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

PRESENT: _____ PART 56

Justice

NFL ENTERPRISES LLC

INDEX NO. 600556/08 6/27/08

MOTION DATE 2/29/08

- v -

MOTION SEQ. NO. 001

ECHOSTAR SATELLITE

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: 4/30/08

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 ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

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NFL ENTERPRISES LLC,

Plaintiff, Index No: 600556/08

-against- **DECISION AND ORDER**

ECHOSTAR SATELLITE L.L.C.,

Defendant.

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RICHARD B. LOWE III, J:

This dispute arises out of a purported breach and ensuing attempt to terminate an agreement as a result of the breach. Plaintiff NFL Enterprises ("NFL") moves pursuant to CPLR 6301 for a preliminary injunction enjoining Defendant EchoStar Satellite L.L.C. ("EchoStar") from asserting that an amendment dated January 27, 2006 is null and void.

BACKGROUND

NFL established the NFL Network (the "Network") in 2003. The Network carries programming relating to NFL seven days a week. It is carried by some cable television providers and the two national direct broadcast satellite television providers (EchoStar and DirecTV), as well as AT&T and Verizon, which carry the Network through TelCom systems.

By letter agreement dated September 2, 2005, between NFL and EchoStar (the "Affiliation Agreement"), EchoStar agreed, among other things, to pay license fees and to distribute the Network on its second most widely distributed package.

By letter-amendment dated January 27, 2006 (the "January Amendment"), the Agreement was amended to provide that EchoStar would (1) carry the Network on its most widely

distributed programming package; (2) pay license fees in specified amounts; and (3) carry the eight-game package of games on Thursday and Saturday evenings (the "Thursday-Saturday Package") shown on the Network each season. In exchange, NFL agreed to pay launch and/or marketing support fees. Although not germane to the instant dispute, two subsequent amendments followed; they are dated July 28, 2006 and July 5, 2007.

The Network began broadcasting the Thursday-Saturday Package for the first time during the 2006 regular season.

In April 2007, NFL released its 2007 regular season schedule. Among the games in the Thursday-Saturday Package was a game between the New England Patriots (the "Patriots") and the New York Giants (the "Giants," with the game referred to as the "Patriots-Giants Game"). The game was scheduled for Saturday, December 29, 2007, which was the last weekend of the 2007 regular season.

On December 23, 2007, the Patriots won their fifteenth game of the season, bringing their record to 15-0. The victory set the stage for the Patriots-Giants Game to establish the Patriots as the first NFL team, since the 1972 Miami Dolphins, to have an undefeated regular season. However, only viewers with cable, satellite or TelCom television subscriptions carrying the Network would have access to the Patriots-Giants Game.

Numerous government officials sent letters to NFL Commissioner Roger Goodell ("Commissioner Goodell") expressing a desire to have the Patriots-Giants Game shown on broadcast television.

On December 26, 2007, Commissioner Goodell announced that the Network feed of the Patriots-Giants Game would be simulcast on CBS and NBC in addition to being shown on the

Network.

On December 28, 2007, EchoStar sent a letter to the Network demanding that NFL distribute the Patriots-Giants Game via the Network channel only, and not CBS or NBC, claiming that to do otherwise would constitute a material breach of the January Amendment.

On January 3, 2008, NFL responded that it did not understand the theory under which EchoStar alleged a breach.

On January 10, 2008, EchoStar again sent a letter asserting that by simulcasting the Patriots-Giants Game, the January Amendment, by its own terms, was rendered null and void and of no force and effect from and after December 29, 2007. EchoStar also asserted that, pursuant to the terms of the January Amendment, EchoStar would thereafter abide by the packaging and pricing in effect immediately prior to the January Amendment.

On February 25, 2008, NFL commenced this action and simultaneously moved for injunctive relief.

DISCUSSION

A party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of equities in its favor (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; CPLR 6301).

Likelihood of success

In the underlying Complaint, NFL seeks declaratory relief and specific performance. The declaration corresponds to EchoStar's Letter of Nullity, dated January 10, 2008, which stated: "[b]y distributing the Patriots vs. Giants football game on Saturday December 29, 2007 via CBS and NBC you materially breached the [January] Amendment. As a result, the [January]

Amendment, by its own terms, is null and void and of no force and effect from and after December 29, 2007 [the date that the Patriots-Giants Game was simulcasted]." (Williams Aff Ex 22.) NFL principally seeks a declaration that the January Amendment is not "null and void."

The January Amendment provides that:

> [i]n the event that Network does not obtain the rights to distribute the Th-Sat Package on or before November 20, 2006, this Letter Agreement shall be null and void and of no force or effect and the original Affiliation Agreement shall remain in full force and effect. In the event that Network ceases delivering the Th-Sat Package prior to the end of the 2011 NFL Season, then the provisions of this Letter Amendment shall be null and void and of no force and effect from and after the date that the Network ceases delivery thereof, and the original Affiliation Agreement shall remain in full force and effect and any provisions replaced, modified, or amended by this Letter Amendment will be automatically reinstated to their initial form as in effect immediately prior to the execution of this Letter Amendment.

The parties do not dispute that the second sentence is the operative provision relevant to the disposition of this motion. Thus, NFL must demonstrate a likelihood that EchoStar improperly terminated the January Amendment, which provided that the January Amendment would be null and void if Network ceases delivery of the Thursday-Saturday Package.

Despite the existence of factual issues, including whether contractual language may be interpreted as a matter of law, a movant may still set forth a prima facie case on the likelihood of success on the merits (*Four Times Square Assocs., L.L.C. v Cigna Invs., Inc.*, 306 AD2d 4 [1st Dept 2003]). Injunctive relief is inappropriate, however, when sought upon contractual language that leaves the rights of the parties open to doubt and uncertainty (*Gulf & W. Corp. v New York Times Co.*, 81 AD2d 772, 773 [1st Dept 1981]; *Xerox Corp. v Neises*, 31 AD2d 195, 198 [1st Dept 1968]).

NFL argues that it benefits from a likelihood of success on its claims. Specifically, NFL

argues that it did not breach; that the purported breach would not rise to the level of a material breach warranting termination; and that EchoStar may not repudiate only part of an agreement.

NFL's argument that it did not breach relies on the *force majeure* provision contained in the Affiliation Agreement (Williams Aff Ex 1 at 10). The provision provides:

> Notwithstanding any other provision in this Letter Agreement, Network or [EchoStar] shall not have any liability to the other or any other person or entity with respect to any failure of Network or [EchoStar], as the case may be, to perform its obligations hereunder such failure is due to . . . (b) any labor dispute . . ., fire, earthquake, flood, riot, government intervention, legal enactment, government regulation or any material change in applicable law; (c) any act of war or act of God; or (d) any cause beyond the reasonable control of Network or [EchoStar] as the case may be . . .

(*id.*) NFL contends that the decision to simulcast the Patriots-Giants Game resulted from intervention - or in the alternative, a cause beyond the reasonable control of NFL - by lawmakers demanding that the game be made available on broadcast television. Indeed, NFL received letters from Sens. Arlen Specter and Patrick Leahy on behalf of the Committee on the Judiciary (Williams Aff Ex 5), Sen. John Kerry (Williams Aff Exs 6, 7, 8), Reps. Christopher J. Dodd, Joe Courtney, Rosa DeLauro, Christopher Shays, John Larson and Sen. Joseph Lieberman (Williams Aff Ex 9), Sens. Patrick Leahy and Bernard Sanders and Rep. Peter Welch (Williams Aff Ex 10), Sens. John E. Sununu and Judd Gregg (Williams Aff Ex 12), Sens. Jack Reed and Sheldon Whitehouse and Reps. Patrick J. Kennedy and James R. Langevin (Williams Aff Ex 13), Reps. Carol Shea-Porer and Paul Hodes (Williams Aff Ex 15), and Rep. Barney Frank (Williams Aff Ex 17). Undoubtedly, the content within the foregoing letters placed pressure on the NFL to make the Patriots-Giants Game available to a broader audience. The issue, however, for the purposes of NFL's motion for a preliminary injunction, is the likelihood that such pressure may

rise to the level of "government intervention" as the term is defined under the Letter Agreement.

Under New York law, *force majeure* provisions "provide a [] narrow defense" (*Kel Kim Corp. v Central Markets, Inc.*, 70 NY2d 900, 902 [1987]).

> Ordinarily, only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused. Here, of course, the contractual provision does not specifically include plaintiff's inability to procure and maintain insurance. Nor does this inability fall within the catchall "or other similar causes beyond the control of such party." The principle of interpretation applicable to such clauses is that the general words are not to be given expansive meaning; they are confined to things of the same kind or nature as the particular matters mentioned.

(*Id.* at 902-903.) "Such force majeure clauses excuse non-performance only where the reasonable expectations of the parties have been frustrated due to circumstances beyond the control of the parties" (*Macalloy Corp. v Metallurg, Inc.*, 284 AD2d 227, 227 [1st Dept 2001] [not a *force majeure* event where a party voluntarily acts due to financial considerations brought about by foreseeable circumstances], citing *United Equities Co. v First Nat'l City Bank*, 52 AD2d 154 [1st Dept 1976]).

EchoStar argues in response that NFL could have chosen alternatives to simulcasting the Patriots-Giants Game on broadcast television. EchoStar goes on to suggest that, after receiving the letters from Members of Congress, NFL "could have met with those Members of Congress to seek a compromise, resolved its disputes with the cable systems, or honored its contractual commitments." (Mem in Opp at 25.) EchoStar also characterizes the strongest threat of further antitrust vetting as the product of only a single letter. In effect, EchoStar attempts to convey that the requests by Members of Congress did not constitute a force majeure event because NFL, far from facing a formal demand, voluntarily chose to simulcast the Patriots-Giants Game on CBS

and NBC. However, the suggestion that the threats were empty because an actual reexamination would require an act of Congress understates the significance of the letters. To be sure, the government possesses the ability to gain compliance through informal means (*see Harriscom Svenska, AB v Harris Corp.*, 3 F3d 576, 580 [2d Cir 1993] ["to have failed to comply would have been unusually foolhardy and recalcitrant, for the government had undoubted power to compel compliance"]; *see cf. Eastern Air Lines, Inc. v McDonnell Douglas Corp.*, 532 F2d 957, 994 [5th Cir 1976] ["There can be little question, then, that the Defense Production Act granted the Government authority to seek compliance with its priorities programs by informal means of persuasion whether written or oral."]).

EchoStar correctly asserts that the conduct in *Harriscom* contrasts with the alleged government intervention here. In *Harriscom*, two companies contracted for the sale of radios and spare parts (3 F3d at 577). The United States government prohibited all sales to Iran of goods it categorized as military equipment (*id.*). United States Customs Service officials detained a shipment of radio spare parts ordered by plaintiff and bound for Iran (*id.* at 578). Following extensive negotiations with the government, defendant reached a compromise under which it agreed to "voluntarily withdraw from all further sales to the Iranian market," and in exchange, the government ruled that the radio was not subject to the stringent export controls of the prohibition (*id.*).

However, to require conduct similar to that in *Harriscom* would lose sight of the controlling principle in *Kel Kim*, which requires the *force majeure* clause to specifically include the alleged event (70 NY2d at 902-903). Here, the *force majeure* provision in the Letter Agreement provides for events such as "government intervention, legal enactment, government

regulation or a material change in applicable law" (Williams Aff Ex 1 at 10). Without giving expansive meaning to the term "government intervention," this Court finds that NFL may succeed in demonstrating that the term "government intervention" includes the alleged government conduct here, particularly the letters by numerous Members of Congress (*see id.*). Moreover, the alleged government conduct here is a reasonable interpretation of government intervention as applied to the "same general kind or class" (*Kel Kim Corp. v Central Markets, Inc.*, 131 AD2d 947, 950 [3d Dept 1987], *aff'd* 70 NY2d 900 [1987]). Accordingly, this Court finds that NFL demonstrates a likelihood of success that the alleged government intervention constitutes a *force majeure* event and, therefore, that NFL did not breach.

NFL's also argues[1] that it did not breach based on a interpretation of the terms of the January Amendment. The operative clause reads: "[i]n the event that Network ceases delivering the Th-Sat Package prior to the end of the 2011 NFL Season" (Williams Aff Ex 2). Thus, the analysis prompted by NFL's argument is whether NFL "ceased delivering" with respect to the "Th-Sat Package." NFL contends it "delivered" the Patriots-Giants Game to EchoStar. "Th-Sat Package is defined in the January Amendment as "a package of eight (8) NFL games that will be played during the NFL regular season in the months of November and December on Thursday and Saturday nights beginning with the 2006 NFL season and continuing through and including the 2011 NFL season (the 'Th-Sat Package')." Thus, NFL further contends that a purported failure to deliver one game does not constitute a cessation of delivering the "Th-Sat Package."

EchoStar argues that although the January Amendment does not expressly provide for

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[1]Addressed for the first time by NFL in its Reply Memorandum, but in response to an argument raised in EchoStar's Opposition Memorandum.

exclusivity, the parties intended that the "Th-Sat Package" would be exclusive to the NFL Network. In other words, the "Th-Sat Package" would be unavailable to broadcast television. By simulcasting the Patriots-Giants Game on CBS and NBC, and thereby making the game available to broadcast television, NFL ceased delivering the "Th-Sat Package."

As between NFL's and EchoStar's interpretation of the operative termination clause, this Court finds NFL's interpretation to be the more reasonable one, and, therefore, this Court finds that NFL demonstrates a likelihood of success that it did not cease delivering the Thursday-Saturday Package.

Secondly, NFL argues that it can demonstrate a likelihood of success because, even assuming a breach, the purported breach would not be a material breach entitling EchoStar to terminate the January Amendment. NFL reasons that the simulcast of one game, among a package of 48 games and over the course of six years, does not substantially defeat the parties' contractual objective.

EchoStar responds that NFL committed a material breach because it bargained for access to games that broadcast television stations would not have access to. EchoStar argues that NFL committed a material breach entitling EchoStar to terminate the January Amendment because it deprived EchoStar of what it bargained for. Whether a material breach occurred involves determining if the breach "defeated the parties' objective in contracting" (*Awards.com v Kinko's, Inc.*, 42 AD3d 178, 187 [1st Dept 2007]; *Wechsler v Hunt Health Sys.*, 330 F Supp 2d 383, 417 [SD NY 2004]["a material breach is a breach that 'go[es] to the root of the agreement between the parties,' and 'is so substantial that it defeats the object of the parties in making the contract.'"]). It is a long-standing principle that termination of a contract "is not permitted for a

slight, casual, or technical breach, but only for such as are material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract (*see RR Chester, LLC v Arlington Bldg. Corp.*, 22 AD3d 652, 654 [2d Dept 2005] [internal quotation marks omitted], citing *Callanan v Keeseville, Ausable Chasm & Lake Champlain R.R. Co.*, 199 NY 268, 284 [1910]).

In *Wechsler*, cited by EchoStar, the court identified numerous factors involved in the materiality determination (330 F Supp 2d at 415). The court stated:

> In determining whether a breach is material, the Court remains mindful of the special purpose of the contract, and considers the following circumstances: "the extent to which the injured party will be deprived of the benefit which [it] reasonably expected"; "the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived"; "the extent to which the party failing to perform or offer to perform will suffer forfeiture"; "the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances"; and "the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing."

(*Id.*)

This Court finds that NFL may demonstrate that simulcasting the Patriots-Giants Game on broadcast television did not defeat "the parties' objective in contracting" (*Awards.com*, 42 AD3d at 187). Furthermore, EchoStar fails to refute NFL's prima facie showing that the purported breach did not rise to the level of a material breach. Deprivation of the benefit for which a party reasonably expected clearly represents one factor - one amongst the many factors identified in the case cited by EchoStar. However, EchoStar fails to address how the other factors militate the conclusion that NFL committed a material breach.

Notwithstanding whether the Court finds that a breach indeed occurred, the parties also

dispute whether the termination clause should be enforced as written. EchoStar relies on its interpretation of the termination clause in arguing that even if the purported breach is not material, the termination provision should be enforced as written. Recognizing that some games in the Thurs-Sat Package would not be in high demand, EchoStar expected that other games in the Thurs-Sat Package would be highly anticipated, thus, attracting new subscribers to EchoStar's services. Therefore, by simulcasting the Patriots-Giants Game on CBS and NBC, two television broadcast stations, NFL triggered EchoStar's right to terminate under the January Amendment because NFL failed to deliver the Thursday-Saturday Package. Thus, EchoStar argues that, even if the breach was not material, the termination clause should be enforced as written (*see A. S. Rampell, Inc. v Hyster Co.*, 3 NY2d 369, 382 [1957]; *J. Petrocelli Constr., Inc. v Realm Elec. Contrs., Inc.*, 15 AD3d 444 [2d Dept 2005]). If, however, this Court ultimately finds NFL's interpretation to be the correct interpretation, enforcement of the termination clause would be improper. To the extent this Court finds NFL's interpretation more reasonable, as discussed above, EchoStar's argument to enforce the termination as written is rendered moot.

Lastly, NFL argues that it can demonstrate a likelihood of success because EchoStar is improperly attempting to repudiate one portion of an agreement while enforcing another portion. The breach asserted by EchoStar is that NFL ceased delivering the Thursday-Saturday Package and, therefore, the January Amendment is "null and void and of no force and effect" (Williams Aff Ex 2 at 4; Ex 22). Thus, NFL argues under election of remedies doctrine that because EchoStar has asserted a breach, EchoStar must either terminate or continue the contract. However, the January Amendment expressly provides a remedy if NFL ceases to deliver the Thursday-Saturday Package: "and the original Affiliation Agreement [the Letter Agreement]

shall remain in full force and effect and any provisions replaced, modified or amended by this Letter Amendment [the January Amendment] will be automatically reinstated to their initial form as in effect immediately prior to execution of this Letter Amendment" (Williams Aff Ex 2 at 4). Accordingly, this Court finds NFL's argument to be without merit.

NFL demonstrates a likelihood of success on the merits and has therefore satisfied the first prong for preliminary injunctive relief (*East 4th Street Garage, Inc. v L.B. Management Co.*, 172 AD2d 292, 292 [1st Dept 1991] ["Although none of these issues can be determined as a matter of law at this time, the plaintiff has shown a likelihood of success on the merits on each of them"]).

Irreparable Harm

NFL argues that harm to its momentum, advertising relationships, and goodwill constitute irreparable harm. As a general matter, NFL contends that termination of the January Amendment - which thereby places the NFL in the second-tier offering by EchoStar - places the NFL in an inferior bargaining position to negotiate with other affiliates and advertisers.

EchoStar responds by arguing for the application of *USA Network v Jones Intercable, Inc.*, 704 F Supp 488 [SD NY 1989]. In *USA Network*, the cable network brought an action against the cable systems operator for breach of contract. It asked for a temporary restraining order and a preliminary injunction to require the operator to keep its network on the operator's systems. The court summarized the cable network's arguments as follows:

> Principally, USA [plaintiff] maintains that Jones' [defendant] actions will have a real but incalculable effect on its status and performance in the industry vis a vis other cable systems operators, advertisers, and program suppliers. The theory is that Jones' abrupt, highly publicized, and unprecedented termination of USA will alter its image from that of a growing, vibrant leader in the industry to that of a

> troubled, vulnerable participant. According to USA, once program suppliers perceive that it is wounded, USA will not get that "important first look," at new programming, which is critical to continued leadership in the industry. USA has cited specific examples of pending negotiations for select programming the procurement of which is allegedly seriously jeopardized by Jones' actions. Program suppliers, as well as advertisers, USA asserts, also will be discouraged by the apparent lack of sanctity in USA's affiliation contracts because they will henceforth be unable to rely on a predictable number of subscribers. Finally, USA complains, other major cable systems operators will smell blood and exact pricing concessions from USA that they would otherwise be unable to demand. In effect, USA posits a commercial domino theory whereby a relatively small, compensable contract breach will gradually but inevitably lead to its irreversible descent to second-rate industry status.

(*Id.* at 492.) Despite NFL's attempt to argue otherwise, the assertions set forth by NFL mirror the assertions addressed by the court in *USA Network*. Accordingly, the same result of no irreparable harm obtains here.

NFL has alleged that it has "undertaken and is continuing to undertake widespread efforts to market the Network to satellite and cable television providers in an effort to expand the Network national footprint and the number of television viewers who have access to the Network" (Williams Aff ¶ 31). "NFL [] would face major and immediate harm in its efforts to enlist new affiliates to distribute the Network. NFL [] and EchoStar have aggressively co-marketed the NFL to potential subscribers. This co-promotion has increased the Network's attractiveness to cable providers, many of which have agreed to carry the Network on their most widely distributed packages and to carry the Thursday-Saturday Package in order to compete for subscribers with EchoStar's satellite service" (Williams Aff ¶ 34). Second-tier status places at risk the agreement by affiliates to carry NFL on their most widely distributed packages or to carry NFL at all (Williams Aff ¶ 35).

Further, NFL contends that it will suffer irreparable harm from the loss of advertising

revenue. "The loss of over 3.2 million households on EchoStar's most widely distributed programming package . . . would greatly impair [NFL's] ability to attract national advertising and dramatically affect the terms of such advertising contracts on a going-forward basis" (Williams Aff ¶ 38). "The competition for national advertisers' business is extremely intense. The high point in the selling season for advertising generally starts in late April of each year, when media companies begin making presentations to solicit advertisers, and continues through August, when sales agreements are finalized. Since the Network is looking to attract national advertisers it is important for the Network to have as broad a footprint as possible" (Williams Aff ¶ 39). "A major element in the negotiation of the advertising sales is the number of households a network represents that it is able to reach. The Network has to stake a claim as to the number of households it expects to access very early on in the negotiation process. With the start of the selling season only two months away, the immediate loss of over 3 million households with access to the NFL Network were EchoStar to take its threatened actions will significantly harm [NFL's] ability to attract national advertisers" (Williams Aff ¶ 40). Moreover, NFL would be forced to charge lower rates to prospective advertisers (Williams Aff ¶ 41).

Arguing that the facts in the instant matter are the "diametric opposite" to the facts in *USA Network*, NFL attempts to distinguish *USA Network* by pointing to differences in the duration of the agreement and the cable operator's percentage of the cable network's national viewership. NFL asserts here that the agreement runs through 2012, whereas the agreement in *USA Network* would be terminated within months after the action was commenced. However, in the absence of the cable operator's intent to terminate, the agreement in *USA Network* would have continued to run for another two years. Indeed, both operative agreements here and in *USA*

Network would have been valid for at least two more years, except for the attempts by parties to terminate or alter the agreements. Additionally, NFL asserts that EchoStar accounts for one-third of NFL's national viewership, whereas the cable operator in *USA Network* accounted for less than two-percent of the cable network's viewership. However, the cable operator sought to terminate the agreement entirely, whereas, here, EchoStar seeks to re-tier the Network. Thus, the termination of the agreement in *USA Network* affected approximately 2% of the cable networks national viewership and the re-tiering affects approximately 10% of the Network's viewership. Accordingly, NFL fails to show that the instant matter and *USA Network* are diametrically opposed. Moreover, this Court "is convinced neither of the fact nor the immeasurability" of NFL's damages (*see USA Network*, 704 F Supp at 493).

NFL also argues that certainty of continued distribution of the Thursday-Saturday Package is crucial early in the year, particularly around the end of April. Thus, NFL argues, termination of January Amendment constitutes imminent and irreparable harm. However, such certainty fails to demonstrate irreparable harm because that certainty is crucial for the purpose of selling advertising (Williams Reply Aff ¶¶ 2-6). Thus, "the injury alleged is pecuniary in nature, and may be adequately compensated by money damages" (*New York City Off-Track Betting Corp. v New York Racing Ass'n*, 250 AD2d 437, 442 [1st Dept 1998]). "Damages compensable in money and capable of calculation, albeit with some difficulty, are not irreparable" (*SportsChannel America Assoc. v National Hockey League*, 186 AD2d 417, 418 [1st Dept 1992]; *but see Tennis Edge Inc. v Stadium Racquet Club*, 305 AD2d 199 [1st Dept 2003] [exclusion from facility will cause it irreparable harm because it will not be able to market itself for the upcoming season or engage another facility]). "Injunctive relief 'will not be granted against

something merely feared as liable to occur at some indefinite time'" (*id.*, quoting *Connecticut v Massachusetts*, 282 US 660, 674 [1931]).

Additionally, NFL contends that it will suffer irreparable harm because it will lose the goodwill of EchoStar subscribers. Of the approximately 3.2 million subscribers who would lose access to the Network and told that an additional 36% per month would be required to regain access to the Network, subscribers "would naturally assume that it is the NFL that it is requiring this additional payment" (Williams Aff ¶ 43).

Nonetheless, courts have refused to find irreparable harm where only a part of the business will be affected or where a company has not been in business long enough for good will to be created (*New Pac. Overseas Group (USA) Inc. v Excal Int'l Dev.*, US Dist Ct, SD NY, 99 Civ 2436,*18, Cote, J.,1999]). NFL relies heavily on *Tom Doherty Assocs. v Saban Entertainment* for the proposition that loss of prospective business constitutes irreparable harm (60 F3d 27, 38 [2d Cir 1995]). In addressing the treatment of prospective good will, the court held "there must be a clear showing that a product that a plaintiff has not yet marketed is a truly unique opportunity for a company" (*id.*). Numerous attempts to rely on prospective goodwill as a form of irreparable harm have been rejected on the basis of lacking a "wholly unique opportunity" (*see e.g. Park W. Radiology v CareCore Nat'l LLC*, 240 FRD 109 [SD NY 2007] [opportunity to become a successful radiology practice rejected as not being unique]; *New Pac.Overseas Group*, 99 Civ 2436 at *20 [plaintiff failed to show that a concrete block factory represented a sufficiently unique opportunity]; *Dominion Video Satellite, Inc. v Echostar Satellite Corp.*, 356 F3d 1256, 1262-63 [10th Cir 2004] [product of predominantly Christian programming rejected as not being unique]). Here, NFL fails to demonstrate that the Thursday-

Saturday Package is a "truly unique opportunity" (*see Tom Doherty*, 60 F3d at 38). Having distributed the Thursday-Saturday Package since 2006, NFL also fails to show that the product has not yet been marketed. Moreover, it bears reiteration that the Thursday-Saturday Package remains available to approximately 8 million, out of 11 million, EchoStar subscribers.

Lastly, NFL argues that because the Affiliation Agreement contains a Limited Liability provision which precludes consequential damages (Williams Aff Ex 1 at 15), NFL cannot be fully compensated by money damages and therefore injunctive relief is warranted. However, in neither of the cases cited by NFL - *Ixis* and *Trans Pac* - was the limitation of consequential damages the basis for the court's finding of irreparable harm (*see Ixis N. Am. Inc. v Solow Bldg.*, Sup Ct, NY County, August 9, 2007, Lehner, J., index No. 102059/07 ["On the issue of irreparable injury, the court finds that the damages that plaintiff would sustain if it is unable to complete the intended construction of numerous trading desks would be extremely difficult to calculate and such inability would be severely detrimental to plaintiffs business."]; *Trans Pac. Leasing Corp. v Aero Micronesia*, 26 F Supp 2d 698, 711 [SD NY 1998] ["And it would be unable, *as a practical matter*, to obtain compensation for them [] because the Head Lease specifically excludes recovery of consequential damages resulting from any breach of the lease."] [emphasis added]).

Accordingly, NFL fails to demonstrate irreparable harm through the loss of momentum, advertising relationships, or goodwill.

Balance of the Equities

Balancing of the equities generally requires the court to look to the relative prejudice to each party accruing from a grant or a denial of the requested relief. Because NFL principally

relies on its demonstration of irreparable harm, NFL fails to demonstrate a balancing of the equities weighs in its favor. On the other hand, EchoStar argues that a balance of the equities tips in its favor because EchoStar lost an opportunity to capitalize on obtaining new subscribers in the days preceding the Patriots-Giants Game. However, losing additional subscribers is a loss that the NFL shares with EchoStar. Not only does the NFL receive license fees on a per-subscriber basis (Williams Aff Ex 2 at 3-4), but NFL also paid EchoStar launch and/or marketing support fees in connection with the Thursday-Saturday Package (Williams Aff ¶ 10; Ex 2 at 2). Accordingly, the balance of equities does not decidedly tip in favor of either party.

CONCLUSION

Based on the foregoing, it is hereby

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

Dated: April 30, 2008

ENTER:

J.S.C.