

SCANNED

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
VOOM HD HOLDINGS LLC,

Plaintiff,

- against -

ECHOSTAR SATELLITE L.L.C.,

Defendant.
-----X

: Index No. 600292/08

: Hon. Richard B. Lowe III

: **FIRST AMENDED COMPLAINT**

: **NEW YORK
COUNTY CLERK'S OFFICE**

: **MAY 28 2008**

: **NOT COMPARED
WITH COPY FILE**

Plaintiff VOOM HD Holdings LLC f/k/a Rainbow HD Holdings LLC ("VOOM HD"), by its attorneys, as and for its First Amended Complaint against EchoStar Satellite L.L.C. n/k/a Dish Network L.L.C. ("EchoStar"), alleges as follows:

NATURE OF THE ACTION

1. This is an action seeking damages for breach of contract arising out of the improper and wrongful termination by EchoStar of a multi-billion dollar, 15-year distribution agreement with VOOM HD. EchoStar is one of the two main direct-to-home providers of satellite television programming to residential subscribers, including high-definition ("HD") programming on its "Dish Network." VOOM HD owns and operates a suite of 15 HD channels known as VOOM.

2. Until recently, EchoStar distributed VOOM to its television subscribers as part of its basic HD programming package pursuant to the terms of a November 17, 2005 affiliation agreement (the "Affiliation Agreement") between the parties. Under the contract, EchoStar paid VOOM monthly affiliation fees that were calculated on a per-subscriber basis for each subscriber receiving VOOM. That fee was \$3.25 per month per HD subscriber receiving VOOM in the first

year of the contract, and increased annually thereafter until it reached \$6.43 per month per HD subscriber receiving VOOM in the final year of the contract. Since 2005, VOOM HD made substantial investments in VOOM.

3. The Affiliation Agreement allowed VOOM HD to capitalize on a unique opportunity to enter into the nascent and rapidly-growing HD programming industry and to emerge as a significant player in this profitable market. But the deal made sense economically only if the parties agreed to partner over an extended period of time. As VOOM HD recognized, under Section 10 of the Affiliation Agreement, it would have to spend in the early years up to \$100 million annually on the VOOM service toward a \$500 million investment, while operating at a substantial loss. Honoring its obligations, and in anticipation of the contract's long-term benefits; since April 2005, when the parties made their initial agreement, VOOM HD has already spent more than \$300 million on the VOOM service, including approximately \$102.9 million in 2006 and \$114 million in 2007.

4. This early investment, however, would have paid off impressively for VOOM HD over time as a result of growth in EchoStar's HD subscription base, and, thus, the amount of subscriber fees that VOOM HD would receive. With EchoStar's HD subscriber base already having expanded from approximately 20,000 at the end of 2005 to approximately 1.3 million at the end of 2007, and its HD subscriber base projected to grow to more than 11 million by the end of the term of the contract, VOOM HD was expected to start turning a profit as early as 2009, and generate billions of dollars in revenue over the life of the Affiliation Agreement.

5. However, after (i) wrongfully threatening to terminate the Affiliation Agreement in June 2007 based on activity that took place in 2006, (ii) electing to perform the Affiliation Agreement for the next five months and exercising no purported right of termination, (iii)

asserting yet again a right to terminate in November 2007 based on the same conduct from 2006, (iv) electing to perform the Affiliation Agreement for two more months and exercising no purported right to termination, (v) announcing that EchoStar would instead unilaterally change the way in which VOOM was distributed to EchoStar's HD subscribers in a manner indisputably prohibited by the Affiliation Agreement, (vi) receiving VOOM HD's objection to such an impermissible change in distribution, and (vii) advising VOOM HD in late January 2008 that it planned to notice a termination of the Affiliation Agreement and drop VOOM from the air, the Affiliation Agreement ultimately was improperly terminated by EchoStar on or about May 13, 2008 when EchoStar took VOOM off its Dish Network.

6. Since the middle of 2007, EchoStar had been dissatisfied with its payment obligations under the Affiliation Agreement, and tried to fabricate a basis for avoiding its commitments to VOOM HD. In particular, EchoStar manufactured various alleged breaches of the Affiliation Agreement that would give rise, according to EchoStar, to a termination right under the Affiliation Agreement. But these vague and often unspecified claims of breach were patently baseless and were conceived merely as pretext for pressuring VOOM HD to relinquish its valuable and enforceable contract rights. Indeed, EchoStar has candidly told VOOM HD on more than one occasion that EchoStar needed to change the deal it struck under the Affiliation Agreement, and that EchoStar would find means to do so.

7. To the limited extent that EchoStar ever explained its assertions of breach, it focused on VOOM HD's spending obligations under Section 10 of the Affiliation Agreement. Under Section 10 of the Affiliation Agreement, VOOM HD agreed to spend \$100 million annually on a 21-channel version of VOOM up to an aggregate amount of \$500 million. Section 10 also provided that, if the number of channels on VOOM was permanently reduced, the annual

spending requirement would decrease commensurately pursuant to a prescribed formula. Because the number of VOOM channels was reduced from 21 to only 15, the spend requirement, pursuant to the formula, was no more than \$82 million. Failure to achieve the required spending threshold was subject to the broad cure provision in Section 10.

8. In its June 20, 2007 letter to VOOM HD, EchoStar declared that VOOM HD had failed to meet its Section 10 spending obligation. EchoStar, however, did not offer one word of explanation as to the nature or amount of the alleged shortfall. Nor was EchoStar's claim plausible. As EchoStar is well aware from documentation supplied to it by VOOM HD, VOOM HD in fact spent \$102.9 million on VOOM in 2006, not only achieving the requisite threshold, but exceeding it by millions of dollars, if not tens of millions.

9. In any event, despite asserting an alleged right to terminate for the first time in June 2007, EchoStar did not in fact attempt to terminate the Affiliation Agreement, but elected to proceed with the Affiliation Agreement for the next *seven months*. In 2007, VOOM HD spent another \$114 million in *new dollars* on VOOM – including \$65.5 million after June 2007 – in reliance on EchoStar's continued performance of the contract. Moreover, in October 2007, EchoStar subsequently conducted an in-person audit of VOOM HD's annual spending and found no issues.

10. Nevertheless, in a November 16, 2007 letter, EchoStar advised VOOM HD that it would terminate on the basis of VOOM HD's alleged spending shortfall unless VOOM HD consented to EchoStar carrying VOOM after February 1, 2008 "on a 'tiered' basis, as determined by EchoStar in its discretion," including in ways that are clearly forbidden under the Affiliation Agreement. In that letter, EchoStar merely claimed that VOOM HD's 2006 spending was deficient because it included certain allocated overhead expenses. EchoStar did not identify the

particular amounts or types of disputed expenses, or suggest that there was any shortfall attributable to anything other than the purported improper allocations of shared overhead expenses.

11. On January 5, 2008, VOOM HD reiterated in writing to EchoStar that it would not agree to EchoStar's unilateral and impermissible re-tiering of VOOM. Further, VOOM HD reminded EchoStar that such re-tiering was squarely prohibited by the Affiliation Agreement. Undeterred, EchoStar continued to press ahead with its plan to re-tier VOOM improperly.

12. Then, on January 24, 2008, VOOM HD representatives traveled to EchoStar's offices in Colorado in another effort to resolve the parties' dispute. During the meeting, EchoStar suddenly declared that it had abandoned its plan to re-tier VOOM. Instead, EchoStar issued an ultimatum: it intended to notice a termination of the Affiliation Agreement and take VOOM off the air entirely, effective February 1, 2008, unless VOOM HD agreed to a 30-day "standstill" period during which VOOM would be re-tiered. EchoStar further stated that it reserved its right to drop VOOM again if a new deal acceptable to VOOM was not reached during such interim period.

13. On January 28, 2008, VOOM HD wrote to EchoStar to reaffirm its position that EchoStar had no right whatsoever to terminate the Affiliation Agreement.

14. On January 30, 2008, EchoStar wrote to VOOM HD informing it that "EchoStar hereby terminates the [Affiliation] Agreement effective February 1, 2008." EchoStar never provided VOOM HD with proper notice or the opportunity to cure any alleged breach as required under Section 10 of the Affiliation Agreement. Before it noticed its termination of the Affiliation Agreement on January 30, 2008, EchoStar never provided VOOM HD with any other

written explanation for its alleged basis to terminate the contract other than what it stated in its November 16, 2007 letter.

15. On February 1, 2008, EchoStar re-tiered VOOM without VOOM HD's consent. Before February 1, EchoStar offered VOOM to its HD subscribers as part of its single, exclusive HD programming package. On February 1, EchoStar established multiple HD programming packages. EchoStar placed the vast majority of its HD programming – not including VOOM – on its \$10 basic, entry-level HD package known as “dishHD Essential.” Meanwhile, EchoStar repositioned or “re-tiered” VOOM with only a few other channels onto its less-widely distributed tier known as “dishHD Ultimate” for an additional \$10.

16. On February 4, 2008, VOOM HD formally notified EchoStar by letter that the re-tiering violated EchoStar's carriage commitments, and constituted a material breach of the Affiliation Agreement. In its letter, VOOM HD provided EchoStar with notice of its material breach and informed EchoStar that it would have an opportunity to cure such breach consistent with the terms of Section 10.

17. On or about May 13, 2008, EchoStar terminated the Affiliation Agreement by dropping 10 of the VOOM channels from the air, and publicly announcing that it would drop the other five channels as soon as possible. Accordingly, VOOM HD sent EchoStar a letter on May 13, 2008, urging EchoStar to reconsider its ill-advised and wrongful termination and to restore VOOM to its proper carriage on EchoStar's Dish Network. Otherwise, VOOM HD advised EchoStar that it would seek to recover the in excess of one billion dollars in damages that it will suffer as a result of EchoStar's improper termination. However, EchoStar dropped the other five VOOM channels from the air shortly thereafter. As of May 14, 2008, EchoStar no longer carried

VOOM on its Dish Network. EchoStar has not paid VOOM HD for its carriage of VOOM since February 1, 2008.

18. EchoStar's termination was clearly improper for several reasons. First, VOOM HD unquestionably met its spending threshold under Section 10 by spending \$102.9 million on VOOM in 2006. The plain language of Section 10 provides that VOOM HD must "spend" a specified amount up to \$100 million "on the Service." Section 10 does not restrict the scope of VOOM HD's expenditures on the VOOM service that count toward satisfying the spend requirement, let alone limit them exclusively to direct programming expenses. EchoStar may now claim that VOOM HD failed to satisfy its 2006 spend requirement because VOOM HD spent only \$59.1 million on such expenditures in 2006. Not only is EchoStar's claim based on an incorrect interpretation of Section 10, but EchoStar never provided such an explanation as its purported basis to terminate the Affiliation Agreement in either its November 16, 2007 letter or its January 30, 2007 notice of termination. EchoStar failed to do so even though it had known that fact, at least, since July 2007 when VOOM HD sent it an itemization of its 2006 spending.

19. Second, pursuant to the express terms of Section 10, VOOM HD's annual spending threshold was, at a maximum, \$82 million – not \$100 million. The decrease in the spending requirement resulted from the reduction in the number of channels comprising VOOM from 21 to 15 before EchoStar launched VOOM.

20. Third, EchoStar's purported right to terminate was subject to the notice and cure requirements under Section 10. EchoStar never provided VOOM HD with sufficient notice regarding the specific nature of any spending deficiency, including any shortfall attributable to the allocation of certain overhead expenses. In any event, any possible spending shortfall for 2006 resulting from such allocations had already been cured, or should have been deemed cured,

pursuant to Section 10 because VOOM HD spent \$114 million on VOOM in 2007 and took reasonable steps to prevent a future shortfall attributable to such allocations. VOOM HD also made it clear to EchoStar that it was prepared to cure any such spending shortfall consistent with the terms of the Affiliation Agreement. Nor did EchoStar ever provide VOOM HD with proper written notice that VOOM HD allegedly had violated its spend requirement by spending only approximately \$59.1 million on VOOM's direct programming expenses, or an opportunity to cure such purported deficiency.

21. Fourth, despite asserting an alleged right to terminate in June 2007, EchoStar elected to continue the contract by performing for seven months under its terms and reaffirming it, and that election bound EchoStar to performing, not terminating, the contract.

22. EchoStar's unilateral decision to re-tier VOOM on February 1, 2008 also unquestionably was a violation of the Affiliation Agreement. Under the core provisions of the Affiliation Agreement, EchoStar was obligated to (1) distribute VOOM "as part of its most widely distributed package of HD programming" (the "Packaging Commitment") and (2) ensure that the vast majority of its total HD subscribers – at least 93% for the 12-month period beginning on February 1, 2008 – actually received VOOM (the "Penetration Commitment").

23. The re-tiering of VOOM violated the Packaging Commitment because VOOM was no longer distributed in EchoStar's most widely distributed HD programming package. EchoStar's most widely distributed HD programming package is its less expensive, entry-level dishHD Essential package. EchoStar's dishHD Essential was now its most widely distributed HD programming package because all subscribers who received dishHD Ultimate also received dishHD Essential. But VOOM was not included in dishHD Essential.

24. Further, if it had not already done so, the re-tiering would have caused EchoStar to violate the Penetration Commitment because the number of total EchoStar subscribers to EchoStar's dishHD Ultimate programming package, which contained VOOM, had fallen, or would have soon fallen, below 93% of all EchoStar subscribers who received HD programming.

25. In the end, EchoStar is a sophisticated multi-billion-dollar corporation that knowingly negotiated and signed the Affiliation Agreement, including its Packaging and Penetration Commitments and its payment obligations. EchoStar should be held to the deal it made. EchoStar had no right to terminate the Affiliation Agreement on the basis of a trumped-up and pretextual claim of breach simply because it no longer liked the deal it struck. Unable to prevent EchoStar from "pulling the plug" on VOOM, VOOM HD now has been forced to bring this suit for breach of contract to recover the well in excess of one billion dollars of damages that it will suffer as a result of EchoStar's wrongful and improper termination of the Affiliation Agreement.

THE PARTIES

26. Plaintiff VOOM HD is a Delaware limited liability company with its principal offices located at 11 Pennsylvania Plaza, New York, New York. VOOM HD is a subsidiary of Rainbow Media Holdings LLC ("Rainbow Media"), which in turn is a subsidiary of Cablevision Systems Corporation.

27. Rainbow Media, the parent of VOOM HD, has been a television programming innovator for the last quarter century. In addition to VOOM, Rainbow Media currently owns and operates several individual programming channels, including the Independent Film Channel ("IFC"), AMC, and WE tv. Rainbow Media also runs IFC Entertainment. Through IFC Entertainment, Rainbow Media owns and manages IFC Films (a film distribution company), IFC

First Take/IFC in Theaters (a feature film/video on demand initiative), IFC Productions (a feature film production library), IFC Entertainment (which owns and operates a film library), and the IFC Center, a movie theater in New York City.

28. VOOM HD has an 80% "Rainbow Member" and a 20% "EchoStar Member." Rainbow Programming Holdings, LLC, a Delaware limited liability company, is the Rainbow Member of VOOM HD. EchoStar Media Holdings Corporation, a Colorado corporation, is the EchoStar member of VOOM HD.

29. Upon information and belief, Defendant EchoStar is a Colorado limited liability company with its principal offices at 9601 South Meridian Boulevard, Englewood, Colorado 80112.

JURISDICTION AND VENUE

30. This Court has jurisdiction pursuant to CPLR § 301, *et seq.* because VOOM HD has its principal place of business in the State of New York.

31. This Court has jurisdiction over EchoStar pursuant to CPLR §§ 301 and 302(a)(1) because EchoStar does business and transacts business in the State of New York through the sale of its satellite television service to New York residents. Furthermore, EchoStar agreed to submit to jurisdiction in the State of New York by registering with the New York Department of State as a foreign limited liability company licensed to transact business.

32. Venue is proper in New York County pursuant to CPLR § 509 and pursuant to CPLR § 503(a) because EchoStar, a foreign limited liability company, designated New York County as the location of its offices in its application to conduct business filed with the New York Secretary of State.

BACKGROUND

A. The April 2005 Deal

33. Several years ago, Cablevision, a cable operator serving the greater New York metropolitan area, decided to expand into the national market for direct-to-home broadcast satellite television services. Through its Rainbow subsidiaries, Cablevision commissioned a satellite to be built and created the Rainbow DBS company ("Rainbow DBS"). At that time, as is the case today, the major players in that market were DirecTV and EchoStar. The hope was that Rainbow DBS would offer consumers an attractive alternative to these other satellite providers by creating and maintaining exclusive, new and innovative HD programming channels catering to a broad range of interests. Rainbow DBS developed many of the channels that comprise VOOM today. Thus, as initially conceived, these channels were the HD programming arm of a larger, nationwide business endeavor for Cablevision.

34. In July 2003, Rainbow DBS began providing television service to subscribers. At that time, Rainbow DBS's programming offerings included a suite of 21 HD channels owned and operated by Rainbow Media, other HD channels, and a number of other popular cable channels that were licensed in standard-definition format from third party providers.

35. Rainbow DBS was unable to attract more than a minimal number of subscribers, and Cablevision's Board of Directors made the decision in 2005 to shut down the Rainbow DBS business and discontinue the proprietary programming channels it provided.

36. Rainbow DBS, and the VOOM channels, were scheduled to go off the air on April 30, 2005. A few days before that deadline, the parties struck a deal. In broad terms, EchoStar committed to carrying VOOM, which originally was contemplated in the contracts to be a suite of 21 VOOM channels, first under an interim arrangement and then under the

Affiliation Agreement. In turn, EchoStar's affiliate received a 20% equity interest in VOOM HD. The Affiliation Agreement was fully negotiated and agreed to in form by the end of April 2005. It was executed in connection with the consummation of the equity interest transaction in November 2005.

37. Under the interim agreement, EchoStar agreed that, pending its formal launch of all 21 VOOM channels, it would distribute a subset of 10 VOOM channels to its subscribers beginning May 1, 2005.

38. Ultimately, after discussion with EchoStar, it was decided to reduce the number of VOOM channels and to launch VOOM in February 2006 as a suite of 15 channels, as permitted under the Affiliation Agreement. The Affiliation Agreement provided a mechanism for adjusting downward VOOM HD's Section 10 spend requirement to address the possibility that VOOM might become comprised of fewer than 21 channels at some point in time.

B. The Affiliation Agreement

39. EchoStar's commitment under the Affiliation Agreement to make VOOM available to an ever-increasing number of HD television subscribers across the country for a term of 15 years and to pay VOOM HD successively higher affiliation fees each year of that term essentially guaranteed that VOOM HD would become highly profitable, and increasingly so, throughout the term, whether or not additional distribution of VOOM by other cable or digital satellite providers was ever obtained.

EchoStar's Distribution Obligations Under Section 5

40. The Affiliation Agreement was carefully crafted to ensure that VOOM would gain wide exposure with EchoStar's HD subscribers. First, the Packaging Commitment required that:

EchoStar shall distribute the Service as part of its most widely distributed package of HD programming services that includes any High Definition Programming Service other than an Excluded HD Service (the "Highest Penetrated HD Package")

(Affiliation Agreement, § 5(a) (emphasis in original).) Second, through the Penetration Commitment, EchoStar agreed to ensure that VOOM "shall be received" by at least 95% of its total HD subscribers within the first year of the term. This penetration requirement dropped by 1% in each succeeding year. Even in the final year of the term in 2020, EchoStar committed that it would ensure VOOM would reach no less than 81% of its total HD subscribers. In Contract Year 3, which began on February 1, 2008, EchoStar was obligated to make VOOM available to at least 93% of its total HD subscribers.

The Termination Provisions And Spend Requirement Under Section 10

41. Section 10 of the Affiliation Agreement set out the general rights of the parties to terminate the agreement in specific situations. Specifically, it allowed either party to terminate upon the occurrence of a material breach by the other, subject to a general cure provision, including a "deemed cure" provision:

Either party shall have the right to terminate this Agreement if (A) the other party has (i) committed a material breach of this Agreement unless such breach, is cured within the 60 day period following receipt of notice of breach, provided that if a longer cure period is provided elsewhere in this Agreement for a particular breach, then such longer cure period shall apply and provided further that if such breach is not susceptible to cure, such breach shall nonetheless be deemed cured for purposes of this provision if the breaching party has taken all reasonable steps to prevent the recurrence of such breach so long as the same or a substantially similar material breach does not occur again within a 6 month period or 2 times in any year, in which case the steps taken by the breaching party to prevent the recurrence of such a breach shall be deemed insufficient and the non-breaching party shall be availed of its termination rights notwithstanding any cure period.

(Affiliation Agreement § 10.)

42. Section 10 then set forth one particular obligation – VOOM HD's annual spending obligation of up to \$100 million – that would trigger a termination right upon a material breach, subject to the notice and cure requirements:

Additionally, and without limiting the generality of the foregoing, if during any calendar year during the Term [VOOM HD] fails to spend \$100 million US Dollars on the Service EchoStar shall have the right to terminate this Agreement, provided that if and to the extent [VOOM HD] permanently reduces the number of channels on the Service during any calendar year such \$100 million US Dollars amount shall be decreased by \$3 million US Dollars per calendar year if it discontinues a Movie Channel and a \$5 million US Dollars per calendar year if it permanently discontinues a channel other than a Movie Channel. For clarity, the parties agree that such decreases shall apply only on a pro rata basis for any part of a calendar year during which a channel is permanently discontinued. Additionally, the parties agree that such \$100 million US Dollars per calendar year shall only apply until such time as [VOOM HD] has invested \$500 million US Dollars in the Service.

(Id.)

43. The Affiliation Agreement, in turn, defines the term "Service" very broadly. The Affiliation Agreement defines "Service" in its preamble as the "television programming service known as 'VOOM.'" Under the Definition Section of the Affiliation Agreement, Service is further defined 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 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. § 1.)

44. The annual spending threshold of \$100 million on the Service was subject to a reduction, where the number of channels that comprised VOOM was reduced below 21 channels.

45. Because it was ultimately decided that the number of VOOM channels would be reduced from 21 to 15, VOOM HD's annual spending requirement was no more than \$82 million under the formula set forth in Section 10.

C. EchoStar Conducted Extensive Financial Due Diligence During Which It Was Made Aware Of The Nature Of VOOM HD's Spending On The Service

46. Before entering into the Affiliation Agreement and related agreements, EchoStar conducted extensive financial due diligence on VOOM HD. Through that process, EchoStar became familiar with, among other things, the financial accounting protocols used by Cablevision and its affiliates, including that of VOOM HD's parent, Rainbow Media.

47. Like other large, sophisticated companies with multiple subsidiary business units, Rainbow Media incurs certain shared expenses, including overhead expenses, on behalf of its numerous business units and then allocates such expenses to its business units. Cablevision, the parent of Rainbow Media, similarly incurs and then allocates a portion of its shared expenses to its subsidiaries, which include Cable & Communications (the consumer television, cable, and telephone business), Lightpath (the commercial telecom business), Madison Square Garden (owner of professional basketball and hockey teams and related properties), Clearview Cinemas, and Rainbow Media. A portion of the shared expenses Cablevision allocates to Rainbow Media is further allocated by Rainbow Media to its business units, including to VOOM HD and, by extension, to VOOM.

48. The rationale for incurring expenses on a shared basis is common and well-accepted. As VOOM HD is part of Rainbow Media, it would be entirely inefficient and wasteful for each of Rainbow Media's programming channels to hire its own engineering, marketing, public relations, legal, and business staff. Those functions can be performed more efficiently by one central staff for the benefit of all of Rainbow Media's channels. The benefits received by

VOOM for these services are real and substantial. It is also common sense, and certainly consistent with generally accepted accounting principles, that appropriate portions of these shared expenses are allocated to VOOM. These expenses, like the benefits received, are real and substantial.

49. Likewise, Rainbow Media is part of Cablevision. Just as it would be inefficient to staff matters at the VOOM HD level instead of the Rainbow Media level, so too would it be inefficient to staff certain matters at the Rainbow Media level, instead of the Cablevision level. For example, Cablevision's financial statements are prepared on a consolidated basis, and therefore, the annual audit of Cablevision encompasses both Rainbow Media and, by definition, VOOM HD. Accounting personnel at Cablevision are therefore engaged working on the accounting for Rainbow Media and, by definition, VOOM HD too.

50. During the negotiation of the Affiliation Agreement and the LLC Agreement which created VOOM HD, EchoStar was explicitly informed that certain shared expenses, including overhead expenses, were allocated to VOOM from Rainbow Media and Cablevision, and would continue to be allocated in this fashion. Budgeted financial information provided to EchoStar during the due diligence phase of the negotiations reflected these very expense allocations, and EchoStar's representatives discussed the allocations and understood that the allocation of these expenses, including overhead expenses, would continue to be made.

51. Similarly, during negotiations, Rainbow Media furnished EchoStar with budgeted financial information that made clear that while Rainbow Media would spend up to \$100 million on a 21-channel version of VOOM, not all of that amount would be spent on "Contractual Rights" and "Programming/Production." The budgeted financial information indicated that spending on the VOOM service would include direct programming expenses, as well as the

above described allocations and other legitimate expenses that allowed VOOM HD to operate, produce and support its VOOM service.

52. Under these circumstances, it is simply misleading and certainly wrong for EchoStar to claim that certain overhead expense allocations – never even identified or quantified – are not legitimate expenses of VOOM HD, or that it did not know that a portion of the overhead allocations would be included in the 2006 spend for VOOM. It is also misleading and wrong for EchoStar to claim that it did not know that the 2006 spend for VOOM would include costs other than those solely on VOOM's direct programming expenses, or claim that such other legitimate costs spent or incurred on the VOOM service could not count toward the satisfaction of VOOM HD's spend requirement under Section 10.

D. EchoStar Challenges VOOM HD's Spending On The Service Under Section 10 Of The Affiliation Agreement

53. Since April 2005, VOOM HD has spent more than \$300 million on VOOM. In 2006 alone, VOOM HD spent a total of approximately \$102,890,000, almost \$3 million more than even EchoStar contends that VOOM HD was required to spend in 2006 and far in excess of its actual spending requirement. At no point in 2006, or for almost the first six months of 2007, did EchoStar ever inquire about, mention, or challenge VOOM HD's 2006 spending.

54. Nevertheless, on June 19, 2007, Kevin Cross, EchoStar's Corporate Counsel, sent a letter to VOOM HD, indicating that "[p]ursuant to Sections 7(b)(ii) and 10 of the Agreement, [VOOM HD] is hereby notified that EchoStar intends to avail itself of its audit right in connection with the provisions of the latter such Section."

55. Then, on June 20, 2007, Mr. Cross sent another letter to VOOM HD, in which he announced definitively that "EchoStar believes that [VOOM HD] failed to spend \$100 million

on the Service in calendar year 2006 and that EchoStar is thus entitled to terminate the Agreement in accordance with its terms.”

56. Mr. Cross did not explain why he thought there was a spending shortfall, what the purported shortfall was, or in what amount. Nor did he specify the type of expense EchoStar believed was improperly included in VOOM HD’s 2006 spending calculation. Similarly, Mr. Cross did not offer any explanation for why EchoStar had said nothing about 2006 spending until June of the following year, when VOOM HD was already well on its way to spending \$114 million in new money on VOOM in 2007. EchoStar also did not explain why it requested an audit of VOOM HD’s compliance with Section 10’s spend requirement when it had already purportedly concluded without the audit that VOOM HD “failed to spend \$100 million on the Service in calendar year 2006,” and that it had an immediate termination right that it could elect to utilize.

57. But despite its pronouncement of a purported termination right in June, EchoStar did not terminate at that time, or at any time for the next seven months. To the contrary, it manifested a clear election to continue the Affiliation Agreement.

58. Just eight days after the June 20 letter, EchoStar persuaded VOOM HD to enter a new letter agreement, dated June 28, 2007 (the “Letter Agreement”). In that agreement, VOOM HD agreed to forego additional affiliation fees to which it would have been entitled under the contract with the addition of new subscribers to EchoStar’s HD service during the period August 15, 2007 through January 31, 2008. VOOM HD made this concession at EchoStar’s request to facilitate EchoStar’s desire to launch a promotional campaign offering new subscribers six months’ worth of HD programming for free. VOOM HD entered into the Letter Agreement in reliance on the fact that the Affiliation Agreement would continue and EchoStar would fulfill its

obligations thereunder. VOOM HD would not have agreed to accommodate EchoStar in this fashion if it believed EchoStar was going to terminate the Affiliation Agreement.

59. On July 11, 2007, John Huffman, Rainbow Media's Executive Vice President, Finance, sent EchoStar a spending breakdown for 2006 (the "Spending Breakdown"). Upon receipt of the Spending Breakdown, EchoStar was advised that VOOM HD had included in its 2006 spending calculations certain shared expenses allocated by Rainbow Media and Cablevision in the amount of \$6.067 million, which included, among other things, certain overhead expenses. The Spending Breakdown also shows on its face that VOOM HD spent approximately \$59.1 million on "Total Prgm Prod. & Lic." or direct programming expenses in 2006. Specifically, the Spending Breakdown demonstrates on its face that VOOM HD spent the remainder of its 2006 spend on other categories of legitimate expenses on the VOOM service, including certain overhead expenses. For example, the Spending Breakdown indicates that VOOM HD spent approximately \$14.3 million on "Salaries & Benefits," \$2.8 million on "Total On Air Promotions," \$3.2 million on "HD Transfer Costs," and \$2.2 million on "Marketing." Mr. Huffman's cover e-mail enclosing the Spending Breakdown analysis invited EchoStar to contact him if it had "any questions or comments."

60. Although EchoStar invoked its audit rights on June 19, 2007, it waited until October 2007 – approximately three months after receiving the Spending Breakdown – to actually conduct an audit. At the conclusion of the October 2007 audit (the "Audit"), EchoStar's lead auditor, Katherine Knight, found that all matters were in order and raised no issues or concerns.

E. EchoStar Purports To Notice Its Termination Of The Affiliation Agreement And Subsequently Re-Tiers VOOM

61. Despite Ms. Knight's findings, EchoStar once again, after some delay, **alleged** non-compliance with Section 10 and asserted a right to terminate the Affiliation Agreement based on spending that had occurred more than a year earlier. On November 16, 2007, Eric Sahl of EchoStar wrote:

As you are aware, pursuant to Section 10 of the [Affiliation] Agreement, [VOOM HD] is obligated to expend not less than \$100 million US Dollars on the Service per annum (the "Annual Investment Obligation"). Section 10 also provides that EchoStar may terminate the Agreement if [VOOM HD] fails to comply with the Annual Investment Obligation.

Further to EchoStar's recent audit of Network's compliance with the provisions of Section 10 of the Agreement, EchoStar has concluded that [VOOM HD] failed to satisfy the requirement by, among other things, inappropriately allocating general overhead costs of the Network to [VOOM HD's] investment in the Service (emphasis added). Such an allocation is not supported by the Agreement's express terms and, as such, is a material breach of the Agreement. Since such breach is not capable of cure and thus is not subject to a cure period, EchoStar hereby reserves its right to terminate the Agreement, effective immediately. In the alternative, EchoStar will continue to carry the Service provided that, beginning February 1, 2008, such ongoing carriage would be on a 'tiered' basis, as determined by EchoStar in its discretion. If this is not acceptable to [VOOM HD], kindly so advise so that EchoStar may formally terminate the Agreement.

(Emphases added and deleted.)

62. EchoStar's November 16 letter did not articulate any purported spending shortfall other than the alleged allocations, and VOOM HD has never received any letter from EchoStar advising it of any other purported shortfall. EchoStar's November 16 letter also failed to identify any specific spending amount within the general category of allocated overhead expenses that it was challenging, or to quantify the amount of overhead expenses allocated to VOOM that it believed were impermissible and explain why it had that belief. EchoStar never provided such explanation, which it clearly was required to do. Nor did this letter mention that VOOM HD

spent approximately \$59.1 million on "Total Prgm Prod. & Lic." in 2006 or otherwise suggest that, in EchoStar's view, Section 10 required VOOM HD to spend up to \$100 million annually solely on that category of expenses.

63. The November 16 termination threat makes abundantly clear that EchoStar hoped, by threatening to terminate the Affiliation Agreement a second time, it could coerce a modification to the Affiliation Agreement that would enable it to re-tier VOOM and avoid what would otherwise be a clear violation of the express and unambiguous Packaging and Penetration Commitments.

64. After receiving the November 16, 2007 letter, VOOM HD informed EchoStar that it did not "agree with [EchoStar's] claims/assertions of breach/proposed actions." Shortly thereafter, VOOM HD conducted broad-ranging business discussions with EchoStar in an effort to resolve the parties' differences. During these discussions, EchoStar made it clear that its sole interest was in carrying VOOM on a tiered basis, or at least differently than it was obligated to carry VOOM under the Affiliation Agreement.

65. Representatives of VOOM HD traveled to EchoStar's headquarters in Colorado on January 24, 2008. EchoStar changed radically the tenor of the parties' discussions at that meeting. Whereas before, EchoStar seemed genuinely interested in finding a mutually acceptable solution to the parties' differences, EchoStar made it clear that none of the business solutions the parties had been discussing for months would be acceptable. Despite all appearances to the contrary, EchoStar intended to notice a termination of the Affiliation Agreement and take VOOM off the air forever, as of February 1, 2008, unless VOOM HD agreed to a 30-day "standstill" period during which VOOM would be re-tiered. EchoStar further

stated again that it reserved its right to drop VOOM if a new deal acceptable to VOOM was not reached during such interim period.

66. In response to EchoStar's new position, VOOM HD reiterated that if EchoStar identified a legitimate spending shortfall in the 2006 spending, VOOM HD stood ready, willing and able to cure. However, EchoStar made quite clear that it was not interested in any cure, and wanted only to be finished with its obligations under the Affiliation Agreement.

67. On January 30, 2008, for the first time, EchoStar sent VOOM HD a letter that actually purported to notice a termination of the Affiliation Agreement effective February 1, 2008 rather than merely threatening to terminate the agreement.

68. On February 1, 2008, EchoStar impermissibly re-tiered VOOM.

69. As a result of the re-tiering, EchoStar immediately breached the Packaging Commitment. The Packaging Commitment required EchoStar to distribute VOOM on its most widely distributed package of HD programming. EchoStar's dishHD Essential was now its most widely distributed HD programming package because all subscribers who received dishHD Ultimate also received dishHD Essential. But VOOM was not included in dishHD Essential.

70. To the extent that it had not done so already, EchoStar also would have imminently breached the Penetration Commitment had it not terminated the Affiliation Agreement and completely dropped VOOM from its programming. The Penetration Commitment required EchoStar to make VOOM available to at least 93% of its total HD subscribers for the 12-month period beginning February 1, 2008. If VOOM remained on dishHD Ultimate, it would not have continued to have been received – if indeed it still was received – by at least 93% of EchoStar's HD subscribers, as required by the Affiliation Agreement.

F. EchoStar Also Challenges VOOM HD's Programming And Certification Requirements Under Section 4 Of The Affiliation Agreement

71. The alleged breach of the annual spend requirement in Section 10 was not the only purported breach of the Affiliation Agreement that EchoStar identified over the summer and fall of 2007. EchoStar also has spent considerable time since June 2007 manufacturing various claims that VOOM HD had breached its programming obligations under Section 4 of the Affiliation Agreement.

72. After VOOM HD successfully refuted each of EchoStar's allegations, EchoStar abandoned its Section 4 claim until its recent effort to revive it as part of this litigation. In particular, EchoStar has raised claims relating to the amount of non-repeat programming that VOOM HD was required to broadcast on VOOM's non-movie channels.

73. VOOM HD fully complied with all its Section 4 obligations. Nevertheless, on November 16, 2007, EchoStar refused to allow VOOM HD to continue to schedule its programming in accordance with its past practices. As a result, VOOM HD was forced to change the programming schedules for VOOM in an attempt to comply as much as practicable with EchoStar's various incorrect, unreasonable and bad faith interpretations of Section 4, while reserving all of VOOM HD's rights and remedies under the Affiliation Agreement.

74. As VOOM HD warned EchoStar on numerous occasions, the scheduling changes to VOOM demanded by EchoStar jeopardized the perception and quality of VOOM.

G. EchoStar Improperly Terminates The Affiliation Agreement And Takes VOOM Off The Air

75. On or about May 13, 2008, EchoStar improperly terminated the Affiliation Agreement when it dropped 10 of the VOOM channels from the air, and publicly announced that it would drop the other five channels as soon as possible. Accordingly, VOOM HD sent

EchoStar a letter on May 13, 2008, urging EchoStar to reconsider its ill-advised and wrongful termination and to restore VOOM to its proper carriage on EchoStar's Dish Network. However, later that day, EchoStar dropped the other five VOOM channels from the air. As of May 14, 2008, EchoStar no longer carried VOOM on its Dish Network.

76. As a result of EchoStar's wrongful termination of the Affiliation Agreement, VOOM HD will sustain well in excess of one billion dollars in damages.

COUNT I
(BREACH OF CONTRACT – IMPROPER SECTION 10 TERMINATION – DAMAGES)

77. VOOM HD repeats and realleges paragraphs 1 through 76 of this Complaint as if fully set forth herein.

78. The Affiliation Agreement was a valid and enforceable contract.

79. VOOM HD performed its obligations under the Affiliation Agreement. Alternatively, assuming *arguendo* that VOOM HD failed to satisfy its Section 10 spending obligation, the amount of any such deficiency would not have constituted a material breach of the contract.

80. Even if VOOM HD had not performed all its obligations under the Affiliation Agreement, EchoStar would have had to provide VOOM HD with proper notice and an opportunity to cure any perceived deficiency in its performance before EchoStar would have had the right to terminate the Affiliation Agreement. Further, EchoStar's continued performance under the Affiliation Agreement throughout 2007 after learning of its purported bases to terminate the agreement constituted an election of remedies, and, thus, EchoStar relinquished any alleged right it had to terminate the Affiliation Agreement on such grounds.

81. Accordingly, EchoStar's termination under Section 10 of the Affiliation Agreement was entirely impermissible and constituted a material breach of the Affiliation Agreement.

82. As a direct and proximate result of such breach of the Affiliation Agreement by EchoStar, VOOM HD has suffered damages in an amount to be determined at trial, but well in excess of one billion dollars.

COUNT II
(BREACH OF CONTRACT – SECTION 5 – RE-TIERING – DAMAGES)

83. VOOM HD repeats and realleges paragraphs 1 through 82 of this Complaint as if fully set forth herein.

84. The Affiliation Agreement was a valid and enforceable contract.

85. VOOM HD performed its obligations under the Affiliation Agreement.

86. For the period from February 1, 2008 through on or about May 13, 2008, EchoStar willfully and deliberately breached, without justification, its Packaging Commitment by re-tiering VOOM.

87. EchoStar's unilateral decision to re-tier VOOM also constituted a willful and deliberate breach, without justification, of the Penetration Commitment.

88. As a proximate and direct result of such breach of the Affiliation Agreement by EchoStar, VOOM HD suffered damages in an amount to be determined at trial.

COUNT III
(BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING)

89. VOOM HD repeats and realleges paragraphs 1 through 88 of this Complaint as if fully set forth herein.

90. The Affiliation Agreement was a valid and enforceable contract.

91. VOOM HD performed its obligations under the Affiliation Agreement.
92. EchoStar owed VOOM HD duties under the implied covenant of good faith and fair dealing in connection with the Affiliation Agreement.
93. EchoStar violated its duty of good faith and fair dealing with respect to the Affiliation Agreement by, including, but not limited to, the following conduct:
- a. attempting to fabricate various pretextual breaches of the Affiliation Agreement in an improper and bad faith effort to terminate the Affiliation Agreement and/or coerce VOOM HD into modifying or altering EchoStar's distribution obligations under the Affiliation Agreement;
 - b. failing to provide VOOM HD with sufficient notice of any purported breach of the Affiliation Agreement in a deliberate effort to deprive VOOM HD of any opportunity to cure any such alleged breach;
 - c. forcing VOOM HD to substantially reduce the amount of its non-repeat programming on its channels in violation of the spirit, intent and purpose of the programming requirements in Section 4 of the Affiliation Agreement, and thus jeopardizing the perception and quality of VOOM HD's programming; and
 - d. upon information and belief, criticizing VOOM HD to, among others, advertisers, suppliers and other television providers.
94. As a direct and proximate result of EchoStar's breaches of its duty of good faith and fair dealing, VOOM HD suffered substantial damages in an amount to be determined at trial.

**COUNT IV
(ATTORNEYS' FEES AND DISBURSEMENTS)**

95. VOOM HD repeats and realleges paragraphs 1 through 94 of this Complaint as if fully set forth herein.

96. The Affiliation Agreement entitles VOOM HD to its "costs, expenses and reasonable attorney fees."

97. Section 13(j) provides as follows:

Attorney Fees. In the event of any suit or action to enforce or interpret this Agreement or any provision thereof, the prevailing party shall be entitled to recover its costs, expenses and reasonable attorney fees, both at trial and on appeal, in addition to all other sums allowed by law.

98. In the event that VOOM HD is the "prevailing party" in the above-captioned action, it is entitled to "to recover its costs, expenses and reasonable attorney fees, both at trial and on appeal, in addition to all other sums allowed by law."

99. VOOM HD has incurred, and will continue to incur, costs and expenses, including attorneys' fees and disbursements, in connection with this action.

100. Accordingly, VOOM HD seeks a monetary judgment "to recover its costs, expenses and reasonable attorney fees" in connection with this action.

WHEREFORE, VOOM HD demands that, upon a final determination by this Court, judgment be entered in its favor and against EchoStar as follows:

On Count I of the Complaint:

- a. an award of damages in an amount to be proven at trial as a result of EchoStar's breach of the Affiliation Agreement by improperly terminating the contract;
- b. awarding costs and attorney's fees to VOOM HD; and
- c. granting VOOM HD such other and further relief as the Court deems just and appropriate.

On Count II of the Complaint:

- a. an award of damages in an amount to be proven at trial as a result of EchoStar's breach of the Packaging and Penetration Commitments under the Affiliation Agreement;
- b. awarding costs and attorney's fees to VOOM HD; and

- c. granting VOOM HD such other and further relief as the Court deems just and appropriate.

On Count III of the Complaint:

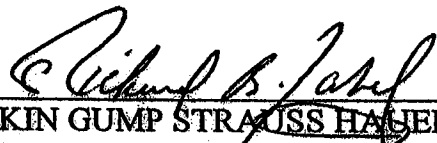
- a. an award of damages in an amount to be proven at trial as a result of EchoStar's breach of its implied covenant of good faith and fair dealing in connection with the Affiliation Agreement;
- b. awarding costs and attorney's fees to VOOM HD; and
- c. granting VOOM HD such other and further relief as the Court deems just and appropriate.

On Count IV of the Complaint:

- a. awarding VOOM HD its costs, expenses and reasonable attorney fees, both at trial and on appeal, in addition to all other sums allowed by law; and
- b. granting VOOM HD such other and further relief as the Court deems just and appropriate.

Dated: New York, New York
May 27, 2008

By:


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Attorneys for Plaintiff
VOOM HD Holdings LLC

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

VOOM HD HOLDINGS, LLC

Plaintiff,

-against-

EHOSTAR SATELLITE L.L.C.,

Defendant.

Index No. 600292/08

AFFIRMATION OF SERVICE

I hereby affirm that, on May 27, 2008, I caused to be served by overnight mail and e-mail true and correct copies of Plaintiff's First Amended Complaint on Charles L. Kerr of Morrison & Foerster, LLP, 1290 Avenue of the Americas, New York, New York 10104-0050, counsel to Defendant EchoStar Satellite L.L.C., now known as Dish Network, L.L.C.

Dated: New York, New York
May 27, 2008


Vincenzo A. DeLeo