

Hearing Date:
June 7, 2004 10:30 a.m.
PORTLAND

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE**

In re:	}	Chapter 11
PEGASUS SATELLITE TELEVISION, INC., et al,	}	Case No. 04-20878 (JBH)
Debtors. ¹	}	

**DIRECTV'S OPPOSITION TO EMERGENCY MOTION FOR RELIEF FILED BY
PEGASUS SATELLITE TELEVISION ET AL.**

¹ The Debtors are: Argos Support Services Company, Bride Communications, Inc., B.T. Satellite, Inc., Carr Rural TV, Inc., DBS Tele-Venture, Inc., Digital Television Services of Indiana, LLC, DTS Management, LLC, Golden Sky DBS, Inc., Golden Sky Holdings, Inc., Golden Sky Systems, Inc., Henry County MRTV, Inc., HMW, Inc., Pegasus Broadcast Associates, L.P., Pegasus Broadcast Television, Inc., Pegasus Broadcast Tower, Inc., Pegasus Media & Communications, Inc., Pegasus Satellite Communications, Inc., Pegasus Satellite Television of Illinois, Inc., Pegasus Satellite Television, Inc., Portland Broadcasting, Inc., Primewatch, Inc., PST Holdings, Inc., South Plains DBS, LP., Telecast of Florida, Inc., WDSI License Corp., WILF, Inc., WOLF License Corp., WTLH License Corp.

1. Introduction

Pegasus' Emergency Motion requests the Court to apply the automatic stay (11 U.S.C. § 362(a)(3)) to prevent DIRECTV, Inc. ("DIRECTV") from answering questions from the public, advertising its services, or signing up consumers who voluntarily choose DIRECTV as their television service provider over DISH Network, cable television, or Pegasus. In short, Pegasus seeks to induce this Court to employ the automatic stay to stifle competition and commercial free speech and deprive in excess of one million rural consumers of choice. The only "property" interest identified by Pegasus as worthy of the automatic stay protection in its motion is an alleged contractual promise of "exclusivity" in a contract between the National Rural Telecommunications Cooperative ("NRTC") and DIRECTV that Pegasus is not a party to, is not a third party beneficiary of, and has no rights under, as determined by prior final rulings of a federal court. Moreover, as discussed below, the contract between NRTC and DIRECTV containing the promise of exclusivity that Pegasus relies on was terminated prior to bankruptcy.² Pegasus has no property interest in a terminated contract and there is no promise of "exclusivity" from DIRECTV to Pegasus that can be subject to the automatic stay provision. In effect, the Emergency Motion does not seek to enforce the automatic stay, but instead a mandatory order reviving a contract that NRTC and DIRECTV terminated prior to bankruptcy. It is hornbook law that Section 362 cannot be used for such purposes.

² Pegasus' Emergency Motion also refers to the separate contracts Pegasus has with NRTC, called the Member Agreements. There is no claim in this motion that NRTC is marketing and selling television services in breach of any promise of exclusivity made by NRTC. Prior to Pegasus' bankruptcy, NRTC gave notice to Pegasus that the Member Agreements would be terminated in 90 days. There is no evidence that NRTC intends to market and sell television programming anytime during the remaining period of the Member Agreements.

In order to grant Pegasus' motion, this Court would be required to reverse rulings a federal court made against Pegasus after four years of litigation. In that litigation, the United States District Court for the Central District of California ("District Court") repeatedly held that Pegasus had no distribution contract with DIRECTV -- exclusive or non-exclusive -- and that Pegasus was *not* a third-party beneficiary of DIRECTV's distribution contract with NRTC. Further, the District Court held that Pegasus had "no rights" under the DIRECTV-NRTC contract, and that Pegasus had no "right to prevent or object to any modification agreed upon by DIRECTV." May 11, 2004 Order (Ex. 2) at 3:3-4 (citation omitted) (published as Pegasus Satellite Television, Inc. v. DIRECTV, 2004 WL 1146481, *1 (C.D. Ca.)). These rulings are now part of a final judgment from which Pegasus may appeal. Pegasus' failure to advise this Court of these adverse rulings is telling.

On June 1, 2004, DIRECTV and NRTC terminated their distribution contract. See Exhibit 1 ("Agreement of Termination"). As such, DIRECTV has no exclusive distribution agreement with anyone, let alone with Pegasus. DIRECTV is legally and contractually free to market and sell its television programming service to any consumer who would like to buy it.

Contrary to Pegasus' unsupported argument, DIRECTV has not taken possession of any property of this estate. Pegasus may continue to sell television programming to existing and new customers, at least until August 31, 2004. Likewise, customers remain free, as they have always been, to choose whether to buy television programming from Pegasus, cable television providers, competing satellite television providers, or not to buy it at all. DIRECTV's conduct in offering television programming to potential customers is no more a violation of the automatic stay than what Pegasus faces from other competing cable or satellite television providers anyway.

2. Factual and Procedural Background

(a) A Brief History of the Contracts at Issue

The District Court, after almost five years of litigation involving DIRECTV, Pegasus, and NRTC, summarized the history of the contracts at issue here as follows:³

On April 10, 1992, DIRECTV and the National Rural Telecommunications Cooperative (“NRTC”) entered into the DBS⁴ Distribution Agreement (“DBS Agreement”). The DBS Agreement provides that NRTC has exclusive and non-exclusive rights to distribute programming and services offered by DIRECTV in NRTC’s area of service. The DBS Agreement contains a California choice-of-law provision. [§ 18.02]. The agreement expressly provides that there are no third-party beneficiaries to the agreement. [§ 18.09]. The DBS Agreement also states that DIRECTV and NRTC can modify their agreement at any time in writing. [§ 18.02]. Pegasus is not a party to the DBS Agreement.

On July 23, 1993, NRTC and Pegasus entered into the NRTC/Member Agreement for Marketing and Distribution of DBS Services (“Pegasus’ Member Agreement”). Pegasus’ Member Agreement is related to the DBS Agreement in that Pegasus’ rights under the Member Agreement arise from NRTC’s rights under the DBS Agreement. However, *Pegasus’ Member Agreement does not require NRTC to obtain Pegasus’ permission before modifying the terms of the DBS Agreement, nor does it provide Pegasus with the right to prevent or object to any modification agreed upon by DIRECTV*. DIRECTV is not a party to Pegasus’ Member Agreement but is a third-party beneficiary to it. [¶ 26]. *Pegasus, in the Agreement, acknowledged that it was not a third-party beneficiary of the DBS Agreement* [¶ 26].

May 11, 2004 Order (Ex. 2) at 2:7-3:7 (citations omitted) (published as Pegasus Satellite Television, 2004 WL 1146481, *1).

In 1992 and 1993, NRTC entered into more than 200 Member Agreements with some of its members and affiliates.⁵ Because the Member Agreements were form contracts, Pegasus

³ All emphasis in this brief is supplied by DIRECTV unless otherwise noted.

⁴ “DBS” means direct broadcast satellite, a way of distributing television services. Television services can also be distributed by cable or over the airwaves. (Explanatory footnote added by DIRECTV and not part of original text.)

⁵ NRTC is a co-operative organization comprised of more than 1,000 members. Members have a right of representation on NRTC’s board of directors, and each member has a right to one vote on matters relating to the governance of the co-operative. Pegasus is *not* a member

(Continued...)

received the same contractual rights as all other NRTC members and affiliates who signed Member Agreements with NRTC.

(b) A Brief History of Pegasus' Litigation Against DIRECTV

In January 2000, Pegasus sued DIRECTV in the District Court, Case No. CV 00-368 LGB. Pegasus alleged that DIRECTV intentionally interfered with Pegasus' Member Agreement with NRTC, and with Pegasus' relationships with its current and future subscribers. Pegasus also alleged that DIRECTV misappropriated and otherwise interfered with Pegasus' alleged rights to subscriber information. Finally, Pegasus sought declaratory judgments regarding *NRTC's* rights against DIRECTV arising from the DBS Agreement.⁶

Pegasus lost or dismissed every one of these claims.

On May 22, 2003, the District Court granted DIRECTV's motion for summary judgment regarding Pegasus' tort claims, ruling that "as a matter of law" DIRECTV could not be liable for interfering either with Pegasus' Member Agreement, or with Pegasus' relationships with current or future subscribers. See May 22, 2003 Order (Ex. 3) at 23:1-5; 45:25-46:6 (published as Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc., 2003 WL 23521329, *9, *17 (C.D. Cal.))

of NRTC; it is an affiliate. Affiliates, in contrast to members, may not serve on NRTC's board of directors and are not entitled to vote on matters relating to the co-operative.

⁶ Pegasus did not sue DIRECTV for breach of contract, of course, because Pegasus never had a distribution contract with DIRECTV. Shortly after Pegasus sued DIRECTV, all other members and affiliates of NRTC who had signed Member Agreements filed a putative class action lawsuit against DIRECTV on generally the same grounds as Pegasus' lawsuit ("Class Action"). NRTC also had sued DIRECTV twice for alleged breach of the DBS Agreement in 1999 (sometimes referred to in the Orders as the "NRTC Actions"). DIRECTV, in turn, brought counter-claims against NRTC seeking declaratory relief regarding the meaning of certain provisions of the DBS Agreement ("DIRECTV-NRTC Suit"). These cases were consolidated for discovery and trial.

In August 2003, DIRECTV and NRTC resolved their disputes regarding the DBS Agreement and agreed to settle the DIRECTV-NRTC suit. As part of that settlement, NRTC and DIRECTV agreed to amend the DBS Agreement. The plaintiffs in the Class Action also agreed to settle their disputes with DIRECTV and to settle the lawsuit that was part of the consolidated cases. Pegasus, however, objected to the manner in which DIRECTV and NRTC agreed to amend their contract, and attempted to prevent any amendment to the DBS Agreement. Pegasus first sought to object to the Class Action settlement, but the District Court ruled that Pegasus lacked standing to do so. See October 17, 2003 Minute Order (Ex. 4).

Pegasus then sought to intervene in the DIRECTV-NRTC lawsuit. The District Court, however, rejected Pegasus' intervention request, holding that "[t]he linchpin of this debate is that the DBS Agreement is separate and apart from Pegasus' Member Agreement. ***Pegasus does not have any rights under the DBS Agreement*** which is the subject of the proposed settlement." November 10, 2003 Order Denying Pegasus' Motion to Intervene (Ex. 5) at 11:13-16 (published as Nat'l Rural Telecomms Coop., 2003 WL 23521293, *4). Moreover, the District Court found "that Pegasus is not a third party beneficiary to the DBS Agreement" (Id. at 12:15-17) and that Pegasus "***does not have an interest in the DBS Agreement*** which is the subject of the" DIRECTV-NRTC Suit. Id. at 17:14-15. Accordingly, the District Court held that "Pegasus' Member Agreement does not require NRTC to obtain Pegasus' permission before modifying the terms of the DBS Agreement, ***nor does it provide Pegasus with the right to prevent or object to any modification agreed upon by DIRECTV.***" Id. at 5: 11-15; see also at 21: 7-9 ("Pegasus does not have any legally cognizable rights in the DBS Agreement . . .").

After this defeat, Pegasus sought an order staying the settlement of the DIRECTV-NRTC Suit so it could seek an emergency appeal. The District Court rejected this motion also, holding

that “[t]he Court based its opinion on its finding that Pegasus *did not have any rights* under the DBS Agreement between NRTC and DIRECTV which was the sole subject of the NRTC Actions. The Court also found that Pegasus was neither a party nor a third-party beneficiary to the DBS Agreement. Under these facts, the Court finds that Pegasus has not shown a probability of success on the merits of its appeal of the Court’s [Intervention] Order” December 11, 2003 Order (Ex. 6) at 7:17-24 (published as Nat’l Rural Telecomms. Coop., 2003 WL 23521293, *12.)⁷

On January 5, 2004, the District Court approved the terms of the Class Action settlement, terms which Pegasus had rejected, specifically finding that the terms agreed to were “fair, just, reasonable and adequate.” January 5, 2004 Order (Ex. 7) at 13. Following the ruling, Pegasus’ was again offered the opportunity to join in the settlement, an offer that expired by its terms in early March. Again Pegasus rejected the offer, choosing instead to continue its lawsuit against DIRECTV.

On May 11, 2004, the District Court dismissed Pegasus’ remaining claims against DIRECTV, reiterating that Pegasus could not object to changes to the DBS Agreement. See May 11, 2004 Order (Ex. 2) at 3:3-4 (Pegasus has no legal “right to prevent or object to any modification” of the DBS Agreement.”) (published as Pegasus Satellite Television, 2004 WL 1146481, *1).

The District Court also rejected as *unconstitutional* Pegasus’ argument that it was entitled to injunctive relief *against DIRECTV* to force DIRECTV to provide rights to NRTC or

⁷ The Ninth Circuit Court of Appeals similarly denied Pegasus’ request for an emergency appeal. See Ex. 8. Pegasus later dismissed its Ninth Circuit Appeal. See Ex. 9 (published as Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc., 2004 WL 1166674, *1 (9th Cir.)).

Pegasus, based upon a contract right NRTC used to have, but that NRTC agreed to eliminate. “The issue before the Court, therefore, is whether the Court can grant the injunctive relief Pegasus is seeking based on the contractual rights of NRTC *pursuant to a contract that no longer exists* solely because Pegasus had a derivative right to these services under its Member Agreement with NRTC. . . . Such an order would stand in direct contravention of the mandate of Article III of the U.S. Constitution *Any derivative rights Pegasus may have had under the DBS Agreement . . . expired when the DBS Agreement was amended.*” Id. at 18:18-19:6 (published as Pegasus Satellite Television, 2004 WL 1146481, *9)..

On June 1, 2004, the District Court filed its Entry of Final Judgment in Case No. CV 00-0368. See Entry of Final Judgment (Ex. 10).⁸

(c) The Termination of the DBS Agreement

On June 1, 2004, DIRECTV and NRTC terminated their contract effective immediately. See Agreement of Termination (Ex. 1).

Also on June 1, NRTC authorized termination of the separate Member Agreements between NRTC and its members and affiliates, including Pegasus. Section 13 of Pegasus’ Member Agreement provides that “in the event the [DBS Agreement] is terminated, . . . NRTC may terminate this Agreement and neither party shall have any further obligations regarding the other except as specifically provided in this Agreement”

At approximately 8:05 a.m. on June 2, 2004, NRTC personally delivered a notice to Pegasus, advising Pegasus that the previous day NRTC and DIRECTV had terminated the DBS Agreement (“Termination Notice”). See Marston Decl. ¶¶ 2,4. The Termination Notice was

⁸ Pegasus has not stayed the Final Judgment by appealing and posting a bond. The Final Judgment is binding for purposes of res judicata. See section 3(b) below.

given to Pegasus as a courtesy. Neither the DBS Agreement nor the Member Agreements required that notice of termination of the DBS Agreement be given to Pegasus or to any other member or affiliate of NRTC.

The Termination Notice further provided that pursuant to Section 13 of the Member Agreement NRTC had terminated all Member Agreements, including Pegasus' Member Agreements, effective as of August 31, 2004. See Notice of Termination (Ex. 11).⁹

At approximately 5:28 p.m. on June 2, 2004, Pegasus Satellite Television, Inc. filed a Voluntary Petition for relief under Chapter 11 of the Bankruptcy Code. At 6:40 p.m. on June 2, 2004, Pegasus issued a press release announcing that it had filed for bankruptcy protection to prevent a purported "unlawful termination" of its Member Agreements. Curiously, Pegasus' first-day motions and an officer's affidavit in their support do not mention the termination of Pegasus' Member Agreements, or the termination of the DBS Agreement, nor describe the reasons for Pegasus' bankruptcy filing. See Affidavit of Ted S. Lodge In Support Of First Day Motions, ¶¶ 25-27 (Describing DBS Agreement and Trademark License Agreement and Member Agreement, but omitting any reference to their termination).

3. There Has Been No Violation Of The Automatic Stay.

(a) Pegasus Has No Property Interests in the Terminated Agreements.

Pegasus' Motion is based on the premise that, as of the time of its Chapter 11 filing, it had a contractual right to prevent DIRECTV from competing. As pointed out above, Pegasus never had any contractual privity with DIRECTV, nor any such contractual rights. But even assuming, contrary to the express terms of the DIRECTV-NRTC agreement and the findings and

⁹ Section 23 of the Member Agreement also provides that notices are deemed received "upon actual receipt."

conclusions of the Final Judgment, that Pegasus had any rights under the DBS Agreement, the contract was properly terminated and was of no force and effect as of the date of filing.

Pegasus claims DIRECTV has violated Section 362(a)(3).¹⁰ But Section 362(a)(3) only applies to acts “to obtain possession of *property of the estate or of property from the estate* or to exercise control over property of the estate.” Property of the estate consists of the debtor’s legal or equitable interests in property “*as of the commencement of the case.*” § 541(a)(1). Whether a debtor has a legal interest in property is determined by state law. See, e.g., Schink v. Stephens (In re Stephens), 221 B.R. 290, 292 (Bankr. D. Me. 1998) (citing Butner v. United States, 440 U.S. 48, 55 (1979)).

The filing of a bankruptcy petition and the resulting imposition of the automatic stay cannot expand the debtor’s state-law property rights. See, e.g., Fed. Aviation Admin. v. Gull Air, Inc. (In re Gull Air, Inc.), 890 F.2d 1255, 1261 (1st Cir. 1989) (“The Bankruptcy Code does not create or enhance property rights of a debtor.”) (citations omitted); In re Advent Corp., 24 B.R. 612, 614 (B.A.P. 1st Cir. 1982) (“The Bankruptcy Code neither enlarges the rights of a debtor under a contract, nor prevents the termination of a contract by its own terms.”).

“It is settled law that a [contract] that was terminated before the filing of a bankruptcy petition is neither affected by the automatic stay under 11 U.S.C. § 362(a) nor may it be assumed by the debtor under 11 U.S.C. § 365.” In re Scarsdale Tires Inc. 47 B.R. 478, 480 (S.D.N.Y. 1985). “When the property in question is no longer property of the estate on the petition date, the automatic stay of actions against property of the estate no longer applies. Thus, for example, if a contract or lease terminated prior to the commencement of the case, it will not become

¹⁰ All statutory references are to the Bankruptcy Code, unless otherwise noted.

property of the estate, and the other party may treat the agreement as terminated.” 3 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy ¶ 362.03[5][a] (15th ed. rev. 2004) (citations omitted).

“[A]n executory contract or lease validly terminated prior to the institution of bankruptcy proceedings is not resurrected by the filing of the petition in bankruptcy, and cannot therefore be included among the debtor’s assets.” Kopelman v. Halvanjian (In re Triangle Laboratories, Inc.), 663 F.2d 463, 467-68 (3rd Cir. 1981) (citations omitted). In fact, the Bankruptcy Code does not even rescue a contract where the termination notice was sent before the filing of a bankruptcy petition, but the termination itself is not effective until after the bankruptcy. In Moody v. Amoco Oil Co., 734 F. 2d 1200, 1206 (7th Cir. 1984), the 90-day termination notice was sent by mail the day before debtor filed its bankruptcy petition. The debtor filed its Chapter 11 petition the next day, the same day it received the termination notice. Id. Nevertheless, because under the applicable state law the “termination notices were effective when they were mailed,” the Seventh Circuit rejected debtor’s argument that the contract could be assumed. Id. at 1212. “The fact that the termination itself was not effective for ninety days does not affect the result. The filing of the Chapter 11 petition cannot expand debtors’ rights as against Amoco. When the termination notice was sent, debtors only had a right to ninety days’ worth of dealership contracts. The filing of the petition does not expand that right.” Id. The Seventh Circuit further held that “Similarly, section 541(a) provides that a debtor’s estate consists of ‘all legal or equitable interests of the debtor in property as of the commencement of a case.’ Thus, whatever rights a debtor has in property at the commencement of the case continue in bankruptcy -- no more, no less.” Id. at 1213 (citations omitted). The Seventh Circuit concluded that “[s]ection 362, which creates an automatic stay of certain creditor actions upon the filing of a petition in

bankruptcy court, does not help debtors here. The automatic stay does not toll the mere running of time under a contract, and thus it does not prevent automatic termination of the contract.

Section 362 does not give a debtor greater rights in a contract. Thus, debtors cannot rely on section 362 to prevent termination of the contracts.” Id. (citations omitted).

(b) Res Judicata and Collateral Estoppel Bar Pegasus From Re-Litigating Rulings That Pegasus Had No Rights Under the Terminated Agreements.

Pegasus’ Emergency Motion ultimately turns on whether, under applicable state law (here California’s), NRTC and DIRECTV lawfully terminated the DBS Agreement prior to Pegasus’ bankruptcy. DIRECTV’s former limitation on marketing in Pegasus’ territories was based on an exclusivity provision in the terminated DBS Agreement — an agreement which a federal court has ruled Pegasus had no rights under and no legally cognizable interests in. The doctrines of res judicata and collateral estoppel, however, prevent Pegasus from even contesting the validity of the termination. A bankruptcy court is bound by a prior decision of a federal district court in accordance with the doctrines of res judicata and collateral estoppel. “Under federal law, a ‘final judgment on the merits of an action precludes the parties or their privies from relitigating issues that *were or could have been raised in that action.*’ Thus, the elements of a res judicata defense are (1) a final judgment on the merits in an earlier proceeding, (2) sufficient identity between the causes of action asserted in the earlier and later suits, and (3) sufficient identity between the parties in the two actions.” Banco Santander de Puerto Rico v. Lopez-Stubbe (In re Colonial Mortgage Bankers Corp.), 324 F.3d 12, 16 (1st Cir. 2003) (citations omitted). “Federal principles of collateral estoppel apply to prior judgments that are rendered by a federal court. In order for collateral estoppel to apply, four requirements must be met . . . : 1) the issue sought to be precluded must be the same as that involved in a prior action; 2) the issue must have been actually litigated; 3) the determination of the issue must have been

essential to the final judgment; and 4) the party against whom estoppel was invoked must be fully represented in the prior action.” Weaver v. Weston (In re Weston), 307 B.R. 340, 342 (Bankr. D.N.H. 2004) (citations omitted). Although Pegasus’ time to appeal from the judgment in the prior litigation has not expired, “the pendency of an appeal does not suspend the operation of an otherwise final judgment as *res judicata* or collateral estoppel, ‘unless the appeal removes the entire case to the appellate court and constitutes a proceeding de novo.’” In re Livaditis, 122 B.R. 330, 335 (Bankr. N.D. Ill.1990) (citations omitted).¹¹

Here, all of the elements of *res judicata* are met. There has been a final judgment on the merits in the prior District Court litigation. See generally Ex. 10 (Entry of Final Judgment), Ex. 2 (May 11, 2004 Order dismissing Pegasus’ remaining claims), Ex. 3 (May 22, 2003 Order granting summary judgment). There is also substantial overlap between the claims Pegasus made in the District Court litigation (the nature and extent of the rights under the DBS Agreement, the Member Agreement, and DIRECTV’s relationship with “Pegasus” subscribers), and the claims Pegasus makes here. Nor can there be any question that the parties are the same in both litigations.

In addition, Pegasus is collaterally estopped from litigating in this Court whether DIRECTV and NRTC can terminate the DBS Agreement. In the prior litigation, Pegasus actually litigated whether DIRECTV and NRTC could amend the DBS Agreement over Pegasus’ objection. Pegasus lost that litigation.

¹¹ Although Federal Rule of Civil Procedure 62(d) grants a district court discretion to stay a judgment pending appeal if the appellant posts a supercedas bond, here Pegasus has not appealed, posted a supercedas bond, or requested a stay.

(c) Under California Law, Pegasus Has No Standing to Enforce the Terminated Agreements.

Even if Pegasus could overcome the res judicata and collateral estoppel effects of the District Court's rulings, it cannot establish that it has any legal right to object to any modification, or the termination, of the DBS Agreement. Under California law, which governs the DBS Agreement, non-parties to a contract have no standing to sue to enforce a contract or to sue for a declaratory judgment regarding a contract. See Southern California Gas Co. v. ABC Constr. Co., 22 Cal. Rptr. 540, 544 (Cal. Ct. App. 1962) ("Incidental beneficiary" to contract may not sue for breach); Jones v. Aetna Cas. & Surety Co., 33 Cal. Rptr. 2d 291, 296 (Cal. Ct. App. 1994) (Third-party beneficiary may not enforce covenant not made for his benefit); Sofias v. Bank of America, 218 Cal. Rptr. 388, 390 (Cal. Ct. App. 1985) (General contractor could not enforce loan contract because he was not a third-party beneficiary); Dateline Builders, Inc. v. City of Santa Rosa, 194 Cal. Rptr. 258, 262 (Cal. Ct. App. 1983) (same); Ascherman v. General Reinsurance Corp. 228 Cal. Rptr. 1, 3 (Cal. Ct. App. 1986) (same); Sheppard v. Banner Food Prods., Inc., 178 P.2d 455, 457 (Cal. Ct. App. 1947) (same).

(d) Under California, Law, DIRECTV and NRTC Lawfully Terminated Their Agreements Before Pegasus Filed for Bankruptcy.

But even if Pegasus could also overcome its lack of standing, the answer regarding the legitimacy of the pre-petition termination of the DBS Agreement is not even a close call. Under California law, two parties to a contract may terminate their contract at any time. See Cal. Civ. Code § 1698(a) ("A contract in writing may be modified by a contract in writing."); see also Cal. Civ. Code § 1699 ("The . . . cancellation of a written contract . . . with intent to extinguish the obligation thereof, extinguishes it as to all the parties consenting to the act."). California case law is in accord. "An executory contract may be rescinded, abandoned, or terminated, either wholly or in part, by the mutual consent of the respective parties at any stage of their

performance.” Sanborn v. Ballanfonte, 277 P. 152, 155 (Cal. Ct. App. 1929); see also Kane v. Sklar, 265 P.2d 29, 31 (1954).

Before Pegasus filed its bankruptcy petition, DIRECTV and NRTC, the only parties to the contract, lawfully terminated the DBS Agreement under California law. Upon the termination of the DBS Agreement, DIRECTV ceased to have any contractual restrictions with NRTC with respect to its ability to market and sell television programming throughout the United States. Pegasus has no contractual right it can enforce against DIRECTV to prevent DIRECTV from selling DIRECTV® programming anywhere in the United States.

(e) Pegasus’ Requested Relief Would Violate DIRECTV’s First Amendment Right to Communicate with Customers.

It is well-settled that the First Amendment protects commercial speech from unwarranted governmental restrictions. Commercial expression not only serves the economic interest of the speaker but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557 (1980). The United States Supreme Court has consistently invalidated restrictions designed to deprive consumers of accurate information about products and services legally offered for sale. See Greater New Orleans Broad. Ass’n, Inc. v. United States, 527 U.S. 173, 195-96 (1999) (striking as unconstitutional regulations against television and radio advertisements for legal lottery). If commercial communication is neither misleading nor related to unlawful activity, the government’s power to restrict such communications is circumscribed and must be supported by substantial governmental interests. Central Hudson, 447 U.S. at 564; see also id. at 562 (“Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.”) (citation omitted). Furthermore, any restrictions on commercial speech must

directly advance the governmental interest asserted and must be narrowly tailored to serve that interest. Id. at 565. Here, the statements broadcasted on DIRECTV's website and information channels are accurate and are not related to any unlawful activity. A prohibition on DIRECTV's commercial speech rights would only work to inhibit competition and would thus undermine, not promote, governmental interests. Pegasus therefore cannot overcome its substantial burden for restricting DIRECTV's rights to communicate with customers. See Greater New Orleans Broadcasting, 527 U.S. at 183 (observing that the party seeking to restrict commercial speech carries the burden of justifying the restriction).

(f) The Automatic Stay Is Not Meant to Prevent Market Competition.

Given the absence of any contractual obligation of DIRECTV not to compete, Pegasus' entire "Emergency Motion" is nothing more than a naked attempt to misuse the automatic stay provision to prevent competition. But market competition with a debtor does not implicate the automatic stay. In Golden Distributions, Ltd. v. Reiss (In re Golden Distributions, Ltd.), 122 B.R. 15 (Bankr. S.D.N.Y. 1990), the debtor sought to enjoin its former employees from soliciting the debtor's customers in violation of the former employees' restrictive covenants with the debtor. Like Pegasus, the debtor in that case relied on Section 362(a)(3) as the predicate for the requested injunction. The bankruptcy court held that the automatic stay was not applicable:

In order to invoke 11 U.S.C. § 362(a)(3), the debtor must show what property of the estate is implicated and that some entity or individual is attempting to obtain possession or exercise control over such property of the estate.

In the instant case, the fact that the defendants may have breached the restrictive covenants in their employment contracts or that they have may have improperly solicited the debtor's customers, for which the defendants might ultimately be liable to the debtor for damages or enjoined from engaging in such improper conduct, does not mean that the defendants attempted to obtain possession or control of property of the estate in violation of 11 U.S.C. § 362(a)(3).

Absent any evidence as to exclusivity agreements between the debtor and its customers or that such customers are required to purchase from the debtor specific

quantities of products, the debtor can point to no property interest with respect to its potential customers which can be interfered with by the defendants, or which is capable of being lost to the possession or control of the defendants in violation of 11 U.S.C. § 362(a)(3).

Id. at 19-20.

In a subsequent decision in the same case, the bankruptcy court refused to enjoin the debtor's former employees who were not subject to confidentiality agreements from soliciting the debtor's customers. See Golden Distributions, Ltd. v. Auburn Merch. Distributorship, Inc. (In re Golden Distributions, Ltd.), 134 B.R. 750, 761 (Bankr. S.D.N.Y. 1991).

(g) Pegasus' Motion is Devoid of Factual or Legal Support.

Pegasus offers only a tepid argument in support of its motion. For example, Pegasus argues that "[t]his purported termination was invalid." See Mot. at 4. While DIRECTV can't tell whether Pegasus complains about the termination of the DBS Agreement, the Member Agreement, or both, Pegasus offers no explanation, argument, or even commentary about why, how, or in what manner any termination was "invalid." The truth is that DIRECTV and NRTC validly terminated the DBS Agreement as was their right under California law prior to Pegasus' bankruptcy filing.

Pegasus also claims that DIRECTV is engaged in conduct in violation of Pegasus' "exclusive distribution rights." See Mot. at 6. The motion is deliberately vague about the source of these "exclusive distribution rights," but the binding rulings made in the California cases make clear that Pegasus has no rights or legally protected interest in the DBS Agreement between NRTC and DIRECTV. If those rulings are not clear enough, the DBS Agreement was terminated prior to bankruptcy and any rights allegedly derived from this terminated agreement cannot be considered property of the estate at the time of filing.

To the extent Pegasus is arguing that it has “exclusive” rights based on its agreements with the NRTC, there is no evidence or even a claim that NRTC is breaching a promise not to market and sell in areas covered by the Pegasus Member Agreements. In any event, as the Court in California ruled, DIRECTV is not obligated to Pegasus under the Member Agreements. Indeed, the Court ruled that as a matter of law, DIRECTV could not be liable for interfering either with Pegasus’ Member Agreement, or with Pegasus’ relationships with current or future subscribers. See May 22, 2003 Order (Ex. 3) at 23:1-5; 45:25-46:6 (published as Nat’l Rural Telecomms. Coop., 2003 WL 23521329, *9, *17).

The authorities Pegasus cites in support of its argument (and there are only two) are off-point. See Mot. at 6. In Carroll v. Tri-Growth Centre City, Ltd. (In re Carroll), 903 F. 2d 1266 (9th Cir. 1990), the debtor entered into a management agreement several months *after* he had filed his bankruptcy petition. Id. at 1268. Months later still, the contracting party sought to terminate the management agreement. The bankruptcy court denied the debtor’s requested temporary restraining order preventing the termination, but the Ninth Circuit reversed. The Ninth Circuit held that the post-petition contract was property of the estate pursuant to Section 541(a)(7), and that the contract couldn’t be terminated post-petition without relief from the automatic stay being granted. Id. at 1270-1271. Carroll has no applicability to this case as DIRECTV terminated its contract with NRTC before Pegasus filed bankruptcy.

Am. Cent. Airlines, Inc. v. O’Hare Reg’l Carrier Scheduling Comm. (In re Am. Cent. Airlines, Inc.), 52 B.R. 567 (Bankr. N.D. Iowa 1985) is likewise inapposite. There, debtor was a party to a scheduling agreement with an airport authority with respect to the allocation of landing slots at Chicago’s O’Hare Airport. After the debtor’s bankruptcy filing, the airport authority purported to terminate the debtors ability to use the landing slots. The bankruptcy court held that

the airport authority's post-petition effort to terminate the contract was invalid and violated the automatic stay. Id. at 570 (“The automatic stay was lifted to permit the Defendants to investigate whether the Debtor had fallen within the ‘use it or lose it’ provision. The stay was not lifted, however, to permit the Defendants to enforce this contractual provision against the Debtor.”).

4. Conclusion

DIRECTV and NRTC terminated their contract before Pegasus, a non-party to that contract, filed bankruptcy. DIRECTV cannot, therefore, be in violation of any contractual obligation it may have previously owed to NRTC, let alone Pegasus. Even prior to the termination of the DBS Agreement, a binding ruling was made — in litigation in which Pegasus was a party — that Pegasus had no protectable interest in DIRECTV's contract with NRTC and could not assert rights under contract provisions that no longer existed. Pegasus may not collaterally challenge these rulings in the bankruptcy court. Accordingly, DIRECTV has not violated any legal right of Pegasus, and has not affected any property of the estate. DIRECTV respectfully requests that this Court deny Pegasus' emergency motion in its entirety, and on the merits.

Dated: June 7, 2004

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DECLARATION OF R. ALEXANDER PILMER

1. I am a partner at the law firm Kirkland & Ellis LLP, counsel for DIRECTV, Inc. in connection with the Emergency Motion for Relief filed by Debtors, Case No. 04-20878, United States Bankruptcy Court, District of Maine. I submit this declaration in support of DIRECTV's Opposition to Emergency Motion for Relief Filed by Pegasus Satellite Television et al. Unless otherwise stated, I have personal knowledge of the facts stated in this declaration, and I can testify competently to them if called upon to do so.

2. Upon information and belief, attached as Exhibit 1 to this declaration is a true and correct copy of the executed June 1, 2004 Agreement of Termination between DIRECTV, Inc. and National Rural Telecommunications Cooperative.

3. Attached as Exhibit 2 to this declaration is a true and correct copy of the May 11, 2004 "Order Granting DIRECTV's Motion to Dismiss Pegasus' Remaining Claims; Granting Pegasus' Motion to Dismiss the Counterclaims of DIRECTV; Deeming DIRECTV's Motion for Reconsideration Moot" from the United States District Court for the Central District of California, Case No. CV 00-368 LGB (CWx).

4. Attached as Exhibit 3 to this declaration is a true and correct copy of the May 22, 2003 "Order Granting in Part and Denying in Part DIRECTV's Summary Judgment Motion No. 2" from the United States District Court for the Central District of California, Case No. CV 99-5666 LGB (CWx).

5. Attached as Exhibit 4 to this declaration is a true and correct copy of the October 17, 2003 Minute Order from the United States District Court for the Central District of California, Case No. CV 99-5666 LGB (CWx).

6. Attached as Exhibit 5 to this declaration is a true and correct copy of the November 10, 2003 “Order Denying Pegasus’ Motion to Intervene” from the United States District Court for the Central District of California, Case No. CV 99-5666 LGB (CWx).

7. Attached as Exhibit 6 to this declaration is a true and correct copy of the December 11, 2003 “Order Denying Pegasus’ Motion for Clarification and Reconsideration, or, in the Alternative, a Stay Pending Appeal” from the United States District Court for the Central District of California, Case Nos. CV 99-5666 LGB (CWx) and CV 99-8672 LGB (CWx).

8. Attached as Exhibit 7 to this declaration is a true and correct copy of the January 6, 2004 “Order Granting Final Approval of Class Action Settlement” from the United States District Court for the Central District of California, Case Nos. CV 99-5666 LGB (CWx) and CV 00-2117 LGB (CWx).

9. Attached as Exhibit 8 to this declaration is a true and correct copy of the December 22, 2003 Order from the United States Court of Appeals for the Ninth Circuit, Case No. 03-57165.

10. Attached as Exhibit 9 to this declaration is a true and correct copy of the March 30, 2004 Order from the United States Court of Appeals for the Ninth Circuit, Case No. 03-57165.

11. Attached as Exhibit 10 to this declaration is a true and correct copy of the June 1, 2004 “Entry of Final Judgment Pursuant to Fed. R. Civ. Proc. 58(d)” from the United States District Court for the Central District of California, Case No. CV 00-368 LGB (CWx)

12. Upon information and belief, attached as Exhibit 11 to this declaration is a true and correct copy of the executed June 2, 2004 Notice of Termination of Member Agreements (Relating to DIRECTV DBS Services).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 7th day of June, 2004.

/s/R. Alexander Pilmer
R. Alexander Pilmer

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