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

PRESENT: HON. RICHARD B. LOWE, III Justice PART 56

Voom HD Holdings

-v-

Echostar Satellite

INDEX NO. 600292/08

MOTION DATE 8/3/10

MOTION SEQ. NO. 002

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 IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: NOV 03 2010

HON. RICHARD B. LOWE, III J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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-

ECHOSTAR SATELLITE L.L.C.,

Defendant.

----------X

RICHARD B. LOWE, III, J.:

Motion sequence numbers 002, 003, 004 and 005 are consolidated for disposition.

In this breach of contract action, plaintiff VOOM HD Holdings LLC (VOOM HD) seeks damages for defendant Echostar Satellite L.L.C.'s (EchoStar) alleged wrongful termination of a 15-year distribution agreement. The four-count first amended complaint asserts two causes of action for breach of contract, one cause of action for breach of the duty of good faith and fair dealing, and one cause of action for attorneys' fees.

VOOM HD now moves, in motion sequence number 002, for summary judgment, as to liability, on its first cause of action for breach of contract. EchoStar cross-moves for an order precluding consideration of certain extrinsic evidence submitted by VOOM HD in support of its motion. In motion sequence number 003, EchoStar moves for summary judgment dismissing the first amended complaint based upon EchoStar's purported proper termination of the parties' agreement. In motion sequence number 004, VOOM HD moves for the imposition of sanctions against EchoStar for spoliation, requesting that the court strike the answer and enter judgment in favor of VOOM HD, or issue an adverse inference instruction at trial, in either case awarding

VOOM HD all costs incurred due to the spoliation. VOOM HD also moves, in motion sequence number 005, for an order barring EchoStar from calling non-party Avram Tucker as an expert witness at trial and from introducing his expert report.

Facts

VOOM HD is a Delaware limited liability company owned by Rainbow Media Holdings LLC (Rainbow Media), which, in turn, is owned by the public company Cablevision Systems Corporation (Cablevision). EchoStar is a provider of direct broadcast satellite television services through its branded "DISH Network," using a satellite distribution system to deliver to subscribers digital television programming licensed from owners of programming services.

On November 17, 2005, EchoStar entered into an "Affiliation Agreement" with VOOM HD (f/k/a Rainbow HD Holdings LLC, the named party in the Affiliation Agreement and defined in that agreement as "Network"). Affiliation Agreement, EchoStar's Appendix of Exhibits, Ex. 7, at 1. In the Affiliation Agreement, EchoStar agreed to distribute "the television programming service known as 'VOOM' (the 'Service') as more fully described below in Section 4." *Id.* In the "DEFINITIONS" section of the agreement, "Service" is defined as follows:

> "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.[1]

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[1] The court notes that, according to The Interactive Television Dictionary & Business Index, located at http://www.itvdictionary.com/v.html, "interactive components" are "[t]he parts of the whole that make interactivity possible"; "VBI" (or "Vertical Blanking Interval") "is the time between the last line of a frame, or field and the beginning of the next frame, or field"; and

Id. at 3 (emphasis in original). Section 4 of the Affiliation Agreement is titled "CONTENT OF THE SERVICE," and section 4(a) provides:

> Content Description. As of the date hereof, the Service is comprised of no more than 21 and no less than 5 full time 24 x 7 linear channels of programming, with each channel programmed in High Definition in accordance with the currently applicable provisions of this section 4(a) and as each constituent channel is listed and described on Schedule A hereto. Subject to the terms and conditions contained herein, throughout the Term, the Service shall be comprised of a suite of no more than 21 and no less than 5 full time 24x7 linear channels of programming, which shall comply with the provisions of this Section 4(a).

Id. at 5 (emphasis in original). As suggested by their titles, subsections 4(a)(i) - (vi) expand upon the parties' agreed-upon content provisions, providing express terms for "Genre Commitment," "Non-Repeat Programming Commitment," "Movie Inventory Commitment," "High Definition and Original HD Commitment," "Premier Programming," and "Right to Cure, Remedy for Breach and Replacement Channels." *Id.* at 5-7. Sections 4(b) - (h) memorialize the parties' agreement concerning "Advertising," "Same Programming Requirement," "Closed Captioning," "Internet Covenants," "Interactive Applications," "Certificate of Compliance," and "Remedies," as suggested by these subheading titles. *Id.* at 7-11.

Section 10 of the Affiliation Agreement provides for the parties' termination rights, one of which was EchoStar's right to terminate if VOOM HD failed to satisfy a spending requirement, as follows:

> *Additionally, and without limiting the generality of the foregoing, if during any calendar year during the Term Network fails to spend $100 million US Dollars on the Service EchoStar shall have the*

"scroll[ing]" is defined as a means by which "[o]ne can move text & images vertically in various computerized devices."

> *right to terminate this Agreement*, provided that if and to the extent Network permanently reduces the number of channels on the Service during any calendar year such $100 million US Dollars amount shall be decreased by $3 million US Dollars per calendar year if it discontinues a Movie Channel and $5 million US Dollars per calendar year if it permanently discontinues a channel other than a Movie Channel. For clarity, the parties agree that such decreases shall apply on a pro rata basis for any part of a calendar year during which a channel is permanently discontinued. Additionally, the parties agree that such $100 million US Dollars per calendar year shall only apply until such time as Network has invested $500 million US Dollars in the Service. ... EchoStar shall have the right to audit such $100 million US Dollar per calendar year expenditure in accordance with its audit rights set out in Section 7(b)(ii) of this Agreement.

Id. at 23 (emphasis added).

By letter dated June 19, 2007, Kevin Cross (Cross), EchoStar's corporate counsel, notified VOOM HD that EchoStar intended to exercise its audit rights under sections 7(b)(ii) and 10 of the Affiliation Agreement. EchoStar's Appendix of Exhibits, Ex. 14. By letter dated June 20, 2007, Cross informed VOOM HD of EchoStar's belief that VOOM HD "failed to spend $100 million on the Service in calendar year 2006 and that EchoStar is thus entitled to terminate the [Affiliation] Agreement in accordance with its terms," and EchoStar demanded that VOOM HD "provide EchoStar with a written certification of the amounts spent on the Service during 2006 together with a detailed substantiation for such certification." *Id.*, Ex. 15.

By e-mail dated July 11, 2007, John Huffman, Rainbow Media's executive vice president of finance, responded to Cross's letters, attaching VOOM HD's "Analysis of 2006 Actual Cash Spending by Category" (Spending Breakdown), which shows VOOM HD's domestic business expenditures of $102,959,000 in 2006. *Id.*, Ex. 17.

In October 2007, EchoStar conducted an audit of VOOM HD's 2006 expenditures, and

by letter dated November 16, 2007, EchoStar informed VOOM HD that, under section 10 of the Affiliation Agreement, VOOM HD failed to satisfy the $100 million spending requirement in 2006 (11/16/07 EchoStar Breach Notice). *Id.*, Ex. 23. The 11/16/07 EchoStar Breach Notice stated, in pertinent part, as follows:

> Further to EchoStar's recent audit of [VOOM HD's] compliance with the provisions of Section 10 of the [Affiliation] Agreement, EchoStar has concluded that [VOOM HD] failed to satisfy such requirement by, among other things, inappropriately allocating general overhead costs of **the Network** to Network's investment **in the Service** (emphasis added). Such an allocation is not supported by the Agreement's express terms and, as such, is a material breach of the Agreement. Since such breach is not capable of cure and is thus not subject to a cure period, EchoStar hereby reserves its right to terminate the Agreement, effective immediately. In the alternative, EchoStar will continue to carry the Service *provided* that, beginning February 1, 2008, such ongoing carriage would be on a 'tiered' basis, as determined by EchoStar in its discretion. If this is not acceptable to Network, kindly so advise so that EchoStar may formally terminate the Agreement.

Id. (emphasis in original).

By letter dated January 28, 2008, VOOM HD responded to EchoStar, stating that EchoStar had no right to terminate the Affiliation Agreement and rejecting EchoStar's proposed re-tiering. *Id.*, Ex. 25. VOOM HD's letter also stated that the spending requirement was not $100 million, but rather, that it was $82 million because the number of VOOM channels had been reduced from 21 to 15. *Id.* VOOM HD's letter stated that, in any event, EchoStar "never provided a clear and consistent explanation of the nature and amount of the allegedly impermissible expenses." *Id.*

In a letter dated January 30, 2008, EchoStar terminated the Affiliation Agreement, effective February 1, 2008. VOOM HD commenced this action the next day, on January 31,

2008.

Discussion

Summary Judgment (motion sequence numbers 002 and 003)

EchoStar claims that approximately $12.4 million of the purported $102,959,000 spent by VOOM HD in 2006 were comprised of overhead and general administrative expenses that were unrelated to programming services and content delivered to EchoStar. The parties dispute whether funds spent on general corporate overhead by VOOM HD and its parent companies count toward VOOM HD's annual $100 million spending requirement in section 10 of the Affiliation Agreement, or whether the parties intended the spending requirement to be tied more directly to the programming and content that is delivered to EchoStar's subscribers. Thus, at the heart of this litigation is the meaning of the phrase "spend ... on the Service," and, more specifically, the meaning of the word "Service" under the Affiliation Agreement. In support of its argument that VOOM HD "fail[ed] to spend $100 million US Dollars on the Service," giving rise to EchoStar's "right to terminate" under section 10 of the Affiliation Agreement, EchoStar defines "Service" as "programming content and other constituent elements in the television channels delivered to EchoStar for distribution to its subscribers over the Distribution System" (EchoStar's 4/29/10 Opening Brief, at 13).

In opposition, and in support of its motion for summary judgment, VOOM HD argues that "Service" refers to VOOM HD's "entire operation and cannot reasonably be limited to only one aspect or component of a business." VOOM HD's 4/29/10 Opening Brief, at 17. VOOM HD argues that the definition of "Service" in the Affiliation Agreement uses expansive language – "include[s]," "in the aggregate," "without limitation," and "all components and/or parts" – to

make clear that its expenditures "on the Service" included expenditures on "'all components and/or parts' of the VOOM Service, not just expenditures on 'content' or 'programming' alone." *Id.* at 17. VOOM HD's argument also relies upon various dictionary definitions of the word "service," which support the argument that "Service" refers to VOOM HD's "entire operation and cannot reasonably be limited to only one aspect or component of a business." *Id.*; *see also* VOOM HD's 5/28/10 Opp. Brief, at 5 (VOOM HD "owned and operated 'the Service' – i.e., the VOOM business") and at 10 ("[t]he VOOM channels comprised a television programming business").

As a preliminary matter, Section 14(c) of the Affiliation Agreement provides that "all matters or issues collateral [to it] shall be governed by the laws of the State of Delaware, without regard to its choice of law." The parties do not dispute that Delaware law applies to the substantive issues in this case. Moreover, "[s]ince Delaware law is identical to New York law regarding contract interpretation [citations omitted], enforcement of the choice of law provision in the ... agreement would not violate New York public policy." *DeLucia v Portolano*, 14 Misc 3d 1230(A), 2007 NY Slip Op 50220(U), *6 (Sup Ct, Nassau County 2007). Therefore, Delaware law applies. *Education Resources Inst., Inc. v Piazza*, 17 AD3d 513, 513 (2d Dept 2005) ("'matters of procedure are governed by the law of the forum,'" while "'matters of substantive law fall within the course chartered by choice of law analysis' [citations omitted]. New York courts therefore apply contractual choice of law clauses only to substantive issues").

"Delaware adheres to the 'objective' theory of contracts, i.e. a contract's construction should be that which would be understood by an objective, reasonable third party," and Delaware courts "read a contract as a whole and ... give each provision and term effect, so as not to render

any part of the contract mere surplusage [internal quotation marks and citations omitted]." *Estate of Osborn v Kemp*, 991 A2d 1153, 1159 (Del Supr 2010). "When the contract is clear and unambiguous, [the court] will give effect to the plain-meaning of the contract's terms and provisions" (*id.* at 1159-60), and extrinsic evidence may not be consulted to interpret the provisions of the contract. *Citadel Holding Corp. v Roven*, 603 A2d 818, 822 (Del Supr 1992) ("[i]t is an elementary canon of contract construction that the intent of the parties must be ascertained from the language of the contract [citation omitted]). Only when there are ambiguities may a court look to collateral circumstances"). Moreover, "[t]he presumption that the parties are bound by the language of the agreement they negotiated applies with even greater force when the parties are sophisticated entities that have engaged in arms-length negotiations." *West Willow-Bay Court, LLC v Robino-Bay Ct. Plaza, LLC*, 2007 WL 3317551, *9, 2007 Del Ch LEXIS 154, *32 (Del Ch 2007).

"However, [i]f there is more than one reasonable interpretation of a disputed contract term, consideration of extrinsic evidence is required to determine the meanings the parties intended." *AT&T Corp. v Lillis*, 953 A2d 241, 253 (Del Supr 2008) (internal quotation marks and citations omitted); *see also Brehm v Eisner (In re Walt Disney Co. Derivative Litig.)*, 906 A2d 27, 69 (Del Supr 2006) ("where a contract is ambiguous, the court must look to extrinsic evidence to determine which of the reasonable readings the parties intended"). "The determination of ambiguity lies within the sole province of the court." *Estate of Osborn*, 991 A2d at 1160.

Here, Section 10 of the Affiliation Agreement requires VOOM HD "to spend $100 million US Dollars on the Service." The definition of "Service" in the first paragraph of the

Affiliation Agreement broadly includes "the television programming service known as 'VOOM' (the 'Service') ... ." *Id.* at 1. The definition of "Service" on page 3 is also sweeping in scope, using the words "shall ... include," "in the aggregate," "all components and/or parts thereof," and "without limitation" (*id.* at 3), thereby "clearly intend[ing] to cover the broadest spectrum of events that would trigger the ... provisions of the[] agreement." *Matter of Johnsen v ACP Distrib., Inc.*, 31 AD3d 172, 178 (1st Dept 2006); *see also Matter of Doniger v Rye Psychiatric Hosp. Ctr., Inc.*, 122 AD2d 873, 877 (2d Dept 1986) ("[t]he word 'including,' when followed by a list of examples, is designed to broaden the concept being defined"). And the remaining subsections of section 4 elaborate on the definition of "Service" by describing the agreed-upon requirements for content and programming. Affiliation Agreement, at 5-11.

Arguably, this definition includes anything required by VOOM HD to provide the VOOM television programming service, which is consistent with the definition of "Service" in the first paragraph, the definitions section, and section 4 of the Affiliation Agreement. As is argued by VOOM HD, when the Affiliation Agreement is read as a whole, the annual $100 million spending requirement in section 10 was not expressly limited to spending on programming content. This interpretation is also consistent with section 4, which provides a separate remedy for EchoStar in the event that VOOM HD failed to deliver the content agreed upon by the parties. Indeed, sections 4(a)(i)-(v) required VOOM HD to include a specific mix of genres, non-repeat programming, a specified movie inventory, a specified percentage of high definition programming, and specified amounts of premier programming. These provisions required VOOM HD to deliver to EchoStar "programming" and "content" that was substantial in both quality and quantity, and subsection 4(a)(vi) provided EchoStar with remedies in the event of

VOOM HD's failure to satisfy these requirements. VOOM HD claims that it could not have satisfied these content requirements without making a substantial investment, as is required under section 10. In other words, sections 4 and 10 each contained distinct remedies and termination rights for failure to deliver adequate "content" (in section 4) and for failure to sufficiently invest "in the Service" (in section 10), evidencing that EchoStar's rights and remedies concerning content and programming were established in section 4, while section 10, which does not mention content or programming, set forth EchoStar's termination right in the event that VOOM HD failed to invest $500 million "in the [VOOM] Service" generally, as opposed to other programming owned by VOOM HD.[2] This reading of the Affiliation Agreement would require VOOM HD to allocate a portion – according to VOOM HD, a "substantial" portion – of its annual $100 million spending requirement to programming content in order to satisfy section 4, while allowing the spending requirement in section 10 to be satisfied by any spending relating to the provision of the VOOM television programming service, including costs relating to ownership, operations, and management of VOOM, all of which,

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[2] The Affiliation Agreement expressly recognized that VOOM HD might purchase or develop other programming services in addition to the VOOM Service. *See e.g.* Affiliation Agreement, § 4(c) ("if Network or any of its Affiliates at any time during the first 4 Contract Years offers any other High Definition Programming Service which is owned, operated or otherwise managed or controlled by Network or any of its Affiliations and which service is not branded and marketed as part of the VOOM Service, then EchoStar shall have the right to distribute such service on terms which comport with the most favored nations treatment afforded to EchoStar in Section 11 of this Agreement"). In other words, when read together with other provisions of the Affiliation Agreement, section 10 ensures that VOOM HD satisfied the spending requirement by spending $100 million per year on the "VOOM" Service, not any other programming services or businesses owned or operated by VOOM HD. By distinguishing between funds spent on the business of VOOM, VOOM HD's only then-existing business, and other programming that VOOM HD might develop in the future, this interpretation also undermines EchoStar's argument that VOOM HD's definition of "Service" conflates VOOM HD, the company, and the "Service."

according to VOOM HD, were necessary to enable it to satisfy the content requirements in section 4. Such costs might include, but would not be limited to, office space, employee salaries, human resources, utilities, satellite trucks, and equipment, as is asserted by VOOM HD.

However, EchoStar presents an alternative but equally plausible reading of the Affiliation Agreement, which is that "Service" is limited to "programming content and other constituent elements in the television channels delivered to EchoStar for distribution to its subscribers over the Distribution System." EchoStar's 4/29/10 Brief, at 13. EchoStar focuses on the various visual and data elements delivered to it for distribution to its subscribers, which are aligned with the technical definition of "Service" in the definitions section and section 4 of the agreement, neither of which defines "Service" as the overall VOOM business or permits expenditures of VOOM HD's parent companies to be included as "spend[ing] ... on the Service" under section 10.

This definition is also consistent with the use of the term "Service" throughout the text of the Affiliation Agreement. For example, in the "GRANT OF RIGHTS" section, section 3(a) states that "Network hereby grants to EchoStar the non-exclusive right and license (including without limitation the requisite license to all copyright, trademark and other intellectual property rights appurtenant to *the programming content that makes up the Service*) throughout the Term to *distribute the Service* in the Territory *using the Distribution System*," and provides that EchoStar "shall be entitled to determine whether *an individual Service Subscriber* is a residential or commercial location, provided that EchoStar shall make such election *with respect to the Service* in the same manner as it makes such elections with *other programming services* similarly situated (i.e. all High Definition Programming Services)" (emphases added). Here, the term

"Service" appears to be limited to programming content delivered to EchoStar's subscribers.

Similarly, section 3(b) states that "EchoStar shall have the right and the license ... to: *receive and manipulate the Service* including without limitation (*decryption, re-encryption, compression, and transmission rate adjustment*) at the Facility for purposes of monitoring and re-transmission," to "advertise, promote, publicize, market and sell *subscriptions to the Service* (and/or the Service as bundled with *other programming services*)," and to "transport and arrange for the transport of the *Signal ... of the Service*" (emphases added). In section 3(b), EchoStar acknowledged that "any *sub-distribution or re-sale of the Service* shall be offered as *part of a broader package of Dish Network programming*" (emphases added). Under section 4(b)(i), VOOM HD agreed "that *the Service shall not contain* any promotions, advertisements or any form of call to action for any other multi-channel video programming distributor" (emphasis added).

Section 5(a) required EchoStar to "*distribute the Service as part of its most widely distributed package of HD programming services*" (emphasis added). Section 5(b) required VOOM HD to "transmit to EchoStar for receipt by the Facility, a video and audio *signal of the Service*, which in any event shall be in accordance with EchoStar's reasonable technical requirements ... and industry standards for High Definition Programming" (emphasis added). Section 5(b) also required VOOM HD to "provide EchoStar with two primary and secondary IRDs capable of *decoding the Service* at least 45 days in advance of the date on which EchoStar first *launches the Service*" (emphases added). Section 5(c)(i) provided that "EchoStar shall employ reasonable security practices and procedures to prevent unauthorized *reception of its distribution of the Service*" (emphasis added).

The parties' arguments highlight the legal issue at the heart of their dispute, that is, whether the phrase "spend[ing] ... on the Service" includes *any* amounts spent by VOOM HD on the VOOM television programming service, no matter how far removed from the actual content delivered to EchoStar subscribers, or whether the parties intended "spend[ing] ... on the Service" to be defined more narrowly, to ensure that VOOM HD's annual $100 million spending requirement inured more directly to the benefit of EchoStar's subscribers. Although "[t]he parties' steadfast disagreement over interpretation will not, alone, render the contract ambiguous" (*Estate of Osborn*, 991 A2d at 1160), this issue is simply not addressed in the Affiliation Agreement, and any attempt by the court to render a conclusion would be mere guesswork that would write the parties' agreement for them, which the court may not do (*Conner v Phoenix Steel Corp.*, 249 A2d 866, 868 [Del Supr 1969] ["(i)t is, of course, axiomatic that a court may not, in the guise of construing a contract, in effect rewrite it to supply an omission in its provisions"]). Moreover, even assuming for the moment that the term "Service" were limited to "programming content and other constituent elements in the television channels delivered to EchoStar for distribution to its subscribers over the Distribution System," as is argued by EchoStar (EchoStar's 4/29/10 Brief, at 13), the Affiliation Agreement provides no mechanism for determining the type of "spending" by VOOM HD that would constitute "spend[ing] ... on the Service" under section 10.

The parties could have easily written section 10 of the Affiliation Agreement to require VOOM HD to "spend ... $100 million US Dollars on the programming content and other constituent elements in the television channels delivered to EchoStar for distribution to its subscribers over the Distribution System," if this is what they intended (although even this

definition, proposed by EchoStar, is somewhat cryptic for failure to define what, specifically, constitutes "programming content" and "other constituent elements"). *Matter of NextMedia Inv., LLC*, 2009 WL 1228665, *5, 2009 Del Ch LEXIS 76, *18 (Del Ch 2009) (party's interpretation of agreement imparts "a meaning that could have been written very directly if the drafters intended to embrace" it); *see also Mickman v American Intl. Processing, L.L.C.*, 2009 WL 2244608, *2, 2009 Del Ch LEXIS 134, *7 (Del Ch 2009) ("parties to the LLC agreements undoubtedly knew how to use more limiting language, but did not"). The parties also could have written section 10 to require VOOM HD to "spend ... $100 million US Dollars on the Service as defined in Annex A to the Limited Liability Company Agreement of VOOM HD, which is incorporated herein by reference," had they intended to do so.[3] *Id.* VOOM HD and EchoStar are sophisticated business entities, quite capable of drafting a contract consistent with their intent. *West Willow-Bay Ct., LLC*, 2007 WL 3317551, *9, 2007 Del Ch LEXIS 154, *32 ("[t]he presumption that the parties are bound by the language of the agreement they negotiated applies with even greater force when the parties are sophisticated entities that have engaged in arms-length negotiations"). The fact that they failed to do so does not permit the court to rewrite the contract. *Conner*, 249 A2d at 868.

As a result of these alternative reasonable interpretations, an issue of fact exists as to the intended meaning of the word "Service" as used in section 10 with respect to the annual $100

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[3] As discussed in greater detail below, VOOM HD urges the court to review Annex A of its limited liability company agreement, which expressly identifies expenditures of VOOM HD relating to the ongoing operations of the VOOM business. Annex A is not limited to expenditures on programming and content, but rather, it also includes expenditures for: salaries and benefits; marketing; intercompany allocations; other general and administrative expenses; and capital expenditures.

million spending requirement. *Estate of Osborn*, 991 A2d at 1160 ("when we may reasonably ascribe multiple and different interpretations to a contract, we will find that the contract is ambiguous"). Therefore, extrinsic evidence must be reviewed in order to determine the intent of the parties. *AT&T Corp.*, 953 A2d at 253. "Sources of such evidence include 'overt statements and acts of the parties, the business context [of the contract], prior dealings between the parties, business custom, and usage in the industry [citation omitted].'" *Dittrick v Chalfant*, 948 A2d 400, 406 (Del Ch 2007), *affd* 935 A2d 255 (Del Supr 2007).

Extrinsic Evidence and EchoStar's Cross Motion

EchoStar cross-moves to preclude the extrinsic evidence submitted by VOOM HD in support of its motion for summary judgment, arguing that the definition of "Service" in the Affiliation Agreement is unambiguous. For the reasons discussed above, the definition of "Service" is ambiguous, thereby undermining EchoStar's argument. EchoStar makes the secondary argument that summary judgment is appropriate only where a contract is unambiguous, and that, therefore, the court should not allow the extrinsic evidence.

Under Delaware law, "[i]n a dispute requiring contract interpretation, summary judgment is appropriate only where the contract is unambiguous." *R & R Capital, LLC v Merritt*, 2009 WL 2937101, *4, 2009 Del Ch LEXIS 161, *11-12 (Del Ch 2009); *see also O'Brien v IAC/Interactive Corp.*, 2009 WL 2490845, *4, 2009 Del Ch LEXIS 154, *12 (Del Ch 2009) ("[s]ummary judgment will be denied where the proffered evidence provides 'a reasonable indication that a material fact is in dispute.' Moreover, '[w]hen the issue before the Court involves the interpretation of a contract, summary judgment is appropriate only if the contract in question is unambiguous'" [citations omitted]). New York law is the same. *See Ruttenberg v*

Davidge Data Sys. Corp., 215 AD2d 191, 193 (1st Dept 1995) ("'when the meaning of the contract is ambiguous and the intent of the parties becomes a matter of inquiry, a question of fact is presented which cannot be resolved on a motion for summary judgment'" [citation omitted]); *see also Digital Broadcast Corp. v Ladenburg, Thalmann & Co.*, 63 AD3d 647, 648 (1st Dept 2009) ("court properly refused to grant summary judgment to plaintiff" where "the parties' agreement was ambiguous"). Moreover, "[t]he court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues, or to assess credibility." *Meridian Management Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-11 (1st Dept 2010) (internal citations omitted).

However, there are certain cases where, when "[f]aced with ... ambiguity" resulting from more than one reasonable interpretation, the court may "turn to extrinsic evidence for guidance as to which interpretation should prevail." *Evans v Famous Music Corp.*, 1 NY3d 452, 459 (2004); *see also Federal Ins. Co. v Americas Ins. Co.*, 258 AD2d 39, 43 (1st Dept 1999) ("[w]here, as here, there are internal inconsistencies in a contract pointing to ambiguity, extrinsic evidence is admissible to determine the parties' intent"); *Eagle Indus. v DeVilbiss Health Care*, 702 A2d 1228, 1232-33 (Del Supr 1997) ("when there is uncertainty in the meaning and application of contract language, the reviewing court must consider the evidence offered in order to arrive at a proper interpretation of contractual terms. This task may be accomplished by the summary judgment procedure in certain cases where the moving party's record is not *prima facie* rebutted so as to create issues of material fact").

Because the Affiliation Agreement is susceptible of more than one reasonable interpretation, extrinsic evidence may be reviewed by the court and, therefore, EchoStar's cross

motion is denied. In any event, the extrinsic evidence does not resolve VOOM HD's claims as a matter of law, but rather, merely underscores the court's inability to resolve the issue on summary judgment.

VOOM HD submits the following agreements as extrinsic evidence: an "INVESTMENT AGREEMENT," dated April 28, 2005 and entered into among EchoStar Communications Corporation, Rainbow HD Holdings, LLC (n/k/a VOOM HD), Rainbow Media, and Rainbow Programming Holdings, LLC (Investment Agreement); VOOM HD's "LIMITED LIABILITY COMPANY AGREEMENT," dated November 17, 2005 and entered into between Rainbow Programming Holdings, LLC and EchoStar Media Holdings Corporation (LLC Agreement); and a "SUPPORT AGREEMENT," dated November 17, 2005 and entered into between Rainbow Media and EchoStar Media Holdings Corporation (Support Agreement). 4/29/10 Snyder Aff., Ex. 6. The Investment Agreement refers to the LLC Agreement, the Affiliation Agreement, and the Support Agreement as "Related Agreements" (Investment Agreement, at 1), and it is undisputed that the Affiliation Agreement and the LLC Agreement were attached as exhibits to the Investment Agreement (*id.*; EchoStar's Rule 19-a Counterstatement, ¶ 29) and that these "two agreements were executed at the same closing pursuant to the terms of the Investment Agreement." EchoStar's 7/2/10 Reply Brief, at 12.

VOOM HD's argument relies primarily upon the LLC Agreement, and the theory that the Affiliation Agreement was one of several agreements entered into concerning EchoStar's carriage of the VOOM service. The LLC Agreement defines the "Funding Date" as "[t]he first date following the Execution Date [April 28, 2005] that the sum of $500 million or more of cash capital contributions ... have been in the aggregate contributed to the LLC following the

[* 19]

Execution Date (the 'Funding Capital Contribution Amount')." Snyder Aff., Ex. 6, at ECHOVOOM00117633 (emphasis in original). This provision also states that "capital contributions made to the LLC during the period between the Execution Date and the Effective Date [November 17, 2005] shall not be counted toward the Funding Capital Contribution Amount unless such capital is used for an On-Going Business Purpose." *Id.* "On Going Business Purpose," in turn, is defined as "See Annex A." LLC Agreement, at 8 (emphasis in original). Annex A to the LLC Agreement provides as follows:

> On-Going Business Purpose: The following expenditures of the LLC relating to the ongoing operations of the VOOM 10 and VOOM 21 high definition business:
>
> - **Salaries and Benefits** excluding those related to employment severance and termination.
> - **Marketing**
> - **Intercompany Allocations** including, but not limited to:
>   – Corporate Allocations
>   – Allocated Service Departments
>   > Rainbow Network Communications
>   > 11 Penn HD Production
>   > On-Air Promotions
>   > Information Systems
>   – Direct Charges
>   > Rent
>   > Building Facilities Charges
>   > Insurance
>   > Audit Fees
>   – Intercompany film sharing
> - **Programming Expenses** including:
>   – Payments to third parties for licensed content to be aired on VOOM 10 or VOOM 21, excluding termination payments and other content not aired or to be aired on VOOM 10 or VOOM 21
>   – Payments to production companies for original production and co-productions
>   – HD Transfer Costs
>   – Miscellaneous Production Costs (i.e., tape stock,

delivery costs, editing, etc. . .)

- **Other General and Administrative** (i.e., office supplies, utilities, etc. . .)
- **Capital Expenditures**.

Id. at ECHOVOOM00117673 (emphasis in original). Under the LLC Agreement, EchoStar Media Holdings Corporation, a signatory to that agreement, was not required to make any capital contributions until *after* the "Funding Date." LLC Agreement, § 3.1(c). Thus, the first $500 million of capital contributions was to be made by Rainbow Programming Holdings, LLC, the other signatory to the LLC Agreement and the sole member of VOOM HD.

However, as a preliminary matter, neither VOOM HD nor EchoStar is a party to the LLC Agreement. Moreover, the Affiliation and LLC Agreements served different purposes. The Affiliation Agreement governed EchoStar's purchase and distribution of the VOOM television programming service. The parties to the LLC Agreement entered into it "to set forth their respective rights and obligations with respect to the continuation of the LLC." LLC Agreement, at 1. Significantly, the Affiliation Agreement does not refer to Annex A, and Annex A makes no reference to the Affiliation Agreement or the spending requirement therein. Nor do the definitions of "Funding Date" and "On Going Business Purpose" in the LLC Agreement refer to the spending requirement in the Affiliation Agreement. *Id.* at 6 and 8 (emphasis in original).

Furthermore, under the express terms of the LLC Agreement, expenditures made between April 28, 2005 and November 17, 2005 were permitted to be counted toward the $500 million "Funding Capital Contribution Amount" if such expenditures were used for one of the "On-Going Business Purpose[s]" listed in Annex A. *Id.* However, the definition of "Funding Date" refers to Annex A only with respect to capital contributions made up until November 17, 2005,

the date of the Affiliation Agreement. The trier of fact must determine whether the parties intended this provision to carry over to section 10 of the Affiliation Agreement, notwithstanding the fact that section 10 fails to mention the LLC Agreement or Annex A. While it is telling that the LLC and Affiliation Agreements contain the same $500 million financial term, this fact does not establish VOOM HD's entitlement to judgment as a matter of law. In short, the parties fail to demonstrate whether or not they intended VOOM HD's spending requirement under section 10 of the Affiliation Agreement to be governed by Annex A to the LLC Agreement. To the extent that the parties submit deposition testimony in support of their conflicting interpretations of the Affiliation Agreement, the court is not permitted "to assess credibility" of that evidence on summary judgment. *Meridian Management Corp.*, 70 AD3d at 511.

VOOM HD makes the alternative argument that it was required to spend only $82 million on the Service, because the number of VOOM channels on the Service was permanently reduced. In support of this argument, VOOM HD refers to the Affiliation Agreement and an Interim Agreement, dated April 28, 2005 (Interim Agreement). Section 10 of the Affiliation Agreement provides, in relevant part, as follows:

> if and to the extent Network permanently reduces the number of channels on the Service during any calendar year such $100 million US Dollars amount shall be decreased by $3 million US Dollars per calendar year if it discontinues a Movie Channel and $5 million US Dollars per calendar year if it permanently discontinues a channel other than a Movie Channel. For clarity, the parties agree that such decreases shall apply on a pro rata basis for any part of a calendar year during which a channel is permanently discontinued.

Affiliation Agreement, at 23. Under the Interim Agreement, VOOM HD agreed to "make available to EchoStar for distribution by EchoStar to its customers the ten (10) channel subset

described below ('VOOM 10') of [VOOM HD's] existing high definition television ('HDTV') service known as 'VOOM 21.'" Interim Agreement, Snyder Aff., Ex. 6, at ECHOVOOM00117744. The Interim Agreement contemplates that the parties will enter into the Affiliation Agreement, "pursuant to which EchoStar will begin distributing VOOM 21 ... ." *Id.* In other words, VOOM HD argues that the Interim Agreement provided for the interim *reduction* of the "existing" service "known as 'VOOM 21'" (a 21-channel service) to a "subset" of 10 channels. VOOM HD argues that the Service was later reduced from the original 21 channels to 15 channels prior to its official launch on the DISH platform in February 2006, thereby permanently discontinuing six original VOOM channels. Under the Affiliation Agreement, the six-channel reduction results in an $18 million decrease in the spending requirement, for a total spending requirement in 2006 of $82 million, not $100 million.

EchoStar counters that any reduction in the spending requirement in section 10 occurred only if VOOM HD launched a number of channels on EchoStar's DISH Network under the Affiliation Agreement, and then subsequently permanently reduced that number of channels at a later date. EchoStar argues that it initially carried 10 of the VOOM channels, and then *increased* that number to 15 channels, but that the number of channels carried on EchoStar under the Affiliation Agreement was never reduced.

Thus, the parties do not dispute that, in 2005, VOOM HD made only 10 channels available to EchoStar. Indeed, in a press release dated January 5, 2006, "EchoStar Communications Corporation (NASDAQ: DISH) and Rainbow Media Holdings announced ... that EchoStar's DISH Network will *expand* its offering of Rainbow's VOOM HD Networks from 10 to 15 channels." EchoStar's Opp. Appendix of Exhibits, Ex. 9 (emphasis added). Nor do the

parties dispute that, "[a]t all times between February 1, 2006, and May 12, 2008, EchoStar distributed fifteen VOOM Channels to its Subscribers on the DISH Network." VOOM HD's Response to EchoStar's Rule 19-a Statement, ¶ 24.

Some of the supporting documents submitted by VOOM HD, such as the Investment Agreement, acknowledge that VOOM HD "owns and operates ... a suite of twenty-on (21) high definition channels." Investment Agreement, at 1; *see also* LLC Agreement, at 1 (stating that "the LLC and Affiliates of EchoStar Members are entering into an Affiliation Agreement for carriage of the VOOM 21 high definition programming services"). However, the Affiliation Agreement provides that "the Service is comprised of no more than 21 and no less than 5 full time 24 x 7 linear channels of programming" (Affiliation Agreement, at 5), thereby providing for a range of channels, and the Interim Agreement makes clear that VOOM HD initially made only 10 channels available to EchoStar. The Affiliation Agreement does not create a clear baseline for judging the number of channels that comprise the "Service," which raises another question of fact as to whether "the number of channels on the Service" were permanently reduced in 2006 for purposes of interpreting section 10. In other words, while EchoStar expanded its offering of VOOM channels from 10 to 15 in 2006, it is not clear to the court whether EchoStar's distribution of 15 channels constitutes an increase from 10 or a reduction from 21. Accordingly, VOOM HD fails to demonstrate that it is entitled to summary judgment based upon the spending requirement being reduced to $82 million. For the foregoing reasons, the motions for summary judgment (motion sequence numbers 002 and 003) are denied.

Spoliation (motion sequence number 004)

VOOM HD moves for spoliation sanctions based upon EchoStar's destruction of

employee e-mails. EchoStar counters that it fully complied with its obligation to preserve, collect and produce documents once VOOM HD commenced the action, and that e-mails pre-dating the commencement of the action are irrelevant to the primary legal issue of whether VOOM HD breached the Affiliation Agreement by failing to satisfy the spending requirement in section 10.

> [U]nder the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading. However, a less severe sanction or no sanction is appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her case or defense. The determination of spoliation sanctions is within the broad discretion of the court.

Denoyelles v Gallagher, 40 AD3d 1027, 1027 (2d Dept 2007) (internal quotation marks and citations omitted); *see also Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 (1st Dept 1997) ("spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence ... We have found dismissal to be a viable remedy for loss of a 'key piece of evidence' that thereby precludes inspection [internal citations omitted]").

"Typically, the duty to preserve evidence attaches as of the date the action is initiated or when a party knows or should know that the evidence may be relevant to future litigation." *Einstein v 357 LLC*, 2009 NY Slip Op 32784[U], *22 (Sup Ct, NY County, Nov. 12, 2009). The "utter failure to establish any form of litigation hold at the outset of litigation is grossly negligent." *Heng Chan v Triple 8 Palace, Inc.*, 2005 WL 1925579, *7, 2005 US Dist LEXIS 16520, *19 (SD NY 2005); *see also Zubulake v UBS Warburg LLC*, 229 FRD 422, 432 (SD NY 2004). A showing of gross negligence is "plainly enough to justify sanctions at least as serious

as an adverse inference." *Heng Chan*, 2005 WL 1925579, at *7, 2005 US Dist LEXIS 16520, at *19; *Einstein*, 2009 NY Slip Op 32784[U], at *23 ("when a party establishes gross negligence in the destruction of evidence, that fact alone suffices to support a finding that the evidence was unfavorable to the grossly negligent party").

> Courts have held that "[a] party seeking an adverse inference instruction or other sanctions based on the spoliation of evidence must establish the following three elements: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind' [;] and (3) that the destroyed evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense."

Einstein, 2009 NY Slip Op 32784[U], at *23-24 (citation omitted).

Obligation to Preserve Evidence

"Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents," and "the duty to preserve extends to those employees likely to have relevant information – the 'key players' in the case." *Zubulake v UBS Warburg LLC*, 220 FRD 212, 218 (SD NY 2003).[4] "Moreover, in the world of electronic data, the preservation obligation

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[4] The court notes that "[t]he CPLR and New York case law are silent on the obligations of parties and their counsel to effectuate a 'litigation hold.' In similar contexts, New York courts have turned to the Federal Rules of Civil Procedure and the case law interpreting them for guidance." *Einstein*, 2009 NY Slip Op 32784[U], at *22 (citations omitted). "'Litigation hold' is a term of art generally used to mean the suspension of any routine document 'retention and destruction policy' and the implementation of additional steps to ensure the preservation of relevant documents; typically, however, the term is used in the context of preserving electronically-stored documents such as emails." *Id.* at *22 n 1, citing *Zubulake*, 220 FRD at 217-18.

is not limited simply to avoiding affirmative acts of destruction. Since computer systems generally have automatic deletion features that periodically purge electronic documents such as e-mail, it is necessary for a party facing litigation to take active steps to halt that process." *Convolve, Inc. v Compaq Computer Corp.*, 223 FRD 162, 175-76 (SD NY 2004). Moreover, the duty to preserve may attach regardless of whether the complaint has been filed. *See Renda Marine, Inc. v United States*, 58 Fed Cl 57, 62 (Fed Cl 2003) ("defendant reasonably should have known of a potential litigation claim ... when it issued a cure notice ... concerning plaintiff's contract performance"); *see also Arista Records LLC v Usenet.com, Inc.*, 608 F Supp 2d 409, 430 (SD NY 2009) ("[w]here copyright infringement is alleged, and a cease and desist letter issues, such a letter triggers the duty to preserve evidence, even prior to the filing of litigation); *Doe v Norwalk Community College*, 248 FRD 372, 377 (D Conn 2007) ("duty to preserve certainly arose no later than September 2004, when Doe's counsel sent the defendants a demand letter indicating Doe's intention to sue NCC. In fact, the court believes the duty to preserve had arisen by February 13, 2004, when a meeting was held ... regarding the Doe incident, which indicates to the court that, as of that date, NCC was aware of Doe's allegations of sexual assault").

Here, Jeffrey Blum (Blum), EchoStar's vice president and associate general counsel, testified that EchoStar knew VOOM HD would sue if EchoStar terminated the Affiliation Agreement (Blum Dep., Snyder Aff., Ex. E, at 18, 175), and all of EchoStar's letters and internal e-mails evidence that, as early as June 19, 2007, EchoStar intended to terminate. In an e-mail exchange dated July 19, 2007 between Carl Vogel (Vogel), EchoStar's vice chairman, and Carolyn Crawford (Crawford), EchoStar's vice president for programming, Vogel stated: "We need to determine now if they are in breach. They are reneging on their free months for six

months for the HD promotion and I need to know our options. ... What are the breach remedies? I need a full summary of what we can do today." Snyder Aff., Ex.H. Vogel also inquired about the spending requirement in section 10 of the Affiliation Agreement, and then instructed Crawford to "[t]rigger the audit now. Given their balance sheet there is no way they've met the commitment. Have Robert prepare the breach notice." *Id.*

The next day, June 20, 2007, Kevin Cross (Cross), EchoStar's corporate counsel, sent a letter to VOOM HD stating, in pertinent part, as follows:

> Pursuant to Section 10 of the [Affiliation] Agreement, EchoStar has the right to terminate the Agreement if during any calendar year during the Term [VOOM HD] fails to spend $100 million on the Service. EchoStar believes that [VOOM HD] failed to spend $100 million on the Service in calendar year 2006 and that EchoStar is thus entitled to terminate the Agreement in accordance with its terms. EchoStar hereby demands that [VOOM HD] provide EchoStar with written certification of the amounts spent on the Service during 2006 together with a detailed substantiation for such certification.
>
> This letter is sent without prejudice to EchoStar's rights and remedies under the Agreement, each of which is hereby expressly reserved.

Id., Ex. M. This letter contains EchoStar's express notice of breach, a demand, and an express reservation of rights. Accordingly, EchoStar should have reasonably anticipated litigation at this time, that is, on June 20, 2007, especially in light of Blum's testimony that EchoStar knew VOOM HD would sue if EchoStar terminated the Affiliation Agreement.

EchoStar's subsequent conduct also shows that it should have reasonably anticipated litigation prior to VOOM HD filing the complaint. For example, in a July 10, 2007 e-mail exchange among Vogel, Crawford and Eric Sahl (Sahl), EchoStar's senior vice president for

programming, Vogel requested that Sahl call VOOM HD to get its financials, and to "[d]raft the breach letter for the existing breaches on original content." *Id.*, Ex. I. By letter dated July 27, 2007, EchoStar's corporate counsel informed VOOM HD that VOOM HD's "Certificate of Compliance" details VOOM HD's:

> non-compliance in several areas discussed in greater detail in my letter dated July 13, 2007 and further fails to certify certain specific requirements such [as] those set forth in Sections 4(a)(ii)(x) and (y) of the [Affiliation] Agreement. As previously articulated in prior correspondence, such non-compliance and failure to certify are material breaches of the Agreement.

Id., Ex. N. The letter then reserves EchoStar's rights and remedies under the Affiliation Agreement.

In an e-mail exchange on September 27, 2007, Sahl was asked to "get [Vogel] the details about declaring Voom in default," and Vogel stated, "[w]e need to declare them in default on the content covenants as well now." *Id.*, Ex. K. Crawford responded to Vogel, stating that "[w]e have sent the content breach notices," and that "[w]e are using both the content covenant breach and the concern about the $100m investment requirement as leverage to get a tiering deal done." *Id.* Thereafter, EchoStar sent VOOM HD the 11/16/07 EchoStar Breach Notice, discussed above, again notifying VOOM HD of its purported "material breach of the [Affiliation] Agreement" and reserving EchoStar's rights and remedies.

EchoStar's own Privilege Log – titled "VOOM HD Holdings LLC v. EchoStar Satellite L.L.C." – shows that EchoStar designated its documents as "work product" relating to "potential litigation" with VOOM HD as early as November 16, 2007, the same date as the 11/16/07 EchoStar Breach Notice letter was sent to VOOM HD. Alma Reply Aff., ¶¶ 27-28 and Ex. 15.

Specifically, the privilege log describes several documents dated November 16th as "Draft Letter with edits by Kevin Cross reflecting legal analysis regarding potential litigation." *Id.*, Ex. 15. Although the affidavit of Alma Asay, counsel for VOOM HD, concedes that EchoStar subsequently updated its privilege log to remove references to "work product" (*id.*, Exs. 16 and 17), it is telling that EchoStar originally designated these documents as work product as early as November 16, 2007. *See Crown Castle USA Inc. v Fred A. Nudd Corp.*, 2010 WL 1286366, *10 and n 16, 2010 US Dist LEXIS 32982, *30 (WD NY 2010) (court stated that "the duty [to preserve] actually arose as early as August 2004 – when several Crown employees, including in-house counsel, considered filing a notice of claim with Nudd's insurance carrier and instituted a practice of labeling Nudd-related communications as privileged under the work product doctrine," and that "[t]he work product doctrine protects from disclosure 'materials prepared by a party's attorney in anticipation of litigation or for trial' [citation omitted]").

In addition, in an e-mail exchange dated January 23, 2008 among Crawford, Sahl, and Michael McKenna, Crawford provided "recommendations if we take Voom down," and when asked if there was "a possibility of certain Voom services remaining," Crawford responded, "Nope - this is the plan for full termination" (Snyder Aff., Ex. L), and Sahl stated that "right now it looks like all go to tier or we terminate on their breach" (*id.*, Ex. Y). EchoStar sent its final breach notice on January 30, 2008, referencing VOOM HD's "material[] breache[s of] the Agreement as previously noticed," and stating that "EchoStar hereby terminates the Agreement effective February 1, 2008." *Id.*, Ex. R.

This documentary evidence makes clear that EchoStar should have anticipated litigation not only in June of 2007, but also in July and November of 2007 and prior to the commencement

of this action in January of 2008. EchoStar's concession that termination would lead to litigation, together with the evidence establishing EchoStar's intent to terminate, its various breach notices sent to VOOM HD, its demands and express reservation of rights, all support the conclusion that EchoStar must have reasonably anticipated litigation prior to the commencement of this action. In short, EchoStar knew, or, at a minimum, "should [have] know[n]," that its contemporaneous internal e-mails regarding its planned termination of the Affiliation Agreement "may be relevant to future litigation." *Einstein v 357 LLC*, 2009 NY Slip Op 32784(U), at *22.

EchoStar argues that it instituted a litigation hold on February 1, 2008, the day after VOOM HD commenced this action. EchoStar Brief, at 2. However, EchoStar admits in its response to VOOM HD's interrogatories that, from May 1, 2007 through June 1, 2008, it permanently deleted e-mails from employees' "Sent Items" and "Deleted Items" after only seven days. Snyder Aff., Ex. A, at 8-9. The deposition testimony of Eric Zimmerman (Zimmerman), EchoStar's senior staff systems administrator, also states that EchoStar's "purge suspension process was implemented in June of 2008" (*id.*, Ex. C, at 27), and Blum's affidavit confirms that it was not until June 1, 2008 that "EchoStar changed its procedures so that automatic deletion of email no longer applies to any individual on litigation hold" (Blum Aff., ¶ 32). This action was commenced on January 31, 2008. Thus, the evidence demonstrates that, in addition to failing to preserve documents upon reasonable anticipation of litigation, EchoStar permanently deleted employee e-mails for up to four months *after* this action was commenced.

Moreover, EchoStar relied upon its employees to determine which documents were relevant and responsive to litigation, and to preserve those e-mails by moving them into separate folders, outside of their folders for Sent and Deleted Items. For example, Blum testified that

EchoStar's "litigation hold" asked employees, as custodians of their own e-mail accounts, "to comply with the law generally to preserve potentially responsive material ..., to gather responsive material, and telling them to – there's a list of things that they need to look for." Snyder Aff., Ex. E, at 172-73. Zimmerman testified that it was unnecessary for EchoStar to suspend its automatic purging of electronic documents, because it was "up to the custodian to preserve the documents involved in various litigation cases they're custodians for," and that EchoStar "expect[ed] the custodians to preserve documents related to cases." *Id.*, Ex. C, at 28-29. Zimmerman testified that he was not trained on how to comply with the company's document retention policies, that he did not know how EchoStar employees were trained to comply with these policies or whose responsibility it was to monitor compliance with these policies (*id.* at 92), and that prior to June 2008, "there were no steps put into place by EchoStar to prevent the purging of emails by custodians" (*id.* at 106-107). According to Zimmerman, "if a person were to receive a litigation hold, they could still delete – they could still double delete and purge an email." *Id.* at 107.

Thus, EchoStar's purported litigation hold failed to turn off the automatic delete function, and merely asked its employees – many of whom, presumably, were not attorneys – to determine whether documents were potentially responsive to litigation, and to then remove each one from EchoStar's pre-set path of destruction. However, as stated in *Zubulake*:

> [I]t is *not* sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched. This is not to say that counsel will necessarily succeed in locating all such sources, or that the later discovery of new sources is evidence of a lack of effort. But counsel and client must take *some reasonable steps* to see that sources of relevant information are located.

229 FRD at 432; *see also Einstein*, 2009 NY Slip Op 32784(U), at *16 (criticizing defendant, whose testimony "incredibly demonstrates that when litigation commences, [defendant's] IT department takes no steps to prevent users, even those named as parties to such litigation, from deleting potentially relevant emails, relying instead solely upon the discretion of such users to select which emails to save and which to delete"); *Pension Comm. of Univ. of Montreal Pension Plan v Banc of Am. Sec., LLC*, 685 F Supp 2d 456, 473 (SD NY 2010) (attorney "instruction does not meet the standard for a litigation hold" where it "places total reliance on the employee to search and select what that employee believed to be responsive records without any supervision from Counsel").

EchoStar claims that the next business day after it instituted the litigation hold, it "mirror imaged" and thereby preserved all e-mail servers for the "key custodians" of documents. EchoStar Brief, at 2-3, 6. Specifically, according to Blum, EchoStar "captured all available emails ... of the key EchoStar custodians using electronic snapshots of the email servers." Blum Aff., ¶ 30. According to Blum, "[e]ach custodian was instructed to preserve potentially relevant evidence going forward. At least two additional snapshots were taken of all emails for most of these custodians between February 1, 2008 and June 1, 2008." *Id.* EchoStar argues that VOOM HD is "[u]nable to point to the loss of any specific relevant emails during this time period." EchoStar Brief, at 10.

There are several problems with EchoStar's argument. First, EchoStar's argument puts VOOM HD in the dicey position of asking it to identify internal EchoStar e-mails that no longer exist and that VOOM HD never had an opportunity to review because they were destroyed by EchoStar.

Second, it appears that several of the snapshots were not conducted in this litigation, but rather, were conducted in other, unrelated EchoStar litigations. Lawrence Aff., ¶ 24. These snapshots rescued some documents that were otherwise unrecoverable in the instant action, thereby demonstrating that relevant documents were destroyed by EchoStar. This includes the September 27, 2007 e-mail exchange between Crawford and Vogel, discussed above. Another example is an e-mail exchange dated January 23, 2008 among Crawford, Sahl, and Michael McKenna, where Crawford provided "recommendations if we take Voom down," and when asked if there was "a possibility of certain Voom services remaining," Crawford responded, "Nope - this is the plan for full termination" (*id.*, Ex. L), and Sahl stated that "right now it looks like all go to tier or we terminate on their breach" (*id.*, Ex. Y). The September 27, 2007 and January 23, 2008 e-mails were not produced to VOOM HD until May 28, 2009. Significantly, these e-mails were produced as a result of EchoStar conducting snapshots in other, unrelated litigations, but no "non-snapshot" versions of these e-mails have been produced in the instant action. Asay Aff., ¶¶ 13, 14.

Another example is an e-mail exchange between Erin Rider, EchoStar's programming manager, and Sahl, dated May 9, 2008, which is after this litigation was commenced but again prior to EchoStar removing its seven-day automatic delete function. The subject line of this e-mail is "Voom." Asay Reply Aff., Ex. 23. In substance, Erin Rider asked Sahl, "Still in with Charlie?" *Id.* (According to VOOM HD, "Charlie" refers to Charlie Ergen, EchoStar's chief executive officer.) Sahl's response e-mail stated, "Yes. Prob another 20 mins." *Id.* Sahl's e-mails were mirror-imaged on March 31 and May 12, 2008, three days after this e-mail exchange, but had he sent this e-mail at any time from April 1 through May 5, 2008, the automatic seven-

day delete function would have erased this e-mail, which potentially confirms a meeting between Sahl and Ergen concerning VOOM.

Thus, VOOM HD has provided evidence of e-mails that were destroyed by EchoStar's automatic delete function in this litigation. In some instances, the e-mails were destroyed completely in this litigation, and made available only fortuitously by snapshots of custodians in unrelated EchoStar litigations. Moreover, EchoStar's argument that its "snapshots of the relevant servers" collected and preserved "all then-existing emails for these custodians" (EchoStar Opp. Brief, at 11) implicitly concedes that the snapshot captured e-mails existing at the time of the snapshot, thereby not including e-mails automatically deleted just days before the litigation and even after the litigation was commenced, up until EchoStar suspended its automatic delete function. Of course, the concern – and, unfortunately, the likelihood – is that many more documents were destroyed that were *not* recovered in snapshots in this litigation or other, unrelated litigations. *See e.g. Quinby v WestLB AG*, 2005 WL 3453908, *7, 2005 US Dist LEXIS 35583, *22 (SD NY 2005) ("[b]ecause the back-up tapes are 'snapshots,' taken at a particular point in time, e-mails that are sent or received and then deleted between snapshots will not be captured onto back-up tapes. For example, if the back-up tapes are created every night at 11:00 and on a particular afternoon an employee receives and then immediately deletes an e-mail, all before 11:00, that e-mail will not be stored on a back-up tape").

Third, EchoStar claims that it issued the litigation hold on February 1, 2008 but concedes that it did not conduct the "electronic snapshots of the emails servers" until one business day later. February 1st fell on a Friday, which means that the purported mirror imaging did not occur until Monday, February 4th, *four days after the action was commenced*, thereby losing, at a

minimum, e-mails from January 24, 2008 through January 28, 2008 as a result of the seven-day automatic purge policy, potentially critical days leading up to EchoStar's formal termination of the Affiliation Agreement. Asay Reply Aff., ¶ 35. Thus, even if the duty to preserve arose only when the complaint was filed, EchoStar still violated this duty.

EchoStar argues that it discussed with VOOM HD alternatives that would avoid termination of the Affiliation Agreement and that the parties were seeking an "amicable business solution" (EchoStar Brief, at 5), thereby demonstrating that there was no reasonable anticipation of litigation. However, as a preliminary matter, discussing a business solution does not preclude litigation or anticipation of litigation. EchoStar's argument ignores the practical reality that parties often engage in settlement discussions before and during litigation, but this does not vitiate the duty to preserve. EchoStar's argument would allow parties to freely shred documents and purge e-mails, simply by faking a willingness to engage in settlement negotiations.

Nor does this argument refute the various EchoStar documents demonstrating that EchoStar was intent upon terminating the Affiliation Agreement. *See e.g.* Snyder Aff., Ex. J (Crawford e-mail to Vogel, stating "we will likely need to lean on the audit lever to accomplish either termination rights [content breach] or tiering rights"); *see also* Snyder Aff., Ex. E, at 175 (Blum testifying that he knew VOOM HD would sue EchoStar if EchoStar terminated the Affiliation Agreement). Moreover, the evidence demonstrates that VOOM HD would not agree to re-tier the VOOM channels unless the "economics" were preserved (Snyder Aff., Ex. G [memorandum of EchoStar-VOOM meeting on September 19, 2007, stating that Josh Sapan, Rainbow Media's president and chief executive officer, "proffered that Voom was open to exploring some packaging flexibility under the affiliation agreement so long as Voom was kept

whole on the economics"]); yet an internal EchoStar e-mail dated October 1, 2007 from Sahl to Crawford states that VOOM is "seeking to preserve the economics" but that EchoStar's "issue IS the economics" (Snyder Aff., Ex. S). In addition, the purported "amicable business solution" was a solution to EchoStar's assertion that VOOM HD had breached the Affiliation Agreement. It is entirely possible that the documents destroyed by EchoStar demonstrated that EchoStar knew all along that there was no breach and that the parties intended the definition of "Service" to include overhead, which would mean that no breach occurred and would prove VOOM HD's case.

Even EchoStar's evidence supports the conclusion that the parties' discussions were not amicable, or at a minimum, that they had begun to break down by January 5, 2008, prior to the commencement of this action, and that EchoStar should have anticipated litigation. For example, in an e-mail from Sapan to Sahl on January 5, 2008, Sapan stated:

> My guys are telling me that Echostar may be planning to announce a re-tiering plan on Monday, beginning in February, even without global resolution of the outstanding issues between Echostar and Voom. Please tell me I'm wrong or than any such re-tiering will not include VOOM. On the assumption I'm not wrong, we're all pretty upset about the situation (and of course urge you to hold off) and feel obliged to make the point that the contemplated re-tiering of Voom, without Voom's consent, is a plain violation of among other things the packaging and penetration requirements of the Affiliation Agreement. While I remain hopeful we can achieve global resolution (in that regard, I still look forward to Tuesday's meeting), we do not consent to any unilateral re-tiering of VOOM outside of a larger, mutually acceptable agreement addressing multiple issues, and we have no choice but to fully reserve all of our legal and equitable rights and remedies.

EchoStar's Opp. Appendix of Exhibits, Ex. 13. Sahl's response e-mail, sent the same day, confirms VOOM HD's concern, stating that he was "surprised to receive this note given our

discussions over the past several months and our most recent meeting in Denver, all on the subject of our HD packaging plans." *Id.*

EchoStar also concedes that, as of January 24, 2008 – again, *prior* to this action being commenced – at a personal meeting with the parties' top executives, EchoStar informed VOOM HD that it "was going to terminate the Affiliation Agreement, effective February 1, 2008, unless the parties entered into a 30-day negotiating period, during which it was proposed that neither party waived any of its legal rights." *Id.*, Ex. 21, Crawford Aff., ¶ 22. Thus, at the absolute latest, the duty to preserve arose in January 2008, yet EchoStar's purported "litigation hold" did not prevent the destruction of documents until, at the earliest, four months after the action was commenced.

EchoStar also argues that it continued to perform under the Affiliation Agreement, paying VOOM HD $22 million in licensing fees, and that it did not contact outside counsel until January 30, 2008, when it sent the final termination letter. However, EchoStar's purported performance merely means that EchoStar *claims* not to have breached, and this, together with EchoStar's argument that it did not contact outside counsel until January 30, 2008, fails to remediate EchoStar's failure to preserve documents upon reasonable anticipation of litigation or its destruction of e-mails for four months after the action was commenced.

For all of the foregoing reasons, the evidence demonstrates that EchoStar failed to preserve documents upon reasonable anticipation of litigation. EchoStar also permanently deleted relevant employee e-mails for up to four months after this action was commenced.

Culpable State of Mind

As stated by the First Department:

> Spoliation is the destruction of evidence. Although originally defined as the intentional destruction of evidence arising out of a party's bad faith, the law concerning spoliation has been extended to the nonintentional destruction of evidence. A correlating trend toward expansion of sanctions for the inadvertent loss of evidence recognizes that such physical evidence often is the most eloquent impartial "witness" to what really occurred, and further recognizes the resulting unfairness inherent in allowing a party to destroy evidence and then to benefit from that conduct or omission.

Kirkland, 236 AD2d at 173 (internal citations omitted). Although evidence in *Kirkland* "had not been destroyed in bad faith," the Court nevertheless dismissed the third-party complaint because the third-party defendant, "through no fault of its own, ... has been deprived of an ability to present a defense." *Id.* (determining that "the evidence [did] not show the spoliation to be intentional," but found that "it clearly support[ed] a finding that crucial evidence was negligently destroyed"); *see also Bear, Stearns & Co. v Enviropower LLC*, 21 AD3d 855, 855-56 (1st Dept 2005) ("[d]efendant's answer was properly stricken because of its negligent spoliation of documents [citations omitted] after it was on notice of plaintiff's claim, albeit before the action was commenced"); *430 Park Ave. Co. v Bank of Montreal*, 9 AD3d 320, 321 (1st Dept 2004) ("plaintiff was considering, or had finally determined to commence, this lawsuit at or before the time it undertook its acts of spoliation which it set in motion virtually immediately after defendants vacated the premises").

Here, EchoStar was sanctioned for spoliation as recently as August 2005 in *Broccoli v EchoStar Communications Corp.* (229 FRD 506 [DC MD 2005]). In *Broccoli*, a former EchoStar employee sued EchoStar based upon allegations of sexual harassment and retaliation. During discovery, Broccoli moved for sanctions, alleging that EchoStar committed spoliation by failing to preserve critical records and documents relevant to several claims and defenses. The

court found EchoStar "guilty of gross spoliation of evidence" (229 FRD at 509) by failing to preserve "employment-related documents relevant to Broccoli and his termination," certain corporate records, "correspondence by corporate decision makers pertaining to Broccoli's termination," and "emails and other electronic communications exchanged during Broccoli's employment and termination" (*id.* at 510 n 2). The court criticized Echostar's "email/document retention policy" as "extraordinary," explaining that EchoStar's "email system automatically sends all items in a user's 'sent items' folder over seven days old to the user's 'deleted items' folder, and all items in a user's 'deleted items' folder over 14 days old are then automatically purged from the user's 'deleted items' folder." *Id.* at 510. Moreover, because the purged e-mails were not recorded or stored, "when 21-day-old emails are purged, they are forever unretrievable." *Id.*

The court stated that, "under normal circumstances, such a policy may be a risky but arguably defensible business practice undeserving of sanctions." *Id.* The court found that the "failure to preserve documents occurred despite Broccoli's written complaint, submitted to Echostar at the time of his termination, that he was unfairly treated by the human resources department." *Id.* n 2. The court stated that, "[i]ndisputably, Echostar should have reasonably anticipated that litigation would follow Broccoli's termination and it should have preserved all relevant documents." *Id.* The court granted Broccoli's request for an "adverse inference" instruction based upon the spoliation. The court's decision was based, at least in part, on "Echostar's status as a large public corporation with ample financial resources and personnel management know-how," and its conclusion that "Echostar clearly acted in bad faith in its failure to suspend its email and data destruction policy or preserve essential personnel documents in

order to fulfill its duty to preserve the relevant documentation for purposes of potential litigation." *Id.* at 512.

Significantly, EchoStar's e-mail retention policy in *Broccoli* was three times longer in duration than in the instant action. It appears that, since the *Broccoli* decision, EchoStar *reduced* its automatic delete function, deleting e-mails after only 7 days instead of after 21 days. In *Broccoli*, EchoStar committed gross spoliation by failing to retain documents relating to a potential claim. In the instant action, EchoStar failed to preserve documents not only prior to VOOM HD commencing litigation, but also for four months *after* this litigation was commenced, making it even more egregious than in *Broccoli*. Moreover, as stated in *Broccoli*, EchoStar is "a large public corporation with ample financial resources" to institute and enforce a proper litigation hold (*id.* at 512), and EchoStar admits that it hired Blum as its new in-house lawyer, "in part to address the [*Broccoli*] court's concerns about EchoStar's document preservation policies and practices" (Blum Aff., ¶ 22). Thus, EchoStar's failure to preserve documents was more than negligent. It was the very same "bad faith" conduct for which EchoStar had been sanctioned in *Broccoli* (229 FRD at 512), and EchoStar has been on notice of its substandard document retention practices at least since the *Broccoli* decision, yet continued those practices even *after* this litigation was commenced by VOOM HD. Therefore, EchoStar's failure to preserve documents constituted, at a minimum, gross negligence.

Relevance to VOOM HD's Claims

As the court stated in *Treppel v Biovail Corp.* (249 FRD 111, 123 [SD NY 2008]), "'[t]he burden placed on the moving party to show that the lost evidence would have been favorable to it ought not be too onerous, lest the spoliator be permitted to profit from its destruction [citations

omitted].'" The court stated that "'it is not incumbent upon the plaintiff to show that specific documents were lost,'" but rather, "'[i]t would be enough to demonstrate that certain types of relevant documents existed and that they were necessarily destroyed by the operation of the autodelete function on [the defendant's] computers or by other features of its routine document retention program [citation omitted].'" *Id.*

Here, VOOM HD has demonstrated that destroyed evidence was relevant to VOOM HD's claims. As discussed above, the Affiliation Agreement is ambiguous with respect to what constitutes a "Service" under section 10. Therefore, extrinsic evidence is relevant to determine the parties' intent with respect to the meaning of "Service." The extrinsic evidence may include "'overt statements and acts of the parties, the business context [of the contract], prior dealings between the parties, business custom, and usage in the industry'" (*Dittrick*, 948 A2d at 406), all of which may be demonstrated via e-mail correspondence.

Moreover, VOOM HD has identified several relevant e-mails that were recovered only as a result of "snapshots" taken in other, unrelated EchoStar litigations. These e-mails demonstrate EchoStar's intention to declare various breaches by VOOM HD in order to restructure the parties' agreement or terminate the Affiliation Agreement altogether. *See e.g.* Snyder Aff., Exs. K, L and Y. The court acknowledges that, "where sufficient grounds for the termination of a contract exist, it is immaterial that the alleged motivation for the termination was attributable to an unrelated reason." *Brywil, Inc. v STP Corp.*, 1980 WL 77945, *10, 1980 Del Ch LEXIS 595, *31 (Del Ch 1980); *see also Hifn, Inc. v Intel Corp.*, 2007 WL 2801393, *13, 2007 Del Ch LEXIS 58, *44-45 (Del Ch 2007) ("to the extent that Hifn is contending that Intel's subjective motivations for wanting out of the contract give rise to an inference that it acted in bad faith, that

argument fails under settled law. In Delaware, a party to a contract is entitled to rely on the terms of the contract regardless of the subjective motivations influencing its actions. The fact that Intel may have had independent reasons to avoid its obligations under the Agreement does not mean that Intel was not allowed to exercise its contract rights according to the contract's terms"). However, these e-mails are relevant to EchoStar's understanding of the term "Service" and whether VOOM HD had actually satisfied the spending requirement contained in section 10 of the Affiliation Agreement, which even EchoStar identifies as "the central issue in this case." EchoStar's 4/29/10 Opening Brief, at 12. The period during which EchoStar's automatic delete function was operating covers the crucial months during which EchoStar was searching for a way out of the Affiliation Agreement and continued even after EchoStar terminated the agreement and the commencement of this action. It is entirely possible, if not likely, that EchoStar destroyed other e-mails that address EchoStar's understanding of the term "Service" and whether VOOM HD had actually satisfied the spending requirement contained in section 10. *Artesian Water Co. v State, Dept. of Hwys. and Transp.*, 330 A2d 441, 443 (Del Supr 1974) (courts "have long looked to relevant facts and circumstances surrounding the contract, including the actions of the parties, in ascertaining the intention of the parties").

These e-mails may also have been relevant to damages, to the extent that they contained projections of future subscribers or acknowledged EchoStar's evasion of payments to VOOM HD. Therefore, VOOM HD has demonstrated that destroyed e-mails were relevant. In any event, "when a party establishes gross negligence in the destruction of evidence, that fact alone suffices to support a finding that the evidence was unfavorable to the grossly negligent party." *Einstein*, 2009 NY Slip Op 32784(U), at *23.

Sanctions

"Under CPLR 3126, if a court finds that a party destroyed evidence that 'ought to have been disclosed ... , the court may make such orders with regard to the failure or refusal as are just.'" *Ortega v City of New York*, 9 NY3d 69, 76 (2007).

> New York courts ... possess broad discretion to provide proportionate relief to the party deprived of the lost evidence, such as precluding proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at the trial of the action. Where appropriate, a court can impose the ultimate sanction of dismissing the action or striking responsive pleadings, thereby rendering a judgment by default against the offending party.

Id. (internal citations omitted). "After a discovery duty is well established, the failure to adhere to contemporary standards can be considered gross negligence," including the failure "to identify all of the key players and to ensure that their electronic and paper records are preserved; to cease the deletion of email"; and "to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources." *Pension Comm. of Univ. of Montreal Pension Plan*, 685 F Supp 2d at 471.

A party's conduct in unrelated litigation oftentimes has little relevance in an ongoing proceeding in another jurisdiction. However, here, EchoStar has systematically destroyed evidence in direct violation of the law and in the face of a ruling by a federal court that criticized EchoStar for the same bad-faith conduct as EchoStar's conduct in the instant action. It is worth repeating that EchoStar is "a large public corporation with ample financial resources" to institute and enforce a proper litigation hold (*Broccoli*, 229 FRD at 512), which EchoStar failed to do

notwithstanding the *Broccoli* decision and having hired a new in-house lawyer to address EchoStar's document preservation policies and practices. EchoStar has been on notice of its substandard document retention practices yet continued those practices even *after* this litigation was commenced by VOOM HD. This allowed EchoStar to permanently dispose of correspondence that was relevant to VOOM HD's ability to prove its case and counter EchoStar's defense.

Here, the evidence destroyed by EchoStar does not completely deprive VOOM HD of the ability to establish its case. While the e-mails lost by EchoStar are certainly relevant to VOOM HD's claims and its ability to counter EchoStar's defense, "other evidence remains available to [VOOM HD], including the business records of [EchoStar], and the testimony of its employees. Under these circumstances, the loss of the subject records will not fatally compromise [VOOM HD's] ... claims or leave [it] without the means of establishing [its] defense." *See E.W. Howell Co. v S.A.F. La Sala Corp.*, 36 AD3d 653, 655 (2d Dept 2007). In this situation, a negative or adverse inference against the defendant at the trial of the action is an appropriate sanction.[5] *Id.* at 654-55 ("while the sanction of dismissal of a pleading may be imposed upon a party who negligently loses key evidence even absent willful or contumacious conduct [citations omitted], a less drastic sanction is appropriate where the loss does not deprive the opposing party of the means of establishing a claim or a defense"); *see also Davydov v Zhuk*, 23 Misc 3d 1129(A), *7, 2009 NY Slip Op 51003(U) (Sup Ct, Kings County 2009) (adverse inference instruction proper

[5] It is only because the court believes that VOOM HD still has the opportunity to make its case using other evidence that the court is imposing the lesser sanction of an adverse inference instruction. But for this belief, the court would have imposed the harsher sanction of striking the answer, based upon the egregiousness of EchoStar's conduct.

where plaintiff was "not totally bereft of the means to establish his claims, and may still be able to establish his damages based upon bank records, tax returns, custom broker records, and other independently available evidence"). Accordingly, VOOM HD's motion is granted and an adverse inference instruction will be issued at trial. In addition, VOOM HD's request for costs incurred due to EchoStar's unlawful spoliation is granted. *Turner v Hudson Transit Lines, Inc.*, 142 FRD 68, 78 (SD NY 1991) ("award of costs, including attorneys' fees, is entirely warranted" by defendant having "unjustifiably destroyed documents after litigation had been commenced, causing the plaintiff to expend time and effort in attempting to track down the relevant information").

VOOM HD's Motion to Exclude Avram Tucker
as an Expert Witness (motion sequence number 005)

VOOM HD moves to exclude the expert reports of Avram Tucker (Tucker), EchoStar's damages expert, and to bar him as an expert witness at trial, arguing that Tucker's Expert Rebuttal Report, dated February 1, 2010 (Tucker Report), relied upon the withdrawn Expert Report of Roger Williams (Williams Report). VOOM HD argues that Tucker's testimony is barred under the Federal Rules of Civil Procedure (Federal Rules), that Tucker's Supplemental Expert Rebuttal Report, dated May 11, 2010 (Tucker Supp Report), was improperly submitted after the close of discovery, and that Tucker is not qualified to testify as an expert about expenses under New York law.

Here, the parties agreed to apply the Federal Rules to expert disclosure. Specifically, counsel for EchoStar hand-wrote on this court's Preliminary Conference Order, which was so ordered and dated May 13, 2008 (PC Order), that the "parties will exchange expert reports and

engage in expert discovery consistent with the Federal Rules of Civil Procedure." Snyder Aff., Ex. Q, at 3. EchoStar now claims that the parties "never discussed or agreed to displace New York law in connection with their use of experts and/or the wholesale importation of the Federal Rules of Civil Procedure and/or the Federal Rules of Evidence into this proceeding." EchoStar Opp. Brief, at 11. However, this claim is at odds with language of the PC Order, whereby the parties expressly agreed – in language admittedly penned by EchoStar's counsel – to be bound by the Federal Rules with respect to exchanging expert reports and engaging in expert discovery. Therefore, the Federal Rules apply to expert disclosure.

Section 26(a)(2)(B) of the Federal Rules provides that an expert's written report "must contain: (i) a complete statement of all opinions the witness will express and the basis and reasons for them" and "(ii) the data or other information considered by the witness in forming them." Section 37(c)(1) of the Federal Rules provides that, "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) ..., the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." *See also Williams v County of Orange*, 2005 WL 6001507, *3, 2005 US Dist LEXIS 46051, *8-9 (SD NY 2005) ("Rule 37[c][1] is 'self-executing,' and the exclusion of undisclosed information is automatic unless the non-disclosing party sustains its burden of showing that the failure to disclose was either substantially justified or harmless"). "A failure to comply with Rule 26(a)(2) is considered to be harmless when the party entitled to the expert disclosure has not been prejudiced." *Id.* The determination of preclusion is a matter within the court's discretion. *Id.*

On December 4, 2009, VOOM HD submitted the expert damages report of Jonathan

Orszag, calculating damages purportedly suffered by VOOM HD as a result of EchoStar's termination of the Affiliation Agreement (Orszag Report). Orszag determined VOOM HD's purported lost profits by multiplying subscriber fees by the number of projected subscribers over the life of the contract to determine revenues, and then subtracting VOOM HD's projected expenses.

EchoStar retained three experts to rebut the Orszag Report: Timothy Brooks, who addressed Orszag's projections of the number of high definition subscribers EchoStar would have had through the term of the Affiliation Agreement; Roger Williams (Williams), who "address[ed] and respond[ed] to the operating expense projections that Mr. Orszag relied on in reaching his opinion as to [VOOM HD's] future lost profits; and Tucker, EchoStar's "principal damages expert," who was retained "to rebut Mr. Orszag's testimony regarding [VOOM HD's] alleged damages, and to calculate alternative measures of [VOOM HD's] present value lost profits, if any, assuming liability were established." EchoStar Opp. Brief, at 7. EchoStar's experts' reports are dated February 1, 2010.

The Williams Report states Williams's background and qualifications, stating that he is "frequently in the position of evaluating how much it will cost to produce and provide programming in a wide variety of genres" (Williams Report, Snyder Aff., Ex. I, ¶ 3), and that he is "well-versed with the costs to operate a cable television network, including the costs of acquiring and producing programming (*id.*, ¶ 4). In Section III of the Williams Report, titled "Assignment and Scope of Work," Williams stated that he was "retained by counsel for EchoStar to respond to the portion of the Orszag Report projecting [VOOM HD's] operating expenses through the end of the term of the Affiliation Agreement ... ." *Id.*, ¶ 11. Williams stated that he

was specifically "asked to estimate the costs necessary to operate and program the fifteen VOOM channels and meet the minimum content requirements under Section 4 of the Affiliation Agreement," and that "[i]n this regard, I have drawn from my years of experience in network programming." *Id.*, ¶ 12. Williams stated that he also "reviewed documents produced by [VOOM HD] reflecting its actual and projected operating expenses, as well as the actual historical spending levels of networks providing comparable programming in the industry, as report by SNL Kagan." *Id.*

The Tucker Report, in a section titled "Summary of Opinions," stated that Orszag "significantly underestimated [VOOM HD's] future costs," and cited the Williams Report as support for the statement that, "[a]ccording to Roger Williams, [VOOM HD] would be required to incur substantially higher costs to meet the minimum content requirements under the Affiliation Agreement than those assumed by Mr. Orszag." Tucker Report, Snyder Aff., Ex. E, ¶ 20. In a section of the Tucker Report titled "Detailed Evaluation of Mr. Orszag's Damage Claim," Tucker expressly stated that, "[i]n performing my recalculation of [VOOM HD's] lost profits (assuming entitlement), I rely on Mr. Williams' analysis of the cost [VOOM HD] would have to incur to meet the minimum content requirements under the Affiliation Agreement." *Id.*, ¶ 37. In its conclusion section, the Tucker Report then calculated damages, relying on the number of projected subscribers provided by Brooks and "utiliz[ing] projected programming and other operating expenditures provided by Mr. Williams." Tucker Report, Snyder Aff., Ex. E, ¶¶ 66-67.

Tucker was deposed on March 3, 2010. At his deposition, Tucker was asked whether he was "offering an opinion in this case that Mr. Orszag has significantly underestimated [VOOM

HD's] future costs in his damages calculation," to which Tucker responded, "Yes. Based on my reliance on Mr. Williams." Tucker Dep., Snyder Aff., Ex. C, at 261. Tucker testified that he was not holding himself out as an expert on the subject of "independent projections of operating expenses for television programs" (*id.* at 262), and that he "would not independently determine an amount for programming for HD television (*id.* at 263). When Tucker was asked whether he knew "how to go about determining the costs which HD would have had to incur to meet the minimum content requirements in section 4" of the Affiliation Agreement, he responded: "I know that there is minimum content requirements in section 4, but Mr. Williams is one [*sic*] that analyzed that and determined what would required [*sic*] and how much it would cost." *Id.* Tucker then reiterated that, "[a]s to the projections that would be needed to meet the minimum content," he "would rely on Mr. Williams" (*id.*), and then stated that he "would not have the expertise to independently estimate how much it would cost to program or develop programming" (*id.* at 264). Tucker admitted that he did not "conduct any independent analysis to verify Mr. Williams's opinion concerning networks offering comparable programming to determine if those networks were indeed comparable to VOOM," and that he conducted no "independent analysis to verify whether Mr. Williams's opinion was correct regarding the minimum VOOM HD would need to spend to meet the section 4 requirements," stating that that "was part of his analysis, not mine." *Id.* Tucker also conceded that he did not "consider relying on sources other than Mr. Williams to project expenses through 2020." *Id.* at 267. When asked specific questions about relying on a draft budget and a percentage increase used by Orszag to project expenses, Tucker responded that he relied on Williams (*id.* at 273) and that "I think Mr. Williams would be the one to address whether or not a 1.2 percent increase is reasonable or not"

(*id.* at 273-74).

On March 18, 2010, EchoStar notified VOOM HD that it would not be calling Williams as a testifying witness at trial, and that EchoStar was, therefore, cancelling Williams' deposition which was scheduled for the following day, March 19th. March 19th was also the court-ordered end date for all expert disclosure and the due date for the note of issue. Tucker testified that he relied upon the expertise and expense projections of the Williams Report. These expense projections were a critical component of the overall damages calculation, and Williams is no longer a testifying witness and he was never deposed. Having withdrawn Williams, EchoStar has simultaneously withdrawn the basis of Tucker's conclusion on expenses. Therefore, under the Federal Rules, the Tucker Report is deficient for failure to provide a basis for Tucker's opinion on expenses.[6] The failure to disclose a basis for Tucker's opinion was not justified, but rather, was the result of EchoStar's strategic decision to withdraw Williams, thereby leaving Tucker without support for his opinion.

By Stipulation and Order dated February 11, 2010 (filed March 2, 2010), the court extended, for the second time, the parties' discovery deadlines. Specifically, this order extended the deadline for expert depositions, expert disclosure, and the note of issue date, to March 19, 2010. Thus, EchoStar's submission of a Supplemental Report by Tucker, dated May 11, 2010 (Tucker Supp Report), is untimely, as it was submitted nearly two months after the close of

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[6] VOOM HD has also demonstrated, by Tucker's own admission, that he does "not have the expertise to independently estimate how much it would cost to program or develop programming" (Tucker Dep., at 264), thereby disqualifying him as an expert under New York law on this subject. *See Hellert v Town of Hamburg*, 50 AD3d 1481, 1482 (4th Dept 2008) (excluding expert as unqualified when he admitted during deposition that he was not qualified to testify on the relevant subject).

discovery. *Wechsler v Hunt Health Sys., Ltd.*, 381 F Supp 2d 135, 156 (SD NY 2003) (plaintiff improperly "submitted the supplemental expert report after the close of expert discovery, with trial approaching").

In short, the papers before the court reveal what appears to be procedural gamesmanship that has backfired on EchoStar. Indeed, the tactics employed by EchoStar are precisely the type of "trial by ambush" that the Federal Rules are designed to avoid. *Macaulay v Anas*, 321 F3d 45, 50 (1st Cir 2003). "Rule 26(e) is not ... a vehicle to permit a party to serve a deficient opening report and then remedy the deficiency through the expedient of a 'supplemental' report." *Lidle v Cirrus Design Corp.*, 2009 WL 4907201, *5, 2009 US Dist LEXIS 118850, *17 (SD NY 2009); *see also Sandata Techs., Inc. v Infocrossing, Inc.*, 2007 WL 4157163, *5, 2007 US Dist LEXIS 85176, *16 (SD NY 2007) ("'Fed. R. Civ. P. 26[e] does not grant a license to supplement a previously filed expert report because a party wants to, but instead imposes an obligation to supplement the report when a party discovers the information it has disclosed is incomplete or incorrect'" [citation omitted]). Rather, "'the expert witness discovery rules are designed to allow both sides in a case to prepare their cases adequately and to prevent surprise,'" and "'compliance with the requirements of Rule 26 is not merely aspirational [citation omitted].'" *Reese v Herbert*, 527 F3d 1253, 1266 (11th Cir 2008). Here, the Tucker Supp Report does not purport to complete or correct Tucker's original report. Therefore, the Tucker Supp Report is not a permissible supplemental report under the Federal Rules.

The prejudice to VOOM HD in allowing Tucker to be called as a witness and introducing the Tucker Supp Report is evidenced by the fact that discovery has closed and trial is approaching, with a control date of December 9, 2010 set on the court calendar. Having

withdrawn Williams, VOOM HD has had no opportunity to question Tucker as to what he now claims is the real basis for his opinion. Prejudice to VOOM HD is also manifest in the expenditure of money, time and attorney resources that it would take to revive discovery in order to address the Tucker Supp Report. *Beller v US*, 221 FRD 696, 700 (D NM 2003) (willingness to open discovery to allow "re-depos[ition] ... does not cure the problem," as this "would frustrate the purpose of the new rule, which is the 'elimination of unfair surprise to the opposing party and the conservation of resources'"). Allowing EchoStar to rely upon this purported new expert discovery would frustrate the purpose of the Federal Rules by depriving VOOM HD of the ability to adequately prepare its damages case. It would also implicitly condone EchoStar's conduct of ignoring bright-lined disclosure deadlines that the parties were well aware of since February 11, 2010. As stated in *Beller*, permitting Tucker to be re-deposed under these circumstances would:

> create a system where preliminary reports could be followed by supplementary reports and there would be no finality to expert reports, as each side, in order to buttress its case or position, could "supplement" existing reports and modify opinions previously given. This practice would surely circumvent the full disclosure requirement implicit in Rule 26 and would interfere with the Court's ability to set case management deadlines, because new reports and opinions would warrant a new round of consultation with one's own expert and virtually require new rounds of depositions. That process would hinder rather than facilitate settlement and the final disposition of the case.

Id. at 701-02; *see also Lidle*, 2009 WL 4907201, *7, 2009 US Dist LEXIS 118850, *23 (prejudice in allowing supplemental expert report deemed "substantial" where it would require opposing party to redepose expert); *Gotlin v Lederman*, 2009 WL 2843380, *4, 2009 US Dist LEXIS 78818, *13 (ED NY 2009) (failure to disclose not harmless where "Court would then be

constrained to reopen expert discovery, which would impose significant additional litigation costs on defendants"). For the foregoing reasons, VOOM HD's motion to bar EchoStar from calling Tucker as an expert witness and from introducing his expert report is granted.

In conclusion, the court notes EchoStar's pattern of egregious conduct and questionable – and, at times, blatantly improper – litigation tactics. EchoStar's spoliation in this action, and the fact that it has been sanctioned for spoliation in previous actions, is precisely the type of offensive conduct that cannot be tolerated by the court. Similarly egregious is EchoStar's last-minute finagling with expert reports, believing that it can play fast and loose with the rules of procedure in order to enhance its litigation posture. EchoStar itself wrote in the PC Order that the parties would be bound by the Federal Rules with respect to exchanging expert reports and engaging in expert discovery. EchoStar now has the temerity to argue that it never agreed to adopt the Federal Rules at all, further demonstrating that, throughout this litigation, EchoStar has been hoist with its own petard.

Accordingly, it is hereby

ORDERED that plaintiff VOOM HD Holdings LLC's motion (motion sequence number 002) for summary judgment is denied and defendant EchoStar Satellite L.L.C.'s cross motion to preclude extrinsic evidence is denied; and it is further

ORDERED that defendant's motion (motion sequence number 003) for summary judgment is denied; and it is further

ORDERED that plaintiff VOOM HD Holdings LLC's motion (motion sequence number 004) for sanctions based upon spoliation of evidence is granted and (1) an adverse inference instruction will be issued at trial; and (2) plaintiff shall have the right to collect, as an additional

damages claim, all costs and legal fees incurred due to defendant's spoliation, including all costs and legal fees relating to plaintiff's spoliation motion and plaintiff's investigation and litigation of defendant's document destruction; and it is further

ORDERED that plaintiff VOOM HD Holdings LLC's motion (motion sequence number 005) seeking to bar defendant from calling non-party Avram Tucker as an expert witness at trial and from introducing his expert report is granted; and it is further

ORDERED that the parties are directed to appear for a pre-trial conference in Room 218, 60 Centre Street, New York, New York 10007, on December 9, 2010, at 9:30 A.M.

Dated: November 3, 2010

ENTER:

J.S.C.

HON. RICHARD B. LOWE, III