4] The term "Service" does not and cannot mean Network itself – a separately defined term – or Network's entire, behind-the-scenes business operations.[5]

Specifically, the Service includes the actual television programming content delivered to EchoStar for distribution to its Subscribers. The Service is described in Section 4(a) as being packaged in "no less than 5 full time 24 x 7 linear channels of programming, with each channel programmed in High Definition . . ." (id. at 5, § 4(a)), and containing a specified mix of programming genres, such as music, news, movies, sports, lifestyle and arts/culture (id. at 5, § 4(a)(i)), with certain specifications for repeat programming, movie inventories, original HD, and premier programming (id. at 5-7, § 4(a)(ii)–(v).) In fact, in the Agreement's grant of rights to EchoStar, the parties specifically refer to "the programming content that makes up the Service." (Id. at 3, § 3(a) (emphasis added).) Although programming is clearly the primary component, the Service also includes the other visual and data elements delivered by Network to EchoStar, such as: (1) "Advertising" with certain limitations (id. at 7-9, § 4(b)), (2) the "Same Programming" provided to Other Distributors (id. at 9-10, § 4(c)), (3) "Closed Captioning"

[4] Specific words used in a contract inform the interpretation of more general language. See Ross Holding & Mgmt. Co. v. Advance Realty Group, LLC, 2010 Del. Ch. LEXIS 86, at *24-25 (Del. Ch. Apr. 28, 2010) (quoting 11 WILLISTON ON CONTRACTS § 32:10 (4th ed. 1999)).

[5] As to Network's contention that EchoStar has had inconsistent views as to what makes up the "Service," this is demonstrably false. As early as June 19, 2007, Network's internal emails reflect that EchoStar's position was, as it remains today, that Network was "obligated to spend 100 m on PROGRAMMING each year." (Pl. Ex. 173.)

including "video-descriptioning" where required by law (id. at 10, § 4(d)), and (4) "Interactive Applications" such as "any video on demand, interactive television applications or services or other similar or related content," where provided (id. at 11, § 4(f)). All of these elements make up the content, divided into channels, that Network was to deliver to EchoStar for distribution to EchoStar's DISH Network subscribers.

Second, Network argues that to understand the meaning of the term "Service," the Court should disregard this carefully crafted definition in the Agreement and instead refer to dictionaries to find what the word "service" means. "Under well-settled case law, Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract." Lorillard Tobacco Co. v. Am. Legacy Found., 903 A.2d 728, 738 (Del. 2006) (emphasis added); Rembrandt Techs., L.P. v. Harris Corp., 2008 Del. Super. LEXIS 400, at *21 n.31 (Del. Super. Oct. 31, 2008) (same). Network, however, has no authority for the claim that dictionary definitions could be used to *modify or override* the carefully negotiated definition of a term in a written agreement. It is a bedrock principle that "parties are free to define their contract terms as they wish." Med. Eng'g Corp. v. Cooper Cos., 1992 Del. Ch. LEXIS 225, at *12-13 (Del. Ch. Oct. 29, 1992).

Third, Network argues that the parties did not intend for the term Service as used in Section 10 of the Affiliation Agreement to have the same meaning as used throughout the rest of the Affiliation Agreement. Specifically, Network argues that absent some steps by the parties to further qualify the term "Service" in Section 10 of the Affiliation Agreement, it must refer to Network's business as a whole. (See Pl. Br. at 7-8.) This is inconsistent with both Delaware law and the language of the Affiliation Agreement itself. The definitional section of the Affiliation Agreement expressly states that "the following terms shall have the following meanings when used in this Agreement" (Def. Ex. 7 at 1, § 1), and specifically defines the term "Service." (Id. at

3, § 1.) In light of the parties' express agreement that the definitions in Section 1 of the Affiliation Agreement would have the same meaning when used throughout the Agreement, Network's argument that the parties intended the term "Service" to have a single uniform meaning except when used in Section 10 is specious. See, e.g., Land-Lock, LLC v. Paradise Prop., LLC, 2008 Del. LEXIS 601, at *13 (Del. Dec. 23, 2008) ("consistent with the definition of the term 'the Deposits' [in the Contract] and its express indication that this definition should be applied throughout the Contract to that term, the reference in Paragraph 12 to 'all Deposits' includes both the First and Second Deposits.")

Fourth, Network argues that, because Section 4 of the Affiliation Agreement includes detailed covenants regarding the Service under the heading "CONTENT OF THE SERVICE," the parties must have meant that the term "Service" refers to something more than just the programming content. As noted above, the term "Service" includes the programming content delivered to EchoStar *as well as* the other visual and data elements delivered to EchoStar for distribution to its Subscribers, including: advertising (Def. Ex. 7 at 7, § 4(b)), closed captioning (id. at 10, § 4(d)), and interactive applications (id. at 11, § 4(f).) The term "Service" does not mean, however, the overall business operations of "Network," which is a separately defined term in the Agreement. In any event, the heading of Section 4 provides no support for Network's argument that the defined term "Service" actually refers to "Network" or its business operations as a whole (such that allocations of overhead expenses from its parent companies would be included within its scope).[6] Furthermore, Network's claim that Section 4 was the only portion of the Affiliation Agreement concerning the quality of the programming content is contradicted by

[6] The Affiliation Agreement specifically provides that "[t]he titles and headings of the sections in this Agreement are for convenience only and shall not in any way affect the interpretation of this Agreement." (Def. Ex. 7 at 29, §14(i).) See Ostroff v. Quality Servs. Labs., Inc., 2007 Del. Ch. LEXIS 2, at *35 n.59 (Del. Ch. Jan. 5, 2007) (not considering headings in light of contractual provision that they are for convenience only).

the testimony of Josh Sapan, Rainbow Media's CEO, who testified that EchoStar's desire to ensure the quality of the programming was a "key motivation" for the Service Spending Requirement in Section 10. (Def. Ex. 51, Sapan Aff. at 12, ¶ 33; Sapan Dep. at 268:17-269:11.)

Again, the Court need look no further than the definition of the term "Service" within the Agreement, which refers to – and is limited to – the elements that Network delivered to EchoStar for distribution "using the Distribution System for viewing and display by Subscribers" and for which EchoStar paid license fees under the Affiliation Agreement. (Def. Ex. 7 at 3, § 3(a).) This interpretation is confirmed by how the parties used the term "Service" throughout the Affiliation Agreement, i.e., (i) Network grants EchoStar the right "to *distribute the Service* in the Territory *using the Distribution System*" (id. at 3, § 3(a)); (ii) EchoStar has the right to "*receive and manipulate the Service* including without limitation (*decryption, re-encryption, compression, and transmission rate adjustment*)" (id. at 4, § 3(b)); (iii) EchoStar acknowledges that "any *sub-distribution or re-sale of the Service shall be offered as part of a broader package of Dish Network programming*" (id.); and (iv) "EchoStar shall *distribute the Service as part of its most widely distributed package of HD programming services*" (id. at 11, § 5(a)).[7]

Thus, Network's post hoc claim that the Service Spending Requirement in Section 10 could be fulfilled by counting any and all expenditures on Network's business as a whole has no support in the language of the Affiliation Agreement.

C. INTERPRETATION OF THE AFFILIATION AGREEMENT DOES NOT REQUIRE REFERENCE TO SEPARATE AGREEMENTS.

Realizing – as this Court did in its April 23, 2008 Decision and Order – that the language of the Affiliation Agreement does not support its arguments, Network now presents a new

[7] Network's use of the term "Service" – as defined in the Affiliation Agreement – in other, subsequent agreements with EchoStar confirms that the term "Service" does not refer to Network's business as a whole. (Cf. Def. Ex. 99, Letter Agreement (June 28, 2007) (referring to "Cablevision's distribution of the Service") (emphasis added).)

theory. Although it still contends that the Affiliation Agreement is unambiguous, Network argues that, to understand what Section 10 of the Affiliation Agreement means by the phrase "to spend on the Service," the Court must look outside of the four corners of the Agreement and refer to an Annex A that is attached to the separate LLC Agreement between different entities.[8] For the following reasons, Network's argument fails.

1. The Affiliation Agreement Is a Fully Integrated Agreement.

The starting point for interpreting the Affiliation Agreement is the language of the Agreement itself. Section 14(l) of the Affiliation Agreement provides: "This Agreement, together with any documents and exhibits given or delivered pursuant to this Agreement, constitutes the entire agreement between the parties to this Agreement." (Def. Ex. 7 at 29, § 14(l).) The suggestion that the "Agreement" referred to in this integration clause somehow embraces other contracts negotiated in 2005 again simply ignores the plain and precise language of the Affiliation Agreement. The word "Agreement" as used in Section 14(l) and throughout the Affiliation Agreement is defined in the very first sentence of the contract as follows: "THIS AFFILIATION AGREEMENT (this 'Agreement'), made as of the 17th day of November, 2005 . . . ." (Def. Ex. 7 at 1.) The LLC Agreement is not attached to, is not referred to and is not "given or delivered pursuant to" the Affiliation Agreement. Thus, by the Affiliation Agreement's express terms, Network's attempt to incorporate Annex A of the LLC Agreement into the Affiliation Agreement fails.

It is well established under Delaware law that "the existence of an integration clause between sophisticated parties is conclusive evidence that the parties intended the written contract

[8] Although Network attached a copy of the LLC Agreement to its preliminary injunction papers filed in 2008, Network never argued that the Court should look to Annex A to interpret the Affiliation Agreement and made absolutely no reference to that Annex in any of its moving papers or supporting affidavits – including the affidavit of Joshua Sapan, who described himself as an "active participant in the negotiation." (Def. Ex. 51 at 3, ¶ 8.)

to be their complete agreement." Progressive Int'l Corp., 2002 Del. Ch. LEXIS 91, at *25 (citing J.A. Moore Constr. Co. v. Sussex Assocs. L.P., 688 F. Supp. 982, 987 (D. Del. 1988).) Furthermore, the presence of an integration clause in the Affiliation Agreement demonstrates its independence and separateness from the LLC Agreement. See, e.g., Gildor v. Optical Solutions, Inc., 2006 Del. Ch. LEXIS 110, at *19 n.16 (Del. Ch. June 5, 2006) (because the parties included an integration clause in a Stockholders Agreement, they "expressed their intent in writing" that contemporaneous agreements entered into at the same time and relating to same subject matter cannot "be considered as one").

2. The Affiliation Agreement Does Not Incorporate by Reference the LLC Agreement or Annex A to the LLC Agreement.

If the parties actually intended for the terms of Annex A to the LLC Agreement to control what constitutes spending on the "Service" under Section 10 of the separate Affiliation Agreement, it would have been – as Network itself concedes – "very easy to say so." (See Pl. Br. at 18) (quoting Cent. Trust Co. of N.Y. v. Morton Trust Co., 200 N.Y. 577, 580 (1911).) The parties did not do so. It would run counter to Delaware rules of contract interpretation to find that the parties intended Section 10 of the Affiliation Agreement to "incorporate" Annex A to the LLC Agreement by reference, when the parties and their counsel made absolutely no reference to the LLC Agreement, much less to Annex A, in the Affiliation Agreement itself.

In interpreting contracts, Delaware courts will incorporate provisions of one agreement into another "where a written contract refers to another instrument and makes the terms and conditions of such other instrument a part of it." I.U. N. Am., Inc. v. A.I.U. Ins. Co., 896 A.2d 880, 886 (Del. Super. 2006) (citing Delaware's "doctrine of incorporation by reference").

> However, one of the well settled exceptions to this rule is this: – that an agreement will not be deemed to incorporate matter in some other instrument or writing except to the extent that the same is specifically set forth or identified by reference.

State v. Black, 83 A.2d 678, 681 (Del. Super. 1951) (citations omitted).[9] Network's cited cases applying Delaware law are in accord. See, e.g., Dow Chem. Canada Inc. v. HRD Corp., 656 F. Supp. 2d 427, 438 (D. Del. 2009) (finding the definition of the term "PE Wax" in a Development Agreement had the same meaning as defined in a separate Supply Agreement, both between the same parties, one of which governed the development phase and one of which governed the commercial phase of the parties' agreement, where the Development Agreement was "*incorporated by reference* into the Supply Agreement") (emphasis added).)[10]

3. Under Delaware Law, the Affiliation Agreement Would Not Be Interpreted With Reference to the LLC Agreement or Annex A to the LLC Agreement.

Network tries to get around Delaware law regarding incorporation by reference by arguing that the Affiliation Agreement and the LLC Agreement were both negotiated during April 2005 and executed on November 17, 2005, and, therefore, should be interpreted as a single agreement. The Delaware courts, however, will interpret separate agreements as a single contract only where they are "executed at the same time, by the same contracting parties, for the same purpose" and where there is the absence of anything that indicates a contrary intention. See Simon v. Navellier Series Fund, 2000 Del. Ch. LEXIS 150, at *28 & n.33 (Del. Ch. Oct. 19, 2000) (citing 11 WILLISTON ON CONTRACTS § 30.26 (4th ed.)). Here, the Affiliation Agreement and the LLC Agreement are separate, independent agreements, entered into by different

[9] Accord Hercules Inc. v. AMEC Va., 1999 Del. Super. LEXIS 102, at *15-16 (Del. Super. Feb. 12, 1999) (same); Star States Dev. Co. v. CLK, Inc., 1994 Del. Super. LEXIS 236, at *10-11 (Del. Super. May 10, 1994) (same); Pauley Petroleum, Inc. v. Cont'l Oil Co., 231 A.2d 450, 457 (Del. Ch. 1967) (same).

[10] The New York cases cited by Network also fail to support its claim that Section 10 of the Affiliation Agreement should "incorporate" Annex A of the LLC Agreement. In fact, Network misleadingly cites to the *dissenting opinion* in ITT Avis, Inc. v. Tuttle, 27 N.Y.2d 571, 576 (1970), as supporting its view, when the actual opinion of the Court of Appeals is completely at odds with Network's position. The Court of Appeals held, "in the absence of an arbitration clause in the option agreement itself, or some clear statement incorporating the arbitration clause contained in the employment contract, it is simply impossible to read these separate agreements as one to find the requisite intention to arbitrate the dispute which has arisen under the option agreement." Id. at 573 (emphasis added). The other New York cases cited by Network also fail to support its position. See Nau v. Vulcan Rail & Constr. Co., 286 N.Y. 188, 197 (1941) (contract between defendant and City of New York was specifically referenced in the contract with plaintiff); Davimos v. Halle, 60 A.D.3d 576 (1st Dep't 2009) (same).

corporate entities[11] for completely different purposes, and each contains a separate integration clause.[12]

The Delaware cases make clear that the fact that the Affiliation Agreement and the LLC Agreement arose out of the same overall transaction and were executed contemporaneously, standing alone, is an insufficient basis to infer that the two agreements are to be read as one or that Section 10 of the Affiliation Agreement was to be read with reference to Annex A of the LLC Agreement.[13] It is fundamental that any reference to a related agreement to interpret another agreement "can be employed only for the purpose of giving effect to the intention of the parties, and is not to be applied arbitrarily and without regard to the realities of the situation, when to do so would be contrary to the intention of the parties and would in fact avoid an essential part of the contract. . . . This does not mean that the provisions of one instrument are imported bodily into another, contrary to the intent of the parties." 11 WILLISTON ON CONTRACTS § 30.26; see also Huyler's v. Ritz-Carlton Rest. & Hotel Co. of Atlantic City, 1 F.2d 491, 492 (D. Del. 1924) (stating that the rule "is merely a rule of construction to give effect to

[11] The LLC Agreement identifies EchoStar Media Holdings Corporation ("EchoStar Media") and Rainbow Programming Holdings, LLC ("Rainbow Programming") "collectively as the 'Members'", and they are the only signatories to the LLC Agreement. Two separate corporate entities, EchoStar Satellite L.L.C. (referred to herein as "EchoStar") and Rainbow HD Holdings LLC (referred to herein as "Network"), are the only signatories to the entire Affiliation Agreement. (Def. Ex. 7, at 30.) Network's parent company, Rainbow Media Holdings LLC, also signed "[s]olely with respect to the most favored nations treatments afforded to EchoStar . . . ." (Id.)

[12] The LLC Agreement also contains an integration clause that refers to the "entire agreement among the Members," which are defined as EchoStar Media and Rainbow Programming. (Def. Ex. 56 at 40, § 10.3). Thus, by its express terms, the LLC Agreement does not constitute an agreement between EchoStar and Network. See Progressive Int'l Corp., 2002 Del. Ch. LEXIS 91, at *25.

[13] The fact that unexecuted copies of the Affiliation Agreement and the LLC Agreement were attached as exhibits to the Investment Agreement entered into in April 2005 and are referred to as part of the "Investment Transaction Documents" referred to in that Agreement does not support Network's argument. See Pauley Petroleum, 231 A.2d at 456-57. The Investment Agreement provided a mechanism for the future closing of various, separate agreements, including the Affiliation Agreement and the LLC Agreement, subject to certain conditions precedent. Once that closing occurred in November 2005, however, the Affiliation Agreement and the LLC Agreement would then become effective and operate separately according to their respective terms. (Rehg Aff. ¶ 6.) Moreover, the written integration clause in the Investment Agreement expressly states that the Investment Agreement and the Investment Transaction Documents "contain the entire agreement and understanding *among the Parties hereto*," which expressly does not include EchoStar, the party to the Affiliation Agreement. (Def. Ex. 55 § 8.06.)

the intent of the parties . . . considering several instruments as one is not the natural construction"); see Habets v. Waste Mgmt., Inc., 363 F.3d 378, 383 (5th Cir. 2004) (applying Delaware law; declining to incorporate by reference terms in an exhibit to a benefits plan document and stating "[w]e refuse to incorporate by reference terms which make a reasonable reading of the contract nonsensical and do not support the parties' reasonable intent"); Falcon Steel Co. v. Weber Eng'g Co., 517 A.2d 281, 285-86 (Del. Ch. 1986) (same).

Network is unable to point the Court to any language within the Affiliation Agreement or the LLC Agreement stating that the parties intended the two agreements to be treated as one. In fact, both agreements contain separate integration clauses, reflecting the parties' written intention that the two agreements should not be construed as a single contract. Gildor, 2006 Del. Ch. 110, at *19 n.16 (by including a written integration clause, parties expressed their intent that simultaneously executed agreements should not be interpreted together); see Rossi, 2008 Del. Ch. LEXIS 99, at *4-8.

Moreover, here the Affiliation Agreement and the LLC Agreement are between different entities and have different purposes: The Affiliation Agreement governs EchoStar's purchase and distribution of the television programming content making up the Service. (Def. Ex. 7.) The LLC Agreement, in contrast, controls the respective equity interests of EchoStar Media and Rainbow Programming in a Delaware Limited Liability Company. (Def. Ex. 56.) The two Agreements work independently of each other, and they contain no provisions for cross-default. The continuation of the LLC Agreement, which has a perpetual term (Def. Ex. 56, at 10, § 2.5), does not require the continuation of the Affiliation Agreement and vice versa. In fact, while the Affiliation Agreement was terminated over two years ago, the Members of Network continue to operate under the LLC Agreement.

Specifically, with respect to the purpose of Annex A to the LLC Agreement, on which Network bases its entire argument, the parties included Annex A in the LLC Agreement to address an issue presented by the operation of the LLC Agreement's non-dilution provision prior to that Agreement's Effective Date. As Network itself recognizes, by its express terms, Annex A applied solely during the limited six and a half month period between April 28, 2005, and November 17, 2005,[14] and was included in the LLC Agreement to prevent shutdown costs associated with closure of the Rainbow DBS business from being considered as part of the "Funding Capital Contribution Amount" used to trigger the non-dilution provision in Section 3.1 of the LLC Agreement. (Rehg Aff. ¶¶ 24-26; see also Deitch Dep. at 148:10-152:23; 198:09-201:04.) That intent is confirmed by the drafting history of the "Funding Date" provision in the LLC Agreement. (Rehg Aff. ¶¶ 27-41.)

If the parties had intended for the list of non-shutdown related expenditures in Annex A to govern the scope of permissible expenditures on the Service under Section 10 of the Affiliation Agreement, the parties or their counsel would have specifically included that language in either of the Agreements. Instead, without any reference to Annex A, On-Going Business Purpose, or any other part of the LLC Agreement, the parties specifically stated in the Affiliation Agreement that EchoStar had a right to terminate that Agreement:

> . . . if during any calendar year during the Term Network fails to spend $100 million US Dollars on the Service.

(Def. Ex. 7 at 23, § 10.) Sophisticated parties, represented by highly skilled legal counsel, entered into the Affiliation Agreement and tied EchoStar's right to termination under Section 10

[14] In its Rule 19-a Statement, Network concedes that the application of Annex A to the LLC Agreement is limited to this short transition period, stating that "[t]he LLC Agreement further provided that, for a period of time, RPH's contributions would not count toward this $500 million unless they were 'used for an On-Going Business Purpose' (as defined in Annex A to the LLC Agreement)." (Pl. R. 19-a St. ¶ 35 (emphasis added).) Thus, it is "nonsensical" to read this provision as applying to a termination provision in Section 10 applying to multiple years *after* the Effective Date of the LLC Agreement (i.e., November 17, 2005). See Habets, 363 F.3d at 383.

to spending on the Service, not to a separate Annex attached to another agreement among different entities. Network's claim that Annex A had any application to Section 10 of the Affiliation Agreement has no basis, and its attempt to rewrite the Affiliation Agreement on summary judgment must fail.[15]

The decision in Nat'l Union Fire Ins. Co. of Pittsburgh v. Clairmont, 231 A.D.2d 239 (1st Dep't 1997), is instructive here. There, the court rejected defendants' argument that an indemnification agreement was inseparable from and dependent upon various investment agreements executed around the same time, and, therefore, that the agreements had to be read together. Id. at 112. In so doing, the court noted that the agreements that defendants claimed were unitary were between different entities – a circumstance weighing heavily in favor of contractual separability – and for different purposes. Id. The investment agreements set forth the terms of defendants' participation in a limited partnership, while the indemnification

[15] Network's assertion that because the dollar figure of $500 million appears in both the Affiliation Agreement and the LLC Agreement, they must be referring to the same specific set of funds, is also demonstrably false based on a simple comparison of the Funding Capital Contribution Amount in the LLC Agreement and the Service Spending Requirement in the Affiliation Agreement. (Rehg Aff. ¶¶ 17-22.) They are completely different pots of money from different sources. The Funding Capital Contribution Amount would come solely from Rainbow Programming, and internal Cablevision documents reflect that the $500 million threshold was never expected to be met. (Def. Ex. 93, Cablevision Issue Summary Memorandum (Feb. 21, 2006); Def. Ex. 86, J. Liotta email (Apr. 28, 2005).) The Service Spending Requirement reflects a specific amount that Network must spend on the Service each calendar year. Otherwise, EchoStar had a right to terminate the Affiliation Agreement. In fact, Network's own filings with the IRS, reflecting $32 million less in capital contributions than claimed spending on the Service in 2007, show that it did not view the provisions as the same. (Def. Ex. 105, IRS Form 1065, 2007 Tax Return).

Moreover, Network's cited cases provide absolutely no support for its sweeping generalizations. See, e.g., Seahorse Marine Supplies, Inc. v. P.R. Sun Oil Co., 295 F.3d 68, 72 (1st Cir. 2002) (considering whether a superseding contract for delivery of fuel was subject to the Petroleum Marketing Practices Act [PMPA], the court looked to a preceding contract between the parties that was "substantially identical in all respects, with [one] exception" and found that the type of oil being provided did not change from fuels for use by land vehicles, which would be governed by the PMPA, to fuels for use by marine vehicles, which would not be governed by the PMPA); Smith v. Rowley, 34 N.Y. 367, 368 (1866) (finding an agreement to sell and deliver hops, where the vendee agreed to advance $125 to pay pickers, and at the same time advance to the vendor that amount, and took a note for the same, payable one day later, then the transaction may be treated as one and the same); In re Jones, 2004 WL 51281, at *3 (Bankr. C.D. Ill. Jan. 6, 2004) (rejecting a debtor's argument that he had paid off the balance on tools purchased from a SNAP-ON Tools dealer on credit, where a balance statement of $2,572.15 had been zeroed out by SNAP-ON Tools, and replaced two weeks later with a balance statement with the same $2,572.15 amount).

agreement protected the guarantor of defendants' obligation in the event that defendants' participation in the partnership terminated by reason of their default. Id. The court stated:

> While it is true that the indemnification agreement was one of a number of executed almost contemporaneously agreements by which defendants came to purchase their interest . . . , and that the indemnification agreement would not have been entered into but for defendants' investment, these circumstances alone do not justify the inference of contractual interdependence defendants would have drawn. Manifestly, one agreement may follow from and even has as its *raison d'etre* another and yet be independently enforceable. And, indeed, in the absence of some clear indication that the parties had a contrary intention, contracts manifesting separate assents to be bound are generally presumed to be separable.

Id. at 111-12 (citations omitted); Rosen v. Mega Bloks Inc., 2007 U.S. Dist. LEXIS 48479, at *12-13 (S.D.N.Y. July 6, 2007) ("The mere fact that a document is an 'integral part' of a larger transaction does not mean that any provision contained in that document must be applied to all other documents that are part of the same transaction. Nor is it dispositive that the contractual documents were all executed at the same time. Parties are free to enter into multiple contracts as part of a single transaction without the provisions in one contract governing another contract.")

* * *

Thus, under applicable Delaware law, Network's argument that Annex A should be incorporated into the Affiliation Agreement or used to limit or modify the language of Section 10 must be rejected. The Affiliation Agreement is a fully integrated agreement. The Affiliation Agreement not only fails to refer to, identify or incorporate Annex A, it makes no reference to the LLC Agreement whatsoever.[16] Nor do the Annexes to the LLC Agreement make any reference to the Affiliation Agreement. Furthermore, the Affiliation Agreement and the LLC

[16] Network cites to Sonitrol Holding Co. v. Marceau Investissements, 607 A.2d 1177, 1184 (Del. 1992), and argues that "[w]here . . . an annex to a contract contains a list that addresses a material issue in that contract, the list controls on that issue." (Pl. Br. at 21.) EchoStar does not dispute that, as described above, the purpose of Annex A was to specify what expenses apply to the non-dilution provision in the LLC Agreement prior to its Effective Date. (Def. Ex. 56 at 6.) That simply begs the question, however, whether the Court should interpret an annex in one contract as controlling a separate issue in another separate, stand alone agreement.

Agreement are between different corporate entities and have completely different purposes. Simply put, Network's "Hail Mary" argument is created out of whole cloth and directly conflicts with the Delaware rules of contractual construction.

D. THE EXTRINSIC EVIDENCE CITED BY NETWORK IS NOT MATERIAL AND DOES NOT SUPPORT ITS INTERPRETATION OF SECTION 10.

Network's contention that there is sufficient – and "undisputed" – extrinsic evidence to support its alternative construction of the Affiliation Agreement is patently incorrect. As discussed below, the actual contemporaneous evidence surrounding the formation of the Affiliation Agreement, is far from supporting, and in fact refutes Network's claimed construction of Section 10. In any event, Network's request that the Court consider extrinsic evidence and, on that basis, grant it summary judgment is inappropriate for two reasons.

First, given that both parties agree that the Affiliation Agreement is unambiguous, the Court may not consider the extrinsic evidence to interpret the terms of the Agreement. "If a contact is unambiguous, evidence beyond the language of the contract may not be used to interpret the intent of the parties or to create an ambiguity. This is certainly the case where sophisticated corporations are involved." Energy Partners, Ltd., 2006 Del. Ch. LEXIS 182 at *53; accord Eagle Indus. v. DeVilbiss Health Care, 702 A.2d 1228, 1232 (Del. 1997) ("If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity."); Rossi, 2008 Del. Ch. LEXIS 99, at *5-6 (where contract is unambiguous, the parties will be bound by its plain meaning).

Second, under substantive Delaware law, "[i]n a dispute requiring contract interpretation, summary judgment is appropriate only where the contract is unambiguous." R&R Capital, LLC v. Merritt, 2009 Del. Ch. LEXIS 161, at *11-12 (Del. Ch. Sept. 3, 2009) (emphasis added); O'Brien v. IAC/Interactive Corp., 2009 Del. Ch. LEXIS 154, at *12 (Del. Ch. Aug. 14, 2009)

(same). New York courts follow this same general rule. E.g., Ruttenberg v. Davidge Data Sys. Corp., 215 A.D.2d 191, 193 (1st Dep't 1995) ("when the meaning of the contract is ambiguous and the intent of the parties becomes a matter of inquiry, a question of fact is presented which cannot be resolved on a motion for summary judgment") (citations omitted); Digital Broad. Corp. v. Ladenburg, Thalmann & Co., 63 A.D.3d 647, 648 (1st Dep't 2009) (trial court "properly refused to grant summary judgment [. . . in that] the parties' agreement was ambiguous, leaving a triable issue of fact as to whether they intended the agreement to cover any and all sales of securities during the term of the agreement"). As this Court has previously noted:

> Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment. On the other hand, if it is necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a question of fact, and summary judgment should be denied.

Sokol v. Ventures Educ. Sys. Corp., 2005 N.Y. Misc. LEXIS 2696, at *11 (Sup. Ct., N.Y. County June 27, 2005) (emphasis added).[17]

In its own motion for summary judgment, EchoStar has argued that the Affiliation Agreement is unambiguous and that the Court should grant it summary judgment on Network's claims based on the language of the Agreement alone. EchoStar stands by that position. In an obvious effort to forestall that result, Network has filed this motion and, in support, served a 227 part Rule 19-a Statement and submitted over 180 exhibits. In response, EchoStar has had no choice but to file a lengthy Rule 19-a(b) Counter-Statement to dispute many of the "facts" asserted by Network and to demonstrate that the extrinsic evidence cited by Network does not support its purported construction of Section 10 of the Affiliation Agreement.

[17] Network cites to certain cases where courts have granted summary judgment even where they have determined that a contract was ambiguous. These cases suggest summary judgment may be appropriate when a court is presented with a situation where the moving party's record was not prima facie rebutted, as is required under Rule 56 of the Delaware Rules of the Court of Chancery or under C.P.L.R. 3212(b). See, e.g., Eagle Indus., Inc., 702 A.2d at 1232-33. That is not the case here.

Much of Network's so-called "evidence" has no bearing on Section 10 of the Affiliation Agreement – relating instead to matters occurring after the execution of the Affiliation Agreement and/or to negotiations regarding the LLC Agreement and EchoStar Media's non-dilutable equity investment in the LLC. See, e.g., Pl. Rule 19-a St. ¶¶ 117-124 (citing discussions about Network's "2005 Budget and Five-Year Plan," with no reference to the Affiliation Agreement); id. ¶¶ 105, 109, 110, 111, 113, 115-116, 126-131 (relating to EchoStar Media's due diligence for its investment in the LLC); id. ¶ 90 (memoranda and drafts relating to EchoStar Media's 20% interest in the LLC). As to Network's contention that the parties intended for Annex A of the LLC Agreement to be incorporated by reference into the Affiliation Agreement (albeit without any such reference being made), Network fails to cite to a single draft of the Affiliation Agreement that makes any reference to Annex A or to any other contemporaneous document making that connection. Instead, its "evidence" consists almost exclusively of the post hoc descriptions of what Network's executives now claim to have *thought* the Service Spending Requirement meant.[18]

Not only do their statements raise credibility issues that cannot be determined on summary judgment, the self-serving statements of Network's executives do nothing to evidence what the parties *actually* discussed or agreed upon. None of Network's witnesses could recall a specific discussion in which the parties expressly discussed that Section 10 of the Affiliation Agreement would be interpreted by reference to Annex A of the LLC Agreement. In contrast,

[18] See, e.g., Greenberg Dep. at 257:19-258:09 ("Q. And the Affiliation Agreement . . . it doesn't anywhere in the Affiliation Agreement refer to Annex A, correct? A. It wouldn't have to. Q. The answer to the question is it does not refer to it, correct? A. It does not refer to it. Q. And it doesn't refer to Annex B, correct? A. It doesn't and that was intentional."); Deitch Dep. at 242:10-243:03 ("Q. And did you as the lead lawyer for Rainbow on the Affiliation Agreement ever suggest to anyone that that schedule should be attached to the Affiliation Agreement? A. No. Q. Did you think it didn't need to be? A. I didn't think it needed to be. Q. You thought it was clear exactly what would be referred to when looking at the hundred million dollar spend in the Affiliation Agreement, that that would refer to the schedule in the LLC agreement? A. I did not have any ambiguity in my mind . . . .")

EchoStar witnesses recalled specific, contemporaneous discussions among the parties that the Service Spending Requirement was included to provide EchoStar with assurance of the quality of the programming content it was receiving under the Affiliation Agreement. (Rehg. Dep. at 85:14-86:15; Moskowitz Dep. at 156:06-157:23.)

Neither of the Delaware cases cited by Network support its contention that the subjective thoughts of one party to an agreement can be submitted as extrinsic evidence to create an ambiguity in an agreement – much less, to be used as "dispositive" evidence to resolve a purported ambiguity. See Eagle Indus., Inc., 702 A.2d at 1233 (holding because a contract was ambiguous, the case should be remanded to the Chancery Court to review it in light of extrinsic evidence); Interspiro USA, Inc. v. Figgie Int'l, Inc., 815 F. Supp. 1488, 1516-17 (D. Del. 1993) (after a three-day hearing, interpreting an ambiguous agreement based on which interpretation made "the most sense," the parties' negotiating history, and the witnesses' credibility).[19]

Finally, contrary to Network's assertions, there is substantial contemporaneous evidence showing that, at the time they negotiated the Affiliation Agreement, Network and EchoStar understood and agreed that "to spend on the Service" under Section 10 was limited to spending on the programming being delivered to EchoStar. For example, all of the drafts of the Affiliation Agreement exchanged by the parties consistently provide that Network had to spend $100 million *on the Service*, not on the overall business operations of Network, and make no reference

[19] Although Delaware law applies, New York courts have also long precluded consideration of a party's subjective thoughts when determining whether parol evidence supports a particular construction of an ambiguous agreement. See, e.g., Mencher v. Weiss, 306 N.Y. 1, 7-8 (1953). The New York cases cited by Network do not support its position that summary judgment can be granted in its favor based solely on the subjective thoughts of its own employees, especially when the other side does not share that view. See, e.g., Wing Ming Props. (USA.) Ltd. v. Mott Operating Corp., 561 N.Y.S.2d 337, 340 (Sup. Ct. N.Y. County 1990) (interpreting an ambiguous contract, looking to a party's *actions*—not its subjective thoughts); Evans v. Famous Music Corp., 1 N.Y.3d 452, 459-60 (2004) (interpreting an ambiguous contract, looking to the parties' history of payments and performance); Fed. Ins. Co. v. Ams. Ins. Co., 258 A.D.2d 39, 45 (1st Dep't 1999) (interpreting an ambiguous contract, looking to the parties having "*acted* consistently with their understanding" of the contract) (emphasis added).

to Annex A of the LLC Agreement. (Pl. Exs. 67, 96, 98, & 99.) After the parties incorporated the $500 million cap into the Service Spending Requirement, EchoStar added language to Section 10 to confirm that all expenditures toward the $500 million cap had to be "in the Service." (Rule 19-a Ctr. St. ¶ 139.) Contemporaneous internal memos prepared by Network for its senior management, including Cablevision CEO Jim Dolan, describing the status of negotiations specify that, under the Affiliation Agreement, Network was obligated to spend $100 million per year on the programming service being carried by EchoStar in every year. (Def. Ex. 79, J. Sapan Memo to J. Dolan and T. Rutledge (Apr. 21, 2005).) Over the course of the negotiations in April 2005, Network's finance department prepared budgets showing that, to meet the obligations under the Affiliation Agreement, Network would have to spend over $100 million per year on programming alone. (Rule 19-a Ctr. St. ¶ 109; Def. Exs. 64, 65, 66, 72, 85, 86, 87.) As noted above, EchoStar witnesses testified about specific conversations between EchoStar and Network executives in which the parties confirmed that the spending requirements in Section 10 of the Affiliation Agreement were intended to insure the quality of the programming content received by EchoStar. (Rehg. Dep. at 85:14-86:15; Moskowitz Dep. at 156:06-157:23.) EchoStar's witnesses recalled no relation between Annex A to the LLC Agreement and the Affiliation Agreement and, instead, testified that Annex A related to the allocation of cost for shutting down the Rainbow Satellite. (Rehg. Dep. at 118:25-119:24.)

Accordingly, if this Court were to find that the Affiliation Agreement is ambiguous, it cannot grant summary judgment in Network's favor based on the record before the Court. Not only does the extrinsic evidence cited to by Network not support its position, EchoStar disputes the inferences that Network seeks to draw from that evidence, which runs counter to the documented negotiation history of the Affiliation Agreement (as well as the LLC Agreement). (Rule 19-a Ctr. St. ¶¶ 21-22 & 68.)

E. NETWORK DID NOT SPEND THE REQUISITE AMOUNT "ON THE SERVICE".

In moving for summary judgment on its claim that it spent at least $100 million on the Service in calendar year 2006, Network tellingly does not cite to or rely upon any of its own internal financial records to establish its actual spending. (See Pl. Br. at 24.) This is not surprising given that, as shown by EchoStar's motion for summary judgment, Network's records establish that it did not comply with the Service Spending Requirement.

Instead, as support that it met its spending obligations under Section 10, Network relies exclusively on the Affidavit of Kathy Knight submitted by EchoStar in connection with the preliminary injunction motion[20] and emails from Ms. Knight stating that the books and records she was shown during the October 2007 audit were well organized. In fact, Ms. Knight's Affidavit refutes any claim that Network spent $100 million on the Service in 2006. "Based on our audit, we could not confirm that Network spent $100 million on either the actual programming shown on Network's HD channels (the Service) or on Network as a whole for calendar year 2006. Our testing of Network's books and records confirmed cash expenditures of $59.1 million on the actual programming shown on Network's HD channels (the Service), . . ." (Pl. Ex. 33, Knight Aff. ¶ 16.) Moreover, Ms. Knight stated that, based on her review of the books and records submitted by Network during the audit, she could only confirm a total of $90.1 million of spending on the business operations of Network as a whole for 2006. (Id.) In

[20] As a purely legal matter, Network cannot obtain summary judgment on the basis of an audit without some basis to claim that the results of the audit would be binding on either party. Audits conducted under the Affiliation Agreement are not binding on either party. (Def. Ex. 7 at 18-19, § 7(b)(ii).) New York courts have held that audits should be treated as final and binding only where the parties have so agreed. See, e.g., Mona Camhe-Marcille v. Sally Lou Fashions Corp., 289 A.D.2d 162, 162-63 (1st Dep't 2001) (petitioner estate attempted to challenge valuation of stock notwithstanding shareholders agreement directing that valuation would be "final and binding"). Network's two cited cases regarding the binding nature of audits are not on point. See Am. Airlines, Inc. v. United States, 551 F.3d 1294, 1305-06 (Fed. Cir. 2008) (case involving government-run audits where audit had been "designed by the government auditors" and when same types of audits had been conducted "regularly and repeatedly"); May v. Wilcox Furniture Downtown, Inc., 450 S.W.2d 734, 738-39 (Tex. Civ. App. 1969) (case involving court-ordered audit and application of judicial estoppel).

fact, the evidence submitted by EchoStar in support of its motion for summary judgment, which is consistent with Ms. Knight's statements, establishes as a matter of law that Network did not spend $100 million "on the Service" during calendar year 2006.[21]

Network also repeats the argument it unsuccessfully raised on its motion for preliminary injunction that because EchoStar carried only fifteen VOOM Channels, the Service Spending Requirement in Section 10 was reduced from $100 million to $82 million. As discussed in EchoStar's brief in support of its motion for summary judgment, that contention has no basis in fact. (Def. Br. at 16, fn. 8.) Any reduction in the Service Spending Requirement in Section 10 would occur only if Network launched a number of channels on EchoStar's DISH Network under the Affiliation Agreement and then subsequently permanently reduced that number of channels at a later date. It is undisputed that EchoStar initially carried ten of the VOOM Channels and that, on February 2006, Network and EchoStar *agreed to increase* that number to fifteen VOOM Channels. The number of VOOM Channels carried on EchoStar under the Affiliation Agreement was never reduced, much less permanently reduced. Moreover, Network's own documents acknowledge that the Service Spending Requirement in Section 10 for the fifteen VOOM Channels carried on EchoStar was $100 million and was never reduced. See Def. Ex. 95, J. Liotta emails (March 9, 2006) (noting "[i]ts a very interesting point you bring up that the $100 million doesn't get reduced to $38 million if we start the calculations with 15 instead of 21 channels."). In any event, Ms. Knight's Affidavit cited to by Network does not even support its claim that it spent $82 million on the Service during 2006, as Ms. Knight stated

[21] For example, Network ignores the fact that EchoStar disputes that portions of the $102.9 million Network claimed that it spent during 2006 was in fact spent on the domestic programming delivered to EchoStar as the Service, as opposed to international programming that is not part of the Service. (Rule 19-a Ctr. St. ¶¶ 21 & 153.) While this dispute does not preclude summary judgment in favor of EchoStar, there are clear issues as to whether the "unrelated, direct spending on [Network's so-called] negligible international operations" that Network claims to have removed from the $102.9 million represented to the Court as its 2006 domestic spending, in fact captures anywhere approaching the true amount of expenditures on the international operations. (Id.)

she was able to confirm only that there were "cash expenditures of $59.1 million on the actual programming shown on Network's HD channels (the Service), including the expenses for in-house production of content, cash payments for commissioned productions and other program acquisition costs." (Pl. Ex. 33, Knight Aff. ¶ 16.)

CONCLUSION

For the foregoing reasons, the Court should deny Network's motion for summary judgment.

Dated: New York, New York
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