SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

VOOM HD HOLDINGS LLC,	:	Index No. 08-600292
Plaintiff,	:	I.A.S. Part 56
-against-	:	Hon. Richard B. Lowe III
ECHOSTAR SATELLITE L.L.C.,	:	**Motion Sequence No. [003]**
Defendant.	:	**Oral Argument Requested**

PLAINTIFF VOOM HD HOLDINGS LLC'S OPPOSITION TO ECHOSTAR'S CROSS-MOTION FOR SUMMARY JUDGMENT

Dated: New York, New York
May 28, 2010

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Plaintiff VOOM HD Holdings LLC, f.k.a. Rainbow HD Holdings LLC ("Rainbow HD"), respectfully submits this opposition to the cross-motion for summary judgment by Defendant EchoStar Satellite L.L.C. ("EchoStar").

PRELIMINARY STATEMENT

EchoStar's motion for summary judgment is based upon outright misrepresentations. To the contrary, its convoluted arguments only confirm that this case is ripe for summary judgment in favor of Rainbow HD.

First, EchoStar distorts the plain language of Section 10 of the Affiliation Agreement and rips that one provision apart from the rest of the agreement. Section 10 permitted EchoStar to terminate the Affiliation Agreement if Rainbow HD did not invest $500 million "in the Service" (at a rate of $100 million per calendar year). EchoStar argues that only expenditures on "programming content" counted toward Rainbow HD's $500 million investment in the Service. But the Affiliation Agreement does not restrict expenditures on the Service to "programming content." Instead, the definition of "Service"—a definition EchoStar assiduously avoids—is broad and all-encompassing. EchoStar's position is also at war with Section 4 of the Affiliation Agreement, which set forth the parties' complete agreement relating to Rainbow HD's obligations with respect to "programming" and "content." Section 4—entitled "CONTENT OF THE SERVICE"—gives EchoStar a separate termination right for "content" breaches.

Second, EchoStar falsely portrays the Affiliation Agreement as a stand-alone document that should be read in isolation, ripped apart from the integrated and interdependent VOOM Agreements to which it was attached and the $500 million investment at the heart of the parties' transaction. EchoStar itself referred to this multi-agreement transaction as a "Joint Venture." EchoStar ignores the integrated VOOM Agreements, failing even to mention the Investment

Agreement—the master contract for the overall transaction relating to VOOM. EchoStar also conceals from the Court that the LLC Agreement and the Affiliation Agreement were physically bound to the Investment Agreement as Exhibit A and Exhibit B, and that the $500 million investment was central to both agreements. Section 10 of the Affiliation Agreement gave EchoStar the right to terminate the Affiliation Agreement in the event that Rainbow HD failed to invest $500 million "in the Service," in increments of $100 million per calendar year "on the Service." And Annex A to the LLC Agreement set forth in unambiguous language the six categories of expenditures that would count toward Rainbow HD's $500 million investment.

Third, EchoStar asks this Court to turn a blind eye toward the overwhelming extrinsic evidence (including contemporaneous handwritten notes, draft agreements, memoranda, e-mails and financial documents). This is because, if the Court were to find the plain language of the VOOM Agreements to be ambiguous, EchoStar knows that the extrinsic evidence is fatal to its invented position in this case. The unrebutted evidence adduced during discovery confirms that Rainbow HD's investment in the VOOM Service included all expenditures "of the LLC relating to the ongoing operations of . . . VOOM 21" as set forth in Annex A—including intercompany allocations and other ordinary administrative expenses.

Fourth, EchoStar confirms that Rainbow HD spent more than $100 million on the VOOM Service in 2006 if so-called "overhead" costs are counted, as they indisputably must be. In the absence of any tenable legal position, EchoStar attempts to distract the Court with a dense laundry list of so-called "overhead" costs it contends should be excluded from Rainbow HD's investment in the Service. But EchoStar's argument goes nowhere. The plain language of the Affiliation Agreement, the plain language of the integrated VOOM Agreements, and the unrebutted extensive extrinsic evidence all establish that Rainbow HD's so-called "overhead"

expenditures qualify as expenditures "on the Service."

EchoStar's premature termination of the Affiliation Agreement had no valid basis. Its cross-motion for summary judgment fails as a matter of law and should be denied. As set forth in Rainbow HD's motion for summary judgment dated April 29, 2010, summary judgment as to liability should be granted for Rainbow HD.

ARGUMENT

I. ECHOSTAR DISTORTS THIS COURT'S MAY 2008 RULING.

EchoStar misrepresents this Court's April 23, 2008 ruling denying Rainbow HD's motion for a preliminary injunction. By cherry-picking portions of the Court's decision and omitting critical language, EchoStar misleadingly suggests—in the first two pages of its cross-motion—that this Court endorsed EchoStar's overly narrow interpretation of "Service" in Section 10 of the Affiliation Agreement to categorically exclude "overhead allocations" and include only expenditures on "content" or "programming." ES Br. 1-2. But the Court did not "previously interpret[]" the word "Service," nor did it make any specific determination of what expenditures do or do not count under Section 10. Instead, this Court ruled, by emphasizing the words "*on the Service*," that the issue in this case is whether Rainbow HD spent $100 million on the Service in 2006 under Section 10. RHD 19-a Opp. ¶ 48(a);[1] Order at 11 (emphasis in original). As set forth in its motion for summary judgment, Rainbow HD emphatically agrees with this Court and

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[1] Citations to "RHD 19-a ¶ __" are to paragraphs of Rainbow HD's Statement Pursuant to Rule 19-A In Support Of Rainbow HD's Motion For Summary Judgment As To Liability, dated April 29, 2010. Citations to "RHD Opp. 19-a ¶ __" are to paragraphs of the accompanying Response to EchoStar's Statement Of Material Facts As To Which There Are No Genuine Issues To Be Tried, dated May 14, 2010. Citations to "ES Br. __" are to EchoStar's Memorandum Of Law In Support Of Its Motion For Summary Judgment, dated April 29, 2010. Citations to "RHD Br. __" are to Rainbow HD's Memorandum Of Law In Support Of Its Motion for Summary Judgment as to Liability, dated April 29, 2010.

has demonstrated that it spent more than $100 million "on the Service" in 2006. *See* RHD Br. 14.

II. ECHOSTAR DISTORTS THE PLAIN LANGUAGE OF THE AFFILIATION AGREEMENT.

A. The Distinction Between "Network" and "Service."

According to EchoStar, "Service" means only "programming content" because "Service" and "Network" are separately defined terms under the Affiliation Agreement. Specifically, EchoStar argues that "programming content" is synonymous with "Service" because any broader definition of what expenditures count as on the "Service" would "conflate" the defined contract terms "Service" and "Network." *Id.* 13-14. EchoStar's argument makes no sense.

The Affiliation Agreement made crystal clear that the terms "Network" and "Service" have different meanings. "Network" was the corporate entity "Rainbow HD Holdings LLC," RHD Opp. 19-a ¶ 13, which owned and operated the VOOM Service and could own multiple businesses (i.e., other programming services). RHD 19-a ¶ 63. In contrast, the "Service" was defined more narrowly, as the "television programming service known as 'VOOM,'" and:

> "Service" shall mean the Service as more specifically described below in Section 4 and shall, for the avoidance of doubt, include, in the aggregate, all components and/or parts thereof including, without limitation, all interactive components, graphic scrolls or other visual graphics and all portions of the VBI (or its digital equivalent) and any commercial advertising that airs on the Service and shall for clarity refer to, in the aggregate, all constituent channels that make up the Service.

RHD 19-a ¶ 66 (emphases added). The Affiliation Agreement thus made clear that the "Service," VOOM, was a television programming service owned and operated by Rainbow HD. Rainbow HD has never argued that "Service" and "Network" mean the same thing, and reading Section 10 to include all of Rainbow HD's expenditures on the "Service" does not "conflate" the two terms.

The Affiliation Agreement expressly recognized that "Network"—Rainbow HD—might

purchase or develop other programming services in addition to the VOOM Service. Section 4(c) of the Affiliation Agreement contemplated that Rainbow HD could have "owned, operated or otherwise managed or controlled" "[an]other High Definition Programming Service . . . not branded and marketed as part of the VOOM Service" that would have competed with VOOM. *See* RHD 19-a Opp. ¶ 16(a) (emphasis added).[2] Rainbow HD owned and operated "the Service"—i.e., the VOOM business—but was free under the Affiliation Agreement to own and operate other businesses, including other programming services.

Section 10 is dependent upon and reinforces the distinction between "Network" (Rainbow HD) and the "Service" (VOOM). Section 10 made certain that Rainbow HD could meet its $500 million investment commitment only by spending on the VOOM Service and not on any other programming service (or other business) owned, operated, or otherwise managed or controlled by Rainbow HD. RHD 19-a ¶¶ 62-66. Section 10 thus guaranteed EchoStar that, even if Rainbow HD launched another programming service, Rainbow HD would continue to spend $100 million per calendar year on the VOOM Service, up to a total investment of $500 million.[3]

EchoStar further contends that the term "Service" must mean only "programming content" because, otherwise, "every dime spent on [Rainbow HD's] overall business operations would constitute spending on the 'Service.'" ES Br. 16. Once again, EchoStar is playing fast and loose with the text and structure of the Affiliation Agreement. In an effort to dramatize its

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2 If this occurred, EchoStar had the right to distribute the additional "High Definition Programming Service" on terms no less favorable than any other distributor. RHD 19-a ¶ 63; RHD Opp. 19-a ¶ 16(a).

3 EchoStar's own cross-motion makes a critical admission on this point. EchoStar defines "Network" as "a Delaware limited liability company that, inter alia, owns and licenses television programming services." ES Br. 3 (emphasis added). In other words, according to EchoStar, Rainbow HD is a legal entity that, among other things, could own and license multiple television services.

point, EchoStar concocts the following scenario: What if Rainbow HD attempted to satisfy Section 10 by spending $90 million on "building luxurious corporate offices on Long Island and lavishing bonuses on its executives, while spending only $10 million on . . . programming."[4] *Id.* This example only confirms the futility of EchoStar's position.

If Rainbow HD had spent $90 million on offices and salaries and only $10 million on "programming," EchoStar could have terminated every VOOM channel that did not satisfy the comprehensive content and programming requirements under Section 4. EchoStar's brief does not address Section 4, entitled "CONTENT OF THE SERVICE," which specifically establishes the parties' entire rights and obligations with respect to the "programming" and "content" on the VOOM channels.[5] RHD 19-a ¶ 56; RHD Opp. 19-a ¶ 16(b). In five separate detailed provisions, Sections 4(a)(i)-(v) required Rainbow HD to deliver to EchoStar "programming" and "content" that was substantial in both quality and quantity. RHD 19-a ¶ 58; RHD Opp. 19-a ¶ 16(b). Specifically, Section 4(a) required:

- that the Service include a mix of at least five distinct "programming genres" (e.g., music, news, movies, sports, lifestyle and arts/culture), including at least one full-time sports channel and one full-time movie channel (Section 4(a)(i));
- that "each channel that is part of the Service, other than a Movie Channel," shall contain an increasing number of hours of "Non Repeat Programming," beginning in Contract Month 19 (Section 4(a)(ii));

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4 Of course, in reality, Rainbow HD's 2006 expenditures on the Service were consistent with the projected 2006 expenses set forth in the 2005 5-Year Plan for VOOM, which EchoStar examined in detail during its April 2005 due diligence. RHD Opp. 19-a ¶ 30(b); RHD 19-a ¶¶ 117-120, 187-188. There is no evidence to suggest that this would have changed in future years.

5 In a further attempt to run away from the content requirements of Section 4, EchoStar's Vice President of Programming, Carolyn Crawford, removes her discussion of Section 4's "detailed requirements regarding the content of the Service" from her Affidavit on April 28, 2010, which otherwise is mostly a cut-and-paste job from her Affidavit submitted to this Court dated February 5, 2008. RHD Opp. 19-a ¶ 26(f). Making this concealment even more egregious, Ms. Crawford adds a new section entitled "Network's Failure to Provide Quality Non-Repetitive Programming"—without referencing the provisions of Section 4 expressly governing this subject matter. *Id.*

- a minimum number of "individual movie titles" to exhibit on the movie channels, increasing over the term of the agreement (Section 4(a)(iii));
- that "each channel that is part of the Service . . . will be programmed 100% in High Definition," with an increasing percentage of "programming" in wide-screen format and originally produced in HD (Section 4(a)(iv)); and
- an increasing number of hours of "premier programming" to be shown during "prime time" on the VOOM channels (Section 4(a)(v)).

Section 4(a)(vi) gave EchoStar specific remedies in the event that Rainbow HD failed to satisfy these content requirements. Specifically, EchoStar had the right to "cease carriage" and "terminate this Agreement with respect to any . . . offending channel." RHD Opp. 19-a ¶ 16(b). Thus, Section 4(a)(vi) reflected the parties' complete agreement with respect to EchoStar's rights and remedies for "content" or "programming" breaches. In contrast, Section 10—which does not mention "programming" or "content"—set forth the parties' agreement with respect to termination of the Affiliation Agreement if Rainbow HD failed to invest $500 million (at a rate of $100 million per calendar year) "in the Service."[6] RHD 19-a ¶ 64.

Recognizing that Section 4 is fatal to its position, EchoStar would have this Court rip the Affiliation Agreement apart and consider Section 10 in isolation. But fundamental principles of contract law require that the Court consider the Affiliation Agreement as a whole. *See, e.g.*, *Kass v. Kass*, 91 N.Y.2d 554, 566 (1998) ("Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby.") (internal quotation marks omitted). Section 10 and Section 4 must be interpreted together: Section 10 ensured that Rainbow HD would invest at least $500 million in the VOOM Service (at a rate of $100 million per calendar year) and Section 4 ensured

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6 Obviously, to satisfy the stringent requirements of Section 4, Rainbow HD was going to have to make a substantial financial investment in "programming content." But the Affiliation Agreement does not, as EchoStar pretends, require that Rainbow HD "spen[d] any specific sum of money on the programming content." ES Br. 14.

that Rainbow HD would deliver "content" in accordance with the detailed provisions of Section 4(a). RHD 19-a ¶¶ 56-60, 64-67; RHD Opp. 19-a ¶ 16(b). Section 10 and Section 4 each contained their own distinct and separate termination right in the event that Rainbow HD failed sufficiently to invest "in the Service" (under Section 10) or deliver adequate "content" (under Section 4). *See* RHD 19-a ¶ 64; RHD Opp. 19-a ¶ 16(b).

In light of Section 4, EchoStar's hypothetical about the $90 million office building is meaningless. If Rainbow HD had spent only $10 million on "content," it would not have been able to satisfy the numerous "content" requirements of Section 4(a). In that scenario, EchoStar could have terminated some (indeed, likely all) of the VOOM channels under Section 4(a)(vi). Section 4 likewise would have protected EchoStar in the event Rainbow HD had spent $100 million on a single live appearance by top recording artists or a single action movie filled with expensive special effects. If Rainbow HD had simply spent $100 million on one "program," for example, it would have satisfied Section 10 under EchoStar's interpretation, but still would not have delivered EchoStar satisfactory "programming content" across all of the VOOM channels.

Considering the Affiliation Agreement as a whole, as this Court must, it is clear that the parties intended Section 4 to provide EchoStar with its remedies in the event Rainbow HD did not meet its "programming content" obligations—including if Rainbow HD did not spend enough money on "content" or "programming" to enable it to do so. The parties drafted Section 10 to ensure that Rainbow HD—"Network"—invested $500 million "in the Service" as a whole (as opposed to any other programming service or other business), in increments of $100 million per calendar year.

B. The Unambiguous Definition of "Service."

EchoStar presents the Court with a made-up definition of "Service." EchoStar proclaims that "[t]he Affiliation Agreement clearly defines the term 'Service' to be the programming

content and other constituent elements in the television channels delivered to EchoStar for distribution to its subscribers over the Distribution System." ES Br. 13 (emphases added). But the definition of "Service" did not say this. The actual definition of "Service"—which EchoStar never even attempts to take on—broadly stated that the "Service" is "the television programming service known as 'VOOM'" and that it "shall for clarity refer to, in the aggregate, all constituent channels that make up the Service." RHD 19-a ¶ 66 (emphases added).

Not only did the Affiliation Agreement define "Service" as the group of 21 channels that make up VOOM, but the definition used every imaginable expansive term—words and phrases like "include," "including," "without limitation," "in the aggregate," and "all components and/or parts thereof." *Id.* EchoStar ignores the legal significance of these open-ended terms, but it is black-letter law that they unambiguously "broaden[] the concept being defined." *Doniger v. Rye Psychiatric Hosp. Ctr., Inc.*, 122 A.D.2d 873, 877 (2d Dep't 1986). Moreover, Section 4 confirmed that "programming content" was only part of the "Service," but was not synonymous with the definition of "Service" itself. Section 4(a), which described the "Content" of the Service, described the "Service" as "comprised of a suite of no more than 21 and no less than 5 full time 24 x 7 linear channels of programming." RHD 19-a ¶ 57; RHD Opp. 19-a ¶ 16(b).

The channels that made up the Service were the VOOM channels. Like the Discovery Channel, the Disney Channel and the Sundance Channel, the VOOM channels were composed of more than just the "programming content" that appeared on the television screen. The VOOM channels comprised a television programming business—owned, operated, managed, and controlled by Rainbow HD. *See* RHD 19-a ¶ 1. Just like other television channels, operation of the VOOM Service required expenditures on more than "programming content" alone. To produce and deliver programming, a "channel" requires office space, employees, a human

resources department, utilities, satellite trucks, equipment, and more. *See* RHD Opp. 19-a ¶ 51(a)-(c). Section 4(c) of the Affiliation Agreement confirmed the broad definition of "Service." Section 4(c) used the term "High Definition Programming Service" to refer to a business that is "owned, operated or otherwise managed or controlled."[7] RHD 19-a ¶ 63 (emphases added). Rainbow HD owned, operated, managed and controlled the VOOM Service, of which "programming content" was only one (important) constituent "part."

As EchoStar admits, the Affiliation Agreement was "negotiated over many months between highly sophisticated parties." ES Br. 15. That is all the more reason to hold the parties to the precise language and structure of the agreement they negotiated. *See W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 WL 3317551, at *9 (Del. Ch. 2007). EchoStar insists that spending "on the Service" must mean spending only on "programming content," but Section 10—indeed, the entire Affiliation Agreement—"is written very obliquely if that is its meaning, a meaning that could have been written very directly if the drafters intended to embrace" it. *In re NextMedia Investors, LLC*, 2009 WL 1228665, at *5 (Del. Ch. 2009) (finding defendant's proposed interpretation unreasonable and granting summary judgment for plaintiff). If the parties had intended "Service" to mean "programming content," they obviously would have said so. *See Mickman v. Am. Int'l Processing, L.L.C.*, 2009 WL 2244608, at *2 & n.14 (Del. Ch. 2009). EchoStar's made-up definition of "Service" is precluded by the plain language of the Affiliation Agreement.

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[7] The Investment Agreement and the LLC Agreement, as set forth more fully below, confirm this reading of the Affiliation Agreement. Both refer to Rainbow HD's "own[ership] and operat[ion]" of the VOOM high definition programming "services" or "channels." RHD 19-a ¶¶ 25, 33.

III. ECHOSTAR DISTORTS THE INTEGRATED AGREEMENTS AND MISREPRESENTS THE DEAL BETWEEN THE PARTIES.

On page 6 of its opening brief, EchoStar makes the following statement:

> In addition to the Interim Agreement and the Affiliation Agreement, Rainbow Media affiliates and EchoStar affiliates entered into other separate contracts in April and November 2005. Each of those contracts has its own distinct term and purpose, and none of these other contracts were between Network and EchoStar, the parties to the Affiliation Agreement.

ES Br. 6 (emphases added). This is patently false.

The parties negotiated one overall deal in April 2005 that EchoStar referred to as the "Joint Venture." RHD 19-a ¶ 19. The terms of this "Joint Venture" were reflected in a series of integrated agreements that were interdependent and affixed to one another. RHD Opp. 19-a ¶¶ 8(b)-(d), 9(d)-(k). The Investment Agreement and the Interim Operating Agreement—both executed on April 28, 2005—made clear that Rainbow HD, EchoStar, and their respective affiliates were entering into "Investment Transaction Documents" relating to VOOM. *Id.* The Investment Agreement stated in the WHEREAS clause:

> [T]he Company [Rainbow HD], a wholly-owned Subsidiary of the Parent [Rainbow Programming Holdings, LLC], owns and operates, directly or through its Subsidiaries . . . a suite of twenty-one (21) high definition channels [i.e., the VOOM Service].

Id. ¶ 9(c) (emphasis added). The Investment Agreement further stated:

> [T]he Investor [EchoStar Communications Corporation] or one of its Affiliates has agreed to enter into the following agreements with the Company [Rainbow HD]: (i) an LLC Agreement of the Company [Rainbow HD] (the "LLC Agreement") in the form attached hereto as Exhibit A, with such changes thereto as are mutually agreed by the Investor and the Company; (ii) an Affiliation Agreement (the "Affiliation Agreement") in the form attached hereto as Exhibit B, with such changes thereto as are mutually agreed by the Investor and the Company, concerning certain distribution services to be provided by the Investor and its Affiliates to the Company in accordance with the terms thereof; and (iii) a Support Agreement (the "Support Agreement" and together with the Interim Operating Agreement, the Affiliation Agreement and the LLC Agreement, the "Related Agreements") in the form attached hereto as Exhibit C, with such changes thereto as are mutually agreed by the Investor and the Company, each

such agreement to become effective upon the Closing.

Id. ¶ 9(d) (emphases in original). The Investment Agreement further defined these "Related Agreements," along with the Investment Agreement as the "Investment Transaction Documents." *Id.* 9(h).

The Interim Operating Agreement—which EchoStar acknowledges, but does not quote—expressly referred to the "[c]oncurrent" execution of the Investment Agreement, and to the pending execution of the other Related Agreements, stating in its first paragraph:

> Rainbow HD will make available to EchoStar for distribution by EchoStar to its customers the ten (10) channel subset described below ("VOOM 10") of Rainbow HD's existing high definition television ("HDTV") service known as "VOOM 21." Concurrent with the execution of this Agreement, EchoStar and Rainbow HD have entered into an Investment Agreement pursuant to which, at the closing thereunder, EchoStar will receive a twenty percent (20%) equity interest in Rainbow HD, and EchoStar and Rainbow HD will enter[] into an affiliation agreement ("Affiliation Agreement") pursuant to which EchoStar will begin distributing VOOM 21 . . . .

Id. ¶ 8(c) (emphases added).

These provisions put the lie to EchoStar's shameless attempt to portray the Affiliation Agreement as a "separate" and "distinct" stand-alone agreement.

First, EchoStar would have this Court believe that the Investment Agreement and LLC Agreement are irrelevant because they were signed by EchoStar's parent companies, EchoStar Communications Corp. and EchoStar Media Holdings Corp., RHD 19-a ¶¶ 24, 31, whereas the Affiliation Agreement and the Interim Operating Agreement were entered into by EchoStar itself (i.e., EchoStar Satellite, LLC). *See* ES Br. 6. This is a technical distinction without a difference, as the plain terms of the agreements demonstrate. For example, the Investment Agreement authorized EchoStar Communications Corp. (the "Investor") to agree to modifications of both the LLC Agreement (entered into by EchoStar Media Holdings Corp.) and the Affiliation Agreement (entered into by EchoStar). RHD Opp. 19-a ¶ 9(d). And the Interim Operating

Agreement (entered into by EchoStar) stated that the Investment Agreement was entered into between Rainbow HD and EchoStar itself. *Id.* ¶ 8(c). Furthermore, all of the Related Agreements were signed by the Executive Vice President and General Counsel of EchoStar (and its parent companies), David Moskowitz. *Id.* ¶ 9(j).

Second, EchoStar creates a false portrait of separate contracts distant in time. In truth, the Investment Agreement and the Interim Operating Agreement—both dated April 28, 2005—made clear that these "Investment Transaction Documents" are all part of a unified transaction involving VOOM that was agreed to in April 2005 and became effective en masse upon the "Closing Date," as defined by the Investment Agreement (ultimately, November 17, 2005). *Id.* ¶¶ 8(b)-(d).

Third, EchoStar commits an egregious sleight of hand by representing to this Court that each agreement had a "distinct . . . purpose." ES Br. 6. The Investment Transaction Documents each expressly related to the very same subject matter—the continued operation of the VOOM television programming service:

- The Investment Agreement referred to Rainbow HD's "suite of twenty-one (21) high definition channels," and provided that, at the "Closing," Rainbow HD would deliver to EchoStar or its affiliates a 20% ownership interest. The "Closing" was not "legally effective" until EchoStar's parent delivered to Rainbow HD and its affiliates "[d]uly executed counterparts of the Related Agreements," including the LLC Agreement and the Affiliation Agreement. To make this point more clear, Article V of the Investment Agreement stated that "consummat[ion]" of "the transactions contemplated by [the Investment Agreement]" was subject to satisfaction of certain conditions precedent, including execution and delivery of the LLC Agreement and the Affiliation Agreement. RHD 19-a ¶¶ 25, 28; RHD Opp. 19-a ¶¶ 9(e)-(g).

- The Interim Operating Agreement governed EchoStar's distribution of a "ten (10) channel subset" of the existing 21-channel service "known as 'VOOM 21'" pending the "VOOM 21 Launch Date" on which EchoStar would begin distributing "VOOM 21" pursuant to the Affiliation Agreement. RHD Opp. 19-a ¶¶ 8(c)-(d).

- The LLC Agreement confirmed the unifying purpose of the transaction, expressly stating that "Rainbow Member and EchoStar Member desire to enter into this Agreement in connection with the continuation of the LLC to, among other things, own and operate the VOOM 21

high definition programming services." RHD 19-a ¶ 33.

- The Affiliation Agreement, of course, set forth the specific terms of EchoStar's "carriage of the VOOM 21 high definition programming services"—as expressly contemplated by the LLC Agreement and the Investment Agreement. *Id.* ¶¶ 34, 48-49.

To leave no doubt that the Investment Transaction Documents must be read together, the Investment Agreement contained an overarching "Entire Agreement" clause, which requires that the Investment Agreement "and the other Investment Transaction Documents, along with the Annexes, Schedules and Exhibits hereto and thereto, contain the entire agreement and understanding among the Parties with respect to the subject matter hereof and thereof . . . ." *Id.* ¶ 27. EchoStar simply ignores this provision.

In an effort to tear the integrated agreements apart, EchoStar contends that a merger clause in the Affiliation Agreement means that "the Court need look no further than the four corners of the Affiliation Agreement itself." ES Br. 12. But the law is clear that Section 10 must be interpreted "within the context in which the parties wrote it," and where multiple agreements form part of a single transaction, "the context includes all of the agreements." *XO Commc'ns, LLC v. Level 3 Commc'ns, Inc.*, 948 A.2d 1111, 1119 (Del. Ch. 2007) (emphasis added); *see also* 11 *Williston on Contracts* § 30:25 (4th Ed. 1989) (separate documents must be interpreted together "where the parties have expressed their intention to have one document's provision read into a separate document").[8] This rule applies "even where in one of the contracts it is stated that there are no other contracts between the parties." *Wells Fargo Bank Minn. v. CD Video, Inc.*, 2004 WL 3029875, at *6 (N.Y. Sup. Ct. 2004) (granting summary judgment for plaintiff), *aff'd* 22 A.D.3d 351 (1st Dep't 2005). EchoStar's butchered reading of the Affiliation

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[8] EchoStar cites only two cases for its argument; both deal exclusively with extrinsic evidence and do not address integrated agreements at all. *See Rossi v. Ricks*, 2008 WL 3021033, at *2 (Del. Ch. 2008); *Progressive Int'l Corp. v. E.D. DuPont De Nemours & Co.*, 2002 WL 1558382, at *7 (Del. Ch. 2002).

Agreement rides roughshod over established New York law holding that separate agreements must be read together as an integrated whole where, as here, they were drafted together, concern the same subject matter, and are between the same or related parties. *See* RHD Br. 20. EchoStar cites no authority for ripping the Affiliation Agreement from the integrated VOOM Agreements.

EchoStar's true purpose here is clear. EchoStar knows that, read together, the Investment Transaction Documents are fatal to its skewed interpretation of Section 10 of the Affiliation Agreement. Rainbow HD's $500 million investment in the VOOM Service was a commercial centerpiece of the parties' transaction. The LLC Agreement provided that EchoStar's interest in Rainbow HD would not be diluted until Rainbow HD's parent companies had contributed $500 million in cash to the LLC. RHD 19-a ¶ 35. The Affiliation Agreement put teeth in the $500 million commitment by giving EchoStar a termination right if Rainbow HD did not invest the $500 million in the VOOM Service (as opposed to any other programming service or other venture). RHD 19-a ¶¶ 64-66. The parties defined the "expenditures of the LLC" that would count toward Rainbow HD's $500 million investment in Annex A to the LLC Agreement. Annex A clearly lists the six permissible categories of "expenditures of the LLC relating to . . . VOOM 21," including "Intercompany Allocations" and "Other General and Administrative." RHD 19-a ¶ 39.

IV. ECHOSTAR IGNORES THE UNDISPUTED EXTRINSIC EVIDENCE.

EchoStar is not entitled to summary judgment because it cannot establish that the terms of the Investment Transaction Documents support its fanciful interpretation of Section 10. To the contrary, the plain language of the Affiliation Agreement and the other VOOM Agreements—which EchoStar ignores—make clear that EchoStar unlawfully terminated the Affiliation Agreement and that summary judgment should be awarded to Rainbow HD. At a minimum, the Investment Transaction Documents are ambiguous and this Court must consider

the extrinsic evidence, which EchoStar desperately seeks to shield from the Court, and which is dispositive in favor of Rainbow HD.

To support its reading of the Affiliation Agreement, EchoStar contends that it "bargained" for Rainbow HD to spend a "specific sum of money on the programming content."[9] ES Br. 14. But EchoStar cites no actual evidence of this alleged "bargain." This is because all of the contemporaneous negotiation evidence (handwritten notes, draft agreements, financial analyses, memoranda and e-mails) establishes that Rainbow HD agreed to invest $500 million (at a rate of $100 million per calendar year) in the VOOM Service as set forth in Annex A, and not only on so-called "programming content."

During negotiations, the parties initially expressed the $500 million investment term as an anti-dilution provision in the LLC Agreement, meaning that EchoStar's 20% interest in Rainbow HD could not be diluted until an additional $500 million had been contributed to Rainbow HD by its parent companies. RHD 19-a ¶ 93. But EchoStar was concerned that the anti-dilution provision did not ensure that the $500 million would be used by Rainbow HD on the VOOM businesses (i.e., channels) as opposed to any other programming service or business venture. *Id.* ¶¶ 94–98. To address this concern, the parties added language to Section 10 of the Affiliation Agreement granting EchoStar a termination right in the event Rainbow HD failed to invest the $500 million (in increments of $100 million per calendar year) specifically in the

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9 EchoStar misrepresents the testimony of Rainbow Media's CEO, Josh Sapan, by selectively quoting his deposition testimony that ensuring the quality of the VOOM programming was "a key motivation" for EchoStar's request that Rainbow HD fund the VOOM Service. ES Br. 6. But EchoStar yanks this testimony out of context, ignoring more than 10 pages of Mr. Sapan's surrounding testimony that "[t]here was a crystal clear understanding that the $100 million was on the Voom business" and it included "[o]perational spending on the Voom business," as "captured in the P&L of Voom"—"consistent with the manner in which [Rainbow Media] spen[t] on each of [its] other businesses, AMC, W[E] TV, IFC, Sundance [all programming services]." RHD Opp. 19-a ¶ 21(b). In any event, it was certainly true that the production of quality programming was a "a key motivation" for requiring an investment of money in an "unproven," ES Br. 6, television programming business.

VOOM Service. *Id.* ¶¶ 99-103, 135-140. Handwritten notes taken by both parties, as well as other contemporaneous documents, confirm this. For example, *see id.* ¶¶ 96–103, 121:

- On April 12, 2005, in its first revision of the 2004 draft of the Affiliation Agreement, EchoStar indicated in Section 4(c) that Rainbow HD's ability to launch "[an]other HD Programming Service" was an "OPEN" issue.
- The handwritten notes of Andrea Greenberg, one of Rainbow HD's lead negotiators of the Affiliation Agreement, show that "Echo[Star] request[ed]" an affirmative "[o]bligation to fund the businesses [i.e., the VOOM channels] over 5 years to the extent of $500 million."
- A contemporaneous memo written a few days after the $100 million expenditure provision was added to Section 10 shows that the parties understood the $100 million sum to be "$100 million of equity . . . contributed to VOOM HD during each of the first five years," or a total of $500 million.
- Because EchoStar obtained this investment commitment, it no longer needed protection against Rainbow HD (or its parent companies) launching another HD programming service that would compete with the VOOM Service and the parties narrowed the "OPEN" reference in Section 4(c) to simply the term of EchoStar's MFN right with respect to any such future HD programming services.
- In a list of open items, David Deitch, another lead negotiator, indicated that the parties continued to negotiate whether the termination right "on underfunding" in Section 10 would apply "even if Rainbow has not started a new HD Service . . . outside of VOOM 21."
- The contemporaneous handwritten notes of Terry Brown, EchoStar's lead due diligence executive, are in accord, referring to the $100 million provision in Section 10 of the Affiliation Agreement as follows: "100/21" and "NON-COMPETE ($100M; REDUCED VIA CHANNEL FORMULA)."

The extrinsic evidence also confirms that the parties understood and agreed that Rainbow HD's $500 million investment in the VOOM Service included all of the categories of expenditures listed on Annex A to the LLC Agreement. EchoStar agreed to Annex A only after conducting extensive due diligence on the expenses necessary to operate the "HD Channels." *See* RHD 19-a ¶¶ 105-131. This due diligence was informed by EchoStar's understanding that Rainbow HD's parent companies had "profoundly different" spending cultures from EchoStar. *Id.* ¶ 110. Among other documents, EchoStar and its team of outside lawyers carefully reviewed Rainbow HD's 2005 5-Year Plan for VOOM. *Id.* ¶¶ 109, 117-120. That document disclosed the

expenses that would be incurred by Rainbow HD to operate the VOOM "HD Channels," including "Administration and Allocations" costs. *Id.* ¶¶ 118-120. The 2005 5-Year Plan further broke out the projected costs into those directly attributable to each of the VOOM channels, and costs incurred on behalf of the "HD Channels" as a whole. *Id.* ¶¶ 117-120. EchoStar's clear understanding of Rainbow HD's expenditures on the VOOM Service was set forth in its own detailed financial analysis, entitled "Finance Due Diligence." *Id.* ¶¶ 126-131.

After EchoStar completed its due diligence, the parties negotiated an "Affirmative List" of permissible "expenditures of the LLC relating to the ongoing operations of . . . VOOM 21"—Annex A—based on an existing list of "2005 expense categories" for "all operating costs." *Id.* ¶¶ 39, 135-136. The same day the parties negotiated Annex A, they also added the $500 million cap to Rainbow HD's investment in Section 10. *Id.* ¶ 137. On the final day of negotiations, the parties ensured that Rainbow HD's $100 million per calendar year expenditures "on the Service" would be measured the same as the $500 million investment term—i.e., according to Annex A—by adding the words "in the Service" following the words "has invested $500 million" in Section 10 of the Affiliation Agreement. *Id.* ¶ 139.

During their depositions, Rainbow HD's lead negotiators offered detailed testimony explaining the parties' understanding that Annex A defined the expenditures that counted toward Rainbow HD's investment in "the Service" under Section 10. *Id.* ¶ 142. Tellingly, EchoStar's witnesses could not recall a single conversation about Rainbow HD's investment in the Service under Section 10 being measured in any way other than as set forth in Annex A. *Id.* ¶ 141.

Despite extensive discovery, EchoStar has failed to offer any contemporaneous extrinsic evidence to support its tortured reading of the Affiliation Agreement. Thus, the extrinsic evidence stands unrebutted and mandates summary judgment for Rainbow HD, not EchoStar.

See, e.g., T.L.C. West, LLC v. Fashion Outlets of Niagara, LLC, 60 A.D.3d 1422, 1424 (4th Dep't 2009) (granting summary judgment for plaintiff where "all of the extrinsic evidence contained in the record weighs in favor of plaintiff's interpretation").

V. RAINBOW HD SATISFIED SECTION 10 OF THE AFFILIATION AGREEMENT.

A. Rainbow HD's 2006 Expenditures On The VOOM Service Exceeded $100 Million.

There is no dispute that Rainbow HD spent at least $102.959 million on the Service in 2006, including so-called "overhead" costs, and EchoStar admits as much.[10] Indeed, EchoStar expressly acknowledges that "[t]here is no genuine dispute as to the amount or nature of the $12.4 million in overhead expenses incurred by [Rainbow HD] in 2006," and its auditor already confirmed in a sworn affidavit to this Court that, in addition, Rainbow HD spent approximately $90.1 million on "actual programming amounts" and "[Rainbow HD's direct] general operating expenses and overhead costs" in 2006. ES Br. 17; RHD 19-a ¶ 199.

EchoStar argues that Rainbow HD violated Section 10 of the Affiliation Agreement because its $102.959 million in reported expenditures included expenditures that go beyond "programming content." Specifically, EchoStar argues that $12.4 million in expenditures set

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10 The expert report of Rainbow HD's expert, David Ricchiute, further confirms that Rainbow HD's 2006 expenditures on the Service exceeded $100 million. Mr. Ricchiute performed several in-depth and widely accepted analyses of Rainbow HD's financial records to determine the total money spent by Rainbow HD in 2006, without making a legal determination of what constituted spending on "the Service." Mr. Ricchiute determined that each of his analyses confirmed that Rainbow HD spent approximately $105 million in 2006. *See* RHD Opp. 19-a ¶ 30(e). Of course, this too directly undercuts EchoStar's argument that Rainbow HD is arguing that every dollar spent by Rainbow HD counted as on "the Service"—a fact that EchoStar delicately sidesteps in its brief. Rainbow HD has made no such argument in connection with either its motion for summary judgment or in opposition to EchoStar's motion for summary judgment. In any event, should Rainbow HD demonstrate that it in fact spent more than $102.959 million on "the Service" in 2006 through expert testimony, it is obviously not foreclosed from doing so. The case cited by EchoStar in support of the absurd proposition that Rainbow HD would be foreclosed from making such an argument (which would render the discovery of any new evidence a nullity) involved a party trying to invoke a different controlling law than that under which it first brought suit and is completely inapposite. *See* ES Br. 17; *Pers. Decisions, Inc. v. Bus. Planning Sys.*, 2008 WL 1932404, at *4 (Del. Ch. 2008).

forth in Rainbow HD's 2006 Spending Breakdown, *see* RHD 19-a ¶ 187, were for "general corporate overhead costs, unrelated to the programming content" that must be excluded. ES Br. 16–17. EchoStar's position fails as a matter of law for the reasons set forth in Sections II-IV above.

EchoStar's conduct in 2007 further confirms that Rainbow HD's permissible expenditures on the "Service" included "overhead" costs. On July 11, 2007, Rainbow HD sent EchoStar its 2006 Spending Breakdown, setting forth $102.959 million in expenditures on VOOM across thirteen categories. RHD 19-a ¶¶ 187-188. EchoStar now claims that three of those categories (totaling $12.4 million) reflect impermissible "overhead" expenses. *See infra*, 22. But, upon initial receipt of the 2006 Spending Breakdown, EchoStar made no such objection. Instead, EchoStar waited four months, until November 16, 2007, to threaten "formal[] terminat[ion]" on the basis of Rainbow HD's inclusion of "general overhead costs." RHD 19-a ¶¶ 189, 204. EchoStar's October 2007 audit further confirmed its understanding that "overhead" expenses were permitted under Section 10 of the Affiliation Agreement. EchoStar audited all of Rainbow HD's expenditures—including "overhead"—and specifically tested "whether overhead costs were allocated to VOOM in accordance with the three-factor formula" set forth in Annex B to the LLC Agreement. *Id.* ¶¶ 192-194 (emphasis added). It was only after EchoStar's auditor concluded that Rainbow HD was "clean" on its total expenditures of $102.959 million on the Service that EchoStar manufactured its new limiting interpretation of Section 10 to exclude so-called "overhead" costs. *Id.* ¶¶ 198, 204.

Because so-called "overhead" costs are included as permissible expenditures on "the Service" under Section 10, Rainbow HD satisfied Section 10 and EchoStar's termination of the Affiliation Agreement on this basis was unlawful.

B. Rainbow HD's So-Called "Overhead" Benefited The VOOM Service.

EchoStar argues that so-called "overhead" expenses are somehow not appropriate. The opposite is true. It is well established that "overhead" costs—such as payroll, accounting, human resources, rent and office supplies—are ordinary, customary, and necessary operating expenses. Indeed, EchoStar's own expert witness, Paul K. Meyer, acknowledged at his deposition that "overhead" is a "necessary cost of operating a business overall." RHD Opp. 19-a ¶ 51(b); *see also* RHD 19-a ¶ 112. It is also standard operating procedure in corporate America for subsidiary businesses such as the VOOM Service to share (and incur costs for) corporate services and departments with their parent and affiliated businesses in order to create economic efficiencies[11] and other benefits.[12]

Rainbow HD's inclusion of so-called "overhead" costs in its expenditures on the Service came as no surprise to EchoStar. EchoStar was keenly aware that Rainbow HD would incur these charges on behalf of the VOOM channels, as a result of its extensive due diligence in April 2005. *See* RHD 19-a ¶¶ 105-131. Nevertheless, EchoStar clings to the pretense that the following three categories of expenditures—representing three of the thirteen categories of expenditures set forth in the 2006 Spending Breakdown—are somehow excluded: "CSC/RMHI," "Other Allocations" and "G&A." *Id.* ¶¶ 187-188; ES Br. 16-19. Each of these challenged

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11 By utilizing shared corporate services and departments, Rainbow HD spent a fraction of what it otherwise would have spent on the VOOM Service. In 2006, Rainbow HD received (and expended on the VOOM Service) only 11.3% of all allocable costs from Rainbow Media and 3.1% of Cablevision's allocated costs. RHD Opp. 19-a ¶¶ 54(a), 53(b). Furthermore, because Cablevision does not allocate 100% of its costs, Rainbow HD achieved additional cost savings on the VOOM Service for the services it was receiving. For example, in 2006, Cablevision incurred approximately $74 million in costs that were never allocated to its business units—a savings on the VOOM Service of $2.3 million (i.e., 3.1% of $74 million). *See id.* ¶ 53(e).

12 The U.S. Securities & Exchange Commission (SEC) and the Federal Accounting Standards Advisory Board (FASAB), for example, expressly recognize that companies allocate common expenses for shared services and provide guidance for allocating those costs. SEC, *Codification of Staff Accounting Bulletins*, Topic 1.B.1; FASAB, *Statements of Federal Financial Accounting Concepts and Standards*, p. 387.

categories of expenditures benefited the VOOM Service and Annex A to the LLC Agreement—which expressly identifies each of these categories as "expenditures of the LLC relating to the ongoing operations of . . . VOOM 21"—was designed to prevent the very scattershot challenges that EchoStar now advances:

- The "CSC/RMHI" category represented amounts charged to Rainbow HD by its parent, Rainbow Media, for shared departments and services provided by Cablevision and Rainbow Media for the benefit of, among their other businesses, the VOOM Service (e.g., legal services, accounts payable, accounting, financial reporting and public relations). RHD 19-a ¶ 195. Annex A expressly identified expenditures for "Corporate Allocations" as relating to the ongoing operations of VOOM 21, and these expenses were allocated to the VOOM Service on a consistent basis, in accordance with the terms of Annex B. *Id.* ¶¶ 39-40, 46.

- The "Other Allocations" category represented amounts charged to Rainbow HD by its parent and affiliated companies for other shared services and facilities benefiting the VOOM Service (e.g., rent and facilities, third-party legal fees, insurance, telecommunications, design services, and information technology). *Id.* ¶ 195. Annex A expressly identified expenditures for "Allocated Service Departments" and "Direct Charges" as relating to the ongoing operations of VOOM 21, and these expenses were allocated to the VOOM Service on a consistent basis, in accordance with the terms of Annex B to the LLC Agreement. *Id.* ¶¶ 39-40, 46.

- The "G&A" category represented amounts incurred directly by Rainbow HD for general and administrative costs benefiting the VOOM Service (e.g., office supplies and equipment, travel and entertainment, and other costs associated with full-time Rainbow HD employees). *Id.* ¶ 195. Annex A expressly identified expenditures for "Other General and Administrative" as relating to the ongoing operations of VOOM 21 (specifically identifying items such as "office supplies" and "utilities" as examples of included costs). *Id.* ¶¶ 39, 42.

Because Annex A is so clear, EchoStar's fallback is to distract the Court with a dense laundry list of so-called "overhead" expenses that supposedly are "unrelated to the programming content." ES Br. 16–19. EchoStar's rambling discussion of these specific "overhead" expenses, at pages 16–21 of its moving brief is irrelevant. Rainbow HD incurred (and paid for) these categories of "overhead" costs on behalf of the VOOM Service as agreed by EchoStar in Annexes A and B to the LLC Agreement and consistent with the 2005 5-Year Plan examined by EchoStar in April 2005. RHD Opp. 19-a ¶ 30(b); RHD 19-a ¶¶ 39-46.

EchoStar's complaints about Cablevision and Rainbow Media allocating "overhead" costs are especially disingenuous given the commercial reality of this deal. It was precisely because VOOM was part of the Cablevision family of affiliated companies that EchoStar was comfortable entering into a 15-year deal to distribute the VOOM channels. *See* RHD Opp. 19-a ¶¶ 52(b)-(d). As Jim Dolan testified:

> [O]ne of the reasons that Mr. Ergen wanted to invest in Voom was because it was a part of [Cablevision]. I doubt that he would have invested in a programming service such as this if it was a startup. If you went and invested with the Disney Company, you wouldn't say "but I don't want to pay for the ears on the mouse." You get the Disney Company. With Cablevision you get Cablevision. And each of the businesses benefits, I believe, greatly from being a part of the corporation and being managed by this team as well as having public relations and other services that are part of the corporate allocations.

Id. ¶ 52(b).

Charlie Ergen, EchoStar's Founder and Chairman, underscored this point when he testified that he believed Chuck Dolan—the Founder and Chairman of Cablevision—was a "visionary" who had the ability to turn the VOOM Service into the "HBO of HD."[13] RHD 19-a ¶ 15; *see also Id.* ¶ 87. Ergen and EchoStar's other executives also respected Josh Sapan, the CEO of Rainbow Media, as a well-regarded figure in the television programming industry. RHD Opp. 19-a ¶ 54(b). It is unimaginable that EchoStar would have entered into a 15-year affiliation agreement with a new programming business that did not have the support (i.e., shared services) of a major entertainment media company and a team of seasoned executives.[14]

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13 Chuck Dolan is one of the leading figures in the television industry, with a nearly unparalleled track record of success in building successful entertainment businesses, including Cablevision, Time Warner Cable and numerous successful television programming services such as Home Box Office ("HBO"), American Movie Classics ("AMC"), Bravo, MSG network and VOOM. *See* RHD 19-a ¶¶ 5–6.

14 The charitable and political contributions made by Cablevision and Rainbow Media—which EchoStar now attacks—provide a good example of the benefits derived from being a part of the Cablevision and Rainbow Media family of companies. These contributions by Rainbow HD's parent companies enhanced VOOM's stature in the

[Footnote continued on next page]

EchoStar agreed to distribute the VOOM Service and, in partial consideration, become a 20% owner of Rainbow HD because VOOM was supported by a larger well-established family of programming and other entertainment services—support that EchoStar now dismisses as "overhead."

C. Rainbow HD Was Only Required to Spend $82 Million on the Service.

Section 10 provides for a clearly stated reduction in the required expenditures on the Service where the number of VOOM channels on the Service is permanently reduced. *See* RHD 19-a ¶ 65. EchoStar argues that there was never a reduction in the number of channels on the Service under Section 10 because the Service began on EchoStar as a 10-channel service in May 2005, and increased to 15 channels in February 2006. ES Br. 16 n.8. This argument is based upon a butchered presentation of the parties' Interim Agreement, which governed the 10-channel interim launch on EchoStar in 2005. The Interim Agreement expressly provides for the interim reduction of the "existing" service "known as 'VOOM 21'" to a "subset" of 10 channels until "EchoStar will begin distributing VOOM 21." RHD 19-a ¶ 72 (emphases added); *see also* RHD Opp. 19-a ¶ 8(c)-(d). As the Interim Agreement itself makes clear, the "existing" VOOM Service in April 2005 comprised 21 channels. RHD 19-a ¶ 72. This was consistent with the parties' other agreements, which referred to VOOM as a 21-channel service. *See, e.g., id.* ¶¶ 25, 34. Later, the Service was "reduced" from the original 21 channels to 15 channels prior to its official (i.e., no longer "interim") launch on the DISH platform in February 2006. *Id.* ¶ 151. Six

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[Footnote continued from previous page]
entertainment industry (including other potential distributors of the VOOM Service) and the community to which the VOOM Service was distributed. ES Br. 18; RHD Opp. 19-a ¶¶ 52(b)-(e). EchoStar's own expert agreed that such contributions are "ordinary and necessary cost[s] of doing business" and, indeed, such costs are commonly incurred by other well-regarded companies in the entertainment industry. RHD Opp. 19-a ¶ 52(e). As part of the Cablevision and Rainbow Media family of companies, Rainbow HD was in the enviable position of benefiting from its parents' significant industry stature and relationships at a fraction of the cost. RHD Opp. 19-a ¶¶ 53(b), 54(a).

original VOOM channels—formerly distributed on the Rainbow DBS platform—were "permanently" discontinued. *Id.* Nothing in Section 10 ties the reduction in the channels on "the Service" to the number of channels distributed on DISH, as EchoStar pretends. ES Br. 16 n.8. Thus, because the Service was permanently reduced from 21 to 15 channels, the channel reduction formula in Section 10 required Rainbow HD only to spend $82 million on the Service in 2006. *See* RHD 19-a ¶ 152.

CONCLUSION

EchoStar's cross-motion must be denied because it relies on blatant mischaracterizations of the Affiliation Agreement and the integrated VOOM Agreements, and it completely ignores the unrebutted extrinsic evidence. EchoStar certainly has not met its burden to "demonstrate that the construction of the agreement that it advocated was the only construction that could fairly be placed thereon." *TSR Consulting Servs., Inc. v. Steinhouse*, 267 A.D.2d 25, 27 (1st Dep't 1999) (emphasis added). Summary judgment is appropriate in this case, but only for Rainbow HD.

Dated: New York, New York
May 28, 2010

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