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February 25, 2011

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: MB Docket No. 10-190
Notice of *Ex Parte* Communication

Dear Ms. Dortch:

On February 24, 2011, Keith Murphy, Vice President, Government Relations, Viacom Inc., together with the undersigned and Antoinette Cook Bush of this Firm, representing Viacom Inc. and MTV Networks, and Aaron Panner of Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., representing Skechers USA, Inc., met with the following Commission staff to discuss matters relating to the above-referenced proceeding: Austin Schlick, Julie Veach, William Scher, Susan Aaron, Mary Beth Murphy, Kim Mathews, David Konczal, Holly Saurer and Jordan Usdan.

The meeting covered subjects already set forth in the parties' comments and other written materials in this proceeding. In particular, the parties handed out copies of the letter that they filed with the Commission in this proceeding on February 23, 2011 (a copy of which is included herewith as Exhibit A). The parties also reiterated that (i) MTV Networks pays Skechers a license fee, consistent with industry standards, which constitutes more than "nominal" consideration for the

right to telecast *Zevo-3*¹; and (ii) Skechers' purchase of advertising time on various MTV Networks channels is made at advertising rates consistent with industry standards (and in line with rates that Skechers pays, and that MTV Networks charges, in other cases).

This letter is being submitted electronically in the above-referenced docket, which has been granted permit-but-disclose status, pursuant to Section 1.1206(b) of the Commission's Rules. Should you have any questions concerning this submission, kindly contact the undersigned.

Respectfully submitted,

/s/

Jared S. Sher
Counsel to Viacom Inc. and MTV Networks

Enclosure

cc: Austin Schlick
Julie Veach
William Scher
Susan Aaron
Mary Beth Murphy
Kim Mathews
David Konczal
Holly Saurer
Jordan Usdan

¹ See *In re Policies and Rules Concerning Children's Television Programming*, Report and Order, 6 FCC Rcd 5093, 5095 (1991) (a programmer "will not be deemed to have received consideration as an inducement to air [a] program" if it "gives more than nominal consideration in return for the right to air a program").

EXHIBIT A

February 23, 2011

Austin Schlick
General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: MB Docket No. 10-190
Written *Ex Parte* Communication

Dear Mr. Schlick:

We write, in connection with the above-referenced proceeding, to provide additional details in response to your inquiry concerning the business arrangements between Skechers USA, Inc. (“Skechers”) and MTV Networks (“MTVN”) in relation to the children’s television program *Zevo-3*.

As detailed herein, the parties’ agreement requires MTVN to pay industry-standard consideration to Skechers for the right to carry *Zevo-3*; Skechers also commits to continue the parties’ preexisting, substantial advertising relationship. This arrangement is fully consistent with decades of Commission precedent and fully protected by the First Amendment.

Agreement Background. MTVN and Skechers are parties to an agreement executed in January 2010, pursuant to which MTVN agreed to license a minimum number of episodes of the program *Zevo-3* from Skechers’ entertainment division. The agreement requires MTVN to pay Skechers a program license fee, consistent with industry standards, for each episode of the series that Skechers delivers in a first season of the program, for an initial license period of three years; the agreement also provides for the license fees that MTVN must pay if it wants to re-run the first season and if MTVN elects to order additional seasons, in its sole discretion.

MTVN and Skechers have had a multi-year advertising relationship that predates the existence of *Zevo-3*. In particular, Skechers for more than 10 years has placed a substantial amount of advertising on MTVN’s various kids and families networks, including Nickelodeon and Nicktoons. The advertising relationship was in place for at least seven years before Skechers and MTVN ever discussed a *Zevo-3* program. The agreement executed in January 2010 covers both the licensing of *Zevo-3* to MTVN and the advertising commitment of Skechers on MTVN’s

networks. For the initial license period, the agreement commits Skechers to the purchase of advertising at negotiated market rates, at a specified level that – as explained further below – represents a reduction in Skechers’ advertising spending compared to immediately prior years. Skechers’ commitment to purchase advertising at the specified level is contingent on MTVN’s carriage of Skechers’ programming pursuant to the terms of the agreement. In addition, in the event that Skechers makes certain additional advertising purchases, MTVN agrees to increase certain license fees for *Zevo-3*.¹ The agreement makes clear that if MTVN exercises its right to re-run the first season, or to order additional seasons, the license fee for these renewal periods is not contingent on Skechers’ commitment to purchase any advertising on any MTVN networks.

During the first year of the license period, MTVN has committed to air a minimum number of episodes of *Zevo-3* so long as they are delivered in accordance with MTVN’s quality requirements and its standards and practices. This type of commitment is common in the industry, particularly when, as in this case, a programming network has played a meaningful role in the development of the programming.² Program creators often seek this type of commitment so as to ensure a certain level of exposure for new programs, which helps ensure that a show has an opportunity to attract and develop a new audience.

The Agreement Complies With Law. Commission precedent and industry context make clear – notwithstanding that the agreement covers both the license fee for *Zevo-3* and Skechers’ commitment to purchase advertising – that the parties’ arrangement does not violate any FCC rules or policies. Specifically, *Zevo-3* is not “commercial matter” both because MTVN is paying “more than nominal consideration for the right to” telecast the program and because the program is not “used to sell a product.”³

¹ Consistent with FCC precedent, the agreement also contains terms concerning the sharing of certain revenues from *Zevo-3*-related merchandise, specifically defined to exclude Skechers’ footwear. *See infra*, note 5.

² MTVN’s creative team played a key role in helping to develop *Zevo-3* in a manner that upholds and reinforces the core Nickelodeon brand and values. Notwithstanding that the program’s characters originated in Skechers promotional materials, to support a recurring television program, the characters had take on deeper and more nuanced personas. Thus, *Zevo-3* features strong and positive characters who deal with issues that children confront on a regular basis, such as peer pressure, bullying and family relationships. MTV Networks provided important input in developing these characters, and the program’s story arcs, in a manner that avoids shoes becoming the focus of any plot.

³ *See In re Policies and Rules Concerning Children’s Television Programming*, Memorandum Opinion and Order, 6 FCC Rcd 2111, 2112, ¶ 4 (1991) (“*CTA Order*”); *In re Policies and Rules Concerning Children’s Television Programming*, Report and Order, 6 FCC Rcd 5093, 5094-95, ¶¶ 7-8 (1991) (“*Recon Order*”).

First, the FCC has long made clear that “if a [programmer] gives more than nominal consideration in return for the right to air a program,” as MTVN does here in the form of a license fee, “the [programmer] will not be deemed to have received consideration as an inducement to air the program,” even when the business relationship between the producer of content and programmer results in the programmer receiving something of value from the producer.⁴ The Commission also has approved of an arrangement whereby broadcast stations were entitled to share merchandising revenues generated by toys based on characters in a children’s program that they agreed to carry. Rejecting allegations that profit-sharing would “create incentives for broadcasters to intermix commercial messages and program content,” the FCC found that “product licensing . . . is widespread” and that there was no evidence that this financial arrangement would “bias the program choices of television stations in an undesirable direction.”⁵

Second, no episode of *Zevo-3* can be considered a “commercial” for Skechers’ footwear, given the distance that Skechers and MTVN intentionally put in the program between the characters and the products that Skechers sells. In particular, the characters in *Zevo-3* do not derive any powers from their shoes, do not go out of their way to refer to their shoes, and do not indicate that their shoes bear any relation to their roles on the program. Neither the Skechers brand nor any Skechers logo is mentioned or appears in the program. And although the characters in *Zevo-3* are based generically on characters that previously appeared in Skechers promotion materials, the characters have been significantly fleshed out to adapt them to the multi-dimensional world of a full-length television series, with weekly storylines and continuing plots.

Third, as MTVN representatives previously explained to the Commission, MTVN employs a strict separation of decision-making between business executives responsible for selling advertising and those responsible for programming their channels and exercising editorial discretion. In the case of *Zevo-3*, MTVN’s programming executives made a creative decision that *Zevo-3* would be an appealing

⁴ See *Recon Order*, 6 FCC Rcd at 5095. In 1991, the Commission was describing a situation in which the producer of content provided a broadcaster with episodes of a children’s television show at no cost – something that clearly provided substantial economic value to the broadcaster. In exchange, the broadcaster gave to the producer a certain amount of time for the producer to sell as advertising, something that the FCC acknowledged provided “more than nominal” economic value in return. The same can be said with respect *Zevo-3*. Notwithstanding that MTVN receives advertising revenues from Skechers, the agreement between the parties ensures that MTVN pays more than nominal consideration for the right to telecast the program.

⁵ *In re Petition for Rule Making to Prohibit Profit-Sharing Arrangements In the Broadcasting of Children’s Programming*, Memorandum Opinion and Order, 100 FCC 2d 709, 710, 713 (1985).

entertainment property appropriate for Nicktoons' audience. They made this decision according to long-standing, clearly defined internal creative criteria, without input or influence from the advertising side of the company.⁶

Fourth, the fee that MTVN pays to Skechers for *Zevo-3* is commensurate with the fees that MTVN pays for other comparable programming. MTVN currently licenses 24 kids and family programs for which it pays a third party a per-episode license fee; these programs include hits such as *Fantastic Four*, *Iron Man*, and *Speed Racer*. The license fee that MTVN pays for *Zevo-3* is greater than or equal to the fee it pays for 14 of those 24 programs. Moreover, the *Zevo-3* fee is 9 percent higher than the median fee for those series. (In fact, the fee is nearly four times higher than what MTVN pays for the least expensive of the programs it licenses on a per-episode basis.)

Fifth, Skechers' advertising commitment under the agreement is in line with Skechers' advertising buy across MTVN kids and family networks in previous years. Skechers' advertising spending on MTVN kids and family networks in 2010, the first year covered by the agreement, actually was 26 percent lower than the amount that Skechers spent on those same networks in 2008 (the year its spending on MTVN peaked). Skechers' advertising commitment for 2011 is lower still than 2010. The advertising commitment for 2011 also is slightly lower than the average amount that Skechers has spent on MTVN's networks during the past five years.⁷

Sixth, Skechers' advertising spending on MTVN kids and family networks is also in line with its spending on competing networks. Skechers makes advertising buys on every ad-supported children's television network, and its allocation of advertising dollars is in line with audience exposure.

Children's Television Is Fully Protected Speech. There is nothing new or untoward about *Zevo-3* or the business arrangement in place here. Indeed, the Commission has long recognized Congress' explicit directive, in the text of the CTA, that "the financial support of advertisers" is vital to enabling "the provision of programming to children."⁸ Moreover, children's television programming is fully protected speech entitled to robust First Amendment protection. Any attempt to impose more restrictive oversight would be subject to strict scrutiny. The Commission acknowledged as much when it adopted rules to implement the law in

⁶ Since it debuted last August, *Zevo-3* has received audience ratings consistent with the ratings received for other Nicktoons programming designed for a similar audience.

⁷ The Skechers-MTVN arrangement also is customary in the industry; multi-year advertising commitments contingent on program carriage are common.

⁸ 47 U.S.C. § 303a note at (3).

1991. The FCC specifically indicated that, “consistent with legislative intent,” it would “interpret the [CTA] with sensitivity to the constitutional rights of the broadcasters and cable operators it affects by affording them significant discretion when implementing” the statute.⁹ The Commission always has sought to avoid actions that would “chill production of children’s programming, thereby thwarting the fundamental objectives” of the statute.¹⁰

It is of no import that a child might perceive a connection between *Zevo-3* and Skechers footwear. That would be no different from scores of children’s programs over the past 30 years in which a character (such as Barbie, Elmo, or G.I. Joe) is also sold as a product or may appear as a “spokesperson.” While the manufacturers of products “of course [have] commercial goals” in using characters to “encourage the development and broadcast of programs in which their toys are depicted,” the mere fact that “programming may serve commercial goals . . . in and of itself, is not controlling.”¹¹ Indeed, “[i]f the existence of commercial rewards from associated products were the criteria for imposing restrictions upon children’s programming, then no program-related product licensing would be possible and even popular . . . and critically acclaimed commercial television programs . . . would have to be eliminated” from television.¹²

* * * * *

In sum, the parties’ agreement is fully consistent with decades of Commission precedent and fully protected by the First Amendment. We hope that the foregoing information is helpful. Please do not hesitate to contact us should you have any further questions.

⁹ *CTA Order*, 6 FCC Rcd at 2112, n.5.

¹⁰ *Id.* at 2118; *see also* Comments of MTV Networks, MB Docket No. 10-190 (filed Oct. 22, 2010), at 22-23.

¹¹ *In re Complaint of Action for Children’s Television against Television Station KTTV, Los Angeles, California, et al.*, Memorandum Opinion and Order, 58 R.R.2d 61, ¶ 17 (1985).

¹² *Id.*

Austin Schlick
February 23, 2011
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Respectfully submitted,

/s/

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