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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

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| ROB BRANTLEY, DARRYN COOKE, WILLIAM and BEVERLEY COSTLEY, PETER G. HARRIS, CHRISTIANA HILLS, MICHAEL B. KOVAC, MICHELLE NAVARRETTE, JOY PSACHIE, TIMOTHY J. STABOSZ, and JOSEPH VRANICH, individually and on behalf of all others similarly situated,<br><br>Plaintiffs,<br><br>vs.<br><br>NBC UNIVERSAL, INC., VIACOM INC., THE WALT DISNEY COMPANY, FOX ENTERTAINMENT GROUP, INC., TIME WARNER INC., TIME WARNER CABLE INC., COMCAST CORPORATION, COMCAST CABLE COMMUNICATIONS, LLC, COXCOM, INC., THE DIRECTV GROUP, INC., ECHOSTAR SATELLITE L.L.C., CHARTER COMMUNICATIONS, INC., and CABLEVISION SYSTEMS CORPORATION,<br><br>Defendants. | CASE NO. CV07-06101 CAS(VBKx)<br><br>**CLASS ACTION**<br><br>SECOND AMENDED COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF FOR VIOLATIONS OF THE SHERMAN ANTITRUST ACT (15 U.S.C. § 1)<br><br>JURY DEMANDED |

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Plaintiffs, on their own behalf and on behalf of all others similarly situated, file this Second Amended Complaint seeking damages and injunctive relief pursuant to 15 U.S.C. §§ 15 and 26, based on violations of Section 1 of the Sherman Act (15 U.S.C. § 1), and complain and allege as follows:

## I.

## NATURE OF THE CASE

1. This consumer class action specifically challenges the written contracts between the programmer defendants NBC Universal, Inc., Viacom Inc., The Walt Disney Company, Fox Entertainment Group, Inc., and Time Warner Inc. (collectively the "programmer defendants"), and the distributor defendants Time Warner Cable Inc., Comcast Corporation, Comcast Cable Communications, LLC, Coxcom, Inc., the Directv Group, Inc., Echostar Satellite L.L.C., Charter Communications, Inc., and Cablevision Systems Corporation (collectively the "distributor defendants") which, by the express terms of the agreements, artificially restrain trade by impeding the development of a properly functioning competitive market among and between cable, satellite and telecommunications distributors for the distribution of cable channels and programming to consumers. These programmer defendants own the vast majority of the channels offered to the public by the distributors, and their market power stems from their control of programming which distributors must have to function. (See Exhibit 1 attached hereto and incorporated herein). Under the terms of the written contracts, the programmer defendants, by virtue of their market power (as set forth more fully below), mandate that all distributors must (1) purchase the entire output of a particular programmer, (2) offer their channels in a prescribed manner within the expanded basic cable tier as directed by the programmers, and (3) offer consumers access to expanded

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basic cable television channels in the form of prepackaged bundled tiers at artificially inflated prices; (distributors are prohibited from offering the channels on an individual or unbundled basis) and (4) keep the terms of the written contracts secret. As a consequence, consumers are denied the choices that a competitive market, free of artificial and anticompetitive contractual restraints, would provide, including (a) the opportunity to purchase on an unbundled basis, that more accurately reflects common consumer preferences, thereby avoiding the supracompetitive surcharge paid for forced bundles containing large numbers of unwanted channels; (b) the opportunity to choose from new and innovative programming that would become more readily available from independent programmers currently foreclosed by the entry barriers created by contract restrictions. Indeed, the Federal Communications Commission ("FCC") has issued an extensive report explaining that in a competitive marketplace in which consumers are given choice by means of unbundled offerings (based upon traditional economic notions of supply and demand) "a consumer could cut his [or her] programming bills merely by electing to purchase fewer networks." FCC, *Further Report On the Packaging and Sale of Video Programming Services to the Public* at 47 (February 9, 2006). The FCC estimates that the typical American consumer is only interested in watching 17 cable channels. Therefore, the existing requirement that consumers purchase 50 or more expanded basic cable channels in the form of bundled tiers results in consumers paying for numerous cable channels they might not otherwise purchase or at least not at the currently mandated inflated prices. The FCC estimates that the failure to offer consumers the choice of purchasing unbundled cable channels results in a total overcharge to consumers in excess of $100 million per year.

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2. The programmer defendants are media entities that collectively own or control the major broadcast (free) television networks in the United States. These companies also own or control most of the major cable channels. The programming exhibited on these broadcast channels and cable channels is usually "unique" and protected by copyright law. Each programmer defendant, because of its full or partial ownership of a broadcast channel and its ownership or control of multiple important cable channels, has a high degree of market power vis-a-vis all distributors. Accordingly, each programmer defendant can dictate to distributors (whether cable, satellite or fiber optics) that as a condition to purchasing each programmers' broadcast channel and its "must have" cable channels (together these are the tying product) the distributor must also acquire and resell to consumers all the rest of the cable channels owned or controlled by each programmer (together these are the "tied" product[s]). As a consequence, distributors can offer consumers only prepackaged tiers of cable channels which consist of each programmers' entire offering of channels. Distributors must agree they will not offer unbundled cable channels to consumers. Moreover, the programmers specify how their channels or networks appear on either the basic or expanded basic tier. Finally, the contract obligates the distributor not to disclose these terms. It is a commercial necessity that each distributor must have on its network each programmer's copyrighted major broadcast network (CBS, NBC, ABC, FOX, CW) and the most important copyrighted cable channels owned or controlled by each programmer defendant, each distributor is practically required to accept the contractual requirement that each distributor not offer unbundled cable channels to consumers. These provisions operate as an enforcement mechanism to insure that each programmer can, without competing with any other programmer, require



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distributors to take its full product offering without serious negotiations. Accordingly, the programmers' market power has produced a relationship between programmers as a group, and distributors, as a group, which are the product of a distorted and anticompetitive market brought about by the exercise of market power by the programmer defendants who seek to avoid competing with one another and with independent programmers for access to distributor systems. Each programmer defendant is aware of this power and each exercises its own power to insure it can maximize its revenues by selling its entire line of channels to distributors without serious negotiation. The programmers, collectively and individually, have no economic incentive or interest to alter the existing market conditions because any effort by even one programmer to offer unbundled cable channels would reduce existing entry barriers and foreclosure effects for innovative independent programmers to offer channels that might compete effectively with the collectively dominant programmers. It is for this same reason that the programmers exercise their market power and prevent the distributors from offering cable channels to consumers on an unbundled basis. Although there are unique aspects to the defendants forced bundling of all television channels, the anticompetitive effect of these contracts can be analyzed as a block booking or as a full line forcing tie-in. Under this analysis, the tying product would be the "must have" channels and the tied product would be all other channels forced on distributors and consumers. In either case the anticompetitive effects of the conduct alleged should be judged by assessing the aggregate effect of all contracts.

3. The named cable provider defendants, Time Warner Cable, Inc., Comcast Cable Communications, LLC, Charter Communications, Inc., Cablevision Systems Corporation, and CoxCom, Inc., are the entities that



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collectively dominate the distribution of channels for exhibition to the public. The two satellite provider defendants, The DIRECTV Group, Inc., and EchoStar Satellite L.L.C. (DISH) are the two largest providers of broadcast and cable television via satellite in the United States. More recently, there has developed a third category of distributor, mainly telephone companies (AT&T and Verizon) which transmit cable channels to viewers via fiber optic cable. The distributor defendants, and the fiber optic distributors, collectively control access to the homes in the United States that desire to view cable channels. In a normal competitive market, as opposed to the existing distorted, artificial, and anticompetitive market, these three categories of distributors, who are competing with each other to sign up consumers, would develop ways to differentiate themselves from one another. A principle way to accomplish this would be to offer consumers channels either on an unbundled basis or to sign up new and innovative programmers that would attract new viewers. Because these measures are actually or practicably prohibited by the distributors contracts with each programmer, the consumer is forced to purchase the full tier of usually 50 or more channels bundled together, including channels that the consumer has no desire to watch, and the consumer is precluded from purchasing innovative programming that might be available in the absence of the foreclosing contractual restraints, all of this at a price that substantially exceeds a market-based-price for the channels that the consumer desires to watch.

4. The result of this series of written contractual restraints is that there is little or no competition among programmers for access to cable providers because each programmer has – and exercises – the market power to force each distributor to take a full line of broadcast and cable channels and to prohibit each distributor from reselling to consumers on an

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unbundled basis. Moreover, as explained above, competition among distributors for consumer business has been significantly suppressed and eliminated because their creativity in offering smaller packages or channels on an unbundled basis has been circumscribed by the contract between each distributor and each programmer which prohibits such offerings. Dish Network explained the problem in a January 4, 2008 filing with the FCC: "The ability of providers [distributors] to test a la carte or new package tiers in any comprehensive manner is limited by the contractual limitations imposed by cable and broadcaster-affiliated content."

5. Accordingly, there exists two levels of noncompetition in connection with cable television exhibition in the United States which has deprived consumers of choice, caused them to pay inflated prices for cable television, forced them to pay for cable channels they do not want and do not watch and denied them the benefits of innovation and competition resulting from the foreclosure of potential programmers. A recent study by the FCC concludes that the practices described in this Complaint are costing the cable television consumers about $100,000,000 per year in excess payments.

6. This class action seeks to eliminate those provisions of the contracts between (1) programmers and distributors and (2) distributors and consumers which contain the unlawful offering to consumers of only bundled or prepackaged bundled tiers so the market responds to the forces of competition. It also seeks reimbursement of overcharged damages during the past four year statutory period.

## II.

## PARTIES

**Plaintiffs and Class Representatives**

7. Plaintiff ROB BRANTLEY resides in Arlington, Virginia. During



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the period covered by this Complaint, plaintiff BRANTLEY has been and continues to be a subscriber of cable programming services provided by defendant COMCAST CORPORATION. Plaintiff BRANTLEY does not desire all of the channels that he is required to buy from defendant COMCAST CORPORATION and would prefer to purchase specific channels on an unbundled basis.

8. Plaintiff DARRYN COOKE resides in Costa Mesa, California. During the period covered by this Complaint, plaintiff COOKE has been and continues to be a subscriber of cable programming services provided by defendant TIME WARNER CABLE, INC. Plaintiff COOKE does not desire all of the channels that he is required to buy from defendant TIME WARNER CABLE, INC. and would prefer to purchase specific channels on an unbundled basis.

9. Plaintiffs WILLIAM AND BEVERLEY COSTLEY, a married couple, reside in San Pedro, California. During the period covered by this Complaint, the COSTLEY plaintiffs have been and continue to be subscribers of broadcast satellite programming services provided by defendant ECHOSTAR SATELLITE L.L.C. Plaintiffs WILLIAM and BEVERLY COSTLEY do not desire all of the channels that they are required to buy from defendant ECHOSTAR SATELLITE L.L.C. and would prefer to purchase specific channels on an unbundled basis.

10. Plaintiff PETER G. HARRIS resides in Pasadena, California. During the period covered by this Complaint, Plaintiff HARRIS has been and continues to be a subscriber of cable programming services provided by defendant CHARTER COMMUNICATIONS, INC. Plaintiff HARRIS does not desire all of the channels that he is required to buy from defendant CHARTER and would prefer to purchase specific channels on an unbundled basis.

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11. Plaintiff CHRISTIANA HILLS resides in San Pedro, California. During the period covered by this Complaint, plaintiff HILLS has been and continues to be a subscriber of cable programming services provided by defendant COXCOM, INC. Plaintiff HILLS does not desire all of the channels that she is required to buy from defendant COXCOM, INC., and would prefer to purchase specific channels on an unbundled basis.

12. Plaintiff MICHAEL B. KOVAC resides in Berkeley, California. During the period covered by this Complaint, plaintiff KOVAC has been and continues to be a subscriber of broadcast satellite programming services provided by defendant THE DIRECTV GROUP, INC. Plaintiff KOVAC does not desire all of the channels that he is required to buy from defendant THE DIRECTV GROUP, INC., and would prefer to purchase specific channels on an unbundled basis.

13. Plaintiff MICHELLE NAVARRETTE resides in Playa del Rey, California. During the period covered by this Complaint, plaintiff NAVARRETTE has been and continues to be a subscriber of broadcast satellite programming services provided by defendant THE DIRECTV GROUP, INC. Plaintiff NAVARRETTE does not desire all of the channels that she is required to buy from defendant THE DIRECTV GROUP, INC., and would prefer to purchase specific channels on an unbundled basis.

14. Plaintiff JOY PSACHIE resides in Riverdale, New York. During the period covered by this Complaint, Plaintiff PSACHIE has been and continues to be a subscriber of cable programming services provided by defendant CABLEVISION SYSTEMS CORPORATION. Plaintiff PSACHIE does not desire all of the channels that she is required to buy from defendant CABLEVISION and would prefer to purchase specific channels on an unbundled basis.

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15. Plaintiff TIMOTHY J. STABOSZ resides in La Porte, Indiana. During the period covered by this Complaint, plaintiff STABOSZ has been and continues to be a subscriber of cable programming services provided by defendant COMCAST CORPORATION. Plaintiff STABOSZ does not desire all of the channels that he is required to buy from defendant COMCAST CORPORATION and would prefer to purchase specific channels on an unbundled basis.

16. Plaintiff JOSEPH VRANICH resides in Irvine, California. During the period covered by this Complaint, Plaintiff VRANICH has been and continues to be a subscriber of cable programming services provided by defendant COXCOM, INC. Plaintiff VRANICH does not desire all of the channels that he is required to buy from defendant COX COMMUNICATIONS, INC., and would prefer to purchase specific channels on an unbundled basis.

**Defendants**

17. Defendant NBC UNIVERSAL, INC. (hereinafter "NBC") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York. Defendant NBC is a media entity engaged in, inter alia, the development and production of entertainment, news and information to a global audience in part through broadcast networks and cable television.

18. Defendant VIACOM INC. (hereinafter "Viacom") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York. Viacom is a leading global entertainment company engaged in, inter alia, the development and production of cable and film programming and has a substantial interest in a number of cable channels.

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19. Defendant THE WALT DISNEY COMPANY (hereinafter "Disney") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Burbank, California. Defendant Disney is a media entity engaged in, inter alia, the development and production of entertainment, news and information to a global audience in part through broadcast networks and cable television.

20. Defendant FOX ENTERTAINMENT GROUP, INC. (hereinafter "Fox") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Los Angeles, California. Defendant Fox is a media entity engaged in, inter alia, the dissemination of entertainment, news and information to a global audience in part through broadcast networks, cable television and partial ownership of a satellite provider.

21. Defendant TIME WARNER INC. (hereinafter "TWI") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York. Defendant TWI is a media entity engaged in, inter alia, the development and production of entertainment, news and information to a global audience in part through broadcast networks and cable television.

22. Defendant TIME WARNER CABLE, INC. (hereinafter "TWC") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Stamford, Connecticut. TWC is the second largest operator of cable television systems in the United States.

23. Defendant COMCAST CORPORATION is a corporation organized and existing under the laws of the State of Pennsylvania with its principal place of business in Philadelphia, Pennsylvania. Defendant COMCAST CABLE COMMUNICATIONS, LLC, is a corporation organized

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and existing under the laws of the State of Delaware with its principal place of business in Wilmington, Delaware (collectively "Comcast"). Comcast is the largest operator of cable television systems in the United States with approximately 24 million subscribers.

24. Defendant COXCOM, INC. (hereinafter "Cox") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Atlanta, Georgia. Cox is the third largest operator of cable television systems in the United States with approximately 6.7 million subscribers.

25. Defendant THE DIRECTV GROUP, INC. (hereinafter "DIRECTV") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in El Segundo, California. Defendant DIRECTV is the largest direct broadcast satellite television provider in the United States with approximately 16 million commercial and residential customers

26. Defendant ECHOSTAR SATELLITE L.L.C. (hereinafter "EchoStar") is a corporation organized and existing under the laws of the State of Nevada with its principal place of business in Englewood, Colorado. Defendant EchoStar (which markets its services as DISH) is the second largest direct broadcast satellite television provider in the United States with more than 13 million subscribers.

27. Defendant CHARTER COMMUNICATIONS, INC. (hereinafter "Charter") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in St. Louis, Missouri. Charter is the fourth largest operator of cable television systems in the United States with nearly 6 million subscribers.

28. Defendant CABLEVISION SYSTEMS CORPORATION (hereinafter "CSC") is a corporation organized and existing under the laws

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of the State of Delaware with its principal place of business in Bethpage, New York. CSC is one of the larger operators of cable television systems in the United States with approximately 3 million subscribers.

## III.

## JURISDICTION AND VENUE

29. Plaintiffs bring this action under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, for treble damages, injunctive relief, costs of suit and a reasonable attorneys' fee, against defendants for the injuries sustained by plaintiffs and Class members by reason of defendants' violations of Section 1 of the Sherman Act, 15 U.S.C. § 1.

30. Jurisdiction is proper pursuant to 28 U.S.C. §§ 1331, 1332(d) and 1337, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26.

31. Venue is proper in this District pursuant to 15 U.S.C. §§ 15, 22 and 26, and 28 U.S.C. § 1391(b) and (c) because each defendant maintains an office, may be found and/or transacts business within this District. Moreover, many of the acts alleged in this Complaint giving rise to plaintiffs' claims occurred in, were directed from, and/or had effects in, this District.

## IV.

## CLASS ACTION ALLEGATIONS

32. Plaintiffs bring this action as a class action pursuant to Federal Rule of Civil Procedure 23 on behalf of themselves and the following Class:

a. All persons residing in the United States who subscribe to "expanded basic cable" provided by one of the cable television or direct broadcast satellite television provider defendants within four (4) years of the date

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of the filing of this Complaint ("Class"). Expressly excluded from the Class are defendants and their subsidiaries, affiliates, officers, directors, and employees.

33. Certification of the Class is appropriate pursuant to Fed. R. Civ. P. 23(a). The members of the Class are so numerous that joinder of all members would be impracticable. There are millions of households who subscribe to cable television or direct broadcast satellite television.

34. There are common questions of law or fact, among others, including:

a. Have the defendants engaged in collaborative activity to preclude cable/satellite subscribers from securing unbundled cable programming apart from "basic" cable service;

b. Whether, as a result of the antitrust violation as set forth in this Complaint, plaintiffs and the Class are entitled to damages, equitable relief or other relief, and the amount and nature of such relief;

c. Whether defendants acted on grounds generally applicable to the Class, making injunctive relief appropriate;

d. Whether a Class can be certified pursuant to Fed. R. Civ. P. 23(b)(3); and

e. Whether, alternatively, a Class can be certified pursuant to Fed. R. Civ. P. 23(b)(2).

35. Plaintiffs' claims are typical of the claims of the Class, because plaintiffs and all members of the Class were injured economically by the

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same wrongful practices of defendants described in this Complaint. Plaintiffs' claims arise from the same practices and course of conduct that gave rise to the claims of the Class members, and are based on the same legal theories. There is an economic or dollar value that can be assigned to the cable subscribers' right to choose the channels he/she wishes to buy. The economic value of this right to choose is common to all Class members. The only difference between plaintiffs and individual members of the Class could be the amount of overcharge sustained, under an alternative damage analysis and this difference does not bar or in any way impair class certification.

36. Plaintiffs will fairly and adequately represent the interests of the members of the Class. Plaintiffs' interests are the same as, and not in conflict with, the other members of the Class. Plaintiffs' counsel is experienced in class action and complex litigation.

37. Questions of law or fact common to the members of the Class predominate and a class action is superior to other available methods for the fair and efficient adjudication of this lawsuit, because individual litigation of the claims of all members of the Class is economically unfeasible and procedurally impracticable. While the aggregate damages sustained by Class members are likely to be in the millions of dollars, the individual damages incurred by each Class member resulting from the wrongful conduct alleged are, as a general matter, too small to warrant the expense of individual suits. The likelihood of individual members of the Class prosecuting separate claims is remote and, even if every Class member could afford individual litigation, the court system would be unduly burdened by individual litigation of such cases. Individualized litigation would also present the potential for varying, inconsistent, or contradictory judgments and would magnify the delay and expense to all parties and to

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the court system resulting from multiple trials of the same factual issues. Plaintiffs know of no difficulty to be encountered in the management of this action that would preclude its maintenance as a class action and certification of the Class under Rule 23(b)(3) is proper.

38. Relief concerning plaintiffs' rights under the laws herein alleged, and with respect to the Class, would be proper. Defendants have acted or refuse to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with regard to members of each Class as a whole and certification of the Class under Rule 23(b)(2) is proper.

## V.

## NATURE OF TRADE AND COMMERCE

39. The relevant product market in this case is multichannel video programming services licensed and/or sold through multichannel video programming distributors ("MPVDs") including cable television distributors (including those named as defendants), direct broadcast satellite distributors (including those named as defendants), and telecommunications/fiber optic distributors to the consuming public.

40. The relevant geographic market is the United States as a whole. There may also be appropriate submarkets delineated primarily by the geographic area in which a particular cable system in enfranchised to operate. While the restraints alleged herein operate nationally, they do so in two stages: the contractual restraints on all distributors operate nationally and are then imposed both nationally and locally by the distributors to the detriment of consumers as explained herein.

41. Cable providers and direct broadcast satellite providers may lawfully supply a bundled service known as "basic cable" which means a tier or group of programming services (channels) to which a subscription is

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required for access to other "tiers" of cable service offered by the cable distributor and direct broadcast satellite distributor defendants. Basic cable includes the retransmission of local television broadcast signals and public, educational and government access channels.

42. In 1992, the Cable Consumer Protection and Competition Act became law. That legislation was designed, inter alia ,to insure that broadcast stations (the major networks owned by programmers defendants named herein) would be compensated for the retransmission of those broadcast channels (and other channels) on cable. This retransmission consent "morphed into the bludgeon used by media conglomerates to ensure their ancillary cable networks get favorable distribution in exchange for allowing cable companies the right to use their network affiliates' broadcast signals." Forbes, December 13, 2004, p. 166.

43. Each programmer defendant owns television program(s) and some interest in one or more television channels. (See Exhibit 1). For example, NBC (80% of which is owned by General Electric Company) operates the NBC broadcast network as well as cable channels USA Network (the number one rated cable channel), Bravo, MSNBC a 24- hour news channel and the Spanish-language network Telemundo. NBC also is a major producer of programming, including, among others, the series "Law and Order." Defendant Viacom operates MTV Networks, including MTV, MTV2, Nickelodeon (the top rated children's channel), Spike, Comedy Central, BET Networks and others, and is also a major developer of television programming including The Real World, Sponge Bob Square Pants, South Park and others. Defendant Disney owns and operates the broadcast channel ABC Television Network and all ESPN related cable channels and the Disney channel. Disney is also a major producer of television programming. Defendant Fox owns and operates broadcast and

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cable channels, including Fox News, FX and Fox Sports Net. Finally, defendant TWI owns part of the broadcast channel WB Network, (now CW), CNN, TBS, Turner Classic Films, Court TV and the leading film cable channel HBO. TWI is also a major programmer for television. Each of these programmers has a major broadcast channel (CBS, NBC, ABC, FOX, CW) and each programmer has, as explained above, cable channels which are deemed by the industry as absolutely necessary for a cable, satellite or fiber optic distributor to have available for resale to the consuming public. This market power gives each programmer extraordinary leverage in "negotiating" with distributors. As defendant Dish Network explained in recent comments to the FCC, "Broadcasters . . .[are] capitalizing on their power over broadcast programming – to acquire and create cable networks . . .[t]hese regulated entities have used their power to alter fundamentally the wholesale programming market."

44. Accordingly, there is a high degree of vertical integration in that defendants collectively own most of the significant broadcast and cable channels and are the dominant producers of television programming. For example, in Los Angeles there are about 60 channels that comprise the basic and expanded basic cable tiers. Of those 60 channels, thirteen (13) are entirely or partly owned by NBC/GE, nine (9) by Viacom, seven (7) by Fox, eleven (11) by Disney; TWI and Liberty Media combined own another sixteen (16) channels. There are few truly independent channels that have access to the cable, satellite, telecommunications/ fiber optic distributors and many are excluded because the programmer contracts require the distributors to take all the programmers' channels. Independent channels have been unable to secure access to the distributor networks. Some, like the Hallmark channel, have been able to secure exhibition have been discriminated against because they lack the leverage to secure fair and

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reasonable compensation. In short, the programmer defendants have exercised market power to dominate the "expanded basic tiers" and to foreclose independents from nondiscriminatory access to the distributors' networks.

45. Each of the programmer defendants, NBC, Viacom, Disney, Fox and TWI sells or licenses its unique, copyright programming or channels to the cable, satellite and telecommunications/ fiber optic distributors. In so doing, the programmers defendants require the distributors to purchase its broadcast and cable channels in a bundled package ("forced bundling"). If distributors want access to the major broadcast channels and the leading cable channels, e.g. USA, ESPN, CNN, etc., they must also acquire the programmers' full line of cable channels. This forced bundling, block booking, full-line forcing, or tying is mandated by written contracts, which are contracts in restraint of trade in violation of Section 1 of the Sherman Act (15 U.S.C. § 1), because they require the distributors to acquire properties which, if unbundled, either they would not acquire at all, or would separately negotiate channel-by-channel based upon consumer demand. The FCC has determined that if channels were sold on an unbundled basis, consumers would pay considerably less than the forced bundled price that derives from the programmers' market power. This practice of "forced bundling" which is, or is akin to, "block booking" or "full line forcing" or "tying" is done by each programmer with the knowledge and anticipation that each other major programmer will do likewise and each does so with the intention to eliminate or suppress competition among and between the programmer defendants. These practices have undermined consumer choice and eliminated competition among and between the distributors for individual channels.

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46. When required to purchase bundled channels, all distributors, including those named as defendants, repackage these offerings and distribute them to the consuming public in bundled tiers of channels, usually some 50 or more channels. The distributors, including those named as defendants, do so because they are expressly required to do so in their respective written contracts with the programmer defendants which often designate exactly where on the expanded basic tiers their owned channels are to be offered. Moreover, the contracts of each programmer expressly prohibits (or may do so indirectly by nature of the pricing structure) each distributor, including those named as defendants, from offering consumers less than the "forced bundled" tiers, i.e., unbundled expanded basic cable television channels. As set forth below, numerous industry participants have made clear that but for programmer coercion derived from their market power, they would offer such unbundled cable channels to consumers:

- **Comments and of Charles W. Ergen, Chairman and CEO of defendant EchoStar and Echo Star:**

"Unfortunately, the largest programmers, particularly those that own a big network, have the muscle to control the way that pay television providers offer programming to consumers.";

"In most instances, a single carriage agreement is signed [with programmers] to carry all content of a particular media company. . . .Such bundling of must-have and other content in a single deal is a well-established problem in the industry. . . .

Programmers do not merely seek carriage on a system, they limit how their content can and cannot be provided. . . .These restrictions on how MVPDs [Multichannel Video Programming Distributors] present



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their packages curtail the ability of MVPDs to design alternative programming packages."

These tiering limitations *coupled with bundling obligations* hamper our ability to differentiate our product. (Emphasis added).

- **Comments of Charles Dolan, Chairman of defendant Cablevision and Cablevision**:

"Fundamentally, [a la carte] would be better for the consumer"; "...we do not believe in the long term that selling programming a la carte will be detrimental to either programmers or cable operators.";

- **Comments of Robert Quinn, Senior Vice President of AT&T and AT&T:**

"We will be happy to offer a la carte programming as long as we are able to obtain access to the programming in that manner." Indeed, AT&T and other telecommunications companies initially announced that they intended to enter the market and compete for consumers by offering smaller, custom tailored packages of channels for consumers. Those efforts have been stymied by the market power of the programmers.

- **Comments of the American Cable Association**:

This association is comprised of small cable companies throughout the United States. In its submission to the FCC, the association explained "how wholesale tying and bundling profoundly shape the channel offerings of small and medium-sized cable companies" and further acknowledges that "[e]ither channels are directly tied or the economic penalty for not carrying them forces bundled carriage." It concluded that "[c]urrent wholesale programming and retransmission consent practices cause substantial public interest harms."

- **Comments of Broadband Service Providers Association**.

This association is comprised largely of telephone companies



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that compete to display content through fiber optic lines. This group advised the FCC "[s]uch wholesale programming practices that include tying and bundling of content and the required placement on particular tiers constrain the way MVPDs can package their services to subscribers and their ability to respond to consumer demand in their competitive MVPD markets."

Other industry participants, including Verizon and Mediacom, as well as many smaller cable companies, have also publicly stated that they would offer unbundled programming to their subscribers if the programmers would permit them to do so. Many small cable companies have testified that they are coerced by programmers into taking channels they do not want, and forced to resell them to consumers who similarly do not want certain channels.

The reason these distributors are forced into accepting bundled tiers that limit their ability to engage in legitimate competition for consumers based upon custom channel offerings is because the programmers defendants' market power (derived from their ownership and control of the major broadcast networks, cable networks and the copyrighted programming contained therein) prevents distributors from rejecting the demands of the programmer defendants.

Finally, in an editorial in the National Review Online dated November 30, 2007, the issue of unbundled programming was analyzed and the editorial states in part as follows:

> "All channels thus benefit from the bundling model, which allows them to access households *that might not otherwise be interested in their programming.* For this reason, TV programmers have signed contracts with cable companies that prohibit a la carte sales. ..." (Emphasis added).



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47. Unbundling of cable channels is technologically and economically practicable because it is offered in numerous foreign countries including England, Canada, India, Hong Kong and Singapore. No cable or direct broadcast satellite provider in the United States offers cable channels to consumer subscribers on an unbundled basis. Aside from "basic cable," many consumers are, because of this bundled tier distribution method, forced to accept channels which, if offered separately, they would decline. For example, an estimated 40% of cable subscribers have little or no interest in sports and yet are required to accept the several ESPN programming channels which constitute a significant part (and cost) of the bundled tiered package. Cable rates have more than doubled in the past ten years. Most cable channels are not actually watched by the subscriber. According to a Nielsen Media research report, the average cable subscriber is paying for 85 channels that he/she does not watch in order to obtain the approximately 16 channels he/she does watch. According to an Associated Press-Ipsos poll, 78% of respondents would prefer to choose and pay for their own tailored selection of channels. The second Federal Communications Commission study on this subject calculates that consumers are charged about $100,000,000 per year for channels which, if offered on an unbundled basis, they would not purchase.

## VI.

## VIOLATIONS ALLEGED

### Violations of Section 1 of the Sherman Act (15 U.S.C. §1)

48. Paragraphs 1- 47 are incorporated herein by reference with the same force and effect as though set forth at this point in full.

49. The foregoing series of contracts between the programmer defendants and the cable and direct broadcast satellite provider



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defendants constitutes a series of contracts and/or combinations among and between the named defendants which unreasonably restrain trade and commerce in the relevant product market in the United States in violation of Section 1 of the Sherman Act.

50. Consumers, including the named plaintiffs and the putative Class, have been injured in their business and property because they have been deprived of choice, have been required to purchase product they do not want, have paid inflated prices for cable television programming, and have been denied the benefits of innovation and competition resulting from the foreclosure of smaller programmers which have been excluded by the programmers' exercise of market power as explained herein.

51. Competition, including price competition at the consumer level for multi-channel video programming services has been, and will continue to be restrained, suppressed or eliminated as a result of the contracts and combinations described herein.

52. Competitors, actual and potential, have been, and will continue to be, restrained from vigorously competing with one another for selling and acquiring cable programming services as a result of the contracts and combination described herein.

53. As a direct result of the unlawful actions of defendants, and each of them, plaintiffs and Class members have been deprived of choice and have paid significantly more for cable and satellite subscriptions than they would have in the absence of the illegal agreements. As a result, plaintiffs and the Class have suffered antitrust injury in an amount not presently known with precision but which is, at a minimum, millions of dollars.

**Prayer for Relief**

WHEREFORE, plaintiffs, on behalf of themselves and others similarly situated, pray:



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1. That this matter be certified as a class action with the Class defined as set forth above under Fed. R. Civ. P. 23(b)(3), or in the alternative Fed. R. Civ. P. 23(b)(2), and that the named plaintiffs be appointed Class Representatives and their attorneys be appointed Class Counsel;

2. That judgment be entered against defendants, and each of them jointly and severally, for the treble damages as a result of defendants' violations of Section 1 of the Sherman Act, and that plaintiffs be awarded a reasonable attorneys' fee and the costs of suit as required by Section 4 of the Clayton Act;

3. That the Court enter an order requiring defendants, and each of them, to immediately cease the wrongful conduct as set forth above and specifically enjoining defendants from unlawfully bundling expanded basic cable channels and ordering defendant cable providers and direct broadcast satellite providers to notify their subscribers that they each can purchase on an unbundled basis except for "basic cable"; and

4. For such other and further relief as to the Court may seem just and proper.

Dated: March 20, 2008

BLECHER & COLLINS, P.C.
MAXWELL M. BLECHER
DAVID W. KESSELMAN
T. GIOVANNI (JOHN) ARBUCCI

By: _____
Maxwell M. Blecher
Attorneys for Plaintiffs

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## JURY TRIAL DEMAND

Plaintiffs hereby demand a trial by jury pursuant to the Federal Rules of Civil Procedure, Rule 38(b) and Local Rule 38-1.

Dated: March 20, 2008

BLECHER & COLLINS, P.C.
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**EXHIBIT 1**

# WHO OWNS WHAT

| NETWORK | OWNER |
|---|---|
| ESPN | DISNEY |
| NICKELODEON | VIACOM |
| ESPN2 | DISNEY |
| TNT | TIME-WARNER |
| SCI-FI CHANNEL | NBC-UNIVERSAL |
| CNN | TIME-WARNER |
| DISNEY | DISNEY |
| CNBC | NBC-UNIVERSAL |
| BRAVO | NBC-UNIVERSAL |
| USA | NBC-UNIVERSAL |
| MTV | VIACOM |
| AMC | RAIBOW MEDIA |
| FOX NEWS CHANNEL | NEWS CORP (FOX) |
| FX | NEWS CORP (FOX) |
| ABC FAMILY | DISNEY |
| MSNBC | NBC-UNIVERSAL |
| TV LAND | VIACOM |
| DISCOVERY | DISCOVERY |
| NFL | NFL |
| CARTOON NETWORK | TIME-WARNER |
| ANIMAL PLANET | DISCOVERY |
| HISTORY CHANNEL | A & E (WITH NBC AND DISNEY) |
| TLC (THE LEARNING CHANNEL) | DISCOVERY |
| TRAVEL | DISCOVERY |
| BET | VIACOM |
| SPIKE | VIACOM |
| COMEDY CENTRAL | VIACOM |
| HGTV (HOME & GARDEN) | E.W. SCRIPPS |
| E! | COMCAST (WITH DISNEY) |
| TBS | TIME-WARNER |
| VH1 | VIACOM |
| OXYGEN | OXYGEN |

| | | | |
|---|---|---|---|
| | THE WEATHER CHANNEL | LANDMARK COMM. | |
| | LIFETIME | LIFETIME ENTERTAINMENT (THE HEARST CORPORATION AND DISNEY) | |
| | A&E | A&E (WITH NBC AND DISNEY) | |
| | FOOD NETWORK | E. W. SCRIPPS | |
| | HALLMARK | CROWN MEDIA | |
| | COURT TV | TIME-WARNER | |
| | COUNTRY MUSIC TELEVISION | VIACOM | |
| | | | |

## PROOF OF SERVICE

STATE OF CALIFORNIA )
)
COUNTY OF LOS ANGELES )

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 515 South Figueroa Street, 17th Floor, Los Angeles, California 90071-3334. On **March 20, 2008**, I served the within:

**SECOND AMENDED COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF FOR VIOLATIONS OF THE SHERMAN ANTITRUST ACT (15 U.S.C. § 1) JURY DEMANDED**

on all interested parties in this action as follows:

**BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused a copy of the document(s) to be sent from e-mail address RARBUCCI@BLECHERCOLLINS.COM to the persons at the e-mail addresses listed below:

I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☒ (Federal) I declare under penalty of perjury that the foregoing is true and correct, and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

☐ (State) I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed on **March 20, 2008**, at Los Angeles, California.

ROSE ARBUCCI

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***Rob Brantley, et al. v. NBC Universal, Inc., et al.***
***Untied States District Court, Central District of California***
***Case No.: CV07-06101 CAS(VBKx)***

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