

issues, the injunction and damages ...?” May 30 transcript, p. 18, ll. 19-22. Both parties agreed. *See id.* The first item in the *Paice* Order was discovery. *See Paice* Order at 2, step 1 (attached as Exhibit A). Briefing followed. *See id.*, steps 2-4. TiVo proposes the same sequence.

The Federal Circuit remanded the case back to this Court so that it can make a determination as to the additional damages that TiVo has sustained while the stay of the permanent injunction has been in effect. *TiVo, Inc. v. EchoStar Communications Corp.*, 516 F.3d 1290, 1312 (Fed. Cir. 2008). During the original case, TiVo obtained damages discovery that included similar information but that information only covered the time period before the 2006 trial. In order for the Court to calculate the post-trial damages TiVo incurred during the stay, between September 8, 2006 and April 18, 2008, TiVo needs updated information for that time period. TiVo respectfully submits that it makes no sense to have its expert calculate damages based on estimates and projections of DVR subscribers when EchoStar has the actual data. For that reason, TiVo has requested limited discovery from EchoStar for the stay period. TiVo’s specific requests are in the form of written discovery - six requests for production and five interrogatories. *See* attached Exhibit B.¹

TiVo’s proposed schedule (filed concurrently) closely follows the *Paice* Order and provides for briefing to be completed before the September 4, 2008 hearing. TiVo respectfully requests that this Court allow TiVo to obtain the requested damages discovery and adopt its proposed schedule.

¹ One of the requests relates to EchoStar’s allegedly modified software. TiVo is mindful of the Court’s June 5, 2008 Order on this subject and seeks the discovery (and may need to seek additional discovery) only to the extent that it relates to damages, *i.e.*, if EchoStar contends that damages should not be assessed on these models.

Dated: June 16, 2008

Respectfully submitted,

By: /s/ Christine Byrd

IRELL & MANELLA LLP
Morgan Chu (Pro Hac Vice)
Christine Byrd (Pro Hac Vice)
Perry Goldberg (Pro Hac Vice)
Andrei Iancu (Pro Hac Vice)
1800 Avenue of the Stars, Suite 900
Los Angeles, California 90067-4276
Telephone: (310) 277-1010
Facsimile: (310) 203-7199

Sam Baxter, Lead Attorney
TX State Bar No. 01938000
McKOOL SMITH, P.C.
104 East Houston Street, Suite 300
Marshall, Texas 75670
Telephone: (903) 923-9000
Fax: (903) 923-9099
sbaxter@mckoolsmith.com

Attorneys for Plaintiff
and Counterdefendant TiVo Inc.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document was served on all parties by electronic service on the 16th day of June 2008.

By: /s/ Christine Byrd
Christine Byrd

CERTIFICATE OF CONFERENCE

TiVo's counsel attempted to meet and confer according to the requirement in Local Rule CV-7(h). The parties' counsel discussed the issues on Friday, June 13, and resolved a briefing schedule, but disagreed on other issues in the schedule. The parties submitted the agreed briefing schedule and stated that they would continue to discuss the issues. Counsel for TiVo requested until Wednesday, June 18 for additional discussion, but counsel for EchoStar required that the parties file their agreements or disputes on Monday, June 16. On Monday, June 16, counsel for the parties exchanged several calls and e-mails, and counsel for EchoStar filed its proposed schedule. Although TiVo remains willing to discuss the issues and TiVo has stated this in a further e-mail communication to EchoStar's counsel, TiVo believes that discussions have conclusively ended in an impasse, leaving an open issue for the court to resolve. Given EchoStar's action to file its proposed schedule, TiVo therefore assumes that EchoStar is opposed to TiVo's proposed schedule.

By: /s/ Christine Byrd
Christine Byrd

By: /s/ Garret Chambers (by permission)
Garret Chambers

EXHIBIT A

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

| | | |
|-------------------------------|---|-----------------------------------|
| PAICE LLC, | § | |
| | § | |
| Plaintiff, | § | |
| | § | |
| v. | § | |
| | § | |
| TOYOTA MOTOR CORPORATION, | § | CIVIL ACTION NO. 2:04-CV-211 (DF) |
| TOYOTA MOTOR NORTH AMERICA, | § | |
| INC., and TOYOTA MOTOR SALES, | § | |
| U.S.A., INC., | § | |
| | § | |
| Defendants. | § | |

DOCKET CONTROL ORDER

| STEP | ACTION | DATE DUE |
|------|---|----------------|
| 1 | Toyota to produce to Paice the supplemental information set forth in Toyota's opposition brief. | April 2, 2008 |
| 2 | Paice to file its opening brief (up to 30 pages, excluding exhibits), with or without expert or other declarations. | April 24, 2008 |
| 3 | Toyota to file its responsive brief (up to 30 pages, excluding exhibits), with or without expert or other declarations. | May 9, 2008 |
| 4 | Paice may submit expert reports (disclosure of expert testimony). | May 15, 2008 |
| 5 | Toyota may submit rebuttal expert reports (disclosure of rebuttal expert testimony). | May 29, 2008 |

| | | |
|----|--|---|
| 6 | <p>Parties may depose any witness that executes a declaration submitted with the other party's brief. Deposition time for each witness will last no longer than three (3) hours, unless interpretation is required, in which case time is limited to six (6) hours. Depositions shall be conducted at a location agreed upon by the parties. In the case that the parties are unable to agree, the Court shall determine the location.</p> | At any time after the declaration is submitted but to be completed by June 30, 2008 |
| 7 | <p>Parties may depose experts that submitted expert reports. Deposition time for each witness will last no longer than three (3) hours, unless interpretation is required, in which case time is limited to six (6) hours. Depositions shall be conducted at a location agreed upon by the parties. In the case that the parties are unable to agree, the Court shall determine the location.</p> | At any time after the expert report is submitted but to be completed by June 30, 2008 |
| 8 | <p>Parties may depose witnesses other than those who executed a declaration or submitted a expert report <u>only if leave of Court is first obtained</u>.</p> | June 30, 2008 |
| 9 | <p>Parties to exchange exhibits and demonstrative aids.</p> | July 7, 2008 |
| 10 | <p>Parties may file a supplemental brief (up to 20 pages, excluding exhibits) in order to comment on any deposition testimony taken and sum up its position on the issue. Neither party is permitted to submit additional declarations or evidence with its supplemental brief other than testimony from any depositions taken.</p> | July 7, 2008 |

| | | |
|----|---|---|
| 11 | Parties may file a responsive brief to the other party's supplemental brief (up to 20 pages, excluding exhibits). | July 14, 2008 |
| 12 | Parties may file a reply brief to the other party's supplemental responsive brief (up to 10 pages, excluding exhibits). | July 17, 2008 |
| 13 | Hearing | July 21, 2008 |
| 14 | Parties to submit proposed findings of fact and conclusions of law. | Date to be determined at the July 21, 2008 hearing. |

SIGNED this 13th day of March, 2008.



DAVID FOLSOM
UNITED STATES DISTRICT JUDGE

EXHIBIT B

UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF TEXAS
 MARSHALL DIVISION

| | | |
|--|---|---|
| TiVo Inc., a Delaware corporation, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | Case No. 2-04cv-01 DF |
| |) | |
| 1. EHOSTAR COMMUNICATIONS |) | FIRST SET ON REMAND OF REQUESTS FOR PRODUCTION OF DOCUMENTS RELATING TO DAMAGES by Plaintiff TiVo Inc. (NOS. 1-6) |
| CORPORATION, a Nevada corporation, |) | |
| 2. EHOSTAR DBS CORPORATION, a |) | |
| Colorado corporation, 3. EHOSTAR |) | |
| TECHNOLOGIES CORPORATION, a Texas |) | |
| corporation, and 4. ECHOSPHERE LIMITED |) | |
| LIABILITY COMPANY, a Colorado limited |) | |
| liability company, 5. EHOSTAR SATELLITE |) | |
| LLC, a Colorado limited liability company, |) | |
| Defendants. |) | |

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Plaintiff TiVo Inc. (“TiVo”) hereby requests that Defendants EchoStar Communications Corporation, EchoStar DBS Corporation, EchoStar Technologies Corporation, Echosphere Limited Liability Company, and EchoStar Satellite LLC (1) respond in writing to this First Set on Remand of Requests for Production of Documents Relating to Damages, and (2) produce the following documents, writings, and tangible things for inspection and copying by TiVo, at a place to be agreed upon, in accordance with the following definitions and instructions within 30 days of the of the date of service and as further specified by Court order.

I. DEFINITIONS AND INSTRUCTIONS

A. “EchoStar,” “you,” “your,” or “defendants” shall mean and include EchoStar Communications Corporation, EchoStar DBS Corporation, EchoStar Technologies Corporation, Echosphere Limited Liability Company, EchoStar Satellite LLC, Dish Network Corp., EchoStar Corp., and all related entities, parents, subsidiaries or divisions, and any predecessor or successor

entities and any of its officers, directors, agents, attorneys, consultants, accountants, employees, representatives, and any other persons acting, or purporting to act for or on their behalf.

B. The “Stay Period” means September 8, 2006, to April 18, 2008.

C. A reference herein to documents or things “relating to” or “that relate(s) to” a given subject matter shall be construed to include all documents or things embodying, containing, memorializing, evidencing, describing, reflecting, identifying, supporting, analyzing, discussing, mentioning, summarizing, or pertaining in any way to, in whole or in part, the stated subject matter.

D. The singular shall include the plural, the past tense shall include the present tense, and vice versa, the words “and” and “or” shall be both conjunctive and disjunctive, the word “all” shall mean “any and all,” and the word “including” shall mean “including without limitation,” as appropriate, in order to bring within the scope of these requests documents that might otherwise be beyond their scope.

II. DOCUMENTS TO BE PRODUCED

1. Provide documents sufficient to determine on a monthly basis for the Stay Period the total number of placements of models DP-501, 508, 510, 721, 921, 522, 625, and 942.

2. Provide documents sufficient to determine on a monthly basis for the Stay Period the monthly average number of DVR placements per DISH subscriber household and the churn (i.e., turnover) rate for DISH Network subscribing households receiving or using DVR(s).

3. If you contend that TiVo is not entitled to damages during any part of the Stay Period on models DP-501, 508, 510, 721, 921, 522, 625, or 942, based on changes to software, provide documents sufficient to determine the number of units so changed and when the software of each such unit was changed.

4. If you contend that TiVo is not entitled to damages during the Stay Period on placements of any DVR models other than models DP-501, 508, 510, 721, 921, 522, 625, and 942, provide documents sufficient to identify such DVRs by model numbers and to determine on a monthly basis the number of DVRs placed.

5. Provide documents sufficient to determine on a monthly basis during the Stay Period EchoStar's total expenditure on advertising that mentioned TiVo and/or DVRs.

6. If you contend that TiVo is not entitled to damages during the Stay Period on any EchoStar DVR model because you contend that model is not infringing based on the way it operates, provide all documents describing or relating to its operation.

Dated: June 16, 2008

By: /s/Alexander C.D. Giza
Alexander C.D. Giza

IRELL & MANELLA LLP

Morgan Chu (*Pro Hac Vice*)
Christine W.S. Byrd (*Pro Hac Vice*)
Perry M. Goldberg (*Pro Hac Vice*)
Alexander C.D. Giza (*Pro Hac Vice*)
1800 Avenue of the Stars, Suite 900
Los Angeles, California 90067-4276
Telephone: (310) 277-1010
Facsimile: (310) 203-7199

McKOOL SMITH, P.C.

Sam Baxter (State Bar No. 01938000)
104 East Houston Street, Suite 300
Marshall, Texas 75670
Telephone: (903) 927-2111
Telecopier: (903) 927-2622

Attorneys for Plaintiff TiVo Inc.

B. The “Barton patent” refers to U.S. Patent No. 6,233,389, entitled “Multimedia Time Warping System,” issued May 15, 2001.

C. The “Stay Period” means September 8, 2006, to April 18, 2008.

D. “Relating to” or “in relation to” a given subject matter shall be construed to mean embodying, comprising, referring to, constituting, containing, memorializing, evidencing, describing, reflecting, identifying, supporting, analyzing, discussing, mentioning, summarizing, stating, or pertaining in any way to, in whole or in part, the stated subject matter.

E. The singular shall include the plural, the past tense shall include the present tense, and vice versa, the words “and” and “or” shall be both conjunctive and disjunctive, the word “all” shall mean “any and all,” and the word “including” shall mean “including without limitation,” as appropriate, in order to bring within the scope of these requests documents that might otherwise be beyond their scope.

F. Each interrogatory shall operate and be responded to independently and, unless otherwise indicated, no interrogatory limits the scope of any other interrogatory.

G. Where knowledge or information in your possession is requested, the request extends to knowledge or information in the possession of your predecessors and/or successors, as well as to information in the possession of your officers, directors, agents, employees, servants, representatives, and, unless privileged, attorneys. Whenever an answer to these interrogatories contains information which is not based upon your personal knowledge, state the source and nature of such information.

II. INTERROGATORIES

1. Provide on a monthly basis for the Stay Period the total number of placements of models DP-501, 508, 510, 721, 921, 522, 625, and 942.

2. Provide on a monthly basis for the Stay Period the monthly average number of DVR placements per DISH subscriber household, and the churn (i.e., turnover) rate for DISH Network subscribing households receiving or using digital video recorder(s) (“DVR(s)”).

3. If you contend that TiVo is not entitled to damages during any part of the Stay Period on models DP-501, 508, 510, 721, 921, 522, 625, or 942, based on changes to software, provide the number of units so changed and when the software of each such unit was changed.

4. If you contend that TiVo is not entitled to damages during the Stay Period on placements of any DVR models other than models DP-501, 508, 510, 721, 921, 522, 625, and 942, identify such DVRs by model numbers and provide on a monthly basis the number of such DVRs placed.

5. Provide on a monthly basis during the Stay Period EchoStar's total expenditure on advertising that mentioned TiVo and/or DVRs.

Dated: June 16, 2008

By: /s/Alexander C.D. Giza
Alexander C.D. Giza

IRELL & MANELLA LLP
Morgan Chu (*Pro Hac Vice*)
Christine W.S. Byrd (*Pro Hac Vice*)
Perry M. Goldberg (*Pro Hac Vice*)
Alexander C.D. Giza (*Pro Hac Vice*)
1800 Avenue of the Stars, Suite 900
Los Angeles, California 90067-4276
Telephone: (310) 277-1010
Facsimile: (310) 203-7199

McKOOL SMITH, P.C.
Sam Baxter (State Bar No. 01938000)
104 East Houston Street, Suite 300
Marshall, Texas 75670
Telephone: (903) 927-2111
Telecopier: (903) 927-2622

Attorneys for Plaintiff TiVo Inc.

| STEP | ACTION | DATE DUE |
|------------------|--|------------------------------------|
| 6. Not agreed | EchoStar may depose any witness providing a declaration supporting TiVo's motion for no longer than three hours. | To be completed by August 15, 2008 |
| 7. Not agreed | EchoStar response brief on damages motion (up to 20 pages, excluding exhibits). | August 18, 2008 |
| 8. Not agreed | TiVo may depose any witness providing a declaration supporting EchoStar's opposition for no longer than three hours. | To be completed by August 28, 2008 |
| 9. Not agreed | TiVo reply brief on damages motion (up to 10 pages, excluding exhibits). | August 29, 2008 |
| 10. Agreed | Hearing. Each side shall have 30 minutes. | September 4, 2008 |

If an evidentiary hearing is required, the parties are to make available for testimony the witnesses who provided declarations to support the briefing, and additional time will be allowed.