

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

IN RE: PEGASUS SATELLITE) Case No. 04-20878(11)
TELEVISION, INC.,) Adversary No. 04-2064
ET AL.,) June 21, 2004
Debtor.) Portland, Maine

TRANSCRIPT

OF

IN-COURT AND TELEPHONIC HEARING

BEFORE

THE HONORABLE JAMES B. HAINES, JR.

APPEARANCES:

For the Debtors	:	Robert Keach, Esq. Leonard Gulino, Esq. Larry Nyhan, Esq. James Conlan, Esq. Michael Warden, Esq. David Richardson, Esq. Thomas Yancey, Esq.
For DirecTV	:	George Marcus, Esq. Steven Baldini, Esq. Richard Krasnow, Esq. R.A. Pilmer, Esq. Lawrence Hunter, Esq. Michael Baumann, Esq.
For NRTC	:	Richard O'Brien, Esq. Dustin Hecker, Esq.
Unsecured Creditors Committee	:	Jacob Manheimer, Esq. David Botter, Esq.
For Senior Subordinated Bond	:	Rufus Brown, Esq.

Holders
For Wilmington Trust : Roger Clement, Esq.
Kristopher Hansen, Esq.
Gayle Allen, Esq.

Steering Committee of : Benjamin Marcus, Esq.
Senior Secured Creditors Lori Chasen, Esq.

Recording Equipment Monitor : Julie Winberg

INDEX OF WITNESSES

WITNESS: DIRECT CROSS REDIRECT RECROSS

No witnesses were presented on the record.

INDEX OF EXHIBITS

EXHIBIT: MARKED ADMITTED

No exhibits were presented on the record.

HEARING COMMENCED (JUNE 21, 2004, 5:00 P.M.)

BAILIFF: United States Bankruptcy Court for the District of Maine is now in session, the Honorable Jim Haines presiding. Please be seated and come to order.

THE COURT: Good afternoon. We're here in Adversary 04-2064, which is Pegasus Satellite Television, et al., versus NRTC and DirecTV. And the purpose of today's hearing is to provide the parties with a ruling on the plaintiff's motion for a temporary restraining order, or in the alternative, for preliminary injunction. As we get started, I'm going to just mention that I'm going to refer to "Pegasus" meaning collectively the plaintiffs throughout articulating today's ruling. And with that said, I'll provide the ruling as follows. Pegasus, collectively, is asking this Court to enter a temporary restraining order or, alternatively, preliminary injunction pursuant to Federal Rule of Civil Procedure 65 and Federal Rule of Bankruptcy Procedure 7065. The parties agree that since notice was provided and the responding parties participated fully in hearings convened here on June 18th, 2004, that any relief that might issue would not be limited strictly as required by Rule 65-B. The parties have agreed that, should further hearings in aid of the plaintiff's motion for preliminary injunction be required, they will convene at 10:30 on July 6th in Portland, continuing to July 7 as necessary. Pegasus seeks injunctive relief prohibiting NRTC, National Rural Telecommunications Cooperative, and DirecTV from soliciting, marketing, providing service to or activating--activating satellite broadcast programming to so-called "committed member residences" in defined Pegasus exclusive territories as those terms are set forth in the pertinent member agreements. By agreement, this matter is submitted to me on a record consisting of testimony and exhibits received in evidence at an earlier trial concerning automatic stay issues which convened June 7, 2004, here. As I said, that was a hearing and trial at which Pegasus

sought supplementary injunctive relief and aid of the automatic stay. In addition to that, the record includes Pegasus' motion for TRO or preliminary injunction including exhibits thereto, which include declarations, and the respondent's responses with exhibits, including declarations. Now, as I said that procedurally we were proceeding pursuant to Federal Rule 65 and Federal Rule of Bankruptcy Procedure 7065, but Pegasus asserts it's entitled to injunctive relief under either of two or perhaps both distinct approaches. One is Rule 65 and its generic four-factor test, and the other is Bankruptcy Code Section 105(a). We'll discuss each in turn, starting with 105(a), and then turning to Rule 65. 105(a) of the Bankruptcy Code provides broad equitable powers for the Bankruptcy Court to protect and preserve its own jurisdiction and to facilitate the reorganization process, indeed, to facilitate any process, including liquidation processes. In particular, Section 105(a) provides, "The Court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title," meaning Title 11. And for today, I accept the widely accepted proposition that included within the Bankruptcy Court's authority under Section 105(a) is the power to issue an injunction to prevent irreparable harms to the debtor's estate or the debtor's ability to reorganize. In addition, Pegasus asserts it's entitled to interlocutory relief under the more familiar Rule 65 analysis because, one, there's a likelihood of success on the merits; two, Pegasus is suffering irreparable harm; three, balancing the hardships to the defendants compared with the hardship to Pegasus supports interim relief, and, four, the grant of such relief would not undermine the public interest. Those are the general Rule 65 factors as articulated by the First Circuit in, among others, *Ayud versus Mobile Corp.*, 862 Fed 2d 890. Now, I appreciate the gravity of the risks to reorganization that the existing circumstances present to these debtors. As a Bankruptcy Court--or as a Judge in a Bankruptcy Court, I'm accustomed to seeing parties' rights and relations altered on the road to

reorganizational relief, and I'm at home with such notions. But I conclude here that Pegasus is not entitled to what it seeks under either Section 105(a) or Rule 65. By the way, I would say that the gestalt of the case would be such that one might think that some Draconian form of relief would be available early on. But having investigated that possibility first with regard to the automatic stay litigation, and, second, with regard to the motion for temporary restraining order or alternatively preliminary injunction, I am unconvinced that a disciplined, intellectually honest analysis of the situation would lead to the conclusion that the relief that the plaintiff seeks can or should issue. The Bankruptcy Court is a court of equity and dispenses equitable relief, including injunctive relief. But as the First Circuit has repeatedly noticed--noted, the equitable powers of the Bankruptcy Court do not accord it a roving commission to do equity, *In Re: Ludlow Hospital Society, Inc.*, 124 Fed 3d 22, 1997 case. And it doesn't authorize bankruptcy courts to create substantive rights that are not otherwise available under the Code or to expand the contractual obligations of parties. And that's *In Re: SPM Corp.*, 984 Fed 2d 1305, a 1993 First Circuit case. And those statements have recently been reaffirmed by the Circuit court. I conclude that the relief Pegasus seeks is not available because you cannot satisfy either the 105(a) test or the Rule 65 test and because fundamentally the scope of relief it seeks is beyond that which is available from either source. In--first, under 105(a), in determining whether to grant interlocutory injunctive relief under 105(a), courts generally inquire whether there is a danger of imminent irreparable harm to the estate or the debtor's ability to reorganize; two, whether there is a reasonable likelihood of a successful reorganization; three, balance of relative harms between the debtor and the creditor who would be restrained, and, four, weigh in the public's interests, including the public's interest in successful reorganization. That has been articulated in several cases that--numerous cases that Pegasus cites, including *Stadium*

Management Corp. versus Connecticut Bank & Trust, 95 BR 264, from district court in Massachusetts in '98--1988; Monroe Well Services, 67 Bankruptcy Reports at 752. In--in Stadium Management, the court enjoined for a closure of a sale of a nondebtor's property because it found that the sale of the property would pose a danger of imminent, irreparable harm to the debtor's ability to reorganize and then balanced the hardships and considered the public interest. In Monroe Well Service, the Bankruptcy Court enjoined certain creditors who were unsecured creditors of the estate from proceeding against property in nondebtors' hands, again, going through the factors I've articulated under 105(a) include--concluding that were the creditors able to move against that property in a third person's hands, it would halt payments that would fund the debtor's reorganization. And again, there was a weighing of harms and public interest. In several other cases that have been cited and, really, the general run of cases that support the 105(a)-type injunctions are cases in which creditors also have rights against insiders or affiliates or principals of the debtor whose cooperation or funding or contributions would be essential to get a reorganization off the ground. Those include In Re: United Health Care Organization, 210 BR 228; McDonald Associates--McDonald Associates, Inc., versus Stillwagon [phonetic], 54 BR 865, 869. And those really do represent the mill run kind of 105(a) cases. They say actions versus the principals who would also fund reorganization or whose effort were essential to the reorganizational process would either divert those sources of funding for reorganization or--or detract from those efforts and thereby inhibit reorganization. Each of those cases is different from the case before me in important ways. Even assuming cases--that Pegasus has made out a case of irreparable harm -- and I think that question itself is open -- one has to ask in what context is the second factor, the reasonable likelihood of successful reorganization, to be--to be considered? Here Pegasus can't say that if things were frozen at the

status quo as of bankruptcy, which is the role of the automatic stay and usually enforcement of the status quo is the function of an interlocutory injunction, it would succeed. Rather, Pegasus' success depends on undoing steps that were taken before bankruptcy. It seeks not to protect the estate, but to enlarge it; not to postpone creditor actions, even those which might be on Section--be beyond Section 362's sweep, but to unwind them. Thus, it really can't satisfy the second prong, crucial--in any orthodox way. Its invocation of Section 105 would not be to carry out provisions of the Code, but to complement them with expanded substantive rights. Similarly, the fourth prong, public interest and the public interest in successful reorganization, is unconvincing here, too. The concept of successful reorganization can't be divorced from context. I mean, sure, every debtor, if invested with super powers on the filing of bankruptcy, and had the ability upon bankruptcy to ignore all limitations on the rights that it had previously or the fact that some of those rights may have been eliminated before bankruptcy, we'd have a great chance of reorganization. And that's really what the debtor is asking for here. That's more than the Code provides. The debtor certainly is entitled to breathing room to work with the tools it has at hand to try to construct a reorganization, but it's not entitled to resurrection of dead rights in the guise of maintaining the status quo. Even the debtor admits that what it seeks here is not the status quo, but the status quo ante. Indeed, if we were thinking of this in the same way as the Stadium Management case, sure, a third party's actions to enforce rights against nonstate assets were enjoined there, and that is not--that's much more than Section 362 provides. But if the debtor were--if the debtor in Stadium Management were in the same posture as Pegasus is here, it would be asking not that the sale be enjoined, but that a sale which already took place and had been effected and executed be undone, and not because it effected a preference or a fraudulent transfer and was sought to be undone through an adversary proceeding, but because it

makes things more difficult from the reorganization sense. Again, even assuming that there's irreparable harm accruing, that alone is not enough. The tail can't wag the dog to that extent, and I'll refer further to a discussion of the merits in the Rule 65 context below. Under Rule 65, interlocutory injunctive relief is available if the moving party can demonstrate a likelihood on the merits, irreparable harm, balance of the hardships weighs in favor of the parties seeking injunctive relief and the public interest would not be compromised by issuing the injunction. We'll start with the likelihood of success, and in the generic--in the general sense, likelihood of success is the linchpin under First Circuit analysis. And I say that aware of the sort of countervailing or balancing statement in the First Circuit cases that you don't weigh likelihood of success in a vacuum, and you must juxtapose it and weigh it in tandem with accruing irreparable harm. And even--even so -- and again, even assuming irreparable harm -- you can't overlook likelihood of success on the merits because if you did, then persons who were being harmed could claim to be entitled to interlocutory relief, even if no one, indeed, had harmed them. So you can't ignore it, and there must be some likelihood of success, perhaps less strong. Pegasus asserts that its irreparable harm is overwhelming and therefore a must less strong showing, perhaps an underwhelming showing of success on the merits, is all that's required of it. I concur that its demonstration of potential success on the merit is underwhelming in this case and, indeed, sufficiently underwhelming as to not carry the day. To start off, I'm less than fully convinced that the harm alleged is irreparable. It seems that it's capable--your capable to ascribe a dollar amount to each subscriber of satellite broadcast services. Indeed, in other contexts, Pegasus has asserted that it's not impossible to quantify the value of each subscriber, but those who have tried to do so with regard to its subscribers have simply come up with an insufficient figure. But even assuming irreparable harm, I can't ignore this case on the merits. Pegasus

asserts that DirecTV and NRTC's pre-petition termination of their bilateral DBS agreement and, following that, NRTC's pre-bankruptcy termination of its membership agreement with Pegasus, that those terminations are actionable and that it will likely prevail in an attempt to undo those terminations. First, there's no question in my mind that DirecTV and NRTC had the ability to terminate the DBS agreement under the terms of the contract in California law, and consistent with the view of the U.S. District Court for the District of California and the clear terms of the member agreement, Pegasus had no say in that matter. Per Section 13 of the member agreement, upon termination of the DBS agreement, NRTC had the right to terminate the member agreement. It did so pre-bankruptcy, effective August 31, 2004. The most I can conclude preliminarily from those facts is that NRTC may, indeed, be in breach of paragraph 2(a) of the amended member agreement with regard to its ongoing obligation to provide exclusivity in the provision of those services to subscribers in Pegasus districts. But that would last from June 1, that breach, from June 1 to August 31, 2004. That appears to me, again, to be a breach for which damages could be awarded if it was, indeed, proven. But, you know, there may even be trouble with that, and I can talk about it later when we talk about the covenant of good faith and fair dealing in that any such breach which may exist between June 1 and August 31 is a--is after there was an announcement of the termination as opposed to pre-termination conduct. Well, to get to sort of the specific theories that we're gonna weigh on likelihood of success on the merits. In light of Judge Baird's decision of May 22, 2003, in the U.S. District Court for the Central District of California, and his subsequent opinions which all follow logically consistently from his conclusion articulated on May 22, Pegasus cannot argue that the DirecTV-NRTC settlement and modification of the DBS constitutes a tortious interference with contract rights for economic relations. And the same principles would extend to and foreclose any claim that their

termination of the DBS was impermissible as to Pegasus. As to NRTC's alleged breach of contract and breach of implied covenant of good faith and fair dealing, I agree that it may well be that NRTC is in a temporal breach of its requirement to provide exclusivity through August 31, 2004, but that is something for which damages could be awarded. The member agreement between Pegasus and NRTC is subject to District of Columbia law, and District of Columbia law implies the covenant of good faith and fair dealing to the following effect. Neither party will be anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. That's as articulated in the Willins [phonetic] case, 844 Atlantic 2d at 1135. But you have to recognize that the fruits of the membership contract can extend no further than the terms of the contract which include an express, unambiguous right of termination following termination of the DBS agreement, and that's again in paragraph 13. And the NRC [sic] exercised its rights under that express covenant. Now, Pegasus cites some cases, including New Jersey cases, for the proposition that the implied covenant of good faith and fair dealing can apply to the exercise of an unconditional termination clause. The Sons of Thunder court discussed *United Grocers versus Colgate*, 649 F. 2d 985, where the Fourth Circuit considered that a contracting party's cessation of performance pending announcement and effectiveness of the termination under such a clause, could violate the covenant. It also discussed *Backalum versus ALCOA* [phonetic], where withholding plans to terminate under such a clause while encouraging expansion was deemed a breach of the implied covenant. Indeed, *Sons of Thunder* itself was a case where there was an actionable leading on, coupled with a calculated withholding of performance. Now, those cases are all quite unlike the current case. And the *Sons of Thunder* court recognized itself a fundamental principle that where a contractual right to terminate is express and unambiguous, the motive of the terminating party is

irrelevant, citing Carl Sales [phonetic], citing 592 A. 2d 647, another New Jersey case. The covenant can only be implicated where there is bad faith or dishonesty by the terminating party, and the focus is on the terminating party's pre-termination performance. Here the NRTC's right to terminate its DBS agreement with DirecTV is under that--that contract, California law and per the U.S. District Court, none of Pegasus' affair. And the NRTC's right to terminate the member agreements upon termination of DBS agreement is unambiguous and unconditional. Pegasus impugns DirecTV's and NRTC's motives, but it must do much more than that to succeed. Aside from the limited question of temporal breach post announcement of the termination, there appears to be no substantive allegation that NRTC's performance was in any way in breach of the contract before the termination was made. I cannot conclude that Pegasus has demonstrated an ability to get relief anything like the substantive--the sweeping injunctive relief it seeks. Indeed, I think that's far from likely. And, indeed, when you talk about the covenant of good faith and fair dealing, that extends only to NRTC, the other contracting party, and says nothing about DirecTV against whom really the meat of the injunctive relief is sought. Now, as to breach of fiduciary duty on the part of NRTC and aiding and abetting a breach of fiduciary duty as to DirecTV, first of all, fundamentally, I'm unconvinced there exists a fiduciary duty between NRTC and Pegasus. The cited provision of the District of Columbia Code, Section 29-903, is titled, "Purposes for Incorporation" and merely states that the cooperative may be incorporated for articulated purposes and, more specifically, it states, quote, "An association may be incorporated under this Chapter to engage in any one or more lawful mode or modes of acquiring, producing, building, operating, manufacturing, furnishing, exchanging or distributing any type of types of property, commodities, goods or services for the primary and mutual benefit of the patrons of the association or their patrons, if any, as ultimate consumers." First, I

questioned whether, under the express terms of the statute, it establishes any fiduciary duty, and if it could, it would go to--run to any other than ultimate consumers, and Pegasus is not--has not demonstrated it would be within that category. Further, Pegasus has cited no authority, and I'm aware of none, that holds that a fiduciary duty arises as a matter of law between a cooperative and a patron in Pegasus' position as a function of that statutory section. Indeed, at oral argument, we explored the anomalous results that would obtain from such a conclusion. And as to whether a fiduciary duty exists as a function of the relationship between Pegasus, its asserted dependence on NRTC for exclusive rights to market and sell DirecTV, I note that the extent of Pegasus' dependence and investment in that relationship evolved as a consequence of its own business decisions. It was hardly imposed on it. It's a far cry from someone such as the members in the housing cooperative in the Willins case, 844 A. 2d 1126. They were minority members of a housing cooperative against whom an action which may have even--which may have involved self-dealing by some of the directors operated. Indeed, that Pegasus and its--the associated plaintiffs have been well aware of the risks that their business model construct engendered is apparent from the Golden Sky disclosures that are part of the record. And when we look at DirecTV under an aiding and abetting theory, the elements just aren't there. First of all, as I've said, it certainly hasn't been demonstrated to me that a fiduciary obli--duty runs from NRTC to Pegasus. Second, Pegasus has in submissions to the District Court in California indicated that the existence of such a fiduciary relationship is an open question, and NRTC itself has denied that such a relationship exists. Under those circumstances, determining that DirecTV has engaged in a wrongful act or was aware of its role in an illegal or tortious activity and that it knowingly and substantially assisted the principal in a violation of fiduciary duty just won't wash on this record. So I conclude there's been no likelihood of success on the merits under business

tort theory, under an implied covenant of good faith and fair dealing, under a breach of fiduciary duty, and aiding and abetting theories. And as I've indicated already, the nature of the injunctive relief sought is, to my mind, broad and retroactive in character and functions in a way that's at odds with the accepted role of interlocutory injunctive relief to maintain the status quo. For those reasons, Pegasus' motion for temporary restraining order or preliminary injunction is denied. I will now speak in conference with counsel for NRTC, Pegasus and DirecTV for scheduling and procedural conference on matters that remain in the adversary action and in the general bankruptcy, including the travel, if any, that the case will take to a preliminary injunction hearing in the adversary, the timing and--of discovery with regard to such a hearing and procedures in the general bankruptcy case on the motion for contempt as it relates to this Court's previously entered order with regard to the automatic stay. The parties on the line now are aware that they are to initiate a second call to chambers in about five minutes, and I want to check and see who in the courtroom is planning to stay for that discussion so that we can determine whether we will do it here or in chambers, and at the same time, I'll do something I neglected at the top, which was to get appearances from those who are in the courtroom, starting with debtor's counsel.

ROBERT KEACH, ESQ.: Yes, your Honor. Robert Keach for the debtors. I will be remaining for that conference.

GEORGE MARCUS, ESQ.: Good afternoon, your Honor. George Marcus for DirecTV, and I would also like to remain.

JACOB MANHEIMER, ESQ.: Jack Manheimer for the creditors committee, official unsecured creditors committee. I think with the permission of the plaintiff and the defendants, we will be participating as well.

THE COURT: Thank you.

BRUCE SLEEPER, ESQ.: Your Honor, I don't believe I'm participating -- Bruce Sleeper -- but I would like to know how soon the result will be available of the scheduling conference.

THE COURT: Oh, it should be--well, it--it sort of depends, because there may be some--the result of it would be available in consultation with the parties immediately and otherwise. I'm gonna ask them to prepare scheduling orders likely, so it may be a day or so. Thank you.

RUFUS BROWN, ESQ.: Your Honor, Rufus Brown. I don't need to participate in it.

THE COURT: Thank you. All right. Thank you, all, very much. It would be--it would be much better in my mind if we were off out of the emergency litigation mode and on to something else. But, as I said at the beginning of the announcement of my decision, I can't agree that there is a principled way to get there, so we will convene in chambers in about five minutes. We'll come get you at the door. Thank you. In recess.

BAILIFF: All rise.

(IN-COURT HEARING RECESSED)

(HEARING RESUMED TELEPHONICALLY)

CLERK: This is the Bankruptcy Court. I'm just gonna go through my list of who is probably on the phone, and if I miss anybody, we'll get you at the tail end. Mr. Conlan?

JAMES CONLAN, ESQ.: Yes, I'm here.

CLERK: Thank you. Mr. Warden?

MICHAEL WARDEN, ESQ.: Yes.

CLERK: Mr. Richardson?

DAVID RICHARDSON, ESQ.: Yes.

CLERK: Mr. Nyhan?

LARRY NYHAN, ESQ.: Yes.

CLERK: Mr. Yancey? Okay. Any other--anyone else representing the debtors?

LEONARD GULINO, ESQ.: Yes. Len Gulino here for local counsel with Bob Keach for the debtor.

CLERK: All right, thank you. All right. For DirecTV, Mr. Baumann? Mr. Pilmer? Mr. Krasnow?

RICHARD KRASNOW, ESQ.: Yes.

CLERK: Okay. So, Mr. Krasnow, Mr. Baumann and Mr. Pilmer are not on?

MR. KRASNOW: They should be.

MICHAEL BAUMANN, ESQ.: We are. I--

CLERK: Okay. Now I hear you.

MR. BAUMANN: And Alex Pilmer is also here in my office.

CLERK: All right. Thank you. Let's see. Mr. Botter?

DAVID BOTTER, ESQ.: Yes, your Honor.

CLERK: Not quite. His Honor's not on yet.

MR. BOTTER: No.

CLERK: Ms. Allen?

GAYLE ALLEN, ESQ.: Yes.

CLERK: Okay. Is there anyone else on that I've missed?

LAWRENCE HUNTER, ESQ.: Larry Hunter, DirecTV.

KRISTOPHER HANSEN, ESQ.: Kris Hansen on behalf of Wilmington Trust with Gayle Allen.

ROGER CLEMENT, ESQ.: And Roger Clement, also from Wilmington Trust.

CLERK: Okay.

DUSTIN HECKER, ESQ.: Dustin Hecker for the NRTC.

RICHARD O'BRIEN, ESQ.: And Rick O'Brien for the NRTC as well.

BENJAMIN MARCUS, ESQ.: Alex, this is Ben Marcus for the Steering Committee of Senior Secured Lenders.

CLERK: All right.

LAURIE CHASEN, ESQ.: And Laurie Chasen from Paul, Weiss for the Steering Committee.

CLERK: All right. Is that everybody?

MR. MARCUS: And also my partner, Steven Baldini, for the committee.

CLERK: Thank you. All right. So we have Mr. Hecker and Mr. O'Brien on for NRTC, correct?

MR. HECKER: That's correct.

CLERK: All right. If you'll all hold for a moment, I'll put you through to Judge Haines.

(PAUSE)

THE COURT: Good afternoon. This is Judge Haines. Let me just check and see if those of you on the phone can hear me. Let's try that again.

UNIDENTIFIED MALE VOICE: We're in New York, your Honor.

MR. HECKER: This is Dustin Hecker for NRTC, loud and clear.

MR. BAUMANN: Michael Baumann for DirecTV. We can hear you.

MR. WARDEN: Mike Warden, and we can hear you, your Honor.

THE COURT: All right. Thank you. Well, what's left to deal with is, first of all, let's just--let's go back to the matter that was just dealt with in the courtroom, because, as I indicated, I understand that the debtor is in difficult straits and that--that having taken a couple of runs here and not convinced me and that we do have time set on July 6 and 7 for preliminary injunction hearing, and I just wanted to make an offer that if--if you--if the debtors choose to do so and I give you some time to think about that, you could treat what's gone thus far as the preliminary injunction proceeding and the order that will enter today as it so that you could pursue rights on appeal if you wanted to get there more quickly than awaiting a full trial. I'm just making that offer to you as something certainly you would have the option, I think, to do anyway, and in fairness, if you're frustrated here, you can try to vindicate your rights on appeal and I would not stand in the way of assisting you in expediting that process if you chose to do it. Now, with regard to the preliminary injunction hearing, as things are set right now, we're set to convene on July 6th at 10:30 with time over on the 7th as necessary. And the question--the question remains how, if at all, we need to coordinate discovery with regard to that hearing and to shorten, if necessary, response times on discovery. When we last spoke in court on Friday, I asked the parties to discuss that with one another and see if they could put together something by way of a scheduling or procedural order that would assist in coordinating discovery, anticipating those July 6 and 7 hearings. Let me just ask, starting from debtor's side if there's anyone there who has any report on that score.

MR. WARDEN: Yes, your Honor. This is Mike Warden. We did chat with DirecTV and NRTC's counsel, and we had some discussions that were useful, but to be honest,

some of them were a little bit frustrating from our end. We discussed obtaining all the deal documents by Thursday of this week, and we had also requested to get the negotiation regarding the termination documents, that is, all documents reflecting negotiations and the back and forth on that by Friday. And the other parties were noncommittal as to that. And then the--obviously, next week we are going to have to be in depositions if we proceed. So that is the--and we were able to narrow some requests. But that, in general, is kind of the sum and substance of what about an hour and 40-minute discussion and weren't able to make very much headway, in large part because we had difficulty obtaining a commitment to the production of documents and the scheduling of production because it was the position of at least DirecTV that until they had a request out to us, they weren't prepared to discuss particular deadlines.

THE COURT: Okay. Well, let's--

MR. BAUMANN: Your Honor, this is Mike Baumann for DirecTV. I don't think that's completely accurate.

THE COURT: I hope not.

MR. BAUMANN: What I did discuss and what we did discuss, we went through every interrogatory, we went through all of the document requests, and we discussed what they related to the claims being made, and we discussed, but did not have agreement on whether the issues that would be raised by Pegasus at the preliminary injunction be the same as the issues they raised in the TRO hearing or would go beyond that. There was consideration given, but no commitment made by Pegasus submitting or narrowing certain categories of information. What I said, and still say, is that, given the limited time [between] now and July 6, parties are going to have to mutually agree on exchanges of information and agree on deposition dates so we can get it all done. It's not all Pegasus' discovery going first and DirecTV and NRTC's discovery going

last and being held for the July 4th weekend. That was the only position I took. We told Pegasus information that we would be requesting and committed to giving them a list of what it is that we were interested in by way of discovery.

THE COURT: Okay. Well, it's not real encouraging as far as I'm concerned. I feel I've just given you till 9 o'clock tomorrow to call in with something sensible and that represents progress towards an agreed discovery schedule with those July--with July 6 in order. I mean, I can't believe we've got dozens of attorneys being paid many multiples of the hourly rate that people get in Maine and your further apart on basically a simple discovery schedule, understanding that it's compressed, than--than anybody's been in my experience with three or four days to talk about it. If I--if I have you call back at 9 o'clock tomorrow, am I gonna get the same stuff, or--or am I gonna get something that resembles a cooperative effort pointed towards exchanging necessary discovery in anticipation of July 6th and 7th hearings?

MR. WARDEN: Well, I--your Honor, Mike Warden. I certainly hope that we can--we can do that, but, you know, we've had roadblocks thrown up already to even a commitment as to producing deal documents that--termination agreement deal documents by Thursday of this week.

THE COURT: Well--

MR. BAUMANN: Your Honor, I'm happy with that. I will--I will be on a phone call at 6 in the morning my time, and I will be happy to stay as late as Mr. Warden wants to stay and discuss the parties'--what it is that we both need to do. I didn't spend an hour and 40 minutes on the phone with Mr. Warden obstructing his discovery. That's just false.

THE COURT: Well--

MR. BAUMANN: I don't appreciate him suggesting that.

THE COURT: Frankly, if I just wanted to hear people cry about each other, I can go somewhere else and--and listen to it, and your discovery won't get any further along than it seems to be getting right now. But I appreciate the offer for the sides to get together and come up with something which, if anything is left for determination by the Court, is sort of a minor sub-paragraph in a necessarily complete outline to get the discovery done by then, and then getting on the phone tomorrow at 9 o'clock and telling me what you got and what little minor things might be left. But, really, we're all sufficiently experienced and grown up that we should not be stymied right at the outset by people waiting for the next--first one to take a step or give a commitment. I expect--don't expect the litigation to be cooperative, but I expect Counsel to be cooperative in preparing for the litigation except to the extent that you might feel it absolutely necessary to stand on privilege or stand on a principle discovery objection. So let's--let's convene tomorrow at 9 o'clock. This phone line will be available and open for a discussion of what the sides have come up with in terms of an agreed discovery schedule pointed towards the July 6th convening of the hearing. Okay?

MR. BAUMANN: Your Honor, this is Mike Baumann. Can we--if Pegasus intends to take advantage of the offer to appeal the decision, will they let us know? I mean--

THE COURT: Yeah. I--I would ask them--I mean, I'm--I think that if they give you that decision by tomorrow or--or by tomorrow morning, then they can file an appropriate--an appropriate paper to say we've accepted that pursuant to the Court's invitation and we'll proceed, and then we don't need to talk about discovery for the 6th. Is that satisfactory with Pegasus?

MR. WARDEN: Yes, your Honor.

THE COURT: Okay. I appreciate that. And again, I just want everyone--I'm not gonna stand in the way of your pursuing your rights however best you might pursue them. So

may we--may we talk about--and I expect we may be in the same position with regard to the contempt matters. Do we have--have you had any discussion about discovery on that score or timing for a hearing? Mr. Warden?

MR. RICHARDSON: Your Honor, David Richardson for the debtors. We discussed that briefly in our call before, not in the context of taking discovery on it, but in the context of setting a hearing. From the debtor's point of view, that remains a critical emergency situation with every passing day, with every passing hour, that channel 205, in particular, is running. And what I propose to DirecTV was that we set a hearing for that a week from today to take that matter up on the merits, because it is, from the debtor's point of view, remains a very important emergency situation.

THE COURT: Well, I think I told you folks in Court last week that I wasn't available on the 28th, the 29th and the 30th. So that doesn't appear to me to be [a] very constructive foray into the scheduling matter, since I went out of my way to be clear with you folks that of all the days left in June and July, those weren't available.

MR. RICHARDSON: Your Honor, I apologize for missing that point. The concept to do that was within a week is what I intended to propose. Obviously, it's subject to the Court's schedule, which I had mistaken.

THE COURT: All right. Well, let me--

MR. BAUMANN: Your Honor, this is Mike Baumann again.

THE COURT: Yup.

MR. BAUMANN: In addition--in that hour and 40 minutes, we did discuss triple-tracking at least of depositions next week. And in that context, it seemed unnecessary to me to have--that I would be required to attend a contempt hearing in Maine while we were trying

to accomplish the discovery they were requesting in that week. We all recognize that if we were going to stick to the schedule of July 6th and 7th that we would have to be producing witnesses and taking and defending depositions next week. That's the only discussion we had about the contempt hearings.

THE COURT: Well, let me ask this. What's--what's Pegasus' view to the time it would take to put on the contempt hearing?

MR. WARDEN: Oh, your Honor, we're talking a couple of hours, I would say.

THE COURT: Okay.

MR. WARDEN: We were prepared, as you know, to do it on--last Friday when we were there.

THE COURT: Right. And from DirecTV's point of view, a couple of hours, too?

MR. BAUMANN: Yes, your Honor. And we would like to take the deposition of the witnesses that they were planning to bring on the contempt proceeding.

THE COURT: Okay. Then this is what we'll do. We're gonna--I'm gonna set that contempt matter for 10:30 on July 6th as well. And we will do it--we will do it first, and then we'll proceed to the preliminary injunction hearing immediately thereafter. That's--that's reasonably expedited for what the parties want to put before the Court. You'll have the day of the 6th and all day the 7th to get the two matters done, and you can coordinate your discovery on the two. I think it only fair that there be at least a week open for--for discovery on the two matters, if you're gonna go to the mat on both of them, and that doesn't put things off, to my mind, terribly unreasonably from the debtor's standpoint, and certainly it gets things on track without them interfering with each other. They can be coordinated with one another, and we'll start off with a couple of hours. And, Mr. Richardson, you'll know that to the extent you have a

lengthier presentation at--on the 6th for contempt than a couple of hours, that it's gonna be eating into the time on the preliminary injunction hearing, but I think that's fair all the way around and dovetails the parties' requirements to proceed in a reasonably prepared way with the necessity that it be heard early, and it also gives you the opportunity between now and 9 o'clock tomorrow morning to work out a coordinated, consolidated, cooperative discovery schedule looking towards the convening of those hearing on the 6th. So that's what we'll do.

MR. RICHARDSON: Very well, your Honor.

MR. BAUMANN: Very well. Thank you, your Honor. THE COURT: Thank you.

MR. WARDEN: Thank you, your Honor.

THE COURT: So I think we need not go any further today other than to agree to convene tomorrow in the spirit of cooperation that will--I'll look for something from the--from the parties that--that moves us towards a coordinated discovery schedule for those two matters, both of which will be set to convene on the morning of July 6th at 10:30, and we will devote as much time as is available to them on the 6th and 7th, and we'll postpone doing anything more than offering you the opportunity to consult with each other between now and tomorrow morning. And again, from the debtor's point of view, if you want to expedite review on what I understand are very important matters to you, if you'll inform DirecTV and NRTC in advance of tomorrow morning at 9 o'clock and inform the Court the way you want to go at 9 o'clock, that would probably be of assistance to everyone. Thank you, all, very much.

ALL PARTIES: Thank you, your Honor.

HEARING RECESSED (JUNE 21, 2004)

STATE OF MAINE)

) ss.

CUMBERLAND)

I, Patricia A. Burrows, transcriptionist, do certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings supplied by the UNITED STATES BANKRUPTCY COURT in the case of Pegasus Satellite Television, Inc., et al., Case No. 04-20878 and Adversary No. 04-2064, heard June 21, 2004, in Portland, Maine.

_____ Date: June 24, 2004

Patricia A. Burrows, Transcriptionist

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