

SIXTEENTH CAUSE OF ACTION
TORTIOUS INTERFERENCE WITH CONTRACT
(Against the DirecTV Defendants and RCA)

173. Plaintiffs incorporate the allegations of paragraphs 1 through 172 above.

174. EchoStar has had contractual relationships with numerous dealers to sell EchoStar equipment and services, and EchoStar derived substantial revenue from these contractual relationships.

175. DirecTV and RCA at all relevant times had notice and knowledge of these contractual relationships.

176. As a direct and proximate result of the artificial inducements and/or threats by DirecTV and RCA set forth herein, which are continuing, several such retailers have agreed to breach and/or terminate their respective contractual relations with EchoStar and have done so or are about to do so.

177. DirecTV and RCA made such inducements and/or threats with the conscious, malicious, willful, wrongful, tortious and wanton intent to injure EchoStar in its trade or business and not with any intent to compete legitimately. These actions of DirecTV and RCA have no legitimate business purpose and are without any privilege or justification.

178. As a direct and proximate result of the conduct described herein, EchoStar has been damaged, and continues to be damaged, in its trade or business.

179. EchoStar has suffered, and will continue to suffer, monetary loss from lost sales of goods and services that would have been made but for DirecTV's and RCA's tortious conduct, and is threatened with continuous and irreparable damage and/or loss.

SEVENTEENTH CAUSE OF ACTION
TORTIOUS INTERFERENCE WITH ECONOMIC RELATIONS, PROSPECTIVE
CONTRACTUAL RELATIONS AND/OR BUSINESS EXPECTANCY

(Against the DirecTV Defendants and RCA)

180. Plaintiffs incorporate the allegations of paragraphs 1 through 179 above.

181. EchoStar has entered into, and continues to attempt to enter into, business relationships and negotiations and contracts with retailers or electronics retailers to sell EchoStar's high-power DBS equipment and service, and has sought to enter into economic relationships with the NFL and other owners of the rights to sports programming.

182. EchoStar has derived, and expected to derive, substantial revenue from such relationships.

183. At all relevant times, DirecTV and RCA had notice and knowledge that EchoStar had entered into and was continuing to enter into such business relationships, negotiations and contracts with electronics retailers.

184. Furthermore, at all relevant times, DirecTV and/or RCA had notice and knowledge that EchoStar sought to enter into such economic relationships with owners of the rights to sports programming.

185. As a direct and proximate result of the conduct of DirecTV and RCA set forth herein, which are continuing, such retailers and prospective retailers of consumer electronic

goods, and owners of sports programming, have not entered into economic relationships with EchoStar that they otherwise would have entered into and or have cut off existing economic relationships with EchoStar.

186. DirecTV and RCA have engaged in such conduct with the conscious, malicious, willful, intentional, wrongful, tortious and wanton intent to injure EchoStar in its trade or business and not with any intent to compete legitimately.

187. The actions of DirecTV and RCA were without any privilege or legitimate business justification.

188. Moreover, these actions of DirecTV and RCA were intended to and do constitute, among other violations of law, an unlawful restraint of trade and an unlawful, and so far successful, attempt to acquire, maintain and/or consolidate monopoly power.

189. As a direct and proximate result of the conduct described herein, EchoStar has been damaged, and continues to be damaged, in its trade or business and has suffered, and continues to suffer, monetary loss from lost sales of goods and services that would have been made but for DirecTV's tortious conduct and is threatened with continuing and irreparable damage and/or loss.

EIGHTEENTH CAUSE OF ACTION
INJURIOUS FALSEHOOD AND BUSINESS DISPARAGEMENT
(Against the DirecTV Defendants)

190. Plaintiffs incorporate the allegations of paragraphs 1 through 189 above.

191. As alleged herein, DirecTV has made false statements regarding EchoStar.

192. These statements were published to third parties including retailers of high-power DBS equipment and service and potential consumers of high-power DBS equipment and service.

193. In making these statements, DirecTV intended to injure EchoStar's pecuniary interests by attempting to convince retailers of high-power DBS equipment and service and actual and potential consumers of high-power DBS equipment and service not to deal with EchoStar.

194. DirecTV recognized that the statements would likely injure and/or were intended to injure EchoStar's pecuniary interests.

195. Such statements were made maliciously, willfully and wantonly, and with knowledge of their falsity.

196. EchoStar suffered, and continues to suffer, pecuniary loss and/or damage as a direct and proximate result of DirecTV's injurious falsehoods.

NINETEENTH CAUSE OF ACTION
UNFAIR COMPETITION
(Against the DirecTV Defendants and RCA)

197. Plaintiffs incorporate the allegations of paragraphs 1 through 196 above.

198. DirecTV's actions are all illegal and intended to adversely affect the market position of EchoStar.

199. DirecTV's disparagement of EchoStar and DirecTV's and RCA's demands that retailers and manufacturers discriminate against EchoStar and exclude it from the marketplace

are improper and violate common law rules supporting competition and thus are intended to obtain an unfair competitive advantage.

200. EchoStar is entitled to fairly compete in the marketplace, and the acts and words of DirecTV as described in this complaint are designed to unfairly attack, disparage and harm the reputation and business prospects of EchoStar for the sole purpose of providing DirecTV with an unfair advantage in competing for high-power DBS subscribers.

201. As a direct and proximate result of the improper acts of the Defendants described herein, DirecTV has been able to unfairly maintain, exploit and consolidate its market position and has damaged the business reputation and competitive position of EchoStar, which has suffered, and continues to suffer, monetary loss and or damage to its goodwill for which it is entitled to monetary recovery.

202. EchoStar is also entitled to an injunction against DirecTV and the other Defendants to enjoin this illegal conduct.

DEMAND FOR A JURY TRIAL

203. Plaintiffs request that this matter be tried before a jury.

WHEREFORE, Plaintiffs request that the Court and/or jury:

A. Enter judgment against Defendants for restitution and damages in an amount to be determined at trial;

B. On Plaintiffs' First through Sixth and Ninth through Fourteenth claims for relief, enter judgment against Defendants for triple the amount of such damages

in accordance with Section 4 of the Clayton Act, 15 U.S.C. § 15; Section 6-4-114 of the Colorado Revised Statutes; and the California Cartwright Act, Cal. Bus. & Prof. Code § 16750;

C. Adjudge and decree that Defendants have violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2; Section 3 of the Clayton Act, 15 U.S.C. § 14; Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B); Sections 6-4-104 and 6-4-105 of the Colorado Revised Statutes; the California Cartwright Act, Cal. Bus. & Prof. Code § 16720; and Cal. Bus. & Prof. Code § 17200;

D. Grant Plaintiffs declaratory and injunctive relief including, without limitation, the following:

- (1) Declare that Defendants' exclusive-dealing agreements are illegal and unenforceable and that they violate Sections 1 and 2 of the Sherman Act, Section 3 of the Clayton Act and Sections 6-4-104 and 6-4-105 of the Colorado Revised Statutes, and that further adherence to these agreements is prohibited;
- (2) Enjoin the DirecTV Defendants, both preliminarily and permanently, from conditioning the right to sell DirecTV high-power DBS equipment and service, or other equipment compatible with DirecTV high-power DBS service, on any retailer's agreement not to carry or promote (i) the equipment or service of any other high-power DBS provider; or (ii) equipment or service

that is compatible with the equipment or service of any other high-power DBS provider:

- (3) Enjoin Defendants, both preliminarily and permanently, from entering into or adhering to any agreement with any retailer of any high-power DBS equipment and services whereby the retailer agrees not to incorporate the receiving equipment for any other direct-to-home satellite services in its brand of television set (whether digital or analog, high-definition or standard definition):
- (4) Declare that the existing agreements between the DirecTV Defendants (or any of them), RCA and/or other manufacturers, in which RCA and/or other manufacturers of high-power DBS equipment are prevented or prohibited from developing or manufacturing high-power DBS equipment that is also capable of receiving DISH Network programming, violate Section 1 of the Sherman Act and are void:
- (5) Enjoin the DirecTV Defendants and RCA, both preliminarily and permanently, from entering into or adhering to any agreements providing for the incorporation internally within television sets of high-power DBS receiving equipment compatible only with DirecTV service:

- (6) Enjoin the DirecTV Defendants, both preliminarily and permanently, from entering into or adhering to any agreements with manufacturers of high-power DBS equipment that preclude such manufacturers from producing DISH Network-compatible equipment, or from otherwise inducing or coercing such manufacturers not to produce DISH Network-compatible high-power DBS equipment;
- (7) Enjoin Defendants, both preliminarily and permanently, from engaging in predatory, anti-competitive conduct with the specific intent to destroy EchoStar as a competitor, or to establish, maintain or extend DirecTV's monopoly power;
- (8) Declare that the DirecTV Defendants' agreements with the NFL, the NBA and/or any other sports leagues or providers of sports programming, under which EchoStar is precluded from a fair opportunity to compete for the rights to carry such programming, are illegal and unenforceable;
- (9) Enjoin the DirecTV Defendants, both preliminarily and permanently, from entering into or adhering to any such agreements with the NFL, NBA or other sports leagues;
- (11) Declare that Defendants have engaged in unfair competition and enjoin Defendants, both preliminarily and permanently, from

disparaging or making any false or misleading descriptions or representations of fact regarding the nature, characteristics and/or qualities of the goods, services or commercial activities of EchoStar and DISH Network; and from engaging in any other unfair competition or deceptive trade practices:

- (12) Order Defendants to remove from their website(s) or any other advertising material any and all false and/or misleading descriptions or representations of fact that misrepresent the nature, characteristics and/or qualities of the goods, services or commercial activities of EchoStar or DISH Network;
- (13) Order Defendants to provide an accounting of all profits obtained from the illegal activity described herein, and pay those illegal profits to Plaintiffs;
- (14) Order Defendants to recall any merchandise or equipment that has been illegally placed into the stream of commerce as the result of the illegal activity described herein; and
- (15) Enjoin Defendants, both preliminarily and permanently, from committing or conspiring to commit unfair business acts and business practices against EchoStar in California; and

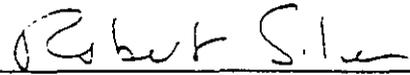
E. Award Plaintiffs punitive damages to which Plaintiffs may show themselves to be entitled:

F. Award Plaintiffs costs, including, without limitation, reasonable attorneys' fees and expert witness fees, to which Plaintiffs may show themselves to be entitled: and

G. Enter judgment against Defendants for such other and further relief as the Court deems just and proper.

December 8, 2000

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 8th day of December, 2000, a true and correct copy of the foregoing Amended Complaint has been forwarded in the following manner to the following attorney(s) of record, in accordance with the Federal Rules of Civil Procedure:

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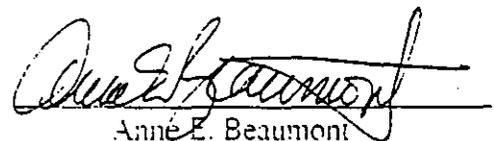
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RECEIVED

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

FEB 20 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Civil Action No. 00-K-212

EHOSTAR COMMUNICATIONS CORPORATION, a
Nevada corporation; EHOSTAR SATELLITE
CORPORATION, a Colorado corporation; EHOSTAR
TECHNOLOGIES CORPORATION, a Texas corporation,

Plaintiffs,

v.

DIRECTV ENTERPRISES, INC., a Delaware corporation;
DIRECTV, INC., a California corporation; DIRECTV
MERCHANDISING, INC., a Delaware corporation;
DIRECTV OPERATIONS, INC., a California corporation;
HUGHES NETWORK SYSTEMS, a Delaware corporation,
THOMSON CONSUMER ELECTRONICS, INC.,
d/b/a, RCA, a Delaware corporation,

Defendants.

AND RELATED COUNTERCLAIMS

**REQUEST FOR RULE 56(f) CONTINUANCE TO RESPOND TO DIRECTV
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

Pursuant to Rules 56(f) and 6 of the Federal Rules of Civil Procedure, plaintiffs EchoStar Communications, EchoStar Satellite Corporation, and EchoStar Technologies Corporation (collectively, "EchoStar" or "plaintiffs") request a continuance to further respond to the DIRECTV Defendants' ("DIRECTV") Motion for Summary Judgment ("Motion") until the parties have either completed discovery or had an opportunity to conduct further discovery, and

that plaintiffs thereafter have an opportunity to provide a substantive response to DIRECTV's Motion. This request for a continuance is necessary because the parties have not completed discovery essential for the Court's proper consideration of the Motion.

DIRECTV's Motion is premature because the parties continue to conduct discovery that directly relates to the very claims on which DIRECTV seeks the entry of judgment in its Motion. The discovery cutoff is not until June 1, 2001; and the dispositive Motion deadline is not until July 13, 2001. The parties are currently engaged in extensive document discovery and have not even begun to take depositions because the extensive document discovery has not yet been completed. Indeed, EchoStar's counsel is currently reviewing more than 475,000 pages of documents that the defendants and third parties have produced, more than 50,000 pages of which were produced in September 2000. Consequently, the parties have yet to schedule a single deposition, but, prior to DIRECTV filing its Motion, the parties had discussed commencing depositions in November 2000. The Motion is particularly premature because, despite EchoStar's good faith and diligent efforts, EchoStar has not been able to review all of the documents produced to date, which EchoStar believes contain scores of information that would make denial of the Motion a *fait accompli*. Once EchoStar has had the opportunity to adequately review these documents and take appropriate depositions, it will be in a position to substantively respond to the Motion. Likewise, once this occurs, the Court can properly consider the Motion.

EchoStar has simultaneously actively pursued discovery from a number of third parties, located at various locations across the United States. To date, EchoStar has subpoenaed fourteen (14) third parties and has received approximately 80,000 pages of documents in response to these subpoenas. Some third parties have requested extensions to respond to subpoenas and other third

until February 15, 2001. Thus, under the Scheduling Order, EchoStar still has nearly four (4) months in which its experts may consider the relevant market questions and issue opinions on these issues; issues that are again central to EchoStar's ability to defend against DIRECTV's Motion and to this Court's proper consideration of that Motion.

In addition, EchoStar recently retained additional counsel to assist in this matter, the Boies, Schiller & Flexner LLP ("Boise") firm. The lawyers at the Boise firm who are assisting EchoStar in this matter appeared herein only shortly before DIRECTV filed its Motion. Consequently, additional time is needed to substantively respond to DIRECTV's Motion to allow the Boise firm to get up to speed in this matter. See Declaration of Robert Silver ("Silver Dec"), attached hereto as Exhibit A.

Pursuant to Rules 6 and 56(f) of the Federal Rules of Civil Procedure, accordingly, this Court should deny and/or postpone ruling upon DIRECTV's Motion to allow EchoStar an opportunity to conduct formal discovery through and including the June 1, 2001 discovery cutoff. At a minimum, EchoStar requests that it have an additional fifteen (15) days after expert reports are due to be exchanged on February 15, 2001 in which to fully and substantively respond to DIRECTV's Motion. This request is supported by the following Memorandum of Law in Support, the Silver Dec., the Rule 56(f) Declaration of Cynthia A. Ricketts ("Ricketts Dec."), attached hereto as Exhibit B, and the entire record herein.

RESPECTFULLY SUBMITTED THIS _____ day of November 2000.

Signed:

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**MEMORANDUM OF LAW IN SUPPORT OF REQUEST
FOR RULE 56 CONTINUANCE TO RESPOND TO DIRECTV
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

I. FACTUAL BACKGROUND

EchoStar initiated this antitrust action against defendants for their improper exercise of DIRECTV's monopoly in the High Power Direct Broadcast Satellite and/or Direct Broadcast Satellite ("DBS") industry. Among other things, DIRECTV has embarked upon an illegal and anticompetitive scheme by:

- entering into illegal agreements with others in the unreasonable restraint of trade and commerce in the DBS industry;
- monopolizing, attempting to monopolize, and combining and conspiring with others to monopolize, the DBS industry;
- engaging in exclusive dealings in the sale of DBS equipment and services on the condition that the purchaser thereof not deal in or with *EchoStar's* equipment or services with the intended effect of substantially lessening competition and maintaining, expanding and consolidating a monopoly in the DBS industry;
- making false and misleading representations of fact that misrepresent the nature and quality of EchoStar's equipment and services and concealing the true relationship among DIRECTV and its co-conspirators;
- engaging in unfair competition, deceptive trade practices and unfair business acts and practices;
- tortiously interfering with the business relations of EchoStar; and
- publishing injurious falsehoods concerning EchoStar.

DIRECTV has engaged in these actions in an unreasonable restraint of trade and commerce all in violation of the Sherman and Clayton antitrust acts, the Lanham Act, the Colorado Antitrust Act, the Colorado Business and Professions Code and the common law. DIRECTV and its co-conspirators, defendants Hughes Electronics Corporation ("Hughes") and Thomson Consumer Electronics, Inc. d/b/a/ RCA ("RCA"), must not be allowed to continue

these unlawful and anticompetitive acts. DIRECTV, Hughes and RCA are collectively referred to as "defendants."

DIRECTV has moved for summary judgment on EchoStar's claims under the Sherman and Clayton Antitrust Acts (Counts 1, 2, 3, 4, 5, 6, and 7) and the Colorado Antitrust Act (Counts 10, 11, 12 and 13). DIRECTV's Motion is based upon a single premise: that the relevant market for this Court to consider is the multi-channel video programming distribution market ("MVPD Market") and that as a matter of law there is no high powered DBS ("DBS") sub-market. If the MVPD market is the appropriate relevant market, as DIRECTV argues, DIRECTV claims it is entitled to judgment as a matter of law because DIRECTV controls less than ten percent (10%) of the MVPD Market. DIRECTV's premise is flawed for at least two reasons.

First, whether or not the relevant market is the DBS Market or the MVPD Market will become irrelevant if EchoStar demonstrates direct anticompetitive effects caused by defendants' actions. When a plaintiff can directly show anticompetitive effects, it is not required to directly show market power or a relevant market. Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998); Mellon v. Cessna Aircraft Co., 7 F. Supp. 1183 (D. Kan. 1998).

Second, DIRECTV's entire Motion is premised upon its extrapolation from purported "admissions" by EchoStar that EchoStar competes in the MVPD Market. These purported "admissions" are taken out of context and simply are not relevant to the issue of what the relevant market is for purposes of EchoStar's antitrust claims.¹ The relevant market for this case is not the MVPD Market, but rather a submarket of the MVPD Market known as the High Power

¹ Indeed, in its Motion to Compel Production of Documents from AT&T ("AT&T Motion"), DIRECTV conceded that these purported "admissions" were made "in other contexts" AT&T Motion at 3.

DBS market ("DBS Market"). EchoStar has alleged and will prove (once it has had a full opportunity to conduct discovery) that DIRECTV controls more than 70% of the DBS Market and uses its monopoly power illegally in violation of federal and state antitrust laws. EchoStar does not dispute that there is an MVPD Market and that both EchoStar and DIRECTV compete with cable companies in that market. However, the DBS Market is an appropriate submarket of the MVPD market for antitrust purposes. An appropriate analogy can be drawn to the transportation industry, where there are a number of submarkets, including the air transportation market and the railroad market. Notwithstanding the fact that airlines compete with railroads, there is little doubt that the antitrust laws apply to anticompetitive actions within the air transportation submarket. Thus, all of the so-called "admissions" and administrative findings referred to in the Motion have been taken wholly out of context and are irrelevant in this action. This Court must determine for itself what the relevant market is.

Although DIRECTV's Motion lacks merit, preparing a proper substantive response to DIRECTV's motion is a task that will involve an extensive effort to synthesize the ongoing document discovery (which has already involved the exchange of hundreds of thousands of documents) and future document and deposition discovery. A significant portion of discovery that has and will be conducted will focus both on gathering further evidence that the relevant market is the DBS Market and the fact that DIRECTV's illegal actions have created obvious anticompetitive effects. Although EchoStar has been diligently proceeding with discovery, the discovery process in this matter has and will continue to be a massive effort requiring a team of lawyers to both conduct discovery and review the hundreds of thousands of pages of documents already produced and to review the documents that DIRECTV and third parties continue to

produce, to interview various third party witnesses and to depose relevant representatives from the parties and from those third parties who refuse to cooperate with EchoStar's informal discovery efforts.

Although EchoStar served its initial discovery requests on DIRECTV on March 14, 2000, which was the very first day that EchoStar could properly serve such discovery, DIRECTV has still, some six (6) months later, only recently claimed to have produced all responsive documents.² Ricketts Dec., ¶ 18. DIRECTV initially responded to EchoStar's discovery requests on April 18, 2000 and the parties have been working through objections and document production issues ever since. *Id.*, ¶ 28. Between April and October 2000, DIRECTV has produced more than 313,000 pages of documents. In September 2000 alone, DIRECTV produced more than 44,000 pages of documents.

Defendant Thomson Consumer Electronic, Inc. ("RCA") also initially refused to produce any documents whatsoever. In fact, RCA did not produce a single document until August 15, 2000, almost four months after responses were due in late April 2000. Since August 15, RCA has produced approximately 80,000 pages and then, on September 27, 2000, produced thirty (30) videotapes, four (4) audio cassettes and two (2) computer discs. Fourteen (14) third parties subpoenaed by EchoStar have also produced approximately 80,000 pages. *Id.* ¶¶ 50 and 78.

This initial phase of document discovery has also included protracted discovery disputes and motions to compel. *See* Ricketts Dec., ¶¶ 57-58. As indicated above, RCA refused to

² EchoStar has not yet had an opportunity to review all of DIRECTV's recently produced documents to verify whether or not DIRECTV has in fact produced all documents responsive to EchoStar's document requests.

produce any documents whatsoever until August 15, 200, and would not even discuss its objections with EchoStar until EchoStar filed a motion to compel. Ricketts Dec., ¶¶ 56.

EchoStar's review of the defendants' and third party documents will lead to follow up discovery requests and then to deposition discovery. *Id.*, ¶ 103. It is simply not practical for EchoStar to substantively respond to DIRECTV's Motion when it is virtually in the midst of its document discovery efforts directed at the very issues raised in the Motion and when EchoStar has not yet had an opportunity to take a single deposition because of defendants' multiple delays in the production of responsive documents and other problems associated with the productions.

The parties are also engaged in extensive third-party document discovery, which will provide evidence about both the relevant market and DIRECTV's market power. In particular, as noted above, EchoStar has already subpoenaed fourteen (14) third parties, including subpoenas to Consumer Electronics Retailers, HDTV Manufacturers and professional sports leagues. Ricketts Dec., ¶ 68. Although more than 80,000 pages of documents have been produced, some third parties have requested extensions of time to respond and others have interposed overly broad objections to requests for relevant documents. Ricketts Dec., ¶ 78. EchoStar will continue to work cooperatively with these third parties addressing both objections and accommodating requests for extensions. However, EchoStar may ultimately need to file motions to compel to obtain necessary discovery, discovery that goes to the heart of DIRECTV's Motion. Ricketts Dec., ¶ 80. Indeed, DIRECTV is also having difficulty obtaining documents from third parties, as evidenced by the AT&T Motion, filed October 20, 2000. In the AT&T Motion, filed after DIRECTV filed its Motion, DIRECTV argues that it is critical to obtain

- a) DBS is in a separate product market from alternative sources of programming, including cable television;
- b) A significant number of DBS subscribers view DIRECTV and EchoStar as a significantly closer substitutes than alternative sources of programming, including cable television;
- c) Cable television is an imperfect and comparatively weak substitute for DBS;
- d) If not constrained by EchoStar, DIRECTV could raise its prices above the competitive level without experiencing a significant constraint by cable;
- e) DBS and/or High Power DBS is superior to most cable services in several respects, including higher quality picture, substantially more programming options, and pay-per-view in a "near-on-demand" environment that consumers find more attractive than the pay-per-view environment offered by cable;
- f) Significant numbers of consumers have subscribed to both DBS and/or High Power DBS service and cable service, reflecting that the two products are imperfect substitutes;
- g) EchoStar is DIRECTV's closest competitor;
- h) Many, if not most, consumers who would switch away from EchoStar if it raised its prices relative to all other subscription programming services would turn to DIRECTV;
- i) DIRECTV expects to profit from raising EchoStar's costs since other potential satellite providers cannot easily enter the market and attract the customers that EchoStar is losing as a result of DIRECTV's conduct;
- j) There are significant entry barriers to the DBS and/or High Power DBS market;
- k) DIRECTV and EchoStar react primarily to each other when setting equipment and service prices;
- l) High Power DBS is the only multichannel television transmission service capable of serving the entire continental United States;
- m) Millions of potential DBS and/or High Power DBS customers live in areas that do not have access to cable such that, if there is no competition between DIRECTV and EchoStar, there is no competition at all;
- n) High Power DBS is the only choice for consumers desiring a broad range of premium sports broadcasting, such as access to all professional sports league games; and
- o) Consumers desiring as broad a range of television programming and entertainment options as possible, comprehensive premium sports coverage, maximum clarity of video

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and audio transmission, and ease of installation and operation have no alternative to High Power DBS service, since cable does not offer such choices.

See Ricketts Dec.

EchoStar has already uncovered some documents in which DIRECTV admits that the relevant market is the DBS Market. For example in a 1999 presentation at a Sales and Marketing Meeting, DIRECTV noted that "DTV Dominates [the] DBS Market." controlling 74% of the DBS Market. See Exhibit 13 to Ricketts Dec. DIRECTV has also produced outside investment reports that recognize the DBS Market as a separate and distinct market. In a February 16, 1999 Morgan Stanley Dean Witter report (produced by DIRECTV), the authors noted:

DIRECTV's service is located in over 26,000 consumer electronics locations across the United States such as Circuit City, Best Buy and Sears. The breadth of locations enabled DIRECTV to capture a large portion of the DBS market where it has remained. . . . Today, DIRECTV has over 51% of the total DBS market. . . .

To strengthen its dominant market share further, in January, DIRECTV announced that it would acquire Primestar's 2.3 million medium power subscribers and high power satellite assets The acquisition would also boost DIRECTV's market share from 51% to 78% to make the DBS industry a duopoly versus an oligopoly.

Exhibit 14 to Ricketts Dec., U.S. and the Americas Investment Research, Morgan Stanley Dean Witter, February 16, 1999, at page 18.

Expert witnesses will also play an important role in explaining to the jury several issues, including the relevant market, DIRECTV's market power, and any resultant anticompetitive effects. Indeed, EchoStar has indicated that it anticipates designating an expert witness regarding the DBS industry. Conversely, DIRECTV has indicated that it anticipates designating expert witnesses to testify about multi-channel video programming distribution ("MVPD"), who will presumably testify that the relevant market is the MVPD Market. With document discovery

II. LEGAL ARGUMENT: SUMMARY JUDGMENT IS PREMATURE BECAUSE THE PARTIES HAVE NOT COMPLETED DISCOVERY.

In deciding a motion for summary judgment, the Court is required to review the facts in the light most favorable to the non-moving party. See generally Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (“inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.”). All disputed facts must be resolved in favor of the non-moving party. White v. General Motors Corp., 908 F.2d 669, 670 (10th Cir. 1990), cert. denied, 498 U.S. 1069 (1991). Defendants have “the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party,” and showing that they are entitled to summary judgment beyond a reasonable doubt. Weir v. Anaconda Co., 773 F.2d 1073, 1079 (10th Cir. 1985) (quoting Brown v. Parker-Hannifin Corp., 746 F.2d 1407, 1411 (10th Cir. 1984) (*citations omitted*)); Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

“[A] party must have an adequate opportunity to develop his claims through discovery before summary judgment is appropriate.” Redmond v. Burlington N.R. Co. Pension Plan, 821 F.2d 461, 469 (8th Cir. 1987); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (summary judgment is appropriate only “after adequate time for discovery.”). Summary judgment must be denied when the non-moving party has not had an opportunity to discover information that is essential to its opposition. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251 n.5, 257, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); see also Texas Partners v. Conrock Co., 685 F.2d 1116, 1119 (9th Cir. 1982), cert. denied, 460 U.S. 1029 (1983).

“When a party opposing a motion for summary judgment is unable to present specific facts in opposition to the motion, Fed. R. Civ. P. 56(f) makes it possible for a party to avoid summary judgment at that time by filing an affidavit explaining why he cannot present specific facts in response to the motion; upon the filing of a 56(f) affidavit, the district court has the discretion to order a continuance to permit additional discovery or the filing of affidavits.” Weir, 773 F.2d at 1082. “Unless dilatory or lacking in merit, the motion should be liberally treated.” Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1522 (10th Cir. 1992); Jensen v. Redevelopment Agency, 998 F.2d 1550, 1554 (10th Cir. 1993). The granting of summary judgment is error when discovery is not yet completed. See, e.g., Sames v. Gable, cert. denied, 464 U.S. 894, 732 F.2d 49, 52 (3d Cir. 1984) (Court erred in granting defendants’ motion for summary judgment while plaintiffs’ interrogatories remained unanswered). It would be error to grant DIRECTV’s Motion prior to the completion of discovery, particularly where DIRECTV still has not completed its production of documents and no depositions have been taken. See Ricketts Dec.

Permitting adequate discovery before summary disposition applies with even greater force in the antitrust context. Patty Precision v. Brown & Sharpe Mfg. Co., 742 F.2d 1260, 1264 (10th Cir. 1984); Oksanen v. Page Memorial Hosp., 912 F.2d 73, 78 (4th Cir. 1990) (citing Hospital Bldg. Co. v. Trustees of Rex Hospital, 425 U.S. 738, 746 (1976)(With respect to plaintiff’s section 1 Sherman Act claim, “He must be permitted further to depose defendants and receive answers to interrogatories.”)).

In antitrust cases, Courts have noted that dismissals should be granted very sparingly prior to giving the plaintiff ample opportunity for discovery as the proof is largely in the hands of