

# DEWEY & LEBOEUF

Dewey & LeBoeuf LLP  
1101 New York Avenue N.W.  
Suite 1100  
Washington, D.C. 20005-4213

tel +1 202 986 8077  
fax +1 202 956 3337  
dturetsky@dl.com

November 13, 2007

## **BY ELECTRONIC FILING**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: *Application of News Corporation and The DIRECTV Group, Inc.,  
Transferors, and Liberty Media Corporation, Transferee, For Authority to  
Transfer Control, MB Docket No. 07-18*  

---

***EX PARTE***

Dear Ms. Dortch:

On November 9, 2007, the undersigned, along with Brett A. Snyder, Dewey & LeBoeuf LLP, met with Mania Baghdadi, William Beckwith, Jim Bird, Ann Bushmiller, Joel Rabinovitz, Betsy McIntyre, Debra Sabourin, Royce Sherlock, Elvis Stumbergs, and Tracy Waldon to discuss the interest of HDNet LLC in these proceedings, as set forth below. Attachments 1 through 4 below were provided to the Staff.

Well after DIRECTV Group, Inc. (“DIRECTV”) and Liberty Media Corporation (“Liberty”) may have expected this transaction to be consummated, they have embarked on a course of conduct that not only is contrary to the public interest and public policy, but is anticompetitive and contrary to statute and the Commission’s regulations. Yesterday, a Texas court issued a Temporary Restraining Order against DIRECTV to stop some of this conduct because it violates HDNet LLC’s contract with DIRECTV for carriage and to avoid irreparable harm to HDNet LLC’s two networks, HDNet and HDNet Movies. A copy of the verified petition to the court is attached at Attachment 1.

HDNet LLC has come forward on an *ex parte* basis at this time because of recent discriminatory and illegal action, detailed below, by DIRECTV, Liberty, and/or Discovery, a network affiliated with and controlled by Dr. John C. Malone, the Chairman of Liberty. This

experience reflects that the proposed transaction cannot be in the “public interest” as required by law without the addition of conditions to protect independent programmers carried by DIRECTV at the time this application was filed. That this discriminatory behavior was not constrained by existing prohibitions under sections 616(a)(3) and 616(a)(1) of the Communications Act,<sup>1</sup> sections 76.1301(c) and 76.1301(a) of the Commission’s rules,<sup>2</sup> and the merger conditions set forth in the 2004 *Hughes/News Corp.* merger order,<sup>3</sup> underscores the need to take this action into account in this proceeding.

### **HDNet LLC, HDNet, and HDNet Movies**

HDNet LLC is an independent video programming provider and a pioneer in producing High Definition Television (“HDTV”) through its two networks—HDNet and HDNet Movies. HDNet presents original and licensed programs, such as the groundbreaking *HDNet World Report* and *Dan Rather Reports*, and the *HDNet Sunday Concert Series*, which has the largest HD concert library in the world—live sporting events, such as games from the National Hockey League, Major League Soccer, and college football and basketball, and more. Its counterpart, HDNet Movies, presents full-length motion pictures without commercial interruption, including both original productions and licensed features, all of which are videotaped in HD or converted to HDTV directly from film, rather than being up-converted from lower quality tape, as many of HDNet Movies’ competitors do. HDNet Movies is the only network in the world to offer *Sneak Previews*, which are exclusive showings of nationally released theatrical offerings shown *before* they are even in theaters, the first of which was the Academy Award nominated *Enron: The Smartest Guys in the Room*. Their consistently high quality is one of the hallmarks of HDNet and HDNet Movies. For example, HDNet videotapes original HDTV programming at 1080i HD, rather than up-converting lesser quality recordings.

In fact, HDNet and HDNet Movies, which at the time were the only full-time HDTV networks in the industry, comprised 50% of DIRECTV’s original HDTV offerings in 2003, and they were pivotal in DIRECTV’s launch of its HDTV services. The other two networks in the original launch were Discovery HD Theater, currently an affiliated network of Dr. Malone, and ESPN HD.

### **Discriminatory Action Taken by DIRECTV**

In October 2007, DIRECTV announced the removal, effective December 15, 2007, of HDNet and HDNet Movies from the current tier of HDTV offerings that DIRECTV’s customers receive in exchange for a flat \$9.99 HDTV fee, a position those networks have

---

<sup>1</sup> 47 U.S.C. § 536(a)(3) & (a)(1).

<sup>2</sup> 47 C.F.R. § 76.1301(c) & (a).

<sup>3</sup> See *In re General Motors Corp. & Hughes Electronics Corp.*, 19 FCC Rcd. 473, at Appendix F (2004).

occupied since being first carried by DIRECTV in 2002–2003. Under DIRECTV’s new discriminatory arrangement, HDNet LLC’s two networks will be moved with four others—Universal HD, Smithsonian HD, MGM HD, and MHD—to an obscure and pricey tier in a package called the “HD Extra Pack.” Long-term viewers of HDNet and HDNet Movies are now being told that their current service constitutes a “free preview” of HDNet and HDNet Movies.

Notably, Discovery HD Theater and ESPN HD, DIRECTV’s other original HDTV offerings, will remain in the standard \$9.99 HDTV tier. Although DIRECTV has tried to distinguish HDNet, HDNet Movies, and the other networks in the HD Extra Pack as those networks that do not simulcast in standard definition, that does not explain DIRECTV’s conduct: Discovery HD Theater, which has been in the same tier as HDNet and HDNet Movies since 2003, but is controlled by Dr. Malone, does not simulcast in standard definition and yet it will remain in the standard \$9.99 tier. In fact, none of the six networks being removed to the more expensive HD Extra Pack are affiliated with Liberty, its chairman Dr. Malone, the Discovery-related networks he controls, or the Transferor News Corp.

Moreover, DIRECTV made it extremely difficult for customers to obtain the discriminatory HD Extra Pack. Until the petition for a TRO and injunction was filed in Texas, it did not appear that a customer could order the HD Extra Pack online. DIRECTV’s website falsely stated that its “Choice Extra plus HD Access” package contains “the best channels” and its “Premier” package includes “the most HD channels DIRECTV has to offer” and “the works.” HDNet and HDNet Movies, which are among the most widely watched HDTV networks, are not offered in either of these packages. Incredibly, when a caller contacted DIRECTV’s customer service to determine whether the HD Extra Pack could be ordered online, the customer service representatives responded that they were not sure but that the programming in the HD Extra Package is programming that “most people do not want.” Such actions do not merely amount to discrimination, they are tantamount to the termination of carriage of a competing, unaffiliated programmer.

DIRECTV is an important platform. It has spent millions of dollars advertising itself as having the most HD channels available and is capable of reaching the highest number of potential customers for HDTV service. Cable does not offer HDTV in all locations and, where it does, cable offers fewer channels.

This action, although initiated while News Corp. still retains control of DIRECTV, will benefit favored partners, including Dr. Malone and his Discovery-related affiliates, among others.

### **Liberty's Proposal As HDNet LLC's Position on DIRECTV Was Deteriorating**

Liberty, with full knowledge of our deteriorating relationship with DIRECTV and the adverse and discriminatory carriage terms to which we were going to be subject, approached HDNet LLC with the suggestion that it sell them a 50% interest in HDNet. When it became clear that HDNet LLC was not coming to an agreement with DIRECTV on its future carriage, Liberty ceased expressing an interest in acquiring a share of HDNet.

### **Discriminatory Action Taken by Discovery**

Moreover, Discovery, a network under the control of Dr. Malone, has wrongfully terminated an advertising agreement with HDNet LLC. Discovery has indicated that it is in the interest of MVPDs that do not carry HDNet and HDNet Movies for Discovery to discontinue advertising of those networks because the customers of such MVPDs may, as a result of the advertising, demand that the MVPDs make HD Net LLC's networks available on their platform.

### **Motive**

One of DIRECTV's motives to kill off HDNet and HDNet Movies is to obtain HDNet's programming for its own new network, "The 101." For example, DIRECTV is trying to sign on bands and concerts that have been shown by HDNet in an attempt to copy HDNet's Sunday concert programming. By pushing HDNet and HDNet Movies to an obscure and pricey tier, DIRECTV is attempting to deprive HDNet of the audience share necessary to compete to obtain those acts. By putting HDNet and HDNet Movies in a tier with far fewer viewers, DIRECTV seeks to accelerate the shift of concert acts away from HDNet.

### **Injury**

The injury to an unaffiliated video programming provider like HDNet LLC when MVPDs like DIRECTV take discriminatory action can be swift and potentially deadly. In terms of subscribers, HDNet LLC estimates that if HDNet and HDNet Movies are put into the new tier at the proposed price, the networks will lose more than 75% of their subscriber base. Furthermore, the mere announcement of being moved to a tier and losing subscriber will have an immediate impact on the advertising revenues that HDNet LLC can obtain. With a significantly lower subscriber base, advertisers will be less likely to advertise on HDNet and HDNet Movies. Lower subscriber numbers will also have a swift negative effect on HDNet LLC obtaining content for its programming. Programs, actors, and musical artists want to be on networks where they will be seen. Details regarding injury are supplied at Attachment 2 in the sworn affidavit of Mr. Mark Cuban, co-founder and owner of HDNet LLC, which was submitted to the Texas court in support of the petition for a TRO. A letter submitted with Mr. Cuban's affidavit is enclosed at Attachment 3.

**Merger Conditions Are Required In Order for the Transaction to Serve the “Public Interest, Convenience, and Necessity” and to Protect Against Retaliation**

In order for the Commission to approve this merger, it must be shown that it will serve the public interest, convenience, and necessity. *See, e.g., EchoStar Commc’ns Corp.*, 17 FCC Rcd. 20559, ¶ 25 (2002). The public interest standard involves a balancing process that weighs the potential public interest harms of the proposed transaction against the potential public interest benefits. *See id.* Among other things, the public interest evaluation includes “preserving and enhancing competition in relevant markets, [and] ensuring that a diversity of voices is made available to the public. . . .” *Id.* ¶ 26. Independent programming providers such as HDNet LLC “provide the diversity of voices that is so central to the proper functioning of our media and, ultimately, to our democracy itself.” *In re Leased Commercial Access*, 2007 WL 1744321, \*16.

Moreover, the Commission recognizes the power that DBS providers like DIRECTV wield in their role as gatekeepers of what Americans watch. *See EchoStar Commc’ns Corp.*, 17 FCC Rcd. 20559, ¶¶ 49-52. To regulate such power, the Commission adopted 47 C.F.R. § 76.1301, which bars MVPDs from certain anticompetitive practices, including “requir[ing] a financial interest in any program service as a condition for carriage,” *id.* § 76.1301(a), or “discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.” *Id.* § 76.1301(c). The increased likelihood of such practices is particularly relevant in the merger analysis, for the “increased incentive and ability to discriminate potentially creates a public interest harm.” *See, e.g., GTE Corp.*, 15 FCC Rcd. 14032, ¶ 25 (2000). Vertical foreclosure, which is the foreclosure to programming by a MVPD to its platform, is also a factor when determining whether the public interest will be met. A vertically integrated firm that competes both in the upstream HD programming market and the downstream satellite market, such as post-transaction Liberty, has the incentive and ability to discriminate against or raise the costs to rivals in either market. *See EchoStar Commc’ns Corp.*, 17 FCC Rcd. 20559, ¶ 257; *Gen. Motors Corp. & Hughes Elecs. Corp.*, 19 FCC Rcd. 473, ¶ 71. The potential that DIRECTV will discriminate against the rivals of the Liberty networks is not only great, but already in evidence.

Independent programming providers do not usually come to the Commission because they are vulnerable to retaliation. This is, of course, a longstanding problem. *See, e.g., In re Leased Commercial Access*, 2007 WL 1744321, \*16 (2007) (Statement of Commissioner Copps). It has been recognized that the low number of program carriage complaints received from independent programmers may not be because of an absence of “unfair or discriminatory practices,” but “because [the Commission’s] processes fail to provide timely and adequate relief and thus discourage the filing of otherwise legitimate claims[.]” *See id.* However, HDNet LLC has little choice in light of the impending destruction of its business at the hands of DIRECTV

and its post-transaction affiliates. Unaffiliated video programming providers need to obtain conditions that will secure their survival after the merger. Such conditions will uphold the public interest by restraining DIRECTV's abuse of its control over distribution. HDNet LLC may ultimately be able to overturn this discriminatory effort in court, but HDNet LLC's contract with DIRECTV will eventually expire. So will the contracts of other unaffiliated programming providers.

DIRECTV's attempt to push HDNet and HDNet Movies into a highly unfavorable tier, while post-transaction affiliated networks receive favorable positioning, and Discovery's termination of advertising for HDNet and HDNet Movies prove that programming competition cannot be preserved and the public interest standard cannot be met unless the Commission includes competitive conditions in this transaction to protect unaffiliated programming already carried by DIRECTV that are much stronger than those previously imposed. This instructive and destructive experience shows that existing conditions, which allow discriminatory action to take place against unaffiliated programmers on the network before any opportunity for review, are entirely inadequate to protect unaffiliated networks like HDNet and HDNet Movies from adverse and discriminatory actions. Consequently, HDNet LLC submits proposed conditions that are narrowly tailored to protect those unaffiliated networks carried by DIRECTV on the date the merger application was filed from discrimination and from being thrown off the platform once their contracts expire without being offered reasonable and nondiscriminatory terms for continued carriage. Copies of those proposed conditions are attached at Attachment 4.

Independent networks carried on the platform have been recognized as valuable by DIRECTV and are particularly vulnerable since they have made substantial investments and commitments to programming. They are also vulnerable to changes in tier that will deprive them of licensing fees and advertising revenue. Unless DIRECTV is foreclosed from retaliation by ensuring the opportunity for review of any material change in carriage *before* such change is undertaken, any protections the programmer has are meaningless. Nor can DIRECTV be permitted to refuse to renew or extend a carriage agreement in retaliation, because an unaffiliated programmer will have little incentive to assert its rights if its carriage contract will soon expire and the programmer can be eliminated or discriminated against at that time.

As detailed more fully in Attachment 4, the first condition requires that DIRECTV continue to carry for four years after Commission approval of the transfer the unaffiliated video programming that it carried as of the application date on reasonable and nondiscriminatory terms and conditions. The second condition requires written agreement by an affected independent video programming provider that any proposed "material change" to its carriage is not discriminatory. The conditions are accompanied by arbitration provisions that follow similar provisions previously approved by the Commission.

Marlene H. Dortch, Secretary  
November 13, 2007  
Page 7

This letter constitutes the required memorandum summarizing oral *ex parte* presentations. One copy of this letter is being filed electronically.

Respectfully submitted,

*/s/ David S. Turetsky*

David S. Turetsky  
*Counsel to HDNet LLC*

Attachments

cc: Mania Baghdadi, FCC (via e-mail)  
William Beckwith, FCC (via e-mail)  
Jim Bird, FCC (via e-mail)  
Ann Bushmiller, FCC (via e-mail)  
Rosemary Harold, FCC (via e-mail)  
Betsy McIntyre, FCC (via e-mail)  
Joel Rabinovitz, FCC (via e-mail)  
Debra Sabourin, FCC (via e-mail)  
Royce Sherlock, FCC (via e-mail)  
Marilyn Simon, FCC (via e-mail)  
Elvis Stumbergs, FCC (via e-mail)  
Tracy Waldon, FCC (via e-mail)  
Sarah Whitesell, FCC (via e-mail)

# **Attachment 1**

HDNET LLC,  
Plaintiff,

v.

DIRECTV GROUP, INC., DIRECTV  
HOLDINGS LLC, DIRECTV  
ENTERPRISES, LLC, and DIRECTV,  
INC.,  
Defendants.

§  
§  
§  
§  
§  
§  
§  
§  
§  
§  
§

IN THE DISTRICT COURT OF

DALLAS COUNTY, TEXAS

101<sup>st</sup> JUDICIAL DISTRICT

FILED  
CLERK OF DISTRICT COURT  
DALLAS COUNTY, TEXAS  
DEPUTY  
11-14-32

**FIRST AMENDED VERIFIED PETITION AND APPLICATION FOR TEMPORARY  
RESTRAINING ORDER AND TEMPORARY AND PERMANENT INJUNCTIONS**

TO THE HONORABLE JUDGE OF SAID COURT:

HDNet LLC (“HDNet”), plaintiff, files this First Amended Petition and Application for Temporary Restraining Order and Temporary and Permanent Injunctions against Defendants DIRECTV Group, Inc.; DIRECTV Holdings LLC; DIRECTV Enterprises, LLC, and DIRECTV, Inc. (collectively “DIRECTV” or “Defendants”), and for cause of action would respectfully show the Court as follows:

1. HDNet intends to conduct discovery pursuant to a Level 3 Discovery Control Plan as set forth in Texas Rule of Civil Procedure 190.

**I.**

**INTRODUCTION**

2. After using HDNet as the critical lynchpin to establish DIRECTV as the industry leader for high-definition broadcasting, DIRECTV is now embarking on an unlawful campaign to destroy HDNet and to usurp its position in the market. In gross violation of their contractual obligations, Defendants have decided to effectively kill HDNet’s viewership by moving the two HDNet networks from their current DIRECTV broadcast package – where the channels are

distributed to more than 2,000,000 households – to a newly created obscure and overpriced package that puts the HDNet channels well beyond the reach of the average television viewer. In its place, Defendants seek to feature their own programming and that of their favored partners, Liberty Media Corporation (“Liberty”) and entities controlled by Liberty’s Chairman, John C. Malone. The Court and jury should not allow such discriminatory and abusive behavior to continue. For Defendants’ actions, HDNet seeks emergency injunctive relief, actual and punitive damages, attorney’s fees, pre- and post-judgment interest, and costs.

## II.

### PARTIES, JURISDICTION, AND VENUE

3. Plaintiff HDNet is a Delaware corporation with its principal place of business in Dallas County, Texas.

4. Defendant DIRECTV Group, Inc. is a Delaware corporation with its principal place of business in New York. DIRECTV Group, Inc. may be served with process by serving its agent of record, Corporation Service Co., 2711 Centerville Road, Suite 400, Wilmington, DE 19808.

5. Defendant DIRECTV Holdings LLC is a Delaware corporation with its principal place of business in El Segundo, California. DIRECTV Holdings LLC may be served with process by serving its agent of record, Corporation Service Co., 2711 Centerville Road, Suite 400, Wilmington, DE 19808.

6. Defendant DIRECTV Enterprises, LLC is a Delaware corporation with its principal place of business in El Segundo, California. DIRECTV Enterprises, LLC may be served with process by serving its agent of record, Corporation Service Co., 2711 Centerville Road, Suite 400, Wilmington, DE 19808

7. Defendant DIRECTV, Inc. is a California corporation with its principal place of business in California. DIRECTV, Inc. may be served with process by serving its agent of record, Corporation Services, 701 Brazos Street, Ste. 1050, Austin 78701.

8. Jurisdiction is proper in this Court because the amount in controversy exceeds the minimum jurisdictional limits of this Court and all parties are subject to personal jurisdiction in Texas based on their residences, state of organization, and the conduct alleged herein.

9. Venue is proper in Dallas County because all or a substantial part of the events or omissions giving rise to Plaintiff's claim occurred in Dallas County. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(1).

#### IV.

#### FACTUAL BACKGROUND

10. DIRECTV is a conglomeration of companies that, together, operate as the largest direct-to-home digital television service and the second largest provider in the multi-channel video programming distribution industry in the United States. Unlike traditional television broadcasting and cable companies, DIRECTV uses satellites to deliver programming directly to customers that have purchased subscriptions to their services.

11. Since its creation, DIRECTV has competed for subscribers. To succeed, DIRECTV initially needed to convince viewers to purchase and subscribe to a satellite system rather than obtaining their home television programs from the users' traditional – and free – antennae broadcast.<sup>1</sup> Moreover, DIRECTV needed viewers to choose their satellite system as opposed to more established cable television or other satellite systems.

12. For DIRECTV, the perceived solution was to differentiate their services from the competition, and to convince viewers that DIRECTV offered more – and better – viewing

---

<sup>1</sup> DIRECTV faced little or no competition in areas where no cable or regular broadcasting was available.

choices that would justify the expense. A key component of that strategy was high-definition broadcasting.

**A. Defendants Seek to Become the Leader in High-Definition Broadcasting.**

13. High-definition television (“HDTV”) is a digital television broadcasting system that provides significantly higher picture resolution than traditional broadcasting. By producing images that have significantly more pixels per inch than standard broadcasting and by using faster progressive encoding (*i.e.*, showing more frames per second), HDTV offers much better picture quality than standard television. This greater clarity means the picture seen on the television screen is less blurred and less fuzzy. HDTV also brings other benefits such as smoother motion, richer and more natural colors, and the ability to allow a variety of input devices to work together.

14. As a key part of their strategy to differentiate themselves from the competition, Defendants decided to brand DIRECTV as the industry leader in HDTV.

15. This commitment to HDTV was important to DIRECTV. In mid-2003, DIRECTV had more than 11.4 million customers, and advertised that it was the entertainment service of choice for nearly one in every nine television households in the country. Additionally, the company was in the process of being spun-off from General Motors and was seeking investors for the new company.

16. In the presentations made to potential investors, DIRECTV’s chairman and CEO, Eddy Hartenstein, touted the fact that DIRECTV was expecting significant growth among viewers and would experience rapidly accelerating cash flow under its new strategy. The gravamen of the new strategy was to differentiate DIRECTV’s service offerings from cable by,

among other things, offering customers “an un-paralleled selection of high definition-programming.”

17. At that time, the key to HDTV was HDNet, as it owned the only two full-time HDTV networks.

**B. To Implement Their HDTV Strategy, Defendants Enter Into a Distribution Contract with HDNet.**

18. HDNet was formed in 2001 by Mark Cuban and Philip Garvin. Since its inception, HDNet has been a pioneer in the television industry’s venture into HDTV. HDNet was the nation’s first national television network to present all of its programming in 1080i HD, the highest-quality format of HDTV, and today still televises more hours of original 108i HD sports, entertainment, and news programming each week than any other network.

19. HDNet offers two HD channels: “HDNet” and “HDNet Movies.” “HDNet” presents original and licensed programs – such as the groundbreaking *HDNet World Report* and *Dan Rather Reports* and the *HDNet Sunday Concert Series*, which has the largest HD concert library in the world – live sporting events, such as games from the National Hockey League, Major League Soccer, and college football and basketball, and more. HDNet also owns the exclusive HD rights to certain major events, such as all NASA shuttle launches. Its counterpart, “HDNet Movies,” presents full-length motion pictures without commercial interruption, including both original productions and licensed features. HDNet Movies is the only network in the world to offer *Sneak Previews*, which are exclusive showings of nationally released theatrical offerings shown *before* they are even in theaters. The first of which was the Academy Award nominated *Enron: The Smartest Guys in the Room*. In fact, many of the films released as a *Sneak Preview* have been nominated for an award. In addition, HDNet Movies has offered the High Definition World Premiere of some of the most highly respected movies ever made,

including classic films such as *West Side Story*, *One Flew Over the Cuckoos Nest*, *Blues Brothers*, *Blazing Saddles*, and many more. Unlike other HD movie channels, none of the motion pictures shown on HDNet Movies are ever up-converted (which can compromise the HD image), nor does HDNet Movies accept movies that were not shot in film or originally in High Definition. That defines HDNet Movies as unique in the world of movie channels.

20. In mid-2003, there were very few non-premium HDTV channels available for DIRECTV to broadcast, and none offered HDTV full-time except for HDNet and HDNet Movies. Thus, if DIRECTV intended to offer the most HDTV programming, HDNet and its stable of programming would be essential.

21. HDNet signed a written contract with DIRECTV on January 1, 2002 to offer HDNet's HDTV programming to viewers. That relationship was expanded in 2003, when DIRECTV signed a contract with HDNet whereby DIRECTV obtained the rights to broadcast HDNet's two channels in exchange for paying HDNet a per-subscriber monthly fee.

22. A key provision in the 2003 contract was Defendants' guarantee to feature HDNet's channels in DIRECTV's main HDTV programming package. As the contract reads:

If DIRECTV distributes a tier or package containing television-programming services in any high definition format, DIRECTV will immediately include both [HDNet and HDNet Movies] as part of *the most widely distributed tier or package* for which the customer pays a separate fee containing such services (the "[HD] Tier"). . . . Once launched, except as expressly set forth herein, *at no time during the Term may DIRECTV delete either or both of [HDNet and HDNet Movies] from the platform.*

The contract's term runs from June 2, 2003 through December 31, 2008.

23. The relationship looked like a perfect match. DIRECTV received much-needed HDTV content that it could tout to investors and customers, while HDNet expanded its viewership. Even after other channels – such as ESPN HD and Discovery HD Theatre –

followed HDNet's pioneering ways, HDNet and HDNet Movies still comprised 50 percent of DIRECTV's non-premium HD programming, for which the Defendants charged a significant monthly fee.

C. **Defendants Launch their HDTV Programming Tier with HDNet as a Central Figure.**

24. On June 3, 2003, DIRECTV issued a press release announcing the new HDTV premium package referenced in the contract. This new service was touted to potential DIRECTV investors as a major milestone for the Defendants. As Mr. Hartenstein noted: "Beginning July 1st, DIRECTV will offer a new HDTV programming package consisting of Discovery HD Theater, ESPN HD, HDNet and HDNet Movies. This package will be offered to customers a la carte for \$10.99 per month and will include selected sporting events in high-definition."

25. With this premium package in place – and HDNet providing 50 percent of the HD content – DIRECTV marketed itself to viewers and investors as the unquestioned leader in HDTV. As Stephanie Campbell, the Senior Vice President for Programming for DIRECTV stated: "Over the last year, as the HD category has gained tremendous momentum, our customers have told us they want more HD programming. The launch of this HD package reinforces DIRECTV's commitment to the category, and to offering our customers the best quality high-definition programming."

26. This announcement formally triggered the "HD Tier" provision of the contract. As required, Defendants broadcast the two HDNet networks on the most widely distributed tier for which they charged a fee (then called the "HD Access" fee). Because the HD Tier clause was triggered, Defendants also had the ability to decrease its payments to HDNet by a set percentage for each HDTV network that was included in the HD tier. DIRECTV immediately

took advantage of that provision and reduced its payments (due to the inclusion of ESPN HD and Discovery HD Theatre). The fee was reduced further when other HDTV channels were offered.

27. Just as DIRECTV hoped, numerous customers signed up for DIRECTV due in large part to the HDTV offerings that HDNet provided. Since its launch, and in reliance upon the promise of the widest possible distribution from DIRECTV, HDNet has expanded its offerings to include war coverage, more sporting events, additional original programming, and first-run movie simulcasts. This programming content has garnered significant publicity for the network, and for its broadcast partner, DIRECTV. That publicity allowed DIRECTV to profit, and to continue to claim superiority in the HDTV business. In fact, the demand for HDTV among DIRECTV subscribers has been so great that DIRECTV experienced dramatic unexpected shortfalls in providing equipment – such as HD digital video recorders – to subscribers, who were required to be on a waitlist until the equipment could be obtained.

28. For its part, DIRECTV has achieved the explosive growth it sought, and has become the nation's leading satellite television service provider, wielding dramatic control over the industry.

29. As DIRECTV and HDNet have grown, both parties have operated and performed under the contract without issue. Over time, DIRECTV has expanded the number of HDTV channels it broadcasts, but has always offered HDNet's programming in its main package as required under the contract. Indeed, as recently as the Summer of 2007, HDNet and HDNet Movies comprised over 25 percent of DIRECTV's National HD programming. HDNet and HDNet Movies continue to be the standard bearers in HD broadcasting, as they remain the only networks offered by DIRECTV in which 100 percent of the programming content is offered in full HD resolution, and, according to TNS Media Research, the HDNet networks are some of the

most watched HDTV networks and regularly draw larger audiences in metered areas than standard definition networks with far greater number of subscribers.

30. Now, however, blinded by greed, Defendants have decided to try to kill HDNet.

**D. Defendants Seek to Move HDNet's Channels Into Obscurity.**

31. For several years, DIRECTV has promised its subscribers that even more HD channels were coming. Recently, the company promised that there would be 100 HDTV channels broadcast on DIRECTV by the end of 2007.

32. After much delay, the additional channels were offered and made available to the public within the past few weeks. As of today's date, the number of HDTV channels offered by DIRECTV – according to their website – exceeds 70.

33. With the rolling out of the new channels, HDNet looked forward to continuing its service in the most widely distributed tier of HDTV channels, as the parties' contract mandates. Unfortunately, Defendants had other plans.

34. Starting in September of this year, HDNet began to hear rumors that Defendants were going to move the HDNet channels onto a new programming package that would require an additional fee. When HDNet approached Defendants, it was told that nothing had been determined and that there was no reason for alarm.

35. That reassurance was false.

36. On October 15, 2007, DIRECTV issued a press release discussing their HDTV expansion to date. In it, DIRECTV notes that "DIRECTV HD customers will *continue to pay only a \$9.99 access fee*," to receive HDTV programming. Unless the customers pay the premium access fee, no HDTV channels are available.

37. Under the newly announced structure, the HDTV channels a customer will receive will depend upon which underlying non-HDTV package the customer purchases from the four that are offered. In addition to four local HDTV channels (ABC, NBC, FOX, CBS), the “Family” package offers 9 HD channels; the “Choice” package comes with 32 HD channels; the “Choice Extra” package offers 42 HD channels; and the “Premium” package provides the subscriber with 57 national HD channels and 9 local HD sports networks.

38. However, rather than including HDNet’s programming on the “most widely distributed tier” of HDTV programming as the contract mandates, Defendants’ press release revealed to the public – and to HDNet for the first time – that HDNet’s programming would be part of a new, smaller package of channels that requires yet another fee:

Customers who want the ultimate HD experience can subscribe to the DIRECTV(R) HD EXTRA PACK for an additional \$4.99 per month. This new addition of HD-only channels is for the true HD fan and includes: HDNet, HDNet Movies, Universal HD, MHD, Smithsonian HD and MGM HD.

Thus, while the vast majority of HDTV content is included in the single \$9.99 “Access Fee,” any consumer wanting HDNet or HDNet Movies must pay both the \$9.99 fee and an additional, specially concocted fee.

39. To make matters worse, Defendants have managed to make it almost impossible to order HDNet or HDNet Movies and are misleading consumers about what is needed. For example, when one tries to sign up for the Premier Package with HD, the website states:

PREMIER - The most HD channels in the known universe: Want the best in HD? The PREMIER package has it all, including the best in HD programming when you add HD Access (\$9.99/month). Plus, you get all of the premium channels — HBO, SHOWTIME, Starz, Cinemax — in HD. *If you want the works, this is it.*

However, the package is not “it,” as it leaves out DIRECTV’s original HDTV partner, HDNet. Moreover, the language suggesting that “the best in HD programming” is provided through this package – as opposed to the “Extra Pack” – suggests to the viewer that HDNet is lesser.

40. Indeed, for the average person, it takes extreme effort to even locate and order the Extra Pack. When ordering service from the DIRECTV website, after one chooses the programming package, a customer can either say he is “done” or ask to look at a page of “extras.” If the customer does not ask to see “extras,” the Extra Pack will never be offered. If a customer goes to the “extras” page, the Extra Pack is listed, but there is no way to determine what – or how many – channels are being offered for the annual \$60 fee. In an effort to seek help, a call to DIRECTV’s “1-800” phone number was worse. The DIRECTV customer service representative stated that she was not sure if the Extra Pack could be ordered on-line, but that the inability to obtain the add-on service was not really important because the HD Extra Pack only contained channels that “most people don’t want.”

41. If a viewer goes directly to the new website DIRECTV has set up to showcase its new HD offerings, the Extra Pack is not included as an option when one browses the available base packages. The website also advertises its “Choice Extra Plus HD Access” as including “All the Best HD Channels,” and, as discussed above, advertises its “Premier” package as including “the Works.” HDNet and HDNet Movies are not available in either of these packages. When the Extra Pack is finally located on DIRECTV’s HDTV website, potential customers are informed that they will have to pay *two* access fees to obtain HDNet and HDNet Movies by language saying: “Add DIRECTV HD Extra Pack (\$4.99/mo.) along with HD Access (\$9.99/mo.) to your base package.” Defendants’ removal of HDNet and HDNet Movies from its

most widely distributed packages, and implementation of a two-tiered fee to obtain these channels clearly contravenes the contract and seeks to destroy HDNet.

42. In short, because of the way Defendants have chosen to repackage and sell HDTV programming (and by charging a premium of 150% more than for other HDTV networks), it is a practical certainty that the DIRECTV “Extra Pack” tier will be the *least distributed* of any of the HDTV offerings. Importantly, the other channels with which HDNet had been previously offered to consumers as a package – ESPN HD and Discovery HD Theatre – have been placed in tiers that are much more widely distributed.

**E. The Truth Revealed.**

43. The decision to relegate HDNet and HDNet Movies to the least distributed package is, on information and belief, an intentional and deliberate move by Defendants. Defendants, who hold an effective monopoly on HDTV satellite services, are seeking to pay less to independent programmers and to promote their own programming and programming that is controlled by their favored partners in blatant discrimination against HDNet.

44. At the present time, the largest and controlling investor in DIRECTV is News Corp. (through its subsidiary, Fox Entertainment Group). Earlier this year, News Corp. announced that it was selling its controlling shares in DIRECTV to Liberty in exchange for stock, cash, several regional television networks, and other considerations. Unlike HDNet, *all* of the HD channels operated by News Corp., Liberty, or companies controlled by Liberty’s chairman, Mr. Malone, are being provided on highly distributed tiers. In fact, based on a rough view of the available channels, it appears that more than one-third of all HDTV channels that are being provided in the main tiers are owned or controlled by either News Corp., Liberty or Mr. Malone.

45. Besides putting HDNet in a hidden tier, Defendants are employing other aggressive tactics against HDNet. For example, DIRECTV created “channel 101” and shifted a significant portion of its programming to various concerts (aping HDNet’s Sunday programming). Seeking artists and bands to broadcast, DIRECTV began competing with HDNet for the same acts. This channel added nothing of value to DIRECTV, and indeed served no purpose other than to draw viewers away from HDNet.

46. In short, Defendants are seeking not only to avoid paying HDNet, but also to ensure that the two HDNet channels cannot survive.

**F. The Immediate and Irreparable Impact on HDNet.**

47. After discovering this grievous situation – by being contacted by the media, not through communication with Defendants – HDNet immediately contacted Defendants and objected. Defendants claimed to be willing to look at the issue and assured HDNet that nothing was happening immediately. That, however, was not the truth.

48. Within the last few days, Defendants have attempted to drive the final nail in the HDNet coffin. On information and belief, Defendants sent a flyer to every DIRECTV subscriber that is currently receiving HDNet programming and informed them that keeping the channels would require paying a new, substantially higher, premium fee. DIRECTV announced the change as follows:

HDNet, HDNet Movies and Universal HD will no longer be part of the HD Access fee that allows you to see all the HD simulcast associated with your DirecTV base or premium package. These channels . . . will be part of the new DirecTV HD Extra Pack which offers unique channels not available in standard definition. Beginning December 15, 2007, this package will be available for only \$4.99 per month. Until then, you can enjoy these channels as part of a free preview.

This immediately moved HDNet from the most widely distributed tier of HD for which DIRECTV charged a fee. Moreover, DIRECTV's implication that all of the channels that are HD unique" and not simulcast in standard definition have been moved to the "Extra Pack" is simply false. DIRECTV is still offering at least one "HD unique" channel to customers for only the HD Access Fee: Discovery HD Theatre (which is a channel controlled by Liberty's chairman).

49. Satellite providers, such as Defendants, control which networks are ultimately made available to consumers in the United States. Accordingly, contracting with domestic satellite providers is the only way that independent networks can ensure their programming is made available to the satellite television subscribers. When satellite providers exert their power over independent networks like HDNet, these independent networks must turn to the terms of their contracts to ensure that their services are made available as promised. If Defendants are not held to their agreed contractual obligations with HDNet, HDNet will suffer immediate, irreparable harm.

50. The massive loss of existing and future subscribers – as well as the loss of advertising and sponsorship revenue correlated to subscriber and viewership numbers – would have a dramatic and instantaneous effect on HDNet. Viewers become loyal to programs that they can see. If HDNet is taken away from its subscribers, even if it is later put back on the schedule, much of its audience would be lost and never regained.

51. For television networks, available viewership is the critical driving point in almost every aspect of the business. The availability of programming content, the value of original programming, and the price of advertisements, *etc.*, are all dependent on the number of potential viewers. If a substantial portions of its potential viewers are removed, then HDNet loses all of

this. The full extent of the repercussions are impossible to fully quantify – but the very existence of the company is at stake.

52. Indeed, just the recent series of announcements have started to cause harm to HDNet. At least one fellow television network has announced that it will no longer accept HDNet's advertising, in large part because HDNet will not have the viewership to justify such actions. Also, viewers have started to complain that they are losing their channels and cannot afford to pay yet another fee.

53. If the Court does not issue an immediate injunction, HDNet will suffer imminent and irreparable harm to its business, reputation, viewership, and good will.

## V.

### CAUSES OF ACTION

#### Declaratory Judgment

54. HDNet realleges and incorporates the foregoing as if fully stated herein.

55. An actual controversy exists between HDNet and Defendants regarding the obligations of Defendants under the June 2, 2003 contract.

56. HDNet seeks a declaration from the Court that Defendants must offer HDNet and HDNet movies on its most highly distributed HD package, rather than being offered as part of the lesser-distributed DIRECTV Extra Pack.

57. HDNet has retained counsel to represent it in this proceeding, and has agreed to pay its counsel for the reasonable attorneys fees, expenses, and other costs incurred in this proceeding on HDNet's behalf. Accordingly, HDNet is entitled to recover those reasonable and necessary attorneys' fees and all other costs associated with this proceeding. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.009.

### **Breach of Contract**

58. HDNet realleges and incorporates the foregoing as if fully stated herein.

59. HDNet and Defendants have a valid, enforceable contract by which Defendants must provide HDNet and HDNet Movies on DIRECTV's most highly distributed HDTV package.

60. HDNet has fully performed its obligations under the contract.

61. Defendants have breached the contract by removing HDNet and HDNet Movies from DIRECTV's most widely distributed package containing HD channels, "HD Access".

62. Defendants' removal of HDNet and HDNet Movies from DIRECTV'S most widely distributed HD package has caused Plaintiff harm.

63. HDNet is entitled to recover reasonable attorney's fees from Defendants. *See* TEX. CIV. PRAC. & REM. CODE § 38.001.

### **Tortious Interference With Contract**

64. HDNet realleges and incorporates the foregoing as if fully stated herein.

65. HDNet has a valid, enforceable contract with at least Defendant DIRECTV, Inc., by which Defendants must provide HDNet and HDNet Movies on its most widely distributed HDTV package.

66. Defendants DIRECTV Group, Inc.; DIRECTV Holdings LLC; and DIRECTV Enterprises, LLC willfully and intentionally interfered with that contract and caused HDNet and HDNet Movies to be removed from the most widely distributed package containing HD programming.

67. This action has caused Plaintiff harm.

### **Tortious Interference with Prospective Business Relationships**

68. HDNet realleges and incorporates the foregoing as if fully stated herein

69. But for Defendants' wrongful actions, there was a reasonable probability that HDNet would have entered into business relationships with numerous third persons, *i.e.*, potential viewers of HDNet, advertisers, and distribution companies.

70. Defendants intentionally interfered with these relationships by knowingly removing HDNet's programs from the vast majority of the viewing public with the intent of harming HDNet's business.

71. Defendants' conduct was independently tortious or unlawful as described herein.

72. Defendants' intentional interference with HDNet's business was the proximate cause of actual damage to HDNet, damages that HDNet seeks to recover through this action.

73. In addition, because Defendants committed these wrongful acts with malice, HDNet seeks to recover exemplary damages pursuant to Section 41.001, *et seq.*, of the Texas Civil Practice & Remedies Code.

**Tortious Interference with Existing Business Relationships**

74. HDNet realleges and incorporates the foregoing as if fully stated herein.

75. HDNet has existing business relationships with numerous third persons, *i.e.*, viewers of HDNet, advertisers, and distribution companies, regarding HDNet and HDNet Movies.

76. Defendants, with full knowledge, intentionally interfered with these relationships by knowingly removing HDNet's programs from the vast majority of the viewing public with the intent of harming HDNet's business.

77. Defendants' conduct was independently tortious or unlawful as described herein.

78. Defendants' intentional interference with HDNet's business was the proximate cause of actual damage to HDNet, damages that HDNet seeks to recover through this action.

79. In addition, because Defendants committed these wrongful acts with malice, HDNet seeks to recover exemplary damages pursuant to Section 41.001, *et seq.*, of the Texas Civil Practice & Remedies Code.

**Civil Conspiracy**

80. HDNet realleges and incorporates the foregoing as if fully stated herein.

81. Defendants, together and with non-party co-conspirators, including Liberty, entered into a combination or conspiracy to harm HDNet's business and to interfere tortiously with HDNet's prospective business relationships as described herein.

82. The conspirators entered into this conspiracy to damage HDNet's business through the removal of HDNet and HDNet Movies from DIRECTV's most widely distributed HD packages and the publication of statements regarding same.

83. Defendants reached a meeting of the minds on the foregoing objectives and course of action.

84. In connection therewith, the conspirators committed one or more unlawful acts or otherwise lawful acts for unlawful purposes, including tortiously interfering with HDNet's business relationships and breaching its contractual obligations.

85. This conspiracy and the acts committed during its course have proximately caused injury to HDNet for which HDNet seeks to recover compensatory and consequential damages.

86. In addition, because the conspiracy among the Defendants and nonparty co-conspirators is the equivalent of fraud and Defendants committed these wrongful acts with

malice, HDNet seeks to recover exemplary damages pursuant to Section 41.001, *et seq.*, of the Texas Civil Practice & Remedies Code.

## VI.

### APPLICATION FOR TEMPORARY RESTRAINING ORDER

87. HDNet realleges and incorporates the foregoing as if fully stated herein.

88. HDNet seeks injunctive relief under both equitable and statutory principles. *See* TEX. R. CIV. P. 680-693 and TEX. CIV. PRAC. & REM. CODE § 65.011. As shown above, HDNet has a probable right of recovery in this action. In addition, HDNet will suffer imminent and irreparable harm to its business if Defendants are not enjoined from moving HDNet's channels to a new distribution tier rather than continuing to offer the channels as part of the so-called "HD Access fee" programming tier.

89. This Court must immediately and temporarily restrain Defendants from taking any actions or making any announcements that would move or declare that HDNet's channels are part of a new distribution tier rather than continuing to offer the channels as part of the so-called "HD Access fee" package.

90. HDNet is directly and irreparably threatened because Defendants' actions will be immediately detrimental to HDNet's business with the loss of viewers, programming opportunities, advertising opportunities, and publicity. HDNet is entitled to a temporary restraining order and a temporary injunction because it has a probable right of recovery on its claims.

91. HDNet has no adequate remedy at law and seeks immediate injunctive relief as stated above. Unless such injunctive relief issues immediately in the form of a temporary restraining order without notice, HDNet will be irreparably harmed. If a temporary restraining

order does not issue immediately, then Defendants' unlawful acts, will immediately and irreparably harm HDNet.

92. HDNet requests that a temporary restraining order be issued and temporary and permanent injunctions be granted enjoining and restraining Defendants and, as applicable, their collective and respective agents, servants, employees, attorneys, and those persons in active concert or participation with any of them, from directly or indirectly:

- (1) Requiring viewers to pay an extra fee beyond the "HD Access fee" to receive HDNet and HDNet Movies,
- (2) Advertising or publicizing that DIRECTV subscribers must pay an extra fee beyond the "HD Access fee" to receive HDNet and HDNet Movies, and
- (3) Excluding HDNet and HDNet Movies from DIRECTV's most "widely distributed" package containing HD programming.

## VII. APPLICATION FOR TEMPORARY AND PERMANENT INJUNCTIONS

93. HDNet realleges and incorporates the foregoing as if fully stated herein.

94. HDNet additionally requests that, after notice of hearing, the Court enter temporary and permanent injunctions on the same grounds and for the same relief as sought in the temporary restraining order.

95. HDNet seeks injunctive relief under both equitable and statutory principles. *See* TEX. R. CIV. P. 680-693 and TEX. CIV. PRAC. & REM C. § 65.011. As shown above, HDNet has a probable right of recovery in this action. In addition, HDNet will suffer immediate and irreparable harm as a proximate result of Defendants' conduct. Further, HDNet has no adequate remedy at law as the total damages caused by Defendants' activities are not readily quantifiable or measurable and/or will likely be unrecoverable.

**A. Probable Right of Recovery.**

96. To be entitled to a temporary injunction, an applicant need not show that they will win at trial, but that it is probable that they will prevail and that they will likely suffer harm waiting for the trial of their case. *Bobbitt v. Cantu*, 992 S.W.2d 709, 712 (Tex. App.—Austin 1999, no writ). In fact, a probable right of recovery on the merits is shown by alleging a cause of action and presenting evidence that tends to sustain it. *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593, 597 (Tex. App.—Amarillo 1995, no writ). HDNet has met this standard. The facts alleged and supported in this Verified Petition and exhibits thereto clearly demonstrate HDNet’s legal right to the relief requested.

**B. Immediate Irreparable Harm With No Adequate Remedy At Law.**

97. As stated above, HDNet is threatened with irreparable harm by Defendants’ conduct because of the imminent and certain harm that will be caused by Defendants’ actions, including the disruption in HDNet’s business and the loss of viewers, programming opportunities, advertising opportunities, publicity, and other matters that simply cannot be fully calculated.

98. HDNet has no adequate remedy at law that will provide protection against this loss, as its damages are not capable of being fully quantified, and the years of effort and expense that have gone into creating HDNet and establishing it to its current level would be instantaneously lost.

99. HDNet therefore requests the Court grant a temporary and permanent injunction on the same terms as the temporary restraining order.

**VIII.**

**JURY DEMAND**

HDNet demands a jury trial of all claims in this Petition on which a jury trial is available.

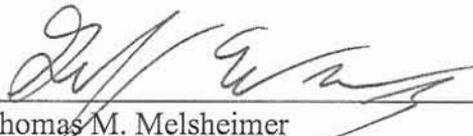
**IX. PRAYER**

WHEREFORE, PREMISES CONSIDERED, HDNet prays that the Court:

- i. issue a temporary restraining order against Defendants as requested herein;
- ii. cite Defendants to appear and show cause, and on such hearing, issue a temporary injunction restraining Defendants as requested herein;
- v. order a permanent injunction upon final trial of this cause enjoining Defendants as requested herein;
- vi. award HDNet all damages to which it is entitled, including, but not limited to, exemplary damages; and
- vii. render judgment against DIRECTV for pre-judgment and post-judgment interest, reasonable attorneys' fees and expenses, costs of suit, and all other relief that the Court deems appropriate.

November 6, 2007

Respectfully submitted,



Thomas M. Melsheimer  
State Bar No. 13922550  
Geoffrey S. Harper  
State Bar No. 00795408  
Scott C. Thomas  
Texas Bar No. 24046964

FISH & RICHARDSON P.C.  
1717 Main Street, Suite 5000  
Dallas, Texas 75201  
Telephone: 214-747-5070  
Telecopy: 214-747-2091

**ATTORNEYS FOR PLAINTIFF  
HDNET LLC**

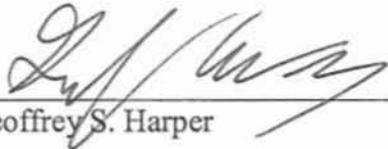
Of Counsel:

Jeffrey Kessler  
Eva Cole  
DEWEY & LEBOEUF LLP  
1301 Avenue of the Americas  
New York, NY 10019  
Telephone: (212) 259-8000  
Telecopy: (212) 259-6333

David S. Turetsky  
DEWEY & LEBOEUF LLP  
1101 New York Avenue NW, Suite 1100  
Washington, DC 20005-4213  
Telephone: (202) 986-8000  
Telecopy: (202) 986-8102

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing FIRST AMENDED VERIFIED PETITION AND APPLICATION FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY AND PERMANENT INJUNCTIONS was served on all counsel of record pursuant to facsimile and certified mail.

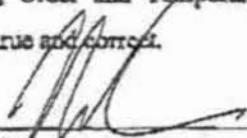
  
\_\_\_\_\_  
Geoffrey S. Harper

VERIFICATION

STATE OF TEXAS  
COUNTY OF DALLAS

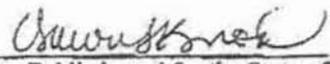
§  
§  
§

Before me, the undersigned Notary Public, on this day personally appeared Mark Cuban, who, after being duly sworn, stated under oath that he is a duly authorized agent of HDNet in this action; that the factual statements contained in Paragraphs 18, 19, 20, 21, 22, 23, 26, 29, 32, 33, 36, 37, 38, 42, 45, 47, 48, 49, 50, 51, and 53 of the foregoing and attached Original Verified Petition and Application for Temporary Restraining Order and Temporary and Permanent Injunctions are within his personal knowledge and are true and correct.

  
\_\_\_\_\_  
Mark Cuban

SUBSCRIBED AND SWORN TO before me, on this the 2<sup>nd</sup> day of November, 2007.



  
\_\_\_\_\_  
Notary Public in and for the State of TEXAS  
Name: Dawn Knox  
My Commission Expires: 6-24-09

VERIFICATION

STATE OF TEXAS

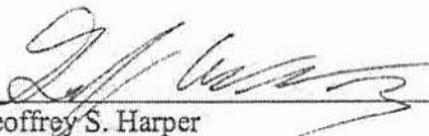
§

COUNTY OF DALLAS

§

§

Before me, the undersigned Notary Public, on this day personally appeared Geoffrey S. Harper, who, after being duly sworn, stated under oath that he is a counsel of record for Plaintiff HDNet in this action; and that the factual statements contained in Paragraphs 10, 15, 16, 24, 25, 31, 32, 36, 37, 38, 39, 40 (other than the statements regarding the phone call), 41 (other than the last sentence), 44, and 48 of the foregoing and attached Original Verified Petition and Application for Temporary Restraining Order and Temporary and Permanent Injunctions, were obtained from public filings of the Defendants before the FCC and/or SEC, the Defendants' websites, or press releases issued by Defendants.

  
\_\_\_\_\_  
Geoffrey S. Harper

SUBSCRIBED AND SWORN TO before me, on this the 1st day of November, 2007.

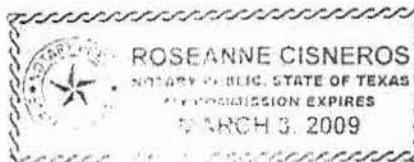
  
\_\_\_\_\_  
Notary Public in and for the State of Texas

Name: Roseanne Cisneros

Expires: March 3, 2009

My

Commission



## **Attachment 2**



the business. Due to my activities on behalf of HDNet over the past six (6) years, I have direct personal knowledge of HDNet's business; the technology associated with HD television programming, broadcasting and distribution; and knowledge of the television industry in general. I am familiar with the terms of HDNet's contract with DIRECTV and the relationship between the parties since they entered into the contract.

3. Prior to co-founding HDNet, I formed, operated and sold several start-up businesses. Among the companies I founded and operated are MicroSolutions and broadcast.com, Inc. With regards to each of these companies, I was intimately involved in the formation and early operations of the businesses. Each of these ventures started out very small, and was considered a start-up enterprise in its respective industry. Through the investment of time and effort, I was actively involved in bringing these companies up from their infancy into mature, stable enterprises. As a result of my experiences with MicroSolutions, broadcast.com and others, I have gained extensive knowledge relating to operating start-up enterprises, bringing them to maturity, and, in some instances, selling or divesting those enterprises.

**B. DIRECTV's Actions Will Have an Immediate and Unquantifiable Impact on HDNet's Business.**

4. As discussed in more detail below, DIRECTV has breached the terms of its agreement with HDNet because it has removed HDNet's channels from DIRECTV's most widely distributed HD tier. If DIRECTV is not stopped from publicly advertising (a) its removal of HDNet and HDNet movies from the "HD Access" tier of channels and (b) its decision to require subscribers to pay an additional premium fee to obtain access to HDNet and HDNet Movies, these comments will cause HDNet to suffer immediate and noncompensable damage to its business, reputation, ongoing business, and goodwill. Specifically, as detailed below, HDNet

will immediately lose subscribers, advertisers, programming opportunities, and critical stature needed for its business.

(1) **DIRECTV's Comments Will Cause an Immediate and Incalculable Loss or HDNet Subscribers.**

5. Based upon my experience in the media industry, it is clear that DIRECTV's creation of the an additional tier of HD programming will move HDNet and HDNet Movies from among the most-watched HD programming to among the least-available to subscribers. DIRECTV has stated that it intends to offer up to 100 HD channels by the end of 2007, and it is advertising that these channels are available for a single, \$9.99 fee. Subscribers who want to receive HDNet and HDNet Movies, however, will be required to pay an additional \$4.99 fee to receive those two channels. Based upon the knowledge I have gained in the television and other industries, I can say with certainty that *HDNet's channels will lose more than 75% of their subscriber base if they are placed on the HD Extra Pack*. The simple fact is that the vast majority of HD subscribers will not pay an additional fee solely to receive the six channels that are only available through the HD Extra Pack package.

6. The most important statistic for HDNet's business operation is the number of subscribers to its network. By DIRECTV's announcement that HDNet is no longer in the HD Access tier, that subscription base has been destroyed. The availability of programming content, the value of original programming, and the price of advertisements are all dependent on the number of subscribers. Saying that HDNet and HDNet movies are being provided to normal DIRECTV subscribers as a "free preview" for the next six weeks provides little or no benefits to HDNet. For purposes of HDNet's business, the number of subscribers that it can identify to advertisers and others is limited to the people who have subscribed to HDNet through the Extra Pack – which is a very small number.

7. Moreover, by telling subscribers that HDNet and HDNet movies will only be available on the HD Access tier for the next six weeks, DIRECTV will cause an *immediate* decrease in subscribers that watch HDNet. Subscribers become loyal to programs and networks that they can see. If subscribers believe that HDNet is only available to them for a few more weeks, much of its audience will be lost immediately, preferring not to watch or become involved in programming that will soon not be available to the consumer.

8. It is almost impossible to place a number on the amount of subscribers that will be lost because of DIRECTV's public announcement and threatened conduct in violation of its contract. That is particularly true where there is brand new competition in the marketplace (with the new HD channels) and new programming on HDNet's channels, such that it would be virtually impossible to determine which subscribers did not watch the channels for which reason. Accordingly, it is nearly impossible to determine the financial impact such a massive loss of subscribers will have on HDNet.

(2) **DIRECTV's Comments Will Immediately Impact HDNet's Subscriber Base with Other Broadcasters.**

9. Beyond the immediate loss of DIRECTV subscribers, HDNet's business with other broadcasters will be impacted as well. The language at issue in this contract is used in the majority of HDNet's contracts with other broadcasters. Also, just like this contract, most of HDNet's agreements have "most favored nation" clauses, that demand that HDNet allow other broadcasters to carry the networks on the same terms as other carriers. If DIRECTV is allowed to move HDNet away from its most widely distributed HD package, then other carriers will be allowed to do so as well. This replication of DIRECTV's actions *could cut HDNet's overall subscriptions by more than 60%.*

10. HDNet is also deeply involved in negotiations with other distributors to have them broadcast the HDNet networks. Those proposed contracts have the same provisions that are at issue in this case. DIRECTV's announcement will impact 100% of those negotiations negatively for HDNet. Not only will HDNet have great difficulty obtaining promises for distribution on the most widely distributed tiers, HDNet will not be seen as a "major player" in the HDTV market, and the impact of that, while dramatic, is simply unquantifiable.

11. It will be extremely difficult, if not impossible, to calculate the damages caused by this decision. It will be virtually impossible to say what contracts would have been entered into and on what terms.

**(3) HDNet Will Immediately Lose Advertisers.**

12. Just as important – if not more so – the continuing announcements by DIRECTV that the subscriber base will be dramatically cut in a few weeks, will, if not stopped, have immediate devastating effects on the operation of HDNet's business.

13. If DIRECTV continues to issue public statements and advertise that it is removing HDNet and HDNet Movies from its most widely distributed HD tier, HDNet will begin to lose advertising immediately. Advertising is tied to programming and amount of subscribers. With knowledge that HDNet and HDNet Movies will be seen by less subscribers in the next six weeks, advertisers will immediately begin seeking to advertise on other networks that can expect higher ratings, rather than HDNet. The number of and extent to which advertisers will turn their business elsewhere because of the announced decrease in subscribers is extremely difficult, if not impossible, to calculate. That is particularly true where the advertisers have new HD channels as an option and new programs on HDNet's channels to look at, so that it would be virtually impossible to determine which advertisers did not buy ads for which reason.

14. Thus, while it is a certainty that advertisements will be lost, it will be virtually impossible to put a value on the damage HDNet will suffer as a result of lost advertising revenue due to DIRECTV's public statements regarding the imminent decrease in distribution of HDNet and HDNet Movies.

(4) **DIRECTV's Comments will Cause Immediate Loss of Programming.**

15. In addition to loss of advertising revenue, DIRECTV's continued statements regarding the upcoming decrease in subscribers will have an immediate impact on HDNet's ability to attract and develop the high level of programming (such as the award-winning *Enron: The Smartest Guys in the Room*) and talent (such as Dan Rather and his program *Dan Rather Reports*) to which its subscribers have grown accustomed. Programs, actors and other professionals flock to networks where they know they will be seen. HDNet is continuously seeking new programming, bidding on programs and talent, and scheduling its programming line-up. DIRECTV's public statements make it nearly impossible for HDNet to compete with other channels for programming content and talent. For example, DIRECTV has created "channel 101" and is attempting to compete with HDNet for a significant portion of its programming relating to various concerts. DIRECTV's announcements regarding HDNet's relegation to the least distributed tier of HD programming give DIRECTV an immediate competitive advantage in bidding against HDNet for performers.

16. It will be nearly impossible to calculate the economic impact DIRECTV's public statements and removal of HDNet from the "HD Access" tier will have on HDNet's ability to attract and retain programs and talent of the quality that HDNet subscribers have grown to expect, as one cannot know for certain which programs have been lost or opportunities that were not given to HDNet and how profitable those opportunities would have been.

(5) HDNet's Damages Cannot be Measured by Past Performance.

17. One cannot attempt to quantify these damages by looking at the past performance of the company. HDNet has grown significantly over the past two years. Accordingly, it will be impossible to project what financial impact DIRECTV's announcement and further actions will have on HDNet based upon the company's historical performance. Based upon the knowledge I have gained in forming and running start-up businesses, historical financial figures are inadequate to serve as the basis for financial projections in newer companies that are hitting its prime, such as HDNet, especially where the company has undergone significant growth after several years of infancy as an enterprise, because such numbers minimize the actual revenues and operations that the mature company would have made.

18. While the full extent of the damage to HDNet is incalculable, the company's livelihood is certainly at stake.

19. The television industry is at an inflection point. There is intense competition among satellite and cable providers for the business of the tens of millions of consumers who have purchased HD televisions.

20. DIRECTV has taken the lead and promoted itself as having the greatest number of HD channels – 70 plus – in the marketplace. Among the HD channels DIRECTV is including in this promotion are HDNet and HDNet Movies. DIRECTV has spent a significant amount of time and money on marketing their expansion of HD programming and the 70 new channels that are available. DIRECTV advertises to consumers that *all* of these channels are available for a single, \$9.99 fee. Thus, a consumer could certainly be led to believe they will receive all HD channels, including HDNet and HDNet Movies, for \$9.99. However, HDNet and HDNet movies are not included in this tier. Accordingly, after receiving the majority of the HD networks for the

single \$9.99 fee, consumers will be surprised to see that they must pay another fee, almost \$60 per year, to receive HDNet and HDNet Movies. It will be nearly impossible for HDNet to overcome the damage to the company's goodwill, reputation, customer base and ability to compete in the television industry because of DIRECTV's breach of the contract with HDNet.

21. HDNET will suffer immediate harm from DIRECTV's announcements that it has removed HDNet and HDNet Movies from DIRECTV's most widely distributed HD packages or tiers. Quite simply, if HDNet is required to wait until subscribers begin leaving – or even an additional two weeks – to obtain relief for DIRECTV's conduct, the damage to the company will have already been done. HDNet has already suffered damage to its goodwill and reputation. If DIRECTV is not enjoined from issuing public statements like those described above, HDNet will suffer further, unquantifiable injury to its goodwill and reputation in the TV industry. Any further injury could result in the HDNet's inability to continue operations.

**C. Background of HDNet**

22. Since its inception in 2001, HDNet has been a pioneer in the television industry's venture into high definition ("HD") television. HDNet was the nation's first national television network to present all of its programming in 1080i HD, the highest-quality format of HDTV, and today still televises more hours of original 1080i HD sports, entertainment, and news programming each week than any other network.

23. HDNet offers two HD channels: "HDNet" and "HDNet Movies." "HDNet" presents original and licensed programs - such as the groundbreaking *HDNet World Report* and *Dan Rather Reports* and the *HDNet Sunday Concert Series*, which has the largest HD concert library in the world - live sporting events, such as games from the National Hockey League, Major League Soccer, and college football and basketball, and more. HDNet also owns the

exclusive HD rights to certain major events, such as all NASA shuttle launches. Its counterpart, “HDNet Movies,” presents full-length motion pictures without commercial interruption, including both original productions and licensed features. HDNet Movies is the only network in the world to offer *Sneak Previews*, which are exclusive showings of nationally released theatrical offerings shown before they are even in theaters. The first of the *Sneak Previews* was the Academy Award nominated *Enron: The Smartest Guys in the Room*. In fact, many of the films released as a *Sneak Preview* have been nominated for an award. In addition, HDNet Movies has offered the High Definition World Premiere of some of the most highly respected movies ever made, including classic films such as *West Side Story*, *One Flew Over the Cuckoos Nest*, *Blues Brothers*, *Blazing Saddles*, and many more. Unlike other HD movie channels, none of the motion pictures shown on HDNet Movies are ever up-converted (which can compromise the HD image), nor does HDNet Movies accept movies that were not shot in film or originally in high definition. That defines HDNet Movies as unique in the world of movie channels.

**D. HDNet’s Contract with DIRECTV**

24. Around mid-2003, there were very few HDTV channels available for DIRECTV to broadcast, and none offered HDTV full-time except for HDNet and HDNet Movies. Thus, if DIRECTV intended to offer the most HDTV programming, HDNet and its stable of programming would be essential.

25. HDNet signed a written contract with DIRECTV in or about January, 2002 to offer HDNet’s programming to subscribers. That relationship was expanded when DIRECTV signed another contract with HDNet dated June 2, 2003 (hereinafter, the “2003 Contract”), whereby DIRECTV obtained the rights to broadcast HDNet’s two channels in exchange for paying HDNet a per-subscriber monthly fee.

26. At the time HDNet entered into its contract with DIRECTV, HDNet was in its infancy as a business and was just beginning to generate business. Through the 2003 Contract, HDNet expected to grow its business substantially due to the wide distribution that the agreement with DIRECTV promised.

27. A key provision in the 2003 Contract was DIRECTV's guarantee to feature HDNet's channels in DIRECTV's main HDTV programming package or tier. As the contract reads:

If DIRECTV distributes a tier or package containing television-programming services in any high definition format, DIRECTV will immediately include both [HDNet and HDNet Movies] as part of the most widely distributed tier or package for which the customer pays a separate fee containing such services (the "[HD] Tier"). . . . Once launched, except as expressly set forth herein, at no time during the Term may DIRECTV delete either or both of [HDNet and HDNet Movies] from the platform.

This provision was of utmost importance to HDNet. In fact, HDNet has refused to sign other distribution agreements that did not contain similar language.

28. The 2003 Contract's term runs through December 31, 2008.

29. Shortly after entering into the 2003 Contract, DIRECTV announced that it would begin offering an HDTV programming tier consisting of Discovery HD Theater, ESPN HD, HDNet and HDNet Movies in July, 2003. Thus, at that time HDNet and HDNet Movies comprised half of the HD programming offered by DIRECTV. The creation of this HD Tier triggered Defendants' ability under the 2003 Contract to decrease its payments to HDNet by a set percentage for each HDTV network that was included in the HD Tier. DIRECTV immediately took advantage of that provision and reduced its payments (due to the inclusion of ESPN HD and Discovery HD Theatre). The fee was reduced further when subsequent HDTV channels were offered on the HD Tier in 2004. This fee was not impacted by other HD channels that were not part of the HD Tier, such as premium channels like HBO HD.

30. As DIRECTV and HDNet have grown, both-parties have operated and performed under the contract without issue – as have the parties to HDNet’s similar agreements with other distributors. Over time, DIRECTV has expanded the number of HDTV channels it broadcasts, but has always offered HDNet’s programming in its main HD tier as required under the 2003 Contract. Indeed, as recently as the Summer of 2007, HDNet and HDNet Movies comprised over 25 percent of DIRECTV’s national, non-premium HD programming.

31. HDNet has approximately 7 million subscribers through DIRECTV and other cable and satellite providers. DIRECTV, however, is by far and away the largest distributor of HDNet and HDNet Movies.

32. HDNet and HDNet Movies continue to be the standard bearers in HD broadcasting, as they remain the only networks offered by DIRECTV in which 100 percent of the programming content is offered in full HD resolution without up-converting the picture, and, according to TNS Media Research, the HDNet networks are some of the most watched HDTV networks and regularly draw larger audiences in metered areas than standard definition networks with far greater number of subscribers.

33. Since entering into the 2003 Contract, HDNet’s business has grown and the company has matured. The increase in revenue and subscribers has allowed the company to create more elaborate original programming, invest in higher quality equipment, and increase demand for advertising on HDNet and HDNet Movies. The growth of HDNet’s business can be attributed, in large part, to the wide distribution it has received through DIRECTV. The ability of HDNet to survive, however, depends on its ability to continue to receive the wide distribution DIRECTV promised in the 2003 Contract.

**E. DIRECTV Removed HDNet's Programming from its Most Widely Distributed HDTV Tier.**

34. Recently, DIRECTV announced that it would offer nearly 100 channels of HD programming by the end of 2007.

35. After much delay, many of the additional channels were offered and made available to the public within the past few weeks. As of today, the number of HDTV channels offered by DIRECTV – according to their website – exceeds 70.

36. With the rolling out of the new channels, HDNet expected that its programming would continue to be provided in the most widely distributed tier of HDTV channels, as the 2003 Contract mandates. In reliance upon this, HDNet has continued to invest in its programming and infrastructure as seen through its signing of Dan Rather and its recent contracts to broadcast various sporting events in full HD.

37. On October 15, 2007, DIRECTV issued a press release discussing their HDTV expansion to date. In it, DIRECTV notes that “DIRECTV HD customers will continue to pay only a \$9.99 access fee,” to receive HDTV programming. Thus, unless the customers pay the premium access fee, they will receive no HDTV channels at all.

38. Under the newly announced structure, the HDTV channels a customer will receive will depend upon which underlying non-HDTV package the customer purchases from the four that are offered. In addition to four local HDTV channels (ABC, NBC, FOX, CBS), the “Family” package offers 9 HD channels; the “Choice” package comes with 32 HD channels; the “Choice Extra” package offers 42 HD channels; and the “Premier” package provides the subscriber with 57 national HD channels and 9 local HD sports networks.

39. However, rather than including HDNet's programming on the “most widely distributed tier” of HDTV programming, as the 2003 Contract mandates, DIRECTV revealed to

the public – and to HDNet for the first time through these public statements – that HDNet’s programming would be part of a new, smaller tier of channels that requires yet another fee:

Customers who want the ultimate HD experience can subscribe to the DIRECTV HD EXTRA PACK for an additional \$4.99 per month. This new addition of HD only channels is for the true HD fan and includes: HDNet, HDNet Movies, Universal HD, MHO, Smithsonian HD and MGM HD.

40. Thus, while the vast majority of HDTV content is included in the single \$9.99 “HD Access” fee, any consumer wanting HDNet or HDNet Movies must pay both the \$9.99 fee and an additional \$4.99 fee.

41. DIRECTV’s newly announced HDTV tiers relegate HDNet and HDNet Movies to near-premium status, like HBO HD. Though DIRECTV is offering up to 70 HD channels for a single, \$9.99 “HD Access” fee, consumers must pay one-and-a-half times that amount to receive six additional channels, including HD Net and HDNet Movies.

42. Through experience in the television industry, I have learned that there is a substantially lower rate of subscription to premium channels. Simply put, consumers subscribe less frequently to channels that are offered for a higher per-channel fee. Thus it is a practical certainty that the DIRECTV “Extra Pack” tier will be the least distributed of any of the HDTV offerings. That is particularly true considering the discrepancy between DIRECTV’s promotion of its HD Access tier versus the HD Extra Pack.

43. In fact, I have been contacted by various HDNet subscribers who have indicated that they are unhappy that they will no longer receive HDNet and HDNet Movies for the same price as the other HD programming they had received in the past.

44. Though they co-existed on DIRECTV’s HD tier for nearly four years, the other channels with which HDNet had been previously offered – ESPN HD and Discovery HD Theater – are not part of the HD Extra Pack, and are available as part of base packages when the \$9.99

HD Access fee is paid. Thus, ESPN HD and Discovery HD Theater will be offered on a more widely distributed basis than HDNet under DIRECTV's announced packages.

45. DIRECTV has publicly stated that the HD Extra Pack was developed for all of the HD channels which are not simulcast in standard definition, i.e. the channels are "HD unique." DIRECTV's implication that all of the channels that are "HD unique" and not simulcast in standard definition have been moved to the "Extra Pack" is untrue. DIRECTV is still offering at least one "HD unique" channel to customers for only the HD Access Fee: Discovery HD Theater.

46. Satellite providers, such as DIRECTV, control which networks are ultimately made available to consumers in the United States. Accordingly, contracting with domestic satellite providers is the only way that independent networks, such as HDNet, can ensure their programming is made available to the satellite television subscribers.

47. After being contacted by the media – not through communication with a DIRECTV representative – HDNet immediately contacted DIRECTV and objected to DIRECTV's announcements as they indicated that DIRECTV would no longer abide by the terms of the 2003 Contract. DIRECTV claimed to be willing to look at the issue and assured HDNet that nothing was happening immediately.

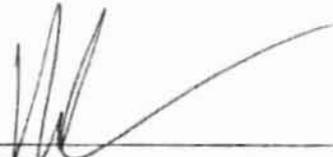
48. DIRECTV, however, recently sent a flyer to DIRECTV subscribers that are currently receiving HDNet's programming and informed them that keeping the channels would require paying a new, substantially higher, premium fee. DIRECTV announced the change as follows:

HDNet, HDNet Movies and Universal HD will no longer be part of the HD Access fee that allows you to see all the HD simulcast associated with your DirecTV base or premium package. These channels ... will be part of the new DirecTV HD Extra Pack which offers unique channels not

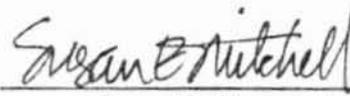
available in standard definition. Beginning December 15, 2007, this package will be available for only \$4.99 per month. Until then, you can enjoy these channels as part of a free preview.

49. This immediately removed HDNet and HDNet Movies from the most widely distributed tier of HD programming for which DIRECTV charged a fee, an act that is prohibited by the 2003 Contract.

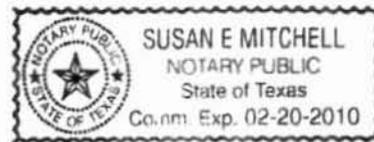
FURTHER AFFIANT SAYETH NOT.

  
\_\_\_\_\_  
Mark Cuban

SWORN TO and SUBSCRIBED before me by SUSAN E. MITCHELL  
on November 6, 2007.

  
\_\_\_\_\_  
Notary Public in and for the State of Texas

My commission expires:  
2/20/2010



## **Attachment 3**

# FISH & RICHARDSON P.C.

Frederick P. Fish  
1855-1930

W.K. Richardson  
1859-1951

1717 MAIN STREET  
SUITE 5000  
DALLAS, TEXAS  
75201

Telephone  
214 747-5070

Facsimile  
214 747-2091

Web Site  
www.fr.com

**Thomas M. Melsheimer**  
214 292-4001

Email  
melsheimer@fr.com

## Via Hand-Delivery

November 6, 2007

The Honorable Teresa Snelson  
600 Commerce St., 6th Floor  
Dallas, Texas 75202

Re: *HDNet LLC v. DIRECTV Group, Inc., et al.*, Cause No. 07-12962

Dear Judge Snelson,

I am writing to follow-up on yesterday's hearing on HDNet's Motion for a Temporary Restraining Order. Attached to this brief, and filed concurrently with HDNet's First Amended Verified Petition and Application for Temporary Restraining Order and Temporary and Permanent Injunctions (the "Verified Petition") is the affidavit of HDNet's founder, Mark Cuban. As the Court requested, Mr. Cuban's Affidavit details clearly and in one document the factual basis for entry of a temporary restraining order. Specifically, Mr. Cuban details the factual basis for why HDNet's injury in this matter cannot be adequately addressed by damages. **Cuban Affidavit ¶¶ 4-21.**

As we discussed yesterday, to be entitled to a temporary restraining order HDNet need only establish three elements: a cause of action, a probable right to recover on that cause of action, and a probable, imminent and irreparable harm in the interim to which no adequate legal remedy exists. *E.g., IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191, 197 (Tex. App. – Fort Worth 2005, no pet. h.). The Court appears to have focused its determination on HDNet's ability to show that no adequate legal remedy is available. To assist the Court in its determination, I have provided the following legal authority and analysis, most of which we discussed at the hearing yesterday, which demonstrates that damages would be inadequate to compensate HDNet for the harm caused by DIRECTV's continued conduct in violation of the parties' agreement.

### **A. The Damages HDNet Seeks Are Not Easily Calculable.**

The damages HDNet will suffer absent a temporary restraining order are not easily calculable because they include (1) the immediate and irreparable loss of good will and (2) the immediate and irreparable loss of a customer base. These two types of



ATLANTA

AUSTIN

BOSTON

DALLAS

DELAWARE

MUNICH

NEW YORK

SAN DIEGO

SILICON VALLEY

TWIN CITIES

WASHINGTON, DC

The Honorable Teresa Snelson

November 6, 2007

Page 2

harm, which often accompany each other, frequently form the basis for temporary restraining orders and temporary injunctions, as they did in the following cases.

Under strikingly similar facts, the United States Court of Appeals for the Second Circuit reversed the district court's refusal to enter a temporary injunction in the context of a media contract. *Reuters Ltd. v. United Press Int'l.*, 903 F.2d 904 (2d Cir. 1990). In *Reuters*, UPI and Reuters entered into an agreement whereby UPI would provide Reuters with American news photographs, in exchange for Reuters providing UPI with foreign news photographs. *Id.* at 905. Each wire service would then distribute the photographs to its customers, along with the accompanying news stories. *Id.*

Before the expiration of the contract, the relationship between the parties began to deteriorate. *Id.* at 905-06. As a result, UPI contracted with a third party company to provide UPI with foreign photographs in the event that Reuters would cease doing so. *Id.* at 906. When Reuters informed UPI that it would no longer provide foreign photographs, UPI sought preliminary injunctive relief. *Id.*

At the injunction hearing, Reuters successfully argued that any damage was merely speculative because the services would still be provided for the next three months. 903 F.2d at 908. The Second Circuit, however, rejected this argument:

Even a speculative loss may cause immediate irreparable harm to UPI's good will.... We cannot imagine that UPI's reputation and good will in the news industry would not be injured by such an announcement. Further an injury of this sort is nearly impossible to value.

*Id.* at 908. The Second Circuit further noted that irreparable damage to good will is "almost inevitabl[e]" where a party is threatening to terminate "the delivery of a unique product to a distributor whose customers expect and rely on the distributor for a continuous supply of that product." *Id.* at 907-08. Thus, in *Reuters*, the threat of lost good will and a lost customer base formed the basis for a finding of an inadequate legal remedy. *Id.*

As equally compelling is a similar holding from the Tenth Circuit. In *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 269 F.3d 1149 (10th Cir. 2001), the court of appeals affirmed the district court's entry of a temporary injunction, preceded by the entry of a temporary restraining order, against Dish Network, a satellite service provider like DIRECTV. *Id.* In *Echostar*, a distributor of a religious television network, Dominion, brought suit against Dish Network after the satellite television provider imposed new restrictions on the parties' distribution contract. *Id.* at 1152. During the hearing on the temporary injunction, Dominion's CEO testified that these

The Honorable Teresa Snelson

November 6, 2007

Page 3

new restrictions had already caused the network to suffer damage, and that the restrictions would further damage the network's reputation among consumers. The *Echostar* court held that injunctive relief was appropriate in that situation because "no [monetary] remedy could repair the damage to Dominion's reputation and credibility," even though there was a monetary figure that could be placed on the loss of subscribers. *Id.* at 1157. The district court's injunction, affirmed by the court of appeals, ordered the parties to return to the status quo—that is, the parties were required to perform their obligations under the terms of their contract under which they had operated under prior to Dish Network's issuance of the disputed, new requirements.

These holdings are not inconsistent with the law across the country, nor are they limited to cases dealing with media and television subscription services. Several courts have held that the loss of good will and customers constitutes irreparable harm, and is sufficient to support the entry of injunctive relief. For example, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048 (4th Cir. 1985), the Fourth Circuit held that Merrill Lynch faced irreparable, noncompensable harm in the loss of its customers when a former employee solicited his former clients in violation of the terms of a non-compete contract the parties entered. *Id.* at 1055. Similarly, another court held that "[l]oss of customers, loss of good will, and threats to a business' viability can constitute irreparable harm." *Int'l Snowmobile Manufacturers Association v. Norton*, 304 F. Supp. 2d 1278, 1287 (D. Wyo. 2004) (enjoining defendants from restricting use of snowmobiles in national parks). Accordingly, it is well-settled that the loss of good will, damage to reputation and the loss of customers are noncompensable and sufficient grounds to support the entry of a temporary injunction.

Like *Reuters*, *Echostar* and the other federal cases above, Texas courts have recognized that a "dollar value cannot easily be assigned to a company's loss of clientele, good will, marketing techniques, office stability, etc." *Martin v. Linen Systems for Hospitals, Inc.*, 671 S.W.2d 706, 710 (Tex. App. – Houston [1<sup>st</sup>] 1984, no writ); see also *T-N-T Motorsports, Inc. v. Hennesey Motorsports, Inc.*, 965 S.W.2d 18 (Tex. App.—Houston [1st Dist.] 1998, no pet.); *Graham v. Mary Kay, Inc.*, 25 S.W.3d 749, 753 (Tex. App. – Houston [14<sup>th</sup>] 2000, pet denied). For example, in *T-N-T Motorsports*, the defendant company consisted of former employees of the plaintiff that decided to start their own business, upgrading sports cars. 965 S.W.2d at 24. The plaintiff accused the defendant of relying on trade secrets to improperly compete with the plaintiff. *Id.*

The appellate court upheld the trial court's granting of a temporary injunction, finding that the plaintiff satisfied its burden of showing an inadequate remedy at law by demonstrating the threatened loss of good will and customers. *Id.* The appellate

The Honorable Teresa Snelson

November 6, 2007

Page 4

court noted testimony showing that if the plaintiff's trade secrets were distributed, it would lose its business "advantage." *Id.* Because of lost customers and good will, the court concluded that "the potential damage to [the plaintiff's] business cannot be easily calculated; therefore, a legal remedy is inadequate."

Other Texas courts have reached similar conclusions when faced with requests for temporary injunctive relief based upon the movant's testimony that damages to the movant's good will are virtually impossible to calculate. In *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593 (Tex. App. – Amarillo 1995, no writ), the court affirmed the granting of a temporary injunction because of the plaintiff's testimony that "we have no way of assessing the damage that [defendants' conduct] is going to cause... as much as I hate to admit it, it could very probably be the demise of [the] business." *Id.* at 602. The appellate court agreed that the testimony established that a legal remedy was inadequate because "[d]amage which cannot be easily calculated may constitute irreparable injury," and "[s]o too may the demise of an existing business."

Similarly, in *Mabrey v. Sandstream, Inc.*, 124 S.W.3d 302 (Tex. App. – Fort Worth 2003, no pet.), the court affirmed the entry of a temporary injunction based upon testimony of the movant's CEO detailing the difficulty of calculating an amount of damages the company would suffer pending trial. *Id.* at 319 (Citing, among other authority, *T-N-T Motorsports* and *Miller Paper*, for the propositions that the loss of good will and potential demise of a business are not adequately compensable by damages.).

In this case, like *Reuters*, *Echostar*, and the other cases above, a temporary restraining order is necessary to protect HDNet against its continuing, irreparable loss of good will and customers. **Cuban Affidavit ¶¶ 4-21.** To survive, HDNet depends on its customers—both subscribers and advertisers—and the good will it has earned from each group. *Id.* ¶¶ 5-14. If DIRECTV is not enjoined from its current course of conduct, HDNet will immediately suffer immeasurable damage to its good will, reputation and business. *Id.* ¶¶ 4-21.

The Defendants have offered no authority which indicates that damages are readily quantifiable here. The case law upon which the Defendants base their argument that an adequate remedy at law exists is easily distinguishable. DIRECTV primarily relies on two cases in support of its argument: *Reach Group, L.L.C. v. The Angelina Group*, 173 S.W.3d 834 (Tex. App. – Houston [14<sup>th</sup>] 2005, no pet.), and *Matrix Network, Inc. v. Ginn*, 211 S.W.3d 944 (Tex. App. – Dallas 2007, no pet.). In each of these cases, during the temporary injunction hearing a representative for the movant testified that an exact dollar figure could be placed on damage attributable to the defendant's conduct. *Reach Group*, 173 S.W.3d at 838 (Managing director of movant for temporary injunction testified that damage totaled \$115,000 and any other damages

The Honorable Teresa Snelson  
November 6, 2007  
Page 5

were capable of being calculated); *Matrix*, 211 S.W.3d at 947 (Movant's president testified at temporary injunction hearing that movant lost "about \$100,000" due to the defendant's conduct.). Here, however, HDNet has offered sworn testimony that the damage done by DIRECTV's prior and threatened conduct cannot be quantified. **Cuban Affidavit ¶¶ 4, 8, 11, 14, 16.** Accordingly, Defendants' reliance on *Reach Group* and *Matrix* is misplaced.

The Verified Petition and the recently submitted Affidavit of Mark Cuban in support of the Verified Petition present the Court with ample evidence that there is no way to quantify the damage HDNet will suffer in the coming days and weeks due to DIRECTV's prior and continuing conduct. **Cuban Affidavit ¶ 8.** Both the Verified Petition and the Affidavit describe specific aspects of HDNet's good will, reputation and business that will suffer immediate and irreparable harm if DIRECTV is not enjoined from continuing with its current course of conduct. *Id.* ¶¶ 5-16. Not only will HDNet lose a significant amount of viewers even before December 15, 2007, but in the coming days and weeks leading up to that date, advertisers, program providers, talent and others will make business decisions adverse to the HDNet based upon DIRECTV's announced decision to relegate HDNet to the least distributed HD package. *Id.* ¶¶ 12-16.

DIRECTV's conduct will also immediately impact HDNet's relationships with other, existing distributors. **Cuban Affidavit ¶ 9.** Pursuant to most of HDNet's agreements with its distributors, the distributors may utilize those agreements' "most favored nation" clauses, which permit the distributors to similarly reconfigure their distribution of HDNet based upon DIRECTV's removal of HDNet from its most widely distributed HD package. *Id.* ¶ 9. Additionally, DIRECTV's announcement will have an immediate, negative effect on HDNet's ongoing negotiations with other television distributors. *Id.* ¶ 10. If HDNet is required to sit and wait until DIRECTV actually "pulls the plug," DIRECTV will continue to breach its obligations under the parties' contract and HDNet will suffer non-compensable damage to its good will, reputation and business. *Id.* ¶¶ 4, 21. Once the customers, advertisers and programmers are lost in the interim, they may never return to HDNet and the viability of the network will be severely threatened. *Id.* ¶¶ 5-16.

**B. Even if Somehow Calculable, Awarding HDNet the Damages it Seeks After Trial Will Be Too Late.**

If DIRECTV's actions persist, HDNet will suffer the incalculable loss of good will, viewers, and advertisers. Even if, however, these damages were somehow easily calculable, their award after trial would not be adequate to compensate HDNet.

The *T-N-T Motorsports* court pointed out the potential inadequacy of even an easily calculable damages award by holding that "[a] legal remedy is inadequate if damages

The Honorable Teresa Snelson

November 6, 2007

Page 6

are difficult to calculate *or* their award may come too late.” 965 S.W.2d at 24 (emphasis added). In *T-N-T Motorsports*, a potential damages award could have come too late if the plaintiff lost the good will of its customers and its customer base through the improper exploitation of trade secrets. *Id.* Even if a monetary value could be placed on such assets, money often cannot repurchase good will or customers.

Courts often give particular heed to a plaintiff seeking a TRO if the continued viability of the plaintiff’s business is at stake. For example, in *Reuters*, the court reasoned that “[n]ews and pictures are the lifeblood of the wire service industry so that interrupting the flow of pictures even briefly threatens a wire service company’s continued viability.” 903 F.2d at 908; *see also GTE Mobilenet v. Cellular Max, Inc.* 123 S.W3d 801, 804 (Tex. App. – Beaumont 2003, pet. dism’d.) (holding that evidence that the movant will go out of business absent temporary relief is sufficient to support probable, imminent and irreparable injury.).

In this case, each day more viewers are choosing packages that do not include the HDNet channels. **Cuban Affidavit ¶¶ 5-8, 20, 43-44.** Their viewing habits are changing and HDNet’s customer base and good will is draining away. *Id.* ¶ 7. At the same time, advertisers are hearing tidings of decreased viewership and considering where to redirect their business. *Id.* ¶ 12-14. Money will not be able to fully restore the loss of good will, viewers, and advertisers to HDNet. *Id.* ¶ 4-21. In addition, these viewers and advertisers are the very lifeblood of the company. *Id.* ¶ 5-11. If DIRECTV’s actions continue, HDNet’s vitality—and the unique content it provides to the public—is at risk of extinction. *Id.* ¶¶ 4-21.

**C. Damages May Be Inadequate for a Plaintiff Alleging Breach of Contract.**

HDNet has pleaded several causes of action in addition to breach of contract—tortious interference with a contract, tortious interference with prospective and existing business relationships, and civil conspiracy, and has provided the Court with verified facts that establish, at the very least, a probable right to recover on those claims. PETITION ¶¶ 57-86. But even if HDNet had only pleaded a cause of action for breach of contract, a temporary restraining order would still be proper in this case.

The Texas Supreme Court has unequivocally held that a temporary restraining order may be proper for a plaintiff alleging only breach of contract. *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993). In *Walling*, the plaintiff had sued for damages arising from the breach of a business contract related to the option to purchase a business. *Id.* at 57. After the trial court’s granting of a temporary injunction pending trial, the court of appeals reversed the injunction on grounds that the plaintiff had failed to plead specific performance. *Id.* The Texas Supreme Court reversed the

FISH & RICHARDSON P.C.

The Honorable Teresa Snelson

November 6, 2007

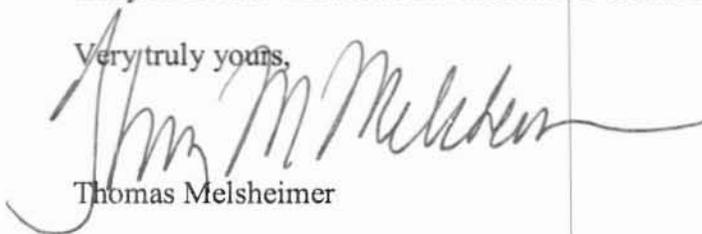
Page 7

Houston Appellate Court, holding that “[i]t is enough that [the plaintiff] pled a *cause of action* for damages resulting from a breach of contract.” *Id.*

The mere fact that HDNet is alleging a breach of contract does not in and of itself resolve, in favor either party, the issue of whether damages are adequate. The operative issue is not the cause of action alleged or the type of relief sought, but whether the relief sought will be adequate if the status quo is not preserved. As demonstrated above, a legal remedy is inadequate to compensate HDNet for the harm resulting from DIRECTV’s actions. If a TRO is not issued, HDNet will continue to suffer the immediate and irreparable loss of good will, viewers, and advertisers. **Cuban Affidavit ¶¶ 4-21.**

Thank you for your time yesterday and your consideration of the authority and analysis herein. Please do not hesitate to contact me if you have any questions.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Thomas Melsheimer", with a long horizontal flourish extending to the right.

Thomas Melsheimer

cc: Craig Simon, Jones Day (via email)  
Julie Shepard, Hogan & Hartson (via email)

## **Attachment 4**

## **PROPOSED TRANSACTION CONDITIONS**

### **Background and Rationale**

HDNet LLC proposes two transaction conditions to protect unaffiliated video programming carried on DIRECTV from discriminatory and other anticompetitive behavior after the transaction. Without these conditions, the transaction cannot serve the “public interest, convenience, and necessity.”

These conditions provide safeguards against discrimination, retaliation, and other conduct contrary to the public interest for unaffiliated video programming carried by DIRECTV as of January 29, 2007, the date the application for approval of this transaction was filed with the Commission. By providing carriage, DIRECTV has previously deemed this unaffiliated video programming valuable and agreed on the terms by which to carry it. These independent networks merit protection against, and are particularly vulnerable to, anticompetitive, discriminatory, retaliatory and other conduct by the acquirer that is contrary to the public interest. These unaffiliated video programming providers have made very substantial investments and commitments. Untoward conduct by DIRECTV can quickly and profoundly damage them, jeopardizing crucial relationships with advertisers, consumers, and other content providers who supply these networks. It may also interfere with negotiations for carriage by other platforms, possibly leading to the ultimate demise of the network.

This concern is not merely academic. As reflected by the recent experience of HDNet and HDNet Movies, as described in *ex parte* filings that include an affidavit and verified documents filed in a court, DIRECTV announced and began to implement major programming changes that discriminate against unaffiliated video programming and that favor programming affiliated with the Chairman of the acquirer, and with DIRECTV. This also breached DIRECTV’s contract.

This occurred recently, well after the expiration of the 180-day clock—thus at a time when the parties might have expected the transfer already to have been approved. When approached about the problem, the acquirer discussed taking a significant ownership interest in the unaffiliated video programming networks. That was declined. Around the same time, a network affiliate of the Chairman of the acquirer, favored by the discrimination, also breached an agreement to run advertising for an unaffiliated network and cut off all advertising, stating the network lacked adequate viewers.

Because of concerns regarding retaliation by MVPDs, independent video programming providers do not often raise these issues publicly. Additional protections are needed to protect unaffiliated video programming providers, especially those who assert their rights.

### **Explanation of Conditions**

This proposal consists of two conditions with accompanying arbitration provisions.

The first condition requires that DIRECTV continue to carry for four years after Commission approval of the transfer the unaffiliated video programming that it carried as of the application date. Should any relevant carriage contract expire in that timeframe, this condition allows continued carriage on reasonable and nondiscriminatory terms and provides for arbitration if necessary. Absent this condition, if the acquirer were caught acting impermissibly, it might only have to postpone its destructive behavior until the contract expired which, in some instances, might only be a year later. Allowing such retaliation would erode any protection independent video programming providers enjoy from discriminatory and otherwise impermissible treatment.

The second condition requires written agreement by an affected independent video programming provider that any proposed “material change” is not discriminatory. If the unaffiliated video programming provider disagrees or declines, the change cannot be implemented until after arbitration. This condition protects independent programming providers from being injured by discriminatory conduct for which relief can only be sought later. The date the application was filed is used as the reference point, in part because it would be inappropriate to use a later date on which discrimination may have already occurred.

The arbitration provisions found in the appendices largely follow those used in previously adopted transaction conditions regarding Regional Sports Networks, in that they allow for “baseball” arbitration and Commission review. The unaffiliated network, which is already on the platform, can remain through any arbitration and review.

### **Proposed Conditions**

1. For four years after an order from the FCC approving this transfer, Liberty Media Corporation and DIRECTV Group, Inc., and their relevant subsidiaries and affiliates (collectively, “DIRECTV”), shall continue to carry or offer to carry any unaffiliated video programming network that DIRECTV carried on January 29, 2007. To the extent an agreement regarding carriage of such a network was in effect on January 29, 2007 and would expire before the end of such four-year period, the unaffiliated video programming provider may request in writing up to 90 days before expiration that DIRECTV negotiate reasonable price, terms and conditions, including tier and channel placement, and enter into an agreement for the remainder of the four-year period. If the negotiations do not result in an agreement within 45 days of such request, the unaffiliated video programming provider may submit a request for binding commercial arbitration in accordance with the rules in Appendices A and C, seeking an agreement that is reasonable, taking into account the terms and conditions of the expiring agreement, prior course of dealing between the parties, all applicable laws and regulations, and any agreement by which DIRECTV distributes affiliated video programming. The terms and conditions of the expiring carriage agreement, including payment, will continue in effect during such negotiations until a new carriage agreement is reached and may be applied retroactively as

described in Appendix A. For purposes of these conditions, the term “affiliated” shall have the meaning set forth in 47 C.F.R. § 76.1300(a).

2. a. Without the specific and express written consent of any affected unaffiliated video programming provider, DIRECTV shall not make a material change to the carriage of any unaffiliated video programming network carried by DIRECTV on January 29, 2007, that is not also made with respect to all video programming networks affiliated with DIRECTV, News Corp., or their officers or directors. DIRECTV shall provide each unaffiliated programming provider a minimum of 30 days’ written notice detailing any such change and all programming that is subject to it. If the unaffiliated video programming provider does not agree that such change is permitted, and does not provide specific and express written consent, it may request commercial arbitration in writing within 21 days after receiving the written notice from DIRECTV, in accordance with Appendices B and C. Such change will not be implemented unless and until the arbitrator renders a determination in favor of DIRECTV.

b. If DIRECTV made a material change to such unaffiliated video programming network after January 29, 2007, and before the date of this order, DIRECTV shall reverse such change upon the request of the unaffiliated video programming provider. An unaffiliated video programming provider may request commercial arbitration to determine whether either a prohibited material change has been made, or whether DIRECTV has appropriately reversed such change and restored carriage to its pre-change status, in accordance with Appendices B and C.

c. Neither Condition 1 nor Condition 2 is intended to provide the exclusive means by which an unaffiliated video programming provider may resolve any dispute.

**APPENDIX A TO MERGER CONDITIONS**  
**CONDITION 1 ARBITRATION RULES**

1. *General Arbitration Rules.*
  - a) An unaffiliated video programming provider may notify DIRECTV that it intends to request within five business days commercial arbitration to determine the terms of the new agreement.
  - b) Upon receiving timely notice of the unaffiliated video programming provider's intent to arbitrate, DIRECTV shall ensure that the unaffiliated programming network continues to be carried under the same terms and conditions of the expiring carriage agreement as long as the unaffiliated video programming provider continues to meet the obligations set forth in this condition.
  - c) Carriage of the disputed video programming network during the period of arbitration is not required in the case of first time requests for carriage.
  - d) The period following DIRECTV's receipt of timely notice of the unaffiliated video programming provider's intent to arbitrate and before the unaffiliated video programming provider's filing for formal arbitration with the American Arbitration Association ("AAA"), shall constitute a "cooling off" period during which time negotiations are to continue.
  - e) The unaffiliated video programming provider's formal demand for arbitration, which shall include the unaffiliated video programming provider's "final offer," may be filed with the AAA no earlier than the 46th day after the unaffiliated video programming provider requested negotiation.
  - f) If the unaffiliated video programming provider makes a timely demand, DIRECTV must participate in the arbitration proceeding.
  - g) The AAA will notify DIRECTV and the unaffiliated video programming provider upon receiving the unaffiliated video programming provider's formal filing.
  - h) DIRECTV shall file a "final offer" with the AAA within two business days of being notified by the AAA that a formal demand for arbitration has been filed by the unaffiliated video programming provider.
  - i) The unaffiliated video programming provider's final offer may not be disclosed until the AAA has received the final offer from DIRECTV.
  - j) A final offer shall be in the form of a contract for the carriage of the programming for a period no less than the remainder of the four-year period. A final offer may not include any provision to carry any video programming networks or any other service other than the video programming networks covered by the expiring agreement.
  - k) The arbitration will be decided by a single arbitrator under the expedited procedures of the commercial arbitration rules, then in effect, of the AAA (the "Rules"), excluding the rules relating to large, complex cases, but including the modifications to the Rules set forth in Appendix C to the Merger Conditions. The arbitrator shall issue the arbitrator's decision within 30 days from the date that the arbitrator is appointed.
  - l) The parties may agree to modify any of the time limits set forth above and any of the procedural rules of the arbitration; absent agreement, however, the rules

specified herein apply. The parties may not, however, modify the requirement that they engage in final-offer arbitration.

- m) The arbitrator is directed to choose the final offer of the party that is most reasonable, taking into account the terms and conditions of the expiring agreement, prior course of dealing between the parties, all applicable laws and regulations, and any agreement by which DIRECTV distributes video programming at that time including, without limitation, affiliated video programming.
- n) To make the arbitrator's decision, the arbitrator may consider any relevant evidence (and may require the parties to submit such evidence to the extent it is in their possession), including, but not limited to:
  - The expiring carriage agreement between DIRECTV and the unaffiliated video programming provider; and
  - Any other carriage agreement under which DIRECTV distributes video programming at that time including, without limitation, affiliated video programming.
- o) If the arbitrator finds that one party's conduct, during the course of the arbitration, has been unreasonable, the arbitrator may assess all or a portion of the other party's costs and expenses (including attorney fees) against the offending party.
- p) Following resolution of the dispute by the arbitrator, to the extent practicable, the terms of the new carriage agreement will become retroactive to the expiration date of the previous agreement. Either DIRECTV or the unaffiliated programming provider, as the case may be, will make the appropriate true-up payment to the other in the amount of the difference, if any, between the amount that is required to be paid under the arbitrator's award and the amount actually paid under the terms of the expired carriage agreement during the period of arbitration.
- q) Judgment upon an award entered by the arbitrator may be entered by any court having competent jurisdiction over the matter, unless one party indicates that it wishes to seek review of the award with the Commission, and does so in a timely manner.

2. *Review of Award by the Commission.* A party aggrieved by the arbitrator's award may file with the Commission a petition seeking *de novo* review of the award. The petition must be filed within 30 days of the date the award is published. The petition, together with an unredacted copy of the arbitrator's award, shall be filed with the Secretary's office and shall be concurrently served on the Chief, Media Bureau. The Commission shall issue its findings and conclusions not more than 60 days after receipt of the petition, which may be extended by the Commission for one period of 60 days.

- a) In reviewing the award, the Commission will examine the same evidence that was presented to the arbitrator and determine whether the price, terms, and conditions of the arbitrator's award are most reasonable in light of such evidence.
- b) The Commission may award the winning party costs and expenses (including reasonable attorney fees) to be paid by the losing party, if it considers the appeal or conduct by the losing party to have been unreasonable. Such an award of costs and expenses may cover both the appeal and the costs and expenses (including reasonable attorneys' fees) of the arbitration.

- c) Judgment upon an award entered by the arbitrator may be entered by any court having competent jurisdiction over the matter.

**APPENDIX B TO MERGER CONDITIONS**  
**CONDITION 2 ARBITRATION RULES**

1. *General Arbitration Rules.*
  - a) An unaffiliated video programming provider may notify DIRECTV that it intends to request within five business days commercial arbitration to determine whether Condition 2 has been violated.
  - b) Upon receiving timely notice of the unaffiliated video programming provider's intent to arbitrate, DIRECTV shall ensure that the unaffiliated programming network continues to be carried under the same terms and conditions as before the proposed change as long as the unaffiliated video programming provider continues to meet the obligations set forth in this condition.
  - c) If the unaffiliated video programming provider makes a timely demand, DIRECTV must participate in the arbitration proceeding.
  - d) The AAA will notify DIRECTV and the unaffiliated video programming provider upon receiving the unaffiliated video programming provider's formal filing.
  - e) DIRECTV shall file a reply with the AAA within two business days of being notified by the AAA that a formal demand for arbitration has been filed by the unaffiliated video programming provider.
  - f) The arbitration will be decided by a single arbitrator under the expedited procedures of the commercial arbitration rules, then in effect, of the AAA (the "Rules"), excluding the rules relating to large, complex cases, but including the modifications to the Rules set forth in Appendix C to the Merger Conditions. The arbitrator shall issue the arbitrator's decision within 30 days from the date that the arbitrator is appointed.
  - g) The parties may agree to modify any of the time limits set forth above and any of the procedural rules of the arbitration; absent agreement, however, the rules specified herein apply. The parties may not, however, modify the requirement that they engage in arbitration.
  - h) For Condition 2(a), the arbitrator is directed to determine whether the proposed change is a material change that is not also made with respect to all video programming networks affiliated with DIRECTV or New Corp. For Condition 2(b), the arbitrator is directed to determine whether (i) the change was a material change that was not also made with respect to all video programming networks affiliated with DIRECTV or New Corp, and/or (ii) whether DIRECTV has appropriately reversed such change.
  - i) To make the arbitrator's decision, the arbitrator may consider any relevant evidence (and may require the parties to submit such evidence to the extent it is in their possession).

- j) If the arbitrator finds that one party's conduct, during the course of the arbitration, has been unreasonable, the arbitrator may assess all or a portion of the other party's costs and expenses (including attorney fees) against the offending party.
- k) Judgment upon an award entered by the arbitrator may be entered by any court having competent jurisdiction over the matter, unless one party indicates that it wishes to seek review of the award with the Commission, and does so in a timely manner.

2. *Review of Award by the Commission.* A party aggrieved by the arbitrator's award may file with the Commission a petition seeking *de novo* review of the award. The petition must be filed within 30 days of the date the award is published. The petition, together with an unredacted copy of the arbitrator's award, shall be filed with the Secretary's office and shall be concurrently served on the Chief, Media Bureau. The Commission shall issue its findings and conclusions not more than 60 days after receipt of the petition, which may be extended by the Commission for one period of 60 days.

- a) In reviewing the award, the Commission will examine the same evidence that was presented to the arbitrator and determine whether the price, terms, and conditions of the arbitrator's award are most reasonable in light of such evidence.
- b) The Commission may award the winning party costs and expenses (including reasonable attorney fees) to be paid by the losing party, if it considers the appeal or conduct by the losing party to have been unreasonable. Such an award of costs and expenses may cover both the appeal and the costs and expenses (including reasonable attorneys' fees) of the arbitration.
- c) Judgment upon an award entered by the arbitrator may be entered by any court having competent jurisdiction over the matter.

**APPENDIX C TO MERGER CONDITIONS**  
**MODIFICATIONS TO RULES FOR ARBITRATION**  
**INVOLVING UNAFFILIATED VIDEO PROGRAMMING PROVIDERS**

1. We modify the Rules in several respects as they apply to arbitration involving video programming providers unaffiliated with DIRECTV.

2. *Initiation of Arbitration.* Arbitration shall be initiated as provided in Rule R-4 except that, under Rule R-4 (a) (ii) the video programming provider shall not be required to submit copies of the arbitration provisions of the contract, but shall instead refer to this Order in the demand for arbitration. Such reference shall be sufficient for the AAA to take jurisdiction.

3. *Appointment of the Arbitrator.* Appointment of an arbitrator shall be in accordance with rule E-4 of the Rules. Arbitrators included on the list referred to in Rule E-4(a) of the Rules shall be selected from a panel jointly developed by the American Arbitration Association and the Commission and will be based on the following criteria:

The arbitrator shall be a lawyer admitted to the bar of a state of the United States;

The arbitrator shall have been practicing law for at least 10 years;

The arbitrator shall have prior experience in mediating or arbitrating disputes concerning media programming contracts;

The arbitrator shall have negotiated or have knowledge of the terms of comparable video programming carriage contracts.

4. *Exchange of Information.* At the request of any party, or at the discretion of the arbitrator, the arbitrator may direct the production of current and previous contracts between either of the parties and MVPDs, broadcast stations, video programming networks, sports teams/leagues/organizations, recording artists, record labels, and music groups, as well as any additional information that is considered relevant in determining the value of the programming to the parties. Parties may request that access to information of a commercially sensitive nature be restricted to the arbitrator and outside counsel and experts of the opposing party.

5. *Administrative Fees and Expenses.* If the arbitrator finds that one parties' conduct, during the course of the arbitration, has been unreasonable, the arbitrator may assess all or a portion of the other parties costs and expenses (including reasonable attorneys' fees) against the offending party.

6. *Locale.* In the absence of agreement between the parties, the arbitration shall be held in the city that contains the headquarters of the unaffiliated video programming provider.

7. *Form of Award.* The arbitrator shall render a written award containing the arbitrator's findings of fact and reasons supporting the award. If the award contains confidential information, the arbitrator shall compile two versions of the award; one containing the confidential information and one with such information redacted. The version of the award containing the confidential information shall only be disclosed to persons bound by the Protective Order issued in connection with the arbitration. The parties shall include such confidential version in the record of any review of the arbitrator's decision by the Commission.