VOOM HD Holdings LLC v Echostar Satellite L.L.C.
2008 NY Slip Op 31278(U)
April 23, 2008
Supreme Court, New York County
Docket Number: 0600292/2008
Judge: Richard B. Lowe
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SCANNED ON 5/5/2008

[* 1]

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

PRESENT: Lowe, Justice

PART 56m

Voom HD Holdings LLC

- v -

Echostar Satellite LLC

INDEX NO. 600292/08

MOTION DATE 2/6/08

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

motion decided in accordance w/ accompanying memorandum decision.

FILED
MAY 05 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/23/08

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56
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VOOM HD HOLDINGS LLC,

Plaintiff

Index No: 600292/08

-against-

DECISION AND ORDER

ECHOSTAR SATELLITE L.L.C.,

Defendant.

FILED
MAY 05 2008
COUNTY CLERK'S OFFICE
NEW YORK

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RICHARD B. LOWE III, J:

This dispute arises out of the efforts by Plaintiff VOOM HD Holdings LLC ("VOOM") to preserve an agreement between itself and Defendant EchoStar Satellite L.L.C. ("EchoStar "). VOOM now moves pursuant to CPLR 6301 seeking to enjoin EchoStar from taking any steps to terminate its November 17, 2005 affiliation agreement with VOOM.

BACKGROUND

VOOM owns and operates 15 high-definition ("HD") channels known as VOOM. EchoStar provides direct-to-home satellite television programming to residential subscribers.

THE AFFILIATION AGREEMENT

On November 17, 2005, VOOM and EchoStar executed an agreement (the "Affiliation Agreement") under which EchoStar agreed to make VOOM available to its television subscribers as part of its basic HD programming package. Pursuant to the Affiliation Agreement, EchoStar paid VOOM monthly affiliation fees calculated on a per-subscriber basis for each subscriber receiving VOOM.

PENETRATION REQUIREMENT

Under Section 5 of the Affiliation Agreement, EchoStar agreed to distribute VOOM as part of its most widely distributed package of HD programming (the "Packaging Commitment") and to ensure that the majority - as defined by a graduated scale in percentages corresponding to years - of its HD subscribers receive VOOM throughout the term of the Affiliation Agreement (the "Penetration Requirement"). Also, EchoStar is obligated to pay VOOM an annually escalating per subscriber fee as determined by the number of EchoStar HD subscribers who have access to VOOM.

SPENDING REQUIREMENT

Under Section 10 of the Affiliation Agreement, VOOM agreed to spend $100 million on the Service (the "Spending Requirement"). Section 10 also provided that, if the number of channels on VOOM was permanently reduced, the annual spending requirement would decrease pursuant to a prescribed formula.

TERMINATION AND CURE PROVISIONS

Section 10 of the Affiliation Agreement also provides for the general rights of the parties to terminate the agreement under specific circumstances. Either party may terminate upon the occurrence of a material breach by the other subject to a general cure provision.

Section 10 further provides that failure to meet the Spending Requirement triggers a termination right. VOOM contends, and EchoStar disputes the contention, that the general cure provision applies if VOOM fails to satisfy the Spending Requirement.

ECHOSTAR'S NOTICE

In a letter dated June 20, 2007, EchoStar declared that VOOM failed to meet the

Spending Requirement under Section 10 of the Affiliation Agreement.

In October 2007, EchoStar conducted an audit of VOOM's annual spending.

In November 2007, EchoStar advised VOOM that it would terminate on the basis of VOOM's alleged spending shortfall unless VOOM consented to permit EchoStar to carry VOOM after February 1, 2008 on a tiered basis, as determined by EchoStar in its discretion. VOOM responded that it would not consent to any change of EchoStar's carriage requirements under the Affiliation Agreement. Nevertheless, both parties continued attempts to resolve the parties' differences amicably.

In a letter dated January 5, 2008, VOOM reiterated to EchoStar that it would not agree to EchoStar's re-tiering of VOOM.

At a meeting on January 24, 2008, VOOM met with EchoStar in another attempt to resolve the dispute. During the meeting, EchoStar declared that it abandoned its plan to re-tier and, instead, intended to notice a termination of the Affiliation Agreement effective February 1, 2008 unless VOOM agreed to a 30-day standstill period during which VOOM would be re-tiered.

In a letter dated January 28, 2008, VOOM stated to EchoStar that EchoStar had no right to terminate the Affiliation Agreement.

On January 30, 2008, EchoStar wrote to VOOM informing VOOM that EchoStar was terminating the Affiliation Agreement effective February 1, 2008.

Subsequently, VOOM brought this action for declaratory and injunctive relief and now moves for a preliminary injunction enjoining EchoStar from terminating the Affiliation Agreement.

DISCUSSION

In order to be entitled to a preliminary injunction, a party must demonstrate (1) probability of success on the merits, (2) danger of irreparable harm in the absence of an injunction, and (3) a balance of equities in its favor (*see* CPLR 6312; *W.T. Grant Co. v Srogi*, 52 NY2d 496, 517 [1981]). A preliminary injunction functions to preserve the status quo pending a full hearing on the merits of the action (*Olympic Tower Condominium v Cocoziello*, 306 AD2d 159, 160 [1st Dept 2003]).

Irreparable Harm

Because irreparable harm is generally so important, "the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered" (*see Rodriguez v DeBuono*, 175 F3d 227, 234 [2d Cir 1999]). "Injunctive relief will not be granted against something merely feared as liable to occur at some indefinite time; the party seeking injunctive relief must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm" *(USA Network v Jones Intercable, Inc.*, 704 F Supp 488, 493 [SD NY 1989] [internal quotation marks and citations omitted]; *Matter of 35 N. Y. City Police Officers v City of New York,* 34 AD3d 392, 394 [1st Dept 2006] ["petitioners . . . failed to establish imminent and irreparable harm"]).

Here, VOOM argues that it will suffer irreparable harm without injunctive relief because VOOM will lose business, reputation, and goodwill without an injunction. VOOM contends that if EchoStar terminates the Affiliation Agreement, VOOM will not be able to continue as a viable business. VOOM alleges that the Affiliation Agreement enables VOOM to sustain a profitable

business independent from distributors other than EchoStar (Moyer Aff ¶ 26).[1] "Given EchoStar's reach and VOOM['s] payment and distribution rights under the Affiliation Agreement, VOOM [] will be a self-sustaining business until 2020, whether or not any other cable or digital satellite provider agrees to carry VOOM, so long as EchoStar continues to honor its obligations in the Affiliation Agreement" (*id.*). VOOM recognized that it would be required to spend a tremendous amount at the outset of the relationship and that it would not be profitable in the initial years of the relationship (*id.* at ¶ 27). However, VOOM also expected that its initial losses would be offset by revenue generated from EchoStar's growing subscriber base over the 15-year term of the Affiliation Agreement (*id.*). Thus, VOOM argues, if EchoStar terminates the Affiliation Agreement, VOOM would be unable to support the costs of continuing because VOOM would be left without a network to distribute its programming.

A complete loss of a business constitutes irreparable harm (*see e.g. Semmes Motors, Inc. v Ford Motor Co.*, 429 F2d 1197 [2d Cir 1970] [termination of auto dealership constitutes irreparable harm where right to continue a business in which plaintiff had engaged for twenty years and into which his son had recently entered is not measurable entirely in monetary terms]; *Roso-Lino Beverage Distributors, Inc. v Coca-Cola Bottling Co. of New York, Inc.*, 749 F2d 124 [2d Cir 1984]; *GPA Inc. v Liggett Group, Inc.*, 862 F Supp 1062, 1068 [SD NY 1994] [where the injunction will prevent damage to the business as a whole, irreparable harm can be established]; *Mr. Natural, Inc. v Unadulterated Food Products, Inc.*, 152 AD2d 729 [2d Dept 1989] [termination of the exclusive distributorship agreements places the plaintiff in real danger of

[1]Gregory Moyer is General Manager of VOOM.

losing its business or suffering dissolution]).[2] However, the degree to which a business must experience loss before that injury becomes irreparable is not as clear (*compare Galvin v New York Racing Ass'n*, 70 F Supp 2d 163, 170 [ED NY 1998] [the loss of business need not be total, so long as it is so great as to seriously compromise the company's ability to continue in its current form] *with Norcom Elecs. Corp. v CIM USA Inc.*, 104 F Supp 2d 198, 209 [SD NY 2000] [the loss of only a part of a business will not support injunctive relief if the loss is entirely compensable in monetary damages]; *see cf Staples, Inc. v Moses*, 2005 NY Slip Op 51376U, *1-2 [Sup Ct, New York County 2005, Acosta, J.] [finding that petitioner stood to lose its business given the time and difficulty in obtaining similar space in the neighborhood absent injunctive relief]). As the court in *New Pac. Overseas Group (USA) Inc. v. Excal Int'l Dev. Corp.* explained:

> Even without the total destruction of a business, irreparable harm may be found where a product will be lost if plaintiff can make a clear showing that the product is a truly unique opportunity or where a business will suffer a significant loss of good will. Nonetheless, courts have refused to find irreparable harm where only a part of the business will be affected or where a company has not been in business long enough for good will to be created.

(US Dist Ct, SD NY, 99 Civ 2436,*18, Cote, J.,1999].) Far from revealing a clear standard, limited case law suggests that determining when lost business constitutes irreparable harm requires an evaluation of the circumstances specific to each case.

EchoStar argues that VOOM must demonstrate that it will lose its business, and not merely lose some business, in order to show irreparable harm. EchoStar asserts that, while not

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[2]While this Court generally eschews reliance on non-binding authority, New York case law has seldom addressed directly loss of business as a form of irreparable harm. Because the federal cases on New York law cited herein have addressed loss of business, the Court finds these cases to offer guidance on the issue.

on the national scale of EchoStar, VOOM retains the regional distribution of its programming by Cablevision (Moyer Aff ¶ 30). Moreover, the Affiliation Agreement is non-exclusive (Moyer Aff Ex 1 at 3). Thus, VOOM may license its programming to other distributors (*id.*). Indeed, VOOM appears to acknowledge that it may be able to enter into regional, short-term, and/or limited carriage agreements, but those agreements would not be as profitable nor carry the same revenue potential as the Affiliation Agreement (Sapan Aff ¶¶ 55, 56).[3]

VOOM alleges that the composition of its programming offering would be permanently affected (Moyer Aff ¶ 29), that alternative national distribution of VOOM programming would be unavailable (Moyer ¶ 31), and that any potential carriage agreements VOOM might obtain would still be insufficient to justify continued spending on its business (Moyer Aff ¶ 30; Sapan Aff ¶¶ 54, 55). VOOM explains that because the 15-year Affiliation Agreement, unlike a traditional affiliation agreement, contemplates the distribution of a suite of 15 channels covering different interests, it would be "inconceivable" that another cable or satellite provider would agree to carry all the channels and/or for the same duration (Moyer Aff ¶ 29). Additionally, VOOM alleges that EchoStar and its competitor, DIRECTV, are the only two nationwide providers of satellite television programming (Moyer Aff ¶ 31). Because DIRECTV has expressed that its business plan does not include the channels shown by VOOM (i.e., shown in HD only), EchoStar's termination of the Affiliation Agreement would foreclose any opportunity to ensure national distribution of VOOM's programming (Moyer Aff ¶¶ 31, 32). Lastly, VOOM alleges that its only other distribution agreement is with Cablevision, which is due to expire June

[3]Josh Sapan is President and Chief Executive Officer of Rainbow Media Holdings LLC, the parent entity of VOOM.

30, 2008. Accordingly, VOOM's assertions regarding the potential for loss of its business sufficiently demonstrates that it will suffer irreparable harm in the absence of injunctive relief.

Further, VOOM contends that it will suffer irreparable harm because it will lose the goodwill of EchoStar's subscribers.

Undoubtedly, a loss of customer goodwill can constitute irreparable harm for preliminary injunction purposes (*see Adirondack Appliance Repair v Adirondack Appliance Parts*, 148 AD2d 796, 798 [3d Dept 1989]; *Alside Div. of Associated Materials Inc. v Leclair*, 295 AD2d 873, 874 [3d Dept 2002] [finding irreparable harm where plaintiff would lose business and suffer a dilution of the goodwill after it cultivated relationships with its customers to develop repeat business]; *see also Four Times Square Assocs., L.L.C. v Cigna Invs., Inc.*, 306 AD2d 4 [1st Dept 2003] [finding irreparable harm to goodwill and creditworthiness if plaintiff was forced to procure terrorism insurance after insurance companies started excluding acts of terrorism from policies after the events on September 11, 2001]; *Brintec Corp. v Akzo, N. V.*, 129 AD2d 447 [1st Dept 1987] [finding the goodwill of plaintiff's business would suffer irreparable harm because defendants' conduct would violate the express terms of a valid and enforceable non-compete clause], cited by *Four Times Square*, 306 AD2d 4; *CanWest Global Communications Corp. v Mirkaei Tikshoret Limited, d/b/a Mirkaei Tikshoret Group*, 9 Misc 3d 845, 859-60 [Sup Ct, New York County 2005] [finding irreparable harm where the loss of key employees, respondents' self-dealing, and a fundamental restructuring of business relationships with irreversible consequences constituted harm to petitioner's goodwill and reputation]; *see generally Picotte Realty, Inc. v Gallery of Homes, Inc.*, 66 AD2d 978, 979 [3d Dept 1978] [identification with a counterparty may constitute a part of plaintiff's goodwill]).

This Court finds VOOM's assertions regarding loss of goodwill to be unavailing. Here, VOOM acknowledges that it has not yet been able to obtain strong brand loyalty and that EchoStar viewers are unlikely to follow VOOM to a regional cable distributor, if one could be obtained (Moyer Aff ¶ 35). Thus, VOOM will not suffer irreparable harm to its goodwill and customer relations because VOOM acknowledges that the goodwill associated with its programming inures to EchoStar's benefit (*see* Sapan Aff ¶ 57 ["If VOOM, a relatively new programming service that is still in the nascent stages of building customer loyalty, were off the air, EchoStar's HD subscribers could not realistically be expected to drop EchoStar and follow VOOM to an as yet non-existent alternative distributor."]; Moyer Aff ¶ 35).

Lastly, VOOM also asserts that it will lose prospective goodwill. The court in *Tom Doherty Assocs. v Saban Entm't, Inc.* addressed the issue of whether a loss of future goodwill can constitute irreparable (60 F3d 27, 38 [2d Cir 1995]). The court stated that irreparable harm is present "[w]here the availability of a product is essential to the life of the business or increases business of the plaintiff beyond sales of that product" (*id.*). The court reasoned that "[w]here the loss of a product will cause the destruction of a business itself or indeterminate losses in other business, the availability of money damages may be a hollow promise and a preliminary injunction appropriate" (*id.*). The court goes on to explain:

> there must be a clear showing that a product that a plaintiff has not yet marketed is a truly unique opportunity for a company. New products as yet unmarketed by anyone would simply not qualify. Nor would products that are successful but have reasonable substitutes. A "clear showing" standard incorporates the primary requirements of irreparable injury because it assures that the harm -- although not quantifiable -- is not speculative.

(*Id.*)

Here, VOOM fails to make a "clear showing" that its programming is either unmarketed or a truly unique opportunity (*see Tom Doherty*, 60 F3d at 38). Accordingly, VOOM fails to demonstrate that it will suffer irreparable harm from the loss of prospective goodwill.

Likelihood of Success

Because plaintiffs met their burden in demonstrating irreparable harm, discussion of the merits of this case is necessary. Despite VOOM's satisfaction of the first prong, preliminary injunctive relief in this case is unwarranted. To satisfy the likelihood of success prong, the movant must set forth a prima facie case on the likelihood of success on the merits (*Akos Realty Corp. v Vandemark*, 157 AD2d 632, 634 [1st Dept 1990]).

In the underlying Complaint, VOOM principally seeks a judgment declaring that EchoStar lacks any right to terminate the Affiliate Agreement, or to cease or diminish its performance under the Affiliation Agreement.

VOOM argues that EchoStar's termination, as noticed, of the Affiliation Agreement would constitute a violation of the Penetration Requirement. VOOM argues that EchoStar will violate its carriage requirement and payment obligations under the Affiliation Agreement by terminating the same.

EchoStar responds that it is entitled to termination because VOOM breached the Affiliation Agreement by failing to meet the Spending Requirement under Section 10.

In response, VOOM argues that it is not in breach because VOOM exceeded the Spending Requirement. VOOM claims that including its overhead expenses, among other things, as part of the spending obligation did not entitle EchoStar to terminate the Affiliation Agreement. In Section 10, VOOM seizes on the term "spend" and interprets the term broadly to

include overhead expenditures. However, VOOM's argument that the term "spend" is neither limited nor qualified expressly lacks fidelity to the subject provision's plain language. In pertinent part, the provision reads: "if during any calendar year during the Term [VOOM] fails to spend $100 million US Dollars *on the Service* EchoStar shall have the right to terminate this Agreement . . . " (Moyer Aff Ex 1 at 23 [emphasis added].) Thus, VOOM's assertion that it need only spend $100 million to satisfy to the requirement is without persuasive force.

However, VOOM asserts an alternative position. Even if VOOM was in breach of the Spending Requirement, Section 10 contains a cure provision under which VOOM cured. VOOM construes the cure provision under Section 10 to provide that "any material breach that is not susceptible of cure shall be deemed cured if the breaching party has taken all reasonable steps to prevent the recurrence of such breach" (Moyer Aff Ex 1 at 23). VOOM contends that a breach of the Spending Requirement is not susceptible to cure, thus, the cure provision applies to such a breach. VOOM also asserts that the purported breach should be deemed cured because recurrence of any possible spending deficiency in 2006 was addressed by spending over $100 million in 2007. Accordingly, VOOM appears to argue that the alleged breach of the Spending Requirement should be deemed cured because VOOM has taken "all reasonable steps to prevent the recurrence of [the] breach" (*see id.*).

EchoStar argues that the cure provision under Section 10 of the Affiliation Agreement does not apply to a purported breach of the Spending Requirement. A breach not susceptible to cure is deemed cured "so long as the same or substantially similar material breach does not occur again within a 6 month period or 2 times in any year" (Moyer Aff Ex 1 at 23). However, the Spending Requirement obligates VOOM to spend during a calendar *year* (*id.*). Thus, the

language of the cure provision contradicts the assertion that the breach of a yearly spending requirement may be cured by taking reasonable steps to prevent the recurrence of such breach within a 6 month period or 2 times in any year. Accordingly, VOOM fails to demonstrate that even if the Spending Requirement was breached, the requirement was subject to the cited cure provision.

Lastly, VOOM argues that, under the election of remedies doctrine, EchoStar waived its right to terminate based on VOOM's alleged breach. VOOM contends that EchoStar continued to perform under the Affiliation Agreement after announcing its right to terminate, therefore, EchoStar should be estopped from terminating the Affiliation Agreement.

"When a party materially breaches a contract, the non-breaching party must choose between two remedies: it can elect to terminate the contract or continue it" (*Awards.com v Kinko's, Inc.*, 42 AD3d 178, 179 [1st Dept 2007]). However, there is no set time to make an election after learning of an alleged breach; how much time is reasonable depends upon the facts and circumstances of each case, in particular the nature of the performance to be rendered under the contract (*In re Randall's Island Family Golf Centers, Inc.*, 261 BR 96, 101-102 [SD NY 2001]; *accord GATX Flightlease Aircraft Co. Ltd. v Airbus S.A.S.*, 2007 NY Slip Op 51124U, *8 [Sup Ct, New York County, Moskowitz, J.], *affd* 40 AD3d 445 [1st Dept 2007]; *River Terrace Assoc., LLC v Bank of N.Y.*, 2005 NY Slip Op 51915U, *8 [Sup Ct, New York County, Moskowitz, J.], *affd on other grounds* 23 AD3d 308 [1st Dept 2005]). More importantly, "waiver is the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it" (*City of New York v State*, 40 NY2d 659, 669 [1976]).

EchoStar argues that it never waived its right to terminate and that the doctrine is

inapplicable. In June 2007, EchoStar noticed VOOM that it had the right to terminate the Affiliation Agreement if the Spending Requirement was not met (Sapan Aff Ex 8). Additionally, EchoStar expressed its intention to undertake an audit pursuant to Section 7 of the Affiliation Agreement (Crawford Aff ¶ 10).[4] The parties arranged for the audit to be conducted in October 2007 (Crawford Aff ¶¶ 14-16). The audit was conducted during the week of October 22, 2007 (Knight Aff ¶ 9; Crawford Aff ¶ 17).[5] Following the audit, EchoStar requested additional information from VOOM and sought explanations to how VOOM's expenditures were attributable to the Service (Knight Aff ¶¶ 11, 13; Crawford Aff ¶ 17; Huffman Aff ¶¶ 14-15).[6] The materials were not provided (Knight Aff ¶ 13; Crawford Aff ¶ 17). In November 2007, EchoStar concluded that VOOM failed to satisfy the Spending Requirement and that EchoStar had the right to terminate the Affiliation Agreement (Crawford Aff ¶ 19). Nonetheless, both parties continued discussions to avoid termination of the Affiliation Agreement through January 2008 (Crawford Aff ¶¶ 20-22; Sapan Aff ¶ 51; Moyer Aff ¶¶ 22, 23; *see* Compl ¶¶ 11, 14).

The existence of issues of fact no longer serve, of and by themselves, to defeat an application for a preliminary injunction (*see* CPLR 6312[c]; *Oriburger, Inc. v B.W.H.N.V. Assocs.*, 305 AD2d 275, 278-79 [1st Dept 2003]; *Frank May Assocs. v Boughton*, 281 AD2d 673, 675 [3d Dept 2001]; *but see Plaza Management Co. v City Rent Agency*, 31 AD2d 347, 350 [1969], *affd* 25 NY2d 630 [1969] [if there are questions of fact, a declaration must await trial]).

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[4]Carolyn Crawford is Vice President of Programming for EchoStar.

[5]Kathy Knight is Vice President of Internal Audit and Corporate Quality for EchoStar.

[6]John Huffman is Executive Vice President, Finance, for Rainbow Media Holdings LLC, the parent entity of VOOM.

However, it is the movant who must satisfy the burden of demonstrating a prima facie case of likelihood of success (*see City of New York*, 40 NY2d at 669). Here, VOOM fails to demonstrate that EchoStar intentionally relinquished its right to terminate the Affiliation Agreement. Thus, because VOOM fails to make a prima facie showing that (1) it satisfied the Spending Requirement; (2) the Spending Requirement is curable under the general cure provision and was in fact cured; or (3) EchoStar waived its right to terminate by making an election of its remedies, VOOM fails to demonstrate a likelihood of success (*Goldberger v Tantleff*, 171 AD2d 642, 661 [2d Dept 1991]; *First Nat'l Bank v Highland Hardwoods, Inc.*, 98 AD2d 924, 926 [3d Dept 1983] [a preliminary injunction will not be granted unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing such an undisputed right rests upon the movant]).

Balance of the Equities

Balancing of the equities generally requires the court to look to the relative prejudice to each party accruing from a grant or a denial of the requested relief. Because VOOM failed to demonstrate a likelihood of success on the merits, it is unnecessary to address a balancing of the equities. This Court remains mindful that its objective "is to try to keep to a minimum whatever irreparable loss of rights may be caused by a preliminary decision that is ultimately determined to be erroneous" (*Home Box Office, Inc. v Pay TV of Greater New York, Inc.*, 467 F Supp 525, 529 [ED NY 1979]). However, the potential for irreparable harm to both VOOM and EchoStar only further militates denying injunctive relief (*see Time Warner Cable v Bloomberg L.P.*, 118 F3d 917, 925 [2d Cir 1997] [irreparable harm shown by having the mix of programming carried on its cable system altered in ways that could not be adequately remedied after the fact]).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED plaintiff's motion for a preliminary injunction is denied.

Dated: April 23, 2008

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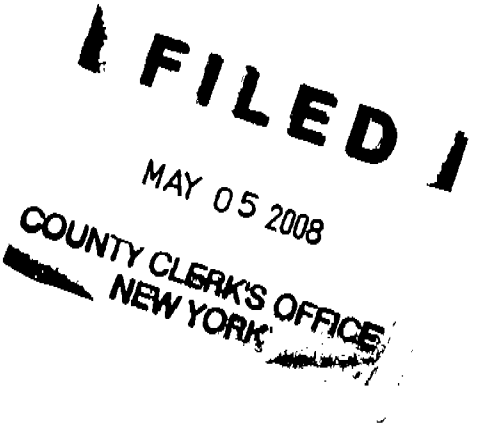
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