

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 00-K-212

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

Plaintiffs,

v.

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

Defendants.

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AND RELATED COUNTERCLAIMS

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

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

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

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

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

party document productions have been deficient, making motions to compel likely if disputes cannot be worked out. Most of these motions to compel will need to be filed in jurisdictions other than Colorado. Thus EchoStar will be required to wage these third party battles on a number of different fronts, which is likely to considerably delay EchoStar's efforts to obtain relevant discovery from necessary third parties. EchoStar nonetheless continues to negotiate in good faith with the various third parties. EchoStar also intends to contact approximately forty-six (46) other third party witnesses to obtain information relative to the issues raised in the DIRECTV motion. It is important for EchoStar to work informally with third parties as much as possible given the Court's limit of thirty-five (35) fact depositions per side. Based upon the document discovery conducted to date and EchoStar's informal discovery efforts, EchoStar intends to serve subpoenas on a minimum of 25-30 additional third parties.

This is also a case in which expert witnesses will play an important role on several issues, including the definition of the relevant market, DIRECTV's market power and the anticompetitive effects of DIRECTV's misuse of that power; issues that are central to DIRECTV's Motion and this Court's proper consideration of that Motion. Not surprisingly, EchoStar's experts have only begun their work, which will require an analysis of the voluminous documents produced and to be produced. Further delaying EchoStar's experts' review and analysis of the relevant documents is the fact that under the Protective Order, each third party must be advised that EchoStar intends to share with its experts documents that the third party has designated as confidential under the Protective Order. As a result of this additional time consuming process, EchoStar's experts have not been yet permitted to review, or even had access to, many of the documents produced by third parties. In any event, expert reports are not due

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

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

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

RESPECTFULLY SUBMITTED THIS \_\_\_\_\_ day of November 2000.

Signed:

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

**I. FACTUAL BACKGROUND**

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

documents from third-party cable companies like AT&T because such discovery may provide evidence:

. . . concerning the fact, scope and nature of competition between cable and satellite TV. Such evidence is directly relevant to the issues of market definition, the existence of market power, the competitive reasonableness and justification for the conduct of DIRECTV that is challenged as anticompetitive in these proceedings, and the health and dynamic quality of the subscription TV market.

AT&T Motion at 4. Although EchoStar would disagree with the spin DIRECTV put on the issues, the basic message is the same: Discovery about the nature of the DBS industry, competition between DBS providers and cable providers, and DIRECTV's exercise of its market power to attempt to exclude EchoStar from the DBS Market is reasonable are all issues on which all the parties are still conducting discovery; issues that are key to DIRECTV's Motion. More importantly, DIRECTV itself recognizes its own difficulties in obtaining relevant information on these issues. DIRECTV has accordingly implicitly recognized that its Motion is premature.

EchoStar has a team of lawyers that is continuing to review the approximately 475,000 pages of documents produced, some of which clearly address the issues related to the relevant market and DIRECTV's market power within that market; issues that are central to DIRECTV's Motion. Ricketts Dec., ¶ \_\_. However, this review is not complete, despite EchoStar's counsel's best efforts. Once EchoStar has had the opportunity to fully analyze these documents, there will be no doubt that summary judgment is inappropriate.

EchoStar believes that a thorough analysis of the already-produced documents and future discovery, through depositions and third-party document production will establish the following facts, which will clearly defeat the Motion:

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

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

See Ricketts Dec.

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

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

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

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

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

ongoing and the parties' review of the hundreds of thousands of pages of documents produced already, it is simply not feasible for the experts to form their opinions in the near future. Indeed, the deadline for expert reports (February 15, 2001) was set with the understanding that extensive discovery needed to be conducted in order to provide experts with relevant information to review and for the experts thereafter to generate reports.

The parties hope to begin depositions in November 2000, but will likely not complete the depositions until shortly before the discovery cutoff in June 2001. DIRECTV may complain that EchoStar has been free to take depositions and any delay in doing so should not permit EchoStar to delay responding to the Motion. Such a position ignores the fact that DIRECTV itself still has only recently professed to complete its document production. Beginning depositions (particularly of DIRECTV witnesses) before DIRECTV finished producing documents and before EchoStar had an opportunity to review and evaluate such documents, is inefficient at best and could prejudice EchoStar in view of the deposition limits (both number and length) proposed by the Court. Each party group is permitted to take only thirty-five (35) fact witness depositions in addition to expert witness depositions. See Scheduling Order at pp. 17-18. Of these thirty-five (35) depositions per side, eighteen (18) must be completed in one day and the remaining seventeen (17) must be completed within two (2) days. Narrowing the list of potential deponents is a significant task in and of itself. In addition to the expected party witnesses that will need to be deposed, there are literally dozens of potential third-party witnesses. EchoStar is conducting third-party document discovery in an effort to narrow the list of potential deponents. However, it will take several months to finish third-party document discovery. Accordingly, it is simply premature for DIRECTV to be seeking judgment as a matter of law at this juncture.

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

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

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

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

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

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



the alleged conspirators. Id. The Tenth Circuit has agreed with this notion and has noted that while affidavits under Rule 56(f) should generally be treated liberally, a party's access to witnesses or material is of crucial importance in antitrust cases where the information is likely to be in the sole possession of the opposing party. See Patty Precision, 742 F.2d at 1264. Cases have indicated that where the facts are in the possession of the moving party, a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course. See Costlow v. United States, 552 F.2d 560, 564 (3<sup>rd</sup> Cir. 1977). EchoStar must be permitted to conduct its basic discovery as the relevant information necessary for an informed response to DIRECTV's motion for summary judgment is mainly in the possession of the defendants (and third parties). Although DIRECTV has produced some relevant information already, the overall volume of documents produced has made a meaningful review of those documents a Herculean task, which has not yet been completed, although it is ongoing.

This crucial importance is also underscored also by the complexity of the claims and the volume of information generally involved in antitrust cases. Indeed, as DIRECTV itself has noted, the sheer volume of documents involved in the present case make even simple tasks extremely time consuming and difficult. Recently, DIRECTV's counsel sent correspondence to EchoStar indicating that DIRECTV believes that it has once again inadvertently produced privileged documents. DIRECTV's counsel further advised that DIRECTV is in the process of reviewing its document production to identify any additional documents that DIRECTV inadvertently produced. DIRECTV admits "Because of the volume of the production, it will take several weeks to complete this process." See Exhibit 1 to Ricketts Dec.

The fact that DIRECTV has already produced a large number of documents does not diminish EchoStar's ability to obtain a Rule 56(f) continuance and actually supports the request. First, it is not practical to quickly review hundreds of thousands of documents to respond to a motion for summary judgment. EchoStar's counsel is working diligently to review these documents, which is a massive and ongoing task. DIRECTV has only recently professed to have completed its production and thus has exclusive control (at a minimum) of tens of thousands of documents responsive to EchoStar's March 14, 2000 document request. The fact that DIRECTV itself was still gathering responsive documents more than six months after the discovery request was served underscores the complexity of this case and the need for more than twenty-five (25) days to respond to the Motion and its thousands of pages of appendices.

DIRECTV would also have the Court believe that it can resolve EchoStar's antitrust claims as a matter of law. However, it is settled law that determining the appropriate relevant market in an antitrust case is a question of fact to be determined after the parties have had the opportunity to conduct appropriate discovery. See, e.g., Eastman Kodak Co. v. Image Technical Svcs., Inc., 504 U.S. 451 (1992) (finding, among other things, that a genuine issue of material fact existed regarding the relevant market); Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 717-20 (3d Cir. 1991) (determining the relevant product market or submarket is "a highly factual issue"); Full Draw Prods. v. Easton Sports, Inc., 182 F.3d 745 (10th Cir. 1999).

It is also settled law that the relevant market in an antitrust case can be a submarket of a larger market in which the goods or services of the submarket compete. Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962) ("well defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes."); Rothery Storage & Van Co. v.

Atlas Van Lines, Inc., 792 F.2d 210, 218 (D.C. Cir. 1986); FTC v. Staples, Inc., 970 F. Supp. 1066 (D.C. Cir. 1997).

In Staples, the FTC sought a preliminary injunction under Section 7 of the Clayton Act to enjoin the acquisition of Office Depot by Staples, pending a final disposition by the FTC of the legality of the acquisition. "As with many antitrust cases, the definition of the relevant product market in this case is crucial. In fact, to a great extent, this case hinges on the proper definition of the relevant product market." Id. at 1073.

The FTC defined the relevant product market as "'the sale of consumable office supplies through office superstores,' with 'consumable' meaning products that consumers buy recurrently.'" Id. Staples argued that the relevant product market consisted only of "the overall sales of office products . . . ." Id. Staples' market would include a variety of stores (e.g. Wal-Mart); whereas the FTC's market would include only the "office superstores", which are Office Depot, Staples, and OfficeMax. Id. at 1073-75.

The court began its analysis by stating that the relevant product market is determined by looking at the interchangeability of use and cross-elasticity of demand—"i.e. whether there are other products offered to consumers which are similar in character or use to the product or products in question, as well as how far buyers will go to substitute one commodity for another." Id. at 1074. The court noted that although office supplies sold by an office superstore are functionally interchangeable<sup>3</sup> with office supplies sold elsewhere, this does not end the analysis.

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<sup>3</sup> "Whether there are other products available to consumers which are similar in character or use to the products in question may be termed "functional interchangeability." FTC, 970 F. Supp. At 1074.

A court should also consider "the responsiveness of the sales of one product to price changes of the other." Id.

The court acknowledged that there is:

a broad market encompassing the sale of consumable office supplies by all sellers of such supplies, and that those sellers must, at some level, compete with one another. However, the mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes.

Id. at 1075. The court concluded that the sale of office supplies by an office superstore was a submarket within the larger market of retail office sales for antitrust purposes. Id. The court reached this conclusion largely on the basis of substantial evidence provided by the FTC showing that pricing at office superstores was directly affected by whether or not there was another office superstore in the area. Id. at 1075-80.

Likewise, in this case, EchoStar will demonstrate, once it has a full opportunity to conduct discovery, that the DBS Market is an appropriate submarket of the MVPD Market for antitrust purposes.

Thus, establishing the appropriate relevant market is a highly factual issue and a summary judgment motion should not be considered on this issue at least until after the parties have completed appropriate discovery. Although the parties have been conducting discovery for approximately seven (7) months, the real discovery in this matter has not even begun. While it is true that DIRECTV has produced more than 313,000 of pages of documents as stated above, DIRECTV has only recently professed to have completed its document production.<sup>4</sup> Although EchoStar's lawyers have been diligently reviewing the hundreds of thousands of documents obtained from DIRECTV and numerous third parties, EchoStar's counsel has not yet had the

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<sup>4</sup> Again, however, EchoStar had not yet had an opportunity to review DIRECTV's documents to verify whether or not DIRECTV has in fact produced all documents responsive to EchoStar's document requests.

opportunity to fully evaluate the documents to assess their relevance to various issues in the case. The process of reviewing and analyzing documents is a Herculean task, requiring work by several lawyers and paralegals. As that task progresses, EchoStar's counsel will gather documents relevant to all of the issues in this case, including documents supporting the fact that the relevant market for the Court to consider is the DBS Market and evidence demonstrating DIRECTV's market power, and the anticompetitive effects caused by exercise of that market power. EchoStar will provide relevant documents to its experts to assist them in formulating their opinions. Expert reports, which will be instrumental in assisting the jury in its determination of the relevant market and market power are not even due until February, 2001.

Nor have any depositions been taken in this matter. The depositions of key DIRECTV executives as well as third-parties will obviously have relevance to determining the relevant market and DIRECTV's market power. To file a Motion for Summary Judgment at such an early stage of litigation, is simply premature.

Until the parties have an opportunity to conduct relevant discovery, the Court cannot sufficiently evaluate defendants' Motion and whether DIRECTV are entitled to summary judgment. The fact that defendants even ask this Court to rule on their Motion in the absence of critical discovery having been conducted suggests that DIRECTV is not interested in this Court learning the truth or even considering all relevant evidence.

The law is well settled: determination of a motion for summary judgment prior to the completion of discovery, as DIRECTV requests, is directly contrary to the policy inherent in Rule 56 of the Federal Rules of Civil Procedure. See Celotex, 477 U.S. at 322 (Rule 56 must be construed "with due regard . . . for the rights of persons asserting claims and defenses that are adequately based on facts to have those claims and defenses tried to a jury"); Anderson, 477 U.S. at 251 n.5, 257, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (summary judgment is a drastic remedy and is therefore granted cautiously).

### III. CONCLUSION

For the foregoing reasons, EchoStar respectfully requests that this Court grant EchoStar additional time in which to complete discovery and respond to DIRECTV's Motion pursuant to Rules 6 and 56(f) of the Federal Rules of Civil Procedure.

RESPECTFULLY SUBMITTED this 14 day of November, 2000.

Signed: 

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that on this 27 day of November, 2000, a true and correct copy of the foregoing Request for Rule 56(F) Continuance to Respond to DIRECTV Defendants' Motion for Summary Judgment and Memorandum of Law in Support Thereof has been forwarded in the following manner to the following attorney(s) of record, in accordance with the Federal Rules of Civil Procedure:

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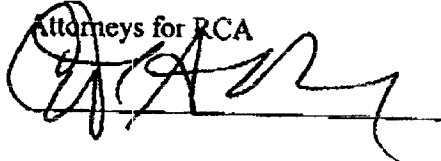
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A handwritten signature in black ink is written over a horizontal line. The signature is stylized and appears to be a combination of initials and a surname.