

In “response” to NPS’s Request for Hearing, Plaintiffs filed an eleven-page brief presenting new arguments and admittedly inadmissible “evidence” (including materials apparently downloaded from an internet discussion group) in support of their Motion to Show Cause. Plaintiffs’ Response also asserts, almost in passing, that a hearing is unnecessary—a position that Plaintiffs have since abandoned. Dkt. 1099 (Plaintiffs’ Request for Hearing). Plaintiffs’ Response further argues that discovery is needed. *Via* a footnote in yet another Supplemental Filing, Plaintiffs additionally urge the Court to enter a temporary restraining order against NPS.

Plaintiffs’ discovery demands and submissions are without merit. Plaintiffs’ half-hearted request for a TRO is improper and improvident. Plaintiffs are attempting to broaden their injunction against EchoStar to bar NPS, an innocent non-party, from providing legal services to customers who want them. Their tactics (thus far) have included 1) misrepresenting the record, 2) quoting publications from NPS and EchoStar out of context, 3) relying on anonymous statements on internet “blogs”, and 4) attempting to bully NPS by moving personally against its president, Michael Mountford, and threatening Decisionmark with separate contempt proceedings if it continues to perform under its contract with NPS.³

In sum, Plaintiffs have launched the legal equivalent of total war against NPS, with all the secondary effects and destruction that such implies. The winner, if Plaintiffs succeed, will not be the public; indeed, Plaintiffs are no longer seeking an injunction against a wrongdoer. Plaintiffs 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

³ In fact, this last act is perhaps the most despicable to date. Decisionmark is the company that verifies that NPS only provides distant network services to eligible customers. Out of fear generated by Plaintiffs’ threats, Decisionmark has terminated its services to NPS—an act itself that constitutes a breach of an agreement between Decisionmark and NPS.

competitor in this market, which is owned by News Corporation (also the owner of Plaintiff Fox Broadcasting Company). Plaintiffs' most recent filing suggests that this is the only result that fulfills Congress's intent. Dkt. 1102 at 9-10.⁴ Respectfully, not the interests of Congress, nor those of consumers, nor those of competition, nor those of justice are advanced by barring an independent, innocent company from providing legal services in order so that one of Plaintiffs' sister corporations can have a monopoly.

Plaintiffs have dragged NPS into their lengthy (and hard-fought) dispute between Plaintiffs and EchoStar *in medias res*. NPS was not a party to the underlying litigation and has never had its day in Court. Moreover, Plaintiffs' seemingly endless filings continue to ignore the *test* for whether this Court may find NPS in contempt of an injunction that is not against it—*viz.*, whether NPS is acting “in active concert or participation with” EchoStar to violate the injunction. Fed. R. Civ. P. 65(d). There is *no* evidence in any of Plaintiffs' papers that NPS is facilitating an illegal act by EchoStar, or that EchoStar is otherwise eluding the full effect of the injunction against it. NPS has done nothing wrong. Plaintiffs actually seek a modification of the injunction to preclude anyone—save Fox's sister corporation, DirecTV—from providing distant network programming to eligible customers of EchoStar.

II. ARGUMENT.

Plaintiffs must prove by clear and convincing evidence that NPS is acting in active concert with EchoStar to violate the injunction entered by this Court. Fed. R. Civ. P. 65(d); *Jordan v. Wilson*, 851 F.2d 1290, 1292 (11th Cir. 1988); *cf. Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 112 (1969). Plaintiffs must show that the permanent injunction

⁴ NPS will respond to Plaintiffs' novel reading of the Copyright Act in an appropriate response. Dkt. 1102 at 9-10. Suffice it to say, there is *no* provision in the Copyright Act that bars an innocent company from competing for deserving customers of distant network programming (*see* 17 U.S.C. § 101 *et seq.*), and the negative inference that Plaintiffs tease out of a different statute is neither the only inference that might be drawn nor the correct one. *Id.* (discussion 47 U.S.C. § 339(a)(2)(C)).

clearly and unambiguously applied to NPS; NPS violated the permanent injunction; and NPS had the ability to comply with the injunction. *Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1296 (11th Cir. 2002); *see also Eli Lilly & Co. v. Premo Pharm. Labs., Inc.*, 843 F.2d 1378, 1381 (Fed. Cir. 1988 (noting that “successors or assigns” come within the scope of an injunction only if they are “instrumentalities through which the defendant seeks to evade an order” or are “in active concert or participation” with defendants “in violation of an injunction”)).

A. Plaintiffs’ Request That The Court “Clarify” The Permanent Injunction, And Request For Discovery, Are Admissions They Have Not Met Their Burden.

Plaintiffs have requested that the Court “clarify” its Permanent Injunction and issue a “clarification”—in fact, a *modification*—of the permanent injunction. In order to hold NPS in contempt, however, Plaintiffs must prove by “clear and convincing evidence” that “*the order was clear and unambiguous.*” *Riccard*, 307 F.3d at 1296 (emphasis added, citations omitted)). An order that even Plaintiffs concede needs “clarification” to apply to the present circumstances is not “clear and unambiguous.” Moreover, Plaintiffs’ Alternative Motion seeking such clarification would retroactively make NPS’s conduct illegal—a serious violation of NPS’s due process rights, which is why NPS is preparing papers to bar such action in this case.

Plaintiffs’ request for discovery also shows that the relief sought by Plaintiffs in their Emergency Motion is without basis. First, Plaintiffs have no right to discovery, nor have they moved for that right. They instead present their discovery request (and “plan”) for the first time in a purported “Response” to NPS’s Rule 7.1(B) Notice. Plaintiffs’ claims that the Court need not even hold a hearing on their Emergency Motion but should simply find NPS in contempt are also fundamentally inconsistent with their claim that, if a hearing is held, Plaintiffs need discovery. If Plaintiffs can urge the Court to hold a nonparty in contempt in their papers based on nothing but the “evidence” that they have presented, Plaintiffs can certainly make the same

arguments to the Court in person. Finally, Plaintiffs' primary reason for seeking discovery—their arguments regarding an alleged "list" of eligible EchoStar customers—are without merit, as discussed below.

If the Court is inclined to grant *any* discovery, however, NPS requests that the discovery be two-way. NPS is entitled to discover what facts, if any, support Plaintiffs' claims it has committed serious wrongdoing; that support Plaintiffs' bald claims that Mr. Mountford should be held individually in contempt of Court; and Plaintiffs' communications regarding the present attempt to bar NPS from this market.

B. Plaintiffs Cannot Meet Their Substantial Burden That The Injunction Precludes NPS From The Activities In Question.

Plaintiffs cannot meet their burden that NPS and Mr. Mountford are "acting in concert" with EchoStar to violate the injunction. Plaintiffs do not, because they cannot, dispute that the services NPS seeks to provide to EchoStar's former customers (and others) are entirely lawful. Plaintiffs do not, because they cannot, dispute that EchoStar and NPS are separate companies that entered into an arms-length business transaction. Plaintiffs do not, because they cannot, dispute that persons who contract with NPS for distant network services will be *NPS's* exclusive customers for those services—not EchoStar customers. Plaintiffs do not, because they cannot, dispute that EchoStar had nothing to do with developing the distant network pricing or packages being sold by NPS. Plaintiffs do not, because they cannot, dispute that EchoStar is not sharing in any profits or revenues from NPS's provision of distant network services—or, indeed, directing NPS in any way. And Plaintiffs do not, once again because they cannot, dispute that NPS has sole control over what it chooses to transmit to its customers.

Rather, Plaintiffs set forth their own laundry list of purportedly "undisputed" facts. These recitations, however, are either irrelevant or seriously misstate the evidence. Plaintiffs

argue that NPS's lease of satellite transponder space from EchoStar shows that NPS is acting "in active concert" with EchoStar. They propose NPS could have leased space on some other satellite. In fact, the only practical way for NPS to provide legal distant network programming to former EchoStar customers is to lease space on an EchoStar satellite; otherwise, these customers would be required to go out and buy a completely new satellite dish and receiver in order to receive the handful (usually, between 1 and 3) of distant network channels that they are eligible to receive.⁵

Plaintiffs also ignore that EchoStar has no input whatsoever in NPS's choice of programming. EchoStar is acting as a common carrier and leasing, at a market rate, a transmission band for NPS to utilize as it sees fit. *See also generally* EchoStar's Nov. 30, 2006 Opposition (Dkt. 1073).

Plaintiffs further provide the Court with downloads from an Internet discussion group (a blog) to supposedly demonstrate that NPS is somehow colluding with EchoStar. First, Plaintiffs suggest NPS is only serving former EchoStar customers. This assertion is false. NPS is willing to—indeed, wants to—serve *any* eligible distant networks customer. That is, in point of fact, NPS's business. NPS neither limits itself to former EchoStar customers, nor would it make any business sense for it to do so, paying as it does a flat, long-term market rate for the transponder space itself. Plaintiffs' reliance on a series of pseudonymous blog postings by alleged former customers of EchoStar—postings Plaintiffs themselves concede are not admissible evidence—is wholly misplaced.⁶

⁵ Doubtless, Plaintiffs would much prefer that these customers be forced to buy a new dish and receiver in order to receive distant network programming because it would mean that their only realistic option would be to buy that new dish and receiver from DirecTV. Indeed, Plaintiffs' latest filing all-but-admits that this is Plaintiffs' goal. *See* Dkt. 1102.

⁶ NPS does not call them "alleged former customers" of EchoStar to be coy. Individuals may post on a blog under their real name, a pseudonym, or anonymously—as shown in EchoStar's Exhibit 12 itself.

C. Plaintiffs' Request For A Temporary Restraining Order Should Be Denied.

Plaintiffs' request for a TRO should also be denied. "A preliminary injunction is 'an extraordinary and drastic remedy' and is 'not to be granted unless the movant "clearly established the burden of persuasion" as to the four prerequisites.'" *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1231 (11th Cir. 2005) (quoting *United States v. Jefferson County*, 720 F.2d 1511, 1519 (11th Cir.1983)). A Plaintiff must show that:

(1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.

Id. (citations omitted).

Plaintiffs can meet *none* of these burdens:

(1) Plaintiffs concede they do not have a substantial likelihood of success on the merits by admitting, even under their erroneous view, the Court's injunction is unclear. EchoStar and NPS have also submitted substantial evidence that Plaintiffs are seeking to expand the Court's Permanent Injunction beyond any legitimate bounds.

(2) Plaintiffs submit no evidence whatsoever of the injury to them, much less an irreparable one: they merely assert they will be injured.

Moreover, several of these former customers have an agenda suspiciously close to that of Plaintiffs'. For instance, Plaintiffs prominently feature a post from "Greg Bimson" in their Response at 7. Mr. Bimson repeats a post of another (pseudonymous) poster from a different (unidentified) forum, and then adds:

First come the strings, then come the woodwinds, and then the brass followed by the percussion.

"in active concert"

To suggest that Mr. Bimson is in Plaintiffs' corner is to put it mildly; more likely, Mr. Bimson has an interest in seeing the Court bar NPS from the market, which neither he nor Plaintiffs have disclosed.

(3) Given Plaintiffs do not dispute that NPS is providing wholly legal services to customers who want them, paying all copyright fees they are due, and Plaintiffs raise no alarm that these same customers might receive the same services from DirecTV, it is not clear how Plaintiffs are even being injured.⁷ If the Court enters a TRO, however, the injury to NPS—a relatively small company—will be enormous. NPS will be required to breach or void thousands of its contracts with new customers. Its credibility in the marketplace will be destroyed, and its financial losses are immediate and real. *See* Mountford Decl., submitted with NPS’s Opposition.

(4) The public interest is also strongly against Plaintiffs’ proposed TRO. Again, NPS is an independent company providing legal services to customers who are entitled to them under the law and would be otherwise unserved. NPS, and the customers it is seeking to serve, did nothing wrong. They are entitled to the services NPS seeks to provide them. NPS should be allowed to compete for their business.

D. NPS Requested And Obtained From EchoStar A List Of Customers In Order To Determine Eligibility As “Unserved Households” As Part Of Its Due Diligence In Negotiating The Lease Agreement With EchoStar.

Plaintiffs speculate that “there are many reasons to believe that EchoStar provided its distant-signal subscriber list to NPS to assist NPS in carrying out the joint plan to defeat the Permanent Injunction.” Response at 2. This is not true. EchoStar did not provide any subscriber list to NPS through Decisionmark. Declaration of Michael Mountford (Ex. 1) at ¶¶ 5-10. EchoStar did not provide NPS with any analysis of whether EchoStar’s customers are eligible to

⁷ The injunction prohibits EchoStar from providing distant network services because EchoStar was providing distant programming to ineligible subscribers. As noted, however, EchoStar is out of the distant network services business. NPS is an independent company that has been in existence more than ten years and has never been accused of providing distant network services to ineligible customers. Indeed, its only alleged wrongdoing here is to lawfully serve former, deserving, qualified customers of EchoStar.

receive distant network programming. *Id.* NPS, not EchoStar, solely determines whether any of NPS's customers are eligible to receive such programming. *Id.* at ¶ 10.

Rather, in connection with NPS's due diligence and evaluation of whether to attempt to take advantage of the business opportunity presented by the Permanent Injunction to compete for EchoStar's former customers of distant network programming, NPS requested that EchoStar provide it with limited customer data to allow NPS to judge the potential market for such services. *Id.* at ¶¶ 3-5. EchoStar provided NPS such data pursuant to a Non-Disclosure Agreement. *Id.* at ¶ 3 (attaching November 21, 2006 Non-Disclosure Agreement between EchoStar and NPS as Exhibit A thereto). As described in the Non-Disclosure Agreement, the customer data was provided to NPS for the "limited purpose of testing and building the Company's [NPS's] internal systems." *Id.* at ¶ 4, Decl. Ex. A at ¶ 1. The customer data provided to NPS included names, addresses, and telephone numbers. *Id.* at ¶ 4. It did not include any programming information. The data provided related to customers located in markets in which EchoStar does not provide any local network programming or in which EchoStar does not provide local programming for all four of the networks. *Id.* at ¶ 5. There was no reason for NPS to have data related to all of EchoStar's customers because there was a limited market for distant network customers. The data did not provide any information as to whether customers were, in fact, eligible to receive distant networks under 17 U.S.C. § 119. *Id.*

Pursuant to an agreement dated November 28, 2006, NPS contracted with Decisionmark to have Decisionmark determine the eligibility of the EchoStar customers for lawful treatment under the Satellite Home Viewer Extension and Reauthorization Act (SHVERA). *Id.* at ¶ 6 (the November 28, 2006 Agreement for Services between Decisionmark and NPS is Exhibit B thereto). NPS paid Decisionmark for that processing. *Id.* at ¶ 6, Decl. Ex. B at § C-1.

NPS has not used the eligibility processing performed by Decisionmark to directly or indirectly contact any EchoStar customers. *Id.* at ¶ 11. NPS has not shared the results of the eligibility processing with EchoStar; indeed, that is NPS's exclusive commercial work product, for which NPS paid. *Id.* If a former EchoStar customer contacts NPS, NPS may access the batch file provided by Decisionmark to determine that customer's eligibility for distant network signaling, or NPS will query Decisionmark in real time. Either method is a lawful act intended to ensure that NPS is, and remains, in full compliance with the law. *Id.* at ¶¶ 11-12. The data provided to NPS does not change the fact that, under the lease agreement, EchoStar will *not* qualify consumers for access to distant network programming, will *not* activate or de-activate subscribers, and will *not* earn any revenue from that business. NPS has the sole right to use the leased transponder to transmit any video programming it desires.

II. CONCLUSION.

NPS requests that Plaintiffs' motions be denied and a hearing promptly scheduled.

Dated this 7th day of December, 2006.

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